NYSBA

2016 Antitrust Law Section Symposium

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2016 Antitrust Law Section Symposium

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New York Hilton Midtown

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ANNUAL MEETING

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New York Hilton Midtown
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Introduction and Welcome

MR. KATZ: Good morning, everyone. Welcome, everyone. Thanks for coming early this morning. I won't say much, other than introduce Lisl Dunlop, who is the incoming Chair and who will organize, with the help of several others, today's great events.

So without further ado, Lisl.

MS. DUNLOP: Thank you and good morning. Great to see people here so early. And we didn't get a snowstorm, which is also very helpful.

We have a great set of programs for you today, starting off with what has become our signature program. And we managed to talk Elai—even though he's technically still the Chair until about 11:45, but he's going to moderate this initial program, which is our overview of antitrust developments for the year. He has brought in two fabulous speakers for us today, for whom I think he will give further introductions.

Throughout the day we have panels for you on antitrust in financial services focusing on benchmarking; we have a program on big data, which is the other side of the FTC house, on the consumer protection side, which I think is a topic we're all starting to get more into. Pharmaceuticals—Pharma to Table—the very clever title of the program, about the pharmaceutical industry and product lifecycle management, reverse payment patent settlements and those types of things. A real hot topic these days.

And finally, a really interesting ethics program, which I'm sure will keep us all here to the end of the day, on the ethical issues in a class action, from the first time that you think of a class action and find your named plaintiff until settlement. There are several really interesting ethical issues that come up in that context that we will be addressing later in the day.

I hope you will all stay for the Young Lawyers Cocktail Party, which will take place immediately afterwards. I am not sure exactly where, but we'll give you coordinates later. And join us at the Annual Dinner at the University Club.

I want to give a quick thanks to all of the members of the Executive Committee and our subcommittees who have come together to help put these programs together today. Although I am technically the Program Chair, they really did all of the heavy lifting and all of the work in putting these programs together. I hope you enjoy it.

Antitrust Developments in 2015: The Year in Review

MR. KATZ: Well, good morning again. Let me get started by introducing our wonderful panel.

To my left and to your right is Martha Samuelson. Martha is an expert in antitrust finance and valuation. She is the President and CEO of Analysis Group, the economic consulting firm. And she has done this kind of advising clients on financial analysis to legal disputes for many years.

MS. SAMUELSON: Don't say how long.

MR. KATZ: I won't say how long. I said for many years. But not all of you know that before that she started out as a lawyer at I must say a very fine firm. She was at Cahill Gordon before she started off as an economist.

She has represented a whole variety of clients, including MasterCard, Intel, Microsoft, and she's worked for banks and in many financial matters. Without going through her entire resume—which I recommend that you look up—I will just say that she really is a leader in the world of antitrust and economics, and we are very pleased to have her here with us today.

To my right and your left is Scott Hemphill, who is a professor of law at NYU. He teaches antitrust, intellectual property, and many other topics. He had been the Antitrust Bureau Chief at the New York Attorney General's Office, and he had clerked for Judge Posner, for Justice Scalia. And he, too, is really one of the leaders in the world of scholarship and thinking about cutting-edge antitrust issues. So we are very pleased to have both of them here.

Before we get started I just want to very briefly thank some people who helped put this together. Kathleen Farley and Komal Patel from my office have been very helpful in putting this program together.

As some of you know, each year we like to start with a review of the prior year's antitrust developments. So instead of going through a litany, since there are so many things that happened, so many important decisions, enforcement actions in this country and abroad, instead we just try to select a narrower list of topics that are of particular interest to us and we hope also to you.

What we are going to do today, I am going to give you a very quick outline. We will talk first about the *American Express* case. We are going to go on to talk about the *Apple* case. And by the way, several of the cases we have to discuss today are indeed not only significant antitrust developments, but they are New York developments, cases that have made their way through the New York courts. So AMEX, Apple, then *O'Bannon v. NCAA* case; that was out on the west coast. Then we are going to talk about several mergers, and should time permit, we will talk a little about some interesting developments in Pharma space. But as you heard from Lisl, there is a great program for that later on today.

I would like to get started with, as I said, *American Express*. As some of you know, this is a case that the United States Department of Justice brought, and it was brought against Visa, MasterCard and American Express. The Government's charges were the agreements, the merchant agreements that the credit card companies have, which prevented the merchants from steering their customers to one payment system over another, were unlawful and in violation of the antitrust laws. Visa and MasterCard settled very early on, but American Express decided to litigate the case. The judge in the Eastern District of New York, Judge Garaufis, ruled against American Express, finding a rule of reason violation. American Express appealed to the Second Circuit, and while oral argument was heard and the briefing is in, the Second Circuit has not yet decided the case.

So I think with that kind of brief introduction, there is a lot to say about that case, but I think that's probably enough to get us started.

Martha, would you want to tell us some of your thoughts on what you've noted and that's of interest in that case?

MS. SAMUELSON: Sure. Well, this is year fifteen I think, at least, of major litigations involving credit cards, and it's interesting to me how the same topics keep getting revisited. The topic of market definition, the topic of market power, the topic of how to think about price and the topic of what practices are acceptable and which aren't. So I am going to talk about two of those topics; I am going to talk about market power, and then I am also going to talk for a minute about how you think about measuring price in a two-sided market.

So the district court held that AMEX had market power with a 26.4 share of consumer credit card spending, and that was actually something that was troubling when it came up to the Second Circuit. So I think that's one way you can think about what's the market significance of that, what's the market power that AMEX has with respect to merchants. I think another way that's interesting for me to think about is that there are 10 million merchants in the United States who take credit cards, and of those 10 million, 7 million take the AMEX card, although the AMEX card is typically the highest priced card. So 7 million of 10, that seems like a meaningful fact to me.

The Second Circuit was very disturbed, on the other hand, that 3 million merchants don't take the card, and that was an issue of concern for them.

Ultimately what was dispositive for the district court in this case was direct evidence of market power. So for the district court the fact that AMEX was able to push through significant price increases to merchants with almost no attrition, the program that they called the Value Recapture Program, was what was dispositive. But this remains a question that certainly the Second Circuit is batting around.

Then the other topic I wanted to talk about, which is really fascinating, is this question of how do you think about price, measuring either price levels or price changes in a two-sided market. So here, on one side of the market, the merchants pay a fee to AMEX for every dollar that a consumer charges at their establishment. And then on the other side of the market there is a negative price to consumers in the form of rewards that consumers receive back.

So one way of thinking about that problem is you could just say these are separate markets, and I think that's really where the DOJ started. We want to think about just the merchant side of the market. A different way you might think about that problem is to think about the concept of price structure and say you do have to look at both sides of the market; you can't just look at one. But you can't ignore the price level in one side of the market either. So from that thought experiment, if AMEX charges 2.5% to merchants and rebates 1.5% to consumers, that's one state of the world. But it's a really different state of the world if AMEX charges 5% to merchants and returns 4% to consumers. Because there is meaning on the merchant side of the world, that would be the price structure of the thought experiment.

And then the paradigm that I think AMEX raised is the net-price paradigm, where you simply subtract and say if AMEX charges 5% to merchants—and I am using 5% because it is a ridiculously high number; it's not the number in effect—I really offer it because I think it shows some of the problems of that paradigm. You could say if AMEX charges 5% to merchants and then returns that entire 5% to its cardholders in the form of rewards, that's fine. That's a zero price. That strikes me as one that can't be right.

So this issue got raised at the district court, and what the court concluded essentially was that AMEX didn't pass the net-price test, which would be the most extreme formulation from the defense side. I think what the district court concluded was that AMEX prices increased when the Value Recapture Program came in. AMEX hadn't sufficiently demonstrated that that price increase had been returned to consumers in the form of rewards. So that question, which of these paradigms applies wasn't really tackled, because something else was dispositive.

This was a big subject of concern at the Second Circuit in the amicus brief that was filed there. I think it is a fascinating open question. I've never seen it tackled in a litigation. I think ultimately where this is going to have to land is an analysis—a real analysis, not an addition and subtraction analysis—of both sides of the market where the welfare impacts on both sides of the market get analyzed and it is looked at with an offset. So if you did that, certainly if you looked at a 5% discount on the merchant side of the market, you'd have a concern that lots of customers who aren't using the AMEX card are going to be paying more for what they buy at merchants. It's that type of analysis that I think needs to be brought into the thinking about two-sided markets.

MR. KATZ: If I might turn this to whoever wants to jump in, to what extent does it matter that you don't have to take American Express. We have these terms and you don't have to take them, a Colgate-like argument. To what extent do you find that to be persuasive of power market definition?

MS. SAMUELSON: I think that the question is whether the facts bear that out. And I think here what was dispositive for the court, certainly for the district court, was it did not seem like the facts bore that out. There is too much information in American Express's own marketing materials that it uses when reaching out to merchants about what it can deliver to the merchants. And there was just too much evidence around this Value Recapture Program that I think was dispositive to the court. So I do wonder whether there is a better and more precisely articulated definition of the merchant market that might have been helpful. Because I think it's clearly the case that high-ticket merchants in certain categories do need to take the AMEX card. A better definition may be based on size or types of purchase might clear up who takes the card and who doesn't. Does the merchant need to take issue?

MR. KATZ: Does it matter when we think about this case that it was initially brought as a challenge to practices that were engaged in by at least the three major credit card companies, or can we think of it as only what does American Express do, and does the vertical agreement have a negative horizontal effect? Should we consider who participated in these agreements at the time we are getting the evidence of pricing and other facts?

PROFESSOR HEMPHILL: Thanks for inviting me to be here. I should also say by way of disclosure, I served as an expert appointed by Judge Garaufis in a private case that ran in parallel to the government's case. I was asked to evaluate the relief obtained in a settlement of that case, not the merits of the government case.

In my view, the collective aspect is a really important element of the analysis. This point has gotten too little attention. As most people here know, AMEX was on trial, while Visa and MasterCard had already settled. But the way the settlement with Visa and MasterCard is structured, the settlement only takes full effect, as to merchants that accept American Express, if the American Express anti-steering provisions are eliminated.

Thinking about the collective effect also changes how we think about market power. Is the right way to think about this to say, AMEX by itself either is or is not a big enough player in a particular market? Or is it better to understand the collective effect of these rules as implemented by all three firms? As to the large number of merchants that accept American Express, that collective effect is relevant. We need to pay attention to the collective effect, for reasons that doctrine may not fully capture right now.

MR. KATZ: Yes, and I think just to go back to what I think the main government theory has been is that in the absence of these restraints, these vertical agreements with merchants, merchants would be able to negotiate down on the prices between Visa and MasterCard and American Express and maybe Discover or any others they might be able to exert some pressure on. But in the absence of the ability to steer or encourage a customer to come in and use another card or maybe use cash, there is—-according to the Government's charges—no real price competition. It's hard to think of how that works.

I want to go back, if I may, to the thoughts that, Martha, you began with about how do we look at both sides of the market. Do we net it out, how do we do it? One of the issues that came up, both in the district court and in the Second Circuit, was not just should you or shouldn't you do that as an economic question, but also as a legal question. Where is the burden? Because I think I am correctly stating American Express's view that the Government must show that the anti-competitive effects on a net basis are substantial. Whereas, I think the Government's view is now that American Express, once the Government meets their burden of showing an anti-competitive effect on the merchant side, American Express can go and show there were pro-competitive effects on the cardholder side. In some way we could say mathematically that may turn out the same, but we all know it may legally have a significant impact.

Speaking as an economist, how you present these things, does that make a big difference or not, and should it?

MS. SAMUELSON: I think it did make a big difference in the two-sided market context. And then with the question whether AMEX had actually returned benefits to cardholders in a sufficient way to offset the price increases it put through to merchants. There was a lot of testimony about accounting for AMEX's rewards programs and what was actually getting delivered to consumers. So the burden did have a big impact there, certainly in particular the district court level.

PROFESSOR HEMPHILL: I want to offer a thought about the presentation of economic evidence at the government trial. One of the things that really fascinated me here was the discussion of market definition. The point I want to make doesn't really turn on two-sided versus one-sided, or whether you think about the price as net price or instead as a merchant-side price.

The government alleged that AMEX has market power in a larger market for general purpose credit and charge cards. By contrast, the private plaintiffs argued that AMEX has 100% of a single-brand AMEX market. What's the right approach here? Is it market power in a broader market or market power in a single brand market? Moreover, does it make any real difference in the end, or are these just two different ways of expressing the same underlying reality? This sort of question comes up a lot.

Let me spell this out a little bit more. Imagine one way of proving AMEX has market power within a larger market. You might take the following steps.

First, can AMEX profitably implement a small, significant non-transitory increase in price? That is, can AMEX profitably implement a SSNIP, all by itself?

Step two. Thus, a monopolist of all credit and charge cards could also profitably implement a SSNIP. After all, if one firm (AMEX) can implement a SSNIP, then so can a bunch of firms including AMEX.

Step three. Therefore, a market comprising all of these firms is a relevant antitrust market.

Step four. AMEX has a significant share in this market, and therefore, AMEX has market power.

So that's one way of approaching it. I think Professor Katz, testifying for the government, took more or less that approach. But if all of those things are true, you might just take step one—AMEX can profitably implement a SSNIP—and say, we're done. And in that case, isn't the market just AMEX?

I don't know what the right answer is here, but it does generate some confusion in litigation when you have these two different approaches. You have this potentially baffling cross-examination, in which the defendant points out that other plaintiffs have taken this other approach, and asks, do you disagree with what they did? In the back of your mind as an economist you might be thinking, I am not sure the exact market definition here really matters to me in trying to work out the economic effects.

MS. SAMUELSON: I think this is a fascinating topic. Really what you're getting at is the concept of must-carry, I think. So when I say 7 million merchants take the AMEX card of the 10 million merchants, we are inherently leading to something where we can't talk about market shares. It's not additive. So the fact that every bundled cable network has to take ESPN, well, how do you think about market power in that context?

I think these are fascinating questions. It's this underlying question of how do you think about market power with must-carry products in the circumstance where there are some set of must-carry products. And you can't really look at what people are actually buying. How much time does an individual person spend watching ESPN doesn't tell you whether a bundled cable network has to have ESPN available. It's not a useful thought experiment.

I think that's the underlying problem that you're raising, Scott, because in that context you will always get to the thought that the differentiated product is its own product market. It has market power; it has to be carried.

MR. KATZ: I do want to move on to some other topics, but before we do there is one last thought I want to make sure we raise on the *American Express* case. Whenever we have a challenged restraint under the rule of reason the question is, what's your business reason for doing it? American Express had said—and I think this is an argument that the other credit and charge card companies might have argued as well—is that to get people to use our cards we need them to feel comfortable as they walk into the store, and feel that the card that they are using isn't disliked, disfavored. We need to have that to make it in the market, to grow the participation, which is so important for these networks to actually function efficiently. I don't know if you have a bit of a reaction to that, and then I would like to move onto our next case, which is *Apple*.

PROFESSOR HEMPHILL: You're absolutely correct, each of the firms had made an argument like this. One of the many fascinating aspects of this case was an additional gloss to that general argument that AMEX made. AMEX had the additional argument that they were "punching up," as opposed to "punching down." They argued that their use of the anti-steering rule was particularly important because they were the upstart relative to Visa. And that in order to cope with Visa's dominance, they needed these provisions just to hold their own. And if you wanted AMEX to remain as a differentiated competitor in this market, that you had to let them continue to hold onto these rules.

MR. KATZ: And with that, since we have so much we want to talk about, I want to turn to another important case that the Second Circuit decided, the *United States v. Apple* case. I think many of you know about it, so I am going to try to very briefly remind you of the facts here.

The suit, again, was brought against more than just Apple. It was brought against five major book publishers and Apple. The book publishers allegedly conspired to set the prices of their e-books on resale, and Apple facilitated that conspiracy when Apple entered the market with proposing agreements—and again we had similar to the prior discussion, vertical agreements with a horizontal effect, although here in a very different way.

The agreements that Apple proposed to the publishers was that they change their model. The previous model was where the e-books were sold by the publishers to Amazon, who then would resell them at a price that they set, whatever margin that they would like to take, if any. Apple's new proposal, was that there would be an agency model. And under this agency model there would be just a commission charged, enabling the publishers to set prices. And included in this vertical arrangement was what many people called in effect a most favored nations clause, maybe a little bit like an RPM, retail price maintenance. But either way, a rule said you can't charge—you have to make sure others aren't charging less than the specified prices.

One of the first questions I would like to ask you, Martha, to start with is what are the pro-competitive and anti-competitive aspects of these arrangements, I suppose both Apple's entry and also having either an agency model or more traditional model?

MS. SAMUELSON: This case is so interesting to me because I think there really is a pro-competitive story that you can tell about the behavior of each of the participants. And here I would include the publishers and Apple and then obviously the big sort of gorilla in the background, that being Amazon. And in each of the cases the stories have some facts you can lay against them that support them and some not.

But from the perspective of the publishers you can tell a story, which is that it was enormously important to the publishers to retain strategic control over pricing in all of the different outlets for which publishers distribute books, so e-books being one, brick and mortar being another. That's a pro-competitive story.

There is an anti-competitive story as well, which is that these participants got together and tried to empower a rival to affect the behavior, to constrain Amazon, who was at that point by far the lowest price supplier of e-books. There is a pro-competitive and anti-competitive.

Similarly I think with Apple, there is a pro-competitive story, which is they have an enormously valuable platform. They distribute over that platform. They tend to charge 30% when they distribute over that platform, and that's what they were doing here. And then there is an anti-competitive story, which is they participated—not that they participated in meetings, but they were aware of the fact; they were an enabler with the publisher cartel; their goal was to get in the way of a very low-priced competitor of e-books, Amazon.

Then with Amazon there is a pro-competitive story, which is a simple one. This distribution form was the lowest price distribution form. They were selling best sellers at $9.99, and that's a pro-competitive story. And then there is an anti-competitive story, which worries one a little bit more now, having seen the facts as they played out on the ground. The anti-competitive story would be that Amazon was selling at or below cost and that the goal was to impede the entry of an important competitor, and that they have been very actively involved in the recoupment process, since this litigation effectively constrained Apple.

The facts that you want to lay against this and that were important to the district court and also the Second Circuit are direct evidence of meetings. Both the district court and the Second Circuit were very concerned about Apple's emails, Apple's awareness of the behavior of the group of publishers.

Pricing is really interesting. Before the agency agreements came into effect, the best seller prices did drop as low as $9.99 when distributed through Amazon. After the agency agreements came into effect with the publishers, prices went up a lot, maybe $12 was the average price for best sellers. Then the settlements came in, prices dropped, but they didn't drop to back to $9.99. That's an interesting fact.

I would say what is the most disturbing is what's occurred in the recent past, maybe the past year-and-a-half, where Amazon has been very aggressive with the publishers. There was a big battle with Hachette. That got a lot of publicity. Amazon has been offering very low prices for e-books to the publishers and charging quite a bit in the e-book market.

E-book sales are down. It looks like prices have gone up, and output has gone down through that particular distribution chain. So it's hard not to have some qualms about the effect of this entire process on the competitiveness of this market.

MR. KATZ: The discussion that we just heard, of weighing pro-competitive analytics in a very complex situation, doesn't sound at all to me, and most of us here, like a per se question. But it should be clear that the Second Circuit in a 2:1 affirmance of the decision by Judge Cote saw this as a per se case. However, Judge Jacobs, in his dissent, criticized that and disagreed with that. He thought that this should not have been seen as a per se case.

I should add I've heard people say, well, not only should this not have been a per se case, this should have been a criminal case. So can you enlighten us; is this criminal, per se, is it rule of reason? And maybe is it not a violation at all? Which is it?

PROFESSOR HEMPHILL: There are two striking similarities to our earlier discussion of AMEX that are worth bringing out.

First, here we have another partial settlement. The government had sued Visa, MasterCard, and AMEX. Visa and MasterCard settled. AMEX was left, which I think everybody would probably agree is the hardest antitrust case of the three.

Similarly, here the publishers all settled, leaving Apple. The partial settlement changes the case in funny ways. To no longer face some of the defendants that were implicated by your theory probably makes your case easier in some ways, harder in others.

Second, the justification offered by Apple echoes the justification offered by AMEX. That you need these provisions, you need this conduct, you need this scheme in order to get into the game or stay in the game. In this instance, that absent the agency contract, combined with the rather unusual kind of MFN—a retail MFN—Apple wouldn't have been able to take on Amazon.

I think Judge Jacobs' dissent, though agreeing with Apple, paints the justification in a slightly funny way. Jacobs seemed willing to accept that Apple needed to see prices increase. I think Apple's argument is more limited than that. Apple's argument is that it needed a retail MFN to make sure that Amazon was unable to persistently undercut it. I think that's a narrower justification.

As to per se versus rule of reason, this is a question that some Supreme Court clerk is starting to think about. The petition for certiorari is reading pretty hard a sentence or two in *Leegin*, the big retail price maintenance case from a few years ago. Here's the sentence: "To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate . . . [a] cartel, it, too, would need to be held unlawful under the rule of reason." The idea is that if there is a vertical agreement that is facilitating a cartel, then that's a rule of reason case, not a per se case. And arguably there is a split on how to read that language in *Leegin*.

Now, I think this is a tricky argument. A lot depends on what you think "facilitating" means. I think *Leegin* in context—a resale price maintenance case, remember—had something different in mind. I think what the Court meant by "facilitating" was the standard situation where you have a bunch of vertical RPM contracts, and they make prices more visible, which in turn makes the cartel easier to sustain.

The government's allegation here and the facts found by the district court, affirmed by the Second Circuit, is that Apple was "facilitating" in a much more fully engaged, deep-in-it sense. Apple was not just doing this kind of fancy, indirect strategy. They were deep in the conspiracy; they understood it. They benefited from it and were relying on the overall strategy of the publishers. So that's the basis for the government's view that this is a standard per se case. And by the way, if *Leegin* meant to go as far as Apple says, why didn't the Court even mention *Interstate Circuit* or the old *General Motors* case?

So, viewed purely as an argument about what *Leegin* had in mind, this is a tough argument for Apple. That said, we are in an era where the Court likes to move from per se liability to the rule of reason. And this is a complicated case that has both horizontal and vertical aspects. And we don't have a clear doctrinal answer to cases where there might be per se liability for some defendants and a rule of reason argument for others. This isn't to say that Apple would necessarily win under the rule of reason. But there is a deep set of questions—in part because of the multifaceted effects of MFN provisions and of agency agreements—that would support rule of reason treatment.

Clearly, Judge Cote had this in mind a little bit when she held, in the alternative, that Apple violated the rule of reason. And surely Judge Livingston had this in mind, to some degree, in writing (just for herself) that the conduct violated the rule of reason. But if the Court wants to reach out to think about these mixed vertical and horizontal arrangements—maybe *General Motors* was wrongly decided!—*Apple* could be a vehicle for that.

MR. KATZ: Well, let's turn to another case we have. I think we're fortunate to have several important rule of reason cases to discuss this year. And in my view, each apply quite differently.

The next case that I want to talk about is the *O'Bannon v. NCAA* case. I know many of you do know the facts, but I'll give a very brief description of what that case is about. Images and likenesses of student athletes, college student athletes, at least those who are very successful, are quite valuable out in the market, especially the market for video games. So the question arises, can they, as they are students, benefit from the value of their likeness and their appeal to people who like to play video games and watch other media. And the answer is that the NCAA has—or maybe I should say had—a rule that said no, colleges cannot compensate students with the license fees generated by their likenesses.

The case was brought in California, and the district court found that the rule that prohibits these kinds of payments violated antitrust law under the rule of reason. But the district court said there is, of course, some reason for this. The concerns of the amateurs and other concerns that the colleges might have about academics, etcetera, are ones that should be considered. And therefore, yes, it's not right not to allow these students to benefit, so you can pay them up to $5,000. I recall thinking that was strange, that zero price fixing, zero is not good, but price fixing at $5,000 is just fine. In any event, this went up to the Ninth Circuit, and the Ninth Circuit, partly affirming and partly reversing, found that that relief was not appropriate. The $5,000 max was not right, but did agree that these restraints were problematic and colleges should permit—to simplify, a fuller scholarship—for those students.

So I think there are a lot of questions about this case. Are sports different enough and we should just think of them as a different thing? But again, let's start with the question is there a better way? There is a goal of amateurism and other goals that the NCAA case and the colleges have. And the question really is what can you do that hurts competition less to accomplish those goals that I think many of us think are valid and the courts seem to think are valid.

PROFESSOR HEMPHILL: So I think that question gets at how we should think about less restrictive alternatives, an issue that is oft recited in lower court statements of the rule of reason. Interestingly, the Supreme Court—maybe because it is not that interested in getting into the details of antitrust law—has never really given us a clear statement of what the rule of reason looks like, other than to say there is a search for net anticompetitive or procompetitive effects.

The *O'Bannon* opinion more or less tracks the analysis that the Ninth Circuit has used in the past. I think there are some real problems, though, with the way the Ninth Circuit approaches rule of reason cases.

Before getting to that, I should note that the NCAA really won this case. They were found to violate antitrust law in a narrow respect, and therefore had to increase their scholarships a little bit. But they won on the question of whether they are allowed to ban cash. And the court answered yes.

The path to liability under the Ninth Circuit's statement of the rule of reason is strikingly narrow, in two different respects.

First, once you have a case of mixed conduct, the only way to win is to identify a less restrictive alternative. Here the players are hurt by the ban on payment. Second, the fans are benefited. So you've got a classic situation where there is some bad, and some good, and we have to find some way to integrate these.

Normally, thinking as an economist, we might try to work out how big each of these are and add them up or just figure out which one is larger. The court didn't do that. They don't actually try to identify net procompetitive or net anticompetitive effects. Instead, they say: unless plaintiffs can show a less restrictive alternative, defendants win. Here, the failure to show a less restrictive alternative doomed the case. That should bother you if you have in the back of your mind that the rule of reason, in places like the Second Circuit, states that ultimately a fact finder has to weigh and compare the positive and negative effects. There ought to be an alternative way for a plaintiff to win a case, even if there is no demonstrated less restrictive alternative. But the Ninth Circuit just didn't recognize that at all.

Second, it's not as though the plaintiffs failed to propose a less restrictive alternative. They had a full less restrictive alternative analysis. And that brings us to the second way in which liability is strikingly narrow. The only way to win as a plaintiff is to show that your alternative is *equally effective*. Here, the credited justification is preserving amateurism for the benefit of fans. Your alternative is pay them, but just pay them a little bit. Paying them even a little bit is surely less effective in serving the goal. Under the Ninth Circuit's analysis, plaintiffs lose without further analysis.

The upshot is that even if the benefit to fans is really small, and even if the anticompetitive effect is really large, there is no weighing, even if there is a good (albeit not perfect) alternative. And that just strikes me as crazy.

MR. KATZ: I suppose what you're saying is in the prior two cases we discussed, we didn't spend that much time talking about other alternatives, and I think the courts didn't either. Was there some other way for Apple to enter? Was there some other way for American Express or Visa and MasterCard to offer cards and increase the network? Are you saying that that's a good thing, we just shouldn't spend that much time talking about less restrictive alternatives, or are you criticizing the way in which it fits into what the Plaintiff needs to show under the Ninth Circuit's rule?

PROFESSOR HEMPHILL: Yes, a less restrictive alternatives analysis is a legitimate, sensible way for plaintiffs to win a case. It is basically an extension of an identification of net effects. You can say the bad is bigger than the good relative to the status-quo baseline. Or that the bad is bigger than the good compared to a second baseline, that thing you surely would have done or probably would have done or possibly would have done had you not engaged in the conduct that's being attacked.

So we don't get to that in *Apple*, because it is a per se case. Though there is a little bit of analysis in the case that you might think of as being about less restrictive alternatives. The issue does come up in AMEX, because the justifications are evaluated in Judge Garaufis' opinion. The court concluded that AMEX had alternative ways to charge for certain services packaged within the merchant relationship.

I should say that I am doing some academic writing about less restrictive alternatives, so this is an issue that I have on the brain. I think the important thing is to treat the analysis of alternatives as another way to win a case, beyond ordinary net effects analysis, rather than the only way.

MR. KATZ: Let's turn to some mergers. I had promised that we would talk about mergers as well, and there were a whole bunch of interesting ones. We won't talk about all of them today, but the ones I would like to start with—I would like to start with kind of two together. We are going to introduce two together and ask Martha for her thoughts on them. One was Zillow-Trulia, the other was Expedia-Orbitz. Both of those were permitted to proceed. Zillow was an FTC case, and Expedia was a DOJ case.

Zillow and Trulia are websites that offer all kinds of information related to real estate properties. And the concern in the market at issue was advertising by realtors. Real estate agents often place ads on both of these websites, advertising homes that they have for sale. The concern asserted was these two were the number one and number two websites of this kind, websites that talk about homes and home buying and other real estate topics, and that that would have a negative effect on the prices or output of advertising.

The other case, I think many of you know, is Expedia and Orbitz, both travel sites where you could buy airline tickets and make hotel reservations. Also leading sites, and the concern there, too, was would this combination have a negative impact either on consumers who use these sites, or might it have an effect on the prices or commissions charged to hotels or airlines.

So both of these cases, in what I've certainly said and many others have said, is an era where the government is fairly vigorous, perhaps even aggressive in merger enforcement, these are two cases where the government let the mergers proceed. And do you have a sense of why?

MS. SAMUELSON: I thought these were very interesting. As Elai says, at first blush each of these look like they are obviously going to be a problem, if each of these mergers resulted in a very large firm, if the market is defined as internet portal access to either online travel services in the Expedia-Orbitz combination or real estate information in the Zillow-Trulia combination. I think there are aspects that are common to each of these in terms of why they cleared and some that are fact specific. But clearly underlying both of them is the question of whether that's the right market definition for this service.

I think if you start with Expedia-Orbitz it was a question of whether consumers have many different methods of gathering travel information. But I think what was particularly important in terms of that merger was the question of whether Orbitz really disciplined the pricing of Expedia, and it looked like it did not to the DOJ. But also, barriers to entry were incredibly important with respect to that merger. And floating around are large firms considering the entry into the travel information services market: Google and Amazon and TripAdvisor.

You know, if you think of a firm like Google, if they wanted to enter this market, they might enter into a completely different way, where you shop for information about travel, and they have a big advertising market associated with that. But I can see why from the perspective of the regulators you might in that circumstance think you'd really like to be sure that there was a powerful independent firm that was also going to be the source of information on those services, with these large entities very overtly contemplating coming in.

I think with Zillow-Trulia, real estate purchasing is a big decision for people, and they seek out many forms of information. So I think there the FTC concluded real estate agents have lots of ways of getting information about pricing to people who are considering buying real estate, and conversely, people who are considering buying real estate don't just look at a website. They look at lots of ways in which they can find out is this the right value for something I am considering buying. So I think stepping back, what I find interesting about these markets is I look at these two types of firms, and I think they are selling information services over the Internet in some very significant way. If I contrast this with another type of portal market, so I think if Uber and Lyft were to announce they were considering merging, they would get shut down tomorrow. That isn't going to happen. The reason why that would not be cleared is it's not an information gathering service, where you might look for information on an important purchase from multiple sources; it's the opposite end of the continuum. I want something right now, and I am going to buy it immediately, and I care if it's there.

So I think, you know, in these portal markets they are just going to be very different, and I think the regulators will understand the economics in back of them very differently.

MR. KATZ: And really it does seem in both of these areas the rapidly changing nature of the industry—and both FTC and DOJ mentioned this. On the one hand it can't be right that you can always win a case or merger by saying this keeps changing. And there are a lot of people and there is Google, who obviously can get itself into any of these online spaces and make an impact. On the other hand, truly, it does matter, and I think especially in the travel space the DOJ seems to note these dramatic changes occurring. It's hard to know where it's going to go.

I want to talk about another merger case, the *Steris* case. The FTC brought a case challenging the merger of two companies involved in sterilization. What these companies offer are ways to sterilize products that are then used in various health care products that of course have to be sterilized before they are used, and there are different methodologies. I will not get into the science of it, but what was interesting about this case is that this was really a potential competition case. The argument was that the foreign company, I believe U.K.-based, was poised to enter the U.S. market, and this merger prevented what would otherwise be the entry of a new player in what was deemed to be a highly concentrated market. The parties vigorously disagreed. And, of course, most merger cases end up being settled by consent decree. This one went to trial, and the FTC lost, though it had a very good successful year in many other matters but not this one.

