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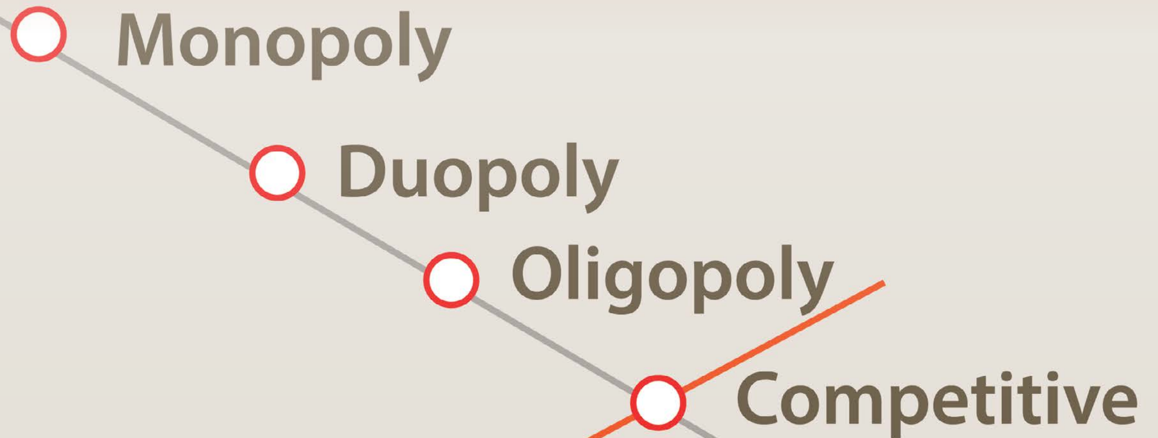
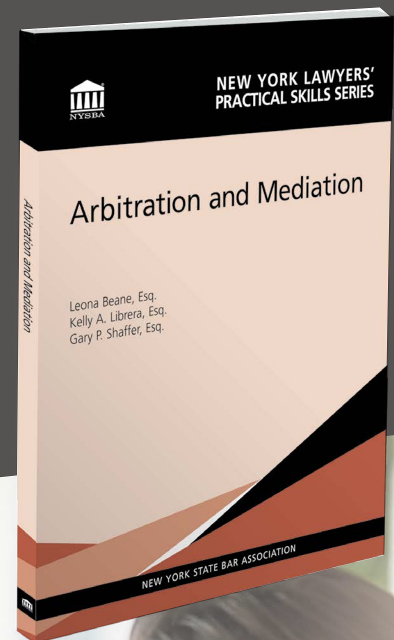


PUBLICATIONS

Arbitration and Mediation

Authors
Leona Beane, Esq.
Gary P. Shaffer, Esq.
Kelly A. Librera, Esq.



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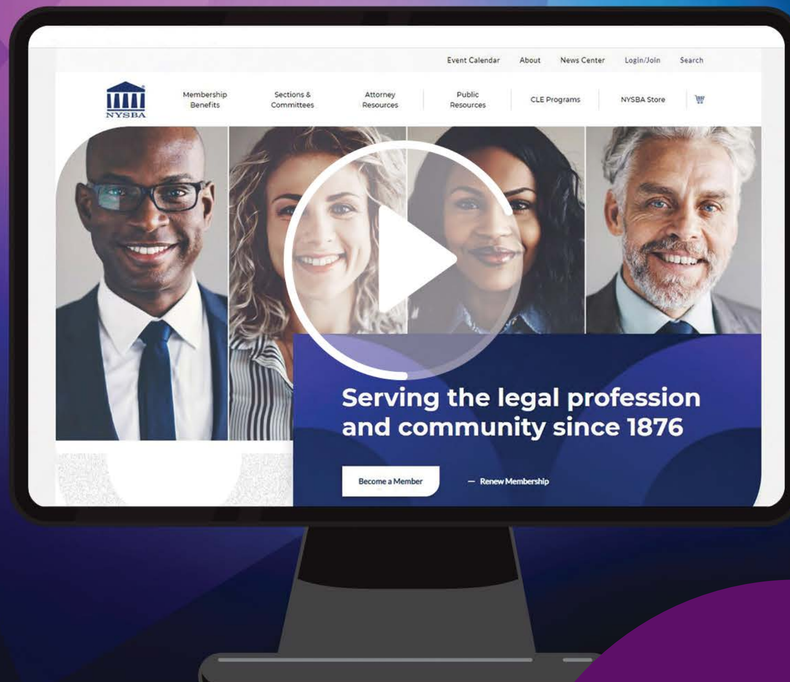

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ANTITRUST LAW SECTION

VIRTUAL ANNUAL MEETING

Friday, January 21 and Monday, January 24, 2022

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New York, NY

PROGRAM CHAIR
M. Elaine Johnston, Esq.
Allen & Overy LLP
New York, NY

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The Honorable Jonathan Kanter, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice

Welcome and Introduction

SIMONE SMITH: Well, good morning, everybody. And welcome to this morning's program, which is the Antitrust Law Section virtual Annual Meeting day one. The CLE portion today will run from 9:00 a.m. to 12:30 p.m., which is followed by a business meeting. To the attendees, please note that you must remain on the line for the program the entire time. As NYSBA is a CLE accredited provider, we have to make sure that your attendance is noted. Submitting MCLE codes is one way we can do so. We will be showing several MCLE codes throughout the day. At the conclusion of today's program, make sure to go back to your My Learning dashboard and enter in the codes to receive your certificate.

A PDF of the form and course materials are also in your dashboard and instructions on how to access them are in the greetings email that you received earlier today. You may need to refresh your dashboard this morning a couple times as we received some additional materials this morning. Please do not post any of the codes in the Q&A box. We would also like to ask attendees to please fill out the evaluations that are in your dashboard as your feedback helps us develop future programs. You're welcome to post questions using the Q&A portal in the zoom portal. We may not be able to get to all of your questions due to time constraints. I would now like to hand over the webinar to Ben Sirota, who is the chairperson of the Antitrust Law Section. Take it away.

BENJAMIN SIROTA: Great, thank you, Simone, and hello to everyone. Good morning, and welcome to the Antitrust Section Annual Meeting. We are excited to see all of you virtually for a second year and we've pulled together really a terrific lineup of programming. We hope you enjoy it. As Simone said, I am the chair of the Antitrust Section, but that honor lasts for only a few more hours. And so my role at this point is really to introduce my esteemed vice chair and incoming chair, Elaine Johnston from Allen & Overy, who is going to be your master of ceremonies for the events of today and Monday. So with that, Elaine.

ELAINE JOHNSTON: Thank you, Ben, and good morning, everyone. And welcome to the 2022 New York State Bar Association Antitrust Law Section program. As was the case last year, we are virtual. This year's program is spread over two half days, this morning and Monday morning. We've got two great sessions of CLE panel programming followed on Monday evening by our two receptions, our Young Lawyers' Happy Hour, and our event reception, where we will be presenting several awards and also hearing from the assistant attorney general, Jonathan Kanter, so please do sign up for those. The receptions are free and can be accessed on the NYSBA website. Before we move to this morning's session, I would like to thank everyone involved in making this program happen. First, our panel organizers today, Elai Katz, Dan Anziska, Nick Gaglio, Tee St. Matthew-Daniel, Jeff Martino, and Bill Allen, and also to all of our panelists who will be introduced in each case by their moderator.

Second, I'd like to thank our sponsors. Our platinum sponsors are Compass Lexecon and Analysis Group, and our gold sponsors are Bates White, FTI Consulting, Brattle, KL Consulting and Consilio. We thank them for their steadfast support of our Section, including through two years now of virtual activities. Thirdly, I'd like to thank Simone Smith from the New York State Bar Association and her colleagues Amy and others that I think are on some of these sessions today. Simone has been amazing. She's been tireless in her efforts to manage a wide range of logistical issues, particularly in the wake of the departure of our Section liaison three weeks ago. Fourth, I'd like to thank all of my colleagues from the executive committee, not only for supporting our programming activity today and on Monday, but also for helping to deliver value to the New York Antitrust Bar and community throughout the year.

I'd also like to thank my Allen & Overy colleague, Eun Joo Hwang, who's been a tremendous help to me during my tenure as secretary and as vice chair. And finally I'd like to thank all of you for attending our session today. So with that, as you know, it's a longstanding tradition that our annual program be kicked off by Elai Katz, who's going to look at annual antitrust developments over the last year with some crystal ball gazing as to what the future may hold. So with that I'm going to pass to Elai, who once again has put together a fantastic panel to discuss these issues. Elai, it's over to you.

Annual Review of Hot Topics and Developments, With a Look Ahead

ELAI KATZ: Thank you, Elaine. And thank you also to Ben. Welcome everyone. Welcome to this year's Antitrust Developments panel. As many of you know, we don't try to cover all developments in the world of antitrust. Bill Lifland was able to do that, but if I tried, we'd be here all weekend. Instead we picked several topics that reflect the key issues and trends facing antitrust practitioners these days. Practitioners and enforcers and academics grapple with these issues, and we wanted to discuss them. We are very fortunate to have two superb panelists to talk about these issues and trends. First, Taylor Owings, she's a partner in the Antitrust and Competition practice group at Baker Botts' in Washington, D.C., where she represents clients in merger and non merger cases. She also counsels clients, including on digital economy issues. Previously, Taylor served as counsel and chief of staff in the Antitrust Division of the US Department of Justice.

She was there from 2018 to 2021. In that role, Taylor was a key advisor to the assistant attorney general on the application of antitrust law to technology industries, including DOJ's review of market leading online platforms and in the application of antitrust law to the exercise of intellectual property rights and standard setting organizations. Taylor went to Harvard College and then the London School of Economics. And she got her law degree at Vanderbilt, a place close to my heart because my daughter is an undergraduate there. She clerked for Judge Douglas Ginsburg on the D.C. Circuit and Judge Richard Leon on the D.C. District Court. Our next panelist is Professor Scott Hemphill from NYU. He has been on this panel before, so we are glad to have him back. Scott's a professor at NYU, as I said. He teaches and writes about antitrust and IP. His scholarship ranges from drug patents to digital platforms, to the use of trademarks for competition. He's also written about mergers that harm sellers, among other things, a topic we will try to address today.

Recently, Scott testified as the government's expert in the Martin Shkreli, or Pharma Bro trial, where Judge Cote just last month found that Shkreli violated antitrust law and banned him for life from the pharmaceutical business. Like Taylor, he went to Harvard College and then the London School of Economics. Scott received a Ph.D in economics and a J.D. from Stanford. He clerked for Judge Richard Posner and Justice Antonin Scalia. He also served as the Antitrust Bureau Chief at the New York Attorney General's office. And Scott has a new baby, just a few months old. So congratulations and thank you for taking time away from the baby to talk with us about antitrust.

I also want to thank Jason Rosebrook who helped us plan for this panel and who put together the CLE materials. So let's get started. First case I'd like to talk about is *NCAA v. Alston*, the Supreme Court's most recent decision involving the NCAA where student athletes claimed that the NCAA's compensation rules violated antitrust law. So Scott, the Supreme Court approved of a line that the district court had drawn between what they thought was permissible and impermissible horizontal restraints on compensating student athletes that the NCAA had imposed. Is this a conventional application of the less restrictive alternative standard? Does this case change the law in any way or is it an application of the law? Does it matter that the goal that this less restrictive alternative is trying to accomplish is to achieve amateurism as opposed to maybe some more traditional and conventional roles?

SCOTT HEMPHILL: Thanks to everyone for letting me join you, and I look forward to this conversation with Elai and Taylor. There's a lot going on this year in antitrust, so it's fun to get to think about these issues. I think the answer to most of Elai's questions is that it's the Supreme Court, and they get to be Olympian or – maybe it's Delphic – in their pronouncements. And the rest of us then try to figure out what they were up to. For some of these questions, it's too soon to tell whether they moved the law. They did lay down a few markers about how to do the rule of reason that we might be able to make some sense of, that are usable in later cases.

Some of this we saw in Amex also, in rendering concrete certain aspects of the rule of reason that I would expect lower courts to probably follow. Let me talk about three things that the Court resolves to varying degrees. Two of them are about the less restrictive alternatives analysis, and one is about procompetitive justifications.

In the less restrictive alternatives analysis, the Court spends some energy emphasizing that one need not pursue the *least* restrictive alternative. You need to have a substantially less restrictive alternative, that is plaintiffs can establish an antitrust case by showing a substantially less restrictive alternative, which is I think pretty straightforward and standard in analyses of the rule of reason. But the defendants are not required to implement the least restrictive alternative.

Now, whenever I teach this in my antitrust course, we spend some time struggling with what such a distinction could mean. After all, if there exists a less restrictive alternative, isn't that more or less equivalent to a failure to adopt the least restrictive alternative? Is there a logical distinction to be made here? I think Alston is useful here because it provides a reasonable meaning for this distinction. Basically, the court is saying: "look, plaintiffs have to establish that the alternative is *substantially* less restrictive,

that we're not going to get caught up in trivialities." So one can understand this idea, that the Court doesn't require the least restrictive alternative, as an insistence on a substantially less restrictive alternative.

It may be that sophisticated practitioners already kind of understood that to be what this language meant. But at least for me, I found that pretty helpful as a way of thinking about what all of these opinions have meant when they said that the chosen alternative need not be the least restrictive. This language is much more useful than trying to interpret a footnote in *Sylvania* that is sometimes relied on, out of context, for the idea that a defendant doesn't have to go through every possible alternative in arriving at the best one from an antitrust standpoint.

Second point: The Court gives a little bit of attention to the nature of the procompetitive justification. Recall here that the *Alston* Court is saying that consumer appeal, as increased by the preservation of amateurism, could count. Now the Court really grants this point arguendo, on the ground that it wasn't contested. Nor is the Court addressing what happens when the benefit is in a different market from where the harms are occurring. Here, the conduct is hurting the scholar-athletes, but it's helping us couch potatoes who watch on TV.

Even so, I think it's still worth noting that the Court seems very comfortable with such a justification. This discussion has echoes in the language of the old *Board of Regents* case involving the NCAA. It is worth noting, though, that a potential willingness to entertain out of market benefits has to be understood alongside an articulation of the rule of reason offered by the Court that doesn't seem to include an explicit balancing of procompetitive and anticompetitive justifications.

To the extent that we pay attention to out of market benefits, one would think some kind of balancing would make some sense. If you'd don't have a balancing step, one might be left in an awkward situation where the procompetitive justification, though it exists, is empirically really small. So you have a big anticompetitive effect and a tiny pro-competitive effect. That might suggest that if there's a procompetitive effect, and plaintiffs fail to show a less restrictive alternative, then defendants just win.

That's an uncomfortable answer from the standpoint of good policy. There are ways out of that box, I think. But it's interesting to me that the Supreme Court has talked about out of market benefits, and yet we don't have a clear instruction from the Court about how to incorporate such benefits into our analysis. If it was a two-sided transaction platform, I think *Amex* suggests that the way we would connect them is through an analysis of net effects. So it would be strange to have net effects there and not do a kind of balancing in this other context in which the benefits are brought in a slightly different way.

Here is a third, final point, back on less restrictive alternatives. The Court takes for granted, I think, what a lot of lower court formulations have said about the less restrictive alternative, which is that the alternative needs to confer the *same* benefits as the challenged conduct. There's a little bit of wiggle room in the language: "virtually the same" or "virtually equivalent." There's different ways of saying it, but emphasizing that it needs to be as good or very nearly as good along the dimension of interest.

This is a pretty restrictive formulation that reflects the Ninth Circuit approach. I'm not sure whether the justices are embracing that language themselves. Once again, there's a concern that such a rule could be underinclusive. There might be an alternative that is not quite as effective

along the dimension of procompetitive justification, but that is much less restrictive, and thus preferable on policy grounds. And so a rule that is so restrictive could be underinclusive in capturing conduct of competitive concern. It might have the benefit of greater ease of application, though I'm not sure that an inquiry into identical benefits is necessarily easier than doing a balancing, depending on the particular facts.

So, one thing to watch going forward is how are the lower courts going to think about out-of-market benefits and how are they going to integrate them? And second, how do we think about the nature of the less restrictive alternative, and will courts take that "same benefit" standard to be gospel from the Supreme Court, as opposed to one among multiple formulations that the lower courts have been using over the years.

ELAI KATZ: Taylor, one thing that I want to turn in sort of a slightly different direction. I feel like there's a lot in this case. Can we read this case narrowly, limited to NCAA? There's a unique set of case law on sports leagues, or there's a change the law more broadly with respect to joint ventures and standard setting organizations, which is an area that I know you think about a lot.

TAYLOR OWINGS: Absolutely. Thanks, Elai. And I'm fascinated listening to Scott here. I wish I could enroll in your class, Scott. This is a treat for me, for sure. So yeah, I think that one of the observations that was striking to me about this case is the importance of how the plaintiffs pled, what it is they wanted at the end of the day. A lot of discussion lately about the blockbuster antitrust cases that are in the news, it's kind of, "what's the potential remedy after all of this," right? And do we need other forms of enforcement, other forms of reaction to some of the concentration or other potential harms that we're seeing in the market? Because we might not be able to get the remedy that we want. And here, I think we see that the specific identification of the remedy being related to education-related benefits for athletes, the ability of schools to provide athletes with things like scholarships and vocational or graduate school entrance, et cetera. Education-related benefits were really the remedy that was on the table from the beginning.

And it affected the way the entire case was pled. And really I think affected the Supreme Court's reasoning here. And I think it's a lesson to be learned for plaintiffs and on the defendants' side for joint ventures and standard setting organizations of all kinds that if the plaintiffs can articulate a specific thing that they want the joint venture to be allowing or the standard-setting organization to be allowing that the question in court is really going to be framed around whether depriving the organization of that possibility is achieving the benefit that the joint venture claims it's achieving. So Scott talked about how conveniently as tends to be the case in so many antitrust cases, the Supreme Court or the district court, and then the Supreme Court affirms it finds no benefit whatsoever from the imposition of a ban on education-related benefit.

They say, "If that's the restriction that's at issue, there is no pro-competitive justification." So it finds in the balancing test, the pro-competitive justification to have a weight of exactly zero. Of course, this ability to find zero weight depends entirely on how the plaintiffs framed up, what it was they were asking for. And so I think one thing I take away from this case is that courts are being given an invitation to get into the weeds of whatever it is the plaintiffs are really asking for at the end of the day. However the plaintiffs frame, the restriction is something that the court is allowed to turn over in its mind and say, what was the real business purpose behind this restriction? Does this specific aspect of the restriction achieve that consumer benefit or product market benefit that the joint venture, the SSO is claiming that it does. So it's not just this joint venture exists to create a product that didn't exist before. That was sort of the holding and the real crux of the *Oklahoma v. NCAA* case. This case is saying, no, we can zoom in. We can parse the things that the joint venture, the things that the organization are doing. We can look at the smallest unit of the decision that they made and we can figure out whether any consumer benefits are really coming from that at all.

ELAI KATZ: Taylor, that brings me to a question that I had about this case, and that is one of the themes running through what we want to talk about today, which is this is a buy-side case. I find it really very helpful the way you're thinking about this. What is it that the plaintiffs wanted? What did they not like about the joint venture's restraints and could the JV have just given it to them and still accomplished their goals? Does it work better, in what I'll call it, a buy-side case? And, by the way, correct me if I'm wrong, but I believe that this wasn't an issue that the litigants didn't make this an issue in the case, but for our purposes, I think we're allowed to talk about it. So does it make a difference if it's a sell-side JV situation? Is it harder to know what it is that the buyers, might or might not, complain about that the JV has as their restraint?

TAYLOR OWINGS: Yeah, that's a great point. And I will echo Scott's sentiment here in saying this is left a little bit unclear, and we're going to have to figure it out as this case is applied in lower courts. I would point out that this is the second time that Justice Kavanaugh here, and he was acting as Judge Kavanaugh in the D.C. Circuit in *Anthem-Cigna*. This is the second time that he decided to use some ink to articulate that the harms on the buy-side of the equation, in his mind, seem like they're enough. There's no need to weigh the out-of-market harms on the sell-side. Now, this has been dicta. This was dicta in the *Anthem-Cigna* case. In fact, he was in dissent there, but the dicta here seems to be inviting a stronger version of NCAA case. He's basically saying, I see a clear restriction on prices being offered on the labor side of the market and I can't imagine what benefit anyone could present me that would outweigh those effects in the buy-side of the market.

ELAI KATZ: Scott, any thoughts from you on whether it matters when we're talking about the back and forth of

the rule of reason, and we get to less restrictive alternative, should it matter if we're looking buy-side or sell-side?

SCOTT HEMPHILL: Speaking normatively, I think the answer is no, it shouldn't matter. I think the best reading of positive law is also that it doesn't matter, as we see in cases like *Weyerhaeuser* or *Mandeville Farms*. I wrote a paper with Nancy Rose, that you mentioned, that gets into some of this. I think the striking thing about *Alston* is the unanimity of the Court on buy-side harms being addressable. Again, the way the case was framed, it wasn't really an occasion to say something critical about buy-side harms if they were inclined to. But the unanimity is notable, given the recent attention on the idea that antitrust ignores buy-side harms. That's where I kind of get off the train a little bit. I think there's absolutely more to be done to identify and remedy buy-side harms, but I think this case illustrates that under existing antitrust authority, we have been interested in pursuing and comfortable with buy-side cases for a while.

ELAI KATZ: With that, let's turn to another, but different kind of buy-side case. This is a DOJ matter and a merger challenge, turning away from conduct. I want to talk about the proposed combination of book publishers, Penguin and Simon and Schuster. This could be deemed a five-to-four merger. It would make, according to the DOJ, the largest publishing house even bigger, more than twice the size of the next largest rival. There has been some criticism of this merger challenge for focusing on buy-side harm and here, specifically, the harm is to these top-selling authors, people who can get hundreds of thousands, if not millions of dollars in advances. They're the principal people, I believe, that are harmed according to the complaint, at least my read of it. I guess, carrying on the theme of what Scott just talked about, are we really in the midst of a new era or a Renaissance in labor and buy-side issues, Taylor?

TAYLOR OWINGS: Yeah. I think this case garnered a lot of attention because it is very rare to see federal enforcers block a merger based entirely on the effect of the reduction in number of firms, on the outcomes for the sellers of inputs. It's not unprecedented. It is sort of the best, I think, example that I can find are consent decrees between the DOJ and buyers in the meat packing industry. We have these cases in the agricultural sector where there have been consent decrees where the complaint articulates only a buy-side harm, but litigating a merger challenge based only on the buy-side harm is, I'll be conservative and say exceedingly rare. I think that that has sort of rightly raised questions about if there's anything theoretically challenging about that sort of case and rightly had people sort of reading tea leaves about it.

I worry much less about the identification of particular individuals who are being harmed on the buy-side. I don't think there's any precedent in antitrust law to only worry about the least well off authors, for instance. I think harm to consumers, harm to sellers of labor is harm no matter which market we're looking at. I think that while the complaint identifies top-selling authors, as a distinct premium sub-market here for labor. It also alleges that advances paid to authors generally is another broader market that they're concerned about. I think that this case gives the Department of Justice a real opportunity to demonstrate what they can do in terms of drawing contours around a labor market. We've seen a lot of activity, and this goes to your question, Elai, about whether there's a current sort of Renaissance in labor cases. We've seen a consistent drumbeat since 2016, when the HR guidance came out in the Obama administration. We saw a consistent drumbeat throughout the Trump administration that labor, that criminal no-poach and wage-fixing cases were being investigated, took time to develop but were on the horizon.

We saw the first case drop before the end of the Trump administration. We saw the mantle being taken off at the beginning of the Biden administration with emphasis on the work that enforcement agencies can do to protect labor markets. All of this has been a steady drumbeat. Maybe a crescendo is the right way to think about it. But one thing that is very difficult about these cases is figuring out how to define labor markets by virtue of the concept of substitution. We're used to thinking about whether consumers are willing to accept, let's say a New York Times best-selling book versus a book that didn't make it onto the New York Times best seller list. We're used to thinking about that question of substitution. We're less used to thinking about whether a best-selling author can substitute away with his or her labor to being something other than a best-selling author.

That question just doesn't quite form itself as easily in, sort of, the generalist judge or lay person's mind. I think this is a case where the particular skills of highly sought after authors lends itself really well to understanding what the definition is of this labor market. And it's a good case for setting precedent. I think that it's a good opportunity for the DOJ to demonstrate what tools it's going to use, what analytical maneuvers it's going to ask the court to make in order to agree with it that there's such a thing as a definite buy-side market for labor.

ELAI KATZ: Scott, do you want to jump in on this?

SCOTT HEMPHILL: Just one quick reaction about how to situate this complaint in the bigger picture. In thinking about the Renaissance that you were referring to, one question to ask is: what was missing before? What's the killer example of a buy-side case that the agencies took a pass on because they misunderstood it or because they were scared? I don't have one to point to, though I've looked.

Now, one reason that sort of case is hard to find is that often when you have a buy-side harm, the defendants are also competitors in product markets. And so, if you have a vivid sell-side harm, an enforcer might think, why stick out your neck and make the case hard for yourself by pursuing

the less frequently pursued buy-side harm? *Anthem-Cigna* includes a buy-side count, but it's principally a sell-side case. Often buy-side counts get included, partly, I imagine, tactically as insulation, because you're afraid otherwise a claim about benefit on the buy side is going to be made. And so the buy side is included in the complaint in order to frame the harms in the most powerful way possible.

This is a buy-side only case, as Taylor mentioned. It's a striking example and it leaves me wondering, why haven't we had more of these before? Is it because agencies were nervous about it? Is it because we weren't thinking about these issues, or is it because they arise pretty rarely? And when they do, for example, in the agricultural context that Taylor mentioned, we usually see consent decrees. I'm very much looking forward to seeing how they pursue this.

TAYLOR OWINGS: What do you make of the passing references, if you will, to consumer-side harm? So the complaint, the headline to its statement of effects is depressing author pay and reducing the quantity and variety of titles published. There's this passing reference to how reducing author pay is going to affect the sell-side. What do you make of that?

SCOTT HEMPHILL: Yeah, I saw that. I could imagine the lawyers and maybe the economists too, wanting to leave some space for an argument that the harm, though confined to the buy-side, has a connection to the sell-side.

Why do we think it's a good idea to recognize buy-side only harms? There's a couple different routes. One is because we care about buy-side counterparties and that's a suitable project for antitrust. A second is because we think that whenever there's a buy-side harm there's going to be a sell-side harm. In straight monopoly cases that's straightforward, that when you cut back on inputs, you expect output to be distorted as well, as long as you're not selling into some global market. But there's another move here, which the complaint, I think, contains, which is whenever you're drying up benefits on the buy-side we might expect there to be a suppressive effect on innovation or investment.

For example, if an insurance company merger results in squeezing doctors and nurses, maybe health care becomes worse because there's less investment. That's a move that would commonly be made. This is the publisher, author analog to that. We are uncomfortable with the analogous defense in cases where we say, "No, no, you can't say that if you just had more profit from your cartel, you would invest in more life-saving treatments." We don't think that counts. This has a slight echo of that. Basically talking about the ex-ante incentive effect, or conceivably even an ex-post effect, that authors have less money and therefore fund fewer future books. I do think that one way to provide a foundation for buy-side harms – not the only way – is to say that whenever we see such buy-side harms, we can also expect a consequent harm to the sell-side.

TAYLOR OWINGS: It also made me wonder about the ramifications of the Supreme Court's opinion in *Amex*, on all sorts of cases that aren't immediately analogous to *Amex*? So the DOJ faced a pretty tough pill to swallow in losing at the district court in favor of Farelogix. Again, a merger challenge where the court said that it thought it was bound by *Amex* to find that two-sided platforms only compete against other two-sided platforms and therefore this merger wasn't between horizontal competitors.

Continuing to deal with that ramification of whether that sort of analysis, which the Supreme Court took in *Amex*, applies in the merger context, applies in the section two context. That was an issue, of course, in the Surescripts motion to dismiss for the FTC. And here, I almost wonder if this concept of seeking at least to the harm on the other side of the market is an echo of concern from what the ramification is of the *Amex* case. If the buy-side of a two-sided platform, if the Supreme Court is saying, you really have to consider how the buy-side and the sell-side work together, what the reason is for the middle man between those two to do what they're doing. I wonder if we're seeing echoes of covering the bases of making sure that *Amex* isn't going to be sort of an unwelcome case citation in this merger case.

ELAI KATZ: That's an interesting observation. Although very recently, the DOJ put in an amicus brief in a case in the Ninth Circuit related to real estate, making clear that not everything where there are two sides is a two-sided market. I think it is correct to read it that way. Before we turn to our next topic, I do think it is very interesting the way we're talking about market definition in this space and substitution on the labor side. One thing I've been thinking about a lot, but we won't be able to address today, so stay tuned for some other opportunity, is who is my competitor? I used to know when we focused on the sell-side, for most people, most companies, it's easy to know who you compete with.

On the buy-side there are a lot of different inputs. This case is pretty clear that the key input is getting the authors to agree to sell their books. But there are many inputs that we have where companies have a whole range of competitors. It turns out that it's sometimes quite important to identify who your competitors are. But as I said, we won't discuss this. I would like to turn to some other cases and turn to you, Scott, and the FTC. So we're turning from the DOJ enforcement matter to some FTC matters.

The FTC had two, important IP-related cases that went up on appeal this year. One went the FTC's way and the other one did not. I'm talking here about *1-800 Contacts* and *Impax*. Let me start by asking, should we treat trademarks differently from patents? *Impax* is a patents drug case, an area that you are one of the leading scholars in. And the other one is a trademarks case, which I know you've thought about and written about a lot, too. Trademarks don't have the same preclusive power, I don't think, as pat-

ents but should we treat them the same when we're trying to assess a restraint?

SCOTT HEMPHILL: The short answer is, I think it depends, but let me build up to that. Let me take a minute or two to explain the *1-800 Contacts* case. And then, try to situate that vis-a-vis your question about how to think about trademarks versus patents. The basic issue in 1-800-Contacts relates to those ads that appear above or below your Google search results. Here's what happens. When a Google user searches for 1-800 Contacts, the online contacts provider, a competitor such as Walgreens will run ads that appear above the search results. And these ads by competitors make it easy for consumers to learn about lower prices. Now, 1-800 Contacts is a trademark, and the firm files a trademark suit alleging consumer confusion from seeing the competitor's ads. Instead of litigating that to conclusion, the parties settle. They agree to both knock it off.

SCOTT HEMPHILL: To take another hypothetical example, imagine American Airlines not advertising on Delta or Delta Airlines, not advertising on American using keyword searches.

So what do we make of the fact that a trademark is involved? The Second Circuit rejected the FTC's case and was extremely dismissive, in much the same kind of register as Elai's comment. The court said that trademarks are by their nature non-exclusionary, and so agreements to protect trademarks should not immediately be assumed to be anticompetitive. In fact, an earlier case – *Clorox*, a case I'm going to talk about in a second – tells us to presume that trademark settlements are procompetitive. Agreements to protect trademark interests are common and favored under the law. As a result, it is difficult to show that an unfavorable trademark agreement creates antitrust concerns. That's all in the Second Circuit opinion – it's not my view.

In thinking about this ruling, it's important to separate two different settings in which trademarks might matter. The first is where a settlement limits a competitor's ability to choose its own mark. The *Clorox* example that the Second Circuit relied on is like this. There was a fight between Lysol kitchen disinfectant, which faced entry from the makers of Pine-Sol, a well known mark for floor cleaners.

Pine-Sol wanted to introduce a disinfectant under the Pine-Sol name. That made Lysol nervous, Lysol sued in trademark, and they came to a compromise. They reached a settlement limiting and restricting the use of the Pine-Sol mark. Pine-Sol could use it for certain kinds of products but not others, and emphasize certain product features but not others. The parties came up with a place in between their two positions. Now I think in a situation like this, one might fairly respond with Elai's reaction: so what? The worst that happens is that the would-be entrant has to pick a different name for its product. Now, in truth, I think this could be a substantial competitive effect, but at least it cabins the harm to whatever the costliness of entering is with some other mark.

The trademark keyword settlement is a different matter. It's not limiting a competitor's ability to choose its own mark, but instead, it's limiting the ability of the entrant to target the incumbent using these advertisements. And if we think that these advertisements are a potent way of competing, then eliminating that form of competition could be important.

In this vein, note that the elimination is not just when a user searches for "1-800-CONTACTS." It includes typing in a search for "1-800-CONTACTS competitors." It could also include more general searches that are not expressly for the trademark, but that get caught up in the way Google does its search matching. You can imagine Google "broadly" matching a large set of searches to the firm's keyword. That results in competitive advertising, even though the competitor didn't make a proactive choice to appear on the page.

This is a very different context. And I think the Second Circuit's dismissiveness, faced with a case of the second type, was a category mistake. It was a category mistake to the extent that it relied on these older *Clorox*-type cases. In deciding a case where the competitive dynamics are really different, where the competitive dynamics actually look a lot like reverse payment patent settlements, to the extent that you are eliminating or restricting your rival under the umbrella of settling trademark litigation.

I asked that in part, because in some ways it reminds me of *California Dental*. So, if it's right, that they were simply saying, do this a little bit differently. I want to go back and look at the opinion. That turned out to be a killer for the FTC in the actual *California Dental* case, because the court sent the case back to do a fuller rule of reason. And on remand, the court of appeal said, you don't get a second bite at the apple. You litigated this under a quick look and we're not going to reopen the record to try again.

I take the point that advertising can be tricky in various ways. I guess I want to hold onto the idea, though, that at least here the connection to competition is pretty powerful. I mean, we are seeing the rivals of 1-800-CONTACTS in this example, using I think a pretty potent means of competition to directly support price competition. After all, 1-800-CONTACTS is more expensive than these rivals.

Now putting it this way disguises a complication, which is 1-800-CONTACTS is arguably plowing the road for all these other online contact retailers, to the extent that it does television advertising in order to make people aware that it's cheaper to buy contacts online rather than from other sources. And so there is therefore a pretty standard free riding story. It's not exactly standard, but it resembles the standard argument about free riding. 1-800 is saying that our TV advertising is making this category possible. And if we do all this work and then you free-ride using

your Google ads, I'm not going to bother to help pioneer this segment.

ELAI KATZ: And I think that's its kind of apparent in the marks, right? The mark is an old world mark. Who dials 1-800-CONTACTS? No, so clearly the secondary meaning came about in an older time, and it's now being used in this current time. So this is fascinating. And I know you and I, Scott, have talked about this a lot. There's one more complication that I want to add to this. And I want to ask whether you think it matters, whether it should matter. In this particular case, there were again allegations of harm in separate directions. But one of the allegations that the FTC had made, which frankly surprised me a little bit, was that there was harm to Google. And to give a little bit of history it's quite some time ago, Google did not allow, they did not permit advertising of this kind using another company's mark.

And then at one point they decided, well, maybe we should. Turned out to be an extremely, extremely profitable move on Google's part. There are many authorities around the world. And I think Taylor has lots of knowledge about this are exploring whether Google has market power in advertising markets. And now we have 1-800-CONTACTS and some other companies who are selling contacts who have done whatever they've done. And one of the main harms is that Google isn't able to benefit from that competition. Should the FTC be spending their time on that?

