



# competition

Vol 26, No. 1  
Spring 2017

---

## The Journal of the Antitrust, UCL and Privacy Section of the State Bar of California

---

Chair's Column  
Niall E. Lynch

Editor's Column  
Peter K. Huston

*26th Anniversary Golden State Institute*

### Articles

**MAKING THE INTANGIBLE CONCRETE:  
LITIGATING INTANGIBLE PRIVACY HARMS  
IN A POST-SPOKEO WORLD**

By Elizabeth Pritzker

**THE CRITICAL IMPORTANCE—OR  
COMPLETE IRRELEVANCE—OF CLASS  
ASCERTAINABILITY IN THE CLASS  
CERTIFICATION DECISION, AND THE  
UNACCEPTABLE CIRCUIT SPLIT**

By Geoffrey Holtz and Nitin Jindal

**BELOW-COST PRICING:  
RECENT DEFENSE-FRIENDLY DECISIONS**

By Ryan M. Sandrock and Stephen Chang

**CALIFORNIA ANTITRUST AND UNFAIR  
COMPETITION LAW UPDATE:  
PROCEDURAL LAW**

By Thomas Greene

**CALIFORNIA ANITITRUST AND UNFAIR  
COMPETITION LAW UPDATE:  
SUBSTANTIVE LAW**

By Thomas A. Papageorge

**ROUNDUP OF 2016 ANTITRUST AND PRIVACY  
FEDERAL COURT DECISIONS**

By Thomas Dahdouh

**KEYNOTE ADDRESS: A CONVERSATION  
WITH THE HONORABLE CAROL  
CORRIGAN, JUSTICE OF THE  
CALIFORNIA SUPREME COURT**

Interviewed by Cheryl Lee Johnson and Kathleen Tuttle

**BIG STAKES ANTITRUST TRIALS: UNITED  
STATES V. AB ELECTROLUX & GENERAL  
ELECTRIC CO.**

Moderated by Peter K. Huston

**BIG STAKES ANTITRUST TRIALS: IN RE COX  
ENTERPRISES, INC. SET-TOP CABLE BOX  
ANTITRUST LITIGATION**

Moderated by Jill M. Manning

**ASSESSING DAMAGES IN PRIVACY CASES**

Moderated by Dominique-Chantale Alepin

**CRIMINAL ANTITRUST ENFORCEMENT  
DURING THE OBAMA ADMINISTRATION**

Remarks by Renata Hesse and a panel presentation  
moderated by Niall Lynch

**MANAGING ANTITRUST AND COMPLEX  
BUSINESS TRIALS—A VIEW FROM THE BENCH**

Moderated by Steve Williams



---

The Journal of the  
Antitrust, UCL and Privacy Section  
of the State Bar of California

---

Chair's Column  
*Niall E. Lynch*

Editor's Column  
*Peter K. Huston*

*Golden State Institute's  
26th Anniversary Edition*

*Golden State Institute's  
26th Anniversary Edition*

Editor-in-Chief

**PETER K. HUSTON**

Partner

Sidley Austin LLP

San Francisco

Article Editors

**SARAH A. HEMMENDINGER**

**STEPHEN CHANG**

**THOMAS P. BERNINZONI**

Sidley Austin LLP

San Francisco

**competition**

The Journal of the Antitrust, UCL and Privacy Section of the State Bar of California

The views expressed in *Competition* are those of the individual authors and do not necessarily represent the position of the Antitrust, UCL and Privacy Section.

Copyright © 2017 Antitrust, UCL and Privacy Section of the State Bar of California.

# ANTITRUST, UCL AND PRIVACY SECTION EXECUTIVE COMMITTEE 2016-2017

## OFFICERS

- Niall E. Lynch, **Chair**, San Francisco  
Dominique-Chantale Alepin, **Secretary/Deputy Vice Chair** (Privacy Law), Palo Alto  
Rafey S. Balabanian, **Member**, San Francisco  
Lee F. Berger, **Vice Chair**, Programs (Webinars), Washington DC  
Jason M. Bussey, **Member**, Palo Alto  
Eric P. Enson, **Vice Chair**, Programs & Social Media, Los Angeles  
Anna Fabish, **Deputy Vice Chair**, Publications (Treatise), Los Angeles  
Robert E. Freitas, **Vice Chair**, Publications (E-Briefs), Redwood City  
Qianwei Fu, **Deputy Vice Chair**, Publications (Treatise), San Francisco  
Abiel Garcia, **Member**, Los Angeles  
Peter K. Huston, **Treasurer, Deputy-Vice Chair**, Publications (Competition), San Francisco  
Jill M. Manning, **Vice Chair**, Privacy Law, San Francisco  
Courtney A. Palko, **Deputy Vice Chair**, Publications (Treatise), Los Angeles  
E. Kate Patchen, **Deputy Vice Chair**, Publications (Competition), San Francisco  
Elizabeth C. Pritzker, **Deputy Vice Chair**, Publications (E-Briefs) Oakland  
Paul J. Riehle, **Immediate Past Chair**, San Francisco  
Heather S. Tewksbury, **Vice Chair**, Publications (Competition), Palo Alto  
Steven N. Williams, **Vice Chair**, Programs (Golden State Institute), Burlingame

## ADVISORS

- Aton Arbisser, Los Angeles  
Asim M. Bhansali, San Francisco  
Maxwell M. Blecher, Los Angeles  
Albert J. Boro, Jr., San Francisco  
Terrence A. Callan, San Francisco  
Craig C. Corbitt, San Francisco  
John F. Cove, Jr., San Francisco  
Thomas N. Dahdouh, San Francisco  
Kathleen E. Foote, San Francisco  
Elaine F. Foreman, San Francisco  
J. Thomas Greene, San Francisco  
Paul R. Griffin, San Francisco  
Don T. Hibner, Jr., Los Angeles  
Thomas S. Hixon, San Francisco  
Geoffrey T. Holtz, San Francisco  
Holly A. House, San Francisco  
Cheryl L. Johnson, Los Angeles  
David Kesselman, Los Angeles  
Kim A. Kralowec, San Francisco  
Susan Kupfer, San Francisco  
John M. Landry, Los Angeles  
Jesse W. Markham, San Francisco  
Sarretta C. McDonough, Los Angeles  
Daniel J. Mogin, San Diego  
Kenneth R. O'Rourke, Los Angeles  
Thomas A. Papageorge, Laguna Niguel  
Roxane A. Polidora, San Francisco  
Robert B. Pringle, San Francisco  
Lisa M. Saveri, San Francisco  
Francis O. Scarpulla, San Francisco  
Aaron M. Sheanin, San Francisco  
Karen Silverman, San Francisco  
Bruce L. Simon, San Francisco  
Gary R. Spratling, San Francisco  
William L. Stern, San Francisco  
Anita F. Stork, San Francisco  
Bonny E. Sweeney, San Francisco  
Kevin Y. Teruya, Los Angeles  
Kathleen J. Tuttle, Los Angeles  
Howard M. Ullman, San Francisco  
Craig A. Waldman, San Francisco

Mitch Wood, Section Coordinator  
Ana Castillo, Administrative Support

## CHAIR'S COLUMN

Niall E. Lynch

Latham & Watkins LLP

San Francisco, CA

The Antitrust, Unfair Competition Law & Privacy Section of the California State Bar is pleased to provide you with another edition of *Competition*. Special thanks to Editor-in-Chief, Peter Huston and his team at Sidley Austin for their work putting this issue together. The bulk of this issue represents a written version of last fall's Golden State Institute. We are grateful to our friends at Barkley Court Reporters who transcribed the presentations allowing edited versions to appear here. The GSI, as those of you who have attended know, provides a wealth of information from leading lawyers, enforcers, judges and thought leaders. It is a key part of the Section's mission to educate the bar, promote dialogue and bring together practitioners from both sides of the plaintiff/defense divide. Following the GSI each year, the Section holds its Lawyer of the Year award dinner which provides an opportunity to honor the achievements of a California lawyer who has established him or herself as leader in the field. In 2016, we honored, toasted and roasted Paul Griffin of Winston & Strawn. Please save the date of October 26, 2017 for what is already shaping up to be another great GSI, and another fun-filled Lawyer of the Year award dinner. As in year's past, the event will take place at the Julia Morgan ballroom in the heart of San Francisco's Financial District.

As you may be aware, changes are coming to the California Bar and to our Section. Legislation is proceeding in Sacramento that will split the Sections, including our Antitrust, Unfair Competition Law and Privacy Section, from the California Bar. This will allow the Bar to better focus on its regulatory and disciplinary functions. The Sections will spin off into a new separate organization. While this change in structure and governance is significant and all the details are not yet settled, the Executive Committee of the Section wants to assure you that our commitment to educating our membership will remain intact. The Section will continue to sponsor the GSI and will continue to publish *Competition*. We will also continue to publish the seminal treatise, *California Antitrust and Unfair Competition Law* and blast out e-briefs on new developments. We will also continue to sponsor webinars and symposia on hot topics. Thanks to the leadership of past chair Paul Riehle and those who preceded him, the Section is in excellent shape as we open this new chapter. And special thanks to Lee Berger for taking an active role in helping to establish the new organization and ensuring that it will be set up in a way that serves our Section members. We are confident that we will thrive in the new entity. Indeed, the new structure will allow us to be more flexible and nimble as we pursue our mission.

In closing, let me thank our members and advisors for their participation and ideas and reiterate our interest in hearing from you. If you have thoughts about the direction of the Section, please contact me or any member of the Executive Committee. If you have article ideas for *Competition*, please contact Peter Huston. If you have ideas for webinars, please contact Lee Berger. If you have ideas for an e-brief, please contact Robert Freitas. If you would like to volunteer to help update the treatise please contact Qianwei Fu.

## EDITOR'S NOTE

Peter K. Huston  
Sidley Austin LLP  
San Francisco, CA

### The 26th Golden State Institute Edition

Each Fall, leading jurists, enforcers and practitioners gather for The Golden State Institute, the preeminent competition law conference in the Western United States. This edition of Competition recounts the many fine presentations featured at the 26th annual GSI.

2016's GSI followed a familiar structure. It got underway, as in years past, with a survey of recent developments in California and federal law by "the three Toms." **Tom Papageorge** presented substantive developments in California antitrust, UCL and privacy law. **Tom Greene** followed with his survey of recent California procedural developments. **Tom Dahdouh** provided an update on federal antitrust and privacy developments.

For the fifth straight year GSI featured panels on "Big Stakes" antitrust trials. In the first panel, trial counsel from the Antitrust Division's challenge to AB Electrolux's \$3 billion acquisition of General Electric Co.'s appliance business, discussed their four week bench trial. For the government, the panel included former DOJ Antitrust Division Deputy Assistant Attorney General **David Gelfand** (currently a partner at Cleary Gottlieb) and former DOJ Litigation III Assistant Chief **Ethan Glass** (currently a partner at Quinn Emanuel). For the defense the panel included Dechert partner **Paul Denis** and Jones Day partner **John Majoras** lead trial counsel for Electrolux and GE, respectively. A second panel discussed the bellweather jury trial in *In Re Cox Enterprises, Inc. Set-Top Cable Box Antitrust Litigation*. **Jill Manning** moderated the discussion between trial counsel for Cox, **Peggy Zwisler** and **Al Pfeiffer**, each partners at Latham & Watkins, and trial counsel for plaintiffs **Todd Schneider** and **Kyle Bates** of Schneider Wallace.

For several years now, GSI has been honored to host California Supreme Court Justices as keynote speakers. The tradition continued this past year as **Cheryl Lee Johnson** and **Kathleen Tuttle** engaged the **Honorable Carol A. Corrigan** in an entertaining and informative discussion that touched on Justice Corrigan's pathway to the law and to the Court, her work revising California's jury instructions, and the future of California's court system. Justice Corrigan also provided invaluable advice for lawyers practicing in front of the State's appellate courts.

Special Guest **Renata Hesse**, then Acting Assistant Attorney of the DOJ Antitrust Division spoke to the GSI audience about the division's criminal program and then participated in follow up panel presentation with her DOJ colleagues **Brent Snyder**, Deputy Assistant Attorney General, **Kate Patchen**, Chief of the division's San Francisco office and **Matt Lunder**, then special counsel to the Director of Criminal Enforcement. The panel was moderated by **Niall Lynch**.

Acknowledging the Section's expanded portfolio into privacy law and the explosion of privacy cases including those following massive, high profile data breaches, GSI included a panel on Assessing Damages in Privacy Cases. The panel was moderated by **Dominique-Chantale Alepin** and featured **Jay Edelson**, **Andrew B. Serwin**, and **Garrett Glasgow**. The panelists discussed the foundations of privacy law, the different types of damages that are potentially available and the numerous complex challenges faced by attorneys wrestling with damage issues in such cases.

The conference concluded with the ever-popular judges panel which included three federal district court judges, each of whom have significant experience presiding over antitrust and other complex trials: **The Honorable Denise Cote** from the Southern District of New York, **The Honorable Lucy H. Koh** and **The Honorable James Donato** both from the Northern District of California. The panel was moderated by **Steven N. Williams**.

This issue of *Competition* also includes excellent articles by **Elizabeth Pritzker**, **Geoffrey Holtz**, **Nitin Jindal**, **Ryan Sandrock** and **Stephen Chang**. Elizabeth's article discusses the legal landscape since the Supreme Court decided *Spokeo Inc. v. Robins*, which involves standing for cases involving statutory damages. Geoffrey and Nitin's article discusses the circuit split on the "ascertainability" class certification requirement of Rule 23(b)(3). Ryan and Stephen's article discusses the difficulty plaintiffs have had recently with below cost pricing claims under California's Unfair Practices Act.

---

The Journal of the  
Antitrust, UCL and Privacy Section  
of the State Bar of California

---

TABLE OF CONTENTS

<u>Articles</u>	<u>Page</u>
<p><b>MAKING THE INTANGIBLE CONCRETE: LITIGATING INTANGIBLE PRIVACY HARMS IN A POST-SPOKEO WORLD</b> By Elizabeth Pritzker.....</p>	1
<p><b>THE CRITICAL IMPORTANCE—OR COMPLETE IRRELEVANCE—OF CLASS ASCERTAINABILITY IN THE CLASS CERTIFICATION DECISION, AND THE UNACCEPTABLE CIRCUIT SPLIT</b> By Geoffrey Holtz and Nitin Jindal.....</p>	28
<p><b>BELOW-COST PRICING: RECENT DEFENSE-FRIENDLY DECISIONS</b> By Ryan M. Sandrock and Stephen Chang.....</p>	52
<p><b>CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW UPDATE: PROCEDURAL LAW</b> By Thomas Greene.....</p>	59
<p><b>CALIFORNIA ANITITRUST AND UNFAIR COMPETITION LAW UPDATE: SUBSTANTIVE LAW</b> By Thomas A. Papageorge.....</p>	80
<p><b>ROUNDUP OF 2016 ANTITRUST AND PRIVACY FEDERAL COURT DECISIONS</b> By Thomas Dahdouh.....</p>	98
<p><b>KEYNOTE ADDRESS: A CONVERSATION WITH THE HONORABLE CAROL CORRIGAN, JUSTICE OF THE CALIFORNIA SUPREME COURT</b> Interviewed by Cheryl Lee Johnson and Kathleen Tuttle.....</p>	118
<p><b>BIG STAKES ANTITRUST TRIALS: UNITED STATES V. AB ELECTROLUX &amp; GENERAL ELECTRIC CO.</b> Moderated by Peter K. Huston.....</p>	129

<b>BIG STAKES ANTITRUST TRIALS: IN RE COX ENTERPRISES, INC. SET-TOP CABLE BOX ANTITRUST LITIGATION</b>	
Moderated by Jill M. Manning.....	145
 <b>ASSESSING DAMAGES IN PRIVACY CASES</b>	
Moderated by Dominique-Chantale Alepin .....	161
 <b>CRIMINAL ANTITRUST ENFORCEMENT DURING THE OBAMA ADMINISTRATION</b>	
Remarks by Renata Hesse and a panel presentation moderated by Niall Lynch .....	173
 <b>MANAGING ANTITRUST AND COMPLEX BUSINESS TRIALS—A VIEW FROM THE BENCH</b>	
Moderated by Steve Williams.....	186

# MAKING THE INTANGIBLE CONCRETE: LITIGATING INTANGIBLE PRIVACY HARMS IN A POST-SPOKEO WORLD

By Elizabeth C. Pritzker<sup>1</sup>

## I. INTRODUCTION

Twenty-five years ago, the Supreme Court in *Lujan v. Defenders of Wildlife*<sup>2</sup> declared that for a federal court to have subject matter jurisdiction in a case, the plaintiff must have Article III standing in the form of an “injury in fact” to bring the claim. Subsequently, “injury in fact” became a “bedrock” Article III prerequisite for a party invoking the jurisdictional power of the federal courts.<sup>3</sup>

Since *Lujan*, defendants have regularly sought to invoke the Article III “injury in fact” requirement as a shield against plaintiffs lacking tangible physical harm or monetized damages—especially against plaintiffs seeking statutory damages on behalf of a class. Such cases typically involve federal statutes designed to protect individuals from unauthorized data gathering, improper or negligent disclosure of their private information, unwanted solicitations and calls, or personal intrusions of their privacy. These statutes endow private litigants with causes of action that empower them to enforce the laws as “private attorneys general” and include statutory damages.<sup>4</sup> This broad sweep of statutory power has put the question of Article III standing in the balance, raising concerns about whether Congress may grant standing to individuals who have not suffered tangible injury, in the form of a physical or economic harm, from the malfeasance at issue.

