

**New York State Bar Association  
Antitrust Law Section**

**2018 Chair's Report**

**OVERVIEW**

It has been a great honor and pleasure to serve as Chair of the Antitrust Law Section this year. Thanks to the many contributions of our members, I have been fortunate to preside over yet another robust year for the Section.

We began 2018 with a highly successful Annual Symposium in January: the five CLE panels were excellent and well attended, our Annual Dinner and other evening events were beautifully produced as always, and we achieved a record level of fundraising from our generous Annual Dinner sponsors. Beyond the Annual Meeting, the Section expanded its substantive antitrust programming, through a new, three-day Antitrust Expert Training Academy, multiple new programs sponsored by the Section's five substantive committees, and a joint CLE program with the Intellectual Property Law Section ("IP Section"), while maintaining annual programs such as the William Howard Taft Lecture and the Summer Mergers Program. We also commenced a thorough review of New York's antitrust statute, through a new Donnelley Act Review Committee ("DARC"), to determine whether amendments to the statute are warranted; DARC's findings will be the subject of a panel program during the Section's 2019 Annual Symposium. And we continued to focus on increasing the number and diversity of our membership, a longstanding priority for our Section and NYSBA at large.

This Report summarizes the Section's events and programming for the past year and recognizes members of the Section who made special contributions during 2018. But it must begin by thanking Tiffany Bardwell, our NYSBA Section Liaison, for helping make everything we do possible; Kathy Suchocki and Lori Nicoll, the NYSBA staff members who support our Annual Meeting and various other section events; and to my Willkie Farr colleagues Sharon Ballard and Sruti Swaminathan for their invaluable, year-long efforts to support my work as Section Chair.

**PROGRAMMING**

**2018 Annual Meeting & Dinner**

- The Section's Annual Meeting includes: (i) the Annual Symposium, a full day seminar on antitrust topics; (ii) the Annual Dinner, held at the University Club following the Annual Symposium; (iii) a Women's Networking Reception held the night before the Annual Symposium; and (iv) an Associates and Young Lawyers Reception, held immediately before the Annual Dinner. The contributors to these events are too numerous to name, but **special thanks to** Ilene Gotts, Hollis Salzman, and Michael Weiner for co-chairing the Annual Dinner; Hollis Salzman and Mary Marks for hosting the Women's Networking

Reception and moderating the panel discussion at the event; and to Shoshana Speiser and Erica Weisgerber for coordinating the Associates and Young Lawyers Reception.

- The Annual Symposium featured five excellent panels:
  - **“Antitrust Developments in 2017: The Year in Review,”** moderated by Elai Katz, and featuring Suzanne Wachsstock and Professor Harry First;
  - **“Criminal Practice: Recent Leniency Developments in North America,”** moderated by Stephen J. McCahey, and featuring Marvin N. Price, Ann Salvatore, Adam C. Hemlock, and Seth C. Farber;
  - **“Role of Market Power in the Digital Economy,”** moderated by Eric Hochstadt and Kellie Lerner, and featuring Nicholas Gaglio, Patrick J. DeGraba, and Professor Rosa Abrantes-Metz;
  - **“Practical Issues in Counseling at the Intersection of IP and Antitrust,”** moderated by Rebecca Kirk Fair, and featuring Melissa Scanlan, Alexander Long, and Renata B. Hesse; and
  - **“If at First You Don’t Succeed...Evolving Approaches to Health Care Mergers,”** moderated by Christine White, and featuring Lisl J. Dunlop, Dr. Subramaniam Ramanarayanan, and Jared Nagley.

**Thanks to** all of the Executive Committee members and other Section members who helped organize panels and participated as speakers.

- During the Annual Dinner, Executive Committee member Harry First presented Professor Edward Cavanagh with the 2018 Lifland Award, which is awarded annually to a distinguished antitrust practitioner in recognition of his or her contributions and accomplishments in the field of antitrust and service to the Section.
- The Dinner’s scheduled keynote speaker was Makan Delrahim, Assistant Attorney General, United States Department of Justice, Antitrust Division (“DOJ Antitrust”); Mr. Delrahim was unable to appear due to an illness, so his remarks were read by Andrew Finch, Principal Deputy Assistant Attorney General, DOJ Antitrust.