TAYLOR OWINGS: So I'll take this one. And I think I have two observations on this. One is categorically, yes. It doesn't matter who the harms are accruing to as a theoretical matter. And as a practical matter, I think there're reasons to amplify that point by pointing out that much of what enforcement agencies are doing is laying the groundwork that creates deterrent effects in the rest of the economy. We get precious few litigated to judgment and well reasoned antitrust opinions on really complicated subjects that create restrictions on how businesses do their business planning. And so to the extent that a specific victim may not be sympathetic because of a balance sheet question I think is largely irrelevant to the question of whether it's an important enforcement priority because of the outsize magnitude of the deterrent effects that these cases can have.

And then second, I would just point out that it's tempting to think of antitrust cases as being decided on their theoretical merits. And we do a lot of talking about business models that we think understand, cause we're just consumers in the world and what incentives business managers might have. In theory, we all consider ourselves sort of armchair able to talk about the facts of the case, but really when you're bringing a case like this, you have to have witnesses sitting in the hot seat, answering questions. And when one of your elements of the case is proving the facts, it's very helpful to have a sophisticated and interested company to sit on the witness stand and describe what the harms from behavior really are.

ELAI KATZ: So we haven't had a chance yet to touch on the other FTC case that I alluded to, which is *Impax*. I don't know if we can kind of run through it quickly if we can Scott.

SCOTT HEMPHILL: Impax is one of these reverse payment settlement cases where the brand is paying the generic, compensating it to restrict or delay entry in some respect. It's an FTC case that made its way to the Fifth Circuit. The court's affirmance places heavy emphasis on the less restrictive alternatives idea. As implemented here, the idea was: okay, you had this settlement that had a payment and it had some delay. And so it fits that reverse payment, pay-for-delay pattern. But one of the points on which the Fifth Circuit agreed with the FTC was that, if defendants had not reached this settlement, you would've reached a different settlement that is better for consumers. A settlement with less payment, perhaps no payment, and an earlier entry date. And so that could be thought of, the court said, as a less restrictive alternative to the settlement that the parties reached. So, even granting that there was a procompetitive justification for the conduct, the parties could have done this other thing instead, and that's a basis for condemnation.

So I want to push on this. I think this is a useful gloss on some language in *Actavis* where Justice Breyer, writing for the Court, said that the parties may settle as in other industries, in other ways. For example, by allowing the generic to enter the patentee market prior to patent expiration, without making a payment. So you can look at this another way. And typically we are able to settle without these payments.

One caution I want to provide here is that, although I think this is a reasonable way of resolving the case – actually the Fifth Circuit is relying on an article of mine from a few years ago in Columbia Law Review about less restrictive alternatives – you don't have to think about this in a less restrictive alternative frame. Note that what's being granted here, for purposes of the LRA analysis, is that early entry is procompetitive. The purported justification is that, well, after all, they were able to enter the market under the settlement prior to patent expiration. Now, I don't think that it's correct to think of that as a procompetitive justification. In an ordinary settlement, we would expect some kind of balancing act, some kind of intermediate position being reached by the parties. The fact that entry occurs earlier than the worst possible settlement is not in itself a procompetitive justification. It's a benefit, sure, relative to that extreme baseline. It's only by seeing that entry as a procompetitive justification in the first place that we get to the less restrictive alternative analysis. The alternative would be just to say that's not a procompetitive justification.

ELAI KATZ: So our cognizable pro competitive benefits are that settlements are good or that enforcing IP when appropriate is good?

SCOTT HEMPHILL: I think the principal one might be that in theory, at least, there may be a set of facts where no such compromise settlement is possible. Right? So imagine a situation where it could be established that the parties could not have settled in a less consumer disregarding fashion. The theoretical requirements in the models are pretty demanding. It requires risk aversion–heavy risk aversion on the part of the brand, and a lack of such risk aversion on the part of the generic. And in addition, it requires overoptimism on the part of the generic. So it's a pretty narrow path, but in principle, there are such circumstances where that ordinary settlement is unavailable.

ELAI KATZ: Let's turn to another matter. And we're still continuing the theme as you out in the audience are seeing, we have two main themes: buy side labor side issues and also less restrictive alternatives. Now, I'd like to turn to the tech sector where there's a lot going on, but we want to kind of try to focus on one case in particular, the *Epic v. Apple* case, which is only decided at the district court level. An appeal was filed, I think just yesterday. So we'll see where it goes, but it's worth talking about, I think, and Taylor take it any which way you want. But at least for me I want to start looking at the importance of the relevant market here. And perhaps other big tech cases too, that are making their way through the courts.

TAYLOR OWINGS: Absolutely. So a lot that's interesting to say about this case, because I think Judge Yvonne Gonzalez Rogers gave us so much to chew on. She wrote a really comprehensive opinion, I think more than 170 pages, that really lays out what she took away from the evidence that she saw. So there's a lot to chew on for the observer. And it's also, of course, I think rightly seen as something of a canary, the coal mine sort of take for the various challenges to big tech business models. And one piece of the court's reasoning that I paid a lot of attention to was her discussion of four markets and after markets, because the public policy discussion about the potential harm from concentration in technology industries, really when you look at the public policy reasons why folks are concerned, it has to do with this concept of network effects, creating lock-in, there being something allegedly something like a natural monopoly available to digital platforms that start aggregating users and develop this flywheel effect where they can collect more data.

And then they become impossible to switch away from. That's the sort of the public policy discussion about what makes technology platforms different than brick-and-mortar antitrust applications of the past. When you look at the court's discussion here of four markets and after markets, there's a lot of echo of these public policy discussions. And essentially the judge rejects the concept that there is a meaningful effect from lock-in to the Apple ecosystem. She finds that even though I think it was less than 2% of people with iPhones switch away from iPhones every year, she finds that the mere fact of those practices aren't enough, isn't enough to establish lock-in for the purpose of defining a specific aftermarket, which is app distribution on the Apple iOS. I think her reasoning there was that even though there's only 2% switching every year from Apple to Android, that you can't, or at least the plaintiffs here didn't prove the reason for that low switching rate.

And there's evidence that the reason for that low switching rate is that people really enjoy their iPhones. Essentially a quality rationale rather than any form of locking that would serve to establish the basis for an aftermarket. That difficulty of proving the reason for low switching is going to be a feature, I think, that plagues all of these tech cases. The parsing out why it is a company has really a digital platform or a tech company has the low switching and loyal customers. That's going to be a really tall hurdle. And so thinking about the ways in which the district court here acknowledged what I think a lot of people would call direct evidence of market power in an aftermarket. She talked about Apple's ability to set prices without any competitive pressure. I wrote down the quote here because it surprised me. It seems to admit direct evidence of an aftermarket in appsin, which Apple was setting prices.

There are several observations she makes that would seem to be direct evidence of this market and Apple's power in it. And I think the going forward lesson for plaintiffs and tech cases that want to allege lock-in is that they're really going to have to parse out not just that lock-in that is occurring, but the reasons for it.

ELAI KATZ: Again, that's really interesting. And I think hard, it's hard, isn't it, to prove why people are not switching? I don't know what kind of modeling one would do, but an interesting question I want to turn away from market definition and ask you a little about the remedies. And I should say, I think many people know, but the judge ruled in two different ways that Apple lost under the Sherman Act but won under California law. And so the remedy that was proposed does involve some change in policy and the issues that are of concern here have to do with security and privacy benefits that Apple claimed they had. And I wanted to ask you a little bit about the tension between what we think of as traditional competitive issues. You're talking about switching and prices and these other benefits or concerns of privacy and security, which seem to come up again and again.

TAYLOR OWINGS: Yeah, absolutely. So this, I think, echoes back to our larger theme of what is it that the plaintiffs asks for and how did that cause them to frame up their case. Here, Epic wanted to be able to put its own app store on the Apple platform on an iPhone. It framed the pleadings of the cases to say that we as a potential app store competitor are being excluded from the market. That desire for a specific remedy framed the whole question of market definition, and also what the alternative is that Apple, hypothetically, should have been allowing in order to foster more competition. And here, the court took great pains to talk about what the ramification would be if Apple had to let other app stores on to its platform, or specifically, what

would happen if it didn't have this review mechanism? The review of apps offered on the phone and that review mechanism takes place through approval to be listed in the app store itself.

And there's a lot of discussion of the good faith attempts that Apple is making to deliver customers what they want, in terms of security and privacy, data protection. And that framing of what the hypothetical alternative is that Apple should have been doing clearly killed the case for the plaintiffs in the sense that it gave the court an opportunity to talk about all the benefits of the approach that Apple is currently taking.

ELAI KATZ: We don't have that much time left, but before we turn to the last topic, I do want to ask this question. Hopefully you can go through it quickly. I'm addressing it to Scott. It seems to me, and maybe I've just been reading the wrong cases, that we're seeing a lot of cases where there's a lot of deep discussion of the less restrictive alternative, but my thinking is that the rule of reason cases that I've been reading over many years often don't even get to that point. They just get stuck in the failure either to define a market or to show harm. And then the court is done. Are we just seeing more such cases or am I starting to read different things?

SCOTT HEMPHILL: I genuinely am not sure. I think we are conditioned to some degree to think that cases that reach the end of the rule of reason are rare, right? That everything gets killed at market definition or failure to show any competitive effects, or also failure to show their justification. I think that's always been overstated. We have some statistical evidence on this, but the evidence itself is not a perfect sample because it tends to be basically a headcount of opinions where some dispositive result is reached. And so some of the cases of interest might not generate, for example, a summary judgment opinion denying summary judgment to defendants. So I think there may be some dark matter in there that we don't necessarily aggregate up because it isn't an opinion following a full trial on the merits. It's true we have this bumper crop this year. We talked about four of them – *Alston* and *Impax*, *1-800*, and *Epic* – that really did go all-out.

One thing I just want to emphasize is, here, again, we are seeing an approach to the rule of reason that is bobtailed in important ways. Again, we don't see the explicit balancing at the end as an alternative way for plaintiffs to win the case. We also don't see an approach to less restrictive alternatives that would permit things that are a bit less effective and a lot less restrictive. That leaves us, potentially, with this hole where a defendant can say, as was said here, we have this benefit, the source of consumer appeal. We're not going to try to put a number on how big it is. I'm now going to force the plaintiff to say that this security benefit could be achieved equally well by something else, and failing that, the plaintiffs lose.

And if you read this opinion from the back toward the front, the resulting tension, I think sort of becomes apparent. Okay. The court seems to sense that there's an anticompetitive effect, right? The language in which they talk about the state law claim is very much the language of traditional antitrust harm, but yet there's no Sherman Act violation found in the end. Partly as a consequence of market definition, partly as a consequence of this approach to how to think about the rule of reason. And I think it does point up the tension and perhaps the limitation of the way that lower courts are thinking about how to do the rule of reason. At least from the standpoint of an economist who's trying to figure out when is there a welfare improvement overall, some of which I think seems to be left out by the way that the court is addressing the rule of reason.

ELAI KATZ: So let's switch gears now to something a little different. And one thing we haven't talked about thus far is there's been so much in the area of antitrust law these days, in terms of proposed legislation, ways to change and improve the law. There's a lot of political pressure, popular pressure to do that. In fact, I think just this morning, the Judiciary Committee sent to the Senate one such bill, but I don't want to talk about that because we can't predict where those bills go. At least I can't. One thing that I think would be useful to talk about is a different way that antitrust law might be developed. And this has to do with the FTC's powers or at least, asserted powers under rulemaking. Taylor, can you walk us through this for the remaining few minutes that we have?

TAYLOR OWINGS: Absolutely. So I think the selection of Lina Kahn as chair of the FTC was a signal that the administration wants to see competition rulemaking take place. Kahn and then-commissioner Chopra have an academic article making the case for why unfair methods of competition rulemaking is both within the authority of the FTC and a good policy to use. And so it's not a surprise. I think that we see signals coming out of FTC that they plan to use APA rulemaking to define what the FTC Act means by unfair methods of competition, with some specificity, prohibiting certain conduct that we see in the market. And the other big signal around the likelihood that the FTC will use competition rulemaking is the executive order that we saw Biden release in July, which essentially encourages the commission to use its rulemaking authority to do things like curtail the unfair use of non-compete clauses, to address unfair or exclusionary practices in certain industries, to deal with unfair data collection and surveillance practices that may damage competition.

Some of the language sounds like unfair and deceptive acts or practices, offenses. But there are lots of clues in the executive order that it's referring specifically to rulemaking that can address alleged harms to competition. And we saw the FTC take steps toward this eventual goal at Chair Kahn's first ever FTC open meeting a couple of weeks after she took the helm. She and the other Democratic commissioners moved to rescind the FTC's standing policy state-

ment on what unfair methods of competition means. That sort of cleared the path for redefining what unfair methods of competition means potentially for rulemaking.

And we also recently saw just a couple of weeks ago, the FTC released its semi-annual regulatory agenda, which is a requirement. It's a statutory requirement to list out all the rulemaking that you're planning on doing in the next six months. And we saw as part of this report, that it issued on what it plans to do going forward. It talks about the fact that the FTC will, in the coming year, consider developing unfair methods of competition rulemaking, and that they're thinking about the way that data abuses and what they call surveillance-based business models, how those practices affect competitive dynamics in markets that may be addressable around fair methods of competition rulemaking.

ELAI KATZ: So let's end with a question that I have for both of you, in a lightning round kind of way, just a couple of sentences, if we can. Scott first and Taylor last. What do you think rulemaking should be about in terms of substantive scope as opposed to judicial development of antitrust law or statutory development of antitrust law?

SCOTT HEMPHILL: I would point to three criteria. First, where there are gains from studying a practice deeply, like in pharmaceutical settlements, an area that has been discussed for a decade as a place where we might do some rulemaking. Second, where there's an opportunity to take advantage of the extra breadth of Section 5. For example, deception that harms competition, but where the firm doesn't necessarily have monopoly power, and where there is no provable agreement among multiple firms. And third, where there's a deep consumer protection angle. I'm thinking here about funeral homes, which is a consumer protection side rule, but that includes an unbundling remedy. It's a consumer protection rule founded partly on deception and shady practices that has implications for competition.

TAYLOR OWINGS: My answer here is basically they just shouldn't do it. And the reason is there's plenty of precedent that the difference between a per se antitrust case versus a rule of reason antitrust case, which is the only kind that the FTC has historically brought, is that you have to look at facts.

And I am very skeptical that even setting aside statutory interpretation questions, constitutional questions that I think are very real and very concerning for the FTC on this. At a minimum, even if you got through all of those things, you would need to identify a practice that is anti-competitive every single time before you could make a rule about it and effects-based analysis is required by our competition jurisprudence and rightfully so, because what we're really worried about here is making sure that we prohibit conduct that actually harms consumers. That effects-based analysis can't be done if there's a rule prohibiting the conduct. And I think that the courts are not going to take kindly to fast forwarding through that effects-based analysis. So as a result, if I'm looking at tea leaves, I say that they try to make a rule where they have belt and suspenders, where it's an essentially an unfair and deceptive acts of practices rule that they can also say has competition ramifications. And so should also be considered a rule, but we will see.

ELAI KATZ: But we're being told that we're being pushed off the virtual stage. I know there's a lot more we would like to say.

ELAINE JOHNSTON: Well, I have to say Elai, Taylor, Scott, that was terrific. Great range of views. I feel we could do a whole panel on that topic that came up in the last three minutes. So maybe that's something for somebody to consider in the future, but thank you all again, it was great panel. And we're now going to hear from one of our platinum sponsors – Dr. Nathan Wilson from Compass Lexecon is going to say a few words. So Nathan, if I can pass over to you and thank you and Compass Lexecon.

NATHAN WILSON: Thank you. It's a pleasure and a privilege for me to be here this morning, speaking for Compass, at such an excellent conference, but candidly, it's also no small challenge to follow the excellent conversation we just had on such a fascinating range of issues confronting us as practitioners. As a result, I'm not going to try and talk about new things. I'm going to follow Falstaff and let discretion be the better part of valor and say a couple of things about old concepts, like economic theory and real world evidence. Now looking at the hot topics that have come up in the press and elsewhere about the challenges that may be facing antitrust, it strikes me that many of the underlying issues are actually ones that have been well-studied by economists in academia and other applied scholars. And that scholarly literature, unfortunately, is often pretty ambiguous in its implications.

In other words, it's pointing pretty strongly to the fact that simply because we observe something like a concentrated market in a multi-market's context, or we observe vertical integration, or we observe something like a non-compete, it's really hard to do draw welfare implications just from that observation. It means when we, as practitioners, confront these issues in the cases we work on, there are no easy answers. There are no free lunches. We really need to dig into the meat and potatoes of the underlying facts and specific nuances of our industries and our cases. Now, of course, on the one hand, that means that our jobs are and will remain challenging. On the other hand, I suppose that means it's going to be much more difficult for someone to come up with an algorithm to replace us. So there is that we've got going for us. In any case, thank you very much for your attention. I look forward to the rest of an interesting conference.

ELAINE JOHNSTON: Thank you so much, Nathan. We're going to take a short break now. So please do be back at 10:35 AM. Thanks.

I Have Never Seen It Before: The Risks and Opportunities of Merger Reviews and Antitrust Enforcement Addressing Privacy and Areas Outside of Traditional Consumer Welfare

SPEAKER 1: Okay, ready whenever you are, Elaine.

ELAINE JOHNSTON: Okay. I think we'll give people just a minute or two. I just want to make sure we've got all our panelists.

SPEAKER 1: No problem.

BRUCE HOFFMAN: Hi, Elaine.

ELAINE JOHNSTON: Welcome back. I spend a lot of my time in the merger world and I have to say the merger world is a pretty interesting place these days. Some are lamenting an unwarranted assault on traditional consumer welfare standards. Others are saying that it's about time that antitrust got real and recognized commercial realities. We have a panel today that Dan Anziska and Nick Gaglio have put together that's going to explore some of these nontraditional theories of competitive harm in the merger context. So with that, Dan and Nick, I pass over to you. Thank you.

NICK GAGLIO: Well, thanks very much, Elaine. And a warm welcome to everybody from pretty frosty New York City. We appreciate everybody attending. My name is Nick Gaglio. I'm a partner at AXINN in their New York office, where for the last 20 years my practice has touched all four legs of the antitrust table. But with a particular focus on merger review, which is the topic of today's panel. I'm privileged to co-host this panel with my longtime friend and co-collaborator Daniel Anziska. Dan is a partner at Troutman Pepper where he co-manages the antitrust practice. Dan represents clients in a wide range of MNA and litigation issues in multiple industries, including the defense industry, construction, modeling, sports, financial services, and many others.

Just to set the table a little bit, for many of us in the Bar, we view antitrust through the lens, I think, most aptly described by Bill Kovacic in his article about 20 years ago, about the normative development of antitrust. This describes the kind of dynamic, but nuanced and gradual, change of antitrust law through an interplay of our institutions, whether it's our public and private enforcers, our close relationship with the economics field, both the academy and the world of IO consulting, the defense bar and our clients, and the idea that this constant, but slow evolution lent a degree of predictability to our practice. Now, of course, acknowledging that it was a gradual evolution isn't to say that there haven't been big moments. Just during the period that Dan Anziska and I have been practicing, we've born witness to big cases and big moments, the *Microsoft* decision, *Twombly, Legion, Empagran*, the auto parts case, the investigation, prosecution, and in some of our views, persecution of the big tech companies. We've even seen already one revision of the horizontal merger guidelines.

But focusing on that for a minute, I think it felt more like the codification of practices that we had already seen sitting across the table at the agencies, and indeed, that the courts at that point were already finding ways to focus on the bottom line of competitive effects. Somehow that merger guidelines amendment in 2010 felt less of a drastic change. This moment feels fundamentally different, maybe even iconoclastic. Dan and I hope that you'll find it valuable and enjoyable to hear three quite different perspectives on some of the questions that this moment is raising about potential changes to the analytical framework of antitrust merger review. We're going to talk about privacy, data security, labor, ESG concerns, and perhaps most interestingly, how, and whether, these can be built into a structured and administrable antitrust analysis. We also hope that the panel will illuminate some risks and opportunities that will be valuable to you to discuss with your clients and colleagues and stakeholders. With that, we are pleased to have with us Christine White, Bruce Hoffman, and Dan Fanaras.

Christine is vice president of the Office of Legal Affairs at Northwell Health, which is a health care system in New York with approximately $15 billion in annual revenue, more than 20 hospitals, and over 77,000 employees. Under Christine's leadership, Northwell has advanced its commitment to improve and expand the scope and accessibility of high quality cost efficient health care solutions, including through affiliations, joint ventures, and collaborative arrangements with other health care systems and providers. Christine's also a veteran of the Federal Trade Commission, having served both in the mothership in Washington, D.C. and in the Northeast regional office here in New York.

Bruce Hoffman practices at Cleary Gottlieb in Washington. He brings to the panel almost three decades of experience handling mergers, investigations, and litigation across the U.S. and worldwide. In particular, Bruce brings a wealth of agency experience, including most recently having served as a director of the FTCs Bureau of Competition from 2017 to 2019.

Dan Fanaras is a principal at the New York City office of The Brattle Group, economic consulting agency, where he co-leads their health care practice. Dan brings more than two years of experience analyzing antitrust and competition issues, but he is specialized in particular in matters involving both health care and tech-focused industries. He analyzes the competitive effects of mergers, assesses liability questions, damages questions with respect to allegations of anti-competitive conduct and litigation. He regularly works for both private clients and government agencies during the merger review process. With that, I will turn it over to Dan Anziska to get us started, but I do want at this point to invite you, the audience, to share any questions you might have as they come up in the chat, and we're going to do our best to take those on as the panel proceeds. Dan A.

DAN ANZISKA: Thanks, Nick, as always. Very exciting panel here, so I just want to jump right in. We're breaking it, really, into two branches. As Nick pointed out, nothing develops in isolation, notwithstanding some headlines over the past couple of years. We first want to discuss the holistic merger review, kind of the origins and prior definitional terms in prior treatment and look at it from the enforcement side through Bruce, from the economic side through Dan, and then, of course, from the business, the hands-on business side, as well as health care focus with Christine White.

Then in the second part, we'll then jump into the headline stuff, the recent developments, and kind of how we see the application occurring in practical advice. Let's kick it off with Bruce to kind of give the enforcement background, the historical background of where we are.

BRUCE HOFFMAN: Sure. Thanks folks. Thanks to the New York State Bar and for everybody on the panel for having me, and for setting up this panel, which I think is really interesting, and particularly if anybody caught the joint press conference by the FTC and DOJ earlier this week, where they talked about revising the merger guidelines generally horizontal, as well as whatever's left of the vertical merger guidelines. There's an awful lot going on here and it's going to be fun and interesting to get into. I think it's worth just doing a very brief historical summary of how these things have evolved and kind of what we're talking about, broadly.

It's interesting to me because there's an element of what Tim Muris once described in his stint here at the FTC, of everything old is new again. The idea of adding ESG, labor, data security, privacy, things like that into the analysis of mergers actually is not new. Elements of this existed in the 1940s, '50, '60s, '70s, and former FTC Chair Mike Pertschuk was kind of famous for saying that everything about the way a firm behaves, like its compliance with law, the efforts that it makes to squeeze profits out of people and whatnot, all affect how it competes. So basically at the FTC, we can regulate everything about what companies do. When we do merger review, we can review everything and everything is fair game.

In particular right now, we've seen a lot of emphasis on labor, and labor issues were called out in particular at the press conference, by both FTC Chair Khan and Antitrust AAG Kanter. This is not hugely new in the sense that labor issues from the monopsony standpoint, buy side market power has been an increasing area of interest, but I think there's extra emphasis here and maybe in somewhat different ways. We've also seen comments on privacy, on... To some extent, although not as much, I think as maybe the media has indicated on environmental issues, but then also a lot of discussion about things like supply chain fragility, issues about simply favoring large firms over small firms, which you might almost think of as an efficiencies offense, and some other areas. We'll get into that more later. I'm going to move fairly quickly, on.

Just to point out that merger commentary by the agencies, speeches and whatnot, are only one source of where these things manifest. You see them manifesting in, for example, second requests, and in context from the agencies, which actually comprise a great deal of the practice of merger law. It's an area that's really kind of outside what the courts do, because obviously when you're dealing with second requests, it's not even like an iceberg, 99.9% of that's below the water and never sees the light of day, but it's very important. But then of course, there's policy speeches, there's writings, there's international enforcement, and then ultimately what the courts say will have significant effects on how all these things actually play out in the real world. With that, let me stop and turn it back over to our moderators to pick up the next topic.

DAN ANZISKA: Yeah. Why don't we pass it on to Dan now, to discuss from an economic standpoint what we've seen historically, and how that's bridged to where we are right now.

DAN FANARAS: Sure. Thanks Dan. Good to be with you all today. I guess for my comments here, maybe I'll focus on the literature and think about some of the tools and analytical approaches that have been considered as we think about how to evaluate or how one would evaluate the so-called holistic approach to considering some of these additional dimensions that Bruce just mentioned.

As folks may, are certainly may be aware of, there's a growing body of work in this area, in the literature about raising potential theories of harm along some of these dimensions, including privacy, data security, environmental standards, and so on. These theories consider, for example, to the extent that a particular dimension is an aspect of how firms compete with each other, could a merger then influence the incentives of one party or the other to continue to compete on this basis? And the literature also considers how, if so.

I'll focus here on the analytical approaches and tools and keep things at a pretty high level. I think the literature on privacy in particular is a good dimension to start with given that much has been written about this over the past 15 years from economists and antitrust scholars alike. I'll start by raising two takeaways from this research into how consumers value privacy. First, research has generally shown that there's a wide degree of variation in how consumers value their privacy, as well as the types of privacy dimensions that they hold to be most important. For example, when researchers have valued the specific dimensions of privacy, there tends to be considerable variation in these relative values when looking across consumers, and consumers tend to be quite heterogeneous in their preferences, as well as their assessments of value.

There's also variation in the relative values of how consumers compare across dimensions, when thinking about these privacy dimensions and considerations. For example, some research has shown that consumers generally tend to heavily value biometric data, think here of things like fingerprints and faces, more than they value their location data, think here of cell phone tracking, for example, and crowdsourcing, and use of that data for creating products. A recent paper by Jeff Smith and Scott Walston discusses this effect. Second, there's a growing body of literature surrounding the so-called privacy paradox. For those unfamiliar with this concept, these papers have generally assessed the following; when asked to what degree to which consumers value their privacy and protecting it, consumers most often assert that their privacy is of great importance. However, at the same time, when looking at their behavior, studies indicate that consumers often disclose things in exchange for minimal or even no incentives.

Authors in these areas include Susan Athey, Catherine Tucker, and several other economists. There continues to be some debate over explaining this paradox and how to frame it. Part of this debate considers whether users are knowingly aware of the types of information that they are disclosing and the methods for measuring how they're disclosing it. I think there are... There's a follow-on discussion that's still emerging that considers whether enhanced transparency and privacy actually has an effect on behavior. If so, what does that look like? Nonetheless, a key takeaway from the evaluation of privacy in this literature is that it's a complex proposition to transform privacy dimensions into a monetary construct, and it's not straightforward. Researchers continue to evaluate how to do this and refine existing methods. But the good news is that there's, at least for privacy, there is a body of literature and methods and tools, proposed tools, for building from. These tools can be considered and incorporated into potential ways of analyzing competitive effects.

Lastly, moving along from valuing privacy, there's a question about how to consider privacy in relation to competitive effects and whether traditional approaches are adequate for assessing changes in consumer welfare. The recent body of literature here includes both economists, but there are plenty of legal scholars who are very active in these debates. For framing this a little bit, let's focus specifically on a merger, and the context of mergers, and specifically the unilateral effects of a merger, and ignore for the moment coordinated effects. There tend to be two types of general views for how one would factor in privacy here, although these viewpoints are still evolving. I would say they tend to boil down to the following; the first viewpoint considers privacy to be one element of competition in a traditional product market sense, among other elements of competition. Privacy here can be thought of just like any other way that firms compete against each other and differentiate themselves.

Included here are those who believe that privacy can be viewed as a dimension of quality, or like other non-price aspects of competition that can be assessed and are sometimes assessed using the existing tools and consumer framework. Among these economists are those who've considered ways to build from these existing tools for assessing unilateral effects. Tools such as the so-called guppies, which folks may be very familiar with, which examine post merger changes in a firm's incentives to raise prices. Papers that consider ways of doing this and extending existing approaches include a paper by Keith Ware on modeling privacy aspects and advertiser, supported digital platforms. Lastly here, the second viewpoint considers ways of assessing privacy outside of the traditional approaches for measuring competitive effects here.

So moving beyond the traditional tools included here are those who think of privacy as a type of product offering in and of itself, and that one can model privacy on a standalone basis. Under this view, privacy can be thought of as a fundamental driver of consumer choice. Consumers are selecting which firms and for example, platforms they might align with. This is especially something that one could consider and model, when you assume that consumers are informed and actually privacy aware. That, as folks know from some of this debate, that's not always the case. Given sufficient information, one could then consider how these choices and outcomes might likely change under a merger.

I'll just conclude here by saying, in conjunction with the existing proposed ideas, as Bruce mentioned, the recent announcements by both the FTC and DOJ leadership about reforming the merger guidelines and the process that will take place for soliciting input into those new guidelines will likely bring new ideas and hopefully innovative ways and tools for thinking about some of these problems.

DAN ANZISKA: Thanks, Dan. Talking about emerging, innovative topics, I think Christine White is going to cover one of the real cutting edge over here, which is ESG plus L, and I'll be happy to pass the baton to Christine to explain what that means and kind of how that's impacting merger analysis in the antitrust context.

CHRISTINE WHITE: Thank you, Dan. I need to offer the disclaimer first that any opinions I may offer today are solely my own and may or may not conform with those of Northwell Health. I also need to make it clear that I won't be giving you a complete, detailed training on ESG because it's a pretty broad topic. I will focus on using the ESG framework when we think about assessing the non-price competitive effects in a merger context, and widening the aperture to think about what those non-price effects could include.

ESG stands for Environmental, Social and Governance. ESG considerations are increasingly important for businesses, including those in the health care space. I will give you a couple examples of the kind of activities and innovation we're seeing around ESG, and then address the competitive significance behind certain of these activities. With respect to environmental examples, we have a couple local examples. One is at the Health and Hospitals System, here in the New York City area. HHS recently announced that it was undertaking a conservation project with a local utility company, and committed to reinvesting any savings that it had achieved into environmental and ESG initiatives. HHS was able to save $1.4 million through those initiatives, and they've committed to reinvesting that amount in other environmental and ESG initiatives. Across the country, CommonSpirit, which is a large health system with operations across 21 states, announced last fall that it intends to reach net-zero greenhouse gas emissions by the year 2040, across all of its operations.

In terms of "environmental" initiatives, many are focused on protecting natural resources and minimizing medical wastes. They may not be addressed in health systems' public announcements every day, but they can be quite significant. Many health systems and provider groups are achieving both objectives, that is, minimizing their footprint and reducing waste including by transitioning away from single use medical tools and implements. Many providers increasingly are purchasing instruments and devices that they are able to recycle, sanitize, and safely reuse. You can imagine the various ways that that has positive impacts in terms of conserving natural resources, minimizing waste, and so forth.

Let's turn next to the "governance" parameter of ESG. The University of Pennsylvania Health System recently announced that it was tying its executive pay to the system's accomplishment of certain health equity measures. Specifically, the school has tied its executive compensation, in part, to reducing maternal morbidity and mortality, and achieving other health metrics. That is an innovative approach to governance, in terms of the history of health care and the degree of accountability it establishes. It is a big development in establishing responsibility for a health system's performance goals.

Another governance development is the State of Massachusetts' requirement, or mandate, that a local hospital reconstitute its board to have greater representation of its patient population. A hospital in Salem, Massachusetts, which is part of the Partners System, was looking for state approval for a large expansion project. In connection with the review of that project, the State required the hospital to restructure its board to reflect greater cultural, ethnic, and gender diversity. The hospital did so. They recruited a number of additional board members reflecting greater diversity. After the board was expanded, the State approved the project. This good example of a State looking at ESG priorities and using its regulatory review and approval process to effectuate a desired outcome on ESG parameters.

Let's turn quickly to competitive considerations with respect to ESG activities. A growing body of literature shows a positive impact between ESG performance on the one hand and financial performance, or value creation, on the other hand. There also are significant implications for access to capital. We have an unfortunate example here in New York where Capital Health System, in Buffalo, reportedly was downgraded in 2021 by the rating agencies. At

the time, Moody's expressed concerns with, among other things, the health system's ESG performance on labor and employment parameters, and specifically called out the system due to serious concerns about its labor and employee relationships, and the resulting implications for its costs, its sustainability and its susceptibility to nursing and other strikes.

That's just one example relating to the potential relationship between a health care system's ESG profile and access to capital. There are other examples where health care systems have been downgraded due to ESG concerns. Please reach out to me if you want other examples. Additionally, a health care entity's ESG is increasingly important to its brand identity and to its sales, and its relationships with its patients and its consumers. This appears to be true across retail and other industries as well. It may be due to the fact that Generation Z, the population with the largest pocketbook right now, is the first generation that has fully grown up with computers, with Google searching, with unfettered access to data. By all reports, they make their purchasing decisions based on considerations of their own ESG priorities and values.

One example of this occurred in November of 2021, after Patagonia made a commitment that it would give 100% of its Black Friday revenues to environmental nonprofits. At the time that they announced this initiative, Patagonia reportedly anticipated that they would raise about $2 million. When the dust settled after Black Friday, Patagonia's special sale had generated $10 million in savings. Patagonia has said that they attribute this to that the impact of ESG values, which prompted their customers to make additional purchases during the sale.

ESG considerations are also being taken into account in connection with health systems' employment practices and their efforts to recruit, retain and engage personnel. It also may be true across many industries because Gen Z employees apparently are factoring potential employers' ESG performance into their individual decisions about the types of places where they want to work and the kind of work they want to do.

Additionally, to tie ESG considerations back to competition and competitive concerns, the focus on ESG and ESG performance also appears to be an increasingly important factor in terms of structuring transactions, identifying potential partners, valuing transactions, and assessing potential efficiencies and synergies. Elements of ESG may factor into each of these considerations. A potential partner could be far more attractive, offer better cultural "fit," and increase the likelihood of merger success and the post-transaction creation of a stronger business profile, depending on its ESG profile, the extent of shared commitment to ESG performance and whether there is complementarity and synergies in the parties' planned integration of sustainability efforts.

ESG considerations, as we will discuss in a couple minutes, also should be factored into due diligence. If a party has an ESG hidden landmine, it will be critical to identify it during due diligence. Any entity that is hiding an ESG landmine, should pay careful attention to the resultant risks throughout the course of transaction planning. If any ESG landmines are discovered in due diligence, there could be significant ramifications for the transaction.

DAN ANZISKA: Absolutely. Just, Bruce, if you want to jump in based on anything that was just shared, if you have any closing remark about the historical framework, feel free to weigh in. Otherwise, we'll jump into the part where I think everyone's focused on, which is what does this mean? That's great that there's all this stuff out there, but how does that affect? And I know Christine had just started that. Anything else Bruce? Or should I . . . ?

BRUCE HOFFMAN: No, let's move on.