Last term, in *Spokeo Inc. v. Robins*,<sup>5</sup> an eight-member Supreme Court<sup>6</sup> aimed to clarify the Article III standing requirement for privacy-related class action lawsuits. Justice Alito’s majority opinion focused on two key points: (1) that “particularized” injury and “concrete” injury are distinct, but necessary, requirements of standing; and

---

1 Elizabeth C. Pritzker is a founding member of Pritzker Levine LLP, an Oakland, California-based law firm that represents plaintiffs in antitrust, consumer protection and privacy matters, including class actions. She is a member of the Executive Committee for the Antitrust, Unfair Competition and Privacy Law Section of the State Bar of California.

2 504 U.S. 555, 560–61 (1992).

3 See, e.g., *McConnell v. FEC*, 540 U.S. 93, 225 (2003) (“One element of the ‘bedrock’ case-or-controversy requirement is that plaintiffs must establish that they have standing to sue . . . . [W]e have reiterated . . . that . . . a plaintiff must demonstrate an ‘injury in fact.’” (citations omitted)), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

4 Examples of such statutes include, among others: the Consumer Protection Credit Act (CPCA) (15 U.S.C. § 1601 *et seq.*); the Drivers’ Privacy Protection Act (DPPA) (18 U.S.C. § 2721 *et seq.*); the Electronic Communications Privacy Act (ECPA) (18 U.S.C. § 2510 *et seq.*); the Electronic Funds Transfer Act (EFTA) (15 USC § 1693 *et seq.*); the Fair and Accurate Credit Transactions Act (FACTA) (15 U.S.C. § 1681a *et seq.*); the Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 *et seq.*); the Fair Debt Collections Practices Act (FDCPA) (15 U.S.C. § 1692 *et seq.*); the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227 *et seq.*); the Truth in Lending Act (TILA) (15 U.S.C. § 1601 *et seq.*); and the Video Privacy Protection Act (VPPA) (18 U.S.C. § 2710 *et seq.*).

5 578 U.S. \_\_\_\_, 136 S. Ct. 1540 (2016).

6 Justice Antonin Scalia died February 13, 2016, after the Supreme Court heard arguments in *Spokeo* on November 2, 2015, but before the case was decided on May 16, 2016.

(2) that the plaintiff’s alleged “concrete” harm may be either tangible or intangible to meet Article III standing.<sup>7</sup>

Particularization and concreteness have long been a feature in class action jurisprudence, but the notion of an *intangible* concrete harm raises new questions about how plaintiffs can successfully demonstrate such harm in federal court. Defendants also face new considerations when deciding whether to seek dismissal of consumer and privacy class actions based on lack of Article III standing. For example, defendants now need to carefully consider whether to remove a case to federal court. In the year since *Spokeo* was decided, many courts have remanded class actions to state courts based on a defense challenge to standing—with one court even awarding attorneys’ fees for improvident removal.<sup>8</sup>

This Article examines privacy law cases that address the intangible harm question in the months following *Spokeo*, to show what has and hasn’t worked for purposes of establishing Article III standing. The Article also discusses the risks defendants face in challenging plaintiffs’ asserted bases for Article III standing in cases removed to federal court.

## II. SPOKEO’S ARTICULATION OF ARTICLE III STANDING

*Spokeo* addressed issues of Article III standing for statutory violations—in this instance, a class claim alleging violations of the Fair Credit Reporting Act (FCRA). Plaintiff Thomas Robins sued Spokeo, Inc., an online “people search engine,” alleging that Spokeo had published untrue facts about him, including that he was married with children, in his fifties, employed, relatively affluent, and had a graduate degree. Robins alleged all of this information was false, and that dissemination of this information had damaged his employment prospects.<sup>9</sup>

Robins brought suit on behalf of himself and a class of similarly situated individuals under the FCRA, which provides for statutory damages of “not less than \$100 and not more than \$1,000” for each willful violation “with respect to any consumer.”<sup>10</sup> The FCRA seeks to ensure “fair and accurate credit reporting.”<sup>11</sup> To achieve this end, the Act regulates the creation and use of “consumer report[s]” by “consumer reporting agenc[ies]” for certain specified purposes, such as credit transactions, insurance, licensing, consumer-initiated business transactions, and employment.<sup>12</sup> Specifically, the FCRA requires that credit reporting agencies “follow reasonable procedures to assure maximum possible accuracy of consumer reports” and information.<sup>13</sup> Robbins alleged that Spokeo had violated these and other procedural requirements of the Act.<sup>14</sup>

---

7 *Id.* at 1548–50.

8 *Mocek v. Allsaints USA Ltd.*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 7116590 (N.D. Ill. Dec. 7, 2016).

9 *Spokeo*, 136 S. Ct. at 1544, 1546.

10 15 U.S.C. §§ 1681n(a)–(a)(1)(A).

11 *Id.* § 1681(a)(1).

12 *See id.* §§ 1681a(d)(1)(A)–(C); *id.* § 1681b.

13 *Id.* § 1681e(b).

14 *Spokeo*, 136 S. Ct. at 1545–46.

The district court dismissed the proposed class action on the ground that the “alleged harm to Plaintiff’s employment prospects [was] speculative, attenuated and implausible.” Further, since the alleged inaccuracies, in the court’s view, had actually upgraded Robins’ personal and professional credentials, the court ruled that Robins had not alleged the “injury in fact” necessary for Article III standing.<sup>15</sup> The Ninth Circuit reversed, finding that Robins had demonstrated “violations of statutory rights created by the FCRA [that] are ‘concrete, *de facto* injuries.’”<sup>16</sup>

Justice Alito, joined by five justices,<sup>17</sup> delivered the Supreme Court’s *Spokeo* opinion. The opinion begins with a nod to *Lujan*, which “established that the ‘irreducible constitutional minimum’ of standing consists of three elements.”<sup>18</sup> These elements are that “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by favorable judicial decision.”<sup>19</sup> To satisfy these requirements at the pleading stage, “the plaintiff must ‘clearly . . . allege facts demonstrating’ each [standing] element.”<sup>20</sup>

Justice Alito extensively explained the “injury in fact” element of Article III standing. To establish an “injury in fact” plaintiffs must allege “an invasion of a legally protected interest”—that is both “concrete and particularized.”<sup>21</sup> These inquiries, while related, are not one and the same. A particularized injury “must affect the plaintiff in a personal and individual way.”<sup>22</sup> The plaintiff must “‘personally [have] suffered some actual or threatened injury.’”<sup>23</sup>

Courts must then independently assess whether the alleged injury is concrete. “Particularization is necessary to establish injury in fact,” Justice Alito wrote, “but it is not sufficient. An injury in fact must also be ‘concrete.’”<sup>24</sup> “A ‘concrete’ injury must be ‘*de facto*’; that is, it must actually exist . . . . [It must be] ‘real,’ and not ‘abstract.’”<sup>25</sup> But, he explained, “[c]oncrete’ is not . . . necessarily synonymous with ‘tangible.’”<sup>26</sup> “Although

---

15 *Robins v. Spokeo, Inc.*, No. CV10–05306, 2011 WL 11562151, at \*1 (C.D. Cal. Sept. 19, 2011).

16 *Robins v. Spokeo, Inc.*, 742 F.3d 409, 410, 413–14 (9th Cir. 2014).

17 Justice Alito’s majority *Spokeo* opinion was joined by Justices Kennedy, Thomas, Breyer, Kagan and Chief Justice Roberts. Justice Thomas also filed a concurring opinion. Justices Ginsberg and Sotomayor dissented. *Spokeo*, 136 S. Ct. at 1550, 1554.

18 *Id.* at 1547 (citing *Lujan*, 504 U.S. at 560).

19 *Id.* (citations omitted).

20 *Id.* (ellipse in original, citations omitted).

21 *Id.* at 1548.

22 *Id.* (citations omitted).

23 *Id.* (citations omitted).

24 *Id.*

25 *Id.* (internal citations omitted).

26 *Id.* at 1549. The court expressed unanimity on this issue. See *id.* at 1550 (Thomas, J., concurring) (“[T]he court explains that ‘concrete’ means ‘real’ and ‘not abstract,’ but not ‘necessarily synonymous with tangible’ . . . . I join the court’s opinion.”) (internal quotation marks omitted); *id.* at 1555–56 (Ginsburg, J., dissenting) (“Concreteness as a discrete requirement for standing, the court’s decisions indicate, refers to the reality of an injury, harm that is real, not abstract, but not necessarily tangible.”)

tangible injuries<sup>27</sup> are perhaps easier to recognize,” Justice Alito acknowledged that the Supreme Court has “confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete.”<sup>28</sup>

In determining whether *intangible* injuries, such as those involving privacy or information injuries, constitute “injury in fact” for Article III purposes, Justice Alito’s *Spokeo* opinion identifies two factors to consider: (1) does the alleged intangible harm have “a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts”;<sup>29</sup> and (2) has Congress identified the intangible harm “as one that meets minimum Article III requirements”?<sup>30</sup> This Article will refer to these factors as the (1) historical precedent factor and (2) congressional identification factor.

The historical precedent factor asks whether there is historical precedent that says the intangible harm is a cognizable and redressable injury. Notably, this factor is not rooted in statute. If, for example, the plaintiff can allege an intangible harm from a defendant practice that amounts or is analogous to an intrusion upon seclusion—a specific privacy tort listed in the Restatement Second of Torts, 652(b)—she may be found to have satisfied the first *Spokeo* factor of “injury in fact” identified in Justice Alito’s majority opinion because historical legal precedent supports the intangible harm caused by the intrusion upon seclusion tort.

The congressional intent factor has two components, both of which focus on statutory language and intent. First, has the Legislature identified in the statute a violation that amounts to a specific harm or a risk of such harm? In such circumstances, the violation of a “right granted by statute” will be sufficient to constitute injury and “a plaintiff in such circumstances need not allege any *additional* harm beyond the harm Congress has identified.”<sup>31</sup> Second, does the statute’s wording offer guidance on how Congress views the nature or severity of the harm in question? Stated another way, courts should ask whether one can discern, from the statute’s language or its history, a legislative attempt to “define injuries and articulate chains of causation” in such a way as to establish concreteness?<sup>32</sup>

---

27 “Tangible” injuries include, for example, physical injuries accompanying mass torts (*see id.* at 1548 n.7); emotional distress, or other forms of psychic harm (*see, e.g., Carey v. Piphus*, 435 U.S. 247, 263, 263 n.2 (1978) [“Distress is a personal injury familiar to the law,” and “[w]e use the term ‘distress’ to include mental suffering or emotional anguish.”]); loss of time, money or property (*see, e.g., Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1251 (11th Cir. 2015) [“We find that Palm Beach Golf has Article III standing sufficient to satisfy the injury” requirement . . . under the federal Telephone Consumer Protection Act’s prohibition on junk faxes, 47 U.S.C. § 227(b)(1)(C), “because it has suffered a concrete and personalized injury in the form of the occupation of its fax machine for the period of time required for the electronic transmission of the (unwanted) data.”]); and injuries to financial, economic or property interests. *See, e.g., Ass’n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–53 (1970) (plaintiffs had standing to allege that unfair competition caused them economic injury).

28 *Spokeo*, 136 S. Ct. at 1549.

29 *Id.*

30 *Id.*

31 *Id.* (emphasis in original).

32 *Id.*

The Supreme Court did not dismiss the case, as Spokeo had urged. Nor, indeed, did the Supreme Court majority apply the *Spokeo* principles articulated in Justice Alito’s opinion to the facts in the case. Instead, the court remanded the case to the Ninth Circuit, finding that their previous analysis was “incomplete” because the panel had “overlooked” concreteness.<sup>33</sup> In remanding the case, the *Spokeo* majority took “no position” as to whether Robins had alleged a “degree of risk” of harm “sufficient to meet the concreteness requirement” for standing.<sup>34</sup>

The Ninth Circuit heard arguments on the remanded case on December 13, 2016. Although the panel has not issued its opinion following remand, other Ninth Circuit panels have interpreted *Spokeo* and its Article III standing requirements in cases involving intangible privacy or information-related concerns. Circuit and district courts throughout the country have tackled these issues as well, but with divergent results.

### III. THE AFTERMATH OF SPOKEO

*Spokeo*’s multi-factor inquiry introduces a fair amount of ambiguity into the Article III analysis. This has led to divergent trends in the federal courts of appeal. The Ninth Circuit as well as the Second, Third, Sixth, and Eleventh Circuits have adopted broad interpretations of *Spokeo* and its Article III standing requirements, while the Fourth, Seventh, Eighth, and District of Columbia Circuits have interpreted *Spokeo* more narrowly.

#### A. Circuits Construing *Spokeo* More Broadly

##### 1. Ninth Circuit

The Ninth Circuit recently issued two key post-*Spokeo* cases. In the first of these cases, *Van Patten v. Vertical Fitness Group*,<sup>35</sup> plaintiff alleged on behalf of himself and similarly-situated class members that defendant’s Gold’s Gym franchises had sent unsolicited text messages for gym memberships to plaintiff’s and class members’ cell phones<sup>36</sup> in violation of the Telephone Consumer Protection Act (TCPA). Citing *Spokeo*, the court noted that Congress has the authority to establish concrete harms for Article III purposes, and that Congress did so in enacting the TCPA.<sup>37</sup> These harms, according to the Ninth Circuit, take the form of “[u]nsolicited telemarketing phone calls or text messages [that], by their nature, invade the privacy and disturb the solitude of their

---

33 *Id.* at 1545.

34 *Id.* at 1550.

35 847 F.3d 1037 (9th Cir. 2017).

36 Van Patten alleged he had received two such unsolicited text messages on his phone. *Id.* at 1041.

37 *Id.* at 1043 (“[I]n enacting the TCPA, Congress made specific findings that ‘unrestricted telemarketing can be an intrusive invasion of privacy’ and are a ‘nuisance.’ Congress sought to protect consumers from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax advertisements.” (internal citations omitted)).

recipients.”<sup>38</sup> Accordingly, the court held that “[a] plaintiff alleging a violation under the TCPA “need not allege any *additional* harm beyond the one Congress has identified.”<sup>39</sup>

The second notable Ninth Circuit case is *Syed v. M-I, LCC*.<sup>40</sup> The case involved whether a prospective employer could “satisfy the Fair Credit Reporting Act’s (FCRA) disclosure requirements by providing a job applicant with a disclosure that ‘a consumer report may be obtained for employment purposes’ which simultaneously serves as a liability waiver for the prospective employer and others.”<sup>41</sup> Plaintiff Syed applied for a job at M-I and signed a pre-employment form that both authorized M-I to secure Syed’s credit report as part of a pre-employment background check, and stipulated that, by signing the document, Syed was waiving his rights to sue M-I for violations of the FCRA. Although the FCRA permits employers to request credit reports of potential employees, the Ninth Circuit held that M-I’s practice of including a liability waiver in the disclosure authorization form violated a statutory provision of the Act that requires that the authorization document “consist solely of the disclosure.”<sup>42</sup> Importantly, the court viewed this practice as “more than a ‘bare procedural violation’” of the law.<sup>43</sup> “The disclosure requirement at issue,” the court observed, “creates a right to information by requiring prospective employers to inform job applicants that they intend to procure their consumer reports as part of the employment application process . . . and [itself] creates a right to privacy by enabling applicants to withhold permission to obtain the report . . . and a concrete injury [occurs] when applicants are deprived of their ability to meaningfully authorize the credit check.”<sup>44</sup> Thus, because “Congress has recognized the harm such violations cause, thereby articulating a ‘chain[] of causation that will give rise to a case or controversy,’”<sup>45</sup> the Ninth Circuit held—as in *Van Patten*—that Syed was not required to plead anything beyond a statutory violation for Article III standing purposes.