So it leads me to a few questions. One is potential competition a good enough basis upon which to challenge a merger? And then what do you think are the right metrics to think about potential competition? Another easy question for you, Scott.

PROFESSOR HEMPHILL: I don't have an answer to either of those questions.

Potential competition is one of several related doctrinal moves that we employ when we are concerned that a firm is essentially buying its closest competitor. Now, I think it's important not to make too much of any single merger challenge. The specific facts matter, and here they may be pretty narrow. The district court ultimately credited the argument that the competing technology would be abandoned not to avoid competition, but because no customer was willing to commit to it. So there were independent reasons why this technology wasn't pursued.

One possible implication is that unless you have some strong facts, these are going to be very difficult cases, I think, to bring.

I think this case is best read as limited to its facts, and I hope it's read narrowly. My concern is that a case like this would have too much of a chilling effect on cases where a firm purchases its closest competitor, even where this doesn't perfectly fit our standard understanding of Section 7 merger cases.

So to take a fanciful example, imagine that Microsoft perceived a threat from Netscape, as it did, and decided, you know what, I bet I won't have a problem if I avoid any exclusionary conduct. Instead I am just going to buy Netscape. So we trundle out our standard Section 7 analysis, and we ask, are these two firms in the same market? To which the answer is likely no. But probably the doctrinal framework that comes most readily to mind is actually Section 2, as a maintenance of monopoly. And even if Microsoft wasn't a monopoly, you'd still be worried about the maintenance of market power from purchasing your closest competitor. All of which is just to say, our standard horizontal merger understanding, which is focused on existing firms engaged in current competition, may not be adequate for thinking about these harder cases.

MR. KATZ: Well, what are your thoughts on this case or potential competition?

MS. SAMUELSON: Yes, well, I agree with Scott. This case should be narrowly restricted, I think. Because I think the facts really don't support how likely the actual entry was by this potential competitor. And I think in fact, if you go back and think about the Expedia-Orbitz merger that we just talked about, the possibility of potential competitors was an overwhelmingly important fact in the resolution of that merger.

Then I guess one other observation that's been present in many of the discussions we have talked about. Doctrine is very important. Direct evidence has been very important in all of these cases this year. Direct evidence of the AMEX Value Recapture Program; direct evidence of the meetings of the publishers; direct evidence of the emails from Steve Jobs. And while we have these important doctrinal discussions going on, direct evidence is overwhelmingly important. I think in the *Steris* case it was the issue, the direct evidence, this firm really wasn't going to enter this market.

MR. KATZ: So we are starting to run short on time. We have several other topics, and I also want to allow some time for questions, so I am going to try to move fast through the rest of this.

I want to spend just a couple of minutes on one more merger case. This is the *St. Luke's* case, and it comes out of Idaho. I think one of the reasons I want to talk about it is that Scott and I flew to Idaho together a few years ago. So the fact that there is a great concern about too much concentration in health care services in Idaho—not in Idaho generally, but actually rather in Nampa, Idaho, which is the second largest city in Idaho—is of interest.

MS. SAMUELSON: Or whatever that means.

MR. KATZ: Yes, it is close to Boise, that is true.

PROFESSOR HEMPHILL: Which mattered in the case.

MR. KATZ: That is true.

But what I wanted to talk about is that case, which was affirmed by the Ninth Circuit. The challenge to the merger was affirmed, and it was a complex merger of really a health system and a medical provider group. One of the questions that was interesting and the Ninth Circuit grappled with was efficiencies that the merging parties discussed. We were able to show that the efficiencies that they would bring were ones that would overcome the higher concentration or the likelihood of anti-competitive effects, which was undoubtedly about to be a very significant increase in concentration in Nampa, Idaho.

One of the points the Ninth Circuit turned to was whether these efficiencies were merger specific or not. And what is meant by that is could you have accomplished the efficiencies they were raising, general policy for health care, ways to move off of payments, fees for services, other kinds of more innovative ways to deliver health care, issues of great importance and concern to our nation without the merger? And then they said, well, by combining we can do more of that. And the court said, you might have been able to do that even without this merger. So to me that's starting to sound a little bit like, well, is it a less restrictive alternative? Do we think about that in mergers too? Should we act the same in the rule of reason? I thought you might have a thought or two on that, Scott.

PROFESSOR HEMPHILL: Yes, as it turns out, merger specificity is just another application of the less restrictive alternative principle. The question is, can you accomplish the claimed benefit of merger by some other means?

In mergers, just like in the rule of reason, we have been obsessed with equal effectiveness. Unless the alternative dominates, less restrictive and equally effective, we say it doesn't count. That seems wrong. If the alternative avoids a big loss, and is only a little bit less effective in accomplishing the claimed goal, that should be good enough.

Now the FTC won the case without that. They won because of a second aspect that's nearly unique to mergers, which is that defendants have to prove the absence of a less restrictive alternative. In this particular domain of health care mergers, the burden of persuasion can be controlling, because we don't really know whether the blessings of integration can be accomplished through a mere network of doctors. The real question here is, whose job should that be? In a rule of reason case plaintiffs have that obligation.

In mergers I would think that the same principle should apply—that plaintiffs should have the obligation to prove up their case, whether against a baseline of the no-merger status quo or against a baseline of the asserted alternative. But it's plaintiff's job to talk up why this alternative would achieve, maybe not all of the benefits, but enough of the benefits that the alternative is shown to be superior to the merger. And the court didn't do that, which strikes me as a mistake.

MR. KATZ: Thanks. Now, before we turn to questions, I promised that we would talk a little bit about Pharma.

And do you think, Scott, if I give you only a minute or two, you can say what you think about pharmaceutical issues. There is going to be an excellent program later this afternoon that's going to address this in much greater detail and have some of the protagonists from some of the important cases, including the *Namenda* case that the New York Attorney General's Office brought.

But I feel since we are talking about what was important in antitrust in this past year. My view is that the *Namenda* case, which was a product-hopping case and some of the fallout for the pay for the delay is that Supreme Court decision is important. So if all we do is tell you these are significant issues, maybe we will be doing our job and then turning to questions. Should we do it that way?

PROFESSOR HEMPHILL: One minute. And I guess one other disclosure. I advised the New York AG's office with respect to the case.

In these product topic cases, which I won't try to define, since I hope everybody knows what they are, we have a focus on, I think, two different ways to establish liability. One, to talk about the nature of the product improvement. All right, was it a big improvement, the new product, or was it just kind of trivial or was it nothing? And then second—I see Eric Stock walking in in the back. I am talking about *Namenda*. Second, the nature of the impediment as to the old product. Was it a withdrawal? Was it coercion? Was it something softer? And so I think one fundamental question—maybe a question for Eric later—is do you need both of these things; do you need both a trivial product improvement and some sufficiently sharp withdrawal of the old product to make out a case? Is it and, or is it or? Now, *Namenda* I think actually furnishes part of and/or, because there is a case granted, and the Plaintiff freely conceded that, okay, sure, this is a significant product improvement, moving from twice a day to once a day. That's a thing that brings some benefit. But if the withdrawal or coercion is sufficiently sharp, there is still going to be liability, right? So the question is whether that is one among several ways of a Plaintiff making out a case, or if it's ultimately a narrow exception to our general and correct deference to firms that are engaged in valuable product improvements.

MR. KATZ: Well, thank you. Let's open it up for questions. I see one way in the back.

AUDIENCE MEMBER: So I guess going back to the potential mergers, to block a potential merger I guess there are two somewhat speculative elements economists sometimes claim. One is, of course, we need to establish whether there would be a price increase, and in the light of that, probably be a situation where economists recognize we see fancy degrees but never the data that would say these econometrics would lead me to believe that there is a price increase. Now the second element, potential element becomes identifying those parties or those rivals that could potentially set a price increase entry into market. I think that's what makes a potential merger even more difficult to foresee or to conclude. Would you in these circumstances really look only at those potential mergers where you see a single viable competitor? Martha, you talked earlier about Trulia; is it really gathering information? Can you say there is really only one viable competitor that would offset a price increase or would lead to a price increase? So is it scenarios where we are looking for somebody who has a customer base or somebody that has exclusive technology that could perhaps provide some guidelines in which potential mergers could be more helpful than others?

MS. SAMUELSON: So I think you're raising a tough question. In the Zillow-Trulia case the issue was that there was this method of acquiring information about real estate over internet portals turns out to be a relatively small share of the way consumers access information about real estate. There are lots and lots of other ways that consumers gather that information, and lots of other ways that sellers of real estate promote that information. So there I think it's really a market definition issue. The market was broader than just the market for acquiring information through real estate portals. Orbitz-Expedia, there were lots of big dogs hanging around and I think with fairly explicit plans to enter. And the question of whether if there is just a firm and that firm has some unique ability to access the customer bases of the merging firms, is that sufficient or not? I don't know. I think that's a tough question. It is closer to the facts of *Steris* actually, but in the *Steris* case the additional wrinkle was that firm was very likely not to enter anyway. So it's got more of a flavor of that, I think.

MR. KATZ: Do you want to respond?

PROFESSOR HEMPHILL: Yes. So I want to push back on the premise of one of the first things you said. That the standard that we ultimately need to apply is that there would be a price increase. Sometimes we have excellent data, and we can do really great and fancy and complicated things. But if our goal is to try to make a reliable estimate based on the available evidence, often that's not going to take an econometric cast. There may not be *any* data to work with in a potential competition case. You may be looking instead at internal evidence about, for example, who they said they were scared by. And if that evidence is powerful, then it can provide an adequate basis for confidence about what would likely have happened.

Here, I again want to come back to Section 2 a little bit. Part of why I like to play around with this Microsoft-Netscape example is in the actual D.C. Circuit opinion. In the context of Section 2 the court said that nascent competitors were a fit subject for antitrust scrutiny, even if you didn't really know, even if you had some substantial doubt about whether Netscape plus Java would have actually grown into a full-grown competitor. So that there might be a difference between thinking about liability, especially liability as brought by an enforcer in the injunction context, and remedial questions or damages questions on the other side.

MR. KATZ: Well, thank you very much. We have reached our time.

MS. DUNLOP: I am going to try to keep with Elai's excellent record of making the trains run on time. It's 10:15. We'll break for ten minutes and come back.

MR. KATZ: Well, thank you very much everyone.

Financial Benchmarks, Competition and Antitrust Injury: Untying the Knot

MS. DUNLOP: Okay, everybody if you could take your seats, please. We are going to get moving on our second session of the morning. I am going to pass this over to Bill Rooney, this panel is on "Financial Benchmarks, Competition and Antitrust Injury: Untying the Knot."

Take it away, Bill.

MR. ROONEY: Thank you, Lisl.

And welcome to our second panel of the day. I would like to introduce our esteemed panelists. First to my left is Andrea Shepard. Andrea is an emeritus professor at Stanford Graduate School of Business and senior vice president and co-chair of the Cornerstone Research antitrust and competition practice. As you can see, Andrea has extensive experience in the financial services world.

Next we have David Scott, who is the managing partner of Scott and Scott. David has extensive legal litigation and trial experience in antitrust, and is currently the lead counsel in the Foreign Exchange case. And you will see David's passion as he discusses these cases.

We then have Russell Lamb, who is the senior vice president of Nathan Associates. David is an expert in antitrust economics and econometrics, and you will also see his familiarity in this area of antitrust economics.

Finally we have Liz Prewitt, who is a partner at Hughes, Hubbard & Reed. Before that, Liz spent 16 years with the Antitrust Division, and most recently was the Assistant Chief of the Antitrust Division's New York office. Liz was very much involved in the Libor and FX investigation with DOJ, so she is somewhat limited in the scope of her remarks, or will be limited in the scope of her remarks. But as you'll see, she will be able to contribute at a high and very useful level of generality.

Our overall structure for the panel this morning is that I will give an introduction on the Libor and FX cases, their decisions and the rationale for their decisions, offer a few brief comments on the pending appeal in the Second Circuit for the Libor decision, and then hand it off to Andrea. And Andrea will comment on the economics of the Libor decision. David will address the law on both the Libor decision and the FX decision and compare and contrast them. Russell will respond to Andrea's comments on the economics of Libor. And Liz will comment, as I say, a bit more generally on injury to competition and antitrust injury.

Lastly, I suspect there are some lawyers in the room who are involved in these cases, and we would welcome your penetrating questions at the end.

So to jump right in on a brief description of Libor and FX. If Tom Artaky is here, I would like to thank him for his very significant help in compiling this deck.

So this first slide is worth pausing on for a second. Those who are familiar with these cases will find it elementary. Those who have an interest in these cases but are not involved will find it very useful.

So what is Libor? Well, Libor is the average of interest rates that each member of the British Bankers Association, which are the largest banks in London, estimate that it would be charged for borrowing from other banks. And then Libor is calculated by taking these estimates, forming an average from what they call the middle two quartiles, some on the extremes are excluded but the middle eight are averaged, and that becomes a Libor rate.

Now, what is Libor used for? It's used globally as a reference rate for the pricing of many financial instruments in the financial and commercial markets. So an important question that will pervade this morning's panel is well, okay, still, what is Libor? Is Libor an element of a price? If you manipulate Libor, are you manipulating the price or are you not? Or are you simply manipulating an interest rate or a benchmark that the British Bankers Association set but is not a purchase price for anything.

I'll leave you with that question.

So now we come on to some recent developments. There have been a lot of headlines and billions of dollars in settlements and guilty pleas in connection with Libor. But it's not all bad news. As you saw in this morning's *Wall Street Journal*, one of the lead editorials was "Maybe Not All Bankers Are Saints, but Certainly Not All Bankers Are Criminals." And in London we just got breaking news over Competition Law 360 that the sixth banker, recently on trial in London, was recently acquitted of everything. So there is some bad news and some good news. It's a mixed landscape, and I don't think we can point to past cases and say got to be liable or not liable.

So what is the alleged manipulation? It's pretty important—and lawyers will appreciate this. It's pretty important to understand the four corners of the district court opinion on the issue that's on appeal. It's also important to see, at least at some level of generality, what the complaint alleged.

So the manipulation: The banks collusively and systematically depressed Libor to artificially lower the interest rates on Libor-based instruments.

Now the motive, the alleged motives or the motives that have been discussed: Banks were able to pay lower interest rates on Libor-based financial instruments that they sold to investors. But also, by submitting artificially low estimates of the interest rates they expected to pay, they guarded against assessments that they were financially unstable.

If we recall in the 2008 financial crises, that was a really big deal. A bank did not want to flag that it was teetering on insolvency, and to say that it was about to pay a very high interest rate would say that those who were lending it money judged it to be not in very valid financial condition. So I will leave you with those ambiguous motives.

Now this is really important. The judge identified four main arguments for dismissal. Allegations that were insufficient with respect to concerted activity; no real allegations of conspiracy to withstand a *Twombly* test. No allegations of a restraint of trade. Remember, what is Libor? Is Libor just an interest rate estimate or is Libor an element of price? The plaintiffs don't have antitrust standing. And finally, the plaintiffs are indirect purchasers under *Illinois Brick*. The court found that there was no antitrust standing and did not address any of the other three, and the decision is based upon there being a lack of antitrust standing.

Now here is a just snippet of the court's rationale in its own words: "Although these allegations might suggest that the defendants fixed prices and harmed plaintiffs, they do not suggest that the harm plaintiffs suffered resulted from any anti-competitive aspect of defendants' conduct. That is, the process of setting Libor was never intended to be competitive. "Thus, even if we were to credit plaintiffs' allegations that the defendants subverted this cooperative process by conspiring to submit artificial estimates instead of estimates made in good faith, it would not follow that plaintiffs have suffered antitrust injury."

Again, Libor is not competitive. The banks conduct was not anti-competitive. It was maybe anti-honest, but it wasn't anti-competitive, because the Libor-setting process was a cooperative arrangement.

This last point is really important. There was no elimination of competition. The collusion itself did not eliminate competition, because the process is cooperative. As such, an injury resulting from the collusion could not constitute an antitrust injury. And a really important question which will linger with us throughout the panel is: How do we construe those sweepingly broad words in Section 1 about a combination in restraint of trade? Or do we need to frame those words within a relatively tight analytical structure to require the elimination of competition within the conduct itself, as opposed to perhaps being even a foreseeable consequence of the conduct? So there will be some tension between the broad words of Section 1 and was it meant to have a broad scope to capture concerted activity that had the foreseeable consequence of affecting an element of price, or do we need a strong infrastructure post-Chicago School for what an antitrust violation really is, and insist that the conduct at issue indeed eliminates competition.

One observation the court made was that the same harm could have occurred if each player acted unilaterally, presumably based upon its interest to protect its own credit perception. It didn't address the sufficiency of the allegations that the banks in fact did not act unilaterally.

Finally, the court made an observation, which will be of interest I think to the economists here as well as those who have got a particular bent toward antitrust economics, and she seemed to be saying that at most the plaintiffs are alleging a wealth transfer and not an allocative inefficiency. Insofar as the conduct at issue may have affected the price, it did not eliminate competition between sellers. And it's only the latter aspect that would in fact affect allocative inefficiencies or efficiencies. I am not saying that's incorrect or correct; I am just saying it seems what she was trying to communicate in that sentence on the slide.

Moving on to the FX benchmarks. A completely different outcome on similar facts. Again, what is a foreign exchange benchmark? It's called the Fix, and it is the exchange rate for major currencies determined by calculating the median price of FX transactions in the thirty seconds before and after the close of business for the day, which is 4:00 p.m.

Query: Can the Fix be properly characterized as "the transaction price" at which currencies are bought and sold? That will be very important as to whether one can construe this as a price fix. Of course, that exactly was the allegation by the plaintiffs against the banks.

To put some color on this for counseling purposes and client interaction, the chat rooms that were used by the FX bankers had the following names: "The Bandit Club," "The Cartel," "The Mafia," and the best, "One Team, One Dream." I will also say that the court cited those names in support of the inference of the sufficiency of the allegations. Again, rightly or wrongly, it's not a bad point to keep in mind when you look at some of the terminology that a client may use and apply our common sense to it. And nine out of the twelve defendants have now prohibited their traders from participating in interbank chat rooms.

So what was the conduct at issue, or at least alleged? The banks placed fake orders in this one-minute window at the end of the day. The trading bank positions—the banks traded their own positions before client positions, and the banks disaggregated and concentrated lots of orders around the FX window in order to effect the final Fix.

The court found that the complaint did state a cause of action and said that it pled facts that plausibly suggested an unlawful agreement among defendants that caused plaintiffs the type of injury the antitrust laws were designed to address. To the extent Libor 1 suggests the contrary, the court respectfully disagreed and said that Libor's conclusion blurs the lines between two separate analytical categories, the sufficiency of the complaint under *Twombly* and antitrust injury. I just note that, because it sort of gives the pivot for the discussion later on.

The court basically said the complaint stated a per se violation of price-fixing and a complaint that it does not separately need harm to competition. It noted there was an injury in fact in so far as the plaintiffs said they paid supra-competitive prices. And that an injury that flows from the setting of or the fixing of prices is of the type the antitrust laws were intended to prevent.

On appeal, the plaintiffs are saying that they did allege a per se violation. The cooperative versus competitive dimension of the Libor-setting process is a phony distinction. If anything, the cooperative nature of the arrangement among horizontal competitors raises the risk of anti-competitive harm, and the injury in fact was the loss of money by the plaintiffs, and that an antitrust injury, the banks' collusion in the Libor-setting process, caused investors to lose that money and hence suffered antitrust injury. If horizontal price-fixing is the paradigm of an unreasonable restraint of trade, receiving or paying horizontally fixed prices is the paradigmatic antitrust injury, say the plaintiffs on appeal.

The defendants say not sufficient evidence of a conspiracy, even though that wasn't the rationale of the decision. There is no per se violation here, because the behavior at issue was not competitive behavior or behavior that was involved in competition for the sale of goods or services. And there is no antitrust injury, because without an allegation of conduct that restrains competition, any harm resulting *a fortiori* cannot constitute an antitrust injury.

Now let's get to the substance of the panel.

MS. SHEPARD: Thank you. It's good to be here. It's good to see some familiar faces in the crowd. Especially, I should say that I've been involved in the Libor matter and the FX matter on the defense side. I am sitting on a panel in which there are three other speakers who were not. So as I see some friendly faces out there, I am particularly grateful.

I should also say that I make the usual disclaimer, that the things I am saying don't represent the view of the client or of anyone else.

So I am going to talk about the Libor decision, because I think that it's just a really interesting decision. There is a lot of law in it. I am going to talk mostly about the economics of the decision and why I think she actually got the economics right.

In doing so, I am going to start by framing the economics in a way that I think fits with the economics of antitrust policy. In order to establish whether conduct fits the definition of antitrust harm that civil litigation and treble damages were designed to address you need to establish certain elements, and I have broken them up into three parts, which I think is really fairly consistent with Bill's description of the Libor ruling.

First, you have to have harm to competition. You're familiar with the saying antitrust laws are not about protecting competitors; they are about protecting competition. And that is true here, with a slightly different twist on it. In addition, I think for it to be civil litigation, you have to have harm to competition. And in between those two things there is an arrow that one has to cause the other. This is actually sort of a subtle point I think in her ruling, that not only is there that sort of thing, this has caused it. What is causal is the part of the conduct that was anti-competitive. It's the anti-competitive characteristic of the conduct that causes the harm. So those are the three pieces.

As Bill has said, the allegation here is that the banks colluded in order to suppress Libor to a level that is actually lower than their true cost of borrowing. And that had the effect of having people who were receiving payments pegged to Libor receive less than they would have received. So in terms of this diagram, the conduct was to suppress Libor. I think the argument is how did it harm competition? Well, it was collusive, and therefore necessarily harms competition. The harm to consumers, actually class members more precisely, because these aren't consumers. These are hedge and pension funds. I am pleased to say one of the things that juries hate almost as much as banks is hedge funds. So the harm to class members is that the payments were suppressed. And the arrow there was that the collusion, which is the anti-competitive part of their conduct, was necessary in order to effect the suppression of Libor.

So I am going to talk mostly about first harm to competition, and about the arrow saying less about harm to consumers. Because I think the arguments there are going to be similar arguments to the arguments that are going to go forward anyhow, whatever happens to the antitrust claim. Those kinds of arguments about did this really harm the members of the class is a more standard argument. And it's actually not the part that she really addressed.

So what do we mean by harm to competition? Let me talk about this first as an economist in sort of standard price-fixing. So there is some product, which isn't widgets or something we all know about, and there is a price-fixing allegation. So what do economists mean about to harm competition? It means that something about what they did changed the way the firms compete with each other. The firms always compete with each other, responding to each other and doing things in the marketplace, and they have done something that changes it, and changes it in a way that makes it less competitive than it otherwise would have been.

So here's the simple example. Take the world without collusion. There is always an implicit comparison, what does the world look like if this hadn't happened and what does it look like if it has? With collusion I see that my competitors raised price. What do I do? I say ah-ha, this is an opportunity. What do I do? I go out there, and I steal their customers, customers come to me because my price is lower. My competitor looks at that and says, well, that didn't work and lowers the price. That's what competition does.

When you collude, I look out there, my competitor raises his price, and I say, great, I raise my price. That's a change in conduct. Does it change the way people respond? It results in a price increase, but it's not the price increase that is the harm to competition. That's the result. The harm to competition is that people are behaving differently. That the price increase happens because competition has been harmed.

So what did she say about this? Well, as Bill said, one piece of her ruling was, okay, so where is the competitive harm? Where did the alleged collusion happen? I am going to stop saying alleged collusion; we all know that this is alleged. The collusion happened in the process of setting Libor, that these banks all agreed and did all submit Libors that were actually below their rate at which they could borrow. As a result, the average of those rates was below what they borrowed, and that is what the collusion was about.

The problem for, I think, the plaintiffs at this point is there is no competition in this process. This is not a competitive process. There is nothing being sold, nothing being bought. There is importantly no kind of responsiveness of the kind I just suggested. It is not the case that if I submit some Libor rate, my competitor can undercut that in any way and cause harm; it doesn't cost me anything if they charge a different rate. Indeed, there are always different rates. There are always arranging of rates. There is no law of one price or one submission. People are submitting estimates; they always vary, and there are no consequences to that. Just because you have a higher or lower Libor than mine has no effect on my profit, except perhaps through this theory of harm that we will come back to somehow about if you infer I have a high rate that I am less creditworthy.

But basically what she said is there is no competition there and there is no competition to harm. Now that's not true that the banks don't compete. They do compete. But what they compete in is the sale and purchase of securities, lots of which have some payment stream that is pegged to Libor. So yes, Libor does affect what goes on in these other markets, but it doesn't affect the competition in those markets. Competition in those markets is also not harmed. Competition is a process. It's how firms interact with each other. That has not been changed.

Take for example, mortgages, a familiar example to most of us, having been paying mortgage rates that were too low for years. So banks don't compete over Libor. Everyone has the same Libor rate that they are offering. What they compete on is how many basis points above Libor you're going to have to pay. That's what you look at when you're out there shopping for a mortgage. You're not comparing one Libor versus the other, because they are all the same.

You think about an interest rate swap. IRS, which stands for Internal Revenue Service. An IRS is a contract whereby one party agrees to pay a floating interest rate over time in return for a fixed payment. What the Libor pegs is the interest rate that you pay over time. What banks compete about again is not the Libor—if the bank is paying a fixed rate. What the bankers are competing over is the fixed rate that they will pay. Not the Libor. That competition has not been affected, and it has not been diminished even if one believes that they collusively repressed the Libor. So that's the basis of the economics of the fact that competition was not harmed.

I am going to go to the arrow now. So what does it mean—I don't think there is any argument that if they repressed Libor—that the effect of that was the Libor was repressed. That's tautological. Of course that's true. What the judge is saying, and I think this is correct, whatever repression happened does not require collusion. That plaintiffs' theory—there are actually two theories of damages. One, as Bill pointed out, was the banks are going to somehow profit by the suppression of Libor, so profit in the usual price-fixing sense. I think that's what we'll get to talking about if we have time, harm to members of the class. The arguments there I think you can see also would apply to the banks because they are on both sides of the transactions actually. They are buyers and sellers. They are paying the fixed fee; they are paying the variable fee. There is no reason for them to think they are going to benefit uniformly from a repression of Libor.

Setting that aside, I think the more interesting argument is whether or not collusion is necessary. Whether the alleged anti-competitive conduct, the collusion, is what caused borrowing costs to be misrepresented.

Under plaintiffs' theory—I am not Lehman Brothers, really you can trust me, I am creditworthy. Under that theory, every bank has a unilateral incentive to look financially sound, to have a lower Libor, to say my submission, which represents my true borrowing costs, shows I am really healthy because I can borrow at a low cost. You don't need to include if you have that incentive and you're willing to act on it, which is what plaintiffs are claiming. You have no need to have others conspire with you to do this. In some sense I would be much happier if everyone else submitted a high Libor, and I can submit a somewhat lower Libor, which is just a little below my true borrowing costs and still looks like I am in the low part of the distribution. I just want to look healthier than the other banks. So in a sense there is no reason to collude, no incentive to collude. The same if you believe that they have this incentive and they are willing to act on it, they don't need to collude. The collusion is unnecessary. The harm does not come from collusion.

And yet another point here is my submission doesn't depend on anybody else's submission. I don't need you to also lower your rate for me to be able to lower mine. I can just do that. And in fact, if some other bank is understating, I look out there, you know I am submitting what I think my true borrowing rate is and look at other people's submission and I say, oh, my goodness, everybody moved down, and I am sitting at the top. This is really bad. What's my response? My response—in a normal price-fixing my response would be to hold that thing and take advantage of it. That's not my incentive. My incentive is to lower mine, and sometimes you get a race to the bottom that's completely unilateral. Unilateral in the sense people wanting to always be in the low part of the distribution system is going to push down the entire distribution.

So the bottom line here, if you take plaintiffs' theory about why banks are doing this is that Libor would be understated, repressed whether there was collusion or not. You don't need collusion. Collusion is not necessary, and therefore, the anti-competitive part of the conduct didn't cause the harm. So I think that's sort of the second and more subtle part of her argument.

Let me say just a few words about harm to class members. As I suggested, the problem is actually not just Libor and FX in all of these cases where the allegations are about trading. Given who the plaintiffs are, they are not individuals who are doing a one-time transaction. There are other institutions who are engaged in lots of transactions. They are on both sides of this all the time. They are on the side that is getting a payment based on Libor; they are on the side that is making a payment set on Libor every day. So you've got this problem that you see in classes where occasionally somebody gets a little benefit, or you can try to define a class to cut out people who are benefiting. This is a much harder thing. It presents much more starkly the question of what do you do with conduct that is simultaneously benefiting and harming members of the class? I think that's going to be really interesting to see how that gets resolved. It may be primarily a legal question rather than an economic question. I think it is complicated by it's not just being on both sides of the same transactions. A lot of these are hedging transactions. So even if you somehow took all the transactions in IRS say, and tried to kind of net those out in some way, you have that the reason they are in that interest rate swap in the first place is they are hedging some other transaction where they were necessarily on the other side. So it's the balancing what is the overall effect may require—in an economic sense requires--expanding it to other areas, which seems difficult and incredibly hard. I think there is going to be a lot of debate. And Bill alluded to this, that Libor might take a component of the price; it doesn't peg the price. Libor, when firms are competing on other parts of the contract, that the competition on other parts of the contract might undo this. This is a familiar argument in lots of contexts. Of course, it comes out on different sides of this in different cases, but I think that's going to be one of the ongoing things.

So let me stop there. We are going to pass this to David, who is going to tell you that not only was she wrong in Libor, even if you were so deluded to think she was right in Libor, she certainly could not be right for ethics.

MR. ROONEY: Thank you very much, Andrea.

If I could make a belated request. Obviously, these are all very live cases. Please allow this to be sort of a Bar Association think session, and please don't quote back to any of the participants what they are saying here in a negative or prejudicial way. Allow them to speak their mind, not on behalf of a client, but for our collective consideration.

MR. SCOTT: Thank you. So I am going to focus on the Libor and FX decision and give you from my perspective, which is a plaintiffs' perspective, what I feel Judge Buchwald got wrong and Judge Schofield got right. In essence, I am giving you the good, the bad and the ugly of those decisions. And I am to do that in approximately ten minutes. So I am going to be moving quickly. If at any point this presentation starts to sound like the guy at the end of the disclaimer for the Publisher's Clearing House Sweepstakes, you'll understand. It is an awful large waterfront to cover, and I hope to touch on many things. Of course, given my time constraints, I am not able to touch on some of the very interesting issues that are there.

So I think it is important to appreciate that Libor and FX are really not your run-of-the-mill price-fixing cases.

These involve huge financial institutions, many of whom, in my opinion, are recidivists who have been engaged in what I believe to be kind of very anti-competitive conduct. And this conduct has dominated the news. As Bill mentioned, there was something just today.

In addition to dominating the news, you've also seen that there have been guilty pleas in the Libor case. There have been guilty pleas in the FX case. And it has not been limited to an investigation in the United States; worldwide agencies, regulatory agencies have been investigating this misconduct and have found that there is a problem here to the tune of tens of billions of dollars in fines. And it is against that backdrop that you have the Libor and the FX cases, and you have the decisions. And although, as was stated earlier, the cases are somewhat similar in terms of the conspiracies and this fixing of a benchmark, the decisions that came out of those cases could not be any different.

In the Libor case, as was discussed, the claim was the banks conspired to fix Libor, which is a component of many financial instruments, and that fixing of Libor caused the financial instruments to trade at artificially determined prices. Now, it is well recognized, I know among people sitting here, antitrust lawyers, that if competitors fix price, a component of price, and that fix is a horizontal price-fix, it is a per se violation of the antitrust laws. And as Judge Schofield said, it is really the quintessential antitrust injury. She said when consumers pay super-competitive prices because of a horizontal price fix, that conspiracy is the quintessential antitrust injury.

So against that backdrop you say to yourself, it's quite a story. My goodness, Libor is a pretty darned good case, a case that's going forward, and you feel pretty confident about it.