DAN ANZISKA: Yeah, the practical. So let's go back to Christine now to answer her own questions.

CHRISTINE WHITE: In terms of the practical implication of ESG considerations in transaction planning, counsel should start thinking about non-price issues from the outside of deal planning. From the minute the potential target is identified, conversations around ESG profiles and performance should begin. When providing transaction planning antitrust guidance, ESG professionals and their role in transaction planning and due diligence should be addressed given the important implications that their work may have for merger review.

ESG professionals may not always be as well trained on antitrust compliance and due diligence as compared to marketing and sales teams that may have had greater exposure to antitrust training. This may be especially true in certain nonprofit health care and life sciences areas, where there can some greater industry history of sharing best practices, and less of an awareness or focus on the competitive perils of doing so. As a result, antitrust training should be scheduled early on for ESG personnel who may be involved in transaction planning.

ESG considerations also could have an impact on the substantive outcome of due diligence. In other words, a hidden ESG landmine could create significant potential risks to the deal value. KPMG has described at least one deal where the discovery of ESG liabilities led to a reduction in the transaction price. The transaction involved the acquisition of a tableware manufacturer. During due diligence, significant environmental liabilities, poor working conditions, unsound board practices, and other ESG concerns were identified. These discoveries led the purchaser to negotiate a $10 million reduction in the deal price. There are other examples of different types of ESG concerns arising in transactions where the target was discovered during due diligence to have failed to secure important licenses and permits. These discoveries reportedly jeopardized the

transaction's closing, due to concerns about financial penalties, and even criminal prosecution. In summary, these examples underscore the importance of due diligence in uncovering and addressing any ESG landmines.

Let's turn now to the competitive effects analysis. At the federal level, antitrust enforcers could begin to ask questions and raise issues such as those raised by Massachusetts regulators in connection with the Salem Hospital transaction. They also could raise considerations about of the merging parties ESG profiles in terms of approaches to board governance or other issues that could jeopardize the cultural fit between the parties, and therefore their ability to effectuate the merger transaction and achieve the planning integration and efficiencies. The FTC's recent announcements suggested that the staff may be starting to consider ESG concerns when looking beyond price effects and effectuating "holistic" merger review.

DAN ANZISKA: Yeah. Dan, do you want to weigh in kind of building off Christine's point about actual quantitative analysis in these areas? As the person who knows math, unlike most of us lawyers, feel free to weigh in on that.

DAN FANARAS: Sure. Yeah. Just focusing on sort of the pre-merger due diligence context and risk assessment considerations. Maybe one consideration to think about for economists in our role. And as folks know, we typically advise and work with council to help quantify and sum things up from an empirical perspective of the likely effects of the merger using available information.

Now, following the preceding discussion to the extent that we can come up with objective metrics and criteria for doing that, that considers dimensions and areas outside of traditional scrutiny. To the extent that we have those metrics, there's a consideration about the relative weights between those metrics and how one would sum things up for council and likely boil things down, so that decision makers can make informed decisions based on available information and evidence that would help just differentiate between concerns that are likely to be de minimus versus concerns that may actually hold up a deal or require a significant remedy.

I'll also add just very quickly here that, of course, as folks may know, the available information and data that we work with in a pre-merger advisory setting is often very limited. There is often tremendous time pressure and limitations on what we can do and what we know and can work with. So obviously that speaks to the need to work quickly and to really boil things down to things that can be put together and applied from case to case and industry to industry.

DAN ANZISKA: Thanks. And also Bruce, from the advocacy side, let's say you're working with a Dan and Christine as your in-house resource. How do you go about formulating a strategy in terms of day one, or even before day one, kind of managing the potential merger investigation and then putting the advocacy plan together and working with the staff on these kind of emerging issues?

BRUCE HOFFMAN: Sure. Well, Christine's point is really well taken, right? You've got to know what the risk areas are before you can figure out how you're going to address them. By day one, we're talking about what are you going to say if you get that first call or if you go in right after filing or before filing to engage with the agencies on what the issues are. And so you've got to know what you want to talk about.

And one problem I think with the current environment is it's very inchoate at the moment, at least in terms of what the speeches say and so forth. And there's the real problem where if everything is relevant, nothing's relevant, which was to some extent what sunk Mike Perch's experiment back in the '70s, with the FTCs looking at everything, then what in the world is it actually looking at? But I think here we've actually seen enough to have some sense, and I think this is going to continue to evolve, but we're certainly seeing in second requests in initial inquiries questions about labor, questions about unionization among firms, questions about executive comp bonus that are flowing out of transactions.

Questions about treatment of workforce, about violations of laws outside of antitrust, right? So traditionally you always get the question of how many other antitrust violations have the emerging firms committed? That's routine. What is not quite as routine is identify every other violation of law that the emerging firms have ever been accused of. That's one that's been coming up. And so you could start to sort these into areas that you think are likely to get attention and then think about, well, do we have vulnerabilities in any of these areas? And if so, what do we say about them? Do we take them on a front? Do we wait and see what we're asked about?

I think at the moment, there's still a little bit more thinking of wait until you're asked, because as I said with a fair degree of vagueness, frankly, out of the agencies, it's not necessarily, you can't know for sure, even if you identify a significant issue, that it's going to be something they're going to care about. But I think certainly being prepared at the very least to address, say, if you have an issue with labor practices, if the acquiring firm's workforce is not unionized, but the firm is being acquired is, what's going to happen there?

We haven't seen as much on the environmental side as I mentioned, but I think that's something that's going to come up. And certainly in terms of privacy of data security, parenthetically I think a points Dan made earlier are absolutely right. And I've mentioned previously in preparation for this panel, I actually spoke on this at some length at the FTC, but just as one quick example on privacy and thinking about maps, giving up your personal data is not the same as paying more.

When I give more personal data to a map, it's much more useful to me, because it might actually know where I am and even more it might know where other people are and therefore how much traffic there will be and where I might want to go all kinds of things that like a paper map, which doesn't take any of my personal data doesn't know, and is therefore much less useful. So those are complicated issues, but certainly you can see there's a lot of focus on effects on privacy effects on data security. And so to the extent you can identify those, you can do things about them.

And in particular, I think what you want to think about are both positive stories and remediation stories, right? So if you've got a positive story to tell that's something to think about working into a day one deck, or at least having ready, if the question arises. And of course, if you identify a major vulnerability at the very least, you want to have something ready so that if that issue comes up, if a staff lawyer says, "Well, what about X?" You're ready to go, there's no rocket science to this, but basic preparation is really important.

NICK GAGLIO: Bruce, if I could though to push on that a little bit and have you gaze into the crystal ball, are there particular issues that you think staff is most likely to test relatively early on, perhaps even as potential theories that could be bolted on to an attempt to block a deal in litigation? Maybe to put it another way. Are there emerging factors for consideration that you think may maybe more administrable or more easily administrable that you would expect to see staff focus on early? Even though we don't have a lot of data on that yet.

BRUCE HOFFMAN: Yes. And I think you can really fit this, there's two broad categories here to consider. Those things, Nick, that fit your point. Stuff we're more likely to see actually getting legs, not just in terms of questions about it, but something that might go somewhere, and then stuff that's going to be much more challenging. The stuff that I think has legs and is likely to go somewhere are ESG type issues, privacy, data security, environmental activities, sustainability issues, labor markets, and whatnot that revolve around competitive dimensions between the emerging firms, right?

So if, for example, you had a firm that had very strong privacy protections in it's collection of data being acquired by a firm that didn't, and where there's some evidence that competition between those firms on privacy, on the level privacy provided was something they at least were thinking about. That's the sort of thing that I think really has potential. And in part, because that fits into the kind of analytical framework that courts employ. So when you think about mergers, the critical question to merger is what competitive issue is changed by the merger? And so where you can take these broader qualitative points and link them to competitive changes than you can fold more things into the antitrust analysis.

This however's not revolutionary. I mean, this has always been part of the antitrust analysis. I've done for example, an airline merger where we put a huge amount of work into demonstrating qualitative benefits to consumers of the merger, non price, pure quality. So it's always been there, but I think there's going to be much more focus on that. The harder area, the second bucket is where the questions actually don't have to do with any change in competition between the merging firms or firms that they work with.

So you're outside now of the competitive paradigm and you're saying, well, okay, but firm X just does something that somebody in an agency doesn't like. And it's not something that the firms that are emerging compete on. So the merger itself doesn't change anything other than this policy or practice or behavior we don't like is now going to be potentially expanded to another firm. I think selling that to a court is going to be extremely challenging because it's not really what Clayton Act section seven is aimed at, but I think things may go in that direction.

If you're thinking today about the practical side, I focus first and foremost on areas where there's some element of existing competition between the firms on this non-price qualitative dimension. And I would maybe think I would be alert for major problems on these more esoteric, I guess, is the word to describe them issues. But I wouldn't put as much energy into thinking that that's going to be an area where you're going to have an actual issue that might get to your court simply because it's much more difficult to conceptualize that in the merger framework. But I wouldn't rule it out in the future. I just think it's a little further away.

NICK GAGLIO: Yeah. And it's interesting too, the difference between sort of defensive considerations and offensive opportunities. There maybe some more creativity on the side of the offensive opportunity to take in something like enhancing diversity of a patient population or increasing data access. But again, difficult to fit into the framework at least as we've known it thus far. We do need to pause for a moment so that Simone can share with the audience the CLE code.

SIMONE SMITH: Thank you very much, Nick. And your code for this segment is the letter A. A as in antitrust, A as in analytics, A as in award. Again, it's a single letter A as in antitrust. Thank you.

NICK GAGLIO: Thank you, Simone A as in awesome. Why don't we transition now back to Dan Faneras maybe picking up on some of Bruce's points about the ease or difficulty of fitting things into the existing presidential framework at the court, and within the existing approach that the agencies have taken. When we're thinking about being in front of be staff or EAG staff, Dan, what do you anticipate will be the most likely sort of work streams that we would expect to see presented by staff economists to try to integrate some of these new factors into the discussion between the parties and staff during the merger review?

DAN FANARAS: Sure. Yeah, I guess I would expect there to be initially at least effort to try to come up with common languages and ways of discussing some of the theories of harm in these areas and consider these theories from a quantitative perspective. I'm recognizing that much of that's going to be innovative, much of that's going to be brand new and may be more likely than not that there is no existing and peer reviewed literature or court, accepted practices for sort of evaluating those considerations.

I'll also add that there are generally maybe a lot of things that would need to be pinned down and where consensus among economists and other practitioners will be needed to help really focus the discussion and framework. Building off of what Bruce just said, I think one consideration that's been proposed is the scrutiny on labor and wage markets, for example.

I think our focus within reviewing a merger of course, tends to look solely and universally at the affected product areas that are affected by the merger itself. Is it or could it be the case that one would need to look beyond that and look at a firm holistically looking at things like governance, wages and practices affecting employees who aren't even involved, or even in the same business segments, for example, as the affected product areas.

I'll add here that it's widely known and pretty accepted that the relevant antitrust markets for product area, more often than not do not align with the contours of the relevant markets for labor. And whether that's along sort of geographic dimensions of considering the labor vis a vis product market, or the sort of the positions themselves, although we should recognize that there certainly are areas that warrant scrutiny where firms that do compete head to head in the product space are competing directly with each other for skilled labor. I think a notable example there of course, is sort of the market for the digital platform, engineers and product developers and that sort.

NICK GAGLIO: So, Christine, turning back to your health care specific experience and picking up on Bruce and Dan's comments, are there areas where the health care industry has already developed a toolkit for evaluating the benefits along some of these ESG and other vectors that you think would be helpful to supplement the advocacy during the merger review process?

CHRISTINE WHITE: That's a great question, Nick. And the answer is yes. Looking back to the late 1990s, some of the DOJ's enforcement actions against health plan mergers focused on the concern that the health plans would acquire monopsony or buyer power resulting from a merger or acquisition and impacting labor prices such as salary or compensation of physicians. The DOJ addressed these concerns in settlements with health plans, including Aetna and others. The DOJ consistently has looked at the monopsony power issue in health plan consolidation since that time, most recently with its challenges to the Anthem Cigna and Aetna Humana mergers.

Additionally, a district court decision addressed, in dicta, the monopsony concern in the Anthem Cigna deal. So there's a fair amount of documentation between the DOJ complaints, the settlement agreements, and some publications by economists that address these issues and could be useful to review for a historical understanding if these issue could be triggered by a new transaction.

In addition to the DOJ's enforcement activities in this arena, there have been a number of private actions focused on employment and labor issues. One example involved Albany Medical Center and allegations of anticompetitive restraints of trade in a nursing wage case. With respect to monopsony concerns in labor markets, it may be important to pay special attention to the definition of the relevant geographic market for purchasing labor. Some of the early cases posit that there is a national geographic market for the provision of, or purchase of, physician services. This would be a very large market from a practical standpoint, and it is not clear that, given current market dynamics, regulators or courts would agree that employees compete in national market for their services. In today's world, regulators and courts might be more willing to consider factors like the physicians' ties to their local community or even the physicians' families' ties to their local community.

Another area of health care antitrust that could be instructive as we move into this brave new world where everything old is new again, is that of certificates of public advantage. In the COPA arena, when a state decides to grant antitrust immunity to a health care transaction, the state often is looking at the transaction's merger effects from a much wider aperture than the price effects alone. In New York, for example, the state COPA legislation requires regulators to assess overall merger benefits and merger disadvantages beyond just price effects. This allows the state to consider the impact of a merger on employment and other ESG-types of issues. In sum, it may be useful to look at state legislation and COPA processes to understand the kind of benefits and disadvantages that they care about with respect to health care transactions. So here, I do think that the current holistic merger approach does raise some prospect that "everything old is new again," and as antitrust counsel, we can learn from what's happened in health care enforcement and apply those lessons in transaction planning activities.

NICK GAGLIO: So we do want to reiterate our invitation to the audience to ask questions of Bruce, Christine, and Dan, but while we're waiting for some of those, I wonder if we could go back to Bruce to you for perhaps a 30,000 foot kind of closing remark here on what you think the audience should most importantly take away from this new development.

BRUCE HOFFMAN: So the most important takeaways would be number one, we know for sure that privacy and data security, labor, and related issues are connected to that. And then some of these other issues that have been discussed are being asked about, so you need to ask about

this, you need to be ready on those points. Number two, the most critical aspect of that is identifying places where if you're doing a merger, the firms in the merger either a have A, large obvious problem, B, have a large obvious benefit, or C, compete with each other in some relevant way on whatever access of these kinds of factors may exist. So for example, if they directly compete on privacy.

And then next, be ready to address those points, whether you affirmatively raise them or wait for questions is a much more complicated tactical issue that it's hard to sort of weigh in the abstract on, but certainly preparation is the key to any of that. And so that's the way I'd break things down as a practical matter right now.

NICK GAGLIO: Yeah. And particularly true given the time constraints that staff seem to be under in light of the sort of merger wave and the time that it's taking for deals to clear and other considerations that seem to be compressing the time that the parties have to actively advocate before the agencies. Dan, similar question to you, is there a key takeaway or two for clients of economic consulting firms and the economists themselves to be focused on here?

DAN FANARAS: Sure. Well, I guess I would just say that the way to approach some of these problems continues to evolve and there certainly are tools and ways of considering them that already exist. And I think we need to think very carefully about the extent to which we deviate from those tools and abandon those tools altogether as some have proposed. I think we expect there to be a very vibrant and lively debate in the upcoming months as folks consider adjustments to the merger guidelines.

NICK GAGLIO: And Christine, from your in-house perspective, any guidance for perhaps your in-house colleagues? Which of these interesting and difficult issues you would have them most keep their eye on in the upcoming months?

CHRISTINE WHITE: Yes. First, I echo Bruce's and Dan's excellent recommendations. Additionally, I would encourage in-house and antitrust council not to dismiss ESG considerations in the merger context due to a healthy skepticism around the current lack of rigor or measurement or quantification of ESG measurements. The importance of ESG issues may vary by issue, by party and by transaction. As a result, it is important to dig into each of the merging parties' ESG profiles and activities, to develop a very fact specific understanding – similar to the approach to any market definition. Finally, antitrust counsel also should think offensively about how to tell the parties' best ESG synergy story. Addressing ESG issues should not be just about playing defense.

NICK GAGLIO: Yeah, I think that last point is actually really critical. I mean, whether you're talking about advances in terms of reaching diverse populations as a result of the merger, I think there's a real offensive opportunity here to craft the narrative as the agencies are figuring out how they want to look at things. So it's definitely going to be a continued interplay as we started out at the beginning of the panel. Well, thank you very much to everyone for joining us today. Thank you very, very much to Bruce, Dan and Christine for your insights and back to you, Elaine.

ELAINE JOHNSTON: Great. Thank you everyone. That was a really thought provoking and fascinating discussion. So thank you to all of the panelists for participating in this. We are now coming to our final panel this morning. This has been put together by our cartel and criminal practice committee, and it's going to look at labor cartel issues. Our moderator for this panel is Bill Baer, who is probably known well to all of us, currently a visiting fellow at Brookings, but I think better known to many of us as either an Arnold & Porter partner or bureau director at the FTC or AAG at DOJ. So he's had lots of roles on different sides of the antitrust aisle as it were. So let me pass over to Bill to introduce his panel and tee up what I think will be another great discussion. Thanks Bill. Good to see you.

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Labor Cartel Challenges: Investigating, Prosecuting, and Litigating Wage-Fixing and No-Poach Conduct

BILL BAER: Good to see you too, Elaine. And thanks to the New York State Bar Association for putting up with me for yet another year. We've got a great topic today. What I thought I'd do is set the stage and then introduce our distinguished panelists. As many of you know, over the years the Federal Trade Commission and the Department of Justice have challenged agreements among competitors to fix wages or enter into no-poach agreements.

They've included nurses in Arizona, Michigan, and elsewhere, piano teachers, fashion designers, and more recently, and probably more notably, no-poach understandings involving tech companies like eBay and Intuit, LinkedIn, and Pixar, and then a Big 6 person understanding between Adobe, Apple, Google, Intel, Intuit and Pixar. Until recently those have been pursued civilly mostly under a rule of reason analysis but they certainly had not been pursued criminally.

That changed as many of you know, in late 2016. After considerable discussion between the Federal Trade Commission and the Justice Department, the two agencies jointly announced that going forward for conduct occurring after the announcement involving naked wage fixing, or no-poach agreements, meaning agreements or understandings not related to a legitimate collaboration between the employer, would be subject to prosecution as per se, criminal offenses under section one of the Sherman Act.

They are effectively under that announcement being treated as the equivalent of a downstream price fixing or an upstream bid rigging agreement, something the Supreme Court has often called the supreme evil of antitrust.

At the time, the two agencies issued joint guidance to HR professionals. As many of us who've had private practice experience have learned, human resources people, I think, for a long time felt they had some freedom to communicate about these issues. And the effort was to provide some guidance to them about how to stay in compliance with the law. That decision, the joint decision of the enforcement agencies, has raised lots of questions for practitioners, which is why we were asked to discuss this in our panel. How is it going to be applied? How are the government and the courts supposed to distinguish between agreements that are ancillary to a legitimate goal and those that are naked per se violations? Is it appropriate for the agencies to have the authority to flip a switch and pursue something as criminal, that in the past has not been pursued criminally?

How will this play out in the courts? There's some early indications, but we really don't know. How will we calculate criminal penalties? What's the volume of commerce involved for evaluating criminal penalties? What does this mean for follow-on civil litigation? There are important questions relating to class certification and damage calculation on the civil side as well. Finally, most importantly in some sense, how do you as counselors, advise clients on how to avoid liability or in the case they come across and share with you a problem, how do you handle it? Do you go in and seek leniency from the Justice Department or not?

Well to address, and hopefully answer, those questions we have a distinguished panel of antitrust experts. The bios are in the course materials, but they more than warrant each a brief summary.

First, Kristina Srica is an assistant chief in the Chicago office of the Antitrust Division. She's been with the Division some 10 years, including an 18-month stint as a special assistant U.S. attorney in the Washington, D.C. U.S. attorney's office. I was privileged to work with her during my four years at DOJ. I know firsthand that she is highly experienced in cartel matters.

Our second panelist is Sam Weglein. Sam is an economist and a managing principal at Analysis Group. Sam has extensive experience as a testifying economic expert in a wide variety of antitrust litigation, private litigation, government litigation, both criminal and civil. He's assessed liability and damages. The Antitrust Division was privileged to have him on the economic team that helped successfully block the Anthem Cigna health insurance merger.

Our third panelist, equally distinguished, is John Taladay. He co-leads the antitrust practice at Baker Botts. John has deep experience dealing with the FTC and DOJ on mergers, on civil investigations, on criminal matters, and has a great litigation background as well. John too has been deeply involved in working with the international antitrust community and has represented the business community before OECD in Paris, and has been a non-government representative to the international competition network.

So let me see if we can first call on Kristina to give us a bit of an overview about what's gone on since that 2016 announcement. Where are we today in terms of pursuing that policy? Kristina, good to see you.

KRISTINA SRICA: Nice to see you as well, Bill, and thank you for the kind introduction, and hello everybody.

Thanks for joining the panel today. So, before I get started, I'll give the standard disclaimer here that the views that I express today are my own and do not necessarily reflect those of the United States Department of Justice.

So I think to start, the antitrust thinking or the Antitrust Division thinking on anti-competitive agreements and labor markets, is fairly straightforward from our perspective. We criminally prosecute conspiracies among competitors that include price fixing, bid rigging, market allocation. The fact that these agreements might arise in the context of a labor market does not change that analysis from our perspective. So agreements to fix wages, which we consider to be price fixing agreements, and agreements among competitors not to hire each other's employees, are considered market allocation agreement for workers.

As a lot of you probably already know, the Division, since issuing the HR guidance, has indicted a number of cases, criminal labor market cases, starting with the first one, which was obtained a little bit over a year ago. And we now have five pending criminal labor market cases. Four of those indicted matters involve different areas of the health care industry, and then the most recent indictment involves aerospace engineering services. I want to talk a little bit about each of these indictments, just to kind of, again, give more of a clear overview of where enforcement stands with the division in this area.

So as mentioned, the first indictment was obtained back in December of 2020, and that was a case involving therapists, staffing companies, who were charged with fixing the wages that they were paying to physical therapists and physical therapist assistants. This indictment was ultimately superseded in April of 2021, in which an additional defendant was added as well as some additional charges relating to obstruction and false statements. So again, pending case.

Next, in January, 2021, the Division obtained its first employee allocation indictment, which involved defendants that owned an operated outpatient medical care centers across the country. In that matter, there was a second indictment that was brought and charging some of the additional co-conspirators there back in July of last year.

Another matter I want to just point to which, again, falls in the health care space, was an indictment for again, a criminal labor case where we charged health care staffing company and a former manager of that company with allocating employee nurses, and fixing wages that they were paying to those nurses. Lastly, as I mentioned, sort of at the outset, our most recent indictment in the labor space came down last month and it involves six former aerospace outsourcing executives for their involvement in a conspiracy among aerospace companies not to hire or recruit each other's employees.

So one thing, you know, just to highlight again, is this area does remain a priority for the Division. And in part, I think the reason for that, and the focus on these matters, is the fact that they do hurt employees by not only limiting their opportunities to find better employment, but of course, hurting their opportunities to obtain higher pay, greater benefits, and a number of other things that would be available in a truly competitive labor market. So, this is just the beginning for us. We have a number of ongoing investigations in this space and we do continue to commit a significant amount of resources to this area.

BILL BAER: Thanks, Kristina. John, I know you have spent some time in this area. You authored an amicus brief in connection with one of the pending cases. Why don't you give us your 10,000 foot overview of where we are and your thoughts on some of the issues that I raised and Kristina discussed in her opening comments?

JOHN TALADAY: Thanks, Bill. So here's the situation we find ourselves in today. Let's take two hospital administrators who enter into a cooperative joint buying arrangement to try and reduce the cost of pharmaceuticals so that they can reduce the cost of patient care. If they do that and if they achieve it, well, they're operating within antitrust safety zone, and they're heroes. But if the next day, they enter into a cooperative joint buying arrangement to try to reduce the wages of surgical nurses so they can reduce the cost of patient care? They are criminals. Even though both of those acts have exactly, or conceivably exactly, the same economic impact on consumers. So we have a tension, I think, in the way we're applying the antitrust laws that is really, to my mind, irreconcilable. And I'll come back to that. But both of these things are input costs and the way the antitrust laws over time have looked at input costs is to essentially look at those as potential efficiencies, without respects to the concerns of the suppliers of those inputs. Right?

So no one really has a lot of sympathy for the big pharmaceutical companies and the profits of their managers. But of course, everyone has sympathy for surgical nurses and everything that they have to go through. But as a matter of antitrust principle, they are both input costs. And so if you look at it under a traditional consumer welfare standard, and if the reduction of input costs reduces prices, then that is probably going to be pro-competitive. But at a minimum, it would be analyzed under a rule of reason. Because you have to think about whether that reduction of input costs has a benefit downstream. Let's say for a minute you don't want to think about just consumer welfare. Maybe that's not your thing. So let's think about it on a total welfare standard for a moment.

Well, even if you're thinking about it on a total welfare standard, you still would have to consider the adverse impacts on the input, the employees, versus the potential benefits to consumers. So even under a total welfare standard, you have to do some balancing there. And again, we're in a rule of reason standard. Get ready for your hyperbolic statement of the day, okay? So the only way I think that you could conclude that that is automatically

harmful under an antitrust regime, is if you were to base the assessment purely on a labor-only welfare standard. And if we're applying labor-only welfare standard, I suggest to you, we just declare ourselves communists. And then just to wrap up, this tension I think exists even within the guidance provided by the DOJ. If you look at the competitor collaboration guidelines, and you look at what they tell you about a per se offense, it says that a per se offense results from agreements that always, or almost always, increase price or reduce output. That's what a per se offense is.

But if you look at the guidelines for HR professionals, they say that wage fixing, or agreements that eliminate competition in employment, are in the same way irredeemable as price fixing. But wages aren't prices. Wages are input to prices. And so I think we have this tension between the competitor collaboration guidelines and the guidelines for HR professionals that is irreconcilable. And I think it puts us in a very untenable position right now in terms of making sense of our antitrust laws when we have these being prosecuted criminally. One caveat, before I wrap up this comment, which is, that's not to say we shouldn't have a law against wage fixing, but I don't think the antitrust law is the law we should be using to prevent wage fixing, because I think it breaks the antitrust laws.

BILL BAER: Thanks, John. First a comment then a question. I'm glad you qualified that this was just your first hyperbolic statement of the day, as opposed to your first hyperbolic statement. But the second point and a question is, how do you distinguish between bid rigging, in which suppliers affect the cost of an automobile manufacturer, which could raise price or could suppress price, a fact pattern whereeverybody seems to agree is a per se violation from the notion that agreeing to suppress wages is not.

JOHN TALADAY: I think it's just the distinction between the upstream effect and the downstream effect. Again, the way we've applied the antitrust laws historically is to protect purchasers, not to protect sellers. And so if you have an intermediate good supplier, like a tier one auto parts supplier, and they are fixing the price of their output, right? You want to protect those buyers. But if they have some deal to try and get cheaper steel in the door, you're not going to look to prosecute that because when you're buying inputs, you want low cost for inputs and that's what's best for consumers. So that's why I think the line is drawn.

BILL BAER: Fair enough. Let me see if I can bring Sam into the discussion. Sam, I know you've thought about these issues. Can you give us your perspective? John has certainly talked from the legal perspective, how we ought to be looking at labor markets, at least in terms of whether there's per se or rule of reason treatment. How do you think about it from your background and expertise?

SAM WEGLEIN: Thanks, Bill. And thanks everyone for having me. So, two points one is more responsive to

what John was talking about, and then one that's perhaps more responsive to Kristina. So, I agree with a lot of what John is describing. I would point to one distinction between a group purchasing organization and a labor market, which is that steel is a commodity. And large purchases will often entail a volume discount. And so to some extent, the existence of group purchasing is a means of leveling the playing field. So in the example that you gave, you might see two clinics putting together their buying power in a group purchasing organization so that they can compete more effectively with partners here in Boston, for example.

Labor is different in that way, because labor is not a commodity. You can't, except in maybe, temporary worker settings, which is unique, you don't buy in bulk, you don't get group discounts on the purchase of labor. So I think that distinction is one just to bear in mind. The other thought I had listening to Kristina and her articulation of DOJ's perspective is we have to be a bit careful. In a wage fixing situation, a direct agreement, let's cap wages, let's hold steady on wages, or a market allocation. So there you have this very direct effect on, if not all employees in the firm, then certainly all new employees in the firm. No-poach agreements or no-cold-call agreements have a different flavor, because these are about switchers or potential would be switchers.

It doesn't affect, not directly at least, all employees. We'll talk more about the extent to which that no-poach then is transmitted more broadly throughout the organization, but it has a more direct impact. It's much more targeted. And no cold call in those circumstances where the agreement doesn't even preclude movement across employers. It's simply that the first move needs to be made by the employee and not by the prospective employer. That's not even an impairment of labor mobility. That's just an

impairment of information flow. And so again, we'll have a less broad impact. And so it's not obvious to me as an economist that those should all be lumped together in a per se setting. And then, we haven't even talked about potential pro-competitive justifications or circumstances.

BILL BAER: Kristina, do you want to respond to any of what you've heard from Sam and John, which seems not to be entirely supportive of the DOJ position?

KRISTINA SRICA: Well, I think from our perspective, we on the criminal side, the per se analysis is a much more straightforward analysis, in the way that we have clearly been enforcing. These cases in labor markets has been consistent with the approach we've taken in other price fixing and market allocation cases. Of course, as you pointed out Bill, all of these cases are still pending. So there's a lot to be seen in terms of what may happen. But I think we've started to get some indications that at least some of the courts are seemingly at least starting to view things in a similar light. And of course there is Supreme Court precedent as well, that puts labor market cases squarely within the per se framework. So I think that's what we're operating under.

In terms of no-poach versus a wage fixing case, in terms of the impact of those cases, I really think it's a fact specific analysis as it is in any of our criminal cases. The impact of who's actually subject to those agreements and how those cases are going to be charged is going to be a fact specific analysis. And I do think they differ even in the cases that we've charged already. So I think that would be what I would say in response to some of the comments.

BILL BAER: One follow-up, and then maybe we can hear from both John and Sam on this issue. Sam raised the question whether something is ancillary to an otherwise lawful collaborative effort. Without getting into specific investigations, are people putting forth those arguments and how do you sort them out? What's the process the Division's going through to make sure that they haven't overlooked something that at least is arguably pursuant to an otherwise lawful collaborative effort?

KRISTINA SRICA: Yeah, so I think as within any criminal investigation, we look at all the facts that are brought to us, all the arguments, defenses that may be raised. And we consider all of this in the context our investigation, and of course when making charging decisions. So I don't think that analysis is any different in a labor market case. Of course, one of the considerations that we will look at is whether these restraints are related to any sort of legitimate business reason. So that of course will be a factor in the investigation. But again, absent facts that would be very case specific that give rise to those types of concerns, again, I think we are, at least from the cases that we've charged so far, we're viewing it as these are pretty cut and dry agreements. They fall into that same framework that we've been seeing and that's how we've been charging them.

So I think it is a fact-specific analysis. We have other ongoing investigations as mentioned, and we all, as with any other case, we would consider defenses that are raised. We go where the facts and the evidence lead us. So we won't ignore anything, of course.

BILL BAER: You mentioned there's been recent case law, at least one district court decision in Texas, suggesting that it clearly is within the right of the Department of Justice to charge criminally this kind of behavior. But let me go to John and Sam, sort of the same question from the flip side. To the extent you've been involved in these cases, are you making these arguments, are the prosecutors willing to listen and draw the kinds of distinctions that I think both of you think need to be made when, when evaluating whether something should be pursued per se or not? John?

JOHN TALADAY: From my perspective, I guess what I would say is it's a little bit of an uphill scramble. The traditional view of the criminal enforcement side of DOJ has been pretty simple: agreement equals violation. If there's an agreement, there's a violation. And for price fixing, I think that's not necessarily a bad approach.

But I think when you get into labor cases, especially when you have some legitimate interactions between the companies involved, I think it gets a lot more nuanced than that. And so, whereas the DOJ lawyers often will start from the criminal perspective saying, there's an agreement and so we're going to presume there's a violation. I actually think it requires a lot of effort to sort of take it from the civil side really, where you would look under the competitor collaboration guidelines and see whether there is insufficient justification for the agreement. And so I guess, as I said, it's sort of an uphill scramble. I have had cases like that where I've been able to get the DOJ over the hump and get them comfortable, but it takes a fair amount of work. And I think it has to do with the traditional perspective of the enforcers, which is kind of understandable given where they've come from on the price fixing side.

BILL BAER: Fair point. Sam, anything to add to that?

SAM WEGLEIN: Maybe more of a prediction, but with a little bit of a preamble. So, just as a matter of basic economics in the context of some sort of collaboration or a joint venture. The reason we tolerate, or might consider tolerating, a no-poach agreement is because we want to encourage those types of collaborations. Collaborations that wouldn't otherwise happen and products or services that wouldn't otherwise be produced, if these two firms that in other circumstances, either compete with each other, or if they're vertical to one another might not interact with each other. That by bringing them together, what the consumer ultimately sees, new services, better services and so on. And if, without safeguards, such as a no-poach agreement, the concern would be bringing people together from both organizations there's intermingling. It just makes it that much easier for a company to lose an employee.

And that might curb, ultimately, investments in these types of circumstances, these types of collaborations, and we want to encourage those collaborations. And so that's the notion of ancillarity here. That's the economic justification. Now the truth of the matter is that even if there isn't an agreement between or collaboration between firms, you could still have a concern about underinvestment in the absence of a no-poach agreement. You could have a circumstance where if I'm at McDonald's and I worry that if I train people really well in the making of burger and fries, that others will free ride on that and will poach my employees. And so, as a result, without those safeguards, McDonald's doesn't make that investment in the first place. So here's my prediction.

BILL BAER: Go ahead, Sam.

SAM WEGLEIN: So my prediction is that argument is not going to carry the day. If you have a no-poach agreement in the absence of a formal collaboration of some sort, I don't think that concern about free riding is going to carry the day. I think the bigger question is the instances where you do have these sorts of collaborations, there I would hope that there's consideration given to that. Then the interesting question, and maybe Kristina can talk about this, you've got that middle ground of franchises. Previously the DOJ had a position that franchisers and franchisees were essentially one firm. And so a no-poach agreement would not constitute a per se violation. I'm not sure if that perspective has changed. I'd be curious to hear about that.

BILL BAER: With the qualifier, Kristina, that you're speaking as an individual and not articulating Antitrust Division policy, do you want to take that on?

KRISTINA SRICA: Yeah, I was going to say, I probably don't have much I can add to that today, but I can certainly give it some more thoughts, and maybe circle back with you.

BILL BAER: Again, John and Sam, in the cases that have been charged so far, have you seen evidence that the defense will be that whatever agreement is alleged was ancillary to some other at least facially legitimate pro-competitive objective?

JOHN TALADAY: I think we're definitely going to see that defense, Bill, in the aerospace engineers case. I don't know enough about this case-

BILL BAER: Because there's a vertical aspect to it?