## 2. Second Circuit

The Second Circuit, in *Strubel v. Comenity Bank*,<sup>46</sup> similarly interpreted *Spokeo* as instructing “that an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff’s concrete interests

---

38 *Id.*

39 *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549) (emphasis in original). Despite holding that Van Patten met *Spokeo*’s standing requirements, the court ultimately affirmed the district court’s dismissal of plaintiff’s TCPA claim, holding that he both consented to the text messages and failed to expressly revoke his consent. *Id.* at 1046–48.

40 853 F.3d 492, (9th Cir. 2017).

41 *Id.* at 495–96 (citing 15 U.S.C. §1681b(b)(2)(A)).

42 *Id.* at 496 (citing 15 U.S.C. § 1681b(b)(2)(A)).

43 *Id.*

44 *Id.* at 505. Finding that 15 U.S.C. §§ 1681b(b)(2)(a) “unambiguously forecloses the inclusion of a liability waiver in a disclosure document,” the Ninth Circuit determined that M-I’s actions were in “‘reckless disregard of statutory duty.’ Its violation of the FCRA was therefore willful under 15 U.S.C. § 1681n,” subjecting the company to liability for statutory damages, punitive damages, and attorney’s fees and costs. *Id.* at 497, 503–06

45 *Id.* at 499 (citing *Spokeo*, 136 S. Ct. at 1549).

46 842 F.3d 181 (2d Cir. 2016).

and where the procedural violation presents a ‘risk of real harm’ to that concrete interest.”<sup>47</sup> In *Strubel*, the court considered whether four alleged violations of the Truth in Lending Act (“TILA”) were sufficient to convey Article III standing absent a separate injury allegation under *Spokeo*.<sup>48</sup>

The case involved TILA-required consumer disclosures in a Victoria Secrets branded credit card agreement. Comenity Bank’s allegedly violated two of TILA’s statutory requirements in its agreements, namely (1) the requirement of notice to the consumer of consumer rights pertaining to disputed credit card purchases and (2) the requirement that a dissatisfied consumer must notify the creditor in writing, give rise to Article III standing absent a separately articulated injury.<sup>49</sup> “These disclosures do not operate in a vacuum,” the court observed.<sup>50</sup> “Rather each serves to protect a consumer’s concrete interest in ‘avoid[ing] the uninformed use of credit,’ a core object of the TILA . . . These procedures afford such protection by requiring a creditor to notify a consumer, at the time he opens a credit account, of how the consumer’s own actions can affect his rights with respect to credit transactions.”<sup>51</sup> As the court explained, “[a] consumer who is not given notice of his obligations is likely not to satisfy them and, thereby, unwittingly lose the very credit rights that the law affords him.” The court concluded, “a creditor’s alleged violation of each notice requirement, by *itself*, gives rise to a risk of real harm to the consumer’s concrete interest in the informed use of credit.”<sup>52</sup> Having alleged such procedural violations, *Strubel* was not required to allege “any *additional* harm” to demonstrate the concrete injury necessary for Article III standing.<sup>53</sup>

*Strubel* was careful to distinguish other violations of statutory procedure that “present[] no material risk of harm” to plaintiffs, stating that in such instances, allegations of procedural violations, alone, would not confer standing under *Spokeo*. To that point, the court found that plaintiff’s “alleged defect in [TILA’s] 30-day notice of correction[ ] [for billing errors] does not, by itself, present any material risk of harm,” and therefore was insufficient for Article III standing without a separate alleged injury.<sup>54</sup>

---

47 *Id.* at 190 (citing *Spokeo*, 136 S. Ct. at 1549).

48 *Id.* at 185–86, 190–94.

49 *Id.* at 190 (referencing 15 U.S.C. § 1637(a)(7)).

50 *Id.*

51 *Id.* (citations omitted).

52 *Id.* at 190–91 (italics added, italics in original omitted) (internal quotation marks and citation omitted).

53 *Id.* (italics in original) (citing *Spokeo*, 136 S. Ct. 1549).

54 *Id.* at 193 (internal quotation marks and citation omitted). For a similar analysis, see *Ross v. AXA Equitable Life Ins. Co.*, \_\_\_ F. App’x. \_\_\_, 2017 WL 730266 (2d Cir. Feb. 23, 2017) (finding that alleged violation of a New York Insurance Law requirement prohibiting insurers from making “any misleading representation, or any misrepresentation of the financial condition of any such insurer or of the legal reserve system upon which it operates,” did not inherently present any material risk of harm; plaintiff required to separately allege materiality and likelihood of harm to support Article III standing requirements of *Spokeo*).

### 3. Third Circuit

The Third Circuit has issued two post-*Spokeo* cases that squarely address Article III standing in class action cases alleging data collection and data breach claims.

The first of these cases is *In re Nickelodeon Consumer Privacy Litigation*,<sup>55</sup> a multidistrict consolidated class action brought on behalf of children younger than 13 who alleged that defendants, Viacom and Google, unlawfully collected personal information about them on the Internet, including what webpages the children visited and what videos they watched.<sup>56</sup> Plaintiffs raised six claims, including violations of (i) the Wiretap Act (18 U.S.C. §§ 2510, *et seq.*), (ii) the Stored Communications Act (18 U.S.C. § 2701, *et seq.*), (iii) the California Invasion of Privacy Act (Cal. Penal Code §§ 630, *et seq.*), (iv) the Video Privacy Protection Act (VPPA) (18 U.S.C. § 2710), (v) the New Jersey Computer Related Offenses Act (N.J. Stat. Ann. § 2A:38A–3), and (vi) a claim under New Jersey common law for intrusion upon seclusion.<sup>57</sup> The district court dismissed plaintiffs' complaints in their entirety, for lack of any sufficiently alleged concrete injury, and, on appeal, the Third Circuit first took up the question of Article III standing under *Spokeo*.

The Third Circuit in *Nickelodeon* had little difficulty deciding that plaintiffs had satisfied *Spokeo*'s requirements. The court stated, "in some cases an injury in fact may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."<sup>58</sup> "While perhaps 'intangible,'" the court reasoned, the harm alleged by the plaintiffs "also is concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of . . . information," which was clearly protected by statute and by common law.<sup>59</sup>

In the second case, *In re Horizon Healthcare Services, Inc. Data Breach Litigation*,<sup>60</sup> the Third Circuit again revived a class complaint that had been dismissed by the district court for lack of Article III standing. *Horizon* involved the theft of two laptops containing sensitive personal information from health insurer Horizon Healthcare Services, Inc. Plaintiffs filed a class complaint on behalf of themselves and other Horizon customers whose information was stored on those laptops, alleging willful and negligent violations of the FCRA, 15 U.S.C. section 1681 *et seq.*, as well as numerous violations of state law, stemming from plaintiffs' claims that Horizon had failed to adequately protect their personal information.<sup>61</sup> The district court dismissed for lack of standing, stating that none of the plaintiffs had adequately plead cognizable injury because none had alleged that the stolen personal information was actually used to their detriment.<sup>62</sup>

---

55 827 F.3d 262 (3d Cir. 2016).

56 *Id.* at 267.

57 *Id.* at 271.

58 *Id.* at 273 (citing *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125, 134 (3d Cir. 2015)).

59 *Id.* at 274.

60 846 F.3d 625 (3d Cir. 2017).

61 *Id.* at 627.

62 *Id.*

In reversing, the Third Circuit in *Horizon* stated that it “underst[ood] that the *Spokeo* court meant to reiterate traditional notions of standing, rather than erect any new barriers that might prevent Congress from identifying new causes of action though they may be based on intangible harms.”<sup>63</sup> Drawing on *Nickelodeon* as precedent, the court observed that “‘unauthorized disclosures of information’ have long been seen as injurious.”<sup>64</sup> The court then looked to the statutory protections afforded plaintiffs under the FCRA, holding that “with the passage of FCRA, Congress established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself—whether or not the disclosure of that information increased the risk of identity theft or some other future harm.”<sup>65</sup> Further, the court reasoned that the intangible harm the FCRA sought to remedy had a “close relationship to a harm [i.e. invasion of privacy] that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” Thus, the court had “no trouble concluding that Congress properly defined [in the FCRA] an injury that ‘give[s] rise to a case or controversy where none existed before.’”<sup>66</sup>

In *Horizon*, the Third Circuit found that plaintiffs did not allege a “mere technical or procedural violation of FCRA,”<sup>67</sup> but rather alleged the unauthorized dissemination of their own private information—the very injury that FCRA is intended to prevent.” Thus, the Court found a “*de facto* injury that satisfied the concreteness requirement for Article III standing.”<sup>68</sup>

#### 4. Sixth Circuit

In *Galaria v. Nationwide Mutual Insurance Company*,<sup>69</sup> the Sixth Circuit held that a putative class of consumers whose personally private information was stolen after hackers breached the computer network of Nationwide Mutual Insurance had Article III standing under *Spokeo* to assert claims for invasion of privacy, negligence, bailment, and violations of the Fair Credit Reporting Act (FCRA).<sup>70</sup> The district court had dismissed plaintiffs’ complaint, reasoning that the plaintiffs—who had not yet suffered identity theft—lacked Article III standing to bring the negligence and bailment claims, and lacked statutory standing to bring the FCRA claims.<sup>71</sup> The Sixth Circuit reversed, finding that plaintiffs had satisfied each of *Spokeo*’s injury in fact requirements.

The court found that plaintiffs’ allegations “that the theft of their personal data places them at a continuing, increased risk of fraud and identity theft,” coupled with facts to show that class members had to spend time and money to monitor their credit,

---

63 *Id.* at 638.

64 *Id.*

65 *Id.* at 639.

66 *Id.* at 639–40 (citing *Spokeo*, 136 S. Ct. at 1549).

67 *Id.* at 640.

68 *Id.*

69 663 F. App’x. 384 (6th Cir. 2016).

70 *Id.* at 386, 390–91.

71 *Id.* at 385.

were “sufficient to establish cognizable Article III injury at the pleading stage of the litigation.”<sup>72</sup> “[A]lthough it might not be ‘literally certain’ that plaintiffs’ data will be misused,” the Sixth Circuit concluded, “there is a sufficiently substantial risk of harm that incurring mitigation costs is reasonable.”<sup>73</sup> Plaintiffs’ additional allegation that they incurred costs to obtain credit protection separately qualified as a “concrete injury suffered to mitigate an imminent harm,” necessary to satisfy the injury requirement.<sup>74</sup>

## 5. Eleventh Circuit

The Eleventh Circuit’s post-*Spokeo* rulings in the privacy arena provide mixed guidance.

In an early post-*Spokeo* case, *Church v. Accretive Health, Inc.*,<sup>75</sup> the court broadly interpreted *Spokeo* to find that Article III standing existed in a putative class action against a hospital (Accretive Health) that alleged violations of the Fair Debt Collections Practices Act (FDCPA). Plaintiff alleged that the hospital violated the FDCPA when it sent her a letter advising her that she owed a debt to the hospital that did not contain certain disclosures required by the Act.<sup>76</sup> Although Church did not allege that she had suffered any actual monetary damages from this failure—only that she was “very angry” and “cried a lot,” the Eleventh Circuit nonetheless held that plaintiff’s alleged statutory violation amounted to an injury in fact for standing purposes.<sup>77</sup> The court observed that “[a]n injury-in-fact, as required by Article III, ‘may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing’”<sup>78</sup> Here, the court found, “Church alleges she had a right to receive the FDCPA-required disclosures” and the hospital did not dispute that the debt collection letter it sent did not contain all of the FDCPA’s required disclosures.<sup>79</sup> The Eleventh Circuit held that Church sufficiently alleged that she “sustained a concrete—*i.e.*, ‘real’—injury because she did not receive the allegedly required disclosures.”<sup>80</sup> “While this injury may not have resulted in tangible economic or physical harm that courts often expect,” the Eleventh Circuit concluded, “the Supreme Court [in *Spokeo*] has made clear an injury need not be tangible to be concrete.”<sup>81</sup>

The Eleventh Circuit interpreted *Spokeo* more narrowly in *Nicklaw v. Citimortgage, Inc.*<sup>82</sup> In that case, the plaintiff sold real property that he owned in New York, using the proceeds of the sale to pay off a mortgage owned by CitiMortgage. New York state law required that CitiMortgage record a certificate of discharge with the county clerk that the mortgage had been discharged, within 30 days of payoff. Failure to file the certificate

---

72 *Id.* at 388.

73 *Id.*

74 *Id.* at 389.

75 654 F. App’x. 990 (11th Cir. 2016).

76 *Id.* at 991.

77 *Id.*

78 *Id.* at 993 (citation omitted).

79 *Id.* at 995

80 *Id.*

81 *Id.* (citing *Spokeo*, 136 S. Ct. at 1549).

82 839 F.3d 998 (11th Cir. 2016).

within 30 days rendered CitiMortgage liable to Nicklaw for a statutory payment of \$500, an amount that increased to \$1,000 after 60 days, and \$1,500 after 90 days.<sup>83</sup> CitiMortgage failed to record the loan satisfaction certificate for 115 days.<sup>84</sup> Nicklaw filed a class action suit against CitiMortgage in the Southern District of Florida, alleging statutory violations of the New York law. The Eleventh Circuit rejected Nicklaw’s two asserted bases of Article III standing: (1) that CitiMortgage’s untimely recording of the mortgage discharge gave rise to substantive legal rights under New York law, and (2) that timely recordation of a satisfaction of mortgage has deep roots in American common law (here, the statutory law of New York).<sup>85</sup> The court looked to *Spokeo*’s statement that “Article III standing requires a concrete injury even in the context of a statutory violation,”<sup>86</sup> and found Nicklaw’s claims wanting because “Nicklaw allege[d] neither a harm nor a material risk of harm that the district court could remedy” through the litigation.<sup>87</sup> The Court observed that “[Nicklaw’s] complaint does not allege that he lost money because CitiMortgage failed to file the certificate. It does not allege that his credit suffered. It does not even allege that he or anyone else was aware that the certificate of discharge had not been recorded during the relevant time period.”<sup>88</sup>

The Eleventh Circuit in *Nicklaw* also underscored the heightened requirements for standing in federal court under *Spokeo*. The court noted that Nicklaw could have alleged a right sufficient to form a cause of action in a court of New York.<sup>89</sup> Instead the court held that “Nicklaw chose to sue CitiMortgage in federal court, and the requirement of concreteness under Article III is not satisfied every time a statute creates a legal obligation and grants a private right of action for its violation.”<sup>90</sup> As such, “A plaintiff must suffer some harm or risk of harm from the statutory violation to invoke the jurisdiction of a federal court.”<sup>91</sup>

---

83 *Id.* at 1000 (citing N.Y. Real Prop. Law § 275; N.Y. Real Prop. Acts. Law § 1921).

84 *Id.* at 1000–01.

85 *Id.* at 1003.

86 *Id.* at 1002 (internal quotations and citations omitted).

87 *Id.* at 1003.

88 *Id.* Other procedural deficiencies in Nicklaw’s complaint also likely contributed to the court’s decision to dismiss it for lack of Article III standing. Significantly, a separate federal district court had previously dismissed Nicklaw’s claims on mootness grounds, in light of an offer by Citibank to pay Nicklaw all statutory penalties that were owed. *See id.* at 1001. Nicklaw did not appeal that dismissal; instead, he filed a new complaint a year later in a different federal court.

89 *Id.* at 1003.

90 *Id.* The Eleventh Circuit reached a similar conclusion in *Meeks v. Owen Loan Servicing, LLC*, \_\_\_ F. App’x. \_\_\_, 2017 WL 782285, \*1 (11th Cir. Mar. 1, 2017), holding that a plaintiff alleging statutory violations against a mortgage lender for its failure to timely comply with the Real Estate Settlement Procedures Act’s (RESPA) requirement that it acknowledge receipt of a borrower’s request for information within five days, without more, was insufficient to confer Article III standing for statutory damages under *Spokeo*.

91 *Nicklaw*, 839 F.3d at 1003.

## B. CIRCUITS CONSTRUING *SPOKEO* MORE NARROWLY

### 1. Fourth Circuit

The Fourth Circuit, in *Beck v. McDonald*,<sup>92</sup> interpreted the majority *Spokeo* opinion much more narrowly than some of its sister circuits. As in the Sixth Circuit *Galaria* case, *Beck* involved the theft of a hospital clinic laptop containing unencrypted information about individual patients—in this instance, veterans who received medical care at a Veterans Affairs Medical Center in Columbia, South Carolina. Plaintiffs filed suit on behalf of a class of patients whose information was stored on the missing laptop, alleging violations of the Privacy Act (5 U.S.C. § 552a *et seq.*), and the Administrative Procedures Act (5 U.S.C. § 701 *et seq.*).<sup>93</sup> The Fourth Circuit affirmed an order dismissing the action at summary judgment, concluding that plaintiffs lacked Article III standing.