### **Summer Mergers Program**

- On July 11, 2018, the Section hosted its annual Summer Mergers program on the subject of “Hot Topics in High-Tech Markets,” which focused on high-tech mergers generally and explored the role of innovation, serial acquisitions, privacy and data aggregation in assessing the competitive impact of proposed mergers. The program was moderated by Ilene Gotts (Wachtell, Lipton, Rosen & Katz), and the panelists were: Aaron Hoag (Networks and Technology Enforcement Section, DOJ Antitrust); William H. Efron (Director, Northeast Region, Federal Trade Commission (“FTC”)); Professor Daniel Sokol (University of Florida School of Law).
- **Thanks to** Ilene Gotts and the Mergers Committee for putting together a fantastic program and to Cornerstone Research for sponsoring the event.

## **William Howard Taft Lecture**

- On September 14, 2018, the Section hosted its annual William Howard Taft Lecture, “After Amex: Multi-Sided Markets, Anticompetitive Effects, and the Rule of Reason,” which was moderated by Bill Rooney of Willkie Farr & Gallagher, and featured presentations by Professor Herbert Hovenkamp of The University of Pennsylvania Law School and Professor Dennis W. Carlton of The University of Chicago, Booth School of Business. The presenters addressed the legal and economic issues raised in the U.S. Supreme Court’s decision in *Ohio v. American Express Co.*, with a particular focus on the Court’s treatment of the economics of two-sided markets, and considered how the decision should be understood and applied to future cases.
- **Thanks to** Bill Rooney and his program committee for all of their hard work developing the topic and coordinating the event, and to Professors Hovenkamp and Carlton for their thoughtful analysis. Thanks also to Analysis Group for sponsoring the event.

## **Antitrust Expert Training Academy**

- On October 29-31, 2018, the Section held its first Antitrust Expert Training Academy, an intensive three-day program designed to train newer lawyers on the role of expert economists in antitrust cases, taking and defending depositions of experts, and presenting expert testimony at trial. Participants engaged in multiple rounds of mock depositions and trial examinations of actual economists employed by the economic consulting group Analysis Group, all under the watchful eye of seasoned antitrust litigators — most of them Section members — who volunteered to serve as instructors and judges for the event. The event was a great success; much like last year’s Antitrust Trial Training Academy, each of the participants showed marked improvement over the course of the three days and most commented on the particular value of receiving feedback from experienced practitioners.
- **Thanks to** Steve Houck and Abby Rudzin for co-chairing the program; Barbara Hart and Aidan Synnot for serving as program lecturers; Professor Andrew Rossner of Rutgers Law School for designing and facilitating the program; Analysis Group for sponsoring the program and supplying our terrific expert economists; DOJ Antitrust for providing the facilities for the program; and all of the Section members and other lawyers who served as instructors and judges for the program: Lisl Dunlop, Lawrence Fox, Andrew Frackman, Meg Gifford, Bob Hubbard, Jennifer Jones, Eric Lobenfeld, Stacey Mahoney, Peter Malaspina, Stephen McCahey, Richard Menaker, Saul Morgenstern, Edward Moss, Eamon O’Kelly, Jennifer Patterson, Bernard Persky, William Rooney, Laura Shores, Gerald Stein, Eric Stock, Aidan Synnot, Steven Tugander, and Christine White. Thanks also to our terrific NYSBA team for their support of the event.

## **Joint IP/Antitrust Sections Program**

- On December 4, 2018, the Antitrust Section teamed up with the IP Section to host a program titled “When Can A Trademark Settlement Be Unlawful Collusion? A Discussion Of The FTC’s Case Against 1-800-Contacts.” The program explored the legal, economic, and policy implications raised by the FTC’s decision, following an administrative trial, that settlement agreements resolving 1-800-Contacts’ trademark claims against certain competitors unreasonably restrained trade among the parties to the settlements, in violation of Section 5 of the FTC Act. The program was moderated by Eric Stock (Gibson Dunn), and the panelists were: Ted Davis (Kilpatrick Townsend & Stockton); Gerald Stein (Norton Rose Fulbright); Professor Scott Hemphill (NYU School of Law); and Jonathan Lutinski (American Express).
- **Thanks to** Eric Stock and the panelists for putting together a fantastic program and to the leadership of the IP Section for our productive partnership.