JOHN TALADAY: Vertical component to it. I mean, it's alleged as basically a hub and spoke kind of conspiracy as I understand it. And I think you're going to hear a defense that from the hub of that alleged conspiracy, that absent that kind of understanding not to poach, that they would not have been able to provide those services. So, I do think that's going to get a lot of play and we'll see where that goes in that case.

BILL BAER: Thanks. Let's move a little further down the road and cover a little bit of both criminal penalty calculations and civil actions in the time we have left. Kristina, as I understand it, in terms of criminal penalties, the Division is able to seek twice the pecuniary gain or loss as a way of exceeding the Sherman Act criminal penalty cap. Have you all thought about how you would demonstrate gain or loss in these cases?

KRISTINA SRICA: In this area, we're following a similar framework to what we would do in other non-labor market criminal cases. So because these types of agreements are criminal conduct, just like any other market allocation or price fixing agreement, I think companies and individuals can expect that the way that the division would apply, the guidelines and calculate loss and harm would be the same way that we do in other criminal cases. Of course, as many of you know, the relevant principle under the guidelines for us is as it relates to the antitrust events in particular is the importance of the severity of the punishment when scaling with the magnitude of the economic harm. So for us, again, we don't view these cases differently in terms of how we would calculate it. We would need to determine what the relevant volume of commerce would be that was affected by the conspiracy. And, of course, that would depend on whether it was wage fixing, price fixing, or market allocation involving employees, and try to measure the appropriate volume of commerce that way.

BILL BAER: All right. Thanks. Sam, do you see unique challenges in establishing gain or loss? This will then segue, I think, into civil actions as well. Go ahead.

SAM WEGLEIN: Sure. Yeah. Let me maybe the place to start, and Bill feel free to cut me off if I'm going too long, because I can touch on some of these things later.

BILL BAER: I've been known to do that, but go ahead.

SAM WEGLEIN: Okay. So I think that maybe a place to start is just, let's pull back the camera a little bit and talk about labor markets. In what ways are there similarities between labor markets and other types of markets and what are differences and how salient are those differences? So let me just touch on some commonalities first and then we'll talk about some of the differences. So I will respectfully disagree with John. Wages, I do believe, are a price. There's a supply curve, there's a demand curve for labor and there is an equilibrium price. It may be at the competitive price. It may not be a competitive price. And we call that the wage. Like in other markets, there can be frictions that cause the wage to depart from that competitive level.

So workers might lack geographic mobility, right? So, in a frictionless market, I take a job, the best job opportunity out there, regardless of its location. The reality is my family's here in the Northeast and I would only tolerate job offers in the Northeast. There are search costs. I may not even become aware of all of the available jobs. That becomes less relevant today, perhaps with better technol-

ogies. Another commonality is that, as in other markets, some wages are posted prices. It's take it or leave it. Here's the starting wage. If you want it, the job is yours. If you don't, there's no negotiation. And then in other markets, other labor markets, there can be a significant amount of negotiation around wage and non-wage benefits as well. And that has important complications too.

Let me touch on some differences, some salient differences. We're very used to thinking about markets for products or services around the product and thinking about the firm as the provider of steel or the provider of consulting services. When we look at labor, the firm is not organized around labor. And so within a firm, you can have employees who participate in very different markets, both in terms of the product, if you will, and geographic boundaries of the market. And so within the same firm, you can have some people who are working within a relatively small geographic market and some who are participating in a national market. And they may be participating in very different product markets, if you will. So that's a very important difference.

Another important difference is unlike many of the goods, the inputs and the outputs, there isn't a single transaction and then the buyer and seller walk away, one with money and one with the product. The employee becomes ideally an employee for a long period of time, the relationship evolves. And so ideally in your analyses, when you are thinking of damages, you want to take account of the fact that wages do change over time, your responsibility as an employee changes over time, you're training on the job that takes place over time. All of these things take place over time and the comparison ultimately that you'd like to be able to make in some form or another, depending on what the data will allow is what would that relationship have looked like absent some conduct? That becomes a harder thing to do when it's not just a point in time, but a relationship over time.

And then there are the non-wage features of the job. And those can be very important too. Some are perks that you negotiate over. Some are just, I like the boss. I like the location. Things that you don't exactly negotiate over, but can make a real big difference. I mean, we talk a lot about corporate culture. The prior panel talked about ESG. Those are all non-price elements, but can be very, very important to employees. So what are the implications? Now, I'm getting to the answer to your question, Bill. What are the implications for measuring damages here? So here's what we've typically seen.

Now, we haven't seen it in the criminal context. We have seen it to some degree in the civil context. And Bill mentioned some of the civil cases. There's a rich record that we can review. And I'm happy to share materials with people after this panel, if anyone is interested. What we'll typically see are two building blocks in the civil context. Two building blocks that are empirical in nature. Both are regression-based. One is just a very basic wage regression of what are the determinants of wage? What are the things that drive wage? You've probably seen this in other contexts with cartels of poultry or steel or what have you, where the plaintiff's expert will include dummy variables for a certain time period, that is meant to reflect the period during which the agreements has existed.

And then you include all the other normal variables that you would have in a wage regression. So local economic factors, national economic factors, if the data are available, the age, and the tenure of the employee. And what the dummy variables are meant to do is they're meant to soak up and demonstrate well, here's the element of the wage that can't be explained by anything else. And so the only explanation left is it must be the effect of the conspiracy. So in the McDonald's case, for example, where this was in the franchise context, the dummy variables were for the post period, and they showed positive numbers. And so it showed, look, we took away the no-poach agreement, wages immediately increased in ways that can't be explained by these other things.

And so that's your measure. Well, that's the impact of the no-poach agreement. That's one building block. And then the other is the transmission. As I mentioned before, no-poach agreements will affect people who are seeking to switch, but not everyone is necessarily seeking to switch. And the notion is that what you want to demonstrate is that there's a rigid wage structure. And so if wages for person A are suppressed, the transmission effect will cause that to reverberate throughout the organization and will affect everyone in that organization. Now that may be less important in the criminal context. In the criminal context, the court may not be so interested in who is affected, how many people are affected. They might just be interested in that first piece documenting that wages were lower during the [inaudible] period. So I'll stop there.

BILL BAER: Sam, it was lengthy, but it was very clear and very helpful. Thank you. Listen, in the time left, let's switch if we can to the counseling challenge, given where we are. And maybe John, I can ask you first, talk a little about how you're counseling, the challenges you face, the extent to which you want to share the concerns that companies are identifying .

JOHN TALADAY: Thanks Bill. So just one clarification. Sam, I agree that there is a price for wages, but I think it's really clear that the competitor collaboration guidelines, when they say price, they mean output price, not input cost or price, because it only declares it to be illegal if it increases price. And so if a wage was a price under that context, then the DOJ would only be prosecuting wage agreements, for example, that drove up prices rather than drove them down.

Okay. That said, I think there are really very tricky issues right now in terms of counseling clients. The easy bit of it is that it is now, I think, essential that in every compliance training program, you have something about

no-poach agreements and wage fix. That's easy because whether you agree with the DOJ's ability to prosecute these matters or not, they are prosecuting them, and that is risk. And so that's an easy question. The trickier bit is what happens when companies come to you and say, "Hey, we have this issue." What do you do about that? And I don't think there is an obvious, automatic answer to that. I don't think that leniency is the automatic answer, for a couple of reasons. One is, I do think you need to investigate very clearly whether it might be reasonably ancillary or you can make the argument or the defense, if it's reasonably ancillary to a legitimate cooperation agreement.

Secondly, if you seek leniency and there's a prosecution, you have bought your client a guaranteed civil action. We've already seen civil actions now, even against the most recent prosecutions against the aerospace engineer companies. And the promise of leniency was not all that it was cracked up to be. If you want to get a better sense of that, you should look back to the DOJ program last year, where there was a discussion about that prior to its renewal. So I think that's very tricky. There are other options besides leniency. Continuing it is not a good option. I wouldn't recommend that one.

BILL BAER: All right. Got that.

JOHN TALADAY: There is extraction to be explored. And you can look at the conditions for withdrawal under the case law. And I think that could give you guidance, if that's the approach you decide to take. And then one other approach you could take is to act contrary to the alleged agreement. So openly, and notoriously, act contrary to it. And then if your client is called on that, deny that it never existed. Right? So in other words, repudiate the meeting of the minds that might have once existed. It's effectively another way to withdraw, but it's at least something to consider. None of these are mutually exclusive, I don't think. And there are many variations on the theme. But I think it's, and I'll repeat what Kristina said, these things are very fact-intensive. And I think your guidance to clients on this has to be very fact-intensive as well.

BILL BAER: So let me follow up on that, John, with Kristina. He does, I think, fairly note the challenge of deciding whether or not to come in, where you arguably have an understanding, a meeting of the minds, but you think you probably have defenses. On the one hand, the Antitrust Division position invariably will be, well come in and talk to us about it. You can seek leniency and we'll let you withdraw your leniency application if, down the road, we conclude it's not a criminal conspiracy.

But John early on in this discussion made a point that is subtle but I think fair, is the people who do the criminal prosecutions at the Antitrust Division are less, on average, experienced in evaluating rule of reason arguments. And how does the Division ensure those prosecutors themselves are open to hearing these arguments. In private practice, I did have a fairly lengthy criminal investigation and it took me a year-and-a-half to get the prosecutors to see that it wasn't horizontal, it was vertical. And it took a long time and a lot of client energy and money to get there. So how do you provide some assurance to the business community, to the antitrust counselors, that in fact the training is such that prosecutors are in a position to evaluate that kind of defense?

KRISTINA SRICA: So let me take a couple of the points in turn. So one thing just to respond to what John said about leniency and when to seek it and things like that, understanding obviously the sensitivities and some of the considerations, I think, that the defense bar has in counseling its clients on whether to seek leniency or not. But of course, another risk that comes with taking that approach of making certain determinations before seeking leniency is your co-conspirator may come in and obtain leniency before you finish that analysis. In which case your client's missing out on what we view as the best route for companies in a criminal antitrust case, the leniency route. So I do think there's risk inherent in there. And of course from our perspective, we do encourage companies to come in to seek leniency as soon as they think it makes sense to do so.

Some of these issues and questions, Bill, sort of turning to your point, can be addressed during the leniency process, during the investigative process. Leniency is, again, I think the best route for companies to seek, to do this type of assessment alongside with the Division to bring in its evidence, to bring in its witnesses that can help to establish some of these things. In the context of that, Bill, you specifically mentioned in your last point assurances of whether prosecutor will be in a position to meaningfully assess these types of things. Again, I think from my purview, from my experience, these are the types of things that we would be looking at that we would be hearing from you all on. Whether we agree on the outcome or the assessment of that evidence, I think, is a different situation.

But at least again in my experience, we are willing to hear the arguments from defense counsel, of course, arguments that are supported by documents and witnesses and things like that, make it an easier, I think, assessment for us to make. But I've not seen teams at the Division who are reluctant or absolutely against hearing defense arguments on some of these things. One other point I did want to just address from what John said. Withdrawal is an approach to end the conduct, but it does not necessarily change the liability that the company will have for the previous conduct prior to withdrawal. So again, another consideration for all folks to think about in counseling clients on the best approach to take. And of course there is, again, the risk even post withdrawal that a co-conspirator comes in, obtains leniency, and the company is still in a difficult position.

BILL BAER: Thanks. We just got a few minutes left. There is a Q and A function if someone watching wants to put a question and do it. But while we wait for that, why don't we go around the horn and give Sam, John, and then Kristina, a chance for a concluding comment. Sam.

SAM WEGLEIN: Thank you, Bill. So just to conclude maybe where we started in terms of the per se versus rule of reason standard and what implications that has to me as an economist measuring damages. So as I said before, I think where we will end up is courts will do what they do. Just the normal run of the mill free riding complaints, concerns about and impact on training, I don't think that will be enough. And I think those types of arguments or those types of circumstances will be treated as per se violations. That's not to say that those procompetitive justifications don't exist. And from a damages perspective, I think it will still be important to take those into account.

And that comes back to another point I made before. There will be a lifecycle for the relationship between the employee and the employer. And that's going to include the amount of training. And in certain circumstances and of course it will be fact specific, but in certain circumstances, in the but for world, there will be a diminished incentive to train employees because of the free riding concern that for which there are no longer those safeguards. And that should be taken into account. And the methodology that a plaintiff uses or that the prosecution uses needs to be nimble enough, needs to be rich enough to do that sort of counterfactual. And some of the tools that we've seen thus far are not nuanced enough, can not run those types of counterfactuals. And so I guess I would say, to the plaintiffs' bar on top of all of the other sources of variation that normally get thrown in their faces, there's this additional burden that to me is a really significant one. And obviously it has implications in the criminal context as well.

BILL BAER: Thanks, Sam; John we're close to the end, but got any closing thoughts?

JOHN TALADAY: Two very quick points. First, I appreciate Kristina's commercial for leniency and leniency is certainly something that should be considered, but it's got a high cost to it. And I think looking at the variables before you commit to that cost is a sensible thing to do. And one of those variables, of course, is whether someone else is going to run in before you. The second point is, I guess I would come back to the assessment of volume of commerce because I think there's an interesting point here. If the DOJ is doing it the same way they do it for price fixing, that raises some questions. Because in price fixing, you know the volume of commerce relates to the actual transactions that occurred during the time period of the price fixing, right? So that everyone has transacted during that time period.

But when you look at wages, if you use the same metric and look at all wages paid during the time period, there's a big question as to whether the employees would've transacted, but for the agreement. Right? And so I think there's a very different question that comes up. And I think that translates through to the damages assessment, the class certification issues in civil actions. And I think that's something where there's more work to be done. And one question I have is actually whether, empirically, whether you can show that the wages for all are set by the marginal employee, right. I think that's something that is a question that's out there that could be a explored more.

BILL BAER: Okay. We're going to need to wrap. One of the questions in the chat is whether, it's really sort of a market definition question. Should we distinguish between agreements that involve the downstream product market versus agreements that are broader, that affect a broader market for labor? But Kristina, any quick thoughts? 30 seconds.

KRISTINA SRICA: I'm going to put on my New York roots and speak really quickly here. But one thing again I just want to stress, and I started with this, but this is an area of continued priority for the Division. So what we've seen in these five cases is the beginning and not an end. And just to address one thing that came up earlier about intermediaries and vertical agreements, I did want to also just reiterate again, that it is per se illegal for horizontal competitors to collude, not only amongst themselves, but also through an intermediary. And all of those parties can have criminal liabilities. So thanks so much, Bill.

BILL BAER: Thank you. Listen, I want to thank our distinguished panelists. They know their stuff and they proved it for the last 50 minutes. It's been an honor for all four of us to be part of the New York State Bar Association's Annual Meeting. Thank you.

ELAINE JOHNSTON: I'd like to thank all of you. That was a fantastic panel, with a great range of views, and certainly a lot for us all to go off and think about and chew on as we move towards our individual lunches. It is also a fitting end to Day 1 of our program. As we wrap up today, I want to thank again all our panelists and all our panel organizers. I hope everybody can join us again on Monday when we will continue with Day 2 of our program. And please don't forget to register for our receptions on Monday. Links are on the website and you can do that without any cost and with minimal hassle. We do have one more brief, but important session this morning, namely the business meeting of the antitrust law section. This is for section members only. We're now going to take a short break. And after that, our chair Ben Sirota will pick up and lead that meeting. So please be back by 12:35 p.m. So we'll see you in seven minutes for our business meeting. Thank you everybody.

SIMONE SMITH: Thank you, Elaine. And thanks to all of our speakers, program organizers. Ben as the chair still, I think for a few minutes. And Elaine's incoming chair, thank you all for your time and expertise and service to your profession. We really appreciate it.

Day 1 Business Meeting

BENJAMIN SIROTA: As chair, I run the meeting where the new chair gets voted in. So we have a really short business meeting today. We'll have you out of here before 1:00 very comfortably, and we have a new bylaw change that we want to get voted on, the traditional Nominating Committee report, and then at the end I'll make some acknowledgements. So the first agenda item is the bylaw change. And Lisl will describe the context behind that.

LISL DUNLOP: Hi, everyone. So, this was discussed in an email and also in the Nominating Committee report, but just to recap, over the last several years, we've had discussions in the leadership and at the Nominating Committee about how many fantastic people we have in the Executive Committee. And we would like to be able to promote people as well as give more coverage to our activities. The committee structure is getting more involved, and there is, I think, a role for somebody to really focus on the committees and interface with the leadership, more relating to their activities. So our proposal is to add a new officer role, which we would call the committee officer, and that person will take responsibility for the committees. And that position would be a one-year position, so prior to the secretary role. So we've gone through the bylaws, and there are a few amendments that we would need to make to incorporate that position.

You see here, section two, we change the four officers to five officers, and add the committee officer role, and I think there's another consequential amendment. Again, just adding the committee officer role to the officers of the Section. In order to amend our bylaws, we need a resolution of a meeting of the Section, which is this meeting, and the amendment is not effective until we actually have it ratified by the Executive Committee of the New York State Bar Association, so the big bar. So I would like to propose a motion that these changes to the bylaws are accepted. Can I have a second to that motion?

SAUL MORGENSTERN: So moved, seconded, or whatever.

LISL DUNLOP: And so, given the virtual nature of this meeting, if anyone has an objection or wants to speak on the motion, would you please either put something in the Q/A, or speak now if you're on panelist mode. Okay, so not hearing any objections, I think we can declare that resolution passed.

The next thing that we need to do today is elect members of the Executive Committee. The nominating report sets out the two classes of Executive Committee members that are already in place. The first list of Executive Committee members, although who are actually in office until January 2023, so we don't need to do anything about those people, but they're there just as a matter of record. The class of the Executive Committee whose term expires this year are up for reelection. And rather than go through everyone's name, I'll just propose a motion that all of these individuals who have been serving on the Executive Committee are reelected for a two-year term ending at our annual meeting in 2024. Do I have a second?

PATRICIA: Second.

LISL DUNLOP: And again, if anyone has a comment or wants to object to this motion, please put something in the chat, or Q/A, or speak now. Okay, so moving right along, we have some new members to propose for election to the Executive Committee. Their names are in the nominating report: Peter Bernstein, who is in-house council at MasterCard; Margaret Rogers at Arnold & Porter, who has been serving as one of the chairs of our committees; Hannah Sholl from Visa USA; Matthew Perez from Labaton, who also has been active in our committees, and Desma Polydorou. And I want to welcome all of those people, and in particular Peter, Hannah and Desma, who I do see on the attendee list, thank you for coming to the business meeting. Do I have a second for that motion?

STEPHEN: Second.

LISL DUNLOP: Great. Again, anyone who opposes or wishes to comment, please note that in the chat, or the Q/A. Okay, the last order of business is the leadership. As you know, Ben has served in that role for over a year now and done an excellent job. And the Nominating Committee would like to propose for election Elaine Johnston, who has served as vice chair in the last year; Mary Marks, who has served as secretary, and Robin van der Meulen, who has been our finance officer for a couple of years. So then following on from that, I think we can do this all in one slate, we're proposing Greg Asciolla to serve in the position of finance officer, and he would serve a three-year term, which would end in 2025. The other terms would all expire in 2023. So I move for the election of these officers; do I have a second?

PATRICIA: Second.

LISL DUNLOP: Once again, any comments or objections? Great. And finally, although our change in bylaws is not formally effective until ratified by the Executive Committee of the bar, the Nominating Committee would

like propose Erica Weisgerber to be the first committee officer. Her appointment will be ex officio until we get the bylaw change finalized, but we will have a motion for her appointment, which will become formal once the bylaw change is approved. So do I have a second for that motion?

MICHAEL WEINER: Second.

PATRICIA: Second.

SAUL MORGENSTERN: Second.

LISL DUNLOP: Any comments or opposition? Great. So please join me in congratulating all of our new officers, new Executive Committee members, and continuing Executive Committee members. Look forward to seeing you at an Executive Committee meeting soon.

BENJAMIN SIROTA: Great. Congratulations everyone. Thank you, Lisl, and the nominations committee. And then the only last agenda item I have is to acknowledge our law student fellow who served at government agencies last summer. Usually we can meet in person and have lunch at Annual Meeting, but this year we'll do it virtually. The law student fellow in 2021 was Yilin Shao, who served at the New York attorney general's Antitrust Bureau, and Vivian Lee, who served at the FTC, and did a great job in obviously very difficult circumstances, being remote, et cetera. So congratulations to the fellow, and we look forward to seeing what you do with your career, and good to see everyone in this way. This concludes the business meeting, and we will see you for the other CLEs and the receptions that take place on Monday. Take care.

STEPHEN: So long everybody.

MICHAEL WEINER: Bye. Thanks, everyone.

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Day 2 Welcome and Introduction

SIMONE SMITH: Well, good morning, everybody, and welcome to this morning's program, which is the Antitrust Law Section Virtual Annual Meeting, Day 2. Today's program will run from 9:00 a.m. to 1:00 p.m. This program is co-sponsored by the Antitrust Law Section and the Committee on Continuing Legal Education of the New York State Bar Association. To the attendees, please note that you must remain on the line for the duration of the program to receive MCLE credit for your participation. Participants are welcome to post questions using the Q & A box in the Zoom portal. Due to time constraints, we may not be able to get to all of your questions.

During the course of today's program, we will announce several MCLE verification codes. It will be a single letter, which we will also announce in a word. At the conclusion of today's program, make sure you go back to your My Learning dashboard, and enter in the codes to receive your certificate. As we are a New York State-accredited provider of CLE, we are required to monitor your attendance, and the codes are one way to do so. At the conclusion of today's program, make sure you go back to your My Learning dashboard and enter in the codes to receive your certificate.

A PDF of the form and course materials are also available in your dashboard, and instructions on how to access them are in the email you received earlier today and yesterday. Please do not post any of the codes in the Q & A box. We would also like to ask attendees to please fill out the evaluations that are in your dashboard as your feedback helps us develop future programs. I would now like to hand over this program to Elaine Johnston, who's with Allen & Overy LLP in New York City, and who's the brand new chair of the Antitrust Law Section. Take it away, Elaine.

ELAINE JOHNSTON: Okay. Thank you, Simone. And good morning, everyone. Welcome to day two of the 2022 New York State Bar Association Antitrust Law Section program. We have another great session of CLE for you this morning, covering pharma, zero-price markets, and environmental and social welfare issues. Also, tonight, please remember we have two receptions. We have our young lawyers happy hour, and our main event reception where we'll be presenting several awards, and also hearing from Assistant Attorney General Jonathan Kanter. It's not too late to register for those. There are links on the website, and registration is free.

Before we move to this morning's CLE session, I would like to thank everyone involved in making today's program happen. First, our panel organizers today, Pete Herrick, Raj Gandesha, Dana Hoffer, Denise Plunkett, Larry Buterman, Beatrice Marquez, Kellie Lerner, and Will Reiss. Second, our sponsors: our platinum sponsors, Compass Lexecon, and Analysis Group, and our gold sponsors, Bates White, FTI Consulting, Brattle, KLDiscovery, and Consilio. Third, I'd like to thank Simone Smith and all of the staff from the New York State Bar Association in managing the logistical issues, which I can assure you are many and myriad, involved in putting on a program of this nature.

Fourth, I'd like to thank my Allen & Overy colleague, Eun Joo Hwang, who's been a tremendous help to me during my tenure as secretary and vice chair of the Section, and also in connection with this program. And finally, thank you to all of you for attending today. This morning, we're going to kick off with a panel exploring the shifting landscape in pharma antitrust. Our pharmaceuticals and health care committee have put that together, and I'm now going to pass over to Pete Herrick who will moderate it. Thank you, Pete, and over to you.

Developments in Pharma Antitrust: Evolution or Revolution?

PETER HERRICK: Thank you, Elaine, for the introduction, and to the New York State Bar Association for putting on another great program as always, and for having us here today. I'm going to go ahead and share my screen. Hopefully this will work. Okay. As everyone in this audience is no doubt aware, antitrust is in the spotlight. In recent memory, there have been potential turning points, significant events in antitrust, the *Microsoft* decision, the issuance of the 2010 merger guidelines, *Twombly*, just to name a few, but it's hard to recall a moment where the antitrust landscape seemed quite so up for grabs. For example, the Biden administration issued its executive order on promoting competition and appointed Lina Khan at the FTC and Jonathan Kanter at the Antitrust Division.

Under their leadership, both the horizontal and vertical merger guidelines are now in play for substantial revision. Congress and states are considering a range of legislation aimed at reforming and modernized antitrust. And not to be left out, both private and government antitrust litigators remain as active as ever, challenging deals and a range of anti-competitive conduct. Amidst all of that, the pharmaceutical industry has been put squarely in the crosshairs, as one of the industries the administration, the agencies and legislatures believe are most in need of greater antitrust scrutiny. That's fair to ask whether and how ultimately these potential changes will play out and what their real-world effects might be.

To answer these questions, we have a terrific panel today. First, Robin Adelstein is Norton Rose Fulbright's global and U.S., Antitrust and Competition head as well as its co-head of commercial litigation. Her pragmatic approach to the practice of law is informed by her experience, having served as in-house antitrust and litigation counsel at UK alcohol beverage leader, Diageo, and at Novartis, before becoming North American general counsel for Sandoz. Robin litigates complex commercial disputes, class actions, multi jurisdictional cases, and more, before EU federal and state courts and government enforcement actions by the FTC and DOJ and in qui tam matters and investigations and litigation by numerous state attorneys general.

Robin also advises companies with respect to the full range of antitrust issues arising in mergers and acquisitions, joint ventures, trade association activities, distribution practices, pricing, programs, and other aspects of competitor and customer communications and collaborations, just to name a few. Robin has also received numerous awards and recognitions, including by U.S. News and World Report, Best Lawyers in America, GCR's 2021, Women in Antitrust, and Thompson Reuters' New York Metro Super Lawyers for antitrust litigation.

Dr. Christine Meyer is a managing director and chair of NERA Economic Consulting's intellectual property practice featured as one of Global Competition Reviews Women in Antitrust. Dr. Meyer is considered one of the foremost testifying economists in the areas of complex commercial litigation involving intellectual property, antitrust claims and commercial damages in the U.S. and Canada. Dr. Meyer has analyzed economic issues in a range of industries with much of her recent work focusing on pharmaceuticals. She has been retained on behalf of both branded and generic firms, and matters that have included small molecule as well as biologic products. Dr. Meyer has also evaluated antitrust claims and damages in numerous cases involving IP issues, including alleged reverse payments, antitrust counter claims, to patent cases, claims of fraudulently obtained patents and monopolization.

And last but not least, Michael Kades is the director for markets and competition policy at the Washington Center for Equitable Growth. His research focuses on competition and antitrust enforcement with an emphasis on consumers, wages, equality, and innovation. Before joining Equitable Growth, Michael worked as antitrust counsel for Senator Klobuchar, who was the ranking member on the Senate judiciary subcommittee on antitrust competition policy and consumer rights, where he led efforts to reform the antitrust laws. Before that, Michael spent 20 years investigating, litigating some of the most significant

antitrust actions as an attorney at the Federal Trade Commission.

I'm Peter Herrick. I'm an antitrust partner at Axinn, Veltrop and Harkrider in New York. And I will be doing my best to keep up with this group. So without further ado, I'm going to pass the baton to Robin to talk about developments with the Biden administration and the FTC. Robin.

ROBIN ADELSTEIN: Thanks so much, Peter. It's a pleasure to be here today. Thank you. So a lot going on in pharma antitrust, but let's start with President Biden's executive order, and we really need to start a little bit before that. So on March 5th of 2021, President Biden appointed Tim Wu as special assistant to the president. Mr. Wu has been a vocal opponent of big tech and believes in aggressive antitrust enforcement. He's advocated for the return to the country's antitrust roots and revitalization of antitrust, and aggressive antitrust enforcement. But he is the author of President Biden's executive order, which provides for a whole of government approach to antitrust enforcement.

The executive order was issued on July 9th of last year, and really suggests a shift away from the traditional consumer welfare standard to a broader social welfare standard, some of which we've seen in the EU over the last several years, but which is really a novel way to approach antitrust in the U.S. And we have decades really of a consumer welfare standard and the economic approach to a consumer welfare standard. But the Biden administration is looking more at social welfare and a whole of government approach. It contains 72 directives to more than a dozen federal agencies, and focuses in particular on eight industry sectors, including pharmaceuticals and health care.

Its goal is to lower prices, increase wages and make the economy work for everyone. And it really will increase the breadth and scope of investigations into anti-competitive practices. And we're already seeing this underway. Upon signing, President Biden stated capitalism without competition isn't capitalism, it's exploitation.

Thanks Peter, next slide. So the executive order and pharmaceuticals. One of the industries of focus is pharmaceuticals, and the executive order contains directives aimed at both the FDA and HHS. Its focus really is on lowering prescription drug prices in the U.S. where it notes that pricing is more than two-and-a-half times other countries and price increases have far surpassed the rate of inflation.

Some of the directives include working with FDA on importing prescription drugs from Canada, and there are directives to HHS to increase support for generics and biosimilars and create a comprehensive plan within 45 days of last July to combat the high prescription drug prices and price gouging. It encourages the FTC to ban reverse payment settlement agreements and similar-type agreements. It includes directives to HHS to increase support for generics and biosimilars, including approving a framework for more efficient, predictable support to biosimilar and generic adoption, and working with FTC to prevent false and misleading statements about biosimilar and generic effectiveness.

It encourages the continuation of the CREATES Act aimed at requiring branded and biologic companies to share samples in order to obtain generic and biosimilar approvals.

Next slide. Thank you. Following receipt of the directives in the executive order, HHS released three guiding principles. So the first is to make drug prices more affordable and equitable by negotiating drug pricing with manufacturers and tie price increases to the rate of inflation. The second is to improve and promote competition throughout the industry by strengthening supply chains, promoting generics and biosimilars and increasing price transparency.

And then the third is to foster scientific innovation, to promote better health care and improve health by supporting public and private research, and making sure market incentives promote discovery of valuable treatments, not market gaming. It also calls for legislation to prohibit reverse payment settlement agreements and speed entry of biosimilars and generics. Finally, it calls for the administrative actions, including data collection from insurers and PBMs.

Next slide. So a lot of developments at the Federal Trade Commission, you all have heard, I'm sure, that Lina Khan was appointed on June 15th to be the chair of the Federal Trade Commission.

She is 32 years old and the youngest chair in the history of the Federal Trade Commission. And right after her confirmation by the Senate, she was elevated to chair of the FTC. She is an outspoken critic of big tech, considered to be an aggressive antitrust enforcer, and looking to shake up the current environment. She's very much in sync with Tim Wu, and they're very similar in terms of their thinking on aggressive antitrust enforcement. She was an associate professor of law at Columbia Law School. And while

a student at Yale, she wrote a law review article entitled Amazon's Antitrust Paradox, in which she argued that the current consumer welfare standard has been unable to curb competitive harms from online platforms.

Chair Khan also helped with a House Judiciary Committee report released in the fall of 2020 that outlined where several big tech companies had engaged in anti-competitive behavior. She has several industry priorities which include pharma and health care. And on July 1st, the FTC authorized investigations into key law enforcement priorities, including pharma and health care. Historically, the full commission was needed to begin an investigation, but now it can open investigations and issue subpoenas with only one commissioner's approval. So we expect to see much more aggressive antitrust enforcement at the FTC against the pharmaceutical and health care industries. Next slide, please. Thanks.

So the multilateral pharmaceutical merger task force was created also last March. And the purpose of the task force is to look at the agency's current approaches to pharma merger reviews. And this includes conduct issues and theories of harm, approaches to evaluating pharmaceutical mergers, including effects on innovation and pricing and market definition and remedies. The task force includes not only the FTC, DOJ and state AGs in the United States, but also the Canadian Competition Bureau, the European Commission Directorate General, and the UK CMA. It is a cross-border initiative aimed at addressing pharmaceutical mergers. Public comment was sought by June 25th of last year. So a pretty short time frame between March and June to submit comments.

There were 46 comments submitted to the Federal Trade Commission by organizations like the ABA, the American Antitrust Institute, the Trade Association Pharma, but additional companies like Spark Therapeutics, which recently merged with Roche submitted its own statement and Spark focused on making sure enforcers continue to focus on issues like predicting real world effect on innovation, and the effect of acquisitions by established companies of biotech startups. That's it on my slides, Peter.

PETER HERRICK: So thank you, Robin. So just to take a step back, so understanding that the administration, FTC leadership, the merger task force, all of these have identified pharma as an antitrust priority, but practically speaking, what does that mean? For example, does the FTC – just to zero in on the agency that's part of the focus of this discussion – do they have the economic and legal tools to actually take a different approach to form the deals than in the past? And, Christine, I'm going to put you on the spot here first. Any thoughts on that question?

DR. CHRISTINE MEYER: Yes. Thank you, Peter. And thanks for including me on this panel. It's quite an honor. I think the challenge for the Federal Trade Commission is going to be that, eventually these questions are going to get to courts and it's going to require rigorous economic analysis. It's not enough to be sitting around a table and musing about theoretical possibilities. And the issue with a lot of these theories, and the challenges are going to be that the implications are not unidimensional, and there's going to be balancing of different concerns and different theoretical economic outcomes. So a great example that Robin mentioned in the Spark discussion is the importance of innovation.

And clearly, I think it's well-understood that innovation is what drives long-term economic growth, both in this

industry and throughout the economy, but that's a place where economics and antitrust do not have the clear implications and model implications that, for example, a price fixing investigation would have. In price fixing, there's not all that much debate in terms of the economics that, if two companies are not competing head-to-head, and instead choosing to negotiate over prices in the marketplace, that barring some other factors that come in, that's going to lead to a decrease in consumer welfare, and in social welfare, in total welfare.

But in these cases, what is actually spurring on innovation? Is it better, for example, for a competitor to buy another R&D facility and to put those R&D efforts together, will that get products to market more quickly? Or is it better for them to be competing smaller perhaps, but competing against each other? And there are no cut-and-dried answers to that. So I think the challenges are going to be that these questions involve a lot more nuance than maybe some of the traditional antitrust issues that have been faced in the past

PETER HERRICK: Robin, or Michael, anything to add to Christine's comments?

ROBIN ADELSTEIN: Yes. I think the real challenge will be to see how this plays out, because you have the agencies making decisions. They also announced last week that they want to rewrite the merger guidelines. It will take the courts a very long time to catch up with a different standard. So we're going to see aggressive antitrust enforcement move forward. We'll see whether that holds up in the courts. It took a while for the standard to change to the consumer welfare standard and for economics to be adopted back in the 70s. But once it was, the case law changed, and it took a while to change. I think we're going to see that now. And there's also a question about how long the current administration will stay in power, and whether in a few years we'll see a change back to a different standard. So I think those are all questions we have to wait and see how they play out.

PETER HERRICK: Michael, any thoughts?

MICHAEL KADES: I would just add that Christine talked about the static price effective mergers, which is really well-established, and the innovation effects. There's a lot more dispute or disagreement on how mergers affect that. But if you look at the rhetoric of this administration, actually it goes beyond both of those issues. And so if we looked to the Joe Simon's FTC commission, the two Democrats at the time, Commissioner Slaughter, who's still there, and Commissioner Chopra, who's now at the CFTC, they basically were dissenting on every single pharmaceutical merger.