Now, unfortunately, Judge Buchwald didn't think the case was as good as the plaintiffs' lawyers thought. And as a threshold matter, what the court asked was, she said, have the plaintiffs demonstrated antitrust injury? Now, to appreciate that inquiry, as we all know, antitrust injury is a standing issue, and it is whether or not you are able to prove that the injury you complain of is an injury that is the type of injury that is intended to be prevented by the antitrust laws.

She found as a matter of law that plaintiffs failed to establish any antitrust injury. Now, there is a fundamental problem I believe with the analysis she performed on antitrust injury. Generally, that is a limited inquiry. There is really no assessment of the merits of the case. However, Judge Buchwald engaged in such an assessment. She assessed the merits of the case when she was assessing whether or not there was an antitrust injury.

Also, don't forget the overlay of all of this, and it gets lost oftentimes. This case was at the motion to dismiss stage, a 12(b)(6) motion. So it got to the pleading stage; no discovery had occurred. There are a lot of cases that recognize that if you purchase from somebody who has fixed prices and as a result you pay artificially high prices, you have suffered antitrust injury. Nevertheless, Judge didn't agree with that.

This becomes, well, how did she arrive at the conclusion that plaintiffs have failed to prove antitrust injury? And it's been mentioned two times now—she comes up with this concept of cooperative process. She determines that the Libor submission was a cooperative process, and therefore, because it was cooperative, there was no competition. You could not have reduced competition.

Now, this again I think has several problems. In the first instance, it is factually wrong. It was not necessarily cooperative. The British Banking Association, the BBA, required that submitting banks do so confidentially and independently. They did not encourage them to come together and collude on the submission of rates.

Secondly, Libor is a component in the price of financial instruments, my belief anyway. The economists may think otherwise. But you can't collude on a component of price. It also encourages what I would say is a form over substance argument. So you say, listen, collusion is okay so long as you do it in a proper structure. It leads also to what I think is an absurd result, because what the opinion says, it's okay to collude on a component of price, but it's not okay to collude on the final price. And finally, it really ignores a lot of Supreme Court precedent, most specifically the *Socony-Vacuum* case, which says, in essence, we don't care what the machinery is that you use to fix price. You fix price, you got a problem because you violated the antitrust laws. Judge Buchwald seems to ignore all of that. She just doesn't seem to pay attention to any of those things.

The court also found that as a matter of law the conspiracy did not harm competition. She acknowledged that prices of Libor instruments are set through competition. She acknowledges that changes in the Libor base rate altered prices, but that competition in other components of the other price components offset any reduction in competition that might have occurred in the Libor component. So, in essence, the baseline price was affected but not the final price.

I think personally this rationale is somewhat of a stretch. Because in the first instance it's really a factual issue, isn't it? I mean it's going to be hotly contested with expert testimony and discovery on what the impact of the conspiracy really is. But nevertheless, Judge Buchwald made the determination on a motion to dismiss that there was no impact.

Secondly, it is contrary to the plaintiffs' allegations, because in the complaint they pled the Libor-based financial instruments traded at artificial prices. It also ignores the teachings of the Supreme Court case in *Catalano*, which says when competition as one component is eliminated, it doesn't necessarily mean that there was an increase in the competition as to other components. And in fact and in reality the court says collusion effectively extinguishes one form of competition among the sellers.

The court also found that plaintiffs had to show that their injuries would only occur through collusion. And they said that even if you have collusion, you wouldn't have an antitrust injury if the harm could have resulted from Defendant's independent misreporting of Libor.

Again, I think that the logic of that rationale has some problems. In the first instance, it really ignores that defendants needed to collude in order to avoid getting caught. And secondly, it effectively eviscerates price-fixing cases. You can never have a price-fixing case if the conduct that is done individually is legal. You may still have conduct if done collusively would be illegal. So it kind of really makes no sense to me. And she hangs her hat on the *Brunswick* and the *Arco* cases as support for this theory, this harm theory.

I think Judge Schofield in FX did a very nice job in explaining what the problems were with the Court's analysis in *Arco* and *Brunswick*. First off, those cases were at the pleading stages. Secondly, those cases dealt with defendants' pro-competitive conduct. Thirdly, the cases—and I reread them just the other day—don't hold that just because you could have the same harm that could be accomplished in some other way, you lack a remedy. Really, probably the correct analysis under *Brunswick* would be for her to determine whether or not the conduct reduced or enhanced competition, and that did not happen.

In sharp contrast to Judge Buchwald's decision you have Judge Schofield's decision in FX, where the court held that at the pleading stages plaintiff had plausibly alleged a price-fixing conspiracy.

I am just going to talk quickly about the benchmark 4 p.m. aspect of the case. The case has changed considerably; the amended complaint now alleges a conspiracy related to the fixing of the bid as spreads, but I am going to limit my discussion to the benchmark.

I personally think Judge Schofield's decision is really a little more intellectually honest than Judge Buchwald's for a couple of reasons. In the first instance, defendants argued that the plaintiffs' complaint had to fail because they failed to plead harm to competition. And generally speaking, Judge Schofield notes there is no need to plead harm to competition. If you plead a per se violation, you don't need to plead harm to competition. She also said that when you have a horizontal price-fixing conspiracy, they are so anti-competitive that they are illegal per se, you don't need to inquire into the harm that they actually cause.

Defendants again raise Libor, and it's a theme that we see in other benchmark cases; Libor gets marched out by defendants all the time as a basis for dismissal. They did the same thing in FX, because they said, you don't plead harm to competition, therefore, you're unable to set forth antitrust injury. Judge Schofield noted the defendants' reliance on Libor and addressed its deficiencies.

In addressing this idea of the cooperative process, Judge Schofield said FX is different. FX is based on actual transactions among competitors who are competing in a market among competitors. So it's not based on some cooperative process.

She also took a look at what I call the independent harm or separate harm conclusion that Judge Buchwald arrived at. And she notes that if you add that requirement, it would doom every price-fixing case. And simply because, as I said earlier, conduct is legal individually does not mean it is illegal collusively. She, as a result of that, recognizing that we have pled a viable antitrust injury as well as a claim, Judge Schofield sustained our complaint, and the case moved forward and debate has been a very successful endeavor I think for those people who have been injured.

In the end the question is what's the future of benchmark litigation in the light of *Libor* and *FX*? And I think that if the investigation defines the civil actions that have been filed to date are any indication of where we are going to be, I think it's just the tip of the iceberg. I think there are going to be many more benchmark cases. So long as Libor is out there, as a plaintiff's lawyer, we are going to have to be confronted with the issues that Judge Buchwald has put out and set forth, the hurdles that she's set forth for us. And the only thing I can say is thank God for *FX*, because it gives us something to hold onto. Thank you very much.

MR. LAMB: Thank you very much for the opportunity to be on this panel with such a distinguished group. It's nice to be able to talk about how justice could be done for two opposing parties in litigation who each deserve to be served and heard by the courts, the bankers on the one hand and the hedge funds on the other.

I am going to structure what I have to say very broadly in two areas. There are many areas in which Andrea and I agree vehemently and aggressively. There are only one or two minor points on which we disagree. In fact, if you took the title of her presentation and substituted the word "wrong" for "right," we would be able to sit down.

There is no dispute, I think, between us about what elements are needed for antitrust injury to occur. That is not in question here. And it is not, of course, an economic question as to whether the judge was proper to focus on the standing issue, as opposed to the other challenges to the case going forward. Nor is it the economist's job to question whether the judge applied the right legal standard in a motion to dismiss stage rather than summary judgment stage. Although I might have thoughts about that, too.

The disagreement here really centers around the question of whether the defendants' anticompetitive conduct—and I am going to use the term anticompetitive conduct here for reasons I'll get to later—affected punitive class members in a way that was consistent with antitrust injury. The key in understanding the answer, in my mind, to that question is in what sense is Libor part of the competitive process in the markets in which the defendants actually participated. Which, I think we would agree, is the market for loans and liquidity that Libor affects the price in.

In my mind, as an economist, in thinking about the Libor case compared with the FX case, they are very distinguishable. And they are distinguishable for reasons that were just given; that in particular, Libor is an index which affects price for liquidity or for loans in that market. The FX Fix is a price; it is calculated as a price. And in the Buchwald decision, the judge might have focused on that fact in distinguishing the cases. I don't know that that's really in her very long opinion in which she goes through the comparison between the two cases. But it's clear that Libor is not the price. That's not in my mind disputable. It is also clear to me that it affects the price and is a component of price.

I want to say that one of the places where I think we get off track in thinking about the Libor, particularly from my perspective in thinking about economics in the Libor decision the court went off track is in thinking about what the court focused on Libor as a cooperative, not a competitive process. And in my mind, once you start down that road, the die is cast as it were, to find that there isn't any competition. Of course, Libor itself, per se, is not the result of the competitive process. In the same way, by the way that the Fix in the *FX* case is the result of a competitive process or actual trades that go into that number. But once you go down the road to say that Libor per se is not the result of a competitive process, everything else from Judge Buchwald's decision seems to follow in my mind.

Where I think Andrea did such a good job in setting up her case was in—a case I disagree with—setting up what competition looks like. And she I think chose the words very carefully, the canonical example of how competition would work, how price-fixing might affect the market. But it is just an example, and in fact a very stylized example. In fact, competition in the actual world in many price-fixing cases is much more complicated than that. The plaintiffs in the Libor case, of course, appealed to list prices and the fixing of list prices being analogous to fixing of Libor by defendants. And the court didn't give that argument much credit. I would say as matter of economics they are in my mind very analogous. List prices in many cases I've encountered and worked on are prices which are never the transaction price in question. In fact, they are published with the understanding and the knowledge of the market participants that they are not the transaction price. Those list prices become, just as Libor is, a reference point for pricing in those markets. That every transaction that occurs in some markets in which list prices are prominent occur at some discount off of list. That discount is determined as the result of a competitive process. The discount and the transaction price actually affect real outcomes, real transactions in the marketplace.

I would say—I was trying to think of some other examples in which price-fixing occurs outside the transaction process. *Mercedes Benz* antitrust litigation is one where the defendants studiously avoided talking about price, never was discussed; they only talked about margins. But there is a better example in my mind, the *Fuel Surcharge* litigation. There is no market for fuel surcharge, whether it's passenger fares or air cargo fares, but yet fuel surcharges are a way of affecting the transaction price for a ticket or for air cargo shipment services in the actual markets where those goods trade.

In my mind, in the *Libor* litigation the defendants' intent was clearly to affect the price in the marketplace, that is the price for liquidity in the marketplace. And in fact, fixing Libor was a convenient means to do that and maybe the only means of doing that. In reading the Court's opinion in *Libor* as an economist, it is hard to understand the logic at some points. And the quote was given earlier, but to me is the most difficult of all, in which the court said: "Although these allegations might suggest that the defendants fixed prices and thereby harmed plaintiffs, they do not suggest that the harm to plaintiffs suffered resulted from any anticompetitive conduct." I find that difficult to understand, because I thought that price-fixing was a per se violation. It is a legal opinion, and I am not offering any legal opinions today. In my mind, if prices were fixed and if the individuals who paid those fixed prices were affected, then that is the very essence of anticompetitive impact in the marketplace. And the wealth transfer that the court refers to is exactly, in my mind, what the antitrust laws address.

The effect on Libor—I just had to throw that chart up, because it's just so good from plaintiffs' perspective—was pronounced and direct.

I just want to try to address very quickly the court's argument that the same outcome could have arisen through individual actions. And to me, this is perhaps the most wrong of the economics in the court's opinion in the *Libor* case. Absent the alleged misconduct or the challenged conduct, Libor was determined—hold onto your hats, this is going to be economics—as a result of a rational expectation equilibrium in which the defendant banks attempted to gauge how each other bank would respond to that individual bank's Libor submission.

The but-for world in which there had been no misconduct would have been one of rational expectation and equilibrium. In my mind, as a matter of economics it makes no sense to argue, as the court argues, that but for the misconduct, banks would have been free to understate their Libor rates freely for two reasons. First of all, because they would have been found out. They would have been known to the individuals misstating them. But more importantly, as Andrea alluded to a minute ago, there would have, if there was no rational expectation equilibrium ground out by each bank gauging the others submissions, there would have been a race to the bottom in which each bank would have had no incentive to tell the truth, and each bank would have simply stated a Libor rate that was epsilon above zero. That is the economic conclusion of Judge Buchwald's decision. There simply could have been no equilibrium in which each bank would have actually revealed what they're actually borrowing.

I think that's all I have to say, except to say I think the question which would have been very interesting to see resolved from a class perspective, is the one that Andrea alluded to, which is how do we deal with a case, which is clearly the case in Libor, in which the plaintiffs were both harmed and benefited, if not simultaneously at least on the same day in many cases. In one transaction benefited and in another transaction harmed. That would have been an interesting question to see resolved. It's clear to me, I think, that some plaintiffs would have not only suffered no injury, they would have benefited. And how one would have dealt with that in a class context seems to me would have been very interesting for the court to have decided.

MR. ROONEY: Thank you, Russell.

Liz.

MS. PREWITT: Thank you. I'll make the usual disclaimer, that I speak in my personal capacity, and not on behalf of my firm, and certainly not on behalf of the Department of Justice.

So my remarks are going to be limited, after the field has been covered by the esteemed panelists here. I am going to try to focus my remarks on the principles that are at play, because I am not going to be addressing the decisions themselves, the holdings, but rather just what I think are the operative concepts and principles that really should drive the analysis in these cases. And I'll be focusing principally on the harm to competition.

I actually expected there would be more empty seats here at this point, talking about antitrust injury in the context of benchmarking for an hour. So either it's a hardcore group, or everybody here has a dog in the fight. or both. So I will try to keep my remarks somewhat brief.

I think really there is no dispute amongst panelists about the fact that we are dealing with a lack of clarity on the injury component in the context of the benchmark cases. Now, there is a debate, and I think a lively debate on this subject, because these are not your prototypical price-fixing conspiracies, based on the facts we are seeing alleged. In fact, one commentator likened defining antitrust injury to I-know-it-when-I-see-it threshold test used for obscenities. I think that analogy fits with the debate we are experiencing right now.

So the baseline we are working with is that we are trying to find the antitrust injury, which is the first part of the analysis—to identify the practice complained of and the reasons that such practice is or might be competitive. It's really only from that part, the harm to competition element, that we get to move forward to causation and other aspects about whether the plaintiffs' injury was an antitrust injury that the antitrust laws were meant to address.

I think that to the extent that the analysis isn't broken down into parts, starting with the antitrust harm to competition, I think the analysis can become very, very muddled. Which is why I think there are so many different perspectives here and perhaps a lack of clarity in what we are seeing from court opinions.

So the first part of the inquiry is really the jumping off part, because it's the threshold inquiry an enforcer must undertake when deciding whether to pursue conduct as a per se violation of the Sherman Act. Because if you don't have harm to competition it also means there has been no antitrust violation at all. Irrespective of whether it is a civil or criminal matter, it's really the beginning point. So taking a look at that, we are looking at which scenario can give rise to an antitrust allegation as a restraint of trade. And so I think I am going to need to refer to some of the facts alleged, because I think that's an important context from which to engage in a discussion here.

Financial institutions contributing to Libor in a collaborative fashion, is collaborative. It is a benchmark setting mechanism. But somewhere in the midst of that endeavor it is alleged that there was collusion at play. So obviously FX and Libor are implicated in this dynamic, but there are going to be other cases on the horizon and are on the horizon now. So I think there are premises that are subject to a debate that I think should inform the analysis about whether there is a harm to competition. And with these premises there is a real question about how settled they are. The first is that there is no competitive dimension whatsoever in the Libor-setting process. I think there is a legitimate and important debate on that point. Second, that the competition remains unaltered in the downstream purchase and sale products pegged to Libor based on the allegations.

So when we start moving forward from that point, we get to the first step of identifying the harm to competition. And when we are looking at an agreement between horizontal competitors in an industry or trade, that's where the analysis starts. From an enforcement perspective there is that need to dive down in a non-typical case. Where you have to at least articulate to yourself what is the harm to competition when it's not so apparent.

To begin with, the presumption that gets us out of the rule of reason begins the case law. We all know *Socony-Vacuum* and the broad standard of what is a restraint of trade. Which is why, from an enforcer's perspective, looking at harm to competition in a quantified way, in terms of being able to peg a dollar amount to it, is not something you delve into. Because, if it is a price-fixing agreement, it's presumed to be in restraint of trade and a per se violation of the Sherman Act. Of course, there are the issues where you have the international aspect at play, and you have to deal with anti-competitive effects and quantify them to get around FTAIA and other limits on the extraterritorial application of the Sherman Act.

So I think during the debate we found ourselves prematurely discussing whether the conduct actually affects price or component price to a sufficient degree before actually getting to the answer whether there is harm to competition. Because it is really the nature of the conduct itself that carries all the water, if you will. So that the nature and degree of the affect does not need to be examined.

When you have horizontal price-fixing the only intent that needs to be established is the intent to enter into the agreement, and that serves as the intent to produce the anticompetitive effect and the knowledge thereof. So applying the per se price-fixing label actually has important meaning, and I think you can see that reflected in Judge Schofield's opinion. So can we effectively accurately apply the label of price-fixing to these products and to the conduct at play involving these products in this market? And I think it is an important question, because the case law that we would be hanging our hats on, to the extent that you're taking an enforcement perspective or plaintiffs' perspective, it's case law that very much predates a lot of the these instruments and these markets which are very, very complex and perhaps not contemplated at the time the decision came down. So the question is to what extent do the seminal cases here really provide the meaning and the structure to be analyzing and answering the question about harm to competition. Because the starting and ending point, if you take a plaintiffs' point of view or enforcers' point of view, is *Socony-Vacuum*, and which holds that any combination which tampers with price structures is engaged in unlawful activity. And that opinion carries such a broad sweep when you look at the language—that any conspiracy formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity is illegal per se, and the precise machinery employed is immaterial. Enforcers will be looking to that sweeping language as a means to define what is a restraint of trade. In that respect it is something that needs to be contended with, because it means that that initial analysis is going to be informed by a very expansive view of what restraint of trade is.

So the bottom line we see in enforcement actions is that the DOJ is not sitting on the sidelines in these cases. They are taking a position that the Sherman Act actually encompasses these markets and products and conduct, and they are implicitly taking a very strong stand on the first leg of the antitrust injury inquiry and finding a harm to competition here.

We are seeing pushback and testing of that point of view, but I don't expect we will see a course change. We will continue to see aggressive enforcement up until the point there is actually a definitive ruling that, in fact, the reach of the law does not extend as widely or as broadly as they believe.

MR. ROONEY: Thank you, Liz. Okay, now for questions.

Yes, sir.

AUDIENCE MEMBER: This is for Dr. Shepard. We know that the Libor is a reference point that's available to the public, and we know the various products are priced in relation to Libor. And we also know that the CTA has issued a bunch of rules that are supposed to describe how the banks submit information and rates generally. Now, I mean if we assume for discussion sake that the banks that colluded, they have corrupted the operation of the BBA's rules, why would an economist want that sort of reference point available to the public, and why would anybody want to use it?

MS. SHEPARD: So I think that there is a tendency here to say something bad happened, and therefore, there is an antitrust violation. The judge didn't throw out the case. She said, you know, you can proceed under the CTA, but this is not an antitrust violation. She said it could be fraud. This is maybe just fraudulent activity. It's not that she was supporting or that I am supporting that bad information should be promulgated and put into the marketplace. The question is: Is it an antitrust violation?

MR. ROONEY: Next question?

AUDIENCE MEMBER: I have a question. How persuasive did you find the evidence alleged in the Plaintiff's complaint as to UBS, that their submissions, which extended over I think a 180-day period, had less than a one percent chance of being achieved absent collusion?

MS. SHEPARD: So that's a level of detail to which I cannot go.

AUDIENCE MEMBER: I see. Thank you.

MR. ROONEY: Other questions?

AUDIENCE MEMBER: How does the setting of the Libor rate differ from the Federal Reserve setting the Federal Funds Rate?

MS. SHEPARD: I don't know as much about the Federal Funds Rate. Maybe somebody else here does.

I don't think it's a submission process. I mean the way Libor is set—when I first read the way Libor was set, I said you've got to be kidding me. This is how they set Libor? This is the rule, the banks get to say? Well, let's see, I think if I was borrowing this morning maybe I would pay this rate. It's a complete hypothetical. Especially in the financial crisis they were guessing, because there was no borrowing or lending going on. But they are required by BBA to submit a rate.

So I think that Federal Funds Rate were set by the Fed; I think it's set on actual transactions and not on a hypothetical transaction that may or may not have happened.

AUDIENCE MEMBER: It's set by a bunch of bankers getting together to fix a rate.

MS. SHEPARD: No, they don't get together. They sit in their own banks and say h-mm, what do I think I could borrow at, and here is the number. That's the way it is envisioned that it would work. The allegation is they sat in the coffee shop together and decided.

MR. LAMB: I'll jump in here. I used to work at the Fed years ago.

Here you go, the Fed has a Fed Funds target, and the effect of Fed Funds Rate may or may not hit the target. But the Fed has an important lever, which is discount rate that can be used to control where you end up relative to target. But of course there is one important difference, which is the Fed is a quasi-government organization that operates under the sanction of the Federal Reserve Act, and not an independent group of businesses getting together and organizing themselves.

MR. ROONEY: Last question.

AUDIENCE MEMBER: What was the purpose of discussions among the chat room participants? What was their economic interest in talking to each other? Why were they doing that?

MS. SHEPARD: Well, the interesting thing I think is that the chat was not about the systemic suppression of Libor. That chat was someone calling up somebody and saying hey guy, Monday there is a Fix, and I really would like it high. Calling up someone else on Wednesday and saying Thursday there is a Fix, I'd really like it low on Thursday. It was this up and down thing to benefit arguably their own trading position. That's very different than saying the banks are getting together for ten years, or whatever the allegation is, to systemically underreport Libor.

MR. SCOTT: I just want to hop in here. Because this was an argument that we heard in *FX* over and over, and lo and behold, as a result of things coming out a lot of those arguments were disproved.

What's interesting to me is that Bernie's question has always been my question: Why were they doing this? If there was no economic incentive to do it, why do it? Why get yourself in trouble? Why pay all these fines, and enter guilty pleas, why do it?

I think what for me was important is that this Judge in Libor, at the pleading stage, has said I am going to find some way to get rid of the antitrust violation here. That's kind of my feeling. We have all been in that situation where you walk into a courtroom and you walk into a buzz saw and you know that this judge is going to flush your case before you open your mouth. And I just get the sense that that's what happened here.

MR. ROONEY: So one question, a short question and a short answer, and then we are going to close. Yes, sir.

AUDIENCE MEMBER: Dr. Shepard or Dr. Lamb, I wonder if you could address whether you think there is any self-interested reason with respect to Judge Buchwald's discussion with the independent reasons for the banks' conduct—for the banks—to not want to go too low?

MR. LAMB: I think the argument was why the banks wouldn't want to understate their true borrowing rate too much, because it would be found out, it would be apparent to the other banks, which would then disrupt the entire Libor mechanism. And irrespective of the misconduct, they did have an interest in there being a Libor mechanism.

MR. ROONEY: So now we are at the end of program, but I have two polls to take out of utter and complete curiosity. Can we see a show of hands of the number of people here who believe that Libor is properly construed as an element of a transaction price; how many people believe Libor should be construed as an element of a transaction price?

(Show of hands.)

Okay, now how many people here believe that Judge Buchwald's opinion is correct, that the plaintiffs did not sustain antitrust injury, as that concept is understood in the antitrust laws? How many here think it's correct?

(Show of hands.)

All right, we will see what the Second Circuit says. Thank you.

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

MS. DUNLOP: We now have the Annual Meeting.

Stacey Mahoney.

MS. MAHONEY: Okay, we need to accomplish exactly one thing—well, I lied—we need to accomplish two things.

So first thing is the minutes from last year's Annual Meeting, the 2015 Section Symposium—minutes or transcript I guess it is. Do I have a motion to approve that? Because I know you've all read it word for word.

AUDIENCE MEMBER: So moved.

MS. MAHONEY: Second?

AUDIENCE MEMBER: Second.

MS. MAHONEY: All in favor?

(Members vote aye.)

MS. MAHONEY: Any opposed?

(None.)

Excellent. We accept the minutes of the symposium from last year.

Now we get to read out the proposed panel of Executive Committee members for the Antitrust Section of the New York State Bar Association. As you know, each of these tenures is for two years. I am not going to read the names of the returning members. I am going to read the names of the folks that some are returning and beginning another two year tenure, which ends in 2018, as well as some new members. And then at the end I am going to read out the proposals for our officers.

The Nominating Committee proposes the following members of the Executive Committee for a two-year term ending in 2018: Rita Sinkfield Belin, Lisl Dunlop, Meg Gifford, Len Gordon, Barbara Hart, Jay Himes, Elinor Hoffmann, Michael Jahnke, Alan Kusinitz, Ethan Litwin, Steve Madsen, Mary Marks, David Marriott, Scott Martin, Terri Mazur, David Park, Bill Rooney, Fiona Schaeffer, Benjamin Sirota, Eric Stock, Virginia Tent, Geralyn Trujillo and Dale Worral.

The new proposed members are: Greg Asciolla, Jennifer Driscoll, Deirdre Hay, Lauren Rackow, Larry Reicher, Sharon Robertson and Suzanne Wachsstock.

Lastly, the Nominating Committee presents as a proposal for the officer slate: Lisl Dunlop as Chair; Michael Weiner as Vice Chair; Wes Powell as Secretary, and Nick Gaglio for one more year as Finance Officer.

Do I have a motion?

AUDIENCE MEMBER: So moved.

MS. MAHONEY: Do I have a second?

AUDIENCE MEMBER: Second.

MS. MAHONEY: Everyone in favor?

(Members vote aye.)

MS. MAHONEY: Anyone opposed?

(None.)

MS. MAHONEY: The motion passes unanimously. Thank you so much. Enjoy lunch.

The Other Side of the House—FTC Policy and Enforcement in Privacy and Big Data

MS. DUNLOP: We are moving onto a slight change in gear from the antitrust focus first half of the day with a program on privacy and big data. Bill Efron is moderating the panel, and he will introduce us to the experts who are going to help us all understand this stuff.

MR. EFRON: Thank you, everyone. I am just going to start. Big data, data security, privacy, the Internet of things, these are concepts that affect everyone in the marketplace. They affect consumers, whether you have a smartphone, you have a computer, you use a Fitbit, you apply for a job or you apply for credit. They affect companies of all sizes and across an array of industries, including those we are talking about in other panels today: health care, Pharma, financial services and many others, such as high tech and social media. Smartphones, devices connected to the Internet, the use of big data analytics to tailor services or target marketing efforts, they can all provide enormous benefits.

At the same time, when your personal information is shared without your consent, your sensitive financial or health information is subject to a data breach or big data analytics may have errors or bias that lead to someone being denied credit or denied a job, consumers are harmed. That affects companies that provide these products or services in a big way. When consumers' information is misused or stolen this can affect companies from a financial, reputational and, of course, from a legal perspective.

Companies are facing an ever-growing range of privacy and data security issues. What information should they collect? How is it stored and collected? When and with whom can it be shared? What promises and representations are made to consumers? How should data be used? What disclosures should be provided to consumers? And is consent required? These are key issues that are part of the Federal Trade Commission's consumer protection efforts. This panel today will address a number of recent developments relating to big data and privacy, including policy initiatives and enforcement actions.

We are very fortunate to have a distinguished group of panelists here with some different perspectives on these issues. Let me introduce everyone and get started.

We have Andrea Arias. Andi is an attorney in the Division of Privacy and Identity Protection at the FTC, focusing on enforcement and policy matters involving consumer privacy and data security under Section 5 of the FTC Act, the Fair Credit Reporting Act, The Children's Online Privacy Protection Act and the Gramm-Leach-Bliley Act. Prior to assuming her current position, Andi was a trial attorney in the Litigation 1 Section of the Antitrust Section of the DOJ.

Janis Kestenbaum is a partner in the privacy, security and commercial litigation practices in the Washington, D.C. office of Perkins Coie law firm, where she focuses on consumer privacy, data security, advertising and marketing practices. Prior to joining Perkins Coie, Janis served for over four years as Senior Advisor for Consumer Protection to the current FTC Chairwoman, Edith Ramirez. In that capacity Janis provided advice and counsel on a full range of privacy, data security and enforcement and policy issues to come before the Commission, including big data and predictive analytics, interest-based advertising, the U.S.-EU Safe Harbor Framework, mobile privacy, data security and data brokers.

Anwesa Paul is Vice President and Senior Counsel at American Express and advises all parts of the business with legal questions relating to U.S. and Canadian financial privacy laws, marketing privacy laws, online and mobile privacy self-regulatory guidelines, big data governance and big data breaches. Prior to joining American Express, Anwesa served as in-house counsel at two online advertising technology startups, Kinetic Social and Epic Media Group. She actually got her start in the privacy space by working at the New York State Attorney General's Office Internet Bureau, handling consumer protection issues related to online marketing.

Finally, we have Marc Roth. Marc is a partner in the Advertising, Marketing and Media Division of Manatt, Phelps & Phillips, LLP and Co-Chair of the TCPA Compliance and Class Action Defense Group. Marc has over 20 years of experience in advising, with clients ranging from Fortune 100 companies to startups on consumer advertising and marketing law matters. In addition to his counseling work, Marc defends clients before various state and federal regulatory authorities, and acts as a subject matter expert on TCPA class actions. Marc actually began his career at the FTC and came to Manatt after serving for seven years as Chief Compliance Counsel for a Time Warner company.

With that out of the way, I would love to get the big picture from each of our panelists, the kind of issues that everybody deals with here in the privacy data security arena. I thought it would be good to start off with Andi to give everybody a brief description of what the FTC does in the privacy and data security space.

MS. ARIAS: Good morning. Before I begin I have to disclose that whatever I say today are my own views and do not necessarily represent those of the Commission or any one of its Commissioners.

With that out the of the way, the Commission is primarily a civil law enforcement agency, it's main operative statute is Section 5 of the FTC Act, which prohibits unfair or deceptive practices in or affecting commerce. What does that mean, deceptive and unfair practices? Well, a company acts deceptively if it makes material misrepresentations or statements or omissions to consumers. So in the privacy sphere, for example, say you have a privacy policy, and that policy says, hey, I am collecting information, but I won't share it with any third parties, and it turns out that you're actually sharing information you're collecting through your website with third parties. That could potentially fall under Section 5 under the FTC Act as a deceptive practice.

What does it mean to be unfair? A company engages in unfair acts or practices if its practices cause or are likely to cause substantial injury to consumers that is neither (1) reasonably avoidable by consumers, (2) nor outweighed by counterveiling benefits to consumers or to competition. So with these two primary statutes we bring a majority of our privacy and data security cases. And in the big data sphere that applies to companies that are, for example, collecting, holding or disseminating data about consumers.

But we have other tools at our disposal as well, so there are several rules and statutes we also use. The first is the Commission's safeguard rule, which implements the Graham-Leach-Bliley Act. Very simply, that provides a data security requirement for non-bank financial institutions. So that's one you want to look at, aside from Section 5 of the FTC.

Number two is the FCRA or the Fair Credit Reporting Act, which requires things of consumer reporting agencies—and that's not just the Equifax and TransUnions of the world but can also include companies that collect profiles about consumers. If you look at one of our previous cases under the FCRA that includes a company such as Spokeo. So customer reporting agencies must use under the FCRA reasonable procedures to ensure that the entities to which they provide sensitive consumer information have a permissible purpose for receiving such information. And it imposes safe disposal obligations on the companies that hold such information.

We also use the Children's Online Privacy Protection Act, or also known as COPPA, which requires reasonable security for children's information collected online. As you can tell, most of these statutes all work around a reasonableness standard.

I want to add, aside from our enforcement, the FTC is very much engaged in providing education both to consumers and to businesses. We hold workshops on a variety of issues on privacy, data security, as well as many other things that are freely available to all of you, as well as to consumers. And we also do a lot of encouraging companies to self industry regulation, as well as proposed legislation to Congress on areas of privacy and data security, among other things.