The court held that plaintiffs' claims that they were at risk of future identity theft from misappropriation of their personal information were "too speculative" based on the facts of the case to constitute an injury in fact.<sup>94</sup> In reaching this conclusion, the Fourth Circuit found *Galaria* and other decisions favoring Article III standing for similar data breach-related claims distinguishable because the data theft in those cases "intentionally targeted the personal information compromised in the data breaches," whereas in *Beck*, "plaintiffs ma[de] no such claims."<sup>95</sup> Further, having had the benefit of discovery, which had failed to uncover "evidence that the information contained on the stolen laptop has been accessed or misused," the court found that plaintiffs had not met their burden to demonstrate that the risk of future identity theft from the theft of their personal information was reasonably likely or sufficiently concrete a harm to satisfy *Spokeo's* Article III standing requirements.<sup>96</sup> Plaintiffs' efforts to assert standing based on the costs they incurred for credit protection and monitoring were held to be insufficient to establish a concrete, intangible harm since plaintiffs had demonstrated only a "speculative threat" that their personal information would be misused in the future.<sup>97</sup>

### 2. Seventh Circuit

In *Meyers v. Nicolet Restaurant of DePere, LLC*,<sup>98</sup> the Seventh Circuit held that a class plaintiff lacked Article III standing to sue a restaurant for failing to truncate the expiration date of his credit card on a receipt, in violation of the Fair and Accurate Credit

---

92 848 F.3d 262 (4th Cir. 2017).

93 *Id.* at 267.

94 *Id.* at 271, 274.

95 *See id.* at 273–74 (“The Sixth, Seventh and Ninth Circuits have all recognized, at the pleading stage, that plaintiffs can establish an injury-in-fact based on [threatened risk of future identity theft].”), and at 274 (“Underlying the cases are common allegations that sufficed to push the threatened injury of future identity theft beyond the speculative to the sufficiently imminent. In *Galaria* . . . , for example, the data thief intentionally targeted the personal information compromised in the data breaches . . . . Here, the Plaintiffs make no such claims.”)

96 *Id.* at 274–75.

97 *Id.* at 276–77.

98 843 F.3d 724 (7th Cir. 2016).

Transactions Act (FACTA) (15 U.S.C. § 1681 *et seq.*). FACTA was enacted by Congress “in response to what it considered to be the increasing threat of identity theft.”<sup>99</sup> At issue in *Meyers* was Section 1681c(g)(1), which requires merchants that accept credit or debit cards not include on purchase receipts the card expiration date or more than the last 5 digits of the credit card number.<sup>100</sup> A merchant that “willful[ly] violat[es]” this provision may be liable for “any actual damages sustained” or “statutory damages of between \$100 and \$1,000.”<sup>101</sup>

“*Spokeo* compels the conclusion that Meyers’ allegations [i.e., the claimed statutory violations of FACTA] are insufficient to satisfy the injury-in-fact requirement for Article III standing,” the court held.<sup>102</sup> Noting that district courts considering FACTA’s requirement that credit card information be appropriately truncated were split on the federal standing question,<sup>103</sup> the Seventh Circuit in *Meyers* determined that some “showing of injury *apart* from the statutory violation” itself was necessary to confer Article III standing under *Spokeo*.<sup>104</sup>

In so holding, the court found persuasive two post-*Spokeo* decisions from two other Circuit courts: the Eighth Circuit decision in *Braitberg v. Charter Comm’ns, Inc.*,<sup>105</sup> and the D.C. Circuit decision in *Hancock v. Urban Outfitters, Inc.*<sup>106,107</sup> These cases are discussed below.

### 3. Eighth Circuit

*Braitberg* involved alleged statutory violations of the Cable Communications Policy Act (CCPA), 47 U.S.C. § 551(e). *Braitberg* gave Charter Communications personal information, such as his address, telephone number, and social security number when he signed up for cable services. *Braitberg* canceled these cable services after three years.<sup>108</sup> Some three years after this cancellation, *Braitberg* learned that Charter had retained all of his personally identifiable information, in violation of the CCPA, which provides that:

---

99 *Id.* at 725.

100 *Id.*

101 *Id.* (citing 15 U.S.C. § 1681(a)(1)(A)).

102 *Id.* at 727.

103 *See id.* at 728 n.3 (comparing *Kamal v. J. Crew Grp., Inc.*, No. 2:15-0190, 2016 WL 6133827, at \*3-4 (D.N.J. Oct. 20, 2016) [printing of first six numbers of credit card without more was not sufficient injury-in-fact, as there was “no evidence that anyone has accessed or attempted to access or will access Plaintiff’s credit card information”] with *Woods v. J. Choo USA, Inc.* \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 4249953, at \*3-5 (S.D. Fla. Aug. 11, 2016) [failure to truncate an expiration date was sufficient for standing purposes because Congress has created a substantial personal right to receive a truncated receipt]).

104 *Id.* at 729 (emphasis added).

105 836 F.3d 925 (8th Cir. 2016).

106 830 F.3d 511 (D.C. 2016).

107 *Meyers*, 843 F.3d at 728.

108 *Braitberg*, 836 F.3d at 926.

“[a] cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information [by the subscriber] or pursuant to a court order.”<sup>109</sup>

Braitberg filed a class action lawsuit alleging that Charter’s retention of personal information—after it was no longer required to provide services, collect payments or satisfy other legal obligations—violated class members’ rights under the CCPA.<sup>110</sup> He claimed that Charter’s alleged violation caused injury in two ways: (1) as an alleged “direct invasion of their federally protected privacy rights” and (2) by “depriv[ing] Braitberg and the class of the full value of the services they purchased from Charter” since Braitberg and other class members ascribed monetary value to controlling their personal information.<sup>111</sup>

The Eighth Circuit affirmed the district court’s order of dismissal finding that Braitberg had not alleged an injury in fact under *Spokeo*.<sup>112</sup> The Eighth Circuit quoted the district court which found that Braitberg’s assertion that Charter had directly invaded class members’ federally protected rights amounted merely to “a bare procedural violation, divorced from any concrete harm.”<sup>113</sup> This was insufficient for Article III standing under *Spokeo*, according to the court:

Braitberg alleges only that Charter violated a duty to destroy personally identifiable information by retaining certain information longer than the company should have kept it. He does not allege that Charter has disclosed the information to a third party, that any outside party has accessed the data, or that Charter has used the information in any way during the disputed period. He identifies no material risk of harm from the retention; a speculative or hypothetical risk is insufficient. Although there is a common law tradition of lawsuits for invasion of privacy, the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts.<sup>114</sup>

Braitberg’s alleged economic injury—an alleged diminution of the value of the cable services that he purchased from Charter—also was held to be insufficient for standing purposes. Braitberg argued that consumers who signed up with Charter’s cable services placed a value on the assumption that Charter would “protect their personal data against improper access and unauthorized secondary use,” and that Charter’s wrongful retention of personal information deprived consumers of the “full monetary value” of their transactions.<sup>115</sup> The Eleventh Circuit found these allegations of harm too speculative for Article III standing purposes, holding that Braitberg had failed to allege “any plausible

---

109 *Id.* at 927 (citing 47 U.S.C. § 551(e)).

110 *Id.*

111 *Id.*

112 *Id.* at 930.

113 *Id.* (citing *Spokeo*, 136 S. Ct. at 1549).

114 *Id.* (citing Restatement (Second) of Torts § 652A (Am. Law Inst. 1977); *see also Spokeo*, 136 S. Ct. at 1549).

115 *Id.* at 931.

connection” between Charter’s wrongful retention of consumers’ private information in violation of the CCPA, and any alleged loss in value of the cable services they had purchased from the company.<sup>116</sup>

#### 4. D.C. Circuit

The D.C. Circuit decision in *Hancock* involved class claims against two clothing retailers, Urban Outfitters and Anthropologie, for allegedly requesting customers’ zip codes in connection with consumer credit card purchases, in violation of two D.C. consumer financial protection statutes, the District of Columbia Consumer Identification Information Act (CII) (D.C. Code § 47-3151 *et seq.*) and the District of Columbia Consumer Protection Procedures Act (DCCPPA) (D.C. Code § 28-3901 *et seq.*).<sup>117</sup> These statutory violations, however, failed to “get out of the starting gate,” as plaintiffs did not properly allege an injury in fact.<sup>118</sup> In reaching its decision that Article III’s standing requirement had not been met, the D.C. Circuit analogized the statutory wrong of collecting zip code information alleged in *Hancock* to the act of disseminating incorrect zip code information in violation of the Fair Credit Reporting Act—an example of a statutory violation the majority in *Spokeo* viewed, without more, as “difficult to imagine” working “any concrete harm” for standing purposes.<sup>119</sup>

The court in *Hancock* did search for some allegation of harm beyond the statutory violations asserted in plaintiffs’ class complaint. But, at oral argument, “Hancock’s . . . counsel candidly admitted that ‘the only injury that the named plaintiffs suffered was that they were asked for a zip code when . . . [under] the law they should not have been.’”<sup>120</sup> Plaintiffs did not establish an Article III injury as they did “not allege, for example, any invasion of privacy, increased risk of fraud or identity theft, or pecuniary or emotional injury.”<sup>121</sup>

### IV. DETERMINING CONCRETE INTANGIBLE HARMS IN PRACTICE

As shown, federal Circuit Courts have not taken a uniform, bright-line approach in applying *Spokeo* in privacy law cases. Instead, the Circuit decisions analyzing standing reflect two approaches, with each approach focusing on one of the two key considerations described by Justice Alito in the majority *Spokeo* opinion. This Article will refer to these approaches as (1) the statutory approach and (2) the factual approach.

Under the statutory approach, evidenced by Circuits construing *Spokeo* more broadly, courts focus on the portion of Justice Alito’s opinion that asks whether Congress has identified the harm alleged as one that meets “minimum Article III requirements.”<sup>122</sup>

---

116 *Id.*

117 830 F.3d at 512.

118 *Id.* at 514.

119 *Id.* (citing *Spokeo*, 136 S. Ct. at 1550).

120 *Id.* (internal citation omitted).

121 *Id.*

122 *Spokeo*, 136 S. Ct. at 1548–49.

These courts analyze the statute at issue and decide whether it creates a right that, if violated, effectively constitutes a *per se* Article III injury. The Ninth Circuit decisions in *Van Patten* and *Syed* are examples of this judicial approach.

Under the factual approach, illustrated by those Circuits adopting a narrower view of *Spokeo*, courts look more searchingly to the particular facts alleged by the plaintiff, including the manner in which a particular statute is alleged to have been violated, to determine whether the alleged facts demonstrate a concrete intangible harm that is “actual or imminent,” “fairly traceable to the challenged action,” and “redress[able] by a favorable judicial decision.”<sup>123</sup> The Eleventh Circuit decision in *Nicklau*, the Fourth Circuit decision in *Beck*, and the Eighth Circuit decision in *Braitberg* are examples of this approach.

Irrespective of these emerging approaches, successful federal court briefing after *Spokeo* likely will rely on context-specific or historically-based arguments for concrete injury. Plaintiffs seeking to establish Article III standing in privacy law cases and class actions will need to consider ways of pleading injury-in-fact with an enhanced focus on these issues.

This Article (1) describes potential strategies for pleading intangible harms after *Spokeo* and (2) provides a chart describing post-*Spokeo* privacy law decisions that have found *Spokeo*’s Article III standing to have been satisfied.

## 1. Pleading Intangible Harms After *Spokeo*

As a preliminary matter, plaintiffs should be cognizant of statutory violations that amount to bare procedural violations divorced from the concrete harm that Congress sought to guard against in passing the statute. *Braitberg* is an example of this, where the claim related to the alleged unlawful retention of personal information, but the harm that Congress sought to address in passing the CCPA was the unauthorized disclosure of personal information. Putting the two claims in context, the provision of the statute regarding retention of personal information was intended to act as a procedural safeguard to limit the instances of inadvertent—and therefore unauthorized—disclosures of personal information. But the fact that Congress put the procedural safeguard in place demonstrates that the harm it sought to address had to do with unauthorized disclosures. Thus, in terms of pleading concrete injuries in the statutory privacy context, plaintiffs must make an effort to understand the harms Congress intended to protect against in enacting a particular statute, and should be selective in the claims they bring, including with respect to different provisions of the same statute.

Additionally, certain types of *intangible* injuries—informational, reputational, invasion of privacy, and even the risk of future harm—can be pleaded to reflect a concrete injury that can be redressed in federal court under *Spokeo*. These types of injuries have long been redressed in English and American courts, and thus, fall within Justice Alito’s framework of claims that give rise to Article III standing.

---

123 See *id.* at 1547–48 (citing *Lujan*, 504 U.S. at 560–61).

Informational injuries fall roughly into three categories. The first category is failure to receive accurate information (misrepresentation claims), and several federal statutes, such as the Fair Debt Collection Practices Act (FDCPA), the Truth in Lending Act (TILA), and the Fair Credit Reporting Act (FCRA), contain provisions aimed at preventing the transmission of inaccurate information that may be pleaded to allege a concrete, intangible harm under *Spokeo*.<sup>124</sup> A second informational injury category is failure to receive informational content—a recognized form of Article III injury for which statutes like the FDCPA, the TILA and the FCRA may provide a basis to articulate concrete injury as required by *Spokeo*. Third, the failure to receive information in the specific manner prescribed by Congress may also provide a basis for Article III standing in privacy law cases.<sup>125</sup>

Like informational injury, the invasion of one’s privacy is a quintessential “harm that has been traditionally regarded as providing a basis for a lawsuit in English or American courts.”<sup>126</sup> Invasion of privacy thus qualifies as a sufficiently concrete injury for standing purposes under *Spokeo*. Plaintiffs may therefore allege Article III standing under a number of federal statutes—such as the FCRA, FDCPA, and Telephone Consumer Protection Act (TCPA)—which were specifically enacted to protect against harmful violations of privacy, often by regulating companies that intend to access or use consumers’ personal information.

A classic example of a statutory violation that evokes an invasion of privacy-type harm is unwanted robocalling or telemarketing, in violation of the provisions of the TCPA. As the Ninth Circuit observed in *Van Patten*, “[u]nsolicited telemarketing phone calls or text messages, by their nature, take the form of and disturb the solitude of recipients,”<sup>127</sup> and can thereby provide a basis for Article III standing on an invasion of privacy injury theory.

Reputational injuries also may give rise to federal standing. The U.S. Supreme Court has long held that “a risk of injury to [one’s] reputation,” without more, is sufficient injury for Article III standing.<sup>128</sup> Where violations of statutory protections involve statements or disclosures to third parties, and where disclosure of that information may work harm

---

124 The FDCPA, for example, specifically prohibits the false representation of “the character, amount or legal status of any debt.” (15 U.S.C. § 1692e(2)(A)). Similarly, the FCRA requires that credit-reporting agencies, upon request by a consumer, “clearly and accurately disclose to the consumer... [a]ll information in the consumer’s file at the time of the request,” as well as “[t]he sources of the information.” (15 U.S.C. § 1681g(a)(1) & (2)). Claims that allege a violation of these or similar statutes can be thought of as inflicting an emotional injury by denying the consumer access to truthful information.

125 Examples of these latter two categories of informational injuries include the Ninth Circuit decision in *Syed*, 2017 WL 1050586 at \*1, 4 (consumers had Article III standing to assert violations of FCRA’s disclosure requirements), and Second Circuit decision in *Strubel*, 842 F.3d at 190 (consumers had standing to assert violations of TILA’s dispute notification requirements).

126 *Spokeo*, 136 S. Ct. at 1549.

127 *Van Patten*, 847 F.3d at 1043.

128 *Meese v. Keene*, 481 U.S. 465, 475 (1987).

to the consumer, plaintiffs may be able to plead a reputational injury sufficient to satisfy *Spokeo*'s standing requirements.<sup>129</sup>

Finally, *Spokeo* explicitly recognizes that “the real risk of harm”—such as the increased risk of identity theft that may arise in the data breach context—can be enough, on its own, to satisfy the concreteness requirement.<sup>130</sup> The key to success in such cases will depend on the extent to which a plaintiff's allegations about potential future injuries are substantially likely to occur, or are sufficiently imminent, to constitute a real risk of injury for Article III purposes.

## 2. Post-*Spokeo* Intangible Harms Satisfying Article III Standing

A number of courts have considered complaints alleging privacy-related claims and found the intangible harm requirements of *Spokeo* satisfied. The following table lists certain post-*Spokeo* privacy law decisions in which plaintiffs alleging intangible harms have succeeded in establishing Article III standing. It also describes the “alleged harms” that were pleaded, by identifying the category of harm the plaintiffs sought to link to the intangible injury asserted in the case.