## **Monthly Executive Committee Substantive Programs**

- The Section’s Executive Committee meets monthly, and each meeting (except for the January meeting, which occurs during the Annual Symposium) concludes with a substantive program that is open to all members of the Section as a benefit of membership.
- **2018 Substantive Programs:**
  - Consideration of proposed Fairness in Class Action Litigation Act: Erica Weisgerber (Debevoise & Plimpton), John Beisner (Skadden), August Horvath (Foley Hoag), Jodie Williams (Moginrubin), and Randall Ewing (Korein Tillery);
  - Enforcement activities and priorities of the New York office of DOJ Antitrust: Jeffrey Martino (Chief of New York Office of DOJ Antitrust);
  - Legal and economic issues and recent litigation related to patent assertion entities: Bob Levinson (Charles River Associates) and Alan Devlin (Latham & Watkins);
  - Use of statistical screens and other empirical analyses to detect antitrust conspiracies, market manipulation, and fraud: Professor Rosa Abrantes-Metz (NYU Stern School of Business);
  - Recent criminal enforcement by the Antitrust Bureau, Office of Attorney General of State of New York (“NYAG Antitrust”): Beau Buffier (Chief of NYAG Antitrust);
  - “The Strategies of Anticompetitive Common Ownership”: Professor Scott Hemphill (NYU Law School);
  - Report on work and recommendations of DARC moderated by DARC member Michael Weiner (Dechert) and presented by representatives of the Section’s five substantive committees: (i) Cartel and Criminal Practice, (ii) Class Actions, (iii) Coordinated Conduct, (iv) Unilateral Conduct, and (v) Mergers;

- “Anticompetitive Bundling Compared to the Legal Standards”: Dr. Graeme Hunter (NERA Economic Consulting); and
  - Discussion of *Apple v. Pepper*, a case pending before the U.S. Supreme Court concerning whether buyers of “apps” via Apple’s App Store are “direct purchasers” from Apple, within the meaning of the U.S. Supreme Court’s decision in *Illinois Brick v. Illinois*: Bob Hubbard (NYAG Antitrust Bureau), Jay Himes (Labaton), and Rich Parker (Gibson Dunn).
- **Thanks to** all of the speakers and to the Executive Committee members who participated in the discussions that help make the monthly substantive programs so valuable.

**Substantive Committee Programs**

- In 2018, our five substantive committees were extremely productive, hosting numerous programs throughout the year. **Thanks to** each of our Committee Chairs, Vice Chairs, and Executive Committee Liaisons, and to each of the speakers and moderators who participated in the programs listed below.
- **Cartel & Criminal Practice Committee:**

Leadership	Stephen McCahey (Chair) Seth Farber (Vice Chair) Jeff Martino (EC Liaison)
Programs	<ul style="list-style-type: none"> <li>▪ <i>Criminal Practice: Recent Leniency Developments in North America</i> (Annual Symposium program, described further above)</li> <li>▪ <i>Working for the Enforcers: How to get there and what to Expect</i> (June 14, 2018)</li> <li>▪ <i>“No Poach Agreements: What the future Holds.”</i> (June 14, 2018)</li> <li>▪ <i>"Your Corporate Client Received a Grand Jury Subpoena: What Should You Do Next?"</i> (September 12, 2018)</li> </ul>

- **Class Action Committee**

Leadership	Erica Weisgerber (Chair) Ben Stenberg (Vice Chair) William Reiss (EC Liaison)
Programs	<ul style="list-style-type: none"> <li>▪ <i>Class Issues in Multi-Sided Markets</i> (May 30, 2018)</li> </ul>

- **Coordinated Conduct Committee**

Leadership	Michelle Zolnoski (Chair) Morgan Feder (Vice Chair) David Park (EC Liaison)
Program	<ul style="list-style-type: none"> <li>▪ <i>Antitrust in High Speed: Colluding Through Algorithms and Other Technologies</i> (January 8, 2016)</li> </ul>

- **Mergers Committee**

Leadership	James Goldfeier (Chair) Aleksandr B. Livshits and Puja Patel (Co-Vice Chairs) Michael Jahnke (EC Liaison)
Programs	<ul style="list-style-type: none"> <li>▪ <i>If at First You Don't Succeed...Evolving Approaches to Health Care Mergers</i> (Annual Symposium program, described further above)</li> <li>▪ <i>The Meaning of HSR Clearance</i> (March 12, 2018)</li> <li>▪ <i>Hard Topics in Antitrust Risk Allocations</i> (April 26, 2018)</li> <li>▪ <i>Merger Control in Brazil</i> (October 19, 2018)</li> <li>▪ <i>What M&amp;A Lawyers Want Antitrust Lawyers to Know</i> (November 1, 2018)</li> </ul>