MR. EFRON: Thanks, Andi.

Anwesa, I thought I'd turn to you, and maybe you could provide a little bit of the in-house company perspective and just explain some of the issues that you confront in the privacy and data security space at American Express.

MS. PAUL: Yes, sure. So it's funny, my practice is really almost following the tenets of the big data variety, velocity, and volume. The variety of issues that I see is incredible. I mean I see so many marketing issues. I do a lot of advice and counsel work for American Express. And you know, I am really involved in creating the products and making sure that when we are developing these products we are taking into account all the principles that Andi mentioned.

Obviously, we are a financial institution, so we have the Graham-Leach-Bliley Act. But my scope of work is really far beyond just GLBA. I am really interested in understanding where the enforcement issues are there. FCRA, TCPA is a big one, Telephone Consumer Protection Act, but that's a big one. There is a lot of litigation in that area, and mostly in financial institutions. That's one we focus on a lot.

A lot of my work involves giving counsel to my clients about how to use data properly. How to really ensure that you're living up to the promises that you are making to your customers and consumers generally, and ensuring that you have procedures in place operationally as well that reflect the regulatory landscape and the legal analysis, making sure you're actually holding up those promises on the back end that you're making to consumers.

I've been working in privacy for about twelve years, and the volume of work has grown so much. Every company is now involved in doing something with data, wanting to do something with data, utilizing their data, even companies that were just sitting on this data previously now want to monetize it in some way. And so the volume of these questions that I see in various areas has really grown. And the speed at which you have to implement efforts with whatever constraints you have in the legal and regulatory landscape, the speed that you take to market is where we have grown. A lot of my work is really working closely with product teams and working closely with the privacy office, which is the operational side of our privacy organization at AMEX, to make sure we are actually living up to the promises we are making to our customers.

MR. EFRON: I thought I'd turn to Janis with the same question. If you could give us a sense of the range of issues that you now deal with in the space of private practice.

MS. KESTENBAUM: A really broad range. My clients tend to come to my firm for one of two situations: Either they are in the process of developing a service, and they want to make sure that they are in compliance with privacy laws, or at other times companies come to us because they got a CID from Andi or from one of her colleagues at the FTC. Just as often it might be a newspaper article with which they had a breach. Sometimes it's not what you would think of as a breach, but these days you see this in the press, companies just have these privacy SNAFUs. They are public relations problems to begin with, but they know there may be legal ramifications. They know that Andi is reading the papers and reading on Twitter and everywhere else. If there is a news story about a privacy issue, she may be drafting her CID. A lot of times companies come to my firm and other firms as well to say let's get a jump on this. Let's go in and call up Andi, and let's see if we can meet with her. Those are, broadly speaking, where I see privacy issues.

Picking up on what I just heard about companies which probably five years ago never thought about privacy, but exactly right, there may be more kinds of traditional businesses realizing maybe that they are sitting on some data and want to use it internally, or maybe they want to monetize it externally and they realize there are privacy ramifications. It may have ramifications under financial services, but also under the FTC Act.

I see a lot of companies that are your garden variety Silicon Valley technology companies. These are companies that have actually been thinking about privacy for a while. But what's interesting at my firm is we really are starting to see the catch phrase for all these connected devices that are beginning to proliferate, like the Fitbits. Just to give you an example, without naming any by name, we have a number of toy companies that come to us. These are companies that probably five years ago thought about privacy because of CAN-SPAM or something like the email marketing or something or their online website. But now perhaps they are in the process of creating connected devices that are toys, and they realize that they have privacy ramifications. It really just runs the gamut.

MR. EFRON: Marc, I'll ask you the same question: What are you dealing with in private practice right now?

MR. ROTH: Thank you, Bill.

When I first started practicing in the protection space at the Federal Trade Commission too many years ago, there was no such thing as the Internet or privacy—well, except for a couple of statutes. It really was not a thing, as my kids would tell me. So in the last few decades privacy has really exploded, particularly in the title of this program, big data, what does it mean, and I have some difficulty figuring out what it is. But it's the collection of information from various different sources and compiling it for different purposes.

Again, back 20, 30, 40 years ago there was very little information to be collected by companies about their customers. Companies didn't even know who their customers were. In fact, some of you may even remember, you used to buy a product or appliance at a store and then get a product warranty card that you had to fill out and send it in to maintain your warranty. Putting aside FTC issues with warranties, etcetera, that was how companies got information about you. It wasn't just your name, your address in case we need to contact you for a recall, but it was demographic information, name, age, people in the household, things like that. Back then that was considered big data. But there was no tracking.

So when I first started practicing, following the FTC, those were the type of questions I was getting. How much information can we ask for? What can we use it for? Can we share with third parties? Back then there were no real laws or sensitivities around it. So the general answer was yes, collect it, use it as you wish.

Over time, the privacy models or concerns exploded with the Internet and collecting information and whether or not consumers had an expectation of what their information would be used for that they provided online voluntarily. And you had tracking information, so consumers did not know that they were being tracked. So you had to disclose in the privacy policy how you were tracking and what it was going to be used for.

At this stage now I am asked by clients questions regarding cross devices. Can we collect information to use if people use our app on our website from different devices, different locations? How can we use this information? Can we share it with third parties? What regulatory schemes govern it? I get questions about this all the time, GLB, HIPAA also for those in the healthcare space, also very important. Particularly now doing work with health care colleagues on the intersection of Fitbit, of the information collected from that app you think is just going to your heart rate and meeting your goals and targets. Is it being collected by those app providers? And what are they using that information for? Can it be used against you, as you may hear from the panel.

Those are the types of questions and issues that my clients are asking about. In addition to transactional issues as well when we're dealing with other parties, who owns the data, who has to protect the data, what can it be used for, and any type of restrictions in that.

MR. EFRON: As you can see, this implicates a host of legal and policy implications, and it's really just changing before our eyes.

Now that people have a sense of the range of issues, why don't we start with the enforcement actions and just the kinds of laws that people are dealing with and the kinds of cases that are brought in this space.

I'll ask Andi and start with the FTC perspective. Can you give us an example of some recent enforcement actions that resulted from issues surrounding privacy or data security? And we have a lot of good recent examples, so it's timely for the panel.

MS. ARIAS: Absolutely. The FTC has been active in this space in the last few weeks even. So it's a good time to talk about some recent cases.

But the most recent case that I thought I should share with you is our consent negotiation settlement with Oracle. As many of you may know, most of our cases develop out of what's called a CID, a civil investigative demand, which is a subpoena for documents. Most often, our cases after going through a subpoena process, if we recommend that there is a case, enter consent negotiations, which is a time for the company to settle with the FTC, rather than to litigate. And most of our cases do in fact settle during consent negotiations, including our case against Oracle.

Our case against Oracle is a deception case that I described earlier. Basically, what we alleged in our complaint was that Oracle promised consumers that by installing Java SE and by updating it their system would be safe and secure and would have the latest security improvements and updates. It just so happened, though, that during the update process, it would remove the last version that you had installed on your computer, but if you had additional older versions installed on your computer, or if you had installed a version that was older than Version 6 Update 10, those versions would still remain on your computer, and those versions were susceptible to attack by hackers. In fact, even if you updated to the latest version and you had one of these older versions of Java SE on your computer, your system would not actually have the latest security improvements, and it would not be safe and secure.

So we settled with Oracle, and along with the settlement agreement they agreed not to misrepresent in the future the privacy and security of any of their software. But they also agreed to notify consumers of the issue and develop a fix, so that when folks updated the software it would actually uninstall all older versions of Java SE that were making computers insecure. That's the latest case that we brought in December of this past year.

Another recent settlement that came out of consent negotiations is our case against Snapchat, which is a developer of a popular messaging app. The FTC alleged in its complaint that, among other things, Snapchat deceived consumers about the security measures it was taking to protect data from misuse and unauthorized disclosure. What happened was that it had this find friends feature where you could find your friends online. But this find friends feature was not properly secured, and it enabled attackers to compile a database of about 4.6 million Snapchat user names and phone numbers. So we settled with Snapchat, and under the terms of the settlement they, like Oracle, agreed not to misrepresent the privacy, security and confidentiality of consumers' information. In addition, the company will be required to establish a comprehensive privacy program that will be monitored by an independent privacy professional for the next 20 years. And we receive these reports at the FTC.

Finally, as many of you may be aware if you're at least familiar with the space, we recently settled with *Wyndham International Hotels*. This case had been ongoing since 2012, when the FTC sued. This was not a consent negotiation; it was actually a litigation. We sued Wyndham and three subsidiaries, alleging that data security failures led to three breaches in two years' time. According to our complaint, the hackers infiltrated the network of a franchise hotel, and because of lax security implementation at the corporate network and at these local hotels, it allowed a hacker to go through the local hotel into the overall network and then steal the information of hundreds of thousands of consumers, which led to tons of unauthorized purchases and identity theft.

We went to district court. Wyndham challenged our authority to bring an unfairness action under Section 5 of the FTC Act, and both the district court and Court of Appeals upheld our authority. More importantly, we then settled with Wyndham, and in that settlement, Wyndham must establish a comprehensive data security program. Unlike Snapchat, which was a privacy security case, this was data security case, so they have to have a data security in place. It must conduct audits for the next 20 years. The order requires Wyndham specifically take a look at the way that the franchise hotels are connecting to its network and be sensitive about the access that it's giving the franchise hotels to the corporate data center. And the order also requires Wyndham to give annual independent assessment under PCI DSS, which is the Payment Card Industry Data Security Standards. But the third-party auditor, unlike standard PCI DSS, must be independent.

Wyndham was both an unfairness and deception case. *Snapchat* and *Oracle* were deception cases. But we are active across the board, whether big network data security case or a software case or even a mobile app case, or a cross-sector look at the various potential breaches and failures that might be happening and affecting the servers.

MR. EFRON: Thanks, Andi.

There you get a sense of the significant Third Circuit decisions and these settlements, also to some degree you could look at past settlements. And we have very consistent themes, as Andi brought up. There is this reasonable concept during the privacy case. There are the representations that you make about privacy and data security, which you need to live up to.

So Janis, from the outside counsel perspective, some of these are picking up on old themes, but how do you counsel your clients on this stuff, and what are your thoughts on the recent cases, and how does it affect your practice?

MS. KESTENBAUM: Yes, I would say Andi mentioned the *Wyndham* case. So people in the privacy arena really paid a lot of attention to *Wyndham*. The Third Circuit decision there, which came out last August, was a very big deal, a really big deal to my clients and to my colleagues. Everybody was watching it very carefully.

For years the FTC had been asserting unfairness authority with regard to data security. And a lot of people, would make these assertions and complaints and companies would typically settle. That was happening time and again. And a lot of companies would say we don't actually think the FTC has authority, but when confronted with that complaint and that consent order, they would choose to settle, and the issue would never get resolved. And Wyndham came along and said, we are going to challenge the FTC, and so the case went to court. The issue really was I'd say twofold. Does the agency have authority over data security? Is a lax data security practice an unfair act or practice to consumer? And that was issue one.

Issue two was even if it does have authority, is the agency giving companies enough notice as to what is unfair data security? We don't see a regulation. We don't see a lot of notice. That was the argument being made. The court decision was really very unequivocal in saying that the agency did have authority. It was not in some respects kind or charitable to the arguments that Wyndham made in trying to argue the agency lacked the authority.

On the notice question, as well, I felt the standard that the court took was fairly pro FTC, and basically said to Wyndham you don't have a right to advance notice as to what is an unfair data security practice. Ultimately, that is a question of statutory interpretation, and we, the court, decide. In that way I actually thought that the court clipped the FTC's wings a little bit. What it was basically saying is we don't think the FTC really gets deference on that decision either as to what is an unfair data security practice. If they take something to court, the court is going to decide that. They are not going to really defer to the FTC on that question as to what is or isn't good enough data security.

This was really a very big decision in the privacy world. Companies really paid attention. Companies pay a lot of attention to data security, whether they can be sued under the unfairness authority by the FTC or otherwise.

I want to point out another decision out there that's kind of brewing in this area that's significant and recent. It's called *LabMD*. And it was interesting because the FTC had this huge win in *Wyndham* in August, and then I guess it was probably October, November, an administrative case before an ALJ, the agency suffered a significant defeat in a case called *LabMD*. This was a medical testing company. It was alleged to have allowed P2P software to be loaded onto its corporate network by an employee, and various billing and medical information got loaded up onto this P2P network where other P2P network members could potentially see it. And the ALJ said basically, okay, I see you brought this unfairness claim, but I don't see any consumer harm. I don't see any evidence that anybody had their identity stolen. I don't even necessarily see hard evidence that lots of people actually saw this data when it was sitting up in this P2P network. So it said the agency had not met the elements of an unfairness claim. That matter is now pending before the Commission for review on appeal. And I think that this is just as significant as *Wyndham* because it goes to what the FTC has to prove to prevail in these cases.

MR. EFRON: Thanks, Janis.

Marc, that same question to you. What's your reaction to Wyndham and the FTC space first?

MR. ROTH: Absolutely. I don't entirely disagree with the FTC but I have issues with the agency. As Andi mentioned, there are two varieties of cases. One is a deception case where you misrepresent your privacy policy and the other is unfairness for the data security cases.

With respect to the privacy misrepresentations, I understand and agree. If you say something, live up to it. It's garden variety FTC 101. If you say something, you have to do what you say, or if you do something different, they come under deception Section 5. What I do differ with slightly though is the materiality of those representations. If a representation is not material to the consumer—and that's a very gray area as well, FTC might differ—but if it is somewhere, you know, in the lighter shade of gray, should the FTC bring enforcement action against a company for misrepresenting the privacy practices if it did not? The definition of material information that may impact a consumer's decision one way or the other. Particularly, when we look at the statistics that show the very small percentage of people who actually read privacy policies, how much are they relying on the privacy policy? Thus, if they are not reading it, could there be deception? But the rules are the rules, the law is the law. And the FTC continues to bring cases.

I advise my clients when I develop a privacy policy, if you're going to say it, live by it. When you develop a privacy policy get all your stakeholders in the room, IT, marketing, sales, legal everyone. Everyone needs to have a seat at the table and have input on the privacy policy. Can we do it this? Can we protect it? What are our intended uses for the information? Are we going to share with third parties? You need to have all these people on board to make that decision. This is what FTC considers privacy by design. Think about this when you're developing new services and get involved people at the table. That's my two cents on the privacy section.

With respect to data security and unfairness, the *Wyndham* case, obviously, upheld authority of FTC and LabMD is on appeal right now, which may go the other way as well. But the points that Andi raised were (1) authority and (2) notice, and were companies put on sufficient notice to know how they have to protect their data?

There are very few regulatory schemes that actually lay out specifically what companies need to do. But in the absence of that, the FTC has said that you have to use reasonable means given the nature of the data. Okay, somewhat gray. They have also put out several reports on protecting data, and they give examples of cases they brought against companies that are intended to illustrate what the FTC's concerns are and the failing points of these companies. That also gives good guidance, which I use fairly often to advise my clients in developing their data security practices.

But the challenges are in one particular area in addition to firewalls and protected access and things like that. When you say you have reasonable protections for the data, or you say in your privacy policy you are using reasonable means, the FTC is expanding that so you are aware of what's going on in the outside world with respect to hacking and unauthorized intrusions. For a small company with limited resources, that's a challenge. You know, to be able to keep up on these things that are going on outside their walls and then anticipating these events as well. It is a real challenge for small businesses, to startups that may not have the resources or access to legal counsel in that area. Granted there are listservs and other online resources as well, but I take some issue where a company does what they can in their circumstances to protect their data, and then they are hacked. Should they have known that there is a new virus out there or some type of intrusion device that can potentially penetrate their systems? It might be difficult for them to identify, and if they are hacked, the FTC might bring a case against them for not knowing about that. So on those points I have some issues with that.

MR. EFRON: I was going to turn to Anwesa. But just one thing, I'll turn it over to Andi too, if she wants to respond.

One thing I want to point out to the audience is for these data security cases, it is not a one-size fits all. It does matter how big the company is although those things factor in to when we see these settlements. There may be different ways to look at it, depending on the size and resources available to the company.

MS. ARIAS: Yes, I'll just add, one of the things we do look at when settling with a company and thinking whether there is a violation, is a reasonableness standard, which means that we look at the sensitivity of the information at issue, the company's size and complexity and the kind of market and the kind of resources that were available. For example, procedures available for a large company, like American Express, may not be the same things available for a small company.

Nothing to say about American Express, but just to keep in mind that is actually one of our enforcement concepts that we take into account.

I also want to highlight, as Marc mentioned, there is a new publication that we put out about six months ago I think, called *Start With Security* and I encourage everyone here to take look at it. It basically takes the last 50-plus cases we have done on data security and extracts ten lessons, and I would actually say there are more than ten lessons. It groups them into ten lessons, but it has subdivisions on the things companies should be considering and thinking about when they are doing privacy by design or installing security into their systems. If you haven't looked at it yet, it's freely available on the business site at FTC.gov. Take a look at it and share it with your clients. It shows you what kind of steps you should be taking to secure your networks or products as you are designing them.

MR. EFRON: With that, I'll ask how does your company respond when you see these decisions come down, you see these enforcement actions in the privacy space. Obviously a lot of these enforcement actions do involve big companies, you have Wyndham, or past things involving Google and Facebook. So when these decisions come in, how does it influence your policies as you go about your job?

MS. PAUL: So I guess I'll start off by saying these are my views and not those of American Express.

I think one of the things that we are paying attention to are the trends from the FTC and looking at other regulators as well. I think that these enforcement actions and the general litigation atmosphere on litigation privacy, as someone who is practicing in this space and working for either a big company or small company, one of the things you have to keep in mind is you have to know your products. You have to know at a very technical level; you have to understand what your company is doing. And so that is something that lawyers can usually rely on other tech people to tell them what was going on, but you have to have a really deep understanding of how your products work, what security practices you're actually employing in order to actually draft your online privacy statement, to make representations about your product, and anything along those lines.

So I think, Andi, you mentioned privacy by design. So this is the concept where you are involved at a very early stage in the product development. You're not brought in at the end to just sign off on the product; you have intimate knowledge of how the product works. And it's an iterative process that you as a lawyer go through with the product to understand and make the product better from a privacy standpoint.

I think that the enforcement actions really highlight how these companies didn't have a good handle on how their software products worked or what their peers were doing in terms of providing adequate security, reasonable security measures. They weren't keeping up to date with what the rest of the ecosystem was doing. It's really important as someone who works at a large company, that I know how all of my products work, in order to counsel them effectively.

The other question you asked me about, are there other litigation issues that relate to privacy that I deal with? The class actions that come about in the privacy landscape are growing. Class action lawyers are very eager to bring privacy claims against a large company, against financial institutions. And you've seen a fair bit of this in the online advertising space with flash cookies, and any time there is any question about how someone's choices are being applied or whether they are given notice about how information about them is being collected. You see a lot of activity in the class action part. So I pay attention to those trends, as well as how the overall landscape of privacy evolves.

Mr. EFRON: I also want to give Marc and Janis a chance to just talk about some other FTC things they deal with in this space.

Marc, I know you mentioned TCPA before.

MR. ROTH: Any time you have an FTC enforcement action or perhaps a multistate AG action as well, you're sure to see the plaintiff vultures flying around as well. Those are a very big concern. When you do settle with a state or regulatory party, you need to be cognizant of the PR fallout on that as well as the class action. And that can really be even more painful, because it really hits the pocketbook sometimes more than regulatory action.

As Bill mentioned, one of my areas of expertise is the TCPA, the Telephone Consumer Protection Act. It's a federal law dating back to 1991 that requires consent from a consumer before you call them on their mobile phone or text them or send a prerecorded message to a landline phone. Without getting into the real specifics of the law, there is a ton of class action litigation going on under the statute, because they have statutory damages; you do not have to prove harm. Strict liability, statutory damages uncapped. Each violation, each unauthorized phone call or text message is $1,500. Settlements are in the tens of millions. Recently they can be lot more if you ever go to trial. Rarely do these ever go to trial, because companies settle soon as it gets beyond class cert stage. So we are doing a lot of work in advising clients on the compliance aspect of the TCPA. Make sure that you get appropriate consent from consumers before you text them or call them on their cell phone, etcetera.

When the complaints do start to roll in, how do you defend against them? Unfortunately, it is an extortion statute, because if you do get sued, you have to defend, you can't just walk away. The plaintiffs' counsel, are very, very tight. And they know where the bodies are, and they know how to plead violations. So any size company, large, small, has to retain counsel to defend, and there are different strategies on settlement, which we are not going to have time to go into today. They literally hold you hostage. We are handling a number of cases now, clients of mine, they are trying to get out and they can't. So compliance is very, very important. But that's in terms of FTC enforcement, and that's probably the largest area of litigation that we are seeing.

MR. EFRON: Janis, how about you?

MS. KESTENBAUM: It's been interesting, the latest development in the last few months is telecom companies; companies generally not within the jurisdiction of the FTC but are under the jurisdiction of the FCC have started to think about privacy more, because the FCC has gotten really active in the privacy and data security arena under the current chairman and current enforcement bureau director.. So we are just seeing lots of enforcement action against big companies, both in privacy and data security. They are about to launch a rule-making that will look at the privacy obligations of Internet service providers, both your home Internet connection and your mobile Internet connection. That's a really big deal, because again, these are companies that are generally outside of the FTC's jurisdiction. I am not saying they thought about privacy and security, but they didn't have a really active regulator, and now they do. This is an agency that is at least as active as the FTC on privacy. They seem to be super interested in privacy over there at the FCC. So a lot of telecom companies are paying lots of attention to privacy and security now.

MS. PAUL: So one other thing that Marc mentioned was the brand and reputational angle, and that was something, even without enforcement agencies or litigation you have this overarching theme. You're really battling it out for your company's reputation. If something happens from a privacy standpoint, people are less likely to use your product or give you the data that you need to make your business run. That's an overarching theme for everything that I do.

MR. EFRON: I think that's a really important point, and I'd love to get the other panelists' perspective. We can talk how the FTC investigates these issues, but I think the point is these are important things, whether or not you were the subject of an enforcement action and whether it is from a policy perspective, it is not just getting sued. These things have other real ramifications, and I'm sure you're counseling your clients well before an enforcement action and many times before an investigation. Would any outside lawyers like to speak about that?

MR. ROTH: Sure. One of the issues that I often ask of my clients is can we do this; can we collect this information; can we share it with other parties, etcetera. I give them the legal answer and then what's called a creepy answer. Creepy answer. It's not illegal, but it is kind of creepy. And I may not want to do it for that reason. They get that, and some will respect that answer and some may not, without naming names.

But yes, it's a very difficult thing, because business has to continue to work. Industry needs to keep moving forward. You have to keep the lights on. So there are certain things you want to do with your customer data that may not be, if it comes to light, viewed very positively in the public forum. So those are the types of concerns that need to be addressed by senior management and other stakeholders in the company. Because you want to maintain your reputation, as Anwesa just mentioned as well. That's very important.

In terms of sharing information, some companies want to do a co-marketing deal will say where did you get this information, if there's a lead generation aspect to it, or is someone selling leads. These people are interested in refinancing their mortgage or buying a new car, and they want to be contacted, okay. Where did they express this interest in refinancing a mortgage or buying a new car? Did they give you the appropriate consent to reach out to them. Do we need to scrub against CAN-SPAM or do an email list; do I need to scrub against the national DNC, do not call list, as well. So all these issues about an existing business relationship, when they actually had a bonafide inquiry about your company, all come into play. Those are the types of questions that I am asked about. Not necessarily from a legal aspect, you know, but also from reaching out to people who did not ask to be reached out to. And that can also, with the laws and everything on social media, really backfire on you as well.

MS. KESTENBAUM: It's interesting, because maybe in privacy and security more than other areas this kind of public relations media angle is of greater importance. And I'll say something that perhaps will resonate with our antitrust audience. A lot of times what you do, what companies are doing with data is not transparent. So it's very hard for consumers to make decisions based on privacy, because they don't really know that there is that inequality of information. Asymmetries of information would be how economists would refer to it.

But you do have a really active group of reporters and bloggers and Tweeters who are paying attention, and security researchers, and that does bring a lot of things to light. Companies may sometimes think that what they do consumers won't completely understand, but they do now realize that somebody out there is quite possibly going to pay attention. And if it comes to light, and it's bad, you can bring Marc in to try to clean up the mess and go into the FTC or whoever and try to clean things up. Maybe you'll be successful, but you won't be able to pull back like that story that ran in *Wired* magazine or whatever. So I do think companies like American Express increasingly think about that angle. Absolutely.

MS. ARIAS: So to respond to two different things. Marc mentioned about deception and the different privacy policies. But I want to make sure that everyone here is clear, that it's not just privacy policies we are looking at. We are looking at statements that you're making on installation screens, like the Oracle example. We are looking at packaging. We are looking at user guides. We are looking at statements that you're making on your website. Any statement that you are communicating to a consumer, make sure it's accurate.

When you are advising a client rolling out a product, don't just focus on the user agreement and privacy policy. Think about the packaging, the website you're rolling out, the installation screens, anything that might be seen as a message to consumers. That's one.

Two: I think that the company seeking advice even before litigation is really key. We have a lot of companies who are not waiting until there is a news article or a blog post on the issues, but are actually coming to the FTC and saying, hey, we are rolling out a product, and this is what we are thinking of doing with the product. What do you think? What do you guys see as the potential pitfalls? Help us understand how the FTC could see this product, so we don't make mistakes. That's really the crux of privacy by design or security by design.

If you have a client, obviously, you want to advise them, but don't hesitate to also reach out to the FTC and get our take or thinking on a product development. More often than not we can help you shape and avoid these pitfalls before they happen.

MR. EFRON: I think this is a good segue to move away a little bit from the enforcement and talk about the policy initiatives. Obviously, the FTC is primarily a law enforcement agency, but we undertake some very significant policy initiatives which include workshops and often reports that issue thereafter. I thought the timing of this panel was again fortunate, because the FTC just recently issued its new Big Data Report. This follows on another one that was issued, I believe, in 2014. I thought I'd have Andi tell us a little bit about the findings of this latest Big Data Report and some of the key takeaways and get other panelists' perspectives.

MS. ARIAS: I've been very fortunate at the FTC in that not only have I had the opportunity to work on enforcement actions, but I've also had the opportunity to work on helping shape some of the reports that we have issued that are freely available to everyone here. The latest report issued is *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues*. It just came out in January of this year, so it is really timely. It came out of a workshop we did in September 2014 with the same name. That workshop came out of a report that we issued in May of 2014 on a study of data brokers. We looked at nine data brokers. We looked at all their practices and put out a 100-page report explaining what data brokers are doing with data, how they are acquiring it and what came out of that.

From that, though, we had the workshop, and then from this workshop we decided to put out this report that goes through various issues, talks about the lifecycle of data. It talks about the benefits and risks of using big data analytics. It talks about various laws that may apply when your client, or if you're in a company, your company is using big data. And it works through the various laws that may apply, at least under the FTC jurisdiction, including the Fair Credit Reporting Act, the FTC Act and equal opportunity laws, such as ECOA. I thought it was helpful. Hopefully you will find it helpful.

It has a little checklist you can use and goes through the various questions you can take back to your client and ask them, hey, are you complying with these various questions so you are in legal compliance with the various laws we talk about in the report?

In addition, the report looks at a lot of research that has been done in the area of big data. It also poses various questions you can take your client through that maybe go outside the laws but may be equally applicable to consider. Those include how representative is your data set? Are you thinking about under-inclusiveness, over-inclusiveness; how data divides may be affecting the data you're using. It also asks you to consider whether your data models account for bias. Biases can incorporate into your model both at the collection stage of the data as well as when you're developing the model. And it works through a few examples of maybe those issues weren't considered and the effects they have on the result of the models. It asks you to consider how accurate are your predictions based on the data. We found that big data is excellent at finding correlations, but not all those correlations are meaningful. So you want to pause and really think about the data that you're using and what the result of that data really says and how it should be used.

Finally, beyond all this, it really has to consider whether you're reliance on big data raises any ethical or fairness concerns. Just because you say, hey, I've accounted for biases, my data is pretty representative, and I accounted for all these biases, well, maybe you still shouldn't use that data, and it gives you examples of companies that pause to consider whether it makes sense to use the data and did not do so.

Again, this is freely available. I encourage everyone to take a look; it has good questions both from the legal side and research side to consider whether big data is for you and how you should use it to help consumers rather than potentially harm them.

MR. EFRON: One thing, before asking all the other panelists, Andi. I just wanted to ask, obviously this Big Data Report pulled off some of the findings of the last one and part of a different stage of the lifecycle of big data. One of the things I found fascinating about the last report, which shed light on the data broker industry, was the sheer amount of data that was collected by some different companies and how many data points there might be about a particular individual, who had no knowledge that any of this information was even being collected about them.

So I open that to you but also to the other panelists, but maybe you'd like to say a few words about the last report as well.

MS. ARIAS: Yes, that was one of the findings, right. That data brokers are collecting millions of data points about consumers, compiling them together without consumers' knowledge. Data brokers are acting outside the customer space and they often don't interact with consumers but are rather acquiring data from other companies that interact with consumers.

But I think more importantly, what we learned from the report is that this data is passing through multiple layers. Out of the nine data brokers we looked at, seven of the nine were sharing data with one another. There is this great graphic where you see the data going back and forth between the nine data brokers. It was hard for us to trace the data, much less for a consumer to try to figure out who has their data and where it was coming from.

Then we also learned that data brokers are combining online and offline data to track consumers online. I think that actually at this point is outdated. Because as Marc mentioned, you have cross-device tracking and now fingerprinting where people are just looking at a few data points on you online and basically can see everything about you just by knowing what browser you're using, what version, and when you last updated.

I think the most important finding, and what led to our workshop was data brokers are taking a few data points and drawing inferences about consumers. And some of those inferences are very, very sensitive. They relate to ethnicity, income, religion, political leanings, age, health conditions. Inferences were being made about whether you're pregnant, whether you have diabetes, whether you have high cholesterol, and those can have serious impacts on consumers. As we talk about in the report, while looking to buy a bike, somebody who is hoping to get a coupon to get a bike cheaper can also be read to mean this person maybe engages in risky behavior, and could lead to detrimental effects when that person is trying to get insurance. The report tells you what it is, but it makes a lot of best practices recommendations as well as legislative recommendations. I recommend everyone take a look at those, because the best practice recommendations and legislative recommendations are a good thing to take back to your client in the ways you should be acting when using big data.

MR. EFRON: Thank you.

Anwesa, can you give us insight from in-house? You're involved in big data; how does it influence how you collect or potentially use it or engage with big data in analytics.

MS. PAUL: I think it is important to know what big data is. Big data allows data scientists to intake a large volume of data that seemingly has no correlation to each other. And the processing power that we now have and the computing power that we now have allows you to throw the kitchen sink of data into this machine, and it basically is able to identify patterns where there were no patterns when you were doing manual calculations on your own. So that level of analysis that you're able to do so quickly has unearthed a lot of opportunities, but it's also unearthed some legal risks you may not have ever considered before.

I really liked the two FTC reports. They have really informed the way that we have thought about those issues. The FTC has really been a thought leader in this area, so it was really great to think about it in terms of a risk-based approach. We have always thought about that at AMEX and just trying to understand the intended uses of that data, the data that we both find and the data we get from our customers. Just what the intended uses of that data are is really important to know.

You know, the other thing is this Big Data Report talks about the lifecycle of big data, collection, compilation, consolidation, data mining, analytics and then use. We have sort of developed our rails around those for different avenues and obviously use is one aspect of it, and this report touched heavily on use. But collection is another big aspect. The people whose data that you have, are they going to expect that you are using their data this way? And are the representations that you've made to your customers about these secondary uses of their data accurate? That really comes down to a fairness question, are people aware of how their data is going to be used?

The other thing is how do you disclose this to a consumer? How do you disclose that you're basically taking data and throwing it into the kitchen sink and hoping that you get some pattern out of it? How do you talk about it? That's a struggle for any lawyer working with a company that does big data. How do you make that disclosure meaningful, where they are actually exercising a choice with some knowledge? I think that's something that I always keep in the back of my mind.