This table is not intended to be a comprehensive compendium of post-*Spokeo* case law. More than 550 federal courts have grappled with *Spokeo*'s teachings since the Supreme Court issued its majority opinion in May 2016. It is not possible to analyze each decision in this Article. This table serves only as guide to representative privacy law cases in which plaintiffs successfully pleaded intangible “particularized and concrete” injuries for Article III standing purposes.

---

129 The primary claim at issue in *Spokeo* is a violation of the FCRA's requirement that consumer reporting agencies “follow reasonable procedures to assure maximum possible accuracy of” consumers' reports. *Spokeo*, 136 S. Ct. at 1545 (citation omitted). This is a typical claim brought when a consumer's report contains an inaccuracy, and in many cases it will not be difficult for the plaintiff to identify reputational harm that would flow from such inaccuracies. The key question for the Ninth Circuit on remand is whether Robins will be able to articulate a theory of reputational harm even when the inaccuracy is “non-negative,” i.e., the consumer looks better as a result of *Spokeo*'s inaccuracy. Arguably, an inaccuracy of this type that results in, for example, an employer believing that an applicant with inflated credentials is too expensive to hire, prone to bombast or factually dishonest, may be a sufficiently “particularized and concrete” reputational injury for Article III standing purposes.

130 *Id.* at 1549.

<b>Statue</b>	<b>Alleged Violation</b>	<b>Alleged Harms</b>	<b>Spokeo's Standing Requirements Met</b>
<b>FCRA</b>	Failure to disclose proper information  Disclosure of private information without permission	Invasion of Privacy	<i>In re Horizon Healthcare Servs., Inc. Data Breach Litig.</i> , 846 F.3d 625 (3d Cir. 2017)
		Emotional Distress	<i>Larson v. Trans Union, LLC</i> , 201 F. Supp. 3d 1103 (N.D. Cal. 2016)
		Informational Injury	<i>Larson v. Trans Union, LLC</i> , 201 F. Supp. 3d 1103 (N.D. Cal. 2016)  <i>Stokes v. Realpage, Inc.</i> , No. CV 15-1520, 2016 WL 6095810 (E.D. Pa. Oct. 19, 2016)  <i>Syed v. M-I, LLC</i> , 853 F.3d 492, (9th Cir. 2017)
		Increased risk of identity theft or misuse of private information	<i>Galaria v. Nationwide Mut. Ins. Co.</i> , 663 F. App'x. 384 (6th Cir. 2016)  <i>In re Horizon Healthcare Servs., Inc. Data Breach Litig.</i> , 846 F.3d 625 (3d Cir. 2017)

<b>Statute</b>	<b>Alleged Violation</b>	<b>Alleged Harms</b>	<b>Spokeo's Standing Requirements Met</b>
<b>FDCPA</b>	<p>Failure to protect private customer information</p> <p>Failure to make required disclosures</p>	Improper disclosure of personal information	<i>Daubert v. Nra Grp., LLC</i> , No. 3:15-CV-00718, 2016 WL 4245560 (M.D. Pa. Aug. 11, 2016)
		Informational Injury (Failure to Receive Required Content)	<p><i>Church v. Accretive Health, Inc.</i>, 654 F. App'x. 990 (11th Cir. 2016)</p> <p><i>Lane v. Bayview Loan Servicing, LLC</i>, 2016 WL 3671467 (N.D. Ill. July 11, 2016)</p> <p><i>Taymuree v. Nat'l Collegiate Student Loan Tr.</i> 2007-2, No. 16-CV-06138, 2017 WL 952962 (N.D. Cal. Mar. 13, 2017)</p>
		Wasting Consumer Time/ Annoyance	<p><i>Horowitz v. GC Servs. Ltd. P'ship</i>, No. 14CV2512, 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016)</p> <p><i>Reed v. IC Sys., Inc.</i>, No. 3:15-279, 2017 WL 89047 (W.D. Pa. Jan. 10, 2017)</p>
		Emotional Distress	<i>Church v. Accretive Health, Inc.</i> , 654 F. App'x. 990 (11th Cir. 2016)

Statue	Alleged Violation	Alleged Harms	<i>Spokeo's</i> Standing Requirements Met
TCPA		Invasion of Privacy	<p><i>A.D. v. Credit One Bank, N.A.</i>, No. 14 C 10106, 2016 WL 4417077 (N.D. Ill. Aug. 19, 2016)</p> <p><i>Aranda v. Caribbean Cruise Line, Inc.</i>, 202 F. Supp. 3d 850 (N.D. Ill. 2016)</p> <p><i>Cabiness v. Educ. Fin. Sols., LLC</i>, No. 16-CV-01109, 2017 WL 167678 (N.D. Cal. Jan. 17, 2017)</p> <p><i>Nghiem v. Dick's Sporting Goods, Inc.</i>, No. SACV1600097, 2016 WL 8203204 (C.D. Cal. Dec. 1, 2016)</p> <p><i>Van Patten v. Vertical Fitness Grp.</i>, 847 F.3d 1037 (9th Cir. 2017)</p> <p><i>Horowitz v. GC Servs. Ltd. P'ship</i>, No. 14CV2512, 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016)</p> <p><i>Mey v. Got Warranty, Inc.</i>, 193 F. Supp. 3d 641 (N.D. W. Va. 2016)</p>

		<p>Intrusion on cell phone capacity</p>	<p><i>Horowitz v. GC Servs. Ltd. P'ship</i>, No. 14CV2512, 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016)</p> <p><i>Rogers v. Capital One Bank (USA), N.A.</i>, 190 F. Supp. 3d 1144 (N.D. Ga. 2016)</p>
		<p>Wasting customer time/nuisance</p>	<p><i>Booth v. Appstack, Inc.</i>, No. C13-1533, 2016 WL 3030256 (W.D. Wash. May 25, 2016)<sup>131</sup></p> <p><i>Cabiness v. Educ. Fin. Sols., LLC</i>, No. 16-CV-01109, 2017 WL 167678 (N.D. Cal. Jan. 17, 2017)</p> <p><i>Etzel v. Hooters of Am., LLC</i>, No. 1:15-CV-01055, 2016 WL 8604317 (N.D. Ga. Nov. 15, 2016)</p> <p><i>Caudill v. Wells Fargo Home Mortg., Inc.</i>, No. CV 5:16-066, 2016 WL 3820195 (E.D. KY. July 11, 2016)</p>

<sup>131</sup> Order clarified with no change in result, No. C13-1533, 2016 WL 3620798 (W.D. Wash. June 28, 2016).

			<p><i>Holderread v. Ford Motor Credit Co., LLC</i>, No. 4:16-CV-00222, 2016 WL 6248707 (E.D. Tex. Oct. 26, 2016)</p> <p><i>Horowitz v. GC Servs. Ltd. P'ship</i>, No. 14CV2512, 2016 WL 7188238 (S.D. Cal. Dec. 12, 2016)</p> <p><i>JWD Auto., Inc. v. DJM Advisory Grp. LLC</i>, No. 215CV793, 2016 WL 6835986 (M.D. Fla. Nov. 21, 2016)</p> <p><i>LaVigne v. First Cmty. Bancshares, Inc.</i>, No. 1:15-CV-00934, 2016 WL 6305992 (D.N.M. Oct. 19, 2016)</p> <p><i>Mey v. Got Warranty, Inc.</i>, 193 F. Supp. 3d 641 (N.D. W.Va. 2016)</p> <p><i>Van Patten v. Vertical Fitness Grp.</i>, 847 F.3d 1037 (9th Cir. 2017)</p>
--	--	--	--

<b>Statue</b>	<b>Alleged Violation</b>	<b>Alleged Harms</b>	<b>Spokeo's Standing Requirements Met</b>
<b>TILA</b>		Informational Injury (Failure to Receive Required Content)	<i>Strubel v. Comenity Bank</i> , 842 F.3d 181 (2d Cir. 2016)
<b>VPPA</b>		Invasion of Privacy	<i>Yershov v. Gannet Satellite Info. Network, Inc.</i> , 204 F. Supp. 3d 353 (D. Mass. 2016)
		Intrusion Upon Seclusion	<i>In re Nickelodeon Consumer Privacy Litig.</i> , 827 F.3d 262 (3d Cir. 2016)
<b>State Statutes</b>		Failure to deliver information or file in a timely fashion	<i>Bellino v. JPMorgan Chase Bank, N.A.</i> , 209 F. Supp. 3d 601 (S.D.N.Y. 2016) (NY Real Property Laws) <sup>132</sup>  <i>Jaffe v. Bank of Am., N.A.</i> , 197 F. Supp. 3d 523 (S.D.N.Y. 2016) (NY Real Property Laws)
		Unlawful disclosure of legally protected information	<i>Boelter v. Hearst Commc'ns, Inc.</i> , 192 F. Supp. 3d 427 (S.D.N.Y. 2016) (MI Video Rental Privacy Act)  <i>In re Nickelodeon Consumer Privacy Litig.</i> , 827 F.3d 262 (3d Cir. 2016) (NJ Computer Related Offenses Act)

<sup>132</sup> Motion to certify appeal granted, No. 14-CV-3139, 2017 WL 129021 (S.D.N.Y. Jan. 13, 2017)

		Unlawful collection of legally protected information	<i>Fraser v. Wal-Mart Stores, Inc.</i> , No. 2:13-CV-00520, 2016 WL 6094512 (E.D. Cal. Oct. 18, 2016) (Song-Beverly Credit Card Act)
		Invasion of Privacy	<i>In re Nickelodeon Consumer Privacy Litig.</i> , 827 F.3d 262 (3d Cir. 2016) (NJ common law for intrusion upon seclusion)  <i>Matera v. Google Inc.</i> , No. 15-CV-04062, 2016 WL 5339806 (N.D. Cal. Sept. 23, 2016) (Wiretap Act and California Invasion of Privacy Act)

## V. “IT AIN’T OVER ‘TIL ITS OVER”:<sup>133</sup> THE RISKS OF SEEKING TO DISMISS FOR LACK OF STANDING

A common defense to consumer and privacy class actions is to seek dismissal based on lack of Article III standing. But, defendants also need to consider carefully the basis for such a dismissal, and its implications for the course of the case.

Importantly, *Spokeo*’s standing analysis speaks only to a plaintiff’s standing to bring a claim in federal court. Accordingly, claims that may not survive a *Spokeo* analysis in federal court may nonetheless be brought in state court. Indeed, since *Spokeo*, several courts have remanded to state courts class actions asserting federal claims based on lack of Article III standing.<sup>134</sup> Courts also have remanded cases removed to federal court under the Class Action Fairness Act (CAFA), based on lack of standing.<sup>135</sup>

Defendants should exercise caution when removing cases where the plaintiff’s federal court standing may be in question. The decision in *Mocek v. Allsaints USA Ltd.*,<sup>136</sup> highlights the risk of challenging plaintiff’s standing under *Spokeo* in removed class actions. *Mocek* involved a federal claim under the Fair and Accurate Credit Transaction Act (FACTA) (15 U.S.C. § 1681c).<sup>137</sup> The case originally was filed in state court. Allsaints removed the action to federal court based on federal question jurisdiction, and immediately sought dismissal under *Spokeo*.<sup>138</sup> The district court remanded the case based on 28 U.S.C. section 1447(c), concluding that the parties were “aligned in the view” that the court lacked subject-matter jurisdiction. The court stated: “plaintiff chose to litigate her FACTA claim in state court, and regardless of whether federal jurisdiction was colorable at the time of removal, the parties now agree that there is none.”<sup>139</sup>

The *Mocek* court did not look favorably on Allsaint’s strategy of invoking the federal court’s jurisdiction for removal purposes, only to challenge that jurisdiction under *Spokeo*. According to the court, “defendant tried to have it both ways by asserting, then immediately disavowing, federal jurisdiction, apparently in hopes of achieving outright

---

133 Yogi Berra, American baseball legend, discussing the 1973 National League pennant race. See *How people started saying ‘It ain’t over till it’s over’*, BBC News Magazine (Sep. 23, 2015), <http://www.bbc.com/news/magazine-34324865>.

134 See, e.g., *Hopkins v. Staffing Network Holdings, LLC*, No. 16 C 7907, 2016 WL 6462095, at \*4 (N.D. Ill. Oct. 18, 2016) (remanding FCRA claim after finding plaintiff lacked Article III standing); *Davis Neurology v. DoctorDirectory.com LLC*, No. 4:16 CV 00682, 2016 U.S. Dist. Lexis 84391, at \*1 (E.D. Ark. June 29, 2016) (*sua sponte* remand of TCPA claim for lack of Article III standing).

135 See, e.g., *Polo v. Innoventions Int’l, LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016) (“a removed case in which the plaintiff lacks Article III standing must be remanded to state court”); remanding state consumer protection claim removed under CAFA); *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1033 (8th Cir. 2014) (remanding state law consumer protection claims based on lack of standing); *Khan v. Children’s Nat’l Health Sys.*, \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 2946165, at \*7 (D. Md. May 19, 2016) (remanding state law claims in data breach class action based on lack of Article III standing).

136 \_\_\_ F. Supp. 3d \_\_\_, 2016 WL 7116590 (N.D. Ill. Dec. 7, 2016).

137 *Id.* at \*1.

138 *Id.* at \*2.

139 *Id.*

dismissal, with prejudice, rather than the remand required by § 1447(c).”<sup>140</sup> The court held “it should have been obvious to defendant, based on well-settled law, that with no party asking for the merits of plaintiff’s claim to be decided in federal court, and both sides arguing against federal jurisdiction, the only possible outcome was for the case to end up right back where it started: in state court.”<sup>141</sup> “Under these circumstances,” the court concluded, Allsaints “lacked an ‘objectively reasonable basis for seeking removal,’” and plaintiff was awarded \$58,000 in attorneys’ fee incurred as a result of removal.<sup>142</sup>

## VI. CONCLUSION

Federal courts have not taken a uniform, bright-line approach in applying *Spokeo*. Some Circuit Courts interpret *Spokeo* broadly, while other Circuit Courts read the decision narrowly. These trends reflect two judicial approaches, one approach that focuses on the statutory basis for asserted claims, and another which focuses on the particular claims of redressable harm alleged in the complaint. To the extent plaintiffs are able to articulate a context-specific or historic basis for “particularized and concrete” injury stemming from statutory violations raising privacy concerns, many courts will find that federal court standing under *Spokeo* is satisfied.

Litigants on both sides of the case need to carefully consider when and whether to bring their actions in federal court. Plaintiffs concerned about satisfying *Spokeo*’s standing requirements may wish to consider bringing their statutory privacy law claims in state court. Alternatively, but less preferably, plaintiffs may succeed in transferring cases out of federal court and into state court based on *Spokeo*.<sup>143</sup> Defendants considering removal also need to think twice before seeking dismissal of removed actions for lack of Article III standing.

---

140 *Id.* at \*3.

141 *Id.*

142 *Id.* (citation omitted).

143 *See, e.g., Medellin v. IKEA U.S.A. W., Inc.*, 672 F. App’x 782 (9th Cir. 2017). In *Medellin*, the defendant removed a class action brought under the California Song-Beverly Credit Card Act to federal court. After the district court decertified the class, the plaintiff appealed and, creatively, conceded that there had been no allegation of cognizable harm under *Spokeo*. The Ninth Circuit vacated the decertification ruling, holding the district court should instead have dismissed the case for lack of Article III standing, paving the way for plaintiff to attempt to seek transfer back to state court. *Id.*

# THE CRITICAL IMPORTANCE—OR COMPLETE IRRELEVANCE—OF CLASS ASCERTAINABILITY IN THE CLASS CERTIFICATION DECISION, AND THE UNACCEPTABLE CIRCUIT SPLIT

By *Geoffrey Holtz and Nitin Jindal*<sup>1</sup>

## I. INTRODUCTION

In the last several years, nine federal courts of appeal have weighed in on whether determining the “ascertainability” of the proposed class is a relevant consideration at the class certification stage of a Rule 23(b)(3) damages case. This issue generally arises where the proposed class is large and disbursed, such as a class of retail consumers who purchased a product at a price that is alleged to have been elevated due to unlawful conduct, a claim that often arises in the context of antitrust or consumer fraud claims.

The circuit courts have diverged significantly on the issue of whether, as a component of the consideration of class certification under Rule 23 of the Federal Rules of Civil Procedure, a district court must determine whether the proposed class is “ascertainable”—*i.e.*, whether the class is defined such that one can objectively determine who is a member, and whether there is an administratively feasible method to make that determination and provide notice to the class members as required by the Due Process Clause. Certain circuits have held that a class may not be certified unless the plaintiff demonstrates that the class is ascertainable, while other circuits have held that this is not a relevant consideration at all at the class certification stage.