And they really were suggesting that there was something much more fundamentally wrong with competition in these markets. It's hard to figure out. Their statements don't give a lot of guidance about what they thought the theories of liability were. But I think they suggested something more than what traditionally we would think of, even innovation. I would say the thing is, one should expect much broader investigations in this area, and we don't know where it leads. I would note that the Khan commission I believe has now approved two pharmaceutical consents, maybe one, that have looked fairly traditional.

I mean, you can agree or disagree, but it'll be interesting to see if the rhetoric of going after concentration as concentration, how that fills out, not just in the investigations, but in the cases they bring, or the consents they try to obtain. That's what I'm watching.

PETER HERRICK:.All right. Well, unless Robin, or Christine, you have any rejoinders on that topic, I'll move to the next topic. Okay. So if the agencies don't have all the tools right now to do what they would like to do, what's the path forward? Well, one option is to change the law. So

I'm going to hand it off to Michael to talk about some of the latest developments on that front. Michael.

MICHAEL KADES: Thanks, Peter. And I should have said, thank you to the New York Bar Association for inviting me to be on the panel. And I'm going to focus on legislation. There's a lot of antitrust legislation out there, probably more introduced in the last two years than maybe the prior 30, or 40, or 50. And obviously there's things that would change the merger standards generally. For today's panel, I'm going to focus on the pharmaceutical specific antitrust legislation. There are three bills out there that I think are worth watching. One is the Preserve Access to Affordable Generics and Biosimilars Act, or a similar bill called the Protecting Consumer Access to Generics Act, deals with the pharmaceutical patent settlements, pay-for-delay, or reverse payments, however you want to call them.

The second one's called the Stop Stalling Access to Affordable Medications Act that deals with citizens petitions, which is the process where citizens, but typically companies file petitions with the FDA, oftentimes opposing approval of generic products. And then the Affordable Prescriptions for Patients Through Promoting Competition Act, which addresses product hopping, or evergreening strategies, where, companies launching new products in the face of their old existing product being genericized. And that deals both with what we call hard switches, which is the situation where the company actually pulls a product off the market entirely before the generic gets there and soft switches, where they use more incentive-based ways to try to move a market to a new product, to avoid the generic capturing the old market.

I would say, as someone who spent three-and-a-half years on the hill, these are some of the longest names of statutes. Usually, if you're going to do that, you try to find some very clever shorthand name, like the CREATES Act disclosure. It was our office that came up with the short name for that. But, Peter, if we can move on to the next slide, that'd be great. And so, rather than going bill by bill, I think it might be more helpful to just talk to how these all share a very similar approach. First, they're all FTC enforcement only. There's no private enforcement. I think that reflects it's a political judgment on that.

It can be very difficult generally for Republicans to agree to new private actions. Although for those of you following on the tech side, Senator Ted Cruz last week admitted that he had become a lover of private actions, at least against large tech platforms. But I think that's generally the exception rather than the rule. These are bills, unlike say the tech bills, that are very conduct-specific. They apply only to a certain type of conduct. They all eliminate the market power requirements, which I think reflects a judgment that at least for brand generic competition, delaying that competition generally has an anti-competitive effect.

And so therefore the feeling is particularly for a government enforcer, eliminating the market power requirement makes sense, and probably is not likely to lead to over enforcement. And then they are generally set up to create a presumption of illegality and then they have an affirmative defense. In the case of the pay-for-delay, the affirmative defense has to be proved by clear and convincing evidence. In the other two bills it's through a preponderance. And then the third thing, and one might see this as to counterbalance lack of a private right, they all adopt fairly large civil penalties.

So the citizens petition has the revenue you earned while violating the act, or $50,000 per day. The pay-for-delay legislation uses something that looks like almost some sort of quasi damage structure. It's three times the value the defendant received by violating the law. And the product hopping bill gives the government authority explicitly to seek disgorgement and restitution, obviously. That's important, given that the FTC lost its general authority to seek those remedies. So Peter, if we can move on to the next slide, I wanted to talk a little bit about where these bills stand and how that affects their likelihood of getting passed.

What is interesting about all these bills is, at least, based on how traditionally Congress works, they all have made substantial progress. And the way we can look at this between last Congress and this Congress, these bills have all made, moved on fairly bipartisan ways in both the House and the Senate. So last Congress, all three bills came out of the Judiciary Committee on voice votes, that's a big change. I'm young enough to remember when the pay-for-delay bill got out of the Committee of Judiciary after a massive debate and totally on party line votes.

All three were passed by the House. However, that was on a partisan line, but that had to do with, for whatever reason, the Democrats actually attached these three bills to bills that aimed at improving the Affordable Care Act. And the Republicans were quite open that they would vote for the pharma bills, but they obviously weren't going to vote for them to the degree it that they were tied to in Affordable Care Act provision. Both the citizens petition and product hopping bills were voted out of the Senate Judiciary Committee, again, on a voice vote. Very surprising. And then in this Congress, they've all been introduced in the House Judiciary Committee, and the Senate Judiciary Committee has already voted them all out, again, basically unanimously on a voice vote.

So when we talk about the thousands of bills that are introduced every year, these are already in terms of on the road to passage, the old, just a bill . . . . They're in the top 1%, I would say, of bills on the road to passage. That doesn't mean it's going to happen, but these are bills that one should be paying attention to. Peter, if we move to next slide, so I talk a little bit about what to think about their likelihood. So where do these go? And I like to say whenever I talk about likelihood for legislation, saying a bill has a good chance to pass is like it has a 25% chance. The world's

too uncertain. There are some real pros here, or reasons why they think they have a good chance.

These bills have incredibly strong bipartisan support at this point. They address prescription drug costs, which is a big issue, and really could become very important if the drug negotiation benefits in the Build Back Better Act fail, because the Democrats, I think, at that point would be looking for something to say that they have tried to address prescription drugs. I worked for Senator Klobuchar. Senator Klobuchar is on all three bills; Senator Cornyn on the Republican side is the author co-author of the product hopping bill. These are senators who are really good at getting bills done and understanding how you get things done at the end of the Congress, getting things attached. You can't discount that.

On the other side, the reasons why, and what's going to be challenges for these bills, they're relatively small in impact. And I like these bills, but compared to drug price negotiation, or massively drug reimportation, they just don't, I think, at this point have this same excitement amongst advocacy groups. The FTC, except maybe in pay-for-delay, has not been real active. On the converse here, if Build Back Better, or at least the drug price negotiation provisions pass, that may lead to people saying we don't need to do these other things or let's move on to other things. And the final thing is, there's this huge focus on digital platform competition bills. Sorry, I wish I could give you a judgment here, but I figured the next best thing was at least to give you pluses and minuses on where these bills stand.

PETER HERRICK: So I'm going to hand it to Robin now to talk about California.

ROBIN ADELSTEIN: So the California reverse payment settlement legislation. I think I counsel in-house IP lawyers once a week on this legislation. There are so many questions. Why are there so many questions? Well, in part, because there are fines up to 20 million per violation, or three times the value the company received, not only for the party, but for anyone who assists in a violation of the provision. And so I think the in-house lawyers are particularly concerned that they may be on the hook for a 20 million-dollar fine if California believes there's a violation of the statute. So this legislation went into effect on January 1st of 2020, but it was recently enjoined by the district court, and I'll talk about that in a minute.

But in contrast to the Supreme Court's *Actavis* decision, which created a rule of reasons standard for reverse payment settlements, California creates a presumption that reverse payment patent litigation settlement agreements between brand and generic competitors are anti-competitive and unlawful if there's an exchange of anything of value. So what is an exchange of value? Well, what the legislation really tried to do is to remove any defense that the pharmaceutical companies have been able to frame in any of these cases. It seems to me as an outsider, that what California did was look at what are the defenses that have been successful in defeating these cases, and let's close those loopholes.

So it specifically identifies exclusive licenses and no authorized generic deals as something of value that trigger the presumption. It specifically states that entry on its own or covenants not to sue, and reimbursement to avoid legal fees up to 7.5 million are okay, as long as they're not coupled with other types of agreements. Another really important feature of the legislation is that it takes away the ability to argue market definition, and to rebut the presumption of anti-competitive effects, and to develop a defense. And it presumes that the relevant market requires the court to presume that the relevant market is limited to the brand and AB-rated generic equivalents.

So you can't argue therapeutic class has been successful in some of the reverse payment settlement cases. The legislation was challenged by the Association For Accessible Medicines, which is the Generic Industry Trade Association. And it was unsuccessful in its first attempt. And then most recently, AAM tried again, and the court found that this time, that AAM had standing to bring the challenge and the issue was ripe, and the court found that it violated the Dormant Commerce Clause because it regulates out-of-state commerce, and enjoined enforcement of the Act altogether. Just the other day, California has sought to modify the injunction, to allow enforcement where the settlement is limited to California, and has argued that the court just enjoined it altogether because it held that it regulated out-of-state commerce.

But California said that the court should narrow the injunction to permit it to apply where there is a direct connection to pharma sales in California, and the settlements are negotiated completely, or entered into in California. So stay tuned, we'll see how this plays out. I think there are a lot of states that are looking to California, and if this is ultimately successful, we'll pass similar legislation. And we may see similar legislation come out of the federal government with this presumption, but this is an issue of concern for lots and lots of in-house lawyers, given the number of times I've been counseling on it every week since it was enacted. Thanks, Peter.

PETER HERRICK: Thank you. And trying to put this into practical terms is a big challenge. So a question I would expect is, how should practitioners really be thinking about the potential impact of these new laws? Robin, you mentioned that you're counseling clients, how does the prospect of these new laws California being one example, but also the various ones that Michael mentioned and others, how does that affect how you counsel clients now?

ROBIN ADELSTEIN: I could talk about that. I could also talk about how I spent almost 20 years as an in-house lawyer, and I had responsibility at Novartis for managing antitrust issues. And I can tell you that there's a huge challenge for in-house lawyers in trying to figure out how to counsel their business when you see a shifting landscape.

And on reverse payment settlements in particular, it was very interesting, because I was in-house at the time, and I went to the Supreme Court argument on the Actavis case. And we were trying to figure out, the business people really push and they want to come up with creative solutions.

You have a brand company and a generic company who don't see the patent in the same way. You need something to be able to bridge the gap between the plaintiff's view, the branded company's view of the patent, and the generic company's view of the patent. And they don't always match. They don't always come together. You need something in the settlement agreement in order to try to get them closer together. And the business people are very creative, and they come up with all sorts of ideas. And when you're in-house and you're trying to counsel, and you're trying to figure out, "Do I let them do this or not?" And you see a shifting landscape. No authorized generic, where the brand company has its own product?

It basically takes the brand product puts a generic label on it and sells it as a generic. And for years, branded companies were agreeing not to enter into authorized generic deals where they wouldn't authorize anybody else and allow the first to file to get in on the market and be the sole generic on the market. And those were going on for years before the FTC said, "Wait, wait, wait, no AG deals are unlawful, and we're going to start challenging them." And so you're trying to figure out as you're going along, how do you counsel, what is the next thing that is going to change? Could I enter into a covenant not to sue? Another perfect example is most-favored nations clauses.

Are most-favored nations clauses considered anti-competitive or not in this context? Will the FTC take a more aggressive approach? Will the state AGs take a more aggressive approach? How is this going to evolve over the next couple of years? And when the legislative landscape is so nebulous, and you don't know where it's going to turn, and you're trying very hard to do the right thing, but you also have the business people that are pushing and saying, "We need to get this done, and we want the best outcome for the company." As an in-house lawyer, now for me in private practice, you're counseling and trying to figure out what is the best way to proceed, what is your risk tolerance and how are you going to come out on that risk tolerance?

So it's all very challenging for the in-house lawyer, and even for us in private practice, trying to counsel our clients, it's really about understanding what is your risk tolerance? Where are you drawing that line? How are you hedging your bets as to how the legislation is going to come out? And it's a brave new world.

MICHAEL KADES: Peter, can I just jump in here? So it's really fascinating. I think about the Actavis decision. Since then, we know the FTC reports these settlements, and we know settlements with payment and compensation to the defendants have basically disappeared at least compensation above 7.5 million, or saved attorney fees. They are just not happening. If you look, patent settlements between brands and generics have exploded. So in fact, the Actavis rule has stopped, precisely the conduct that the FTC said should be inherently suspect, with seemingly no impact on over deterrence. And you can talk about all those bills. What's also interesting is, virtually none of the deals being reported at this point would fall in the presumption in all these bills.

So one of the things you face on the hill is, people are saying, "Well, why do we need legislation Actavis actually?" People have figured out how to deal with the Actavis world in a way that doesn't harm competition, doesn't exploit market power. Obviously I don't counsel, but whatever the private bar is doing in counseling seems to have fixed it. And most of the litigation, in fact, maybe all of it at this point are settlements that were entered into shortly after or even before Actavis. And so I suspect going forward, there's going to be far more difficulty navigating these other types of conduct and where I would expect the FTC to bring product hopping cases, or maybe citizens petition cases going forward. I mean, I think actually in some sense, there's more clarity now on this rule than there has ever been.

ROBIN ADELSTEIN: I would say though that California changed the line. I was counseling one way after Actavis and saying, "Well, I think this is fine. This is fine. This is fine." The California legislation is a whole other thing. And I do think that by creating this presumption of anti-competitive effects, you really have to look at it and say, will California consider this something of value? Where under a rule of reason, you're pretty comfortable it's not something of value. So I do think that counseling has to be more conservative in light of the California legislation than it was under just a rule of reason.

MICHAEL KADES: But we're not seeing that show up. There has not been a dramatic shift in the settlements being reported to the FTC. And I think that's, at least from a policy perspective, what antitrust enforcers should be most interested in.

ROBIN ADELSTEIN: And I think the FTC has been looking at it under the rule of reason, and I agree with you.

MICHAEL KADES: I think how they litigate and how they look at it is a little different. The FTC has always been very clear that they think the presumption that California's set up, if you ask the people enforcing the cases, they think it's a pretty good line.

PETER HERRICK: All right. So speaking of litigation, I'm going to use that as my segue to the next topic. The judiciary branch of course has no shortage of antitrust cases today. We're going to focus on one such area of litigation, which has been subject of testimony for Congress, and an FTC report to Congress, but may not be all that familiar to everyone in the audience, and that's rebate walls, or rebate

traps, as they're sometimes called. To explain what a rebate wall is and why it matters, I'm going to turn this over to Christine.

DR. CHRISTINE MEYER: So if we could maybe turn to the next slide, I think we have some language from the Federal Trade Commission report to Congress as Peter had mentioned. And then, I'll walk through a short canonical example of how this works. I'd agree with Peter. This is one of the newer types of litigation in the antitrust pharma space. And basically, this deals with the pricing and rebating arrangements as between manufacturers and ultimately payors, insurance companies. But typically, in between those two entities, in the payment structure, sits what's called a pharmacy benefit manager, a PBM, that works on behalf of the payor to set up formularies and the pricing, and the way this is supposed to work. This is not a market in which I go to the store, I see the loaves of bread, I compare the prices, decide on the value, and I pick the one that's of highest value for the lowest price for me, that balances that out for me.

And that happens across the economy. Because as a patient, first of all, I don't have very good information on prices for pharmaceuticals. So if I'm thinking about various antibiotics, I don't know what the price differential is. And there's a lack of information about what the best one is for me. I mean, I know what kind of bread I like, but I really do need the doctor's input to determine which antibiotics are equivalent to one another, and which ones might be superior for my particular condition. And then there's the other layer, which is that, I'm insured. So when I go into the store and buy bread, if I choose to buy the most expensive loaf of bread, well, that falls on me, and I might not make that mistake again, and I bear the full cost of that.

Now there's an economy-wide cost in terms of effect on equilibrium. But if I'm what we call an atomistic consumer, that doesn't matter, and I certainly, in any case, don't worry about that. But in pharmaceuticals, I don't pay the price, at least not directly, my insurance company does, and then decides what part of that I'm going to reimburse. So for so many reasons, and as anyone who has studied this market knows, it deviates from the typical economic market that we think about. But the PBM plays a key role, and the formulary status, in that, what's supposed to happen is the drug manufacturers will negotiate and compete for preferential status on the formulary. So they'll give price discounts ultimately through the PBMs, to the payers.

And then the ones that offer the best price will then be put on the preferred formulary tier, which means for me, as a patient, I usually pay a lower copay or I just pay a small copay versus paying an 80, 20, or something like that. All the formulas are set up in different ways. So there's a little bit more of a path from pricing to encouraging higher usage or higher demand, but that path runs through rebates and PBMs. So what is the issue with the rebate wall or rebate track, if I want to think about it? And there's a typical example that's laid out here. But the issue is that, oftentimes, these rebates are structured as market share-based, or threshold-based.

So in order to get a certain rebate, the payor PBM needs to reach a certain market share for that particular drug, or needs to have certain volume of sales based on historical volumes and things of that nature. So where this comes in is, typically, when you have drugs that are used to treat chronic conditions. And so it's not possible for the payer and the PBM to switch people to the lower price product. Because in order for this mechanism to really work, when they put the lower price, the product that gives a deeper discount, on a preferred formulary status, and you want everyone to shift over to that lower price product.

But as we know, a lot of chronic conditions and particularly ones that involve things like autoimmune conditions involve biologics. So we're going to start to bring biologics into this discussion as well, where it's not an antibiotic I take for 30 days, and the next time I have an infection, I look at this question anew. No, if I have a product that's working and controlling my autoimmune condition, even if a lower price product comes out, I and my doctor might not be willing to switch because some of these products take a long time to figure out the right dosing and the right mix of products for that particular patient.

And so that stickiness means that if the formulary, if the payor decides, "Well, I'm going to try and go with this lower price product, I'm going to accept those discounts. And I'm going to try and get more people over. Then what happens is, they end up paying the higher price for the product that they're not giving preferred status to. But guess what, the market is not going to react in the way that all patients are going to move over to the lower price product. So what they have is this sticky group of patients for which they're paying the higher price. And so that can prevent the formulary in the first instance, from even accepting those discounts and putting that new product, let's say, onto a preferred formulary status.

And so what happens, the allegation runs, is that you never even see that in the marketplace. What happens is, that calculus is done, and it's decided, no, even though this other company is offering great pricing, in the form of these rebates, we have to, we feel like we have to stick with the old product, higher price product on the preferred tier, the formula, in order to avail ourselves of those rebates. Because we know that our patients are going to be using that product, and we have to avail ourselves of those rebates. So it's a long-winded answer to just explaining it because it is a complicated issue. And the economics are complicated because we're talking about discounts, we're talking about the fact that this older product, the one that patients are sticky on, is offering discounts.

And so right then and there, you have an issue of, where is the anti-competitive harm when we're talking about a product that's discounting? I'll just move to the

next slide quickly and just mention a few cases. I'm not going to run through these. There have been a number of cases, and you see the dates on these. These are relatively recent cases. The Remicade case, the first one that's on here just settled this past summer. So we're just beginning to see these cases come up, and we're just beginning to see them resolve through the court. So it'll be really interesting to keep following them. I want to just go on from an economic perspective, just to give you a sense of why these cases are so different, and why this tends to happen in biosimilars.

So here's an example, this is just, as you can see from the title, there's some pricing that we were able to get from public documents, from Medicare claims. And I'll give a shout out to my colleague, Christopher Stoneberg, who put these together, who's going to be coming out with a fact sheet on some of these issues that you might want to follow. So you can see here, the innovator product, Remicade, the first of these biosimilars, and then the follow-on products that are claiming biosimilar status. And when you look at the share here, or on the price here, this looks pretty similar to what you would expect in small molecule, when generics come in. These are not generics, these are biosimilars, but when follow-on products come in, the price goes down.

But let's go to the next slide, and let me just show you something that is very different from what you see in small molecule. Look at the share. The shares of those follow-on products are very, very low. Remicade was the first case that was brought in 2018, on these issues, although now settled. So what you can see here, and I know we have limited time, and I certainly want the lawyers to weigh in on the legal aspects of this. But what you see on these two graphs is surprising, if you're at all from familiar with the typical X chart that you see time and time again, where, upon generic entry, the generics take over huge portions of the share.

There are three generics. Now this was three years after, you would expect generics to be taking 90% share or so, and you don't see that. So this tells you right here about the stickiness of those patients. And that really puts in the distinctive aspects of biosimilars in which they're not automatically substituted at the pharmacy, they're very expensive to produce. And physicians and patients are unwilling to switch to them, again, because some of these chronic conditions make the dynamics in biosimilars very, very fascinating, and it's going to introduce a whole new set of issues, this being the first.

But I have no doubt there'll be other issues that come up because of the differences between biosimilars and small molecules. So with that very quick intro, I'll turn it back over to Peter, and have our lawyers weigh in on some of the legal aspects.

PETER HERRICK: Thanks, Christine. I'm going to kick it over to Michael now to talk about some of those issues, as well as some scholarly analysis that's just coming up in this space.

MICHAEL KADES: Okay. So I'm going to try to be very quick. So every thing I think Christine really did a nice job outlining the issue and why it's important. And let me just try to put where I think the legal landscape is here. One, I think it's important to understand that this issue of loyalty rebates, there's actually is a lot of economic literature about when it can be a problem and when it can't. And so there's some papers there that you can look at if that interests you. I think the thing to think about is, it is far more likely to be a problem with biologics because you don't have automatic substitution, and that the cost for biosimilars is so much higher in terms of manufacturing costs, that you don't get the dramatic price decreases.

So changes, incentives. So, Peter, can we just skip? We're going to skip that, because that would take way too long. And I think, to put a point on what Christine was saying, the courts are going to struggle with this issue precisely because it is a strategy that looks like a discount. If you work through the example in the previous slide, it may not function as one, but I think it's really interesting, one of the cases where they failed, they lost that summary judgment the plaintiffs did, and it involved EpiPen, which is often in the news, because prices go up and lots of people have to use it.

At summary judgment, interesting, the court said, yes, there's a loyalty rebate here. Yes, the brand the incumbent had, for the purpose of summary judgment, the plaintiffs can prove, market power, monopoly power. The plaintiffs can prove that both parties expected the competitive product was going to take substantial share at a substantially lower price, within three years. They can prove that the brand did not respond to entry by lowering price or improving its product; instead, they used a loyalty rebate. And they can prove that the result of this was that the entry largely failed entirely, and that prices for the brand on net, overall, went up.

So one would think, if that's where you were on summary judgment, you get to go to trial, and then you can have a fight about whether your evidence actually proves those facts. In fact, the court basically said no, and if that's the rule of law, it means that even where these rebates are anti-competitive, it's going to be very virtually impossible for plaintiffs to win. And so we need to see where the courts go with this. But I think this problem is very hard for people to wrap their heads around. How can a discount be anti-competitive? And even where there's economic theory, and arguably facts, it's still a struggle.

PETER HERRICK: So I'm going to kick it to the general group for final thoughts. We've talked about a huge range of issues, too many to recount right now. But looking ahead, how should practitioners and in-house counsel think about all of these new issues? Will we be looking back five years from now and think how this was much

to do about nothing, nothing really changed? Or will we be saying, wow, that was the beginning of a revolution in pharma antitrust? It's a big question, and we have only limited time, but I'm going to give Robin the first shot at it.

ROBIN ADELSTEIN: I think it has to be an evolution rather than a revolution, but it very well may be the beginning of a revolution. I do think it's going to take a little while, I think I said this earlier, for the courts to catch up, if there is more aggressive antitrust, which I expect we will see. If there is a change in the consumer welfare standard, and different standards are applied, I think it will take a little bit of time. So I think it will be an evolution, but this may be the start of the revolution.

PETER HERRICK: Christine, any final thoughts?

DR. CHRISTINE MEYER: I don't know if I have a strong opinion about evolution versus revolution, but I come back to what I started with, which is that, at some level, I think we've been able to deal pretty well with pricing in the markets. Obviously, the rebate walls give us an example of where some of those challenges are, but I think it's really on questions of long-run innovation, because that's really what's driving economic growth. And maybe by some retrospectives and furthering our economic understanding of innovation, if we can actually begin to tackle that and how to make the markets as competitive as possible for long-run innovation, then I think it's a revolution. I think if we're just staying with the newest way of thinking about pricing, then I think we're in the world of evolution.

PETER HERRICK: Michael, you have probably about 30 seconds before we get the big hook. Any final thoughts?

MICHAEL KADES: I think, I don't really have much to add. I mean, I think we just don't know. I think there's the rhetoric, and the initiative here is for revolution, and we'll just have to wait and see how far it goes.

PETER HERRICK: All right. Well, thank you everybody, and especially the New York State Bar Association for giving us this opportunity and to each of the panelists. A great panel, great discussion.

ROBIN ADELSTEIN: Thank you, Peter. And thanks to the bar.

MICHAEL KADES: Thank you.

DR. CHRISTINE MEYER: And thank you, Peter, for all your organization. Terrific.

ELAINE JOHNSTON: Yes, I would like to echo that. That was a great panel – very informative, and covered a huge amount of territory, but I think did remarkable justice to the material. So thank you all so much for that. Before we take a short break, I'm going to invite Dr. David Toniatti from our platinum sponsor Analysis Group who is going to say a few words. So Dave, if I can pass over to you.

DR. DAVID TONIATTI: Sure. Thank you, Elaine. Good morning. It's a pleasure to be with you. In the next session, we'll hear about zero-price markets, and I'm looking forward to hearing from our esteemed panelists. Much of the discussion about zero-price markets has rightly focused on technology platforms, and the position often held by economists is that there's nothing inherently different about the economics of zero-price markets. Zero is a price, just like $5 is a price, and negative $5 is a price. A zero price presents challenges to conventional approaches, to market definition, and raises questions about what it means, for example, to impose a SSNIP, but the economic incentives firms in a market or how those incentives might respond to changes in the competitive landscape, doesn't require that a price be positive.

We also sometimes hear that zero-price products are ones in which there cannot be harm. Again, the economic toolkit here is fundamentally the same. And the opportunity for harm, or benefits from changes in incentive, is also present. I'll offer that this may be too simple of an out for economics and economists. It is certainly true that zero-price markets present empirical challenges, if not new theoretical ones. The data to assess competition in zero-price markets are often harder to obtain, and harder to interpret. And the disagreements between technology firms and regulatory and enforcement agencies about how particular data can be used in the matter are often broader and deeper than in matters involving more traditional industries.

At its best, economics provides support for the common sense logic about how markets work. And the challenge for both technology firms and agencies is to present empirical analysis that are grounded in the facts of the case, and reflect a nuanced understanding about how these data are created and used by firms. There's of course much more to be said and explored on this topic, as we'll hear in the next upcoming session. So thanks very much. Elaine, I'll turn the mic back to you.

ELAINE JOHNSTON: Thank you, Dave, and thank you to Analysis Group for your support. We're now going to take a short break, but please be back at 10:15 a.m. Okay. Thanks.

Zero-Price Markets and the Boundaries of Antitrust Law

ELAINE JOHNSTON: Welcome back. Our second panel this morning has been organized by our Monopolization and Big Tech Committee, and it's going to look at the highly topical issue of zero-price markets. With that, let me turn this over to our moderator, Antonio Capobianco. Antonio is the deputy head of the OECD competition division. Antonio, we're delighted to have you here. I will pass over to you to introduce your panel. Thank you.

ANTONIO CAPOBIANCO: Thank you, Elaine, for the introduction. Let me welcome all of you, all the participants to this panel discussion on zero-price markets and the boundaries of antitrust law. I think I can comfortably speak also on behalf of my co-panelists when I thank, take this opportunity to thank the New York State Bar Association for the vacation and most of all for putting such an interesting and challenging topic on the agenda of the 2022 Annual Meeting.

It's a real pleasure to share this panel with three esteemed panelists. They need no introduction, but still I want to say a few words about each and one of them, and I will do that in the order in which will give them the floor in a few minutes.

I would like to start introducing Cristina Caffarra. Cristina is a well-known international expert in competition economics. She has led the antitrust and regulatory practice at CRA. She also assisted it in Europe for many years, and she has gained a vast experience advising clients in landmark antitrust cases. In recent times, she's put her heart and intellectual curiosity deeply in the discussion of regulation and digital economy. She's a regular speaker to round table and events on competition regulation and the digital policy, so welcome Cristina.

I want to welcome also Andreas Mundt. Andreas is the president of the Bundeskartellamt, the Federal Cartel Office in Germany since 2009. But he has a longer history in the agency and the German government, so he can bring a lot of experience from the enforcement side, not only from a domestic agency but he's also the chair of the ICN, and so he brings also a perspective from a discussion that takes place in international forum.

Last but not least, let me welcome Makan Delrahim. You all know Makan very well. He's a lecturer in law at University of Pennsylvania School of Law, where he has the pleasure to teach students from both the law and the business school. Makan, of course, served as a assistant attorney general for the Antitrust Division from 2017 to 2021. Again, welcome Makan. Welcome to you all.

I can say with a pinch of pride that all of you have been involved in discussion at OECD on digital issues, zero-price market. You have roles, have had roles in the OECD, so welcome to all of you and thanks for your time. I'll say just a few words to set the stage and then I'll pass the floor to the panelists on the topic. That is a zero-price market and I'm sure that over the course of any single day, most of us consumers are coming to contact with at least one product that is offered price at zero. Whether we use social media, we look for an address on a map app, check on the weather or search the internet.

Now, this business model is not a new one. We know we're familiar with basic version of products offered at zero-price, an advanced version offered at a price. We know about multi-sided market where transaction on one side of the market at zero-price but the cost of providing that service of that product compensated from transaction. In other markets, and not only in the digital world but also in traditional markets I remember when coming out of the Metro station, we are offered for free the magazine and newspaper, so that's a typical situation.

However, zero-price markets have certainly appeared in great numbers in the digital economy, especially in the platform economy. And they have unique characteristic that may raise policy questions and enforcement challenges for competition authorities and practitioners. We know that the fact that consumers are not charged with the price or a fee to access that good services, because a service is provided to them in exchange for other valuable assets to the provider that is access to their information, their personal data, their attention to advertising.

This has consequence for competition, and this is why the growth and importance of the zero-price economy has raised a number of questions for antitrust policy makers, enforcers and of course for practitioners and in-house counsels.

Some of these questions, first of all, if price is not the relevant criterion for competition, how do firm compete and how relevant are for-competition business models based on these other variables of competition. We've seen agencies focusing more and more on quality competition and trying to identifying also what constitute the correct, the right dimension of quality competition in zero-price markets.

We have seen also developing new theories of harm and we'll hear about those in a moment. It could be consumers can suffer from degradation of quality and respect of the level of privacy afforded to them, the amount of personal data that are requested from consumers or the amount and type of advertising that consumers are subject to.

There are challenges also for competition authorities associated with the analysis in zero-price market. We know that competition agencies have developed analytical tools based on their ability to observe price behaviors and to draw all sorts of inferences from how forum price their products. From what is the market, the relevant market in which they operate, whether they have market power, whether they're trying to exclude competitors and predation, for example, or whether they're exploiting consumers, whether that is a theory of harm that is relevant in that particular jurisdiction.

Here the question is, do competition authorities have to adapt their analytical tools in absence of the ability to observe monetary prices? And how do we measure competition when the right dimension on which firm complete it's quality or measurement issue? And how do we integrate behavior insights in more traditional industrial economics approaches to assessing firms' behavior?

Also policy questions that have emerged. How do we best address demand side concerns into zero-price economy? And we know that the whole range of demand side issues can affect competitive outcomes in zero-price markets. We know that consumers may be subject to able biases that undermine competitive outcomes in these type of markets. And firms have exploited these biases ranging from deceptive, unfair contract terms. From exploitation of information asymmetries, causing market failures, exploitation of consumer biases in decision-making.

And here the question is whether competition law is the best or even the right tool to remedy these demands and concerns, or whether other agencies such as consumer protection, data protection authorities or sector regulators are better placed to do that. So the discussion moves to, what is the role of different policies to diagnose demand size problems and develop pro competitive consumer wealth enhancing solution. How these different policies interact.

The last question, which is very much live policy for but also in conferences is if competition law enforcement is not sufficient to address these concerns, what do we do about it? Should competition law, competition enforcement be complimented by regulation that we have seen a plethora of proposals, proposals are developing to legislation and now legislation is giving also generating cases.

We'll hear about some of these issues and more possibly from our three panelists. So I'll stop there because we really want to hear from them, and I'll give the floor first to Cristina. Welcome, Cristina. I know you have done a lot of thinking about privacy and data protection violation as a potential antitrust theory of harm. But please, the floor is yours for the next 10 to 15 minutes.

CRISTINA CAFFARRA: Thank you so much, Antonio, and thank you so much for this invitation. Good day to everyone. Honor to be here, to be the warming up act in fact. Andreas and Makan, both of whom have done a lot of thinking on this. Andreas in particular has pioneered some of the issues I'm going to be talking about in Europe, so delighted to be here. Just a brief disclosure. As many know, I always do this in the beginning of any talk. I've done work for agencies and companies. I've worked adverse to Google and Facebook. I've done some work for Amazon, Apple, Microsoft, Uber and a few more.

Privacy and competition, this is an incredibly important angle, because we are in effect, in a situation of market power crisis and monopoly, and privacy crisis, and the two compound each other. Because it is real that in fact, data protection, privacy violations, which have leveraged data assets across markets and have allowed accumulation in the cascading of market power, have led us to where we are pretty much, with markets being enveloped, with market power being cemented.

And assisting and conversely, it has been also the market power that's been accumulated that is enabling and has enabled significant data protection violation on a massive scale with impunity, with systematic breaches that we observe today. Not withstanding the fact that we are observing this kind of parallel phenomena, we continue to run in many ways, antitrust and data protection as siloed disciplines. The antitrust agencies tend to, and I make an exception for Andrea's agency, but tend to do market power over here, so this is what we deal with. We do market power. And over there, there are the data protection agencies that do their thing.

Except that if we fail to deal with the market power, if we allow companies to go ahead and leverage data offensively from a market to another, combining cross-using data between their subsidiaries, their friends, their second cousin, within the companies themselves, cascading monopoly from market to market, we are making life much more difficult for data protection agencies and we are not facilitating the taming and the control of the market power that besets many of the situations.

Not only that, we are also letting these data giants effectively impose or formulate their own definition of what a privacy solution should or could be. We've seen Google's deprecation of the third party cookies with the privacy sandbox becoming their own way in which privacy could be pursued. But we are in a world in which that may be argued to address some perhaps of the external data referral, but it certainly does not address the internal data referral that many of the companies are benefiting from.

They maintain first party data that they can again, leverage and use to cascade market power from a market to the other. And the reality is that if we do not see this together in some way, we send fragmented, under resourced data protection agencies. In Europe we have something like 40 data protection agencies to go out there and fight these giants with no more than plastic knives in the end, in terms of the tools that they can bring to the party.

Let me just be clear. I'm not arguing that we should be addressing data protection violations, which are ripe and multifarious through antitrust. This is not my point. However, when both of these somehow fail to work together, we are creating a bigger composite problem for both. And so, I think we need to recognize in antitrust much more explicitly, that the accumulation, the aggregation and the exploitation of data is at the real core of mergers and conduct and we need to develop ways in which we look at it properly.