Going back to the reputational angle again, Andi you mentioned pregnancy, and I always think about that Target story some of you guys might know about. Target had this great big data lab, really great at predictive analytics. They basically uncovered people who bought certain types of things, like multi-vitamins, were likely to be pregnant. And they ended up sending some marketing materials about diapers or something to a 16-year-old girl, whose dad was irate; he didn't know she was pregnant. So all these brand issues came out from that. Even though the underlying premise was we want to give you an offer that's really relevant to you, it's almost too relevant to you. You have to keep that creepy factor in the back of your head when using big data.

MR. EFRON: So Marc, how do these reports work; what were your reactions and how has it influenced the way you counsel clients?

MR. ROTH: Sure, I'll make my comments quick.

A couple things. One, we represent a number of different data brokers. I am not going to tell you who they are. I advise them on many different things. How do you advertise your product? If you say use our lists to screen your perspective employee or other things covered by the Fair Credit Reporting Act, you have triggered the Fair Credit Reporting Act. It can be considered a credit reporting bureau or agency, which has a whole host of responsibilities. So I try to advise them to stay away from that.

I also advise companies which buy information or utilize services of data broker analytics companies because you need to know the integrity of the information. If there is a lack of integrity or you don't know where the information is coming from, if you're making decisions on that data, for example, sending coupons for diapers and things that can be really bad. So you have to be careful about who you're getting this data from, the services you're using etcetera.

Very quickly, I want to cover one of the points that the FTC had suggested. I think they are often making a push to Congress to legislate on data brokers. While

I think transparency is in theory a good idea, there are certain practical aspects that make it unfeasible. How do you make all your information available to consumers? I guess you could do that, but to see that information you have to vet consumers to ensure that's actually who they are. Because you don't want to give away a consumer file to someone who isn't them. So what are you going to use to verify that they are these people? Now you're turning it into almost a credit reporting agency, needing their Social Security number and access to other information as well. I understand from some of my people in the industry, that can be prone to abuse.

So I see some practical difficulties, and we can talk about that afterwards, but from a practical aspect those are some of the problems I see in some of the FTC's suggestions.

MR. EFRON: Janis.

MS. KESTENBAUM: The FTC reports are very influential and people pay a lot of attention to them. They are usually a mixture of best practices. Best practices, you know, as it sounds like, there may not be any law, except if you make representations that you're going to follow those best practices. People still pay a lot of attention to them. But certainly in counseling clients I think everybody pays the most attention of course to the law.

When I was at the agency I had some involvement in the decision to launch the project that led to this report that just came out on big data and discrimination. The way that I thought about it myself when I was at the FTC was, wow, the use of big data means that there is a lot of potential for the use of big data to reinforce or harden existing disparities that we have in society. Think about it. What if everything we do, like all companies kind of slice and dice us, so that even when you pick up the phone and you call customer service you're getting the best customer service. They know they have done predictive analytics, and they want to keep you happy. Maybe some other consumer gets worse customer service. If you think in every aspect of our lives we have gotten sliced and diced, what kind of impact could that have on us as a society?

I think that was an issue that the White House was spotlighting and the FTC was spotlighting. I thought the purpose of the workshop that led to this report was a lot of it was we want companies to be sensitive to this issue, because it's going to be around for a really long time. We are at the early stages. I think they did a wonderful job in this report.

Now today, when I counsel clients, of course, I am cognizant of the fact that a lot of that was just wanting companies to be sensitive to these issues. There may or may not always be a legal hook. Sometimes yes, sometimes no. Where I think of it most likely for there to be a legal hook, again if you're not making a representation to consumers that could get you into trouble from a deception angle, would be where you're making these eligibility decisions. Either because you're subject to this Fair Credit Reporting Act if you're making a decision whether a consumer will get access to credit or how they get credit or employment or insurance or housing. That's really where I think companies really need to be paying the most attention. Because we really know that there is a potential for harm there. So when I counsel clients, that's really front and center.

MR. EFRON: I know we are running out of time, but I wanted to raise one more issue and try to leave time for a question or two.

Obviously, a lot of people in the audience deal with the EU on the competition side. I thought Janis maybe you could speak to that a little bit, since you deal with the U.S.-EU Safe Harbor framework, maybe give a little background of what that is and what just recently happened.

MS. KESTENBAUM: Yes, sure. So people may know this, we are really at a time of transition with privacy in the EU. There have been two things happening. The first is that in October the European Court of Justice, the Supreme Court of Europe basically, said this mechanism that companies have been using to transfer data from the EU to the U.S. for the last 15 years called the Safe Harbor, we don't think it's valid. We think it's basically unconstitutional under European law. A huge deal, because companies were relying on it. And there are other mechanisms to transfer consumer data. One is called Binding Corporate Rules and one is called Model Contracts. Those have existed and been used for many years, but really the Safe Harbor was the big deal, because it was pretty easy for companies to participate in Safe Harbor.

So now the EU and the United States, led by the Department of Commerce and the FTC, are trying to negotiate a new framework, and it's really getting down to the wire. Really in the next few days I think we'll be hearing an announcement as to whether they have been able to reach a deal as to a new framework. So that's one really huge thing.

Companies are very much impacted, because when the court announced that this was annual, that the Safe Harbor was unlawful, it wasn't like they said, you know, we know you've been relying on this for fifteen years, so you got like six months at least to kind of come into compliance. No, it's not like that. It's like overnight. And you have the regulators saying, we will give basically companies a little window, a few months before we are going to start enforcing. That window is closing the end of this month. This is a really big deal for companies.

The second thing that was happening was the EU was in the process of rethinking its entire data privacy regime that had been in existence since 1995. At the end of December the EU Parliament and the Council reached a deal on this huge legislative package that is going to rewrite all of this European privacy law. Already it is substantially stricter than the United States has been for many years. And this new package is really a sea change, and it takes a system that was here and it ratchets up to here. We'll see it actually become law in the next few months, and then companies will have two years to come into compliance. But just an enormous development, lots and lots of new requirements that are coming down the pipe that will affect many companies.

MR. EFRON: Why don't we open it up for questions?

AUDIENCE MEMBER: The first question I want to ask is actually you talked about how can you be deceived. Is that the FTC's, primarily, role in the privacy sphere, to protect consumers who don't read the policies?

MR. ROTH: Absolutely, correct. I do not disagree with that at all. One of the arguments against that though might be the deception and misrepresentation. Can there be deception if someone has not even read the policy. I guess that's the point I was trying to make. Is it a winner all the time? Maybe not, but it's something I had to ask.

AUDIENCE MEMBER: Isn't that an issue that—

MR. ROTH: Presumably if you click on something, you read it. You don't always have to read privacy policies, click-wrap or browse-wrap, whatever you want to call them. But by saying yes, I agree to terms and conditions, I read and agree to terms and conditions. With Apple i-Tunes every time there is a new version it pops up and you have to scroll through 48 pages. That presumably, you know, it's been put in the consumer's face.

AUDIENCE MEMBER: Just one thing, you've given some statistics about the absolute minimum number of people who read the policy. Can you compare those statistics?

MR. ROTH: Obviously, I don't know the answer to that. I do know a lot of the ethics and other privacy advocate groups put out a number of people who are actually reading privacy policies. I think it's in the one or two percent range.

AUDIENCE MEMBER: Following that click-wrap comment, it seems like it used to be for a lot of free services, the price of the service was advertising for you to watch it. And now the privacy services for your information and the service is free because they monetize the information you give them. How did that intersect with antitrust perspective? If you disclose it, it's disclosed so there is not a deception there. But there is something about having to give your information to get to Facebook, LinkedIn, things that are now—maybe not Facebook, but LinkedIn is pretty much essential to our profession these days.

MR. ROTH: Can't speak to the aspect of that question, but I think somewhere there was a question about in order to use certain products or services you have to give up a certain amount of privacy, which goes back to Oracle and Larry Ellison in 1990 something, saying "get over it, you have no privacy."

MS. ARIAS: That's the idea. You're saying that goes into the idea of the unfairness standard we talked about. Countervailing benefits to consumers, that analysis would come into play? Yes, without it maybe you then don't have these products for consumers, and what benefit does that play. So there is a risk-benefit analysis that goes on there that can happen under the FTC Act Section 5.

MR. ROTH: The FTC has not brought any cases in that regard, which is in order to use our service you must agree to—

MS. ARIAS: We have not.

MR. EFRON: Last question.

AUDIENCE MEMBER: Andi, you mentioned in the Wyndham settlement, the complaint alleged both deception and unfairness, but the settlement really only deals with unfairness. There is no prohibition and privacy policy is not really material to consumers. The suspicion has been that there is no misrepresentation language in there because the FTC couldn't prove that anyone had actually been deceived. I wonder if you can comment on that?

MS. ARIAS: I can't comment on that. I looked at the settlement, and we settled what we thought was the best for consumers, and obviously it was a result of a long litigation and a lot of discussions. And it was the result of what we thought really addressed the issues of the case and really brought the result to consumers' benefit.

MR. EFRON: All right, we are out of time. I want to thank our panelists.

MS. DUNLOP: So we have a slightly less than 15-minute break. Come back here at quarter of. Thanks.

Pharma to Table: What's Hot?

MS. DUNLOP: So we are going to get going. I am already breaking Elai's record of not being on time. I didn't realize there was not a break scheduled just then. So I hope you enjoyed it.

We are going to move into our next panel, "Pharma to Table," in which we have a slight change of personnel. But I am going to hand it over to Dan to introduce the panel. Thank you.

MR. ANZISKA: Hi, everyone. My name is Dan Anziska. We are here to discuss a very interesting panel on *Pharma to Table: What's Hot*? I think for antitrust practitioners this has been a very interesting, cutting-edge year. Everything from mergers to the Actavis product-hopping case here in New York, and even to the "Pharma Bro"—and I promise we are not going to discuss it today—it's been a very exciting year. We have an esteemed panel of people who have seen it from all different angles.

To my immediate left is Stacey Anne Mahoney, who is speaking from the private law firm standpoint. To her left is Elinor Hoffmann from the New York AG's office. To her left is David Emanuelson, who is at Novartis and who will give us the in-house Pharma view, and to his left is Steve Weissman, who is back at Baker Botts now, but was recently at the FTC Bureau of Competition.

What we are going to do is have each of our panelists speak for a few minutes about four different topics: Reverse payments, product hopping, restricted distribution and mergers, followed by a discussion among the panelists to try to bring the common threads to bear. That will be followed by a question and answer session with you, the audience.

So Stacey, why don't you begin.

MS. MAHONEY: Thanks so much, Dan. Really appreciate it.

It is no understatement to say this has been an incredibly busy year in reverse payment litigation. While I give the FTC credit for the very pithy and catchy pay-for-delay phraseology, you won't hear me using it.

So basically, in 2013 we get the *Actavis* case, and it says large and unjustified reverse payments can cause antitrust concerns. We have since been litigating what is large, what is unjustified, what is reverse, and what is a payment. Each of those four aspects have gone through district courts in various states of play in the past year. For the most part, the past year has seen a variety of motions to dismiss. We have had a few of these cases get up to a variety of the circuit courts, including the First Circuit and the Third Circuit most notably. One of these cases has gone to trial, *Nexium* in the District of Massachusetts, which is a procedural morass. And there is a variety of things on appeal on that case as well.

But let me give you a little bit of a rundown in a couple minutes about what the primary issues are that are going on.

"Payment." Does the payment have to be in cash? Well, that's still an unanswered question. The Third Circuit has come down and said, no, the payment does not have to be in cash. That question is in front of the First Circuit right now in the *Loestrin* decision. We will see what they say. If they say the payment has to be in cash, then lo and behold we have a split, and it will probably go up; at some point these cases are going back up to the Supreme Court. The Supreme Court basically said rule of reason applies, and the district courts have done exactly what they do with the rule of reason; they struggle to follow the guidelines that *Actavis* provided, with its interesting and not necessarily consistent results. So that's the payment issue.

"Reverse." That seems fairly straightforward and fairly easy. Is the money flowing from the brand to the generic? Well, it's actually not that straightforward and easy. Because now there are a number of cases discussing when there was a payment that flowed from the generic to the brand, whether that reflected some kind of discount or some off-market rate and therefore is consideration in and of itself. Well, a number of the courts have said consideration is obviously going to flow in both directions, because the underlying issue is a patent litigation settlement. So you can't really look to whether consideration flows in two directions. At any rate, those are being litigated right now, those issues, and they are closely related to whether the payment is justified.

"Justified." So justified gets into whether there is some other reason for which the payments are being made. Again, I am using "payments" in quotes; it's not necessarily cash, but it is consideration for a variety of different kinds of arrangements. That question remains outstanding, and we'll see what they do, but the majority of courts have said payments are not limited to cash.

At any rate, the question regarding "justified" is whether there is some service that is being provided for which the payments are flowing. And then the question is whether that service is pretextual. There is an issue about whether there are guarantees, regardless of the execution of the service. There are a variety of different things that have been contracted for, so there are a variety of different things being litigated.

Then of course, you have the issue of whether it is a "large" payment or not. And "large" again would seem to be something that would be fairly straightforward, and lo and behold, it is not. There are all sorts of parties suggesting that *Actavis* stands for the idea if it's anything in excess of litigation costs, it is definitionally large. That really hasn't been adopted, but it continues to be presented as an argument. There is an issue with what needs to be pled at the motion to dismiss stage in order to get past the motion to dismiss.

One court in the District of Connecticut—*Aggrenox*—has said that there is just enough to say it is large, and you don't need to go give an entire explanation of the methodology for your calculation of the overcharges of whatever is the payment. So those are continuing to be litigated.

There are also issues revolving around overarching conspiracy claims and whether in fact there is a large and unjustified reverse payment. If there is not, can there still be an antitrust claim. And that is an issue that is being pursued in a few courts.

Then there is an interesting satellite issue, and I don't know if we are going to have time to discuss it, but I wanted to flag it for this group. There has been an effort on behalf of the government as well as some private parties to be able to pierce privilege and get information regarding the underlying settlement negotiations or information regarding how the parties, contemporaneous to the settlement, were valuing the settlement in an effort to try to figure out whether the consideration was large and unjustified. Those efforts, as far as I know, have been entirely unsuccessful to date, but they are continuing.

So that's a little bit of a snapshot. I'll pass it onto Elinor, and then I look forward to discussing these in more detail.

MS. HOFFMANN: Good afternoon, everybody. I am not Eric Stock. Eric couldn't be here this afternoon. He had to go back to the office.

But let me first say that whatever I say today is for myself only. It doesn't necessarily represent the views of the Attorney General or any member of his office.

So what I am going to talk about very briefly is product hopping or product withdrawal as the case may be. And just to make sure we are all on the same page, since not all of you practice in the Pharma space. What I am talking about is a situation, sometimes it's called lifecycle management, where a brand company has a drug on the market, usually a successful drug, it develops a new version, a new and improved version, perhaps a new and very much improved version or just a little bit improved version, and it tries to essentially extend the patent monopoly on this very successful drug or tries to extend the lifecycle of this very successful drug by introducing a new version or improved version.

So when does this become a problem from an antitrust perspective? It's not always a problem. It is a problem though if it constitutes unlawful monopolization. So you've got a monopoly on the brand drug out there; let's say it's still under patent. That patent may be expiring, and you engage in exclusionary conduct, that is, you harm competition, and there is no pro-competitive justification that offsets that anti-competitive harm or exclusionary conduct. That's the test that arose in the *Microsoft* case in the D.C. Circuit.

As you probably know, there was an important decision in the Second Circuit last May in a case that our office brought called *New York v. Actavis*. I am going to call it the *Namenda* case to distinguish it, so no one gets confused. We investigated and charged a drug company for basically engaging in unlawful monopoly maintenance. They had an Alzheimer's product called Namenda IR, a twice-a-day tablet. The patent was going to expire in July of 2015. They introduced a new version called Namenda XR, which was a once-a-day version of the tablet and which had a longer patent life.

At first they tried to market them simultaneously and give patients a choice. They promoted the new version, perfectly okay. The patients had a choice; they had an opportunity to decide which one is better on the merits. But then that wasn't working well enough, so Actavis announced they were going to withdraw the old version. We investigated and we sued and sought a preliminary injunction. After an evidentiary hearing that lasted a week, the Judge granted our motion for preliminary injunction. And last May the Second Circuit upheld that. The generics were launched as planned in July of 2015, so now there is generic competition in that market.

It's important to note that this was the first Circuit Court decision on product hopping. There is other litigation in the works. There is a case in the Third Circuit involving Doryx. It's a private case brought by Mylan. It was dismissed on summary judgment and now is being appealed. And there is a case involving the drug Suboxone, private litigation where a motion to dismiss was denied.

So it is an active and hot area in litigation. We expect to see more, and that is important in terms of preserving and maintaining competition in the pharma industry.

MR. EMANUELSON: Thanks, Elinor.

I am going to talk about restricted distribution in the industry. This is a topic that has a considerable amount of recent news, as Dan put it, in the "Pharma Bro" and the investigations that are going on with that company.

I am going to try to keep it limited, but one thing I think is really important at the outset is restricted distribution and product hopping are very similar when it comes to the pure antitrust theory. It is a quite narrow theory of antitrust law that basically obligates a competitor to deal with a rival in some way or make its products in a way that unilaterally allows competition to exist. So it's not exclusionary conduct through agreement. It is fundamentally unilateral conduct that is considered exclusionary.

In restricted distribution, the way that this has arisen, most of the cases before this recent example have been within a REMS program, which stands for Risks Evaluation and Mitigation Strategies. It's something that the FDA requires for certain products that have particular health and safety issues, and they actually require Pharma companies to institute a REMS program so that the benefits of the drug do not outweigh the risks—or do outweigh the risks. So there has been allegation in certain circumstances that those REMS programs, which oftentimes require very, very strict distribution and who can actually get access to the products, think about things like OxyContin or basically narcotics that are prescribed. And those programs are used as a pretense to deny generics the ability to conduct bioequivalent studies, so that they can actually file for approval by the FDA.

There have been a number of cases along the REMS lines, and they really split on this sort of threshold question which gets back to product hopping and the Supreme Court precedent outside the Pharma space, which is *Aspen Skiing*, *Otter Tail*, *Trinko*. Do you have a legitimate business justification for your conduct? That threshold question. Before we even consider competitive effects, let's answer that threshold question. If you do have a legitimate business justification, then there shouldn't be an antitrust claim there. You see some courts have found those—or at least in the complaint sufficiently pled to show that there is at least evidence that there may not be a legitimate business justification. And then there are other circumstances where, frankly, there wasn't enough there to show that you were inappropriately using your REMS program. And in that case—there is a case called *Letairis*, or the product Letairis, and that was dismissed.

The important thing to know about this area of law is actually nothing has gone to trial yet, though we do have a few cases sitting out there. And then we have this new investigation that we'll see if it develops into something. That one is somewhat unique, because there is actually not a REMS program at all. So it will be interesting to see how that develops and whether there is some legitimate business justification outside of REMS.

MR. WEISSMAN: Thanks, Dave.

So, another hot area for antitrust lawyers, and this is an area that has been hot for a couple years now, mergers and acquisitions in the pharmaceutical sector. When I got to the Commission in 2013, the wave of merger acquisitions was just beginning; it continues today, and it's going to continue for a while. We are seeing all sorts of deals that are not the typical traditional deals, generic buys another generic, brand buys another brand. We are seeing in the last couple of years and continuing today deals like branded companies buying generic companies and vice versa. You're seeing asset swap transactions, where companies, instead of paying a purchase price for stock, exchange a nonprescription business for a prescription business. You're seeing hostile takeovers more and more. And you're seeing interlopers or third parties coming in and breaking up those hostile takeovers acquiring the company. And you're seeing deals between foreign entities and U.S. entities in so-called inversion deals to take advantage of tax benefits by moving their headquarters abroad.

You're seeing all of this happen, with no sign of it slowing down and with very active and aggressive antitrust enforcement by the FTC, which, as many of you know, is the principal enforcer in the pharmaceutical sector.

What's driving this more active and aggressive environment on pharmaceutical deals by the FTC? It's not just pharmaceutical deals. It is not just the number of deals that we are seeing in this sector. That obviously has an effect on staff resources and the time to review deals. The fact that the deals are global in nature requires a lot of collaboration with foreign regulators, synchronizing timing and so forth.

But we are now in an environment with the pharmaceutical industry, where we're seeing reports of pricing of generics, the quintessential low-price products, are going up. You're seeing rare cases but very visible and controversial cases of the exercise of monopoly power through pricing. And query whether the antitrust laws can get at that kind of activity where you're just talking about a single firm exercising its unilateral discretion on how to price its products. We are looking for example at the hepatitis C drug; you're talking about $80 thousand a year for therapy. And we said we won't be talking about the "Pharma Bro," but that's all over the headlines. Turing Pharmaceutical skyrockets prices. Those are headline issues and those headline issues create a lot of consumer backlash that trickles up to the Hill. The Hill leans on the FTC, and like any good government enforcement agency, is going to investigate. And some more than others, because some theories are just nonstarters, but they are worthy of investigation, and the government has a duty to investigate those claims.

So what we are seeing now is an environment where you have this type of pricing profile and frustration by a lot of folks on the Hill, consumer interest groups. That's led to increased or heightened FTC sensitivity. You're going to see, I predict, continued antennae being raised pretty high by the FTC on these issues. I think that doesn't portend an increased number of theories to get at remedies in the pharmaceutical sector. I don't think that's where this is going. But I do think companies that are bringing mergers down to the FTC need to be prepared to anticipate the questions other than the traditional types of questions about narrow overlaps. You're going to need to address perhaps why the decrease in the number of generic manufacturers globally shouldn't be a concern, regardless of whether the companies overlapped in a couple areas, given that large generic companies are the ones typically who get into new markets and are well positioned to do that. They have the cost and infrastructure to do that.

In the brand area, with the sensitivity of these rare but highly visible cases of exorbitant drug price increases you're going to see the agency concerned that their only shot to get at that type of activity may be by blocking a merger or blocking some sort of combination that leads one company to control the market. You're going to see more attention paid, whether it's manifesting itself in the form of more scrutiny about what's in the pipeline of both companies' portfolios or what's out there and what other deals are in the works or all sorts of different ways.

I leave off this topic for now on M&A by saying we are in a world here where the sort of traditional static thinking about how you get a pharmaceutical merger through is not the world we are in today.

MR. ANZISKA: Thanks.

Stephen, why don't I just start with you. You just described the state of mergers occurring in Pharma and FTC's review, and I think you touched on this. An issue that frequently comes up in these mergers is whether a pipeline project in the R&D portfolio of one party creates antitrust concerns where the other party has a competing product or pipeline project. In your experience when does the FTC insist on a remedy in these situations based on the theory of potential competition instead of actual competition, and when does such a theory become overly speculative to support an antitrust challenge?

MR. WEISSMAN: That's a great question, and it's a question that probably rankles a lot of the folks in the industry who have to get their mergers through. They have sought and have not been entirely successful in getting great transparency about when a pipeline product will be potentially problematic. This area lacks guidance or guidelines from the FTC. It's complicated because the industry wants that, and that's a laudable goal. But particularly in this enforcement environment, the type of guidance that the agency would give if you want clear, hard, fast rules is probably not the guidance they want. Because it's so fact intensive, each of these analyses about what's in the pipeline and how real is this product and how far out is it and how much speculation is there. To craft a blackletter rule about when it's a problem and when it isn't is a difficult task. And a task that at this point is probably left alone for the industry's sake, if nothing else.

We think about pipeline issues when we talk about Pharma transactions. It doesn't matter what side you're on, whether you're with the government or you're representing a pharmaceutical company. There are two different dimensions. One is generic deals or generic pipeline issues and others are branded pipeline issues. Generic is relatively straightforward, and even though there may not be some blunt statements from the agency about guidance in this area, if you look at the cases and the history of FTC enforcement, the principles are pretty well gleaned from those enforcement actions. If one of those companies has a current product and somebody has something in the pipeline and that pipeline product consists of the party having either an ANDA, abbreviated new drug approval, or an application for an ANDA pending, then that's considered an overlap for pipeline purposes. Whether there is a remedy that the FTC will insist upon is a little more nuanced. What the FTC will look at are the number of players already out there. For example, if there are four other generic manufacturers and one of the merging parties has an ANDA but two others have ANDAs as well, that's an overlap but it's probably not going to result in a divestiture.

I am not giving away the secret sauce here. Again, you can glean this from looking at the enforcement decisions and consent orders and other materials. If you are a four to three deal, more or less three to two, two to one you're looking at a divestiture of a pipeline product in a generic case. Five to four is one of those close calls and results in a lot of fact intensive analysis about whether customers believe that for that type of generic product the addition of a fifth competitor in the marketplace is going to have a material effect on downline pricing. A lot of times the answer is no; four is enough. Where you see five to fours become an issue is where you have a history of supply problems. Sometimes they go off the market for a couple of months or a year or so, and that's where the FTC gets concerned about five to fours.

Branded deals are more nuanced and fact intensive. The FTC looks at a lot of things. One, they basically apply a sliding scale approach. If the merging companies are the only two companies that have these projects in the works or one has a current product on the market and the other has a project in the pipeline that may be three, four years away and no one else is out there—and they will investigate—then you've got an uphill battle. But just because you have an uphill battle in saving that pipeline project doesn't mean it's a lost battle. The way to really convince the agency here that that pipeline product does not create a problem and shouldn't force a divestiture is really getting into the weeds. Be fact intensive about all the layers of speculation and hurdles that that pipeline has before it gets to market. Those hurdles can be technical; they can be regulatory; they can be patent. Maybe there is a patent out there that could be blocking the R&D that the company is engaged in ultimately. It could be financial; the company could have limited resources and capital is not being allocated to that project. There are a lot of facts that companies can bring to bear to try to convince the agency that this is not worthy of a divestiture. And those have been successful and they have also not been successful when the arguments have been conclusory.

So again, not a lot of clear-cut guidance, and very fact intensive on the branded pipeline.

MS. MAHONEY: Steve, one of the things I've been seeing in the discussions in this space, particularly with some of the very big deals in the pharma merger area is whether the overlap analysis is the analysis that we should be engaging in. At some point, does a particular deal raise concerns not just about overlap but maybe about R&D resources or something else that would suggest that the FTC and the government should be looking at this in a way that divorces itself from a strict overlap analysis and maybe take a more global view?

MR. WEISSMAN: Yes, that question gets put to the FTC all the time. It first became public in the Pfizer-Wyeth deal back in 2009. Many of you recall that the FTC put out a long statement with a consent order on the animal health side explaining why it didn't take any action on the human health side. Part of that long statement was an explanation that the FTC staff didn't just look at overlap, overlap, overlap and whether there was a problem, but also looked the big picture issues and whether certain companies were getting too big and whether there were a limited number of those big companies, such that R&D and pipeline projects would suffer going forward. And the analysis that the FTC put out I thought was pretty revealing, because what it showed was we still have a very fragmented market. There is a lot of R&D done, as many of you know, by third-party companies. That's in large part driving the R&D in the industry today. I will tell you, I think even today that holds true. There is still a very fragmented market out there. A lot of research companies. A lot of branded companies—a lot of generic companies are now trying to get into the branded space.

On the branded side, Stacey, I think that's been looked at and it will probably be a while before that's looked at again. I think where it is more likely to become an issue, if it becomes an issue, is on the generic side where you're seeing a lot of generic consolidation. Again, you have three, four big companies, and these are not R&D-driven organizations. It's all about the production and ability to get the bioequivalency production done and getting your product made. To the extent there may be an issue there for generics, I think generic companies will want to be prepared to address those big picture issues instead of just overlaps.

MR. EMANUELSON: One other thing on the branded side. There is just an incredible amount of innovation going on. You can walk the streets of Cambridge and see every large Pharma company and just tons of biotechs out there. If something gets discovered, it's going to get developed if there is a new discovery.

So it's really important on the branded side to distinguish between concern over potential competition and a concern about reduction in innovation competition. I know Steve said it is nuanced, and I definitely appreciate it is nuanced for potential competition, but for me it should be nothing before a Phase III registration for clinical trial. Because there you're actually doing a study, a randomized study, comparing against the standard of care to try to get a drug approved from the FDA. Anything before that is exploratory. Phase I you're trying to get the dosage right. Phase II you're trying to approve your concept. It's actually not in the U.S., but actually in Europe you're seeing statements from the European Commission that say actually we are concerned about innovation competition. We are concerned about Phase I and Phase II trials. And to me that is just not the right approach to take in a branded pharmaceutical merger because you have such a robust innovation environment in Pharma.

MR. ANZISKA: Okay, David, next question for you.

We know that Congress expressed alarm at the connection between restrictive distribution and pricing. Why do you believe this issue is coming to the forefront now and how is it best addressed?

MR. EMANUELSON: I think Steve and others have mentioned it; it's understandable that this issue prompts media attention. From an antitrust perspective I think—I don't want to comment outside the area of antitrust-- but from an antitrust perspective I do think it's important to focus on the core principles that actually are applied. This is not the first time that a pricing outcry has prompted consideration of what can antitrust do. You see this every time gas prices go up, there's got to be collusion, right, sort of that presumption.

So going back to what I said, if you're talking about unilateral conduct, it should be a threshold. Is there a legitimate business justification for that unilateral conduct? If you can show evidence there wasn't, as I think the New York Attorney General did in the product hopping environment, then you have a potential antitrust issue. But we should not depart from those core antitrust values when looking at pricing to have a situation where we extend the antitrust laws and chill the legitimate pro-competitive behaviors. Because from sitting at a company, I can't do a rule of reason balancing test for every decision that our company makes, right? You have to ask these threshold questions and safe harbors, like do you have a legitimate justification for your conduct, is hugely important in counseling.

MS. HOFFMANN: In the restricted distribution setting isn't the real issue that the restrictive distribution program might prevent access to potential competitors, like lower cost generics or lower cost forms of the drug they can't get access to the product to test it? I think that's my question, not so much just the pricing, but whether you're restricting competition.

MR. EMANUELSON: Yes, I agree. I go back to the REMS situation, because at least that's the one that's been tested in the courts. The *Revlimid* and *Thalomid* cases got past a motion to dismiss and they're still in trial. But there you see the FDA sent letters saying we don't think these REMS programs should foreclose you from selling your product to a generic to do the studies. That seems fair to me if you have that evidence that the FDA actually told you. But the converse is the other case, the *Letairis* case, where there wasn't evidence that the REMS program was actually being used as a pretense. They weren't able to come up with something that gets you past that. Every REMS program is different. So if you have a legitimate reason that the FDA won't let you use your REMS program in a way that can get a generic out, I mean I don't know. Actually, it is not an issue I've ever personally dealt with. But at least in the *Letairis* case, one reason the motion was dismissed is that other generics were actually able to get access to the product. It was just this one generic that for some reason couldn't get in.

MS. MAHONEY: And that takes it into a different area. Then you're talking about exclusive conduct vis-a-vis a particular competitor or potential competitor. If you've got a regulatory overlay that—okay, I am thinking *Trinko*, if you have a regulatory overlay you need to abide by, and you have a particular intellectual property interest that you don't really want to share with your competitor, and you're abiding by that regulatory requirement, I don't think a profit-making organization should be forced to go beyond that and engage in altruism with its competitors. If it did, wouldn't we then have an antitrust problem, because wouldn't that look like potential collusion? What are we doing helping competitors?

MS. HOFFMANN: Yes, I think there is a danger of confusing cases that deal with helping competitors with exclusionary conduct, like a Microsoft test. Exclusionary conduct in the monopolization context is by definition unilateral. And I think that in the REMS situation, the pricing is a symptom of monopoly power. You have monopolistic price. But the way to cure monopoly pricing is to introduce competition into the marketplace. So if the sole purpose of not providing the sample or using some restricted distribution program to exclude that competition, that to me could be an antitrust problem.

MR. WEISSMAN: This area, like other areas, like product hopping and we are going to talk about next, shows where the intersection of the Hatch-Waxman Act and the objectives and policy underlying that Act to get generics out to the market and help with affordable drug pricing, where that intersects with antitrust law. And it is one of these areas that the courts are going to have to really sift through over the next couple of years with the cases that are pending to get the right balance.