The current circuit split on such an important issue is not tenable. As antitrust and class action practitioners generally are well aware, the class certification determination is often the dispositive decision in a case. In a category of consumer class action cases, that determination is now almost entirely dependent on the judicial circuit in which the case is filed. This promotes forum-shopping, which sound jurisprudence frowns upon. And with antitrust class actions often subject to district court assignment by the Judicial Panel on Multidistrict Litigation, the Panel’s assignment decision can effectively decide the ultimate fate of the case.

In this article, we describe the current circuit split and define the relevant due process and Rule 23 considerations identified by the Supreme Court and courts of appeal that must factor into the question of ascertainability at the class certification stage. These considerations are often in direct conflict with one another. To date, none of the circuit courts that have addressed the ascertainability issues have properly considered all of the relevant due process and other considerations, with certain courts ignoring some key considerations and other courts ignoring different considerations. No circuit court has yet properly considered and worked to reconcile all of the relevant factors.

---

1 Geoff Holtz is a Partner in the Antitrust & Competition group at Morgan, Lewis & Bockius LLP and is a former member and current advisor to the Executive Committee of the Antitrust, Unfair Competition, and Privacy Section of the State Bar of California. Nitin Jindal is an Associate in the Antitrust & Competition group at Morgan, Lewis & Bockius LLP. The views expressed in this article are those of the authors and do not necessarily represent the views of Morgan, Lewis & Bockius LLP.

We do not purport to propose the “right answer” to these questions here. Rather, our purpose is to identify the relevant due process and other considerations that should factor into the analysis and point out where the two camps of circuit courts have fallen short in their analyses in the decisions to date. If the circuit courts cannot bridge the gap with uniform guidance that properly takes into account all considerations relevant to the ascertainability issues, the Supreme Court needs to do so to resolve the current circuit split.

## II. DEFINING “ASCERTAINABILITY” UNDER RULE 23

The term “ascertainability” in the context of class certification has been used inconsistently and imprecisely by the courts and commentators who have addressed the issues. Thus, we begin with some definitions and first principles to delineate the issues at hand.

The concerns relevant to this article arise in the context of a class action seeking damages, a Rule 23(b)(3) action. The requirements under the text of Rule 23 for maintaining a damages class action are familiar. First, the general prerequisites of Rule 23(a)—applicable to all class actions—must be satisfied:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.<sup>2</sup>

If the court determines these prerequisites have been met, the additional requirements under Rule 23(b)(3) must then be satisfied:

(b)(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

- (A) the class members’ interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.<sup>3</sup>

---

2 Fed. R. Civ. P. 23(a).

3 Fed. R. Civ. P. 23(b)(3).

The plaintiff has the burden to establish that these requirements have been met in order for the court to certify the case to proceed as a class action.<sup>4</sup>

Beyond the requirements set forth in the text of Rule 23, courts have required that additional criteria be satisfied in order to certify a Rule 23(b)(3) damages class—sometimes expressed as an implicit component of one of the express requirements of the rule and sometimes not. For example, the class may not be defined in a way that precludes membership unless the defendant’s liability is first established—*e.g.*, a class definition such as “persons who are entitled to damages as a result of the defendant’s conduct”—a so-called “fail-safe class.” In *Randleman v. Fidelity Nat’l Title Ins. Co.*, 646 F.3d 347 (6th Cir. 2011), the class definition was flawed because it only included those who were “entitled to relief.” As the court explained, “[t]his is an improper fail-safe class that shields the putative class members from receiving an adverse judgment. Either the class members win or, by virtue of losing, they are not in the class and, therefore, not bound by the judgment.”<sup>5</sup>

In addition, a class in which membership is dependent on a putative class member’s state of mind or other subjective measure is too imprecise to certify. In *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981), a class consisting of persons who failed to apply or were discouraged from applying for public assistance because of invalid regulations was too indefinite for class certification. As the court explained, determining class membership would first require that those individuals who qualified for assistance be identified, which would itself be a tall order. “After completing this task, the court and parties would have to proceed with the Sisyphean task of identifying those individuals who not only qualified for CIP assistance, but also knew of the existence of the regulation and were discouraged from applying for assistance because of the” flawed regulation.<sup>6</sup>

A proposed class also may not be so broad as to include a significant number of class members who suffered no injury. One might avoid the problems addressed in the previous paragraphs by simply defining every class as “each and every individual residing in the United States,” which would certainly be objectively specific and avoid the fail-safe concerns. However, this would raise all sorts of problems with providing notice, classwide proof, and manageability. Therefore, if “a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant’s allegedly unlawful conduct, the class is defined too broadly to permit certification.”<sup>7</sup> Thus, for example, in a claim involving an alleged conspiracy among freight railroads to fix shipping prices, the D.C. Circuit vacated an order certifying a class that included shippers operating under “legacy” contracts that set their rates before any alleged antitrust violation and could not have been injured by it. The presence of so many “false positives” can preclude class certification where the plaintiffs are unable to prove, through common

---

4 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

5 *Randleman v. Fidelity Nat’l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011).

6 *Id.* at 669.

7 *Messner v. Northshore Univ. Health System*, 669 F.3d 802, 824 (7th Cir. 2012). *See also Romberio v. UnumProvident Corp.*, 385 F. App’x 423 (6th Cir. 2009) (on a claim of improper denial of long-term disability benefits, overturning certification because the proposed class included “many individuals whose claims were properly denied for medical reasons”) (emphasis in original omitted).

evidence, that all class members were in fact injured by the alleged conspiracy.<sup>8</sup> Nonetheless, the First Circuit has held that a “*de minimis*” number of uninjured class members does not defeat class certification<sup>9</sup> although the precise line between a *de minimis* number and one that is too large to proceed as a class action remains uncertain.

Thus, the umbrella term “ascertainability” embraces a number of issues either made expressly a part of the text of Rule 23 or developed by the courts—a class that is defined such that one cannot objectively determine who is, or is not, a member; a class in which membership turns on a liability determination; a class that includes too many members with no injury or right to recover, such that liability cannot be determined on a classwide basis; or a class that would involve too many administrative feasibility problems to justify proceeding on a class basis. Indeed, because of this imprecision in the term, the Ninth Circuit declined to address a purported “ascertainability” requirement in a recent decision.<sup>10</sup>

With these basic Rule 23 principles in mind, we first describe the recent key circuit court decisions that have addressed the role of the various “ascertainability” issues in the class certification context. The issue of administrative feasibility is generally front and center in these decisions, although the other issues that fall within the “ascertainability” label are also factors.

### III. THE CIRCUITS’ VARYING APPROACHES TO ASSESSING AN ASCERTAINABILITY REQUIREMENT AT THE CLASS CERTIFICATION STAGE

#### A. The Third Circuit

##### 1. *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013)<sup>11</sup>

In *Carrera v. Bayer Corp.*,<sup>12</sup> plaintiff sued Bayer Corporation and Bayer Healthcare claiming they falsely and deceptively advertised a certain diet supplement.<sup>13</sup> Plaintiff moved to certify a class of Florida consumers under the Florida Deceptive and Unfair Trade Practices Act.<sup>14</sup>

---

8 *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013). *In Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), the Supreme Court reaffirmed that at the class certification stage, the plaintiff must present a model of damages that applies classwide and measures only the damages attributable to plaintiffs’ particular theory of liability.

9 *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015).

10 *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

11 Although *Briseno*’s analysis of “administrative feasibility” largely points to the Third Circuit’s holding in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), the requirement as applied by *Carrera* originated with that court’s opinions in *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593-94 (3d Cir. 2012) and *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 312 (3d Cir. 2008).

12 727 F.3d 300 (3d Cir. 2013).

13 *Id.* at 304.

14 *Id.*

Ascertainability was an issue because of disputes regarding the evidence available to prove class membership. It was undisputed that class members were “unlikely to have documentary proof of purchase, such as packaging or receipts.”<sup>15</sup> Defendants likewise had “no list of purchases because . . . [Bayer] did not sell [the product] directly to consumers.”<sup>16</sup> Nonetheless, plaintiff offered two methods for identifying class members: affidavits of class members attesting to their purchases, and retailer records of sales made online or with store loyalty or rewards cards.

The court stated that “[a]scertainability mandates a rigorous approach at the outset because of the key roles it plays as part of a Rule 23(b)(3) class action lawsuit.”<sup>17</sup> Ascertainability is necessary so that potential class members can identify themselves for purposes of opting out of a class.<sup>18</sup> The requirement also ensures protection of a defendant’s “due process right to raise individual challenges and defenses” to plaintiffs’ claims by ensuring a defendant’s ability “to test the reliability of the evidence submitted to prove class membership.”<sup>19</sup>

The court also found that ascertainability ensures that parties can identify class members “in a manner consistent with the efficiencies of a class action.”<sup>20</sup> “If a class cannot be ascertained in an economical and ‘administratively feasible’ manner . . . significant benefits of a class action are lost.”<sup>21</sup> As a result, the court required that plaintiff provide a method for “determining whether someone is in the class” in a manner that was “administratively feasible.”<sup>22</sup> The need for “individualized fact-finding or mini-trials” to determine class membership would not meet that standard.<sup>23</sup>

The court then rejected both methods of establishing ascertainability offered by plaintiffs. The court found there was no evidence that retailer records existed that could establish membership in the class.<sup>24</sup> The court also found that plaintiff could not rely on consumer affidavits, as the named plaintiff’s own deposition testimony “suggest[ed] that individuals will have difficulty accurately recalling their purchase[.]”<sup>25</sup> This deficiency would prevent defendants from being able to adequately challenge class membership.

Plaintiff argued that ascertainability of specific purchases was less important in the case at hand, because records existed establishing defendants’ total sales and thus defendants’ total liability could be established.<sup>26</sup> The court disagreed for two reasons.

---

15 *Id.*  
16 *Id.*  
17 *Id.* at 307.  
18 *Id.*  
19 *Id.*  
20 *Id.*  
21 *Id.* (citation omitted).  
22 *Id.*  
23 *Id.*  
24 *Id.* at 308.  
25 *Id.* at 309.  
26 *Id.* at 310.

First, the court found that it would be “unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims” and that there was the “possibility” that plaintiff’s proposed reliance on “affidavits [would] dilute the recovery of true class members.”<sup>27</sup> Second, the court found that “[i]f fraudulent or inaccurate claims materially reduce[d] true class members’ relief, these class members could argue the named plaintiff did not adequately represent them because he proceeded with the understanding that absent members may get less than full relief.”<sup>28</sup> Because absent class members would not be bound by the judgment in such a circumstance, they could bring a new action against defendant where principles of issue preclusion could prevent defendant from relitigating liability.<sup>29</sup> A defendant “has a substantial interest in ensuring this does not happen.”<sup>30</sup>

Finally, the court rejected plaintiff’s claim that a screening method could be used to ensure that defendants only paid claims based on reliable affidavits, as the plaintiff did not present evidence of the effectiveness of a *specific screening method* that could be effectively applied to the instant case.<sup>31</sup>

The court thus remanded and directed the district court to allow plaintiff the “opportunity to submit a screening model specific to this case and prove how the model will be reliable and how it would allow [defendants] to challenge” the proposed affidavits.<sup>32</sup>

## 2. *Byrd v. Aaron’s Inc.*, 784 F.3d 154 (3d Cir. 2015)

In *Byrd v. Aaron’s Inc.*,<sup>33</sup> plaintiff alleged that Aaron’s Inc. and its franchisees unlawfully used spyware to secretly access the computers they sold in violation of the Electronic Communications Privacy Act of 1986, 18 U.S.C. section 251. Plaintiff moved to certify a class of (a) purchasers and lessees of computers sold by defendants on which the spyware was used, as well as (b) the purchasers’ and lessees’ household members.<sup>34</sup>

Relying on *Carrera*, the court stated that the “ascertainability inquiry is two-fold,” requiring that “(1) the class is ‘defined with reference to objective criteria’”; and “(2) there is ‘a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.’”<sup>35</sup>

This time, the Third Circuit found that plaintiff met both criteria and distinguished the evidence provided by plaintiff from the evidence rejected in *Carrera*. The *Byrd* plaintiff presented “various ways in which [legitimate class

---

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* at 311.

32 *Id.*

33 784 F.3d 154 (3d Cir. 2015).

34 *Id.* at 159.

35 *Id.* at 163.

members] could be defined and how relevant records could be used to verify [their] identity.”<sup>36</sup> Unlike *Carrera*, which rejected “unverifiable affidavit[s]” and found an “absence of any methodology that [could] be used later to ascertain class members,”<sup>37</sup> defendants’ “own records reveal the computers upon which [the spy software] was activated, as well as the full identity of the customer who leased or purchased each of those computers.”<sup>38</sup>

The court also found that identifying household members of purchasers and lessees based on their shared addresses was administratively feasible. The court clarified that *Carrera* did “not suggest that *no* level of inquiry as to the identify of class members can ever be taken,” because if that were the case, no “class could ever be certified.”<sup>39</sup> “[I]n most successful class actions,” individual verification of class membership would be necessary to administer the fund.<sup>40</sup> Finally, unlike in *Carrera*, defendants’ due process rights would not be violated because plaintiff was “not relying solely on unverified affidavits to establish ascertainability”; defendants could “challeng[e] the evidence [plaintiffs] propose[d] to use.”<sup>41</sup>

As a result, plaintiff had established ascertainability. The evidence and methodology proposed was a “far cry” from what was presented in *Carrera*.<sup>42</sup>

## **B. The Eleventh Circuit—*Karhu v. Vital Pharm., Inc.*, 621 F. App’x 945 (11th Cir. 2015)**

The Eleventh Circuit followed *Carrera*’s lead in an unpublished opinion in *Karhu v. Vital Pharmaceuticals, Inc.*<sup>43</sup> In *Karhu*, plaintiff brought a class action against Vital Pharmaceuticals, Inc. alleging it falsely marketed a dietary supplement in violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-12, and the Florida Deceptive and Unfair Trade Practices Act.<sup>44</sup> Plaintiff sought to certify a nationwide class of purchasers of the supplement as well as a sub-class of New York purchasers under New York General Business Law Section 349.<sup>45</sup>

Citing *Carrera*, the court required plaintiff to “propose an administratively feasible method by which class members can be identified.”<sup>46</sup> Plaintiff’s “asserti[on] that class members can be identified using the defendant’s records” was insufficient to meet this

---

36 *Id.* at 169.

37 *Id.* at 170.

38 *Id.* at 169.

39 *Id.* at 171.

40 *Id.* at 170.

41 *Id.* at 171.

42 *Id.* at 170.

43 621 F. App’x 945 (11th Cir. 2015).

44 *Id.* at 951.

45 *Id.*

46 *Id.* at 947-48.

standard.<sup>47</sup> Plaintiff needed to, but did not, “establish that the records [we]re in fact useful for identification purposes” and that “identification [would] be administratively feasible.”<sup>48</sup> Defendant’s sales data “identified mostly third-party retailers, not class members,” and plaintiff had not explained how additional records might be used to ultimately identify class members.<sup>49</sup>

The court also rejected mere reliance on self-identification to meet the ascertainability standard—a plaintiff needed to also establish that self-identification was administratively feasible “by proposing a case-specific and demonstrably reliable method for screening each self-identification.”<sup>50</sup> However, the court described self-identification as problematic:

On the one hand, allowing class members to self-identify without affording defendants the opportunity to challenge class membership provide[s] inadequate procedural protection to . . . [d]efendant[s] and “implicate[s their] due process rights . . . .” On the other hand, protecting defendants’ due-process rights by allowing them to challenge each claimant’s class membership is administratively infeasible, because it requires a series of mini-trials just to evaluate the threshold issue of which [persons] are class members.<sup>51</sup>

The court stated that a plaintiff needed to explain how a method based on self-identification would avoid this problem, but offered no guidance on how that might be accomplished.<sup>52</sup> In the case at hand, plaintiff had not made “a specific proposal as to how identification via affidavit would successfully operate.”<sup>53</sup>

Finally, the court rejected plaintiff’s argument that “a strict ascertainability requirement will eradicate small-dollar class-action claims.”<sup>54</sup> The court pointed to *In re Scotts EZ Seed Litig.*, No. 12-cv-4727 (S.D.N.Y. Jun. 15, 2012) as an example where class members could be identified by the customer records of third-party retailers.<sup>55</sup> The court noted that plaintiff could have similarly established ascertainability with third-party retailer sales records.<sup>56</sup> Because plaintiff had not, class certification was properly denied.

---

47 *Id.* at 948.

48 *Id.*

49 *Id.* at 949.

50 *Id.* at 949, n.5.

51 *Id.* at 948-49 (quotations and citations omitted).

52 *Id.* at 949.

53 *Id.*

54 *Id.* at 950.