- **Unilateral Conduct Committee**

Leadership	Eric Hochstadt (Chair) Kellie Lerner (Vice Chair) Robin van der Meulen (EC Liaison)
Programs	<ul style="list-style-type: none"> <li>▪ <i>Role of Market Power in the Digital Economy</i> (Annual Symposium program, described further above)</li> </ul>

### **Donnelly Act Review Committee**

- Numerous members of the Section have collectively devoted hundreds of hours to a detailed review and analysis of the Donnelly Act to (i) identify areas in which the Act may be out of step with federal antitrust law and/or other States' antitrust statutes, or otherwise in need of updating; (ii) consider potential amendments to the Act that could address any perceived deficiencies; and (iii) determine if consensus could be reached among the Executive Committee to recommend any such amendments to NYSBA for possible legislative action. This work was delegated to the five substantive committees, which researched key issues and prepared detailed memoranda summarizing their analysis and any recommendations.
- At the October 2018 Executive Committee meeting, representatives of the committees reported on their findings and recommendations, and a robust discussion followed. As a

next step, several of DARC's findings/recommendations will be the subject of a panel program at the 2019 Annual Symposium on January 17, 2019.

- **Thanks to** Michael Weiner, Bob Hubbard, Jay Himes, Elai Katz, Eric Stock, Harry First, Christine White, Kerin Coughlin and the many representatives of our substantive committees who led and worked on this important initiative.

## **OTHER PROGRAMS & EVENTS**

### **Outreach and Social Programs**

- *Smooth Moves*, April 10, 2018 (Wendy Wazsmer)
- *Spring Fling*, May 21, 2018 (Erica Weisgerber & Terri Mazur)
- *Why Antitrust?* June 20, 2018 (Wes Powell)
- See below-referenced diversity-focused outreach programs.

### **Writing Competition**

- Each year, the Section hosts a writing competition for currently-enrolled J.D. or LL.M. students at (i) New York law schools or (ii) if a New York resident, at any ABA-accredited law school outside of New York State. Submissions may be up to 50 pages, and may address any antitrust topic. The winner of the contest receives a cash prize of \$5,000 and publication of the article.
- **Winner:** The winner of the 2018 Antitrust Section Writing Competition was Maxime Fischer-Zernin (NYU Law School), for his article titled "Dynamic Pricing Algorithms As Inhibitors of Tacit Collusion." Mr. Fischer-Zernin has been invited to the 2019 Annual Meeting and Dinner.
- **Thanks to:** Ned Cavanagh for his continued leadership and organization of this program, and to Steve Houck and Steve Edwards for their help reviewing the submissions.

### **Diversity Fellowship Program**

- To promote both diversity and continued antitrust scholarship, the Section offers Diversity Fellowships that allow several law students to spend the summer working on antitrust matters at state and federal antitrust agency offices in New York with the benefit of a \$6,000 stipend.
- **2018 Winners:** Three law students received the fellowship for the summer of 2018: Frances Jennings (NYU Law School) worked at NYAG Antitrust Bureau; Halli Spraggins (Hofstra Law School) worked at DOJ Antitrust in New York; and Christine Yuan (American University Law School) worked at the FTC in New York.

- **Second Annual Diversity Fellowship Luncheon:** On June 20, 2018, the Section hosted its Diversity Fellowship Luncheon, which brought together current and former Diversity Fellows for an afternoon of fun and networking. During this lunch, the Section's Diversity Committee took suggestions for the upcoming program and selection process, which has begun for 2019.
- **2019 Applications:** DOJ Antitrust, FTC and NYAG Antitrust have again agreed to take on fellows for the coming summer, and the application process is under way. The Section plans to continue offering up to four fellowships for 2019.
- **Thanks to:** Wendy Waszmer, Nick Gaglio and many other members of the Membership and Diversity Committee and Fellowship Committee for their hard work in leading these programs; to the three antitrust agencies who host and provide invaluable guidance and feedback to our Fellows; to the New York Bar Foundation for serving as the administrator of the Fellowship Program; and to our past Fellows who perform valuable work for their host agencies and give us critical feedback on how to improve the Fellowship application process and program.

### **Diversity Interviewing Workshop**

- On June 20, 2018, the Section held its first workshop to provide training and feedback to law students and lawyers from diverse backgrounds on effective participation in job interviews. **Thanks to** Wendy Waszmer, Ben Sirota and Puja Patel for their leadership of the Workshop and to Jessica Delbaum, Lisl Dunlop, Stuart Lombardi, Komal Patel, GERALYN Trujillo who volunteered to serve as interviewers.