On the one hand, as David points out, you've got a company that has IP, that has its own product and the rule in *Trinko* is no duty to deal. That's your prerogative as a company. You don't have to deal with anyone. Why should you have to subsidize someone else's venture? Then you have to balance that, in some people's eyes, with the whole macro policy issues of drug pricing. Where that appropriate balance is plays itself out in REMS cases as well as in product hopping, where you see the generic substitution laws providing what some claim is a windfall for generics, whereas others, including enforcers, see it as just part of a broader scheme. They take issue with the word windfall and viewing it as a windfall. So it's an important policy debate and there are good arguments on both sides for sure.

MR. ANZISKA: Elinor, in product hopping cases we have seen the term soft switch and hard switch. What's the difference between those terms and what are the implications for the legality of that conduct?

MS. HOFFMANN: Well, those are labels. I don't think they have any legal significance actually. Soft switch can be used often to describe a situation where you've got a new product on the market and the old product on the market and the firm is using its efforts to persuade people with advertising and promotion to use the new product. And that's generally okay in and of itself.

Hard switch is used to describe a situation where, as in the *TriCor* case, the states substitution laws don't work for the generics or in the situation we had in the *Namenda* case where Actavis was going to withdraw the old product from the market completely.

But the real issue here is not hard switch/soft switch. It's coercion. Is there an introduction of a new product coupled with some action that is solely designed to impede lower cost competition? And that's what we persuaded the judge was taking place in the *Namenda* case. As David points out, if there is a legitimate pro-competitive justification, the court will weigh that against any harm to competition. So it really depends on the evidence. It's always fact specific, but you can have coercion, I think, in a soft switch situation. And you can have coercion in a hard switch situation. So it's really fact specific.

MS. MAHONEY: That raises a myriad of counseling problems because coercion in one person's eyes is persuasion in another's. So again, I start from the premise that you've got companies that are meant to be profit-maximizing organizations, and if they have introduced a new drug that they spend some time, efforts and energy in developing, and there are sunk costs that they are interested in recouping and they market the heck out of that new product, and they pull all the marketing for the other product and they pull the sales force, to me that's persuasion. I don't know if every regulator would necessarily agree. Say I am massively successful in that and the uptake of the new product is phenomenal, but the regulator does not necessarily think that the change is a significantly meaningful change to the product. I mean more than the color of the pill, but something less than a regulator would think is substantial. That just creates a virtually unworkable counseling environment, because not only are there no right/wrong rule, it is just a sea of gray.

MS. HOFFMANN: Yes, well, I teach antitrust, and the one thing I tell my students in class number one is that there are no bright lines in antitrust. So I agree with you, Stacey, there are no bright-line rules and it must be a very difficult counseling situation.

I think the case law has developed to the point where we know there are some really bad situations. I wouldn't advise a client to yank the NDA code, because that totally precludes the pharmacists' ability to substitute a lower-cost generic version for a brand drug.

The *Namenda* case teaches us that withdrawal of an old product where the contemporaneous evidence showed that the sole justification for that was to impede generic competition. That could be problematic. There are going to be some cases which are very gray. I agree. That's our job to figure out the evidence and figure out whether it's a problem for clients or not.

MS. MAHONEY: Because in *Namenda* there wasn't an entire withdrawal actually, but there was, I understand, contemporaneous evidence suggesting the primary purpose if not the sole purpose of doing this was to facilitate the uptake of the new product.

MS. HOFFMANN: Yes, *Namenda* was a preliminary injunction case. So Actavis issued a public statement saying in February of 2014 we plan to withdraw the old version in August. Now this is a drug that's for a chronic illness, and people get 90-day supplies. So when that announcement was made—and I think the Second Circuit refers to this in its decision—it already created a little bit of a coercive atmosphere, because doctors had to think about what they are going to do to gradually get their patients accustomed to a new routine. And yes, in November, after we filed our complaint, November of 2014, right before the trial, Actavis said no, no, no, we are not going to withdraw it; we are going to institute a limited distribution program. But at the time they announced that, they said we only expect less than 3% of the patients on the old drug to stay on the old drug. So effectively, 3 percent, zero—it's not much different. And the court certainly viewed it that way. So yes, it wasn't a complete withdrawal, but it was okay, so 3 percent would be left on the old drug.

MS. MAHONEY: And they gave a warning, you can say vaporware; I am saying warning. If they didn't give a warning, if they just pulled it, you would be upset about that too.

MS. HOFFMANN: Probably.

MR. EMANUELSON: I go back to my first statement, the importance of thresholds when it comes to unilateral conduct that the antitrust violation is that you didn't help a competitor out. To jump straight to the *Microsoft* balancing test is a really dangerous standard to apply in this area. There needs to be at least a threshold, no legitimate business justification. I don't know if we are saying the same thing, but I have this concern of a brave new world where we go right to the balancing test.

MS. HOFFMANN: I think we are not really disagreeing on standards. I do think that again it's evidence driven, and, it really depends on each case. And if you've got evidence of a legitimate business justification, then that may be a significant defense.

MR. EMANUELSON: Right. I guess I would say we will agree to disagree. But presumptively, anything that goes to your desire to promote the new product and go out and try to convince doctors to use your new product should not be considered coercion. Now if you're talking about conduct that denigrates or withdraws the old product, that's when you at least have an issue to look at, and that is a struggle from a counseling perspective. But at least we have the *Namenda* case, and we have the *Suboxone* case also where these issues at least give you something to look at.

MR. WEISSMAN: I would say a couple things about product hopping cases. The notion that legitimate business justification should be a Safe Harbor, I think that makes sense in the abstract. But in the real world I think determining whether you have a legitimate business justification or whether it's pretextual or not is much more complicated. I think we saw that in *Namenda*. Here you had a product, the XR product, the extended release. It was an extended release product, a capsule that you pop once a day instead of the old version which you had to pop two a day. All of you in the audience look pretty young, so you probably don't realize it, but for older people I think they really value having to pop one pill a day instead of two pills a day. And I've heard that time and time again. So is that a legitimate business justification and a pro-competitive effect of the new product? Yes. And query if you should take the old product off the market so that you can promote what you think is a better therapeutic product, whether that should be good enough.

The problem is that's not what the documents showed, as I read the opinion. That was more of a pretext and things were being done for different reasons. So yes, I think in the abstract, legitimate business justification sounds good, but that may be very fact intensive about whether it is pretextual or legitimate.

The other thing, I think from a counseling perspective, before I went to the government and particularly now, I never viewed counseling in this area as particularly difficult, and it may have gotten more difficult after *Namenda*. But the rules of thumb that we have always used and these go back to the early cases in product hopping, is don't pull the product, the original product off the market unless you can show evidence that the new product you are replacing it with has therapeutic advantages. It can't be a green pill instead of a red pill. But if you've got evidence in your files and you're careful and guide your business people in the right way to document the legitimate reasons why you are prioritizing the new product and not keeping the old product on the market, I think that's a pretty good case. I would counsel clients to go ahead and do that.

So I don't think it is that difficult to counsel clients in this area. Although I do acknowledge that the *Namenda* discussion about what the documents say and the coercion analysis complicates things. But I hope that at some point a higher court will resolve this issue. We have the *Warner Chilcott Doryx* case that's in the Third Circuit, and there are other cases percolating, so at some point hopefully we will get more clear-cut guidance.

MS. HOFFMANN: Let me say one thing quickly. I just heard the word pro-competitive justification and safe harbor in the same sentence. I want to make sure no one took that to mean anything other than that if a pro-competitive justification is a defense and a proper one, then a court will weigh the anti-competitive harm against pro-competitive justification.

But I think, Steve, you're absolutely right with regard to the nature of the evidence in *Namenda,* and it was very fact specific. We not only had documents but we had repeated public statements of their top executives during earnings calls explaining what the purpose of this withdrawal program was. And there was no contemporaneous evidence of any pro-competitive business justification other than that. Yes, one could argue that popping one pill instead of popping two pills, but there was also evidence, including from defendants' medical experts, that Alzheimer's patients, doctors don't like to change the routine. It's very difficult. And yes, they might gradually change over, but being forced to do that by the withdrawal the old drug was not something that necessarily was good for the patient.

MR. ANZISKA: Stacey, it's been awhile but we have both seen that post-*Actavis* pharmas have been changing the way that they structure settlements, while the FTC and plaintiffs have challenged a wide variety of settlements, including those without an actual monetary component. I know Elinor is not going to like this, but are there any bright lines at this point as to what is lawful or unlawful or are things hopelessly muddled, as predicted in the *Actavis* dissent?

MS. MAHONEY: I think the short answer probably is at the very moment there are few bright lines in this space, which is not terribly surprising, right? A 2013 Supreme Court case that disregarded the scope of the patent test and disregarded the presumptively illegal test that the FTC had proposed, and said no, everybody, go back and apply rule of reason to this. And here we are three years later, and that's what the district courts have been doing.

So I suspect that when *Loestrin* comes down we are going to have a clear decision about this cash issue. Maybe not. Maybe I'll be surprised and the First Circuit will disagree with the Third Circuit, and we will have a circuit split.

But other than that, I think this continues to be an evolving area. There are so many different ways to structure a patent settlement. And I spend a fair amount of time with folks on the phone working them through these issues and what's okay and what's not okay, particularly if there is an ancillary contemporaneous business arrangement of some kind. And you can't tell these companies not to do that. I don't know if that is beneficial, even though the FTC has some public statements along these lines, but if you actually ink the deal 30 days later, it is going to be considered different and not a contemporaneous business arrangement. That gives me pause as a counselor. So to the extent there are creative patent attorneys who come up with new and different settlement arrangements, we are going to have to go with that and figure out how to make the arguments work with it.

There have been some arguments made that I don't know are going to get a lot of traction, and one of them is that acceleration clauses only can support a finding of a Section 1 violation. Full-disclosure, I am counsel-of-record in *Actos*, and this is one of the cases where that theory is being pursued. We are about to go do our briefing in the Second Circuit on that. It strikes me—all biases now having been revealed—that is a very difficult argument for plaintiffs to be able to make. If you've got a term that allows for competition to maybe come in even sooner, why that's going to have an anti-competitive impact strikes me as a counter-intuitive argument to make. And the Southern District of New York has agreed and the court in *FTC v. AbbVie* is agreeing so far as well. So that's one that I don't know is really going to survive in the fullness of time.

Look, some of these supply agreements, if you've got a situation where there is a supply agreement and the amount that the generic is paying to the brand is infinitesimal—maybe that's enough to raise a lot of eyebrows. Same with some of these agreements where there was a marketing component to it, but the payments were guaranteed. So you don't actually have to sell anything, you don't actually have to do anything, but we are going to call this a marketing agreement and here's your X millions of dollars. I think it's becoming more and more clear if, you have a pretextual term, that's not going to get too terribly far with the district courts.

Other than that, though, this idea that you can't settle these patent cases is just a nonstarter. I think it's similarly a nonstarter that any dollar amount over the cost of settling the patent litigation or continuing to litigate the patent litigation is definitionally a large payment. That hasn't gotten any traction with any court yet, and I don't know that it will. I did a count—I think there are about 20 cases going on right now in this space between district courts and courts of appeals. So there are a lot of different moving pieces.

There is a big dispute right now in a number of the cases about what's called "no authorized generic" clauses. The commitment here is from the brand; that the brand will not issue its own authorized generic to compete with the first-filer generic during their entire 180-day period of exclusivity that's provided for by Hatch-Waxman, or for some period that even goes past that 180 days. The courts are pretty consistently finding that can constitute a reverse payment, and they start to really scrutinize that fact pattern. I think that's going to continue, and the courts are going to continue to be highly skeptical of those.

The FTC came out with an interesting report—I want to put it like two weeks ago, give or take, about the number of cases that they are reviewing right now. And all of these patent settlement agreements have to be filed with the FTC and DOJ more or less contemporaneously with their being entered into and a review is done. They are saying that there are far fewer of them that are causing them to have any concerns. And one can attribute that to the enforcement efforts that were successful, if you look at it that way. Or I think that the regulators might think a little bit more along the lines of, well, the lawyers have gotten smarter and have tried to work around the rules. I suspect in truth the answer is somewhere in the middle of those two things; that folks kind of get what the FTC has worked out and have understood that there is exposure if you do that. And we are paid to be creative people who come up with solutions that are within the four corners of the letter of the law and yet push the envelope at the same time. So these are going to continue on.

The *FTC v. Abbvie* case, that was an interesting one for me, to see they pursued as their first one after *Actavis*, and they are having some mixed luck with that. And of course, they have come down now recently to suggest that even with their review—and they are getting oodles of these, but even with their review pursuant to the MMA, that their determinations not to challenge these various agreements should not be used or considered as a relevant fact by the courts. Well, I can tell you, the courts are going to darn well consider it a relevant fact if the FTC has decided to challenge it. So I am not quite so sure that it's entirely fair for the court to not consider that the FTC has opted not to challenge it. Now, I think it's a different question about whether it should be a dispositive determination if the FTC doesn't challenge it. Do we all just go away and think we are scott free? Certainly various members of the plaintiffs' bar are choosing to go after these agreements that the FTC has chosen not to. I think there are some mixed results there as well. I think that the indirect purchasers are having a harder time these days with what the courts are requiring them to do at the pleading stage in order to satisfy all of the different states requirements, not for the Section 1 claims but for the various other kinds of unjust enrichment and consumer protection claims they are putting in there. So I don't know that we are going to continue to see as much activity on the indirect purchaser side. I think the courts have created a substantial pleading requirement for them to meet in order to get their complaints past the motion to dismiss. That's not as apt a concept when you apply it to the direct purchasers. The directs don't have that issue; they can just go in with a straight Sherman Act claim, and that's a clearer set of requirements. Although as we just discussed, it's not the picture of clarity.

MR. WEISSMAN: So on the issue of whether the FTC has challenged a particular arrangement or not and the relevance of that, I think it's completely irrelevant both ways. If the FTC has challenged a reverse payment agreement and there hasn't been a judgment yet, why is that relevant? And it shouldn't be relevant. I know some courts like the optics of that and cite that in their opinions. But if it's a jury case, that should not be relevant.

By the same token, if the FTC has not challenged or even investigated a particular arrangement, that's even more irrelevant. I mean everybody who knows the way government works knows that these are agencies with limited resources and they have to pick their cases. And sometimes part of the calculus is whether some private Plaintiff is already pursuing a case, so why would you devote your limited resources into pursuing that case. I think that's all optics, and that should never, ever get to a jury.

MS. HOFFMANN: Yes, I second that. And after being in private practice for 25 years and then moving to government, you really do have limited resources. One of the joys of being government is that you get to pick and choose your cases, but there are a lot of factors that go into that. And as I said, if there is a private class action out there may be a reason or that you don't have resources, or that ten people in your bureau are being funded to some other bureau. There are just a whole host of issues that should be irrelevant.

MR. EMANUELSON: Let me make three points from the in-house perspective. And I agree with almost everything you said, Stacey.

The first is that clarity, you know, someone who actually reviews these things and what to say, we should go ahead with them. The need for clarity is just as paramount.

One thing that I would actually really commend FTC, and I view it as a compliment, is the settlement in the *Teva-Cephalon* case involving Provigil. There are some things that I would consider—well, not safe harbors but at least the FTC thought it okay enough to put there—release public documents talking about attorneys' fees, the $7 million limit there; and then also the acceleration clauses, which is a carve-out there. I just think again this is just a complete nonstarter from any perspective about not being a reverse payment. I think it is very interesting that the FTC carved those acceleration clauses out of the settlement.

We have been talking a lot about what does it take to get past a motion to dismiss, these threshold questions, and that's what's being litigated right now. Because these are motions to dismiss that have been granted, denied or appealed, but the $64,000 question, now that you're litigating a case can you prove pay for delay, right? I think just a hugely important case is the *Nexium* case in the District of Massachusetts. It really goes to show why the presumptive illegality standard the FTC originally advocated and now is sort of trying to advocate, well, okay, it's not a quick look test but at least we should say large, unjustified reverse payment presumes anti-competitive effect. No, the facts of the *Nexium* case showed there was a significant value transfer that the jury found. They actually put it on their jury verdict form that they found there to be a reverse payment, but they found the reverse payment did not result in any delayed entry by the generics. And that's because of two really important facts. First, really strong IP rights by the brand, which were uncontroverted, and second, uncontroverted evidence that the brand would not agree to an earlier entry date. Any other circumstances—there was no hypothetical settlement that there would have been an earlier entry date. There just was no evidence of that. And so these causation issues—it's only the *Nexium* case right now, but that's really what to look out for, can you actually prove this under the rule of reason?

MS. MAHONEY: The issue with the *Nexium* case, as it was presented—of course I like both of those things, but when I say procedural morass, the judge changed the theory of the case during the trial. He had issued a summary judgment ruling, and then during the trial he said, oh, sorry, misunderstood you, just keep going though, and this is going to go to the jury. That creates for me some real issues in using *Nexium* as precedent, much as I like some of the things that eventually came out of it. So I just caution people to not necessarily throw a lot of weight into the *Nexium* camp. Because one can hope, given the judge's change in the middle of the trial, that that will not be a replicated process.

MR. EMANUELSON: I agree.

MS. MAHONEY: I wonder out loud if that had an impact on what some people might perceive as an inconsistent jury finding.

MR. EMANUELSON: I'll say this, the judge really wanting to go to trial and going through fits and starts to try to get there, even though the evidence wasn't there, and then the jury cutting through that and then realizing there never was a case there.

MR. ANZISKA: We are running a bit over, so we have time for two questions.

AUDIENCE MEMBER: Comment and I'll turn it into a softball question for Elinor. David mentioned the high drug price for Hep C. For those who haven't read it, the Senate Finance Committee Report that came out last month is fascinating. It studies Gilead's pricing on Hep C drugs and finds one of the things they considered was the standard of care currently for Hep C, the standard of care for other important diseases and even how much attention a huge price increase would cause on Capitol Hill and whether the Congress could do anything about it. So softball question, these are all perfectly legitimate questions for a company. Can you unilaterally set the price anywhere you want?

MS. HOFFMANN: I am not going to comment. I think the issue is complicated. I am going to go back to something Steve said at the beginning. There have been in various markets huge increases or just very high prices for drugs, both brand and now generics in some cases. And we are trying to come to grips in this country with the high cost of health care. So what do we do that's consistent with our promotion of a great product by all accounts, the Hep C drugs cure hepatitis, right. It's not a minor tablet to capsule innovation here. It cures hepatitis. So what do we do? We want to promote that kind of innovation, but we are shocked that it costs $84,000 a year for treatment. So there are huge problems, and it's not a hundred percent clear that antitrust has the tools to address all of them.

MR. ANZISKA: Last question, go ahead.

AUDIENCE MEMBER: So not really Pharma but pharmacies, in the wake of Sysco-U.S. Foods I am curious. Pharmacy mergers used to be looked at like grocery store mergers, but now there is this national market idea that seems to have been getting traction. Does it matter that we could be looking at mergers of down to a small number of national players on the pharmacy market?

MR. WEISSMAN: I think the FTC will look at deals in the pharmacy space the way that they traditionally have. I know you have a bureau director, Debra Feinstein, who has done a lot of work in that area and in grocery stores. Unless there is great evidence that fewer players nationally are somehow going to affect competition in local markets where these pharmacies are, you drive three miles and you are at a pharmacy. And unless there is that type of evidence, I don't see the FTC going to a national analysis.

AUDIENCE MEMBER: Is there an industry where that would matter, where you think we are starting to see shifts to more national perspectives?

MR. WEISSMAN: Well, Sysco-U.S. Foods is one, right. Staples-Office Depot, that's the allegation there, you need a nationwide network. But pharmacies, we go right to the pharmacy right down to Rite Aid or the Duane Reade right down the street here. If anything, there is an argument that mail order pharmacies now have some effect. I don't know how big an effect, but that's certainly an argument I would think when pharmacies are consolidating they are pressing. The best example of where national Internet competition affected the analysis was in the 2013 statement the FTC put out in Office Depot-Office Max, where because of the Internet and availability of national products from Internet sellers, and other factors as well, you had stores go to a national pricing system and you have to compete with those national Internet sellers. But beyond that I don't know. Again, it's all facts.

MS. DUNLOP: So join me in thanking our panelists. That was really great. We are going to swing straight into the next panel. Give us one minute to reset and if you want to grab a cup of coffee, please do so quietly.

Watch Out Below! Avoiding Ethical Pitfalls in Class Action Litigation

MS. DUNLOP: We are going to move into our last panel of the day. Thank you so much for your patience and really great questions coming from the audience. One more and then we'll go into the cocktail reception for the Young Lawyers.

The final panel is being moderated by Greg Asciolla. It's called "Watch Out Below! Avoiding Ethical Pitfalls in Class Action Litigation."

MR. ASCIOLLA: Good afternoon. Thanks, Lisl.

My name is Greg Asciolla. I am a partner and co-chair of the Antitrust Practice Group at Labaton Sucharow here in New York City. On behalf of myself and the panel members we welcome you to the last program of the day. I trust you're all here for the interesting subject matter and not just to get valuable CLE credits. Bear in mind the cocktail reception is just a short 75 minutes away.

Let me introduce our esteemed panel starting with Ethan Litwin. Ethan is a partner and co-chair of Hughes Hubbard Antitrust Group. For the last 18 years he's represented many companies in class action litigation, including most recently Philips Electronics in CRT class actions, Expediters International in the Freight Forwarders class actions, WestLB and Libor class action, Soshin Electric and Capacitors class action, and Cantor Fitzgerald and the Treasury class action.

Ethan is a frequent speaker and author on many antitrust issues, including the co-author of the ABA's *Indirect Purchaser Handbook*.

At my far left is Hollis Salzman. She's a partner in Robins Kaplan and co-chair of the firm's Antitrust and Trade Regulation Group. She served as court-appointed lead counsel in *In re: Automotive Parts Antitrust Litigation*, a private civil action that extends from one of the largest DOJ criminal investigation in the U.S. history, with settlements today totaling over $250 million, and court-appointed lead counsel in the *In re: Air Cargo Shipping Services Antitrust Litigation*, which has settlements to date of over $1 billion.

In addition, she provides pro bono representation to indigent and working poor women in matrimonial and family law matters.

And in the center, Bruce Green is the Louis Stein Professor of Law at Fordham University School of Law where he directs the Louis Stein Center for Law and Ethics. He teaches and writes primarily in the areas of legal ethics and criminal law and is involved in various Bar Association activities, including many in this field.

His accomplishments in the area of ethics are too many to list here. So I picked three non-ethics related highlights from his CV worth mentioning today. One, he served as an AUSA for the Southern District of New York. Two, he clerked on Second Circuit for Judge James Oates, and three, he clerked on the Supreme Court for Justice Thurgood Marshall.

Two quick mentionables, our focus here today is on New York ethical rules, opinions and law. That's the underpinning of all of our discussion today. And second, the questions I'll be asking the panel are hypotheticals, and Ethan, Hollis and Bruce are good sports to do their best to respond to them. But what they would do in the real world would depend on the specific facts and circumstances of any given situation. That's a soft disclaimer.

To get started, as you know, ethical issues frequently arise in complex class action litigation, including in antitrust litigation, in such areas as conflicts of interest, solicitation, contacting class members, settlement and attorneys' fees. This is true for both plaintiffs and defense counsel; neither side is immune.

So where do New York lawyers go for guidance on ethical issues? A good start is the New York Rules of Professional Conduct. The New York State Bar Association adopted the Rules of Professional Conduct, effective on April 1st, 2009. The rules replace the New York Code For Professional Responsibility, which had been in effect since 1970. At the same time the new rules came out in 2009 comments were released accompanying each new rule to help place the new rules in context and offer guidance for interpreting and applying the new rules. As you probably know, New York is one of the few states that doesn't follow the ABA Model Rules.

As you quickly learned when you opened the New York Rules for guidance on ethics, you will see it does not deal specifically with the ethics of class action lawyers. That is the controling ethical rules do not nicely fit in the class action rubric. Some rules provide general guidance, and some rules contain comments that may refer to class actions, but there is not much else directly in the rules themselves. And courts recognize this by often stating in cases that the ethics rules cannot be mechanically applied to class actions.

So back to my original question: Where do we go for ethics guidance? One main place are the comments and the annotations to annotated publications of the rules, one being *Simon's*, Professor Simon at Hofstra. You're probably all familiar with this book. Obviously you can see it's very big. The rules themselves probably take up a couple dozen pages, so the value in this book are the annotations, comments, discussions of law. And it's updated every year, so a very valuable resource.

Also look to procedural rules, notably Rule 23 on class actions and related case law. Ethics opinions go from New York City, county and state bars, case law on the New York Rules in New York State court. Also the *Manual for Complex Litigation* is helpful. You could submit questions to a local ethics committee, and of course consult with the experts, professors. In fact, your own firm probably has an ethics specialist or a point person you can also reach out to. So today the panel will explore various key areas where lawyers involved in class actions should be aware of ethical pitfalls. We will be presenting a very simple hypothetical which we will walk through and discuss in a practical way ethical issues that arise from a case in its incipiency through settlement. The format will be an interactive dialogue, and we will reserve some time for questions at the end.

Our main goal here is to present ethical questions we experience on a daily basis in our various practices as they relate to class actions, and not dilemmas you might see once in a lifetime or on a law school exam. So let's get started.

Last week Ethan was reading his favorite newspaper, the *Wichita Weekly*. He came across an article reporting that Wichita's largest employer, Ping-Pong Inc., which manufactures ping-pong equipment, was being investigated by the DOJ's Antitrust Division, which appears to be the latest in a long line of DOJ investigations into the sporting equipment industry. The paper cited an unidentified source for the information. No other facts about the conduct or investigation were mentioned, nor whether a CID or subpoena had been issued. And the paper quoted Gina Talimoda, a DOJ spokeswoman, stating DOJ does not comment on the existence of its investigation.

Ethan's firm has represented Ping-Pong Inc. in other unrelated matters.

So Ethan, you're interested in potentially being retained by Ping-Pong Inc.; how do you go about contacting them?

MR. LITWIN: Well, hopefully the hypothetical has Ping-Pong Inc. being either a client or former client of the firm, so the rules are a little bit more lax in that regard. I would of course solicit the input of whoever had the relationship with Ping-Pong Inc. in my firm. We would decide the best way to proceed, and we would have a multitude of ways to proceed. We could send them an email, call them up on the phone, ask for a meeting, send them a letter. Any of those things are at our disposal.

The more difficult question is if we don't have a relationship present or past with Ping-Pong Inc., and while cold calling works, it typically works best when the client cold calls you. But if we were going to reach out, the ethical rules actually are quite strict. In that case you do have to send a letter; you're not allowed to use electronic communication.

MR. ASCIOLLA: So when is an entity or individual a prospective client?

MR. LITWIN: If they pick up the phone, or when they call you back or respond in an email or engage in a bilateral conversation with you, in any of those forms, your duties to that entity as a prospective client arise.

MR. ASCIOLLA: Ethan, you engaged in several conversations with Ping-Pong Inc., now a prospective client, to discuss possible representation. What duties do you have to the prospective client?

MR. LITWIN: The first and most important is a duty of confidentiality. At least to me, and perhaps Professor Green will disabuse me of my ignorance here, but I don't treat it any different than any other client. We are getting into a very serious discussion about what they may or may not have done. This is for the purpose of establishing a retainer. And in my mind the duty of confidentiality is exactly the same as it would be otherwise for a retained formal client.

The second, and it's a little more nebulous at this point, is conflicts. And I know every firm's conflicts department is a little bit different. I've had the benefit of dealing with three different firms and their conflict departments, and they are certainly all different from one another. But it is very important at the stage—even before you reach out to a prospective client, to make sure if they call back and start telling you confidential information—that you haven't created a conflict within your firm. So at least at the preliminary stage you need to at least have some confidence there isn't going to be a conflict there.

MR. ASCIOLLA: Ethan, Ping-Pong Inc. is interested in retaining you in this matter. You learned during your discussions with Ping-Pong that the company has received a Grand Jury subpoena. The company would like to retain you to represent it. What do you consider in evaluating this question?

MR. LITWIN: Did the retainer clear? Well, outside of jumping for joy, the rules are very clear that you have to have the correct expertise, competence, experience and bandwidth to handle the matter. You can't take on something where you can't actually provide the legal services the client requires.

MR. ASCIOLLA: Let's add a little more complexity. Shortly after commencing the representation you learn that the client's current CEO ran the division of Ping-Pong Inc. that is under investigation for fifteen years, prior to taking his current post three years ago. What steps do you take now?

MR. LITWIN: So this raises a large number of practical and ethical considerations. And in my mind they blend together; they are almost the same issue. The prospect of an investigation involving and targeting a company's CEO is probably the ultimate nightmare for a client. You need to understand whether or not the CEO has any exposure, even if at day one you have no reason to believe that he did, other than from the naked facts that you've given in this hypothetical.

I dealt with this once in my career. I think the way we solved it was the best way to solve it, which is we asked the audit committee of the board of directors to retain independent counsel to conduct an investigation to see if there was anything there. The reason we did it that way was we were very mindful of the inherent conflict of reporting up through the general counsel, who then has to report to the target of this investigation and to ensure, because it was a public company, that it could face potential shareholder liability suits if this was not done correctly and diligently. We made sure that there was an independent path to the board of directors; that the CEO or the general counsel had no ability to influence that investigation.

MR. ASCIOLLA: So Professor Green, just looking at some of the things Ethan talked about, solicitation of a former client, dealing with a prospective client, joint representation of a company and executives. Can you identify any pitfalls, things to look out for and consider, common mistakes made in those areas?

PROFESSOR GREEN: I am not going to grade Ethan. I will just say a couple of things.

First of all, so far I don't think in the hypothetical there is anything unique here. The question is not particular to a class action or antitrust action; these are things that I think you encounter in all kinds of representations. I don't think as a practical matter anybody is going around disciplining big law firms for soliciting or seeking business from big clients, that's not a big pitfall. Even if you had maybe picked up the phone, I don't think anybody is going to care. They are not going to be engaged in overreaching or whatever the other underlying concerns of the solicitation rule are.

What's interesting here, when you're initiating the communication, is the challenge of doing the conflict check. I don't know whether you're soliciting to represent Ping-Pong Inc. in the DOJ investigation or in an anticipated lawsuit brought by Hollis, by somebody on behalf of a class or by a lot of other individuals coming out of the woodwork.

MR. LITWIN: We would have to consider all of that up front.

PROFESSOR GREEN: So how would you go about figuring out who are all the prospective consumers or plaintiffs, and who you would be adverse to?

MR. LITWIN: So that's a great question. And that happens frequently. You do the best that you can up front. Most of these cases arise not in the ping-pong industry but in industries that are rather consolidated, where the customers, like the primary customers, are easily identifiable.

It is possible you might recognize a conflict up front, and you may need conflict counsel for that part of the litigation. And then frequently—well, maybe not frequently, but from time to time you do get a claim that comes in from a party that creates a conflict within your firm, and then you have to go out and get conflict counsel to handle that part of the case.

PROFESSOR GREEN: Although, a named class representative, if they are clever and they want to conflict you out, they may name a class representative that is a client of your law firm. Conflict counsel is not going to solve the problem—

MR. LITWIN: That hasn't happened to me yet.

PROFESSOR GREEN: Well, somebody has that idea now.

So you were asked, when does this company become a prospective client? It only becomes relevant I think if you do end up with the conflict issue, and then they say, you can't be adverse to us in this matter. Maybe your firm—someone else in your firm is representing one of the plaintiffs after Ping-Pong Inc. turned you down for this work. And they say, you know, we met with you for a whole hour, and we disclosed all this stuff. There is a rule, Rule 1.18, that is relatively recent that deals with this issue. If you're not careful to limit what you're learning at that initial meeting, then you could be conflicted out and the firm could be conflicted out because of that conflict rule. So that's something to think about. Because here you are, so aggressively pitching this client, and if you don't get this representation, you may have pitched yourself out of other business.

The last thing I would say is, I think the idea of representing a company and a CEO is not a good idea, almost invariably. But of course, I come at this from the criminal background. You never know enough at the beginning to know whether their interests are going to diverge, and if they do, you may have to withdraw from both, not just one. That would then get to the issue of advance waivers and what's in the retainer agreement and whether you provided an advance agreement that if a conflict arises you'll represent the company and not the CEO, and whether that's going to be binding. That's a lot of stuff to worry about.