55 *Id.*

56 *Id.*

### C. The Second Circuit—*Brecher v. Republic of Arg.*, 806 F.3d 22 (2d Cir. 2015)

In *Brecher v. Republic of Argentina*,<sup>57</sup> a class of bondholders sued the Republic of Argentina for defaulting on debt Argentina issued. Liability was not contested, and to avoid difficulties in determining damages, the district court agreed with plaintiffs that the class definition could be *expanded* from individuals who held beneficial interests in a particular bond series from the date of the complaint through the date of final judgment to individuals who held beneficial interests in that bond series at any time, *i.e.*, without any limitation as to time held.<sup>58</sup> Defendant argued that the new class definition was not ascertainable.<sup>59</sup>

The court agreed that there was an “implied requirement of ascertainability” in Rule 23.<sup>60</sup> The court noted that it had not previously “defined” the requirement, and “clarif[ied] that the touchstone of ascertainability is whether the class is ‘sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.’”<sup>61</sup> “A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case.”<sup>62</sup>

The court did not apply the “administratively feasible” standard it defined, nor did it discuss the standard’s justifications. Instead, the court focused on ascertainability’s requirement that there be “objective” criteria to “establish the definite boundaries of a readily identified class.”<sup>63</sup>

The court found that the expanded class definition was not ascertainable because it lacked a temporal limitation. Because there was secondary trading of interests in the bonds and the beneficial interest of a given bond could not be traced, the lack of a temporal limitation prevented the court from determining whether the class included any given individual who at some time may have had a beneficial interest in a relevant bond.<sup>64</sup> As a result, the district court’s expanded class definition violated the requirement of ascertainability.

---

57 806 F.3d 22 (2d Cir. 2015).

58 *Id.* at 23.

59 *Id.* at 23–24.

60 *Id.* at 24.

61 *Id.* (quoting 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed. 1998)).

62 *Id.* at 24–25 (quoting *Charron v. Pinnacle Grp. N.Y. LLC*, 269 F.R.D. 221, 229 (S.D.N.Y. 2010)).

63 *Id.* at 25.

64 *Id.* at 26.

#### **D. The Fourth Circuit—*EQT Prod. Co v. Adair*, 764 F.3d 347 (4th Cir. 2014)**

In *EQT Production Co. v. Adair*,<sup>65</sup> plaintiffs in five classes alleged that EQT Production Co. and CNX Gas Co. unlawfully deprived them of royalty payments from the production of coalbed methane gas. After the district court granted class certification, the Fourth Circuit reversed in part because of the district court’s failure “to rigorously analyze whether the administrative burden of identifying class members . . . would render class proceedings too onerous.”<sup>66</sup>

The court found that Rule 23 “contains an implicit” ascertainability requirement, which requires that a court “can readily identify the class members in reference to objective criteria.”<sup>67</sup> Although plaintiffs “need not be able to identify every class member at the time of certification,” “[i]f class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate.”<sup>68</sup> The ascertainability standard was not met in the case at hand because ownership interests in relevant gas royalties had changed over time, and there were no records that could be used to ascertain who currently held relevant interests.<sup>69</sup> Because of the lack of records, the court had “little conception of the nature of the proposed classes or who may be bound by a potential merits ruling,” and did not have “even a rough outline” of the class “size and composition.”<sup>70</sup>

The court instructed the district court on remand to reconsider ascertainability issues, and to “give greater consideration to the administrative challenges it will face when using [] records to determine current ownership, and assess whether any trial management tools are available to ease th[e] process.”<sup>71</sup>

#### **E. The Fifth Circuit—*John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443 (5th Cir. 2007)**

In *John v. National Security Fire and Casualty Co.*,<sup>72</sup> plaintiff claimed that National Security Fire and Casualty Company violated the terms of insurance policies it issued in Louisiana by systematically under-adjusting claims and failing to account for the true

---

65 764 F.3d 347 (4th Cir. 2014).

66 *Id.* at 358.

67 *Id.*

68 *Id.* (quoting *Marcus*, 687 F.3d at 593) and citing 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed. 2005) (“[T]he requirement that there be a class will not be deemed satisfied unless . . . it is administratively feasible for the court to determine whether a particular individual is a member.”)).

69 *Id.* at 359.

70 *Id.* at 360.

71 *Id.*

72 501 F.3d 443 (5th Cir. 2007).

costs of repairs. Plaintiff’s complaint sought to certify a class of certain policy holders, but the district court dismissed the class allegation.<sup>73</sup>

On appeal, plaintiff argued that the district court could not dismiss the class allegation. The Fifth Circuit disagreed, finding that where “it is facially apparent from the pleadings that there is no ascertainable class,” the class allegation can be dismissed from the pleadings.<sup>74</sup> The court cited decisions from the Fourth and Seventh Circuit, as well as Moore’s Federal Practice guide, to support its holding that there was an ascertainability requirement.<sup>75</sup> Without addressing how the standard might be applied, the court affirmed the dismissal.

**F. The Seventh Circuit—*Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015)**

In *Mullins v. Direct Digital, LLC*,<sup>76</sup> the Seventh Circuit explicitly declined to follow other circuits in requiring that a plaintiff to prove that identifying class members was “administratively feasible.” In *Mullins*, plaintiff alleged that Direct Digital, LLC fraudulently claimed that its product relieved joint discomfort. Plaintiff alleged that defendant was liable for violating the consumer protection laws of ten states, and sought to certify a class of consumers who purchased defendant’s product.<sup>77</sup>

The court affirmed the district court’s grant of class certification even though it was not readily apparent yet how class members would be identified. Defendant argued that self-identification through affidavits would be plaintiffs’ only option, and defendant claimed this was insufficient as a matter of law.<sup>78</sup> But the court stated that it was too early to decide the issue because it did “not know yet what sales and customer records” defendant had.<sup>79</sup> Nonetheless, the court assumed for the purposes of evaluating the district court’s decision that defendant “will have no records for a large number of retail customers” and that many consumers were “unlikely to have kept their receipts” of the “relatively inexpensive consumer good.”<sup>80</sup> The court thus assumed that self-identification was plaintiff’s only option for identifying class members.

The court found that “[n]othing in Rule 23 mentions or implies th[e] heightened [ascertainability] requirement” used by the Third Circuit.<sup>81</sup> The court reasoned that “[t]he policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially

---

73 *Id.* at 444.

74 *Id.* at 445.

75 *Id.* at 445 n.3.

76 795 F.3d 654 (7th Cir. 2015).

77 *Id.* at 658.

78 *Id.* at 661.

79 *Id.* at 661.

80 *Id.*

81 *Id.* at 658.

(b)(3).”<sup>82</sup> The “heightened ascertainability requirement upsets” the balance of factors used to determine class certification, as “it gives one factor in the balance absolute priority, with the effect of barring class actions where class treatment is often most needed: in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase” and where “the class device is often essential to overcome” the disincentive “for an individual to bring a solo action.”<sup>83</sup>

The court then addressed the four policy reasons *Carerra* and other cases had provided for requiring more than just self-identification to prove class membership.<sup>84</sup>

First, the court found that the desire to achieve “administrative convenience” was adequately addressed by Rule 23(b)(3)’s requirement that a class be “superior to other available methods for fairly and efficiently adjudicating the controversy,” the determination of which requires considering “the likely difficulties in managing a class action.”<sup>85</sup>

Second, the court found that the “stringent version of ascertainability” was not necessary to prevent unfairness to absent class members, who might want to pursue an individual claim. The court stated that Rule 23 recognizes that “it might be *impossible* to identify some class members for purposes of actual notice” and that due process did not always require actual notice at the certification stage.<sup>86</sup> The court also noted that in “class actions for low-value claims like this one,” “only a lunatic or a fanatic” would litigate the claim individually, “so opt-out rights are not likely to be exercised by anyone planning a separate individual lawsuit.”<sup>87</sup>

Third, the court found that the “stringent version of ascertainability” was not necessary to prevent the claims of bona fide class members from being diluted by erroneous or fraudulent claims. The court reasoned that the risk of dilution was low, “perhaps to the point of being negligible,” because the court was aware of “no empirical evidence that the risk of dilution caused by inaccurate or fraudulent claims in the typical low-value consumer class action is significant” and believed that the likelihood of widespread fraudulent claims would be low.<sup>88</sup> Even if that was wrong, the court noted that “only a tiny fraction of eligible claimants ever submit claims for compensation in consumer class actions,” and thus the risk of dilution was “not so great that it justifies denying class certification altogether, at least without empirical evidence supporting the fear.”<sup>89</sup> The court further found that courts could use tools to “combat this problem during the claims administration process,” including through “claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to take into

---

82 *Id.*

83 *Id.* (citations omitted).

84 *Id.* at 662.

85 *Id.* at 663 (citations omitted).

86 *Id.* at 665 (listing examples where actual notice was not required) (emphasis in original).

87 *Id.*

88 *Id.* at 667.

89 *Id.*

account the size of the claims, the cost of the techniques, and an empirical assessment of the likelihood of fraud or inaccuracy.”<sup>90</sup> In many consumer class actions, a class claim provided “the only meaningful possibility for bona fide class members to recover anything at all” and a diluted recovery was better than no recovery at all.<sup>91</sup>

Fourth, the court found that protecting a defendant’s due process rights did not depend on “whether the identity of class members can be ascertained with perfect accuracy at the certification stage.”<sup>92</sup> Instead, the due process question is “whether the defendant will receive a fair opportunity to present its defenses when putative class members actually come forward.”<sup>93</sup> The court found that “[a]s long as the defendant is given the opportunity to challenge each class member’s claim to recovery during the damages phase, the defendant’s due process rights are protected.”<sup>94</sup>

Overall, the court found that the “stringent version of ascertainability does not further any interest of Rule 23 that is not already adequately protected by the Rule’s explicit requirements.”<sup>95</sup> Moreover, “the costs of imposing the requirement are substantial.”<sup>96</sup> “The stringent version of ascertainability effectively bars low-value consumer class actions, at least where plaintiffs do not have documentary proof of purchases, and sometimes even when they do.”<sup>97</sup> The result could cause “significant harm” “by immunizing corporate misconduct.”<sup>98</sup> Thus, “a district judge has discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed.”<sup>99</sup>

### **G. The Sixth Circuit—*Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015)**

In *Rikos v. Procter & Gamble Co.*,<sup>100</sup> plaintiffs sued Procter & Gamble under various state unfair or deceptive practices statutes because they alleged that a nutritional supplement they purchased did not work as advertised. Plaintiffs sought to certify five single-state classes of purchasers of the product.

Defendant argued that the classes were not ascertainable because there was “no plausible way to verify that any one single individual actually purchased” the product.<sup>101</sup>

---

90 *Id.*

91 *Id.* at 668.

92 *Id.* at 670.

93 *Id.*

94 *Id.* at 671.

95 *Id.* at 662.

96 *Id.*

97 *Id.*

98 *Id.* at 669.

99 *Id.*

100 799 F.3d 497 (6th Cir. 2015).

101 *Id.* at 524-25.

Most consumers did not buy the product directly from defendant, but instead purchased it from a commercial retailer.<sup>102</sup> Defendant thus argued that there was no “‘reliable’ or ‘administratively feasible’ method for *identifying* the class members” and that class certification should be denied under *Carerra*.<sup>103</sup>

The Sixth Circuit disagreed, noting “the strong criticism [*Carrera*] has attracted from other courts.”<sup>104</sup> “It is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies.”<sup>105</sup>

In the Sixth Circuit, “[f]or a class to be sufficiently defined, the court must be able to resolve the question of whether class members are included or excluded from the class by reference to *objective criteria*.”<sup>106</sup> The ascertainability standard was satisfied in a prior case where a class could be “discerned with reasonable accuracy using [d]efendants’ electronic records,” even where “the process may require additional, *even substantial*, review of files.”<sup>107</sup> Ascertainability was met in *Rikos* because the proposed class was defined by objective criteria—anyone who purchased the product in five specific states—and the classes could be determined with “reasonable accuracy” from a “substantial review, likely of internal [defendant] data” that “could be supplemented through the use of receipts, affidavits, and a special master to review individual claims.”<sup>108</sup>

Although the court found “no reason to follow” *Carerra*, the court nonetheless distinguished the case on the facts. Unlike in *Carerra*, the *Rikos* defendant’s records in could be used to identify specific purchasers, and affidavits from third parties could be used to verify individual purchases.<sup>109</sup> Granting class certification was appropriate.

#### **H. The Eighth Circuit—*Sandusky Wellness Ctr., LLC, v. MedTox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016)**

In *Sandusky Wellness Center, LLC, v. MedTox Scientific, Inc.*,<sup>110</sup> plaintiff sued MedTox Scientific under the Telephone Consumer Protection Act (“TCPA”) for allegedly sending unsolicited faxes without an appropriate opt-out notice. Plaintiff sought to certify a class of persons who were sent those faxes.

Defendant claimed the class was not ascertainable because plaintiffs could not identify who was harmed by any given fax and that injury from a single fax could be

---

102 *Id.*

103 *Id.* at 524 (emphasis in original).

104 *Id.* at 525.

105 *Id.* at 525–26 (quoting *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 540 (6th Cir. 2012)).

106 *Id.* at 525 (quoting *Young*, 693 F.3d at 538 (emphasis added)).

107 *Id.* (quoting *Young*, 693 F.3d at 539) (emphasis in original).

108 *Id.* at 526.

109 *Id.* at 526–27.

110 821 F.3d 992 (8th Cir. 2016).

claimed by multiple people, including potentially the subscriber to the fax number, the owner of the machine, the lessee of the machine, or any user of it.<sup>111</sup> The court disagreed, finding that the relevant question under the TCPA was identifying the “recipient” of the fax, and that fax logs showing the numbers that received each fax were “objective criteria that make the recipient clearly ascertainable.”<sup>112</sup>

The court noted other courts’ requirement of an “administratively feasible mechanism” for determining class membership as well as *Mullins*’s rejection of that standard.<sup>113</sup> Without discussing the merits of the emerging disagreement, the court found that it had not previously “addressed ascertainability as a separate, preliminary requirement,” but instead “adhere[d] to a rigorous analysis of the Rule 23 requirements” including that a class “must be adequately defined and clearly ascertainable.”<sup>114</sup> Class certification was thus appropriate.

### **I. The Ninth Circuit—*Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017)**

In *Briseno v. ConAgra Foods, Inc.*,<sup>115</sup> consumers from eleven states sought to certify a class of consumers who alleged that a label on a cooking oil sold by ConAgra Foods, Inc. was false or misleading in describing the product as “100% natural.” Defendant claimed there was no “administratively feasible” way for consumers to “reliably identify themselves” as class members, as consumers do not generally save grocery receipts and are unlikely to remember details about purchases of low-cost products like the oil at issue.<sup>116</sup>

The Ninth Circuit followed the Sixth, Seventh, and Eight Circuits in disagreeing that plaintiffs needed to prove an “administratively feasible” method for identifying class members.

The court first noted that the text of Rule 23 did not mention “administrative feasibility,” an “omission [that] was meaningful.”<sup>117</sup> The court further found that imposing an “administrative feasibility” requirement would render Rule 23’s manageability requirement “largely superfluous, a result that contravenes the familiar precept that a rule should be interpreted to give effect to every clause.”<sup>118</sup>

The court then rejected the three reasons provided by the Third Circuit for justifying its “administrative feasibility” requirement. The court heavily cited and relied on the Seventh Circuit’s “sound[] reject[ion]” of the Third Circuit justifications in *Mullins*.<sup>119</sup>

---

111 *Id.* at 997.

112 *Id.*

113 *Id.* at 996.

114 *Id.*

115 844 F.3d 1121 (9th Cir. 2017).

116 *Id.* at 1125–26.

117 *Id.* at 1125.

118 *Id.* at 1126 (citation and quotations omitted).

119 *Id.* at 1127.