### **Mentorship Program**

- This was the third year of the Section's Mentorship Program, which was created to provide law students and junior attorneys (those in their first 5 years of practice) with mentors from the antitrust bar (attorneys with 6+ years of experience) who will provide guidance, direction, and advice for pursuing a career in antitrust. The goal of this program is to grow the Section's junior membership. This year, we celebrated the Mentorship Program as part of our *Spring Fling* event referenced above, which was attended by a number of mentors and mentees. The program continues to be successful.
- **Thanks to:** Erica Weisgerber, Terri Mazur, and Michelle Clerkin who continue to lead this program.

## **THE STATE OF THE SECTION**

### **Leadership Planning**

- Section Leadership held its second Leadership Retreat, in which current officers and former Chairs discussed long-range plans and the mission of the Section. (June 25, 2018). **Thanks** especially to all the former Chairs who contributed their time and ideas.



## Finances

- We began 2018 with the record-breaking financial success of our Annual Dinner Sponsorship program. This was immediately followed by the launch of a new program in which the Section offers our Annual Meeting sponsors the opportunity to sponsor any of five other section events (Spring Fling, Summer Mergers, Trial/Experts Training Academy, Taft Lecture, and Fall Symposium), at a cost of \$2500-\$5000 depending on the event. We received an enthusiastic response to this new program. Despite continuing to expand our program offerings, the Section's surplus is approximately \$200,000, and we expect to maintain a very healthy financial condition for the upcoming year.
- **Thanks to** Elaine Johnston for her outstanding service as Finance Officer for 2018; Ilene Gotts, Hollis Salzman, and Michael Weiner, who lead the Annual Meeting sponsorship drive; Elaine Johnston and Bill Rooney, who jointly designed the new sponsorship program; and each and every Executive Committee member who solicited sponsors.

## Membership and Diversity

- Current section membership is 535 (as of 11/20/18), which is up from last year at this time (520) but less than the two prior years — 557 in 2016 and 544 in 2015.
- The Section is proud of its diversity of membership and its steadfast commitment to increasing the number and diversity of our membership. Our Section has chosen to define “diversity” broadly, which has helped us maintain a constant and vigorous dialogue regarding antitrust law, enforcement, and policy. As a result of the Section's longstanding commitment to diversity:
  - more than 40 percent of the Executive Committee's members are women;
  - the current four-person leadership team (Chair, Vice-Chair, Secretary, and Finance Officer) has gender parity and LGBT representation;
  - the Executive Committee includes LGBT members, African-American and Asian attorneys, lawyers who are within their first ten years of experience, attorneys who practice in upstate New York and outside of New York State, private practitioners from both the defense and plaintiffs' bars, federal and state government antitrust enforcement lawyers, academics, and in-house lawyers from multi-national corporations.
- While there is always room for improvement, we are sensitive to enhancing diversity in the Section in terms gender; LGBT/sexual orientation; age; years of experience in the practice; race/ethnicity; representation of plaintiffs and defendants; employment as outside counsel, in-house counsel, government enforcers, and academics; geographic location of practice (New York City, upstate New York, and international); law students; and attorneys who practice in related fields (such as litigation and white collar).

- The Section continues to undertake important initiatives specifically aimed at increasing this diversity in its membership, such as its Diversity Fellowship Program, Diversity Interviewing Workshop, Mentoring Program, and other activities throughout the year.
- The Section also participates in NYSBA Committee on Diversity and Inclusion meetings to understand better what other sections are doing to increase their diverse membership.
- **Thanks to:** Wendy Waszmer, Will Reiss, Dale Worrall and the rest of the Membership and Diversity Committee for their leadership and efforts to ensure the continued growth and diversity of the Section.

### **Collaboration with other Sections/Bar Organizations**

- The Section is always on the look-out for opportunities to work with, and support the efforts of, other Sections and Bar organizations.
- In 2018 the Section continued this tradition through:
  - The above-described joint program with the IP Section
  - Co-sponsoring two events hosted by the new Section on Women in the Law
  - Starting a new collaboration with the Antitrust, UCL and Privacy Section of the California Lawyer's Association, which will begin with a joint webinar program, to take place most likely in the first half of 2019.

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Finally, many thanks to the Section for giving me the honor of serving as Chair, which has been enormously gratifying and fun. Best wishes for an even stronger 2019!

**Wes Powell, Chair  
December 2018**