MR. LITWIN: It's just too big an issue. The risks are just too high. I fully agree.

MR. ASCIOLLA: Okay, Hollis, is not a reader of the *Wichita Weekly*; however, she is a subscriber to *Bloomberg*

Legal News service. Shortly after the article is published, an associate at the Hollis' firm sees a Bloomberg alert with a link to the *Wichita Weekly* article. She sends it around the department immediately, and a staff meeting is quickly called to discuss the news.

Hollis, what things would you take into consideration in soliciting a client for a potential class action matter?

MS. SALZMAN: Well, as all of us know, you cannot directly solicit clients unless they are former or existing clients or a close friend or family member. At my firm we have a fairly large amount of lawyers and 75 years of compliance. So I would send around an alert internally within my firm to see if anyone there had a business relationship, an attorney-client relationship with a prospective client. And if they did, I would be able to have a direct solicitation through that partner or lawyer.

There are ways to solicit potential clients through written materials. There are very specific guidelines, and I don't do that myself. But I think the important thing to remember is you need to follow to the letter the rules in the book and hopefully not only in New York, because you're a New York lawyer, but in those states where the clients might be located where you're soliciting, you also have to follow those ethical guidelines for a direct solicitation.

MR. ASCIOLLA: So Hollis, you conduct your conflict check to ensure the representation will not involve you representing differing interests. How do you take into consideration unnamed members of the class in considering potential conflicts?

MS. SALZMAN: Well, unnamed members of the class are typically not clients of class counsel in a case. So we run conflicts for the actual clients and not the potential absent class members. That would be such a broad group, we would be unable to do so.

MR. ASCIOLLA: Okay, Hollis, you agreed to represent the client on a contingent fee basis. What disclosures do you make to the client as to the nature of the contingent arrangement and when?

MS. SALZMAN: Well, we lay out all of the details of the relationship very early on, as soon as the client is interested in retaining the firm. If it's a class action, we explain that there is no guarantee of success. That it is a contingent fee arrangement, likely in the retainer agreement, but that in a class action all fees are subject to court review and approval and that the fees would likely come out of any settlement or recovery that the class receives.

You may also go into the details of costs and whether your firm is going to cover the costs of the litigation for that potential client or what the arrangements are with regard to the costs.

MR. ASCIOLLA: Okay, Hollis, I am going to change the hypothetical a little. You, unfortunately, have been unsuccessful in retaining the client. But as luck would have it, another attorney calls you and says she has retained the client who purchased ping-pong balls directly from Ping-Pong Inc. She does not have the resources to litigate such a large case, but she said she will refer the client to your firm for a fee allocation. What do you do to execute such an arrangement?

MS. SALZMAN: Well, I would enter into the appropriate parameters for fee allocation, and that is that the referring counsel and my firm would share a joint responsibility for representing that client, and we would jointly prosecute the case. And that whatever arrangement we have with regard to splitting the fee would likely have some relationship to the work that we performed in the case. So that if our firm is doing the lion's share, their percentage of the fee share would be smaller. But then that all is laid out in a written document, part of the retainer to the client and the client would acknowledge that, the allocation, by signing the retainer and returning it to us.

MR. ASCIOLLA: Okay, Hollis, one last question. Prior to being retained, the client wants to meet with you. The client tells you it wants to get paid for its time working on the matter. How do you respond to a question like that?

MS. SALZMAN: Well, in class actions potential class representatives always wonder why they should get involved, and hopefully they get involved because they think it's the right thing to do, and they are willing to step forward in the litigation. You cannot pay a class representative to be a class rep, but you can apply to the court for what's called an incentive award. And some people in the room may already know what an incentive award is, but basically courts have found it's a way to acknowledge the class rep for the time he or she has spent in the case. You cannot guarantee that amount. It is all subject to court approval. First of all, it varies in scope, depending on the case, and it's generally the complexity of the case, what that class rep did in terms of helping litigate the case. Did the case settle very early on and class rep didn't do much? Did the case go to trial and the class rep produced documents, reviewed documents, helped with the prosecution of the case, sat for a deposition, sometimes sat for two depositions? You know, these are things that the courts take into mind when they are awarding this amount. And they'll also look at, obviously, the recovery to the class. If it's a very small class recovery, the consent for award is going to be on the lower side.

MR. ASCIOLLA: Back to Professor Green. You've heard Hollis talk about solicitation of the clients from the plaintiff's side, conflicts, contingent fees, fee allocation, incentive awards. What are the pitfalls, common mistakes, things to look out for in those areas?

PROFESSOR GREEN: I am not going to answer your question exactly. First I want to raise—and maybe Hollis can help me with this. Of all the things you said, the area that I thought was the most interesting was fee splitting in a class action.

Let's suppose you had a personal injury case, because that's really what the fee splitting rule probably envisions. And you have somebody who brings in the client, but then they don't know too much about trying cases, and they bring in someone to try the case who is going to do 99.9% of the work. Under Rule 1.5(g), which I think you were alluding to, you could actually divide that fee however you want, as long as the person making the referral maintains—what's the word—joint responsibility for the case. And joint responsibility, according to the Bar Association opinions, can be as little as looking over the shoulder occasionally of the trial lawyer and maintaining malpractice liability if they screw up. So you don't really have to do very much.

But now, let's go to a class action. At the end of the day you are going to have to ask the court to approve the fee. And aren't you going to have to say something about who did what, and maybe even you'll find a judge who wants to know how the fee is being divided among counsel? Suppose you say that I am seeking X hundreds of thousands of dollars and 33 percent of the fee is going to this person, who you've never even seen because all they did was have nominal responsibility and they never did any work, and their fee is not in proportion to the work done. Might a court say, don't give that money to them; give it back to the plaintiffs. Add it to the recovery. Is that a possibility in a class action?

MS. SALZMAN: Well, anything is a possibility, Bruce.

PROFESSOR GREEN: But seriously, aren't there cases where courts examine how the fee is allocated among counsel and think that the fee should not go to counsel who didn't work for it?

MS. SALZMAN: Well, I think typically in a class action your recovery is based on the percentage of the fund, and that percentage of the fund is compared to the lodestar in the case. Typically the court gives the discretion of how to split that fee to co-lead counsel in that case, who in the beginning has already been ordained by the court to look over the work that the lawyers do and use their judgment in terms of how it should be allocated, because they know actually who did the work in the case.

At least in my experience referring counsel does do work in the case, at least some work in the case. Because I've never met referring counsel that wants to give me 24/7 access to their clients. They want to maintain that relationship.

PROFESSOR GREEN: If referring counsel is being compensated in proportion to the work, that's fine. I am just raising the question of whether they are seeking to profit from the referral itself, and not from the work they did. Because I could imagine cases where courts don't give 100 percent discretion to lead counsel to divide up the compensation without at least implicitly thinking it ought to be divided up in relationship to the work that the lawyers do.

MS. SALZMAN: Yes, I have not had that experience, but maybe other panelists have.

MR. ASCIOLLA: I haven't. I haven't had that experience either, but there are times when a judge will ask for detailed time records from all counsel in the case, so he or she can look at that. But I've never seen it go so far, to analyze what the fee might be. I've never seen it go so far to see a judge say, okay, I am going to now split the $20 million based on what I am seeing in these detailed time records.

PROFESSOR GREEN: No, I am just saying that if a third of the fee is going to somebody with virtually no role, but as compensation for a referral, which is the way things work in a personal injury case, I would think in a class action somebody might object to that, including plaintiffs.

MS. SALZMAN: Right, I see the court take much more interest in the expenses submitted by plaintiffs' firms, because the fee that's taken from the recovery to the class is a percentage. And how that percentage gets split up, I just have not found the courts to take concern. What they do have concern with are the expenses on top of whatever that percentage is, whether or not each individual firm is submitting reasonable expenses. And there have been cases where if the detailed expense records have not been careful, there are firms that, well, they needed a computer to review documents, so they expensed the computer, and the lawyers putting the papers together didn't look at the level of detail and that came out when the judge asked for records.

PROFESSOR GREEN: On a different issue that you raised, the solicitation issue: One thing I imagine class counsel does is find clients. But another thing is investigate, right? And so you might want to contact prospective class members in order to gather information. In that case, can you just call them up on the phone or—not that you really drive by their house and knock on their door. But in theory, the solicitation rule makes it a solicitation when you contact someone for the purpose of pecuniary gain. But if the purpose is evidence gathering, is that okay?

MS. SALZMAN: Well, first of all, you can't just gather evidence if, for example, someone is a former client of a defendant, right? There are particular rules as to if someone—

PROFESSOR GREEN: I am talking about prospective plaintiffs though.

MS. SALZMAN: I think if you fully disclose who you are and it is transparent. I think the important issue for the person that's soliciting is you need to explain why you're calling, and advise them that you're a lawyer that is going to be bringing this case. You might advise them that they will have a lawyer—I mean, that would be the first question. Ask them if they are represented by counsel, so that you're not speaking to them directly. But I think it's common sense. You want to be as transparent as possible before you start asking someone a lot of questions. And you need to protect yourself, as anything you say is discoverable. It's not protected when you call someone just for factual background on the case.

PROFESSOR GREEN: When you sign up the client, do you say anything to them about their role as class representative? I think you do, because they probably wouldn't have a clue.

MS. SALZMAN: Yes, we tell them what their duties and responsibilities will be as a class representative. And in fact we make that part of our retention agreement.

PROFESSOR GREEN: Do you shop around for someone who is not going to opt out or—

MS. SALZMAN: I don't shop around.

MR. ASCIOLLA: Well, Ethan, it turns out that a case is filed against five major manufacturers, including your now retained client Ping-Pong Inc. You get a call from counsel from one of the other defendants. He wants you and the rest of the group of five to enter into a joint defense agreement. What are the considerations in deciding whether to join a joint defense group and what protections do you and your client need?

MR. LITWIN: So the beginning is just practical. There is going to be a joint defense group. The court is going to require a high degree of cooperation among defense counsel on briefing and a whole host of other issues. Plaintiff's counsel is going to want a primary point of contact. You're going to have a joint defense group. And if there is a joint defense group, you want to be part of it. Not just because it usually will be a cost-saving device for your client, but also because you want access to the joint work product and the information that's exchanged within the group.

So the question really isn't do I join it, although we have been asked that question more times in the last year than in my entire career, you want to be part of the group. The question is what do you need in the JDA to protect your client? Most of these things are pretty well understood now. You want to make sure that the joint defense agreement does not create an attorney-client relationship for you and any other client in the case or for any other counsel in the case and your client.

You want to make sure that the agreement preserves absolutely your right to act in the best interests of your client. That no matter what, you have no duty to any other member of the joint defense group, save with respect to jointly prepared work product, and that you have the freedom to settle when you want to settle, to make whatever arguments you want to make and to represent your client to the best of your ability.

You also want to be very conscious about conflicts. And this is I think a developing area of joint defense agreements where in the last three or four years we have come a long way. At some point someone is going to begin to cooperate with the plaintiffs, and the question is what does that do in terms of a conflict within the joint defense group, and if it does create a conflict, what does that do to the privilege? And it is not an exact science, but it is important to have language in the joint defense agreement that provides for at least that if any defendant going to begin actively cooperating, even in advance of a settlement, that they have to give notice to the group so that the group can have time to make a reasonable decision as to conflicts.

MR. ASCIOLLA: Professor Green, any comments on a JDA?

PROFESSOR GREEN: Could you have a provision that says if you withdraw from the joint defense and cooperate with the Plaintiff you waive the privilege?

MR. LITWIN: It is not dealing with withdrawal. The scenario we are concerned about is the reverse, where the Defendant does not withdraw.

PROFESSOR GREEN: No, no, I understand that. But if you want to make it harder for people to—

MR. LITWIN: I would never agree to that.

PROFESSOR GREEN: You wouldn't agree to that because you want to reserve the right for your client to cooperate—

MR. LITWIN: As I assume everybody else does.

PROFESSOR GREEN: Okay. And what if it's not the Plaintiff they are cooperating with, but it's the prosecutor who says we want you to hold off on letting them know that you're cooperating, because we want to be able to exploit the information you're giving us, without all these other Defendants knowing. What about that?

MR. LITWIN: That's something we deal with all the time. I am involved in a case now where we had scheduled a joint defense group meeting to actually get the amnesty applicant to give us the same proffer they gave the Justice Department. And hours before that meeting, the Justice Department told them they couldn't give us the proffer. So we deal with that situation all the time. And this is a joint defense agreement for the civil case, and we all know that the Justice Department is going to have their rules and their expectations, not just for the amnesty applicant but anybody else who is actively pursuing settlement.

PROFESSOR GREEN: So let's suppose the DOJ lawyer said, "I know that your joint defense agreement says that you have to give notice, maybe timely notice or notice right away, but I want you to delay giving notice." What would you say to the other four Defendants?

MR. LITWIN: That they are settling?

PROFESSOR GREEN: That you're cooperating with the government.

MR. LITWIN: The agreements don't talk about the government. They only talk about the Plaintiffs. Because that's really what creates the conflict in the civil case.

PROFESSOR GREEN: Okay.

MR. LITWIN: Although maybe that's something to think about, quite candidly.

MR. ASCIOLLA: So the case is moving along in discovery. Importantly, the class is not yet certified. Ethan's client has no desire to settle. However, it does want to reduce its overall exposure. The client instructs Ethan to contact some of its customers, many of which are class members, to see if they would be interested in individual settlements.

Ethan, can you as a defense counsel contact class members prior to certification?

MR. LITWIN: Yes. And there are a number of rules and principles that come into play here. So let me walk through these. The first is Rule 4.2, and that precludes counsel from contacting directly any represented party by any court's definition prior to certification. Absent class members are not represented parties. You also have to be very mindful of Rule 4.3; that's really the most important thing here. You're dealing with an unrepresented party, and in some cases you may be dealing with, in my case, a business person and not necessarily a lawyer on the other side. And you need to be very careful because you are not allowed to give legal advice, even suggested legal advice, to an unrepresented party who is adverse to your client. And that's Rule 4.3.

It's also important to note, as Greg did at the start, that Rule 23 plays a role here. Rule 23(d) gives the court the power to determine the procedures for notice and to supervise notice to the class. Many courts have said that that gives them authorization to set rules for precertification contact. So under Rule 23(d) many courts do enter protective orders that set forth the terms upon which counsel for the Plaintiffs and counsel for the defense can contact unrepresented parties prior to certification.

Then finally, the First Amendment plays a role here. Obviously, this is speech. You're engaging in commercial speech. It is a form of protected speech. It's one of the lower levels of protected speech. But the court has to be mindful that in crafting any order they can't overly restrict the parties' right to speak. And the rules have to be narrowly tailored to the very facts of the case and the particular concerns involved.

So, for example, if this were a case—instead of an antitrust case it was an employee rights case; you have a large number of issues that would be very different, most notably the power that the Defendant would have over its employees, and the court may be justified in going further with its protective order in that case.

So a few guidelines from those rules, yes, I can contact class members prior to certification. Yes, my client can also do that, although there may be problems with them doing it directly that aren't ethical but practical. I can propose and negotiate a settlement prior to certification with any absent class member, but I've got to be very careful. I can't mislead. I can't deceive. I can't coerce. I can't lie. I can't undertake communications in bad faith in any way, because I have to be mindful it's an unrepresented party. But of course, this is all extremely fact specific and really specific to the case at hand.

MR. ASCIOLLA: You just listed a whole bunch of things you can't do. Do you need to disclose the existence of the class action litigation?

MR. LITWIN: Yes. That's very easy.

MR. ASCIOLLA: Assume for this question, Ethan, that Ping-Pong Inc. never returned your initial phone call, but you have another idea to get involved in this litigation. You represent a group of opt-outs or potential opt-outs; how can you solicit class members in that way?

MR. LITWIN: So this is going to be very difficult in our hypothetical situation, because Ping-Pong Inc. is either a client or a former client. If it's a current client that's the beginning and end of the story. If Ping-Pong Inc. is a former client, this is a conversation for me to have with our general counsel to figure out if there is any expectation of further work, what duties we owe to them. Do we have any information as a firm that may be relevant to this litigation? Can we get a waiver? Do we need a waiver? And do we set up a Chinese wall or something that would work? I have no answers to that. That's Jim Kobak's job, not mine. I just know to ask the questions.

Assuming we can proceed, we may need to look at the various jurisdictions that may be at issue here to see what the rules are as to when an attorney-client relationship is formed. It is not clear. It's not clear in the Second Circuit. I know of no jurisdiction where it is fully clear. A majority of courts I think hold that if at certification an attorney-client relationship is formed with the entire class, that would preclude my ability to solicit opt-out plaintiffs. However, ABA Formal Opinion 07445 took a differing view. And that rule said that you had—that the attorney-client relationship was not formed until the end of the opt-out period. That rule is followed in certain courts, but you would need to very carefully research the jurisdiction and perhaps the judge, whether it was here in the Second Circuit. It's just not settled yet. I have a couple of cites for this, because it was one of the interesting questions I looked into: the *Dodona* case, which is 300 F.R.D. 182 (S.D.N.Y.) 2014, and the New York City Bar Formal Opinion of 2004 No. 1. They both deal with this issue as well.

PROFESSOR GREEN: Can I jump in on a couple of these things, but the last one first?

So the question, as I understand it, is if you don't have a client, which is a sad state of events, right, can you solicit an opt-out? And I would say even if the class is certified you could solicit an opt out, because you don't have a client, so the no contact rule, Rule 4.2, doesn't apply to you. The no contact rule says if you're representing a client, you can't communicate with another party—I am paraphrasing—in the matter, if they are represented. But you're not representing a client.

Now, it may be unprofessional to try to poach people's clients. But nothing stops you from going up to a party who—it doesn't have to be an opt-out, it could be anyone who is unrepresented and saying I could do a better job. So that was one point.

Going back a little bit, on the no contact rule and the question of whether the defense attorney can try to settle I guess with prospective—with class members before the class is certified, two things. One is that this is an area, because it's in a class action, that's heavily supervised, and you get a lot of opinions. And in general, the no contact rule, after conflicts, is the most written about, at least in federal court opinions. That issue comes up a lot. There was a recent opinion of Magistrate Judge Francis where a Plaintiff objected, in a fair labor class action, to the Defendant's communication with individual class members, and it had been in writing and the class counsel's argument was that the writing was misleading.[1] Judge Francis said, "I am going to review this." He found it was not as misleading as some communications, but it was a little bit misleading, and he required Defendant's lawyer to send around another email that clarified the first one. I thought that was pretty interesting.

The other case that I thought was interesting—now Judge Francis' opinion was October 2015—was a November 2015 opinion by Judge Pauley in Dial Corporation against News Corporation.[2] In that case the Defendant wanted to communicate with members of the class after certification, at which point the no contact rule kicked in. But they were all corporations with counsel and very sophisticated, and Judge Pauley said, I know the rule technically applies, but I don't think the purpose of the rule really kicks in here, and the Defendant has relationships with all those Plaintiff companies. As long as you're not misleading and you give advance notice to Plaintiff's counsel, if you want to communicate directly with the class members, you can do that. And I thought that was really interesting also.

MR. LITWIN: Yes, I read that opinion also. It just goes to show that these rules are designed to run the entire gamut of cases out there. And in class actions you deal with plaintiffs who are individuals all the way to the most sophisticated companies on earth, and one size doesn't fit all. The courts have not adopted very, very strict rules on contact with even the represented parties. And it is important to very carefully research the jurisdiction, research the judge, and when it doubt ask for permission.

MS. SALZMAN: I'll add one thing. There are these companies that reach out to potential class members to sort of file claims or opt them out of class actions. There has been litigation involving these companies, because the communications that they make to class members and sometimes potential class members have been misleading. And I think *Interchange* is the most prominent case on this point, where Judge Gleason actually held weekly hearings to review what was going on with these companies in communication with class members, and he was very troubled by the information that was being fed to these absent class members, that weren't necessarily represented by counsel, and making sure that they got the right information to make the appropriate decision to stay in the class or not.

MR. ASCIOLLA: Hollis, some class members are confused about all these contacts from Ethan. They don't understand, class action, settlement, what are you talking about? So they call you—they learn somehow you've been appointed interim class counsel—for advice. And again, I remind everyone at this point the class has not yet been certified. Can you give advice to the absent class members that call you?

MS. SALZMAN: I would not give advice to absent class members that had called me, absent getting a court order that I was permitted to do so. I would go to court if a large number of absent class members were calling me telling me they were being contacted by lawyers perhaps not involved in the case, not court-appointed to represent the class. Because at that point I would think there was a real issue that needed to be addressed by the court. But I would not give legal advice to those absent class members.

MR. ASCIOLLA: Professor Green, any comments?

PROFESSOR GREEN: That seems very conservative. Let's suppose, for example, you're at a stage where you're trying to decide whether you want to accept a settlement or not on behalf of the class. Imagine a desegregation case, where you have a class and you want to know what people feel before you decide on what remedy to seek. Don't you need to talk to absent members of the class to figure out how they feel about all this? That's not to say you're giving them advice about opting out or not. Maybe you can't do that because you can't give disinterested advice. But what's wrong with talking to them? They are not quite your client, but they are kind of, you know.

MS. SALZMAN: Well, I do solely antitrust cases, so people have less feelings because it's financial. But I would have my class representatives go and speak to them and get their ideas about the case. And I think that they are the most informed—generalized, they are the most informed injured parties or potentially injured parties in the case. They know what's going on in the litigation. They just have more of an understanding of the facts in the case. So I wouldn't need to go, I don't think, beyond that.

But it's certainly a good idea if you had that scenario, if there was a large group of people where they actually had more than just a financial stake at risk, that perhaps speaking to more would be a good idea. But I don't know what the appropriate forum would be to do that or whether you would want to get a court order and hold a meeting or something very inventive to capture all those ideas. Because you can imagine in a class action the number of ideas that range within a particular class are pretty vast.

PROFESSOR GREEN: I am not saying you have to. I just thought you were mighty conservative in thinking that you can't talk to them.

MS. SALZMAN: I won't take that as an insult to call me conservative.

MR. ASCIOLLA: Kelley?

AUDIENCE MEMBER: Sure. Forget about whether you can or can't, but wouldn't those communications be discoverable? Isn't there sort of another reason why you might not want to create some negative record for your opposing counsel that can ask for that information with you?

PROFESSOR GREEN: We talked about that before. So do you think class counsel's communications with members of the class who are not class representatives are discoverable or are they work product?

MS. SALZMAN: Well, I think it depends. But I think it could be; it could go either way. It really depends on what you're asking them, what you're talking to them about and whether or not the court whose case you're filed before agrees with you, and it can be a close call. I think that's really the wild card.

MR. ASCIOLLA: Okay, let's move on to the settlement stage.

This presents unique challenges as to ethical issues. At some point the adverse relationship between the parties essentially ends, settlement is executed, and both sides unite to get it approved. With little adversity left to the parties with respect to the settlement at the approval stage, it's the court that steps in under Rule 23 to act as a fiduciary to the class to ensure the settlement is fair, reasonable and adequate, and that the class has been provided sufficient notice of the settlement.

Ethan's client decides to begin settlement negotiations. Hollis, you are in charge of negotiations with Ethan to settle the case on behalf of the class. Your client is a class representative in the action. What responsibilities with respect to settlement as to your client?

MS. SALZMAN: Well, typically in class actions, after settlement negotiations, I do advise the client as to what the settlement parameters are, and generally the client is relying on the lawyers to agree with those settlements. They are, in most cases, less sophisticated, perhaps even individuals who don't have the experience to understand what the appropriate numbers are or parameters to settle for in a class action, especially in an antitrust class action. Certainly, they are more interested and understand more about cooperation that may be available to prosecute the case against other defendants; that would be more meaningful.

But we do advise the client as to what we deem to be a reasonable and fair settlement on behalf of the entire class. And they usually ask, well, what does that mean for me? And there is no way to tell at that point in time what that individual class representative would get.

MR. ASCIOLLA: Do you need to get the consent of your client to the settlement?

MS. SALZMAN: You don't need to get the consent of your client, but typically clients do consent to the settlement. If they didn't, they, like any other class member, have the right to opt out or object to the settlement. Of course, you hope that that doesn't happen. But it does.

MR. ASCIOLLA: Hollis, there is a blow provision in the settlement which most people know means that the defendant has the option to walk away from the deal. A certain percentage of sales opt out in settlement. Do you have to inform the class of the opt-out percentage?

MS. SALZMAN: Typically—well, you do not have to advise the class of the opt-out percentage, just the fact that there is this what's called a blow provision. Typically the percentage of the blow provision is a confidential side letter that is submitted to the court only. And the rationale for that is if other lawyers see that percentage and they want to try to tank the settlement, they may work very hard to get to that percentage of the class. That's been something that's been accepted by courts across the country.

MR. ASCIOLLA: So Hollis, the class has been notified of the settlement. Absent class members start calling you for advice as to whether to stay in the class or opt out; they want to know where they can get more money. Can you advise them?

MS. SALZMAN: What I do is explain to them what their rights are as set forth in the notice, and what it means if they stay in the class, then they would be entitled to their generally prorated percentage of this settlement or the recovery of the net settlement fund in the case. And that if they found a portion of the settlement objectionable, they could file an objection and still a share in the recovery of the class. But if they opt out—if they stay in the class they also release their claims against the Defendant, if they opt out, then they would retain the rights to sue the Defendants, but they would not share in the recovery of the case. I would not tell them or advise them which way I thought they should go because my duty as class counsel would be to the class. I would advise them that they should seek outside counsel if they need advice on whether to stay in the case or opt out.

PROFESSOR GREEN: Do you tell them about the blow provision?

MS. SALZMAN: Well, I would hope I would remember to tell them about the blow provision, yes, but I would not tell them the percentage.

PROFESSOR GREEN: What if they ask?

MS. SALZMAN: I would tell them that is confidential.

PROFESSOR GREEN: Why? I assume that the named class representatives know, right? Or do you not tell them either?

MS. SALZMAN: You know, I have not had a class representative ask me what the blow provision number is. So I am not sure what—I don't think I've ever told a class rep, but I don't know if I would if they asked.

PROFESSOR GREEN: So you have no client here with whom you really have a duty to consult and to disclose?

MS. SALZMAN: Well, that's a very small aspect of the settlement, and it doesn't affect the settlement amount or the terms of the settlement if there is cooperation or the release. These are the terms of the agreement that are central and that the class members should know about. The fact that there is a blow provision is an important factor, but the amount of the blow provision is not found to be an essential element that needs to be disclosed in notice. And those notices are all subject to court approval and they are put together by media experts and notice experts in the field.

PROFESSOR GREEN: It's interesting only because if you had an individual client and you were counseling the client, I can't imagine there is very much that you're allowed to not tell the client in terms of the settlement.

MS. SALZMAN: Do you mean a nonclass?

PROFESSOR GREEN: Right, an individual.

MS. SALZMAN: Yes. We wouldn't have an opt out.

PROFESSOR GREEN: That's what makes this interesting.

MR. ASCIOLLA: So Ethan, you care about this settlement of course getting approved. What role do you, as defense counsel for the settling Defendant, play in ensuring that not only the settlement of the notice is fair, reasonable and adequate so it can get through the court and approved and your client get final judgment?

MR. LITWIN: Well, I do have a client, and they are going to be very, very interested in the terms of the settlement, and I do need their consent. So that's very different. This is one area where practical considerations are really going to trump ethical considerations. My client is going to be involved in every detail of this settlement. At times we may ballpark the risk of objectors and what they are going to say and what the court might do, and quite frankly the prospects of a settlement getting approved. It is going to be through that counseling we are going to largely fulfill our role. In the hearing itself, obviously, we are not going to lie to the court or mislead the court in any way. But we would hope that our client would want to approve and give their consent to a settlement that provided adequate notice. Because if not, you know, the settlement is going to be objectionable and could very well see us back at the negotiating table before long.

In terms of what is a fair settlement amount or format, I think it's very fact specific. We are going to largely follow the class counsel's lead in that regard. Once the settlement is signed, and we will support them at the hearing, but they are the ones who have the fiduciary duty to the class.

MR. ASCIOLLA: Finally, in the settlement area, Professor Green, any additional comments?

PROFESSOR GREEN: No.

MR. ASCIOLLA: Then I think we are ready for questions from the audience.

AUDIENCE MEMBER: I was just wondering where the last week's Supreme Court decision in *Campbell-Ewald* would have any effect on your thinking.

MR. ASCIOLLA: We do have questions!

MR. LITWIN: So it was a very interesting opinion, and it deals with a very difficult situation that probably never arises in an antitrust case.

So for those of you who are not aware, this is a case where the defense was trying to settle with the named plaintiffs to defeat class certification. In civil rights cases, employee rights cases, the amounts tend to be rather nominal. The defense position was, well, I offered full settlement to the plaintiffs, all of the named plaintiffs, of all damages. And there can be no dispute that we are going to make them whole, therefore, there is no dispute here, and the case should be dismissed. What the Supreme Court said—I think it was 6 to 3—was that if the named Plaintiff refuses that settlement, the case continues, because there are broader implications for the class. What it did not get to is really the home run issue that a lot of us struggle with, which is: is that practice ethical? Can you systemically—and let's take it out of antitrust that we all deal with, and put it into an area we can all come to agreement with in a civil rights case. Can a defendant kick out all of the named plaintiffs time after time after time to prevent certification, where the clear motivation is to undermine the class action? And that's something that the courts really haven't begun to answer yet, but I think they will do that.

MR. ASCIOLLA: Yes.

AUDIENCE MEMBER: Ethan, Professor Green, could you talk a little bit about judgment sharing agreements among the defendants and especially including provisions where anybody that drops out wants to take their market share with them?

MR. LITWIN: You know, there are more practical issues than ethical issues. I have not had a case where my clients have wanted to do that. In antitrust perhaps it may be a little bit more difficult because of automatic trebling. But off the top of my head, I can't think of an ethical problem.

PROFESSOR GREEN: I think the defendants can enter into whatever agreement they want. At the end of the day, it can't stop the named plaintiffs from settling out. I assume in these cases all the defendants are individually represented.

MR. LITWIN: Yes. Although it does bring up the question that we took out of this, what happens if a firm is representing multiple defendants.

PROFESSOR GREEN: You may have a problem.

MR. LITWIN: That may raise a conflict.

MR. ASCIOLLA: Other questions? Okay, it is exactly 5:00. We did it!

MS. DUNLOP: Thank you so much to our final panel of the day and all of the panelists who were really wonderful.

Now we have the Young Lawyers Cocktail Reception, which is going to be next door here in Sutton Center, so not too far to go. And of course, tonight we have the Annual Dinner at the University Club. So we hope to see you at both of these events. Thank you.

Endnotes

1. *Agerbrink v. Model Serv. LLC*, 2015 U.S. Dist. LEXIS 145563 (SDNY Oct. 27, 2015).
2. *Dial Corp. v. News Corp.*, 2015 U.S. Dist. LEXIS 168363 (SDNY Dec. 16, 2015) (Pauley, J.).

Scenes from the Annual Meeting Antitrust Law Section Dinner

Jan. 28, 2016 | The University Club


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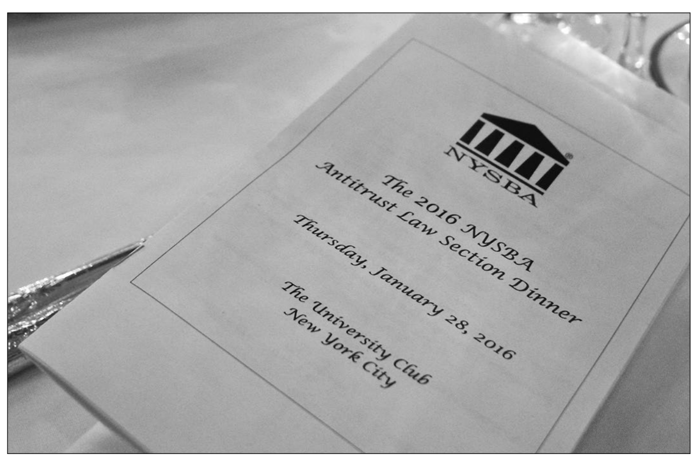
NYSBA
The 2016 NYSBA
Antitrust Law Section Dinner
Thursday, January 28, 2016
The University Club
New York City

The 2016 NYSBA Antitrust Law Section Dinner

MR. KATZ: Good evening and welcome to our Annual Dinner.