And this in two ways. One, we need to integrate in some way that understanding of what the data power entails into the antitrust analysis, developing theories of harm that reflect that. We also need to recognize that there are synergies between the two, not tension. This idea that they are in conflict with each other is ultimately a propaganda narrative by many big tech comparatives. There is no sense in which the way I see it, these two are in contradiction. They can actually reinforce each other because principles like line of business restrictions in antitrust are not very dissimilar from purpose limitation principles in data protection.

In what ways do we need to develop new theories of harm or in any way sharpen, in any event sharpen the kind of theories we have to deal with this more effectively? I think emerges one example I'd like to quote, because it was so high profile and controversial last year, was of course the Google Fitbit cases. We know it was approved by the European Commission after some undertakings. The concern there that the European Commission pursued was very much about the ways in which the data that Fitbit was bringing to the party could potentially increase the market power of Google in digital advertising.

Except that Google is already a monopolist in digital advertising, or almost so. And so the issue was never that. The issue was much more a concern around the ways in which combining data about health fitness, my vital signals, with an existing data fire hose about location, about my searches, about my history, about everything about me, could in principle create the opportunity for practices that extend beyond digital advertising into other markets, which have to do with insurance and medical care and financial services and potential employment. Ways in which a monopolist like Google could use this information to discriminate effectively against citizens. That was the na-

ture of the concern that wasn't addressed, of course, by the remedy that the European Commission put in place. Because that was simply a restriction on Google to use the Fitbit data for digital advertising. But that was never the problem. Under the current remedies, Google in principle is free to use this data for an any other application. Unless, of course, GDPR is enforced and the principle of the purpose for which the data is collected is really pursued.

But more generally, I think in mergers, we need to ask our sales systematically questions about, when you are buying someone and you're paying a gazillion for that company which has got a significant data asset, let's try not just ask ourselves the question of, what is the quality of the data? How big is the data lake that is being acquired? But also kind of questions about, does the buyer have the necessary consent potentially to use the data of the targeting the ways it might intend to? Because if those consents are not in place, then we are effectively anticipating that the buyer will violate GDPR, and that may well be why it is paying so much for the target.

But this isn't a pretty happy situation to be in. This is something we should be full of. Even in the context of merger analysis, we should be asking these questions. Again, I do not intend to mean that we should be addressing data protection violation through antitrust, but we need to be informed in the antitrust assessment by the data protection expert. Conduct another area briefly. Again, this is an area in which one can develop and should develop a sharper understanding of how theories of harm can be grown around a notion of exploitation.

If I use data that I have as a platform, just because of my interaction with the sellers or the developers, data that does not necessarily belong just to me, and that affects my conduct, for example, in ways that may lead to self-referencing, that is potentially a serious issue. And it's not an exclusion issue. This is where things disconnect because we see some of these cases being brought forward, but tend to be then turned into some weak feeble theory of exclusion. This is not exclusion. We need to be clear that we are talking about exploitation of a data asset in directions that benefit one at the expense of others. There is a need to develop these theories in a sharper and more and clearer way.

Finally, I will say that what's interesting is that perhaps something is moving in this direction. I look forward to hearing Andreas who really has pioneered this approach in Germany. We have also in the UK, a very clear leadership from the Andrea Coscelli and his team, who are profound believers in this idea of integrating these insights into the analysis. They have combined teams of data scientist and economist and lawyer working on cases. We're also seeing, of course, even from here in the U.S. what appears to me a potentially big shift. The chair of the FTC is, of course, very known to be very keen on this potential use in future of rule making, who knows?

But also what is interesting is I've seen just last week, a judgment in California by a judge co, which rejected the motion to dismiss by Facebook, against a class action, where the consumers and the advertisers were bringing forward privacy argument as violation and the judge spent 30 pages acknowledging that bait and switch techniques, the ways in which the use of data was misrepresented by Facebook, had all of the potential to lead to consumer harm and to be potentially also violation of Sherman Act. I think that this is an area where things are coming into focus, and I'm hopeful that discussions such as these may help in that transition. Thank you.

ANTONIO CAPOBIANCO: Okay. Thank you, Cristina. Andreas, I don't think there's been any event in the last years where you could get away without talking about the Facebook case. But I think after having heard Cristina, I think your agency's been in the lead in thinking and trying to test sharper theories of harm on the relationship between privacy/data protection and competition. Why don't you tell us a little bit more about the Facebook case or saga, as it is now? But I know that Germany has also been leading in reforms, regulatory reforms and there's a lot of developments in the country, and that will affect, have an impact also on the thinking in the Bundeskartellamt. Andreas, over to you.

ANDREAS MUNDT: Antonio, many thanks. Well, the Facebook case proves two things. One thing is: you can be innovative with regard to data in competition law. The other one is: it takes years before the courts to bring such cases to a good end. And that is maybe the flip side of it. Well, many thanks to the New York State Bar Association for having me on this panel today. It's a panel on zero-price markets and the boundaries of antitrust law.

Reading the title, I already find this wording of zero-price markets misleading because there is no zero-price market. In the end, somebody has to pay and there is a price, of course. Maybe you could call it a zero money market, at least at first glance, if you look at the exchange between the users and the platforms. But it is definitely not a zero-price market. Because as I said, there is a price.

I will give you a very short overview of the Facebook case in a nutshell because I think this case stands for network effects, for data-driven business models, for the fact how a user can pay with data and for the fact that at least from a European perspective this is also maybe an exploitative abuse that we see here if we take data as a means to pay for a service. At the same time, by the way, applying to the detriment of competitors of Facebook. I will try to make that clear.

Well, the Facebook case in a nutshell. First, we found that Facebook holds a dominant position in the market for social networks. Market definition is not easy here, but we found that there is basically no other platform that has the same functions as Facebook, confirmed by the way, by judgment of a federal court here in Germany, the federal

Supreme court. We found that Facebook is dominant addressing 23 million daily active users in Germany, 32 million monthly active users, corresponding to about 80% of users of social networks here in Germany.

So I think it is fair to say that Facebook is dominant in this respect. Where does this dominance stem from? I think there are two effects. First, there are network effects. I do not have to explain that. But the other one of course is the data gathering and the data processing that Facebook is performing. It uses different sources of data, one, of course, being the data that is collected on Facebook itself.

Other data sources are Instagram and WhatsApp, affiliates of Facebook, but Facebook is also on many third-party websites you can be on as a user. This is another source of the data that Facebook is collecting. So a user that wants to make use of Facebook, a user that cannot evade Facebook, because Facebook is dominant in its market, this user has to agree, he has to give consent to a limitless gathering and processing of the data that the user leaves in the internet.

And we found that this is exactly the abuse: you have to give your consent to the collection of this data. It is not voluntary just because Facebook might ask for your consent. Remember Facebook is dominant. So if you want to make use of it, you have to give your consent. In this situation, you really cannot say that giving your data is voluntary. You have to accept limitless data gathering. You have no choice. And this is crucial. Again, the user wanting to make use of Facebook has no choice along the general terms and conditions of Facebook with regard to data gathering. And that is what we found to be not in line with the European GDPR. Because again, there is no voluntary consent to this gathering of data.

The remedy that we have imposed on Facebook is exactly along these lines. Facebook has to leave a choice or give back a choice to the consumer. If the user agrees to the limitless data gathering, fine. Facebook is allowed to combine all the data that it collects on the Facebook account of that user. But if the user does not agree to this limitless collection of data, the data shall not be combined on the Facebook account. It shall remain with the respective service, like Facebook, like WhatsApp, like Instagram, or with the respective third-party website.

This decision, if you want is maybe a bit along the lines of an exploitative abuse, in particular if you take data as a replacement for money. Another point is of course the more data Facebook collects, the better its service gets, the more it is able to attract users and providers and the more this is to the detriment of competitors of Facebook. It is a two-sided theory of harm that we have developed here.

What was very helpful in this respect was an amendment of the German Competition Act, already back in 2017. That amendment said that zero-prices do not exclude the existence of a market. I think that was so helpful. Because it spared us from long discussions with the courts on exactly that point. Can we talk about a market when we do not see a price in terms of money? We tried.

What we tried was to describe exactly which factors contributed to the dominant position of Facebook, and what data did in that. We took that decision in 2019 and then we were subject to an ongoing saga before the courts. The case went to the Higher Regional Court in Duesseldorf on an interim basis. We lost that case. We went to the Federal Supreme Court. We won the interim proceeding before the Federal Supreme Court. Then the main proceeding went back to the Higher Regional Court in Duesseldorf, which decided it could not decide that issue and referred the case to the European Court Of Justice where it is now.

We expect to have a decision by the end of the year, which in one sense, of course might be helpful because it clarifies things for the future. The question of the interrelationship between competition law and privacy law in Europe will be clarified by the court. You could say that this is good for the Bundeskartellamt, we will write history of law in a way. But it is bad for the users, it will take years. Because once the European Court of Justice will have taken its decision, it's going to get back to the Higher Regional Court in Duesseldorf and from there I'm sure it will again go to the Federal Supreme Court in Karlsruhe.

And exactly this proceeding has contributed to another amendment in German competition law. Just recently, we have introduced a new section in our law, section 19a. It applies to companies with paramount significance for competition across markets. Well, to translate that, there are many words for that, so you could call them ecosystems. If you go to the UK, you hear about companies with a strategic market status, which is roundabout the same as we have in section 19a.

If you go to Brussels and take a look at the DMA, you find gatekeepers operating core platform services, in a certain sense very much the same that we have. And if you look at the U.S. legislative proposals, they're not far away from what we have in our law in section 19a. Section 19a should facilitate such cases for the future. We have to take a two-step approach. Step one is that we take a holistic assessment that an undertaking is of paramount significance for competition across markets. That is our decision. And then in a second step, we can prohibit certain kinds of behavior of these companies, which is very much in line also with competition cases that we have done in the past. Not only in Bonn but also in Brussels, in Rome, in Paris, in other competition agencies.

And you find one element in this section 19a that says we can prohibit undertakings to make use of a service conditional on the agreement to data collection, without giving the user sufficient choice. This is what is stated in the law now. Very close maybe to our Facebook case, and you find something very similar also by the way, in the DMA.

We're just now on the way to apply section 19a, on Google. We have already finished a proceeding against Google to declare Google being a company of paramount significance for competition across markets. And we will look at the process, how Google is gathering and processing the data of the user. This is an ongoing case, bearing some similarities with the Facebook case.

Just maybe one final word. I would like to echo what Cristina has said. Of course it is not our task to assess privacy issues of these companies. But if you look at questions like: does a company have dominance in certain markets, is it an ecosystem, is it a strategic market status company, you always have to look at the question, where does this stem from? And you will always find two parameters. One is always network effects. Nothing to say against that. But the other one is data. Facilitating the service, keeping others out of the markets, other competitors because they do not have the same data of the same volume, variety and velocity.

If you look at that data, data is so crucial in competition law. You must have a benchmark to assess data. So again, we could develop our own parameters, but we could also make use of parameters that the legislator has already put in place and for Germany from my perspective, this is the GDPR, so the assessment of privacy issues is a side effect if you look at abuse of dominance. And this is all that we have to do.

And maybe one very, very final word. In the ICN, we have set up a project that looks exactly at these issues. It's about the relationship between privacy, competition and consumer protection. You can see from that already, everything belongs together in a way. But we have to find out how it belongs together, and this is exactly what we do in the ICN. And there are similar strings of work at the OECD. This is a chapter that needs to be explored, but doing cases and working on that in multilateral forums is an excellent idea I guess, many thanks.

ANTONIO CAPOBIANCO: Oh no, thank you, Andreas. It's always fascinating to hear you present on the Facebook saga and clearly there are maybe a few more chapters to be written about the saga still. But we'll hear from you more in the future. I'm fascinated by the points you're making. What clearly show an intimate connection between competition, competition of course and regulation. And our regulation has an impact again, on approaches to competition cases.

But maybe before we go back to this question, I want to give the floor to Makan to tell us whether all this discussion is purely a European discussion or whether like Cristina said also, the administration in the U.S. is moving to a different ground developments on the enforcement side, on the policy side in the U.S. Makan.

ANDREAS MUNDT: It's already an ICN discussion. Just wanted to mention it. It's not European.

MAKAN DELRAHIM: Well, thank you. Thanks to the New York State Bar Association, Beatrice and Larry for inviting me particularly to have this opportunity to be with my friends, Andreas, Cristina and Antonio. It's been a while since we've been meeting in that bunker at the OECD. I miss it very much, and hopefully the virus will again allow us to be together in a different place rather than on Zoom. This has been a fascinating discussion and will continue to be. I wish I had answers like any of us.

Andreas has been the pioneer, and has had to put on a case to show some answers. But a couple of things he said resonate with me. One is just the convoluted process for the legal system and competition enforcement. It's even more so I think in the United States legal system. As we've seen just in these types of complex, big tech so-called cases, for lack of a better term. The FTC investigated Google for a number of years. The Justice Department did, October, 2020 brought a case. The case doesn't go to trial. Assuming it stays to the schedule until September, 2023, there'll be a trial. There will be an opinion. Presumably that'll take at least a year.

Then you're going to have to go to remedies. Then there's is going to be perhaps appeals, most likely, of whatever the merits of the case or whatever the remedies might be, that'll go through a process and then it'll come back down and I very much sympathize with what Andrea says to go through. And ultimately, if there is a violation of the law found that harms consumers, you have to empathize with the consumer. Because even though the law might develop in its wake, there have been a lot of competitors, innovators, and consumers that have been harmed in that process. So a bigger question to talk about whether antitrust is exactly the right place to address this.

Andreas and Cristina both said about the whole issue of zero-price is a misnomer. First, as I've noted before, going back to 100 years, we as antitrust enforcers have dealt with so-called zero-price product. And as Milton Friedman said, there is no free lunch. There is a product someplace, there's a cost to somebody someplace. Whether that's the consumer in data that they have to give up, or some level of . . . And with that goes with privacy that they have to give up. Or some other level of quality aspect.

But we've had a so-called zero-price take on consumer products. In radio, in broadcast television, in newspapers that have gone around and we've always found a way to address them. Now, the scale of data collection is nothing like we've seen before. You are getting more and more data. The tools to collect, aggregate, and analyze data are cheaper. And it's even more important as we look to the future, as machine learning and artificial intelligence continue to be implemented in every aspect of our business lives and the product for consumers.

Whether it is insurance claims and machine learning that uses photographs and lowers the cost to address that, or a whole host of almost anything. And we at the Antitrust

Division at the Justice Department, also had a course offering through the MIT Sloan on machine learning and artificial intelligence for all of our economists and lawyers, so that they could appreciate that. They could appreciate the impact that data has from a competitive standpoint, but also the possible pro-competitive efficiencies that such data could bring.

But the consumer is harmed. The law, as many have said in the United States, allows for more than just price effects. Of course, quality and innovation and quantity. The problem with that is our court system, in our court system the experience isn't so much there. You can quantify and we have economic analysis and econometric tools that, Cristina's one of the experts on this, but that we have the snip test to define what the market and market power would be in a particular market.

When you're dealing with these types of products, the challenge for the enforcer becomes, you don't have those type of economic tools to readily define a market and meet your burden of proof in a court. As the Federal Trade Commission found before, the D.C. district court and its Facebook case, it is difficult and you bear the burden of proving not only the market, the definition, but then ultimately the power. And without those types of home tools, can you really prove that?

And so the qualitative effects that we would be concerned with, and then no question, there will be qualitative effects, are issues that are difficult to prove. You have to show the but-for analysis there. That somehow the collection of this data or the provision of this product at the zero-price is harming ultimately competition. Not necessarily any one particular competitor as much as we want more competition in the system, but there is a challenge for enforcement by not having these tools.

At the same time, we also have to recognize, and Andreas said that sometimes these companies, when they collect the data, they improve the product. So the more data they get, the better their product would be. Now, the challenge for the enforcement is to show that type of collection is anti-competitive. If it actually is improving the product for the consumer, there is an admittedly pro-competitive element to the accumulation and aggregation of such data. So it really becomes a challenge from the enforcement side, as we've all grappled with it.

I think one of the things that we have seen is both at the state level and the federal level in the United States and internationally, legislation to deal with security and privacy on the consumer protection side, but all of these certainly have an impact on the competition analysis. And here's why. Because the market is ultimately defined by what the market participants can do. Just as we have in various regulated industries, whether it's telecommunications or transportation or dairy that is regulated by a different regulatory regime, the actual market is defined by the disciplines imposed by that.

Should the consumer, is there and there clearly is, an asymmetry of power between the consumer and some of these companies that provide these zero products, absolutely. Should there be, for example, an opt-in type of privacy regime or the type of disclosures? Or maybe you can't sell it to a third party, the data. The data is collected for a number of reasons. You either improve the product internally, you use it to direct advertisement, or you sell it sometimes to third parties, whether it's advertisers or others amongst other uses for the data.

But all of these certainly have a competitive impact. Now, should public policy, should the folks who are empowered, in our system of government in the U.S., it's Congress, to come up with regimes to recognize this, to recognize this asymmetry of power between the consumer and the market participant, or is it really the role of the antitrust enforcer? It certainly is their role to enforce anticompetitive harm. But is it their role to come up with what is best and what is not in a way that is difficult to quantify the actual consumer harm, that ultimately results from it?

I think, as Commissioner Vestager once said, it's really important to keep these debates complicated about data and privacy and competition. Why? Because if we keep it too simple, we miss really important elements of this debate. What does this all mean for antitrust? Is it that antitrust enforcers still need to do what they need to do to deal with abuses? It is really difficult to meet those standards and prove predation or monopolization.

But more importantly, the legislation is going to have to define the contours in order to address the potential anti-competitive harm that we see. Are there some practices which we should just not allow, regardless of how it could theoretically be proven, that it might be pro-competitive or not, or anti-competitive, because the tools that the antitrust enforcers have are not really there or equipped to prove with the right level of protection ultimately for the markets and for the consumer using the antitrust laws.

I think that's where a lot of the discussion should end up focusing on a broader public policy standpoint. Because I think antitrust, one, it's too blunt, and two, it takes a little bit way too long in its administration. I proposed, on my very last day at the Justice Department, a possible private public rulemaking body to address issues of data portability and interoperability. Of course, other things could be addressed in there. But what that would provide is greater efficiency and nimbleness to change the rules implemented by competition and consumer protection officials, as well as the private sector engineers and experts, who know what the standards should be.

That's if they want to gain the consumer's confidence and public policy, that would be an important measure before we have a completely broken market and the government has to come in with much more command and control rules. I hope that's something that policy makers look at, they could implement that. And you can make

those rules change. We have had that since the 1970s in the United States, in the securities industry. And not all securities but one sub segment of the municipal securities bonds.

The municipal securities industry was in shambles. There were all sorts of fraud. And by definition, if some people wanted to be better citizens and better players, there were folks who because of the force of the money that was involved, would lower that standard of the quality control and information provided. And so what did they do? They came in under the auspices of the SEC, but not directly regulated by the SEC, but a rule-making board was created by Congress, and they can change their rules often and more regularly, in a way that is relevant to them.

And that takes a lot of enforcement and technical expertise out of the government agencies, but keeps their hand in there to make sure that the parties are honest players. And then once they pass a rule, then it applies to everybody, as a matter of law and the enforcement agencies can enforce that rule. I think that's in an industry that is moving so fast with technology and the types of data practices that are deployed and used.

It may not be a bad way and a more efficient way to address some of the potential information asymmetries with the consumer. Antitrust may not be just the most effective tool ultimately. It's my view from some experience there. One last point, if may, as far as the-

ANTONIO CAPOBIANCO: Very briefly, Makan.

MAKAN DELRAHIM: Sure. The administrations executive order and some of the new policy, ultimately you can have policy makers that will say a number of things. And I've said this on a couple of occasions. I had an old mentor who said, "You can tell a man to go to hell. Getting him there's a whole different story." You can say all sorts of things about your enforcement objectives, but ultimately, you have to deal within the laws that Congress has set for the two enforcement agencies. So just having rhetoric ultimately does not mean there's going to be enforcement.

ANTONIO CAPOBIANCO: Thank you, Makan. I'd like to go back to this issue about regulation and competition. You all touched upon it. But before we do that, there's a question that was triggered by your comments on the challenges to apply typical traditional economic tools to zero-price, zero money products using Andreas' expression. The question is from Jay Hymens and he says lacking typical economic tools to evaluate zero money products, doesn't using direct evidence of market power become more valuable? I don't know if you have any reaction to that, Makan, or maybe also Cristina, Andreas wants to react to this one.

MAKAN DELRAHIM: It absolutely does. I think more and more, those indirect, the types of data and the types of tools become more and more valuable in enforcement, because you just cannot use the typical standards and the tests that we would have in a price-positive product.

CRISTINA CAFFARRA: Sure. If I may jump in, I think that we are already doing that. I think that the idea that we can indeed, as Makan says, deploy the traditional bag of tools that the antitrust economies carry around doing snip test in a world in which you have at least formally a zero-price. Remember zero is a number on a line. It doesn't mean that it is the be-all and end-all. It's just the number on a line, and so you could do analysis.

But that said, we are in a bit of a different paradigm here to some extent. Because what I certainly hear Makan saying is it's difficult to do traditional analysis. Absolutely. But then we need to think about what then? And the reality is that both we have direct evidence of market power that we need to absolutely give way to. But when we are also talking about a world in which some of these companies start from a data lake which is absolutely unmatched, we can no longer take the position that well, data can improve the product.

That may be true in some sense, but if I have a market which is fairly competitive, I care for that. I say, okay, accumulation of some data may improve the product. When we are in a different paradigm in which we have effective monopolist and everyone else is lying on the floor, giving that monopolist more data doesn't really make me happier because he can improve the product. That product improvement can be a way in which it can make absolutely sure that no one else would come in ever, in an adjacent market because market power is being cascaded and it's been leveraged in other places.

I don't want to give personally that kind of credit and thumbs up to the idea that you have potentially a product improvement. Because when you're starting from a monopoly who can discriminate, we are in a different paradigm. We need to take a step back and see that much of the concerns that we have are about the preemption of competition in these markets. How these data assets allow these effective monopolies to preempt serious competition from developing?

In that world we cannot rely on traditional instruments because you don't have any evidence that speaks to that. You're looking forward at the situation in which potentially a challenger is going to be unable to make any inroads, because effectively the market power is being expanded and there is development of markets serially. So I think that is the problem we're facing and it is one that I think we need to absolutely face. And it is part of the reason why we are in part also transitioning to regulation, because there is a sense that at least you possibly lay out some exact rules that make this clear.

Now, we can talk about it in the rest of this panel, but I feel strongly that we need to take a view that when we are facing these absolutely massive monopolies, we cannot reason in the traditional way and just say, well can we do a snip task? Can we look at a bit of natural experiments and this and that? It doesn't work in my mind?

ANTONIO CAPOBIANCO: Well, the panel has only five more minutes, Andreas. While we address these questions . . .

ANDREAS MUNDT: Very briefly.

ANTONIO CAPOBIANCO: Go on.

ANDREAS MUNDT: Makan said that maybe competition law and competition agencies are not the perfect bodies and the perfect law to solve these problems. I agree with that to a certain extent, but nobody has found a better answer so far. This is my point. Who should go after these companies? And from my perspective, it cannot be that competition law and competition agencies are not equipped to deal with the most dominant companies that we have probably ever seen. And if we take notice of the fact that our instruments that come from an offline world do not fit perfectly into this new digital world, then we have to do something. We have to develop them further. And maybe we should take a step back and look at the instruments and how we have applied them in the past.

It is not in vain that today there's a lot of saying about the recreation of the structural preconditions for competition. This reminds me of a world where we don't live in for a long time, but in a certain way, we are going back to a certain extent, looking exactly at the structure of the market and what the market is able to perform or not at that time, and if competition is still in place. I think in a way, we have to go back in a certain sense to a more qualitative assessment that we have done in the past, and from there develop further the instruments, the tools that we have. I think this is the way forward. And again, I do not see anybody else who can do that for the time being.

My last point, even if you look at the new tools that are to come, the DMA or others, we can have a long debate. Is this competition or regulation? I don't think that this debate is so exciting, because if you look at the DMA, it is easy to see that it all stems from competition cases that we have done, and it's our theories of harm that we have developed over time. So in a way, it cannot be that we are such badly equipped. By the way, there have been great cases in the past, which have already had an impact on the market. Maybe not to the extent that we wanted them to have an impact, but there was some impact.

MAKAN DELRAHIM: Andreas, one point. I didn't mean to say that the antitrust agencies or the competition agencies are not equipped. I was saying that current tools that they have and the current laws and regime . . .

ANDREAS MUNDT: Understand that.

MAKAN DELRAHIM: . . . is not the proper one. Ultimately, actually I think that if there's a rule-making that defines what the markets for the data and the types of practices, the enforcement, I actually think the best is the competition agencies to oversee and enforce those rules. Not anybody else because they come to it from understanding the actual impacts and the competitive impacts of the rules once those are set.

CRISTINA CAFFARRA: Aren't we also making a bit of an excuse for ourselves if we're saying that we don't have all the tools? It's a question of enforcement posture to me, not being a regulator. But if the regulator is sufficiently motivated and pushy ultimately, it will take a stance. I think that where we are going with regulation is of course a recognition. Regulation is coming. It is there. It is there in Europe and it is coming in as far as one can see, unless it's killed on the floor. But it seems to be coming in the U.S.

And it is motivated in very large measure by this notion that antitrust is limited in its reach. I agree with Andreas that it shouldn't be. It takes time, but it is a question also of posture. So we are now going to let it take time. Of course the court takes time, but we will go out and be courageous about it. That is what [inaudible] with the Facebook case, this is what Andrea Coscelli is doing with a CMA. Take decisions that are controversial and just push the boundaries.

Because I also think that while regulation is a great idea, the notion that regulation could be self-executing is also a great myth of our times. Because the notion that these companies will just go and say, oh goodness, look at the DMA. I better not do that. No, this company is saying, "Self-preferring, you're talking to me. I don't do that. I don't do it. Look, I've got a wonderful compliance report from my very expensive lawyers in Brussels that says I comply. I don't do any self-preference whatsoever." So the notion that regulation is going to be saving us from some of the known limitation of antitrust is also, I think, a little delusional. I'll just stop there.

ANDREAS MUNDT: Back to Antonio.

ANTONIO CAPOBIANCO: No, that is extremely interesting. And I think I was going to this discussion about whether example regulation is really needed. It seems that on the one end there is a question whether there is a market failure that needs to be fixed by regulation, whether the competition framework itself needs some boosting to ensure effectiveness. I wonder what your ideas are and whether we do really need example regulation. You have touched upon on this already in your presentation, but if you can expand a little bit.

ANDREAS MUNDT: The conduct regulation, of course, is extremely difficult in this area. Because we talk about completely different business models. We have some features in the digital world where we would also say "this is a behavior that is anti-competitive." There are these cases in the past that have become classical cases in a certain way. But on the other hand, if you really want to regulate the behavior of a company, you have to be very precise.

Even I see that this might go to the detriment of innovation. And this is the question where we are all in and this is where we try to find our path in Germany, in the UK, at the European level. How clear, how precise can we be on

the one side and to which extent do we have to give room for maneuver, also for these companies?

I can only say in Germany, we have taken the decision to be in between somehow. The question, if a company is of paramount significance is still subject to a decision by the Bundeskartellamt, and the behavior that we prescribe is also subject to a decision by the competition agency. So it is clear what is going to happen. I never ever believe in the idea of a self-enforcing regulation. Because I see the same issue as before. If a company shows up in Brussels and Brussels says, well, DG COMP says what you do is not in line with the DMA, the company might say, "Listen, I am DMA compliant and it's all good." So what do you do as an agency? You start a proceeding.

And if you have to start . . .

CRISTINA CAFFARRA: Exactly.

ANDREAS MUNDT: You have to go for questionnaires, and there is a right to be heard. In fact, you are in the same kind of proceeding as we are. Some regulation is maybe so clear that it goes without further clarifications. The pre-installation of a certain program on an electronic device is something that there is a clear yes or no. But many other rules in the DMA are not like this and they will provoke proceedings again.

This is why I believe the spirit is so important, and this is why I believe that national competition agencies need a right also to enforce the DMA because we will need all forces in order to be able in Europe to enforce this regulative framework. I'm absolutely sure. The question is how we balance all this? And this is what we are in exactly regarding the discussion about the DMA.

SPEAKER 1: Antonio, would it be okay if I showed the next CLE code?

ANTONIO CAPOBIANCO: Of course.

SPEAKER 1: Thank you so very much. I apologize for the interruption. Your next CLE code for the audience is the letter A. That's a single letter. A, as in antitrust, A as in analysis, A as in accounting, and your bonus word is A as in aqueous. Again, A as in antitrust. Thank you.

ANTONIO CAPOBIANCO: Thank you. Cristina or Makan wants to react to this issue about example regulation.

CRISTINA CAFFARRA: Makan, go ahead.

MAKAN DELRAHIM: Sure. Like Andreas, I agree. I think ex ante rules would be difficult because of the different business practices and also what we don't know may come down as a business practice. Who would've seen the scope of the two-sided markets and the different types of businesses that have occurred just over the last 10 years. And I think we will continue to see more changes and more innovation. I agree with that.

I agree that instead of that, we need just additional powers for the enforcement agencies to be able to be more effective. The timing of enforcement of competition is really important. What we have seen, I think, at least in the United States but globally, is the fact that you did not have timely enforcement of competition against some of those who have now been alleged to have monopolistic market power and engaged in activity. Had this happened, we might have had multiple competitors in place, and the markets would have addressed it, rather than now thinking about various other drastic issues.

One other thing I think is really important is, and there isn't as much discussion about it, is remedies. What are remedies? In the United States, we have very limited guidance in our courts. The *Microsoft* decision, the Supreme court's decision in an unrelated case. But it was the NCAA antitrust case, where Justice Gorsuch talks a lot about remedies. What should a remedy be, assuming you have a violation found? The breakup, the structural remedy that Judge Jackson imposed in *Microsoft* was overturned by the D.C. Court of Appeals. And it basically laid out some guidance, but not really great guidance on that.

Who is going to impose and what should those remedies be? We have some basic generalized guide to restoring competition, but what is that? There's going to need to be a lot of, I think, coordination. Because there's going to be a lot of litigation over whatever the remedy would be. Let's even assume liability is found that remedy in and of itself could become a big debate. And what's the best design ultimately for the consumer for what those remedies should be? I think we should begin thinking about that before it's too late.

CRISTINA CAFFARRA: Well, remedies is a key piece, and of course, one of the difficult parts for us in Europe is that while we have been in Europe, I think certainly forward in terms of enforcing cases against Google started over 10 years ago, the piece that's been weak is that we haven't really been able to just design remedies that were worth a dime. They didn't do anything. This is a difficult question.

That's why I also think though, that thinking more broadly also about issues of data protection together with antitrust, and this is in the spirit of Andrea's *Facebook* case, may be helpful. So silo the data. If we are concerned about data being exploited and leveraged across these properties, these crazy data free for all, then we can try and use the data protection rules that effectively tell us that there is purpose limitation. Which is not this dissimilar in some dimension from line of business restriction. So let's exploit these tools that we also have.

But I think that it's a difficult spot we're in because, of course, it takes so much time and that is what allows the defendant to then go and claim that a case against them shouldn't hold because it's time barred. We know that all these cases are basically coming up with the theory of

laches or the defense of laches, that these cases are just not worth it anymore. In these markets, harm is cumulative. It starts some time ago and then it weakens the market progressively.

Regulation in principle has the ambition to try and do something about it, but I am with Andreas that I think much as we are well-intentioned, the precision of the regulation is not enough to really do very much. You're going to get people saying it's nothing to do with me. Then you're going to have to open an investigation and you're back to square one. This is the real difficult spot.

ANTONIO CAPOBIANCO: We have really five more minutes, and the question, which I think might be interesting for American practitioners, and it's probably a question for Makan. Both Cristina and Andreas mentioned exploitative abuse in their original initial presentation. The *Facebook* case would fall into that category. Cristina mentioned exploitation cons of conduct. Makan, do you think this is an area where we could see development or a shift in the U.S. as well or not?

MAKAN DELRAHIM: Well, it just depends on what the term that would be given in the United States, but I think it's certainly a . . . It's and a version of the monopolization harm that would be here. It's not necessarily the exclusion from a competitor, but you exploit. And the question is, who are you exploiting? Are you exploiting the consumer, or are you exploiting a competitor? And what should the different liabilities to that be?

Some of the legislation that both Cristina and Andreas mentioned in the United States, it's working its way and I guess I have a little bit of benefit. I served on the Senate Judiciary Committee as its chief counsel, some 20 some odd years ago, where I was involved, I think, with the last two major pieces of antitrust legislation in the United States. I find it hard to really positively handicap passage of those legislative efforts in the United States for a number of reasons. Just the way the government . . . I think there's a real opportunity the next six months in America to have the most significant substantive antitrust change that we have seen probably since maybe the Hart–Scott–Rodino or even before that, the FTC Act.

But it requires effort and compromise from both sides. You won't have the perfect legislation that some of the groups want. But there is a real opportunity. Because there's Republicans who want it and there're Democrats who are in power. But you also have people who are in very high positions of power from the states or companies that would be effected. And they may not allow the legislation to get a vote. That's the challenge in the United States, which I handicap it to maybe less than a 10% chance the legislation passes here, unfortunately. Even though the political stars are lined up for a major legislative effort.

ANTONIO CAPOBIANCO: Thank you, Makan. And I think we have really like a minute to wrap up. I know if there's any final message you want to send on the topic, Andreas, Cristina Makan? Otherwise, I think I'll thank you for your comments. I think it's been a very rich discussion. A lot of questions. Some answers. I think discussion will continue in this form in other forums. Thank you very much, and I'll give back the floor to you, Elaine, I suppose. Thank you for . . .

CRISTINA CAFFARRA: Thank you.

ANTONIO CAPOBIANCO: . . . the opportunity.

CRISTINA CAFFARRA: Thank you so much.

ANTONIO CAPOBIANCO: Bye.

MAKAN DELRAHIM: [inaudible].

ELAINE JOHNSTON: I knew when I saw the lineup for this panel that it would be a spirited and lively discussion, and indeed it was. Thank you, Antonio, Cristina, Andreas and Makan. That was just terrific, very substantive, very thought-provoking, and I really appreciate it. With that, we are going to go to a break, and I would ask everybody to be back at 11:40 a.m. Thank you.

Should the Antitrust Laws Be Used To Promote Societal Change?

ELAINE JOHNSTON: I'm going to give people just one more minute, since . . . okay, we're now at 11:40. Welcome back, everyone. Our final panel today has been organized by our Diversity and Membership committees, and looks at the extremely interesting issue of whether antitrust laws can, or for that matter should, be used to promote societal change. And with that I'm going to pass this over to the moderators and panel organizers, Kellie Lerner and Will Reiss. So Kellie and Will, take it away.

WILLIAM REISS: Thank you, Elaine. And good morning, it's wonderful to see everybody remotely, hopefully next year in-person. And as Elaine mentioned my name is Will Reiss, and I'm a partner at Robins Kaplan. And I will be moderating the program along with my partner Kellie Lerner. And I'd like to start by again thanking the New York State Bar Association, the Section and particularly Elaine for putting together such a wonderful slate of panels over the past several days. Kellie's going to be providing a brief overview of our panel today. But before I turn it over to her, I'd like to just take a couple of moments to introduce our distinguished panel.