As I think many of you know, this morning I was the Chair of this Section, and now I am relieved of my duties. But I will start off our dinner remarks.

What I am going to do first is introduce the people who are sitting here on the dais. Starting on my right, to your left, Lisl Dunlop, who is now the new Chair of our Section.

(Applause.)

Ted Snyder, who is the Dean of the Yale School of Management and our keynote speaker this evening. Next to him we have Bill Efron, who is the Director of the FTC's Northeast Regional Office. Next to him Michael Weiner, who is the new Vice Chair and one of the co-chairs for this dinner. Then next is Wesley Powell, Secretary, and on the end is Hollis Salzman, who is another one of the co-chairs of the Dinner Committee for this evening. Now, to my left, and your right, we have Jeff Martino, Chief of the New York Office of the Department of Justice's Antitrust Division. Then next to him Nick Gaglio, who is Finance Officer of our Section for one last year; next to him is Eric Stock, who is the Chief of the Antitrust Bureau of the New York State Attorney General's Office. Last but definitely not least, Ilene Gotts, who is another one of the co-chairs of tonight's dinner. Thank you, everyone, for coming.

One more thing I would like to say before I pass this onto Lisl. I want to thank all our sponsors. We have some wonderful sponsors here, and we want to especially make note of our Platinum sponsors, Analysis Group, Compass Lexecon, GCG, The Garden City Group, and NERA Economic Consulting, as well as our Gold and Silver sponsors, who are listed in the program.

Having said that, let me pass this onto Lisl.

(Applause.)

MS. DUNLOP: Thanks, Elai. We will get another chance to applaud him in a second, because we have a little thank you gift for him, and I have a few words about his chairmanship.

But before I go on with that, I wanted to give a couple of thank yous to our New York State Bar Association support team, Tiffany Bardwell and Lori Nicoll. They did a fabulous job of helping us run the CLE program today and tonight's dinner, as well as all the other things that we do during the year.

I want to also thank the Executive Committee. Most of you are here along with your colleagues from your firms. Thank you so much for all of your enthusiastic participation and making this job of being in leadership so fun and easy.

When I reached out to people to discuss this whole day of CLE programs, everybody stepped up and put together an absolutely incredible day. More about that, too, in a second.

Over the last 24 hours there have been so many great events. Last night we had our Sixth Annual Women's Networking event and panel, which I attended. I think I was at the very first one, which occurred in the middle of a snowstorm. So a big thank you to Hollis Salzman and Mary Marks, who organize that each year. It is a really fabulous event. The women of this Section really enjoy it, and we want to keep doing it.

(Applause.)

Then, of course, today we had a full day of CLE programs. I enjoyed it, and I certainly hope you did. It was a great selection of panels. We started off with Elai's Antitrust Developments of 2015, which was very interesting and included analysis from Scott Hemphill and Martha Samuelson.

Bill Rooney moderated a panel on Financial Benchmarks, Competition and Antitrust Injury.

Bill Efron moderated a panel on Big Data and Privacy, something from the other side of the FTC house from what most of us deal with most of the time.

Dan Anziska and Stacey Mahoney put together a great panel on the Pharma industry and lifecycle management.

Finally, we actually had an ethics panel, which is a real achievement for our Section. We talked about ethical issues in managing class actions from the Plaintiff perspective, which Hollis Salzman addressed, and the defense perspective, which was addressed by Ethan Litwin. That panel was moderated by Greg Asciolla.

And in the middle, of course, we had the Annual Meeting. And I am really grateful that nobody said nay when my name came up for appointment of Chair. So thank you for that.

After that and before tonight—it's a really exhausting 24 hours—we had the Young Lawyers Section Cocktail Reception, which we have now been doing for a couple of years. And I wanted to thank Erica Weisgerber and Shoshana Speiser for stepping up and putting together a committee and organizing that event. It was really successful.

(Applause.)

And one more thank you for again the last 24 hours, and certainly their work wasn't limited to the last 24 hours, but it's been going on for months, and that's the Dinner Committee, Ilene Gotts, Hollis Salzman and Michael Weiner. Thank you so much for organizing tonight.

(Applause.)

So before I get on to thanking Elai—I won't take too long, but I just want to make a couple of personal remarks. I am so excited and honored to have been named Chair of this Section, and I want to express my thanks and gratitude. This has just been a wonderful experience, being involved with this Section. It is diverse in terms of gender, sexual orientation and age, and we have a really great span of types of practice and points of view within the Executive Committee and the Section more generally. I have felt enormous support for women in the Section and younger lawyers in particular, and you see this reflected here in the leadership year after year. I think it's a great institution and a fabulous Section to be involved in.

As far as this year, my main task is not to mess it up. Elai and all of the previous leaders have just done such a great job of building this Section and building up our activities.

The sponsors that we have had over the years, we thank you again. You have made it possible for us to do an enormous amount. We not only put on our annual CLE day, which this Section has done for many, many years, but now we have an annual summer merger program that Ilene Gotts puts together. We have an annual fall symposium that Bill Rooney puts together. We put on a program for summer associates. We put on an antitrust basics program for newer lawyers. We sponsor several fellowships for law students to work at the U.S. DOJ Antitrust Division and the FTC here in New York and the New York AG Antitrust Bureau. We sponsor a writing competition. All of that activity is made possible by our sponsors and the really energetic activity of the Executive Committee. We'll be continuing with all of that work, and maybe a few new things as well.

So to talk about Elai. He had a wonderful year as Chair. I have a huge list of his achievements for the year. In terms of our monthly Executive Committee meetings, they were incredibly interesting. He brought great speakers in to talk to us. He opened up those meetings much more broadly to the Section membership, so other people could come along and hear some of that material. He held the Summer Merger Program, the Antitrust Basics program, the Summer Associate Program, and the Fall Symposium. And in addition to that, he really focused on growing membership and enhancing the involvement of our members, which I think he's been really successful in, and diversity. The Fellowship Program has grown under his watch, and our Section and our Executive Committee have really benefited from his leadership.

So I wanted to say thank you again to Elai for passing the baton to me, and I really will try not to mess it up.

MR. KATZ: A nice blue box. Thank you very much, Lisl. I'm sure you won't mess it up. I'm sure you will do great. I appreciate your kind words. And you were right to mention the people who came before me who really made this a great Section that does a lot of great things.

One thing that a few of you here may know is, other than this Section, Lisl and I have another connection,

which is the Aussie connection. My wife is Australian, and therefore my children are too. So we share a connection to the land down under.

I want to very quickly thank the leadership. Rather than list everyone who has done so much to make this a really wonderful year, I just want to thank everyone. I want to point out especially Lauren Rackow, who was very helpful to me in the work I did over the years, the people seated up here and the people all around here who have done a lot of great work.

In addition to the things that Lisl mentioned, I also want to make note of the committee structure that was put in place several years ago that has made a great difference. I encourage those of you who have not yet gotten involved with our Section to get started with one of our committees. It's a great way to get to know people, learn a little bit about antitrust and get involved with this group of people. That to me is one of the things that I like most about this Section, and what I liked about being involved in the leadership is the community of friends that I have here. We have, really I think, built up a nice group amongst the New York Antitrust Bar. We have great friends and mutual respect for one another, regardless of what side of the aisle we come from. And we really share an interest in various intellectual and other more mundane interests.

Having said all that, I hope you guys enjoy the rest of this evening and our speakers and thank you again.

MS. DUNLOP: Thank you, Elai. So while our dinner is cooking, we thought we'd move onto our dinner speaker, Ted Snyder. I am going to give a very quick introduction to Ted, who many of you I'm sure have heard of.

Ted, of course, is the Dean of the Yale School of Management, and he has actually being called the most successful business school dean in the nation. So I was very interested to read that. He's served as Dean of the Chicago Booth School of Business and before that Dean of University of Virginia Darden School of Business.

But you might ask why the Antitrust Law Section might want the dean of a business school to come and talk to us. Well, hidden beneath that is Ted's true nature. He actually started as an economist with the U.S. DOJ Antitrust Division, and he now works with Analysis Group and does a lot of antitrust economics consulting. In addition to antitrust economics consulting, he was an expert in the famous *Deflategate* case last year. Although I don't know that we are going to hear about that at this time.

Without further ado, I am going to hand it over to Ted Snyder.

Keynote Speaker
EDWARD A. SNYDER

Thank you very much. My topic this evening is questions about global antitrust enforcement. An imperfect way to measure the tsunami-like expansion of antitrust regimes around the world is to calculate the share of world GDP under the jurisdiction of competition laws.

Back in 1950 the GDP share was under 37%. Now with 120-plus enforcement regimes we have 97% of the world GDP under global antitrust laws. Over the decades, heads of the Federal Trade Commission and the Antitrust Division have encouraged other countries to adopt antitrust laws. One might ask what U.S. interests have actually been advanced by the results. Some in the U.S. look back at some point and say they really miss the 1950s, when the U.S. was in fact the only substantial significant enforcement regime. Some look back fondly on the 1980s, as a period of nice duopoly between the U.S. and EU, in contrast to the future chaos with all these antitrust nodes activated, enforcers competing to punish violators all around the world. At some point will all of you who operate in this global antitrust administrative space recognize that the multitude of competition laws, even though they have similar kinds of words and terms in the statutes, diverge wildly in their application?

My plan for these remarks is to provide some perspective on these questions. I'll identify some divergences in antitrust policy and enforcement, and I'll consider the question that's, of course, important to economists: Whether economists will somehow guide us to convergence. And I'll consider whether and where the threat of retaliation by other countries will discourage misuse of their enforcement powers, misuse that may be motivated, for example, by protectionism. And I'll also observe that there is a big difference between the expansion that I just described and the exportation of the kind of antitrust enforcement that we have here in New York and the United States.

I am not going to offer a bottom line or precise conclusion. But just to preview things, I think that there is more risk of divergence than some people expect. On the other hand, I think of what some people would call the left-tail risk, the all-hell-breaks-loose kind of scenario, that risk is probably not so great.

Before I continue, I want to thank Lisl Dunlop and Elai Katz for this very kind invitation. This, by the way, contrasts with an invitation that I got a while ago from the American Bar Association. I was asked to participate in their antitrust workshop. I was tagged to play the role of economic expert in a class certification exercise, a mock evidentiary hearing. And I got really excited about that. I thought, wow, this proposed class looks sort of shaky to me, and I was excited. I was developing these arguments, and I was looking forward to being on the winning team. But then I looked at the agenda, and I realized the next day, after the class certification mock hearing, they were automatically going to go to merits, given that the class was certified. So I realized that I was like the guy in act one, who was going to be killed, and I would never get to act two.

When I got the invitation from Lisl and Elai, I asked for the full agenda, and I realized I get the last word, so I am very, very appreciative of that.

By the way, I won't refer to the fact that I was a professor at University of Michigan for 16 years, where I would only speak in 80-minute increments. I've been a dean for an equal number of years, and I know how to speak in 8-minute increments. I know you've had a long day, and you probably want me to be done very soon. I will, however, tell a story.

I remember very fondly six years ago there was a conference to honor Gary Becker at the University of Chicago. After a full day of Chicago-style discussions on policy and economics, Judge Posner had this spot, giving after-dinner remarks. He got up, and he pulled out his latest, probably first, close to final draft of his research paper, and he said well, I thought I'd present my latest paper, see if you have any comments. And that was a 90-minute exercise.

Back to the topic. In assessing global antitrust enforcement, I think we can do well to acknowledge one truth about a world with over 120 enforcement regimes. We have no theory to guide us for what global competition enforcement will mean for consumers, for static efficiency, for dynamic efficiency, for individual firms, industries, for law firms or for the economy. Just as there is no general theory of oligopoly, we cannot turn to a theory to help us understand what happens when we move to a world of many enforcement regimes.

Nevertheless, people of great stature have commented on what this world will look like, and I would like to cite the views of two people, a former Antitrust Division Chief Economist and a jurist. First, Larry J. White of NYU, close by. He's one of my former bosses at the Antitrust Division. He writes with John Kwoka in their 2014 treatise *The Antitrust Revolution*, about where American antitrust policy of enforcement is going. I think the lawyers will really appreciate this: Overall efficiency has moved to center stage, as the objective, or at least the key measure of antitrust policy, and there is widespread agreement as to what has been the driving force behind these changes. It has been the ascendance of industrial organization economics in antitrust policy-making. More sophisticated theory, they write, better adapted to specific issues has proven capable of identifying specific conditions under which practices may well have anticompetitive effects even when they are elsewhere benign.

I think it's fair to say that the Kwoka and White hypothesis is either of the following: The antitrust revolution that guided IO economists is irreversible, and hence we need not worry about future divergences and chaos, or in the weaker form, if all the enforcers around the world and all the lawyers will just listen to economists, it will be okay. And we'll assure convergence.

Indeed, Kwoka and White emphasize two points about the future. One, the paramount importance of economics in the antitrust process is firmly established. Two, advances in economic understanding can be expected to improve the rationality and consistency of antitrust policy. While a considerable range of acceptable policy remains, to an increasing extent that range is informed and bounded by industrial economics. In that respect the antitrust revolution seems certain to be ongoing.

By the way, I enjoyed the second panel today on Libor, and I viewed that as an opportunity to test the paramount importance of economic's hypothesis. I checked to see if after Andrea Shepard gave her excellent economic analysis all the lawyers with different views decided to join the revolution and just say yes. I noticed that they didn't, and for some reason they had some other things to say.

But more seriously, if one were to accept the White and Kwoka view that IO economists are increasingly influential, they obviously don't run either the Antitrust Division or the FTC. By the way, the FTC introduced the chief economist position in 1915. The DOJ formalized the Economic Policy Office, now at the EAG, in the late 1970s. The chief economist function is well developed; over 20 IO economists have held the position there and many more at the FTC.

But what about around the world? The EU introduced the position of chief competition economist in 2003; four economists have held the post. Brazil created the Department of Economic Studies in 2009. I am not sure what that is, sounds a bit like a backwater. Japan is ambiguous. The Japanese Fair Trade Commission did not specify a chief economist role, but they did create the

Competition Policy Research Center to draw on economic and legal scholars to plan, propose, and evaluate competition policy from the medium and long-term perspective. Note the absence of an immediate involvement. China does not have a well-defined chief economist role but employs Ph.D economists. The Competition Authority in India was established in 2003; they do not have a chief economist role.

From my review of this set and other sets of regimes, I think it's fair to say that if IO economists are going to chart the future of global antitrust policy and enforcement, they probably need to fill out their roster and be a little bit more visible.

Let me turn to a different source of insight, Judge Diane P. Wood of the Seventh Circuit. She wrote academic articles on local antitrust enforcement, and many of you may be familiar with them. In 2002, observing that antitrust laws in various regimes differed, sometimes subtly, sometimes abashedly so, and that these differences impose costs, Judge Wood asked: Assuming that the case for harmonization has been made, what models are available to accomplish this goal and which one should we adopt? Her conclusions, which were efforts to obtain an international consensus on competition law principles, have thus far met with only modest success, to the point that the search for either harmonization of national competition law rules or the establishment of any kind of supranational procedural or substantive regime seems to be an impossible dream. And, "a tortoise-like approach to harmonization is the only way that will win the race more effectively over the long run, and that it would be unwise to push too fast for global competition law standards."

From other comments that Judge Wood has made, I think she remains of the view that the slow harmonization approach is best, but we'll see. I am looking forward to getting an update next month.

But what are my thoughts? My experience, I admit, has been framed. I worked on transition economies in the 1990s, when I worked in China and India and the former Soviet Union. And during those exciting times 3 billion people joined the world's market-oriented economies. This may sound a little bit off the mark, but I actually don't think it is. During that time the expectation of many, especially economists, was that other countries would converge to a U.S.-style approach. Those expectations, however, gave way to the continuing reality of a diverse set of market-oriented economies. Yes, demand curves sloped down. Yes, Metcalfe's law on networks is important everywhere, but the rules of the game vary tremendously. So I bring a fairly large degree of skepticism to the view that economics will guide policy and a substantial degree of skepticism about the prospects of harmonization in global competition policy. Indeed, one can make a case, based on several factors, that optimism about convergence should give way to the view that all hell will break loose. (1) the laws differ; (2) economic analysis is far from settled in many areas; (3) the objectives of enforcers differ; (4) economies and societies are at different stages of development; (5) China and India are just getting started. And for those of you who are thinking about retaliation in a complex game-theory way, the threat of retaliation as a means to discipline cross-border harassment, while a factor in some settings, is mostly going to be, I would argue, absent in others.

Let me pursue this. There are, of course, ongoing policy debates in the U.S. More relevant is manifest divergence across regimes in the three major areas of antitrust policy and enforcement: monopolization, mergers, and cartels. Given the expertise here, I am going to be brief and just cite an example or comment about each category.

Let's take monopolization. Investigations into Google search practices were opened by the EC in 2010 and by the FTC in 2011. Despite extensive cooperation between the two authorities, the investigations ended differently. The FTC closed its investigation in 2013, concluding that consumers were probably benefiting from Google's decision to prominently display its vertical content, and any negative impact on competitors was incidental to improved search quality.

By contrast, the EC brought abuse of dominance charges against Google for the same conduct, given its favorable treatment of Google search results. Might the role of national champion, the question of who is likely going to emerge in these settings where network effects is important play a factor in each decision? Maybe in Europe the approach puts more weight on protecting rival entrants, maybe an artifact of the EU's experience with state-owned enterprises? I don't know.

Let's turn to mergers. The merger between Glencore and Xstrata, two mining firms, prompted the review by competition authorities in Australia, China, the EU, South Africa, and the U.S. The merger was approved quickly in all jurisdictions, except China. China took over a year to review the merger and required Glencore to auction Xstrata's Las Bambas copper project in Peru and to continue offering long-term arrangements to sell copper to Chinese customers. These conditions were imposed even though Glencore and Xstrata did not hold or operate assets in China, and their combined share of copper concentrate sales to China was only 12%. China, however, is the largest importer of copper concentrate in the world, and they, I think, saw this as an opportunity to advance their national and industrial interests by objecting to the merger. And by the way, that Las Bambas mine was subsequently sold to Chinese companies.

I am not going to say much about cartels, but the globalization of economic activity has led to the result that several antitrust authorities have imposed penalties on firms involved in the same litigation. We see that in *Vitamins*; you see that in *LCD*. And that raises, of course, the long-standing policy question: What's the optimal level of penalties? I think it's fair to say that the effect of the damage multiple in these settings may take on the character of a random variable, when in addition to the sources of variation in the U.S., you've got multiple global authorities each imposing substantial fines.

I have one last factor to identify that suggests we should have a fair level of concern about the future. Some hope that potential retaliation will discipline authorities that enforce their antitrust laws to benefit domestic interests. Retaliation is indeed relevant in some settings, but the likelihood of retaliation and hence its threat value depends on the depth of the economic relationship and opportunities to retaliate. Retaliation is wholly irrelevant when the relationship between the countries in question does not involve substantial economic interactions and the opportunity to actually retaliate in antitrust enforcement actions.

I've identified why I think the risks are greater. Let me now try to go the other way and put some bound on the bottom end. I would like to provide some perspective as to why I don't think the all-hell-will-break-loose scenario will actually result.

First, while it's true that antitrust laws now cover virtually all of the globe, there is (1) a difference between having an authority and having an active authority. This is a pretty obvious point. And (2) there is a huge difference between the expansion of antitrust enforcement regimes geographically and the exportation of U.S.-style enforcement apparatus.

On the first point, the global antitrust enforcement industry as measured by fines imposed by national authorities continues for the most part as a duopoly, U.S. and the EU. I'm in the process of getting more precise data, but the vast majority of fines are imposed by those two enforcement regimes. This suggests if you're concerned about the effects and the actions of these other regimes, rather than focus on the penalties, fines, maybe it's more important to focus on possible orders coming out of these other authorities. But I am not betting on anything close to across-the-board activation of enforcement authorities. The various BRIC countries and BRIC-plus countries could target foreign entities with actions that are potentially costly. If they start to do that, those same actions may end up also negatively affecting the interests of their own domestic firms.

On the difference between expansion and export, we all recognize that the U.S. enforcement regime has a set of features that are not duplicated anywhere; it's dualism cubed. We have federal and state, we have criminal and civil, and we have public and private. And we have other things too; we have treble damages, one-way fee shifting, and there is much more of a legal structure in the U.S. that complements antitrust. No other country has anything like what is found in the U.S. But imagine if sometime down the road Brazil, China or Russia started putting U.S. people in jail. That would change things dramatically in my view. There is one thing that would really push us in a very different direction, and that would be the exportation of criminal enforcement.

Let's now turn to private enforcement. The recently introduced EU directive on antitrust damages creates a pathway for private antitrust litigation, but it lacks a lot of the features that we found here concerning pretrial discovery and other factors. Other provisions for private enforcement specifically say no treble damages. While private antitrust regimes are being established, they really don't look like the U.S. So this characterization that I've used going from two to over 120 misses major differences in actual enforcement regimes and the distinctive role of the U.S. antitrust approach.

Finally, I just want to go back to economics. I was making fun of my former boss, Larry, quite a bit. I don't believe in the economics antitrust revolution the way he thinks about it, but I have a lot of confidence in economics, as do many of you. Even though it's far from definitive on all fronts and even when the guidance is clear, economics may not win the day. My long-run confidence comes from a very basic point in economics. Good economics has value added. And the value add comes from, in this case, the underlying antitrust law and antitrust economics. Indeed, sound application of antitrust laws can improve overall economic efficiency. So there are more gains than there are losses, hence political interests in the long-run do favor good antitrust enforcement.

Let me close with a few provisional implications about global antitrust enforcement. The expansion (1) adds risk and uncertainty; (2) the extent of convergence may differ across major areas of enforcement, cartels, mergers and monopolization; (3) the constraint from the threat of retaliation is uneven at best. If you take those three areas of major enforcement, I would expect more convergence in an area like cartel enforcement between the EU and U.S. where the economic relationship is substantial and there is a long history of enforcement actions.

By contrast, we should be more wary about monopolization enforcement in all other peer-wise settings. And as I suggested, I'd be even more concerned about high-technology cases where network effects increase the stakes for a small number of rivals, some of whom may be vying to become national champions. Fourth, expect countries to sequence industrial policy objectives and the development of competition policy and enforcement. Not instant or near-term activation. Don't expect U.S.-style enforcement, even when other countries are in full swing, because of the complementary inputs in the U.S. legal system. Deterrence increases in the cartel setting in some mega sense but with imprecision.

Next, I expect new defenses will continue. There is a broadening view of how companies should defend themselves, including, for example, broader-based communication strategies that emphasize how firms innovate or play well, are good partners, etcetera.

What about economists? I think the implication for economists is that the analysis has to be framed in the relevant context. Oftentimes the economic analysis needs to be much more clear and simple and compelling. For example, we know nine things about cartels. What are the effects of cartels? Here are nine things; do they actually apply?

I want to close and say I really enjoyed giving this topic some thought. I would value any comments from you in the days and weeks to come. I hope you don't grow old looking back fondly on the good old days. This remains a very exciting time, which is not too chaotic. And again, thank you very much for the invitation.

MS. DUNLOP: Ted, thank you so much for that really insightful speech. It gave us a lot to think about. I think I started out a little more optimistic about the prospect of convergence and harmonization than I feel right now. But I have to think about it a bit more.

Dinner is about to be served. Please enjoy, and then afterwards we have one final award. Thank you.

(Dinner was served.)

MS. DUNLOP: Hello, thank you. I hope you are enjoying the food. It's really great to see everybody catching up. Such lively conversation. But before we let you finish your wine and, of course, go to the dessert buffet, we do have one very important task, which is to award the Lifland Award to Bill Rooney, who is sitting here with his wife and son today. To introduce Bill and give the award, we have Bruce Prager, who is a previous recipient of the award.

BRUCE PRAGER: Thank you, Lisl. Good evening. Last year at this dinner, as Lisl just mentioned, I had the honor and privilege of receiving the William T. Lifland Award for 2015, presented by the Section. And this year I

have the equal honor of presenting the award to my good friend and colleague William H. Rooney.

The William T. Lifland Award is presented annually by the Antitrust Section, and I am quoting, "to a distinguished antitrust practitioner in recognition of his or her contributions and accomplishments in the field of antitrust and service to the Antitrust Section of the New York State Bar Association."

When Bill was informed that he would be receiving the Lifland Award this year, with typical humility, he asked that the presentation focus not on him but on William Lifland, rather than shining a spotlight on Bill. I certainly don't intend to shortchange Bill Rooney, and I will in good time tell you why he has been selected. But I will honor Bill's request and briefly share with you the considerable contributions of Bill Lifland that made him worthy of not only of being the first recipient in 1997 of this Section's award, but why ten years later, in 2007, the Section decided to name the award in his honor.

Bill Lifland—and I have to use full names to distinguish between the two Bills—Bill Lifland was a consummate antitrust lawyer and partner at the firm of Cahill Gordon & Reindel. For more than 33 years he wrote a regular column on antitrust for the *New York Law Journal*. He taught antitrust for decades as an adjunct professor at Fordham Law School, and for a similar period of time he chaired the annual PLI antitrust programs.

For many years Bill Lifland also gave the annual address that opens this Section's antitrust program, the program that the Section gave earlier today at the Hilton. Bill presented an in-depth review of that year's antitrust developments. He was also a mentor and counselor to many more lawyers, whether colleagues at his firm, co-counsel on client matters and even, I am told, to opposing counsel on those matters.

Across his range of activities, Bill Lifland was tireless and selfless in his devotion to the practice and teaching of antitrust law. It's easy to see why the Section decided to name the award that we give after Bill Lifland.

Now let me switch gears and tell you why Bill Rooney is a worthy recipient of this award, and he certainly is.

Bill is an antitrust partner in the New York office of Willkie Farr & Gallagher, where he chairs the U.S. antitrust practice. Bill handles a broad range of antitrust matters. He and I have worked together on both mergers and litigations as co-counsel, and I can tell you from personal experience that he is a zealous advocate, a serious intellect, and a tireless worker.

I spoke with several practitioners among you in preparation for tonight's remarks, and several used the same word to describe Bill: Tenacious. Bill is known for doing his homework. He analyzes the facts and the laws deeply and comes up with innovative and insightful approaches to the issues before him. He is a problem solver of the first order.

His list of client accomplishments goes on for pages, so I'll highlight just a couple. I don't want to keep you here too long. He's represented parties in many high-profile mergers, including Hudson's Bay, Saks Fifth Avenue, Teva-Cephalon—some of you may have heard of. He acted for clients in government investigations and private litigations, including the private equity antitrust litigation, *American Express v. Visa* and one that we did together, the Coalition For a Level Playing Field, Robinson-Patman litigation. That's a mouthful!

Bill has brought the same kind of dedication that he gives his clients to his work at the Bar Association. He chaired the New York City Bar Association Committee on Antitrust and Trade Regulation from 2001 to 2004. In 2007 he was vice chair of the Economics Committee of the ABA Antitrust Section, and he was, of course, the Chair of this Section with great distinction in 2012.

I think we recognize that Bill's perhaps most lasting contribution to this Section is his continuing leadership in creating and sharing what has become an annual tradition, the Fall Antitrust Symposium. These programs reflect Bill's dedication to continuing the kind of scholarship and exploration of antitrust that Bill Lifland exemplified in his teachings and writings. Bill Rooney's contributions to antitrust scholarship continue with a list of publications that goes on for pages. His articles have appeared in such prestigious and diverse publications as the *Columbia Business Law Review*, *Competition Policy International* and *The Journal of European Competition Law and Practice*.

Were I to stop right here, there could be no doubt that Bill is highly deserving of this award. But his contributions in service don't end with his client practice, bar service and scholarship. Bill is also devoted to his family, his church and his community. He has three nearly grown sons. His youngest, Jeb, a high-school sophomore, is sitting here at his table tonight, as is Bill's wife, Mary.

We are glad you both are able to be here. I know how proud you are of your dad and your husband.

As all of us who have families know it would be difficult if not impossible to accomplish the professional things that we do without the whole-hearted support of our families. Bill and Mary have both been avid supporters of their sons' travel pursuits, including travel hockey, basketball and Little League baseball. Bill told me he coached the kids YMCA basketball teams for all three of their sons during their elementary years, and as he describes it, he had a ten-year coaching career with quote "some success sprinkled among the years."

Bill also has a strong spiritual side, which not all of us can see, and serves as a lay Eucharistic Minister of his church in Darien, Connecticut, where he and his family live. He's also taught CCD classes, and leads a breakfast discussion series on a range of educational topics for his church.

And adding yet another dimension to this pretty impressive fellow, Bill serves on the Board of Trustees of the Dietrich von Hildebrand Project. Hildebrand, as some of us may not be familiar with, was a fierce foe of the Nazis and a religious, political, and philosophical author. The Hildebrand Project is the world's leading organization dedicated to the presentation and exploration of Hildebrand's work and writings. Pope Benedict said of von Hildebrand, "When the intellectual history of the Catholic Church in the 20th century is written, the name of Dietrich von Hildebrand will be among the most prominent among figures of our time."

As you can see, Bill Rooney's interests, dedication and scholarship extend far beyond the bounds of antitrust law and make him a worthy heir to the legacy of Bill Lifland. Thus, it is with great esteem and pleasure that I present to Bill the 2016 William T. Lifland Service Award on behalf of the New York State Bar Association.

Please join me in congratulating Bill on this honor.

(Standing ovation.)

WILLIAM ROONEY: Thank you, Bruce. Beautifully done. That was something else.

MR. PRAGER: It's a real pleasure, Bill.

MR. ROONEY: Thank you, Bruce.

Well, this is sort of "This Is Your Life," right. I mean I have a few remarks, but I am speechless. Thank you very much, Bruce, for those extremely generous and thorough remarks.

Needless to say, I am very honored to receive the Lifland Award. I mean honored in the way that one of the greatest thinkers of the west spoke of honor: as a flag that points to virtue. And the virtue here is that exemplified by Bill Lifland.

As you described so well, Bruce, Bill Lifland incorporated into his career all that attracted me to antitrust law. He handled complex cases that turned on a combination of law and economics. He combined practice and scholarship in a manner that enriched both. And he was of great service to his personal community, to the bar, and to the academy. Bill Lifland's legacy should guide us all and especially the emerging generations of antitrust lawyers in this room. He set a wonderful example of how to live a full personal life, how to be a well-educated lawyer and citizen and how to be a superb antitrust lawyer.

Yes, the Lifland Award is a great honor. I am extraordinarily thankful to receive it, and I salute the flag to virtue that Bill Lifland was and that his legacy remains.

This Section also offers an inspiration and an opportunity for fulfillment. A more recent great thinker spoke of The Law of the Gift. That is the principle that the more one gives of one's self, the more one enhances and fulfills one's self. Self-gift is reflected in the relationships that form communities and inform collegiality, working with and for others. I have found my time participating in the activities of this Section and collaborating with you to be enormously rewarding. Whatever good things Bruce mentioned about my activities in the Section have yielded far greater fruit to me. A living verification of The Law of the Gift.

I would like to thank you all for that.

Finally, I would like to offer two more personal thank yous. First to Willkie Farr, both past and present and indeed as represented here tonight, for providing such a terrific place to practice law and to develop a special and truly valued collaboration. You—not it—are truly a great firm.

And last and most importantly, I would like to thank my family for supporting me throughout my entire career. My wife Mary and my son Jeb are here this evening. They, together with my other two sons, Wills and Austin who are away at school, make up the family that has allowed me to become the person that I am. How can anyone do more for another than that? Thank you all very much.

MS. DUNLOP: Thank you, Bruce and Bill. Those are words to live by.

So now I get to say we are adjourned. That's the formal part of the evening. Please enjoy your wine.

We have the dessert buffet sponsored by a huge number of firms in the next room, and I hope you will stay and enjoy something chocolate and maybe some port. Good night.

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