And I'm going to start with Professor Eleanor Fox. Professor Fox is the Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She's a scholar in antitrust law and international and comparative competition policy. She served as a member of President Carter's Antitrust Commission and President Clinton's International Competition Advisory Committee. Her written contributions are far too numerous to cite today, but suffice it to say that she's received numerous awards as a result of her scholarship in the antitrust field.

Our next panelist is going to be Professor Christopher Leslie. Professor Leslie is a Chancellor's Professor of Law at the University of California Irvine School of Law. Professor Leslie has been a visiting professor of law at Stanford, NYU, and Texas. And like Professor Fox, he's been prolific in his written contributions to the field. And indeed he's among the top five most cited antitrust professors in the United States.

Our third panelist is Professor Eric Posner. Professor Posner is the Kirkland & Ellis Distinguished Service Professor of Law at the University of Chicago. His research interests include financial regulation, antitrust law, and constitutional law. He's written dozens of books and more than 100 academic articles on law and legal theory. He is a fellow of the American Academy of Arts and Sciences, and a member of the Council of the American Law Institute.

And our final panelist is Professor Sandeep Vaheesan. Professor Vaheesan is the legal director at the Open Markets Institute. It's called the OMI. He leads OMI's legal advocacy and research work, including its amicus program. Professor Vaheesan works on a range of anti-monopoly topics, including antitrust laws' role in structuring labor markets and promoting fair competition. And Professor Vaheesan's writing has appeared in a number of different publications, including The Atlantic, Harvard Law Review and Policy Review, The New York Times, The Washington Post, and the ELO Journal Forum, to name a few.

And just briefly, I want to just give a brief introduction to my co moderator and my partner, Kellie Lerner. Kellie Lerner is the co-chair of the Antitrust and Trade Regulation Group at Robins Kaplan. She's got two decades of experience litigating high stakes antitrust disputes on behalf of plaintiffs and defendants in federal courts across the country. In addition to her numerous roles, Kellie's responsible for identifying and initiating new antitrust actions at the firm. And in this capacity, she's initiated the first antitrust class action lawsuits in the country for dozens of various actions that have ultimately resulted in billions of dollars in recoveries for victims of anti-competitive conduct. And so without further ado, I'm going to turn it over to Kellie to provide a brief introduction to the panel.

KELLIE LERNER: Thank you so much Will for that generous introduction and to the New York State Bar for allowing us to put on this thought-provoking program by our esteemed panelists who are going to address, should antitrust be used as a social tool? And we're going to have a discussion and analyze whether antitrust is being used with its intended goals and whether it's overlooking certain populations and certain social issues. We're going to have each of our panelists give a brief presentation, followed by a discussion among all of us on their area of focus. So with that, I am going to hand the floor to Professor Eleanor Fox.

ELEANOR FOX: Thank you so much, Kellie, Will, Elaine. It is a great pleasure to be here with all of you today. I am going to start on a broad canvas on social values and competition. I want to say a word about the United Nations project on Sustainable Development Goals. And then I'm going to talk about poverty and equality and sustainability, both in terms of competition law and what can they do. My general thesis is that these two areas, both poverty and equality, and sustainability, are existential threats that can and should be accounted for in some way by competition law. They can be accounted for in ways that will

advance the goals of competition law and not undermine them. I have on the screen right now the United Nations Development Goals, the Sustainable Development Goals announced in 2015. The United Nations, on announcing them, said every discipline should be doing its part in advancing these goals. If you read the goals carefully, you will see that they almost all fit either into poverty and inequality, or sustainability, the two areas I want to address.

Let's take poverty and inequality first. The poverty problem is horrendous and it's getting more extreme every day. Inequality of wealth and income are getting more extreme every day.

So what does antitrust have to do with it? Antitrust has two things to do with it. First of all, in almost all nations that have antitrust, there is some form of an equality value embedded in the antitrust law. Markets should work favorably to those who, on their merits, can contest them, and markets themselves, when there's not market power, will work in favor of everyone, including those who have been left out. And particularly those who do not have power and privilege. And secondly, as markets get more concentrated, as we see in a number of instances today, and as market power builds, there is a tendency of higher markups and the lion's share of the higher markups go to the elite, not to those without power and without resources. This is a constant tendency. Since antitrust has a major role in pushing back power, committed antitrust enforcement maps onto more equality.

I've recently written an article on this with my student Philipp Bazenov. We look at four jurisdictions, U.S., Germany, EU and South Africa. I want to say a word about Germany. Its famous school of Ordoliberalism maps onto more equality of opportunity and more equality of wealth and income. EU competition law, which stresses the value of open markets, maps onto equality. South African competition law puts equality values front and center. In South Africa the huge inequality and suppression of most of the people, the black South Africans, was and is still a problem, even post-apartheid. Former president of South Africa, Zuma, announced: "We want to use competition law to help make the markets more nearly equal, a better spread of ownership, more equality of opportunity for the historically disadvantaged persons." South Africa adopted amendments to its Competition Act to do so.

What to do about it? The equality value fits with more inclusiveness in markets. That means attention to lower barriers to outsiders should certainly be a trump over more hypothesized innovation incentives for monopolists. Look at lowering barriers, letting outsiders in. This tack should improve allocation of resources, which is very traditional antitrust. Second, distribution. Who are the winners and who are the losers? We are seeing many transactions where the winners are mostly the elite, and often the losers are those who have been left out of society, the poor and marginalized. Consciousness of who are the winners and who are the losers should be relevant to antitrust, including both enforcement choices and substantive rules. We should go beyond Kaldor-Hicks: the idea that if winners win more than losers lose, that's good, it's efficient, don't touch it.

The next slide goes to sustainability. Degradation of the environment is now the world's greatest threat. We might not even have a planet if we do not pay attention to environmental harms. In Europe, certainly very much in the Netherlands, there is conversation not about whether but how to integrate antitrust and the green agenda. There is an interesting point of debate on what counts as efficiencies in pro-environment but anticompetitive agreements: Should the authorities consider greener-product benefits only to the extent that they benefit the consumers of the product, or more generally?

The question is: Are we going to continue living in silos in the United States where antitrust seems impermeable to other values, nothing in, nothing out? Or are we going to move to scaffolds where we consider who are the losers, both in poverty, in equality and sustainability? Where we give more attention to the harmed populations? If we give more attention to distributional impacts, antitrust and markets can help us reach social goals efficiently, and social goals can move markets in an efficient direction. Thanks.

KELLIE LERNER: So thank you so much, Eleanor. I'd like to start on that last point. And my question really is with antitrust designed to promote fair competition, do you think that we have a moral economy here in the United States? And speaking as a devil's advocate, if we're going to consider social values in antitrust jurisprudence, doesn't that water down market efficiencies?

ELEANOR FOX: Thanks, Kellie. Very good question. Markets are not moral. Markets work for consumers and for efficient producers. Efficiency is a loaded word. As we see today, "efficiency" adorned with laissez faire assumptions helps to protect incumbents from competition. On the other hand, the inclusiveness value, which is much embraced in developing countries, helps people contest markets without having to hurdle unnecessary barriers. Think about South Africa with all of the excluded population. That economy will never reach its efficiency potential unless attention is given to inclusion. Our conservative U.S. antitrust laws do not occupy all of the space for what is efficient; there is a large, ignored space in which efficiency and equity coincide.

KELLIE LERNER: Thank you. Let me turn to one of our other panelists, Sandeep. So we've been talking about antitrust as this equalizer. In your view, do you see there being any core thread between rigorous antitrust enforcement and a strong democracy?

SANDEEP VAHEESAN: Yeah, so antitrust like all law structures the marketplace allocating power to some and withholding it from others. And if you look at the legislative history of the principle antitrust laws, the Sherman,

Clayton and FTC Acts, you see a broadly democratic fair economy vision where the drafters of those statutes wanted the law to disperse power, prevent concentrations of the power. And so the original vision of antitrust is a deeply democratic one. And so enforcement in line with that vision can advance economic democracy and fairness, but over the past 40 years, we've had a very different approach to antitrust. So if you look at rules on mergers and vertical restraints and horizontal coordination, antitrust has actually served to concentrate power rather than disperse it. So antitrust in its present iteration is actually quite undemocratic. But as a history of antitrust law shows, the law is elastic, it's subject to revision, reinterpretation. And I hope in the coming years, we see an antitrust jurisprudence that's much more consistent with the original vision.

KELLIE LERNER: Great. Thank you. So we've been talking on a very broad scale and I'd like to turn to Eric who focuses on labor markets and ask him, Eric, in your view in recent decades, has antitrust been used to balance out power in those labor markets or exacerbate imbalances of power?

ERIC POSNER: Well, I think in the last few decades, antitrust law has been underenforced. I think there's a growing consensus of this view. And so the natural effect of underenforcement of antitrust laws is to favor large concentrations of economic power, monopolies and cartels. I've been interested in particular in the interaction between antitrust law and labor markets. While antitrust law formally applies to employers who engage in anti-competitive behavior in labor markets, it's been very rarely enforced against employers. And that's been true over the last three decades and also over the last 100 and whatever, 100 and 30, 40 years. Just over the last couple years, though that has been changing. So there are grounds for optimism.

KELLIE LERNER: Thank you. And turning back to Eleanor for just a moment. Eleanor, you raise some really pressing concerns about our environment and its precarious state. Do you have any suggestions as to how environmental effects should be factored into the antitrust analysis in the US? Do you think that something should be the subject of rule making, exemptions, case law? What are your thoughts on that?

ELEANOR FOX: First of all, using traditional antitrust, many collaborations helpful to the environment would not violate antitrust standards. Companies should be so advised. If they have a plan that they want to do what they say helps the environment, analyze it; it may not be anti-competitive. If it is anti-competitive, I'm not generally in favor of exemptions. I also am suspicious when firms get together and say, we have this great idea and we're going to help the environment, when you see it's really in their interest and they're going to get more profits. I would rather see statutes and regulations that protect the environment than big business volunteers saying: I'm doing this deal to protect the environment. But I also think that we ought to be listening to the story. The U.S. is behind in listening to the story of when and how firms can protect the environment. And we should be watching the EU and the Netherlands to see how their projects play out.

KELLIE LERNER: Great. Thank you. Okay. I think we're already running along. So I'm going to move it over to Christopher. Before I do I just want to remind people that if any of this discussion prompts some questions, please feel free to use the Q & A, and we can leave time at the end to answer any questions. So far we've talked about some overlooked social issues in antitrust, but I'm going to now kick it over to Christopher who's going to talk about some overlooked people in our antitrust jurisprudence.

CHRISTOPHER LESLIE: Excellent. Thank you, Kellie. Food deserts are generally defined by proximity to a supermarket, usually one mile for urban residents in low income neighborhoods. Many residents neither own cars nor live close enough to public transportation to access healthy, affordable food. America has 6,500 food deserts. They exist in every region of our country. Between 23 million and 30 million Americans live in food deserts. And even when a food seller is technically accessible, independent urban grocery stores often charge 10 to 60% more than chain supermarkets. Paradoxically, consumers with less money face higher prices, which reduces their purchasing power even more.

This lack of proximity to supermarkets has significant health consequences. Food desert diets are higher in fat, salt, and sugar. This translates into higher rates of heart disease, hypertension, and diabetes for people who live in food deserts. Millions are suffering, but it didn't have to be this way.

In the early 20th century, urban residents enjoyed relatively competitive markets for fresh fruit and vegetables from independent grocery stores. But then the supermarket model emerged, and mom and pop grocery stores largely vanished. If you could advance the slide. As more African Americans and recent immigrants moved into urban centers, white flight took over. Federal, state and local governments all subsidized this white flight to the suburbs through policies such as mortgage discrimination, highway development and zoning. Between 1950 and 1970, the population of the suburbs doubled from 36 million to 72 million. And supermarkets soon followed consumers out to the suburbs. Focused on suburban dollars, supermarket chains closed their inner city locations. African Americans couldn't follow the supermarkets out to the suburbs due to racist laws and private racial discrimination, such as racial covenants. Yet even after the Supreme Court invalidated racial covenants in residential real estate, segregation continued because of discrimination by the Federal Housing Administration, redlining by mortgage lenders and discrimination by local real estate agents.

Part of this legacy is that food deserts are largely racialized in America. Half of the Black neighborhoods in our country don't have either a supermarket or a full ser-

vice grocery store. Consequently, African American households are often forced to pay more money for lower quality food, in large part because of the absence of supermarkets in their neighborhoods. But food deserts aren't merely an unintended consequence of supermarkets focusing on consumers in the suburbs. Many food deserts are the result of a premeditated strategy by supermarket chains to deprive certain neighborhoods of large full service grocery stores. So lack of space is the critical barrier to entry for supermarkets in urban food deserts. If you could advance the slide please.

One major reason that appropriate space is unavailable in some cities is that supermarkets have imposed restrictive covenants when they sell their inner city store locations. These covenants prevent the most suitable land and storefronts from being used to sell food. These covenants have created or reinforced food deserts across the country in places as diverse as Chicago, Illinois, and Vallejo, California, from New Brunswick, New Jersey to Greeley, Colorado. You might ask why would an exiting supermarket impose a covenant that deprives an inner city neighborhood of affordable food? And the answer is simple. Supermarkets are trying to prevent competition for the remaining stores that are driving distance from the abandoned location.

Almost half of the residents of food deserts may have access to cars so they're able to drive to the supermarket chains in other locations, such as their stores in the suburbs. The restrictive covenant is designed to encourage that. Consumers with cars will drive far to another location. But for the food desert residents without cars, this means that they're left without a way of buying healthy, fresh food, fruit, and produce.

In addition to these restrictive covenants, some food deserts are created or reinforced by supermarkets simply closing a store in a location that they own, and then leaving this storefront vacant. The practice is so common that it has a name in the grocery industry, it's called going dark. But this going dark strategy isn't limited to landowners. Supermarkets sometimes will abuse their exclusive use covenants by taking a lease in a shopping center that prevents any other store in that shopping center from selling food. The supermarket will then abandon its location in that shopping center, but continue to pay rent so they can enforce the restrictive clause that prevents anybody from selling food in that shopping center location.

My scholarship argues that food deserts are an antitrust issue. They're a failure of competitive markets. But antitrust claims challenging supermarket anti-competitive tactics have generally failed. This is perplexing because these restrictive covenants unreasonably restrain trade, indeed their sole purpose is to reduce competition. The problem stems largely from how judges define geographic markets for antitrust purposes.

Most antitrust claims, including those challenging mergers, monopolizations and agreements under the rule of reason require a definition of the geographic market. But when analyzing antitrust claims involving supermarket restrictive covenants, stores treat the relevant geographic market as the metropolitan area, the entire city, including the suburbs. So for over 60 years, courts have been reluctant to define geographic markets as narrowly as neighborhoods in large part because judges assume that all consumers have cars. So, for example, when the FTC challenged the Whole Foods acquisition of Wild Oats Supermarket, the district court defined the relevant geographic market as competitors within a distance of three to six miles of their stores, roughly 16 minutes driving time.

We see this in section two cases as well. When these restrictive covenants are challenged our courts define the geographic market as a seven to 10-mile radius around a city, which eliminates monopolization claims. When defining geographic markets our courts would be better off if they define the geographic market with respect to how consumers and food deserts actually live. Because the current failure to treat neighborhoods as geographic markets or sub-markets distorts the antitrust analysis. It makes restrictive covenants seem reasonable, it makes monopolists seem like they face competition, and it makes mergers seem like it'll leave consumers unaffected even when it'll ultimately hurt the residents of food deserts. We're not going to solve the problem of food deserts with antitrust law. The problem is too complicated, the solution will have to be multi-pronged, but antitrust should be one of those prongs. With that, my time is up. Thanks.

KELLIE LERNER: Thank you so much, Christopher. This is the second time I've had the privilege of hearing you speak about this issue, and it just boggles the mind that this has pervaded as a problem, and yet seems to me exactly what antitrust was designed to address. You talked a lot about what these deserts look like. Can you just share for our audience today what robust competition should look like in these food deserts?

CHRISTOPHER LESLIE: So perhaps ironically competition in these deserts doesn't look like robust competition the way that we're used to seeing it in antitrust. Because in antitrust, we think that there're multiple sellers in the market competing against each other on price. The problem with food deserts isn't just a lack of competition or even a monopoly. It's a no opoly, that there's no seller that's in the market. What competition would look like when you eliminate these restrictive covenants or invalidate them through antitrust law is that the vacant space that used to house a supermarket can house a supermarket now. So it's not robust competition that you're going to have multiple supermarkets in walking distance. It's you eliminate the restrictive covenant, and you go from no opoly to monopoly, but that one provider, that one large supermarket empirically will charge less than any other small mom and pop

store and will offer a greater selection of fresh fruit and produce.

KELLIE LERNER: Okay. Makes sense. So looking to our other panelists, Sandeep or Eleanor, we have read a lot about consolidation in the food industry when it comes to agriculture seeds, producers, do you have any views as to whether these food deserts exacerbate the supply chain disruptions that we're already seeing as a result of that consolidation?

ELEANOR FOX: I would flip it because I think the supply chain disruptions exacerbate the food desert problem, because with the supply chain disruptions, the firms with power are both getting more power and raising prices higher than competitive price. So the population that is unserved is more deeply unserved because of supply chain problems.

KELLIE LERNER: Yeah. For any of our panelists, given the challenges that Christopher highlighted in terms of previous attempts at antitrust enforcement in this space, do you have any suggestions for how antitrust enforcers might tackle this issue going forward?

CHRISTOPHER LESLIE: If you're asking me, I think that the response should be a couple of things. First, defining relevant geographic markets differently, not just looking at consumers with cars, but instead looking at life as it's lived in food deserts, to recognize that for some consumers, the relevant geographic market might be the entire city and suburbs. But for thousands, millions of consumers, the relevant sub-market is the walking distance where they can access food. The other thing we might consider is merger enforcement, not just how we look at supermarket mergers and whether or not they will create food deserts, but whether or not to negotiate the conditions for allowing a merger to go unchallenged. One thing that would be great is if the antitrust enforcement agencies said we're going to look to see if you are engaging in these anti-competitive covenants and make a condition of allowing a supermarket merger that you don't have these sorts of covenants, and you don't enforce these sorts of covenants.

KELLIE LERNER: Makes sense. Hope the antitrust enforcers are listening. Okay. Well with that, I'm going to turn to Eric who's going to shed light on another overlooked demographic under the antitrust laws. Eric, please take it away.

ERIC POSNER: Thank you so much. I'm going to talk about the relationship between antitrust law and labor markets. And this is based on my research over the last few years, which I've recently put into this book, (How Antitrust Failed Workers). Next slide, please.

So, very quickly given time, the basic premise of the book is that there's been under enforcement to say the least of antitrust laws with respect to labor markets. So the problem here is one of employers, either colluding to suppress wages or developing through legal means what economists

Implementing Social Change

call monopsonies, meaning a single buyer, a small number of buyers of labor, in particular labor markets around the country. Now there's no doubt that antitrust law applies to labor markets abuse. The Supreme Court recognized this fact as early as the 1920s, but there has been almost no enforcement of antitrust law in labor markets. Just the only cases that really got any attention involved sports leagues, but other than that, there's been very little.

Now, this has begun to change starting about 10 years ago with the Silicon Valley tech scandal, where the big tech companies, including Google and Apple, agreed not to poach each other's workers. The Justice Department learned about this cartel and brought a lawsuit and settled with the tech companies, although they only slapped them on the wrist. There was follow on litigation that resulted in several 100 million of damages for the software programmers who were victimized by this new poaching agreement.

But recently there have been some claims of wage fee fixing, for example, among meat processors. But there was also, some of you might remember the scandal over the overuse of noncompetes by the Jimmy John's sandwich chain. Researchers, including Evan Starr and his co-authors, have documented that noncompetes are ubiquitous in labor markets and are despite the common law regulation of noncompetes, they're clearly overused. Frequently

they bind low skill, low income workers, like in the case of Jimmy John's.

But what's really created a new wave of interest in labor markets and antitrust law has been academic research. Going back only a few years, 2017, 2018, a number of academics began posting papers on the problem of labor monopsony as related to antitrust problems. Some of these papers have only recently been published. One of them, for example, the Krueger and Ashenfelter paper, found that the majority of big franchises like McDonald's and Burger King and so forth use no-poaching clauses in their franchise agreements.

There's also been a number of papers that look at the mergers of employers and find that when employers merge in concentrated markets, the wages of effective workers generally go down, or I should say go up at a lower rate. The most important paper here is the Prager and Schmidt paper, which is a very well done paper that looks at hospital mergers and finds that when hospitals merge in already relatively concentrated markets, making the market even more concentrated, the wages of medical professionals go up less rapidly than when hospitals do not merge, as you would expect as a matter of antitrust theory.

And then there's been a large number of papers, probably almost a dozen by now, which document the level of employer concentration throughout the country. So Azar et al. is one of the most important of these papers. If you look at the right side of the screen, that map of the United States shows average HHI of labor markets at the county level throughout the country. And the bottom line here is that 25% of labor markets have HHIs over 7,200, which means basically that there's one or two employers who are hiring from a particular type of worker. And the average is 4,374, which is amazing for all of you who, as I assume, are antitrust people. That's a dangerously high level of concentration. These papers also show that where labor markets are more concentrated wages are lower. Next slide, please.

Now, is this a big problem? This graph is based on one of these papers, the Azar paper, and it's just intended to illustrate what's at stake here. Imagine somebody like, I don't know, legal secretary who's paid $45,000 a year, let's say in a small Midwestern town. If there is a lot of competition for the secretary services, that person would earn around $45,000 based on certain assumptions about what the labor market is like in this city. If the employers all merge, so that there's only one, and we have a HHI of 10,000, the worker's wages would go down about a third from 45,000 to 30,000, right? So that's a huge amount of money for someone at that income level. And although it's very unlikely that antitrust law would ever convert a fully monopsonized labor market into a fully competitive labor market, you can see that even a relatively incremental change could mean many thousands of dollars for a relatively moderate or low income person. Next slide, please.

I don't have the time to explain the theory here, but probably most of you already know about it. The theory of labor monopsony is simply the theory of monopoly except applied to buyers rather than sellers. The important thing to understand is that a rational profit maximizing employer, who's not worried about the law will, if it has market power in labor markets, for example, if it's the only employer or one of a few employers, will offer wages lower than the competitive rate. Okay? So W rather than W prime in this picture. And the basic reason is for such employers, if they want to hire an additional person, they have to raise their wages of all their existing workers. And that means it's much more expensive to hire another person than to obtain the marginal revenue that person would bring.

Now, crucially, this is really important. Not only will the wage go down, but the amount of employment will go down. So in the monopsonized labor market people will be unemployed. They might just not work, they might retire early, they might try to find a job in another market. If there's less employment, then there's less output. And so we would generally expect prices to be higher as well for consumers. Next slide, please.

Now, what got me interested in this topic is this amazing discrepancy between the amount of antitrust litigation that's been focused on product markets of various types, and the amount that's been focused on labor markets. This is going back over the last three years or so, although things are changing. But historically there have been lots and lots of Section 1 cases involving product markets, and only a few involving labor markets, mainly sports league cases. For Section 2 cases, you have the same story. There've basically been no successful section two cases against employer monopsonies. And then with respect to Section 7 of the Clayton Act, similar point, while the DOJ and the FTC have historically evaluated mergers based on their product market effects, they almost never look at the labor market effects of mergers. But there are a few quasi exceptions.

Now, why is this the case? There's a very interesting story about intellectual history in economics about the rise and fall of unions and just the traditional practices and assumptions of regulators and judges. I don't have time to go into it, but there's no reason as a matter of antitrust theory or a matter of law why there should be more product market cases than labor market cases. Next slide, please, and the last slide.

So what should this mean? My thesis here is not a wild-eyed extreme proposal. My argument here is simply that antitrust law should be applied in labor markets. And a lot of good could be done if it were. And just over the last few years, the White House, the FTC, the DOJ have begun focusing on labor markets. So there is reason for optimism. In a merger review, there's been greater attention to the labor market effects of mergers. The DOJ has brought several criminal indictments against employers who have engaged in wage fixing or no-poaching agreements. There's increasing private litigation, and the State AGs have been quite

active over the last few years. Also, there's more pressure to regulate noncompetes than before, but there's still a lot to be done. There're just so few labor market antitrust cases that courts are unfamiliar with. They've been struggling with the new cases because of the complexities of these labor markets. But I think things are going to get better in the near future. And with that, I will stop.

WILLIAM REISS: Thank you, Eric. I just want to jump in with a question or two, and I know we're running a little bit late on time. But you've made a very compelling case as to why there should be enhanced enforcements on labor market monopsonies. And I'm wondering if in your studies, or the academic literature that you've read, if you found that labor market monopsonies have a disproportionate effect on people of low income or people of color. And if so, what are the conclusions in terms of what that disproportionate impact has been?

ERIC POSNER: It's a quite complicated question. At a very broad level, if antitrust enforcement against labor markets was enhanced, that would result in a transfer of wealth to poor people from wealthier people, because generally speaking workers don't have capital. So higher wages at the expense of a lower profit would tend to redistribute wealth in a more equitable way. Of course, a lot of workers are highly paid. And highly paid workers are often in more concentrated markets. So there would be individual cases where, for example, wealthier people would get even more wealthy, think of the Silicon Valley case. But of course there are lot more low income people in the United States than wealthy people. And so if you think about the non-competes, for example, that's a situation where greater antitrust enforcement would tend to help lower income people.

WILLIAM REISS: Thanks, Eric. And just one follow-up question to that. Obviously we're now entering our third year of the global pandemic. Do you think that the pandemic to an extent has enhanced inequalities in the labor market and perpetuated monopsonies? What, if any-effects have you seen as a result of the pandemic?

ERIC POSNER: The pandemic has in some ways benefited some segments of the labor market by giving them more bargaining power, enabling them to demand higher wages and in some cases to form unions. But as a general matter, the pandemic has exacerbated inequalities. We've seen this, the stock market has gone up while real wages have not really gone up. To the contrary, wages on average have actually gone down. So we're in a complicated situation right now. The so-called shortages of labor, though, tend to illustrate the power of employers rather than the workers. If labor markets were competitive, employers would not be complaining that they can't hire enough workers because the marginal revenue product in a competitive market of another worker is zero, very low. So the fact that employers are complaining that they can't hire workers is really because they're not willing to raise wages to the competitive level.

WILLIAM REISS: Thanks, Eric.

WILLIAM REISS: I'm going to try to share my screen again. I want to give our last presenter, Sandeep Vaheesan an opportunity. He's going to be speaking about racial equality and possibly some suggestions as to how we can improve that. So, Sandeep, let me go to your PowerPoint here, and just give me a moment.

KELLIE LERNER: Yeah. While Will's pulling it out, we got some great follow-up questions for Eric, which we will ask time permitting.

SANDEEP VAHEESAN: Great. Thanks so much, Kellie and Will. So if we were to boil antitrust down to its essence, it's really about two questions, who gets to coordinate and how do business enterprises compete? So looking at the first question, the law grants economic power to some, and withholds it from others. And so key question is who gets to make decisions? Who gets to organize and manage collective activity? Sanjukta Paul, a professor at Wayne State Law, has coined the term coordination rights to describe this legal allocation of power. If coordination is inevitable, the question is who gets to do it?

So here in Washington, D.C., we have three Walmart supercenters. If tomorrow Walmart headquarters in Bentonville, Arkansas wants to raise the price of toothpaste, it can simply call store managers of all three of locations and say, please raise the price of toothpaste by 50%. That's perfectly fine because under existing antitrust law, Walmart is treated as a single entity, and it would be even if each of those three stores were separate corporations, as long as they are part of the same corporate family, Walmart would have the right set prices at all its stores.

Well, let's say three independent grocery stores made the same decision. Let's say they came together and said, let's raise the price of toothpaste tomorrow. That of course would be illegal under present antitrust law. That would be horizontal price fixing, which the Supreme Court has called the supreme evil of antitrust. So Walmart shows that we allow certain types of coordination, top down coordination, while restricting other types of coordination, horizontal coordination.

Uber is an even more extreme example. Uber can dictate fares, routes and wages for millions of drivers, and at the same time says these drivers aren't actually our employees, they're independent contractors, or in other words, they're effectively their own business. Whereas Walmart creates its store managers as employees and gives them certain benefits and rights, Uber says, no, our drivers are independent contractors. We will control them, but we will not extend the benefits and rights that come with the employment relationship. At the same time, drivers at Uber don't have the right to coordinate as independent contractors. And the Department of Justice and Federal Trade Commission, and the 2017 amicus brief said if the drivers came together to set rates and other terms, they

would be committing a per se violation of the Sherman Act. So we have a system where we have a strong preference for vertical control, and deep hostility toward horizontal coordination. Next slide, please.

This has relatively clear implications for economic and racial justice. Our present constellation of rules concentrates power in the hands of executives and shareholders and deprives power from workers and small firms. And this has disparate impact on racial lines. Powers concentrated mostly in the hands of white disproportionately male and affluent constituencies, namely executives and shareholders, and withheld from workers and small firms. And if you look at sectors like the gig economy and fast food, the people doing the actual work are often people of color. Next slide please.

So the second major question is, how do firms compete? Law structures business competition. Competition is not a free for all despite common antitrust jargon like pro-competitive, anti-competitive and competitive process. Certain types of competition are deemed unfair and restricted. These include copyright infringement, commercial bribery, and false advertising. Indeed, some of these competitive practices are so strongly condemned that those practicing it can be subject to criminal prosecution. Antitrust restricts certain forms of competition in its own right. So it restricts deception, industrial sabotage, and other generally prohibited conduct, it restricts exclusive dealing in certain contexts, and it restricts mergers and acquisitions through Section 7 of the Clayton Act. Since the 1970s however, the courts and agencies have weakened legal restrictions on many of these types of business rivalry. So today it's much easier for a business to compete through below-cost pricing, mergers and acquisitions, and generally prohibited practices. Next slide, please.

So this has major implications for technological innovation across all areas, including in environmental and energy innovation. So the law has made it much easier for firms to compete through M&A, below-cost pricing, and generally prohibited conduct. This shapes business strategy. Businesses have a much easier path to dominance and even monopoly under the well established standard that firms that acquire a monopolistic position through superior products are not liable for monopolization.

But courts have made it much easier for firms to acquire dominant, even monopolistic, positions through other means. And so they don't have to innovate and invest when they have simpler paths to dominance available to them. And this has deep implications for innovation in all markets. So more than 30 years ago, Walter Adams and James Brock described the implications of loose merger policy. They said two decades of managerial energies devoted to sterile paper entrepreneurialism and the quick growth through merger game are at the same time two decades during which management attention has been diverted from the critical task of investing in new plants, new products, instead of the old manufacturing techniques. Billions of dollars spent on shuffling ownership shares are at the same time billions of dollars not spent on productivity-enhancing plant equipment and research and development.

So there is a real opportunity cost for giving businesses an easier path to growth and success. And that means antitrust today is permitting socially undesirable forms of competition, and indirectly discouraging investment in new technologies and processes. Billions of dollars poured into enterprises like WeWork and Uber mean billions of dollars and labor and resources not poured into enterprises that could be doing socially beneficial investment and innovation. And when we're facing the threat of climate change and the imperative need for technological innovation, especially in energy production and efficiency, this has profoundly negative effects for building a sustainable and ultimately zero carbon economy.

WILLIAM REISS: Sandeep, I wanted to just follow up on one thing in your presentation that I have screened from some of your writings. You suggest, I think, that the bigger evil to remedy right now is consolidation among companies. And you've argued for a more nuanced approach to separate entities that potentially get together and create horizontal restraints. So we know for instance, right now that price fixing agreements for instance are subject to per se legality. And I'm wondering when you suggest a more nuanced view of horizontal restraints, if you would do away with the per se standard, and to the extent you would advocate for change, how you would enact that change and how you view horizontal coordination among competitors.

SANDEEP VAHEESAN: I think the key point is horizontal coordination is sometimes harmful, and it's sometimes innocuous, sometimes even beneficial. Example of harmful coordination is what Eric referred to in his presentation, the Silicon Valley no-poach conspiracy case, where big tech companies came together, agreed not to recruit each other's workers. So horizontal coordination is sometimes harmful. But in other cases, horizontal coordination is actually quite desirable and even protected by the law. So for example, labor unions have long enjoyed an antitrust exemption that allowed workers to come together, engage in strike action, form unions, undertake collective bargaining. Similarly, farmers and ranchers can come together to form cooperatives to jointly market their livestock and crops, and even engage in joint production.

So I think we actually have a pretty good model right now where the per se rule applies to certain types of coordination among certain class of actors, but for horizontal coordination among other actors, including workers and farmers, Congress has enacted specific exemptions that protect them from the per se rule. So in other words, Congress has said, certain class of actors can engage in certain forms of coordination. So it's not so much a question of revisiting or softening the per se rule, but for granting more legislative authorizations to coordination by certain classes.

WILLIAM REISS: Thank you, Sandeep. And there are a number of other questions I would love to ask you, but I know we are already over time and there were some questions from the audience, and I want to be respectful to everybody's time. I don't know if we have another moment or two to address some of those questions or if we need to cut off. So maybe, Elaine, I'll defer to you.

ELAINE JOHNSTON: I think we can take a couple of minutes, probably not much more.

WILLIAM REISS: Okay.

KELLIE LERNER: One of our questions is for Eric, and I know we talked about this in some of our planning. But there's a question that in labor markets, if you are going to essentially raise input costs, would that ultimately result in higher prices for consumers downstream?

ERIC POSNER: Right. I mean, normally we would not expect that to happen because the way that an employer with market power pushes down wages is by hiring fewer people, just the way a monopolist is able to charge higher prices by reducing output. So if an employer hires fewer people, it's going to produce less, it has fewer workers, right? So you have fewer products going to market, under the laws of supply and demand prices are going to go up. Now, that's not necessarily going to happen. There are lots of different types of markets. The platform markets pose special challenges. And also, if a single employer is not a monopolist, it's a monopsonist but not a monopolist, and it has competitors in the product market, then its competitors will increase production to make up for the monopsonist employer's lost production. So prices might stay the same. They're not going to go down then. They're going to either go up or stay the same in these normal, simple models, while wages go down. Where does the money go? It goes to the shareholders. They're the ones who make money off of anticompetitive behavior.

KELLIE LERNER: Thank you. And I see you were very efficient. You answered the questions in the actual chat. That's why they disappeared. So thank you for that. There were some others. Will, do you have any final questions before we wrap up?

WILLIAM REISS: No, again, I want to be respectful for everybody's time, but I just want to give a special thanks to the panelists. Again, I think this was a really interesting and enlightening conversation. And of course like the other panels, I think if we all had more time to talk, we could get further into these details. But again, look forward to hopefully continuing the discussion at a later date.

KELLIE LERNER: Thank you, everyone. Thank you, Elaine.

ELAINE JOHNSTON: Thank you, Kellie, and Will and to all of the panelists. That was a really thought provoking, somewhat provocative and very interesting discussion, and we really appreciate you all participating today. And with that, this brings our program to a close. Before we break, I'd like to extend a thank you again to all of our panelists, to all of our participants, and everybody who attended today. A final plug for our young lawyers happy hour, and our event reception this evening where Jonathan Kanter will be speaking. And thank you again for all coming today. I look forward to seeing as many of you as possible this evening. And with that, we conclude our session. Thank you.

SIMONE SMITH: Thank you so much to everybody for your time and expertise in service to your profession and to your colleagues. We really appreciate it. We all know that this is very time-consuming. So thank you for taking the time to do these great panels. To the attendees, make sure you go back to your My Learning dashboard on the NYSBA website, enter your codes; to receive your CLE certificate. Always wait till the end of the program to actually enter in the codes otherwise it will not take them. And with that, I wish you all a wonderful Monday and a week ahead. Have a great day.

WILLIAM REISS: Thank you.

KELLIE LERNER: Thank you.

Virtual Reception With Awards and Breakout Groups

BEN SIROTA: We may not have the University Club, which was what we did historically, but we have all of you. So thank you for joining. We're very excited to be with you tonight. Just a couple of housekeeping notes, if people could turn on their cameras where possible, this is really designed to be an interactive event and keep yourself on mute when you're not speaking. I think everyone knows that drill by now after two years of this.

I'm Ben Sirota. I am the outgoing chair of the Antitrust Section of the New York State Bar, but I'm really the outgone chair. As a formal matter, my position ended on Friday and your new chair, Elaine Johnston, who is on, is going to be your MC for tonight. So my role other than really enjoying myself is to introduce Elaine Johnston, new chair of the Antitrust Section, who will be running tonight's program. Elaine.

ELAINE JOHNSTON: Thank you, Ben. Thank you everybody. We've had a great couple of days of CLE programming with panels covering hot topics, merger analysis, labor cartels, pharma antitrust, zero-price markets and antitrust and societal change. We've had panelists from a broad range of firms, in-house legal departments, government, academia, and think tanks expressing diverse and sometimes conflicting views. And as we come together for this reception to mark the official end of our proceedings and our celebration together, I would like to acknowledge and thank everybody who has made all of this possible. Our panel organizers and our panelists; and our sponsors – our Platinum Sponsors, Compass Lexecon and Analysis Group, and our Gold Sponsors, Bates White, FTI Consulting, Brattle, KLDiscovery and Consilio.

I'd also like to thank Simone Smith and the rest of the staff of the New York State Bar Association, including Catherine Carl, who is double teaming with Simone this evening. And I'd like to thank Eun Joo Hwang, my colleague at Allen & Overy. One of the first tasks that falls to me as incoming chair of the Antitrust Section is to recognize and thank my predecessor Ben Sirota, who I view as not only my predecessor, but as my friend. I find it hard to know where to begin in recognizing what Ben has contributed to this Section. As many of you know, we tragically lost our Section chair Hollis Salzman in October 2020, several months before the end of her term as chair. Ben was at that point our vice chair, and stepped up to lead the Section through a period of deep loss and mourning and adjustment following Hollis's tragic passing.

Ben's leadership continued throughout 2021 after he officially became chair of the Section. During his tenure, Ben has presided over excellent programming, the continued commitment of the Section to its diversity and other membership initiatives, the empowerment of our committees, the establishment of a Fellowship in Hollis's memory (we'll say a little bit more about that later), our trial training program, and the preparation and submission of a significant piece of analysis of pending New York antitrust legislative changes.

In addition, and in some ways, most importantly, in a virtual environment that has lasted longer than any one of us expected, Ben has guided us and helped us maintain our culture, our energy, and our collegiality. Ben, it is an enormous privilege to succeed you as chair, and if I do half as good a job as you did in maintaining the culture of the Section and inspiring great programming, I will have succeeded. Since we're virtual we cannot make a physical presentation to you on this occasion, but a thank you from this Section for your service will be forthcoming. And Ben, I would like to thank you both on my own behalf and on behalf of all of our Section members.

BEN SIROTA: Well thank you so much Elaine for those gracious remarks and thanks to you and the entire rest of the leadership team of the Section, it was such a privilege to work with all of you during as you recognize a pretty tumultuous time and to all the members of the Executive Committee who really came together for the past year and a half. I really thank you from the bottom of my heart. It was a great honor and you're going to go on to do incredible things. So thank you.

ELAINE JOHNSTON: Thank you. So it is now my pleasure to turn the floor over to Ilene Gotts who will present this year's Lifland Award to Michael Weiner. So it is over to you, Ilene.

ILENE GOTTS: Thank you, Elaine. It's a great honor to be asked to introduce this year's recipient of the Lifland Award. The Lifland Award is presented to an antitrust practitioner in recognition of their contributions and accomplishments in the field of antitrust. I cannot think of anyone more deserving than Michael to receive this award. I first met Michael about 30 years ago when we were both playing what I'll describe as minor roles on opposite sides of a hostile deal. The group Schneider Square D matter. Over time, both of us graduated to taking leading roles in deals and have had the opportunity to work together in a number of them. Simply stated, Michael is one of the most

brilliant antitrust lawyers of our generation and has brilliantly handled some of the most challenging deals before the agencies. He does so with his tireless work ethic and attention to detail. Michael applies that same work ethic and attention to detail in his Bar activities as well.

He has effectively carried out his various positions at the ABA Antitrust Section, which included service as editor-in-chief of Antitrust Magazine, the council and as secretary and here at the New York State Bar Association, where he has been on the Executive Committee for about 20 years, as well as having been the chair in 2017. He has been a go-to person for a variety of other projects, programs, comments, et cetera, in addition to his official positions, because giving the task to Michael means that it will not only get done, but get done right and on time. As you can see from this discussion, Michael clearly has earned this award and our recognition, but I don't want to end it there. What distinguishes Michael from my standpoint is Michael as a person and the way he always conducts himself, Michael is first and foremost, immense.

And he's also fun to boot. Some of my fondest memories of Michael have been doing what has become our ritual pre-COVID, our joint efforts in connection with the annual fundraising and dinner. I look forward every year to our getting together, in Michael's apartment typically because my apartment is usually chaotic, to us as fairly as possible deciding who got to sit where at the table, literally handwriting the roster, figuring out what to do with sponsors, et cetera, Michael, I really look forward to our being able to resume our collaboration, hopefully next year as we get to return to what I hope is a more normal life. So, Michael, congratulations for a well-deserved recognition as this year's Lifland Award recipient.

MICHAEL WIENER: Well, thank you very much, Ilene. And after listening to that, I'm tempted to quote Muhammad Ali who famously once said that, "It's hard to be humble when you're as great as I am," but I'm feeling more like the advice of another great fighter Golda Meir, who stated, "Don't be humble, you're not that good." Or the statement that's attributed to Churchill. And I think most statements that no one can figure who said them are attributed to Churchill and after one of his political rivals was described as being a modest man Churchill responded, "Yeah, he has much to be modest about." So looking back on it and I'm shocked by the numbers of years that you quoted, and the deals that I've done, the cases that have litigated they're important and they're accomplishments to proud of for sure.

But I think what's equally or more important is doing it the right way and treating people with respect, mentoring lawyers is very rewarding and very important. I remember as a 25-year-old first year associate being sent up to Les Arps's office to work on a brief together. And I think he saw my teeth chattering and he started telling me the story about how he went to the rodeo at Madison Square Garden the night before he did every year. And he's sitting there in the front row with a client and all of a sudden the horse ran by and a cow chip flew up and landed in his cup of beer. And I'm thinking, "This guy's trying to relate to me. This is the stupidest story I've ever heard, but yeah, he's trying to make me comfortable. I should be comfortable."

So you try to do that with associates and you try to give younger lawyers opportunities to grow, give them responsibility. I think most law firm partners here will agree that the day that you make new partners is the best day of the year. You need to treat people with respect. You need to develop relationships with the people that you work with in joint defense or in joint offense opportunities. I remember a few years ago I was interviewing a potential lateral at my old firm coming from the FTC and the next week someone coming from DOJ and they both told me, "Oh, actually you were working on the first case that we worked at when we were at the agency." And I said, "Oh, I'm so sorry, please forgive me." And they answer, "No, no, you treated us with respect. You were nice to us. You dealt with us as equals and yeah, that's important." Our colleagues we're going to end up as judges, as clients, as high ranking government officials and what people remember about you is the way that you make them feel. So thank you for this award.

I met Bill Lifland a couple of times, and he really came across as a class act and I'm super proud to have been added to the list of award recipients. I want to thank my kids, Matthew and Rachel, who I think if Matthew's got his kids to sleep already are tuned in, but thank you for understanding why dad wasn't always or ever at home for dinner. I want to thank my fiancé, Catherine, for keeping me focused. And I'm going to stop now because you want to hear from Jonathan Kanter, not from me and Jonathan, if you're tuned in we're looking forward to your remarks very much. A few years ago, when I was chair, I had an antitrust fellow, Mark Whitaker, speak at this dinner and you might think of that as creating a low bar for you, but his

speech was very interesting. So no pressure. And again, thank you all. This is really an honor.

ELAINE JOHNSTON: Thank you, Ilene. And congratulations again, Michael, this is a very well deserved honor. I referred earlier to the tragic passing of our Section chair, Hollis Salzman in October 2020. Hollis had many wonderful qualities and among them, she embodied strong legal skills, she embodied successful and inspiring leadership, and she embodied a deep commitment to advancing the careers of other women attorneys. The Section is very proud to establish the Hollis Salzman Women's Leadership Fellowship in Hollis's memory. And I will now turn the floor to Lisl Dunlop who will present the inaugural Fellowship to Rosa Morales. So Lisl, it is over to you.

LISL DUNLOP: Thanks, Elaine. Hollis was a wonderful colleague, mentor and friend to many of us. And when she so tragically passed while in office, as chair of the Section, a committee was formed to consider ways for the Section to honor her memory in a tangible way. She's remembered as a leader who devoted significant time and energy to mentoring younger lawyers, particularly women lawyers, and campaigned for recognition of women lawyers within law firms and as leaders in significant antitrust class actions. The committee focused its effort on developing a proposal that addressed some of these issues. We're at a point in the legal profession where women equal or outnumber men at law schools and many firms, mine included, aim to have diverse incoming classes and women are well represented in the junior and mid-level ranks. However, women are only 21% of equity partners and women of color represent less than 4% of both equity and non-equity partners.

Women's representation outside of law firms is not much better. There are several Fellowships, scholarships and other programs for female and diverse law students and young women and diverse lawyers, but very limited resources and attention have been directed towards women later in their careers. The Hollis Salzman Women's Leadership Fellowship is designed to support and promote women antitrust lawyers who are at the mid-stage of their careers and seeking to move to the next level, whether that be as a law firm partner or in a senior in-house or government role. The Fellowship sponsors a woman lawyer approximately seven to 12 years out of law school to attend a high-level multi-day women's leadership program. Such trainings have been heralded as one effective way to develop leadership skills and develop recognition in the workplace. A huge thank you to the Fellowship Committee members who met frequently as we designed and implemented the Fellowship program, reviewed extensive materials from multiple highly qualified applicants, and conducted several interviews. And thank you to the Executive Committee and the Section leadership for supporting the program.

So this is the first year that the Fellowship will be awarded and we're proud to announce our inaugural fellow Rosa Morales. Rosa is counsel in Crowell & Moring's Antitrust & Competition Group in the New York office. She's a 2006 graduate of Fordham University Law School. Over her career in litigation at several New York firms she's developed a passion for antitrust law. Her practice now spans all aspects of antitrust law with a special focus on representing companies' major antitrust litigations and government investigations. Rosa impressed the Fellowship committee with her energy and enthusiasm for antitrust, as well as her demonstrated commitment to mentorship and women's advancement in the legal profession. She serves on several committees at Crowell, including as co-chair of the New York offices' Women's Leadership Initiative, through which she organizes events that promote community building and opportunities for women lawyers. Her colleagues describe her as a take-charge lawyer who inspires confidence, a self-starter, creative and astute and dedicated and passionate about her work.

She mentors within the firm as well as participating in our Sections mentorship program and has been a strong and effective mentor, particularly for women and attorneys of color drawing on her own experiences. She cares deeply about justice and equal opportunity and has published on the intersection between antitrust enforcement and racial equity. Rosa has thrown herself into Section activities. She was a panelist on the section's annual women's networking panel last Thursday evening. And she also co-hosted the young lawyers virtual happy hour prior to this evening's reception.

On a personal note, it has been a pleasure getting to know Rosa through this process. And I think Hollis would've loved meeting her. As our inaugural fellow Rosa will join the Harvard Women's Leadership Initiative this May. The committee and I believe she will be a strong participant and will get a lot out of the program. And we hope that she will continue to be involved in the work of our section and share her talents and experiences with all of us. I'll now hand off to Rosa to say a few words.

ROSA MORALES: Good evening everyone and thank you for the warm welcome. And thank you, Lisl, for your

kind introduction and outstanding leadership at the New York State Bar Association's Antitrust Section and in the Antitrust Bar overall. And thanks to the Antitrust Law Section for establishing the Fellowship in memory of such an inspiring antitrust leader and tireless champion for the promotion of women and diversity, equity and inclusion within the legal profession generally, and the Antitrust Bar, specifically Hollis Salzman. I'm deeply humbled and honored to have been selected as the inaugural Salzman fellow.

As an immigrant from the Dominican Republic I never dreamed that I would be receiving such a prestigious honor before such a distinguished audience, let alone be able to participate in a leadership program for schools such as Harvard Law School. But it has been true for many immigrants this country has afforded me many opportunities I never thought were possible. While I know that I stand on the shoulders of many others, I want to take a brief moment to thank a few individuals who have been instrumental in my personal and professional journey. Without the support and love of these individuals I would not be here today accepting this tremendous honor. First and foremost, I want to thank my mother and my daughter who are my source of inspiration and purpose. I have benefited greatly from their sacrifices and unwavering faith in me as I pursued my dream of becoming a lawyer. Because of you, I am who I am.

I also want to thank my Crowell & Moring's family for believing in me, especially during moments when I doubted myself. I'm extremely fortunate to be part of a firm that has been a trailblazer and thought leader when it comes to diversity, equity and inclusion. In particular, I want to thank my colleagues, Randy Smith, Chahira Solh and Juan Arteaga who are in the audience tonight. If I end up being half the antitrust lawyer Randy is I would feel incredibly accomplished and proud of what I have achieved. Thank you Randy for your continued guidance and generosity. Chahira and Juan, both fervent champions of diversity, equity and inclusion at Crowell and in our profession are the reason I chose to join Crowell. Not only are both of them phenomenal lawyers, but they are great human beings who embody the values that Hollis Salzman stood and fought for. Seeing the prominent leadership roles that Chahira and Juan, who are both diverse attorneys, play within our firm and antitrust group enabled me to see what was possible if I joined Crowell.

I thank them for continuing to invest their time in me to ensure that Crowell's promise is within my reach and for supporting my candidacy for this Fellowship. In the brief time that I have remaining, I want to assure the New York State Bar Association Antitrust Section that as the inaugural recipient of the Hollis Salzman Fellowship, I will honor her legacy and life's work by doing everything that I can to break glass ceilings and kick open the doors of opportunity for women and diverse attorneys. I will do everything possible to ensure that the Antitrust Bar better reflects our nation's rich diversity. And I encourage each and every one of you to join me on this journey.

As you know, the Antitrust Bar is unfortunately one of the least diverse areas of the law. In order for our antitrust laws to live up to their mission, we need to increase the diversity among the judges who interpret them, the lawyers who enforce them and those who advise companies and executives. So while progress has been made in recent years, there's still much more work to be done when it comes to ensuring equal participation and representation within the Antitrust Bar. I hope that each and every one of us will do our part toward achieving this admirable goal. After all, this is the best way that we can honor Hollis Salzman and ensure that her legacy lives on. Thank you very much for this honor and opportunity tonight.

ELAINE JOHNSTON: Thank you, Rosa. I do want to also recognize that we have several of Hollis's family members with us tonight, and we're really thrilled that they were able to join and thrilled that they were able to hear your remarks, which were really truly wonderful.

ROSA MORALES: Thank you, Elaine.

ELAINE JOHNSTON: We are very honored to have as our keynote speaker tonight, Jonathan Kanter, the assistant attorney general for the Antitrust Division of the U.S. Department of Justice. As the Antitrust Section, it's always a privilege for us to hear from the AAG. And this year we're particularly excited to do so since it's so early in your tenure, we realize how busy you are these days and we very much appreciate you taking time out of your schedule to talk to us. Jonathan was confirmed on November 16th, 2021 as assistant attorney general for the Antitrust Division. The Senate vote was bipartisan, which I have to say is a fairly rare event these days. And I think this really reflects the universal respect that Jonathan commands among those on the hill who are focused on antitrust issues.

I know that the members of this Section, whether in government, private practice, in-house or academia, share that respect for Jonathan and for his work. Jonathan brings a broad range of experience to his leadership role at the Antitrust Division. He began his career as an attorney at the Federal Trade Commission in the Bureau of Competition. He moved to private practice where he was a partner in the D.C. offices of two major national law firms. And then he left big law to found his own boutique, to promote antitrust enforcement. With this range of background and experience we know that the Division is in excellent hands under Jonathan's leadership and we really look forward to hearing from you Jonathan this evening so with that I will cede the floor.

JONATHAN KANTER: Well, thank you Elaine, for those extraordinarily kind words. I am beyond delighted to be with all of you tonight and thank you to New York State Bar Association for the invitation to address the Antitrust Law Section. It's an honor and in many ways, it's a very special address for me personally and professionally. I was born and raised in Queens and I've been a member of the New York Bar for over 20 years. So in many ways, this virtual reception feels like a call home. I'm certainly disappointed that we cannot all be together in person this year, but instead, I guess we'll have to settle for what we can think of as the virtual equivalent of bridge and tunnel. The New Yorkers in the audience will certainly understand the reference, certainly the folks from Queens. But there's another reason I'm pleased to be speaking with this group tonight by delivering my first address as assistant attorney general for antitrust to this group. I'm following in the footsteps of one of my role models and a role model to many of my predecessors, Robert Jackson.

Jackson became assistant attorney general for antitrust in January 1937, and he delivered his first speech as AAG to the New York State Bar Association that same month. Of course, Jackson went on to serve as attorney general, Associate Justice of the Supreme Court and a war crimes prosecutor at Nuremberg. Today I would like to reflect on AAG Jackson's brief, but highly influential tenure at the Antitrust Division. In 1937, our country was suffering from widespread corporate concentration, at the time monopoly power was not just a technocratic concern, relegated to the narrow halls of white shoe law firms and elite institutions. Americans understood acutely economic forces that operated on them. Concerns about monopoly power were kitchen table issues. American citizens were craving access to economic opportunity, competitive wages and democratic institutions that worked for all people, not just a small cadre of plutocrats. Entrepreneurs and innovators wanted access to markets and the opportunity to succeed by building their own competitive and successful businesses.

Jackson's solution was to embark on an aggressive campaign of antitrust enforcement to free markets from the grip of monopoly power. Our solution of the monopoly problem must be expressed in the terms of our ideals, the ideals of political and economic democracy. The economy in Jackson's time was at an inflection point. He believed that the country faced a choice, rigorous antitrust enforcement on the one hand or greater government regulation on the other. Jackson subscribed to the view that regulating competition was preferable to regulating monopolies. Thus, antitrust was beneficial, not only for consumers and workers, but for businesses that long for the opportunity to compete on the merits. In his first year at the Antitrust Division, Jackson instituted dozens of cases, including the landmark challenges against Socony-Vacuum Oil Company and Alcoa. It was an impressive campaign that helped lay the groundwork for one of the greatest periods of economic growth and prosperity in American history.

It also helped bring clarity to the law, which is a point that I will return to later in my remarks. Today's economy is much different than that of the late 1930s. In fact, it's much different from the economy of the 1990s or even the 2000s. In the past 20 years, we have seen an evolution in industry on par with, and perhaps greater than the industrial evolution, with it has come serious competition and challenges in too many markets. For example, in the past few decades, concentration has increased in more than 75% of U.S. industries, including health care, financial services, agriculture, and many others. Price cost markups have tripled over the past 40 years. Some labor markets are even more concentrated than product markets. Monopsony power of employers in labor markets tends to depress wages around quality of life and make it harder for workers to switch jobs. And as more markets are dominated by large companies it becomes harder for entrepreneurs and small businesses to get off the ground.

In fact, the rate of new business formation has fallen by half in the last 50 years. I'm deeply concerned about these trends. Too little competition hurts real people every day. It's not just a statistical or economic concept. It's half empty grocery carts for Americans who can't afford price hikes and padded margins or lower salary or worse working conditions because of employers who face too little competition and workers who do not have sufficient options. It's masses of personal private data extracted by dominant platforms whose digital services have few, if any realistic alternatives. And it's the inability of Americans to buy a house or afford college. Antitrust Law enforcement has not succeeded in keeping pace with these massive changes in our economy. In my view, the only way to reinvigorate antitrust enforcement is to adapt our approach, to reflect the obvious economic and transformational technological changes that now define our economy.

That is why we and our law enforcement partners are committing to using every tool available to promote competition. The American people deserve real antitrust en-

forcement that meets the needs, meets the economic challenges that we confront. The principle that civil antitrust enforcement against unlawful mergers, monopolies, and many kinds of restraints should reflect current market realities has long been recognized as the case law. For example, the Supreme Court held in Eastman Kodak versus Image Technology Services that, "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Instead, the court explained that analysis is preferable for antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record. And just last term in *NCAA v Alston*, the rule of reason case involving college athletes, a unanimous Supreme Court reiterated that whether an antitrust violation exists necessarily depends on careful analysis of market realities.

When I look at the current state of antitrust law, the most charitable explanation is that we are stuck fighting last generation's war with precedent that bears little or no resemblance to today, or the future. Failing to account for market realities is a problem for at least two reasons. First it ossifies the law, even as market realities transform, monopoly power and competitive conduct today presents differently than it did 20, 30 or 40 years ago. And second, it is inconsistent with the text of the Sherman and Clayton Acts and with Congress's intent to draft antitrust statutes that are broad and flexible enough to account for economic changes. I recognize that it can be challenging to ask courts to look at the competitive dynamics in an industry anew, is often easier for courts to carry forward a test, even when that test was developed at a time when markets functioned in radically different ways.

But that is what antitrust law often requires. And it is our job as enforcers to ensure that courts engage with markets as they actually exist, adapting to market realities will inevitably involve questions of economics, but we must be mindful that economics and expertise more broadly are tools, tools to understand facts relevant to a particular case. Courts should use economics and industry expertise to address questions of fact, not to resolve questions of law. And where there are natural experiments and direct evidence of competitive harm economic theory must give way to market realities. The principle that antitrust doctrine should be responsive to market realities has application across many areas of antitrust law, and it is guiding our approach at the Antitrust Division. I'd like to touch briefly on how this principle applies in several important areas. One area where there's been growing divide between antitrust doctrine and the market realities is Section 2 of the Sherman Act. Approximately 20 years passed between the filing of major DOJ monopolization cases, even as competition languishes in vital industries.

The result is that there is a dearth of Section 2 case law addressing modern markets. For example, there are an increasing number of markets where competition is not reflected merely or even primarily in consumer prices or output. Antitrust doctrine must therefore account for the many ways that the process of competition is important. Competition brings benefits that include improved quality, greater choice of products and services, incentives to innovate, the empowerment of workers to negotiate better working conditions, or to switch jobs, the flow of information news, which is vital to the health of a functioning democracy. As Jackson put it back in 1937, the ultimate purpose of the antitrust laws is to see to it that a true competitive economy functions. Section 2 doctrine that is responsive to market realities, not outdated models, is a necessary step to build a competitive economy.

In addition to Section 2, merger enforcement likewise needs to track market realities. Merger review has always been an essential part of the Division's mission, but we're currently going through a truly unprecedented explosion of pre-merger notifications. According to our provisional data in fiscal year 2021 alone, we received over 3,500 HSR merger Act notifications. This was the most filings since the current HSR filing requirements went into effect in 2001, and it wasn't even close. The second highest annual total in the last 20 years was in 2007 when received about 2200 filings, which is just over 60% of the filings from last fiscal year. And the pace shows no signs of slowing down. Our provisional data shows that November 2021, and October 2021, are the first and second highest ranked months respectively for HSR filings in the last 20 years. This surge is taking place even as market specific and merger retrospective studies indicate that consolidation has led to less competition and more market power.

The surge is also occurring as the Division is experiencing a historic resource shortage. The Division had over 350 more employees in 1979 than it does today. Think about that for a moment. The Division had over 350 more employees in 1979. The Antitrust Division has among the most talented staff in the country, and we are being creative to stretch our resources as far as they can go. But even the exceptionally talented personnel at the Antitrust Division have limits. We're working with our bipartisan champions in Congress and the administration to increase funding, to support antitrust enforcement. These are urgent and pressing concerns. We have an obligation to enforce the antitrust laws as written by Congress. And we will challenge any merger where the effect may be to substantially lessen competition, or tend to create a monopoly. The second prompt or tend to create a monopoly has often been given less emphasis. No longer.

We intend to remain faithful to the plain language of the Clayton Act. We're also committed to making sure that we are transparent in how we evaluate mergers and that our economic models reflect market realities. Accordingly, together with the FTC, we have requested public comments on the existing horizontal and vertical merger guidelines. This marks the beginning of a process of consultations with state enforcers, other government agencies, businesses, trade and labor groups, scholars, and the

American people at large. Our merger guidelines must reflect the text and evident purpose of the antitrust laws enacted by Congress. The economic realities faced by businesses, workers and consumers, and the most recent empirical evidence of how competition functions or does not function in today's economy. We're interested in hearing from all stakeholders, especially those impacted by harm to competition resulting from consolidation. I would next like to touch briefly on how a remedy antitrust violations.

Again, Jackson's wisdom guides us. We should not spend great sums to obtain decrees, which are economically unenforceable he said, and when carried out in form are often lessons in futility. Like Jackson, I am focused on how a remedy will function, after the ink is dried and the press cycle is faded does a settlement in fact restore competition? Does it preserve the competitive process? Most importantly, does our overall approach to remedies carry out across cases and industries to protect competition as the law demands? We are law enforcers, not regulators. I'm concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the Division concludes that a merger is likely to lessen competition or tend to create a monopoly, in most situations, we should seek a simple injunction to block the transaction.

It is the surest way to preserve competition. Let me explain why. First, determining the contours of a remedy that carves up a business to maintain competition assumes we can capture with precision the contours of competition in the market. Competition, of course, we all know, is not static. It is dynamic, complex, often multidimensional. How do we determine the appropriate divestiture for evolving business models and innovative markets? We must give full weight to the benefits of preserving competition that already exists in the market rather than predicting whether a divestiture will actually serve to keep a market competitive. That will often mean that we cannot accept anything less than an injunction blocking the merger full stop. Moreover, merger settlements that include partial divestitures too often result in what might be called concentration creep. This happens when divested assets ends up in hands of someone that does not make effective use of them.

Divestiture buyers may lose interest in assets after acquiring them, or be less effective than they expected. Even the divestiture buyers with the best of intentions. Finally, settlements do not move the law forward. We need new published opinions from courts that apply the law in modern markets in order to provide clarity to businesses and the American public. This requires litigation that sets out the boundaries of the laws applied to current markets, and we need to be willing to take risks and ask the courts to reconsider the application of old precedents to those markets.

None of this is to say that divestitures should never be an option. Sometimes business units are sufficiently discreet and complete that disentangling them from a parent company in a non-dynamic market is a straightforward exercise, where divestiture might have a high degree of certainty of success. But in my view, those circumstances are the exception, not the rule. Remedies in conduct cases likewise should reflect market realities. Experience shows that it is often impossible to craft behavioral remedies that anticipate the complex incentives that drive corporate decision making. This is especially true as market realities evolve over time; therefore to restore competition and markets that have been harmed by antitrust violations we will pursue structural remedies in our condo cases whenever possible. And we will pursue remedies that are forward-looking in nature, especially in dynamic markets. In short, we will pursue remedies, not settlements. We cannot compromise if there is a violation of the law.

Finally, we are also working closely with our partner agencies on the whole of government competition initiative launched under President Biden's competition executive order. Today, we announced a new program to that end at the Competition Council meeting just a few hours ago. We explained that the department is eager to help other federal department and agencies win cases, targeting anticompetitive conduct that violates industry-specific statutes, including through direct litigation support. And by formalizing our cooperation through MOUs. We call this new initiative antitrust enforcement for all of government. Our cooperation through this initiative could transform our approach to competition policy and law enforcement. We plan to work collaboratively with partner agencies to ensure that competition issues are thoroughly considered and pursued under all of the statutes that promote competition throughout our economy.

In sum, the challenge we face today from increased consolidation and decreased competition is really serious. It will take an aggressive campaign of antitrust enforcement to meet the moment, but just as the challenge is great so too is the opportunity to restore competition to our markets. An antitrust enforcement policy that is focused on markets as they exist in the real world will deliver tangible, real world benefits to American consumers, workers and businesses. On that score I'd like to return for a moment to Robert Jackson. I maintain as Jackson did that competitive markets are ultimately good for American businesses. Businesses should want strong antitrust enforcement. First of all, competition enforcement opens markets and frees businesses to compete on the merits. It creates opportunities for entrepreneurs and ultimately for innovation and growth that benefits everyone. Antitrust is not about stifling or controlling markets. It is about opening them to competition.

Second, as I noted in the context of remedies, antitrust enforcement does not only protect competition in individual cases. It also brings clarity to the law and allows its

evolution to contemporary circumstances, which benefits everyone. We need litigation that ends in published decisions so that businesses can know what is lawful and what is not. The clarity that comes from robust antitrust enforcement will help market participants to plan, to invest in the next generation of innovations and to thrive. Ultimately, that is beneficial for competition, our economy and ultimately our democracy.

Thank you for your time and attention. I look forward to continued engagement with the New York State Bar Association in the years to come. Enjoy the rest of your evening and please make sure to tip your virtual waiters and waitresses. Thank you very much and have a good evening,

ELAINE JOHNSTON: Jonathan, thank you so much for that speech. That was terrific. It was thought provoking. It was a little provocative and it's clear that interesting times are going to lie ahead and we look forward to seeing what the Division does under your leadership. It's clearly going to be active. And I guess my word to my colleagues in the room is buckle up. It's going to get interesting. So thank you again, really appreciate you joining us and a real privilege to hear from you particularly so early in your leadership role. Thank you again.

JONATHAN KANTER: It's wonderful to be with all of you and it's particularly wonderful to see so many friends and family faces out there in the virtual world. So I look forward to being with you again.

ELAINE JOHNSTON: Thank you. We will hold you to that.

JONATHAN KANTER: You should. Okay. Take care.

ELAINE JOHNSTON: Thanks. So with that, we actually bring our formal proceedings to a conclusion for the evening.

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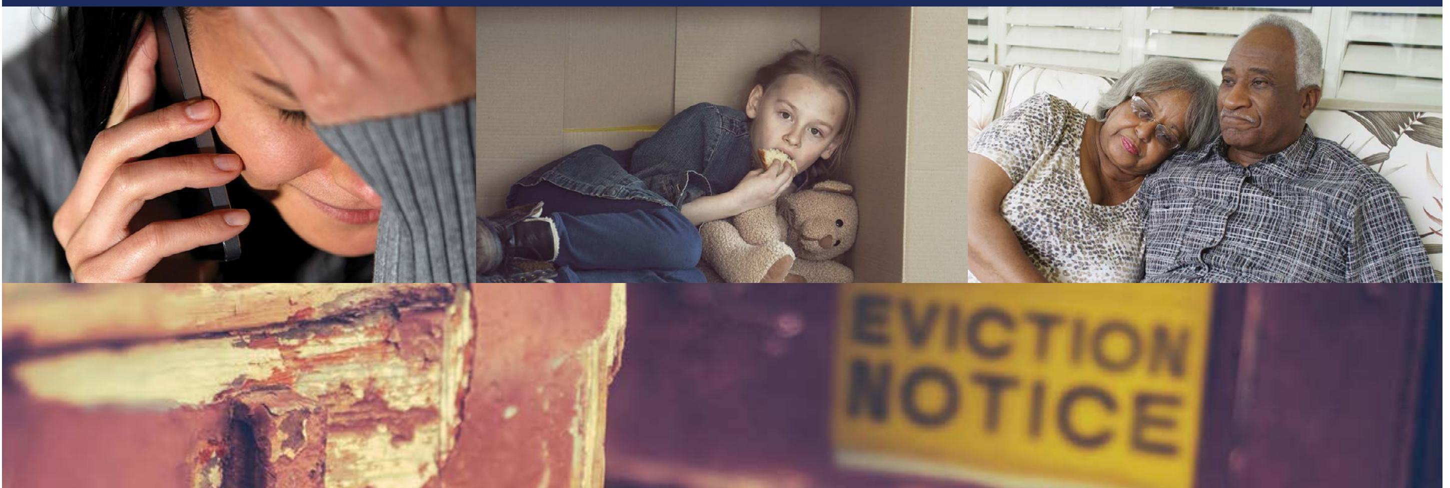

Antitrust Law Section Symposium

Editors
Bob L. Hubbard
Attorney General's Office
Antitrust Bureau
28 Liberty, Fl 20
New York, NY 10005
robert.hubbard@ag.ny.gov

Michelle Clerkin
Motley Rice LLC
777 3rd Ave, Fl 27
New York, NY 10017
mclerkin@motleyrice.com

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©2022 by the New York State Bar Association.
ISSN 1056-4136 (print) ISSN 1933-8554 (online)

SECTION OFFICERS

Chair
Benjamin D. V. Sirota
Kobre & Kim LLP
800 3rd Ave
New York, NY 10022
benjamin.sirota@kobrekim.com

Vice-Chair
M. Elaine Johnston
Allen & Overy LLP
1221 Avenue of the Americas
New York, NY 10020
elaine.johnston@allenovery.com

Secretary
Mary K. Marks
Davis Polk & Wardwell LLP
450 Lexington Ave
New York, NY 10017
mary.marks@davispolk.com

Finance Officer
Robin A. van der Meulen
Labaton Sucharow LLP
140 Broadway Fl 34
New York, NY 10005
rvandermeulen@labaton.com

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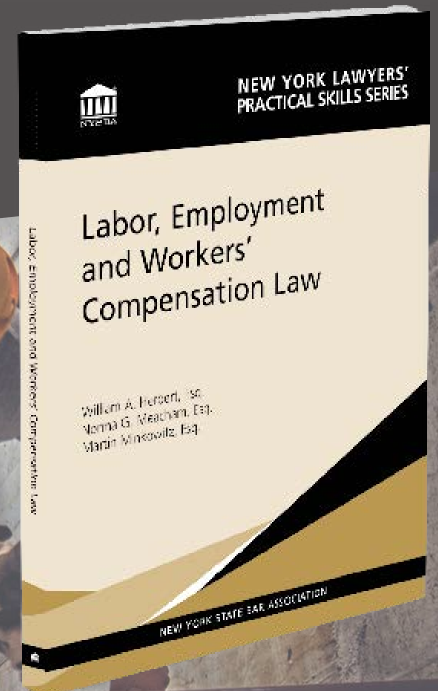
Labor, Employment and Workers’ Compensation Law

Authors
Willam A. Herbert, Esq.
Norma G. Meacham, Esq.
Martin Minkowitz, Esq.



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