First, the court agreed with *Mullins* in finding that imposing an “administrative feasibility” requirement to mitigate administrative burdens conflicts with the manageability criterion of Rule 23’s superiority requirement.<sup>120</sup> An “administrative feasibility” requirement also conflicts with the presumption that certification should not be denied solely because of manageability concerns, especially given “the variety of procedural tools courts can use to manage the administrative burdens of class litigation.”<sup>121</sup> The court agreed with *Mullins* in finding that a standalone administrative feasibility requirement would upset the cost-benefit balancing that the manageability assessment requires.<sup>122</sup>

Second, the court agreed with *Mullins* that the “administrative feasibility” requirement was not needed to protect absent class members or to protect legitimate claimants from fraudulent claims. Neither Rule 23 nor due process required actual notice to every class member.<sup>123</sup> The court also deferred to what it considered the “reality” of whether notice to absent class members is necessary:

In theory, inadequate notice might deny an absent class member the opportunity to opt out and pursue individual litigation. But in reality that risk is virtually nonexistent in the very cases in which satisfying an administrative feasibility requirement would prove most difficult—low-value consumer class actions. Such cases typically involve low-cost products and, as a result, recoveries too small to incentivize individual litigation. At the same time, an administrative feasibility requirement like that imposed by the Third Circuit would likely bar such actions because consumers generally do not keep receipts or other records of low-cost purchases. Practically speaking, a separate administrative feasibility requirement would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members—in precisely those cases that depend most on the class mechanism. Justifying an administrative feasibility requirement as a means of ensuring perfect recovery at the expense of any recovery would undermine the very purpose of Rule 23(b)(3)—“vindication of ‘the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.’”<sup>124</sup>

The court found that the risk of fraudulent claims diluting the recovery of legitimate claims “seems low,” “especially . . . in class actions involving low-cost consumer goods.”<sup>125</sup> The court agreed with *Mullins* that the risk of dilution was low given the “consistently low participation rates in consumer class actions,” and cited a study finding

---

120 *Id.* at 1127–28.

121 *Id.* at 1128.

122 *Id.*

123 *Id.*

124 *Id.* at 1129.

125 *Id.* at 1129–30.

that it “is not unusual for only 10 to 15% of the class to bother filing claims.”<sup>126</sup> Courts also have tools they could use to minimize the risk of fraudulent claims.

Third, the court found that the “administrative feasibility” requirement was not necessary to protect the due process rights of defendants. Defendants can challenge the standing of class representatives at the certification stage, and can oppose proffered proof as to class representatives “at every stage” of the litigation.<sup>127</sup> Defendants would also “have similar opportunities to individually challenge the claims of absent class members if and when they file claims for damages,” and Rule 23 “specifically contemplates” that individual analysis “after a finding of liability.”<sup>128</sup> Reliance on a “self-serving affidavit” as proof of class membership was not problematic *at the class certification stage*, because if a consumer were to pursue an individual lawsuit, “an affidavit describing her purchases would create a genuine issue if [a defendant] disputed the affidavit, and would prevent summary judgment against the consumer.”<sup>129</sup> Finally, the court found that if “identification of class members will not affect a defendant’s liability,” for example where aggregate liability can be calculated according to defendant’s sales records, a defendant’s “due process interest” is not implicated “at all.”<sup>130</sup>

The court thus rejected an “administrative feasibility” requirement at the class certification stage, reaffirmed the ability of class plaintiffs to rely on self-identification to prove class membership, and affirmed the district court’s grant of class certification.

#### **IV. THE CURRENT CIRCUIT SPLIT MUST BE RESOLVED TO AVOID FORUM SHOPPING AND INCONSISTENT DECISIONS**

That the nine Federal Courts of Appeal to have considered the role of “ascertainability” in the class certification determination have split five to four on the question is alone a serious concern. In short, circuit splits on important questions are bad jurisprudence. Two hundred years ago, Justice Joseph Story pointed out that uniformity is a crucial component of the federal courts’ critical role in vindicating federal rights:

A motive of another kind, perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the constitution. Judges of equal learning and integrity in different states might differently interpret a statute or a treaty of the United States, or even the constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different

---

126 *Id.* at 1130 (quoting Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 119 (2007)).

127 *Id.* at 1131.

128 *Id.*

129 *Id.* at 1132.

130 *Id.*

States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two states. The public mischiefs that would attend such a state of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.<sup>131</sup>

The Supreme Court's façade is emblazoned with the phrase "Equal Justice Under Law," and equal justice by definition cannot be allowed to turn on the geographic location of the particular court hearing the dispute.

One practical concern about the varying applications of Rule 23 among the circuits is that it encourages forum shopping, which is generally considered to erode the public's confidence in the judicial system by making the legal system appear arbitrary, with the outcome determined by the particular court that happens to hear the suit.<sup>132</sup> With antitrust class actions, which can generally be commenced in any district court given the broad antitrust venue provisions,<sup>133</sup> this is a particular concern. Compounding this concern is that antitrust class actions often end up before the Judicial Panel on Multidistrict Litigation in an MDL proceeding for consolidation before a single court for pre-trial proceedings. Thus, the critical—and often dispositive—determination of class certification can turn on the serendipitous assignment by the JPML of the district court that will hear the cases.

This is not a mere hypothetical concern. For example, the Ninth Circuit's *Briseno* decision almost certainly would have come out differently—with no class certified—had it been decided in the Second, Third, Fourth, Fifth or Eleventh Circuits. The First Circuit, in its 2015 decision in *In re Nexium Antitrust Litigation*,<sup>134</sup> discussed certification of a putative class of indirect purchasers of a heartburn drug. The plaintiffs had commenced the action in the Eastern District of Pennsylvania—within the Third Circuit—but the JPML transferred the case to the District of Massachusetts—in the First Circuit.<sup>135</sup> The First Circuit affirmed the decision to certify a class, finding that the use of absent class member affidavits resolved concerns about ascertainability, while the Third Circuit almost certainly would have reversed the class certification decision had the decision been appealed to that circuit, in which it had originally been filed.

Class action practitioners are fully aware that—with rare exceptions—the decision on class certification is generally the dispositive ruling in a case once the matter has proceeded beyond Rule 12 and summary judgment motions. If the class is certified, the stakes of proceeding to trial have typically become so heightened that a settlement

---

131 *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-48 (1816).

132 See, generally, Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1686 (1990).

133 See 15 U.S.C. § 22 ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business").

134 *In re Nexium Antitrust Litig.*, 777 F.3d 9 (2015). Note that the First Circuit assumed an "ascertainability" requirement under Rule 23 and approved of the use of affidavits to resolve concerns that arose, but the court did not address the issue in detail as the dispute focused on whether the presence of a number of uninjured class members could defeat class certification.

135 *Id.* at 14 n.7.

is nearly inevitable. If the class is not certified, that effectively ends the litigation as the small individual remaining stake does not justify further litigation. Few courts have discussed what is nominally a mere procedural ruling in such blunt terms. The Seventh Circuit so observed in reversing a class certification order based on questionable grounds. Facing a certified class which magnifies the risks even on a dubious liability case, defendants “may not wish to roll these dice. . . . They will be under intense pressure to settle.”<sup>136</sup> Justice Ginsburg has questioned the “alchemy” of permitting Rule 23 “to transform a \$500 case into a \$5,000,000 award.”<sup>137</sup>

The Seventh Circuit recognized that the elevated pressure to settle from a certified class can be dispositive and that this reality must factor into the considerations that go into the certification decision: “We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts.”<sup>138</sup>

With the stakes from a class certification decision so high and that decision often the *de facto* end of the case, the outcome of that decision should not depend on the fortuity of the JPML venue assignment or the circuit in which the lawsuit was commenced. Indeed, such geography-based results raise due process concerns in their own right. As the Supreme Court has observed, “[t]he Due Process Clause, by ensuring the orderly administration of the laws, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”<sup>139</sup> And even though a district court’s class certification decision is reviewed for abuse of discretion, “[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike.”<sup>140</sup> Clear and uniform standards are essential.

While circuit splits will be inevitable, and the Supreme Court cannot resolve every one of them, the role of “ascertainability” in the class certification decision is a recurring one that arises in dozens of cases each year in antitrust and other disputes involving billions of dollars in claimed damages collectively. It is critical that the standards governing these issues be reconciled as the significant differences among the circuits can give rise to forum-shopping and unpredictability. The Supreme Court has already denied certification twice in cases that provided an opportunity to provide uniformity on these questions.<sup>141</sup> Unless the circuits are able to reconcile their significant differences on their own, the problems created the differing approaches will continue to give rise to results driven by the forum in which the matter lands, which is not tenable.

---

136 *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

137 *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 436 (2010) (J. Ginsburg dissent).

138 *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1299.

139 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (internal citation and quotations omitted).

140 *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005).

141 *Procter & Gamble Co. v. Rikos*, 136 S.Ct. 1493 (2016); *Direct Digital, LLC v. Mullins*, 136 S. Ct. 1161 (2016).

## V. DUE PROCESS CONCERNS RELEVANT TO THE ASCERTAINABILITY ISSUES IN CLASS CERTIFICATION

Underpinning the requirements in the text of Rule 23 and the additional class definition criteria required by the courts are basic principles of due process, including due process rights of both absent class members and the defendant.

The primary due process concern relevant to these issues is the right of absent class members to be provided with notice. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that due process restricted the ability of courts to exercise *in personam* jurisdiction over out-of-state absent class members unless individual notice and an ability to opt out are provided.<sup>142</sup> In *Eisen v. Carlisle and Jacquelin*, the Supreme Court further held that in Rule 23(b)(3) damages actions, class members must be furnished with “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>143</sup> This requires individual notice to all members who are reasonably identifiable.<sup>144</sup> The “best practicable” method of notice requirement has been incorporated into the text of Rule 23, which provides that absent class members be notified by the “best notice that is practicable under the circumstances.”<sup>145</sup>

The notice requirement also relates to another due process concern. An absent class member cannot be bound by a decision in which he or she was not provided notice and an opportunity to opt out.<sup>146</sup> To preclude monetary claims in a later suit by unnamed absent members who did not opt out of an earlier class action, it must be shown that the notice required in a Rule 23(b)(3) class action was provided.<sup>147</sup> The courts have held that due process does *not* require that the absent class member actually receive notice; it is sufficient if the best notice “practicable” was given.<sup>148</sup> However, the precise contours of what satisfies the “best notice practicable” standard—particularly with a nationwide antitrust class of hundreds of thousands or millions of potential class members—are unclear. The Supreme Court has counseled that “when notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”<sup>149</sup> Seldom addressed in the reported case law is another critical application of the notice requirement—notice to class members of the deadline to submit a claim for an award after

---

142 472 U.S. 797 (1985).

143 417 U.S. 156, 173 (1974).

144 *Id.* at 175.

145 Fed. R. Civ. P. 23(c)(2)(B).

146 *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992).

147 *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000).

148 *Silber v. Mabon*, 18 F.3d 1449, 1451 (9th Cir. 1994) (notice to investors whose names were unknown was published in financial periodicals and mailed to securities brokers who held stock for investors in street name, and absent class member’s due process rights were not violated although the notice was not received until after the opt-out deadline).

149 *Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950).

settlement or judgment in a class action. Plainly due process requires such notice as the claim is generally waived unless submitted.

On the other side, the defendant in a class action has its own due process rights. As with any civil defendant, a class action defendant has the right to present a defense to both liability and the claimed damages by the class as a whole and each individual class member.<sup>150</sup> This right is obviously compromised if the defendant cannot determine who the class members are or if it is prevented from challenging a member's claim.

More subtle due process issues arise once the class and the defendants have reached a settlement (as is quite often the case after a class is certified), or once a judgment has been entered after trial or otherwise. If the resulting award is tallied on a per-class member basis, then the defendant's right to challenge the entitlement to or amount of any individual claim is paramount, as each successful challenge will lower the total damages to be paid. On the other hand, if the settlement or award is a fixed amount to be divided among the class members who present valid claims, the interests of the defendant in challenging any individual claim may be lessened, but this arrangement then gives rise to an interest of each class member with a valid claim to maximize his or her individual award by challenging those with invalid claims.<sup>151</sup> And the defendant retains an interest in the process as class members who fail to receive adequate notice will not be bound by the settlement or judgment and can bring a second action for damages.

The issues that fall under the umbrella of “ascertainability” thus raise practical concerns for both the litigants and the court. If the class wins at trial (or, more likely, obtains a settlement), how does one go about identifying those entitled to relief, providing them with opt-out and claim notice, and dividing up the award? By contrast, if the defendant prevails, how does one determine who is bound by the result so that the defendant does not risk a second lawsuit based on the same conduct?

The circuit courts that have addressed the ascertainability questions relating to class certification have not fully identified or addressed these concerns. It is critical that when reconciling these differences the courts give full consideration to the issues discussed herein, which involve dueling—perhaps irreconcilable—due process and practical considerations.

## VI. ADDRESSING THE CIRCUIT SPLIT

While nine circuits have weighed in—in varying degrees of completeness—on the role of “ascertainability” in the class certification decision, no circuit decision to date has properly identified and considered all of the Rule 23 and due process considerations that must be taken into account.

For example, in its *Carrera* decision, the Third Circuit properly observed that “[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.”<sup>152</sup> Thus, certification properly requires some reasonable

---

150 *Mullins*, 795 F.3d at 669.

151 This also may give rise to class counsel conflict issues, but that is beyond the scope of this article.

152 *Carrera*, 727 F.3d at 307.

process to permit the defendant to challenge claims submitted by class members in the claims process. But the Third Circuit then rejected the proposed methods which, individually or in combination, may have provided a somewhat reliable method for ascertaining who purchased the offending weight loss product and challenging false claims—examining retailers’ records from customers who used loyalty cards that record product purchases and affidavits submitted by purchasers. And in rejecting them, the court provided no guidance regarding what, if any, processes *could* be sufficient to ascertain which consumers had valid claims or how they could be tested. In demanding such strict proof of an ironclad method to identify purchasers at the class certification stage, the Third Circuit arguably allowed the perfect to be the enemy of the good.

In a subsequent decision denying class certification, the Third Circuit noted the fact that the defendant itself—there a large retailer—failed to keep records of the allegedly fraudulent sales at issue, and thus there was no conclusive way to determine precisely who was defrauded.<sup>153</sup> This, of course, would act as an incentive for a company that is violating the law to not maintain business records of the transactions so it can then point to that failure as a grounds to challenge class certification should litigation arise. This would be an inappropriate incentive. The Third Circuit also ignored the ultimate consequence of its strict standard, which is that a defendant who is liable to a large and diffuse number of retail customers is effectively immunized from private class action damages litigation. As the Seventh Circuit has noted, “[t]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”<sup>154</sup>

The courts that have rejected an “ascertainability” requirement have also overlooked critical considerations. In the Ninth Circuit’s *Briseno* decision, the court stated it was simply interpreting the plain text of Rule 23, which makes no mention of an ascertainability requirement.<sup>155</sup> But the court ignored the impact of the Rule 23(b) (3) “predominance” requirement, which, as the Fifth Circuit has observed, requires the district court to seriously consider the administration of the trial of the case on a classwide basis, balancing the common issues against the individualized issues; a court may not adopt “a figure-it-out-as-we-go-along approach.”<sup>156</sup>

The *Briseno* court properly observed that due process does not necessarily require that all absent class members receive actual notice, and it added that “[c]ourts have routinely held that notice by publication in a periodical, on a website, or even at an appropriate physical location is sufficient to satisfy due process.”<sup>157</sup> But clearly it is not the case that *any* notice in *any* publication or website, no matter how limited the circulation, would suffice for a large class of consumers. The court provided no guidance of whether the notice plan in the case before it would suffice for due process or the considerations for reviewing such plans. Notably, the Federal Judicial Center’s “Judges’ Class Action Notice

---

153 *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013).

154 *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis omitted).

155 844 F.3d at 1125.

156 *Madison v. Chalmette Refining, LLC*, 637 F.3d 551, 557 (5th Cir. 2011).

157 844 F.3d at 1129.

and Claims Process Checklist and Plain Language Guide” specifies that reaching 70–95% of class members is a reasonable “lynchpin” for proper notice.<sup>158</sup> But the Ninth Circuit provided no discussion of whether the notice in that case could reasonably be expected to reach that high a percentage of the class or the evidence a court should review to make that determination. This is of further importance because courts typically consider the absence of class member objections to support a proposed settlement when, in fact, such an absence could simply be the result of few class members actually receiving notice of the pending action.

The *Briseno* court then minimized the problem of inadequate notice which then “might deny an absent class member the opportunity to opt out and pursue individual litigation.”<sup>159</sup> It reasoned that “in reality that risk is virtually nonexistent in . . . low-value consumer class actions. Such cases typically involve low-cost products and, as a result, recoveries too small to incentivize individual litigation.”<sup>160</sup> This is true, but the court ignored the fact that due process *requires* such notice. The court also ignored another key problem with inadequate notice, which is that class members who do not receive notice cannot submit a claim for their share of any award, yet they will be precluded from seeking recovery in a subsequent action. And, of course, the *defendant* also has a critical interest in ensuring that notice to the class was “the best practicable” because, if it was not—which will be decided by a later court and not the court hearing the class action—there is no bar to subsequent claims and even a subsequent class action seeking the same damages that were already paid after trial or settlement. In stating it was simply interpreting the plain text of Rule 23, the Ninth Circuit ignored these important due process issues.

The *Briseno* court then addressed the possibility of fraudulent claims—a concern that the Third Circuit observed must be considered—by stating that courts “can rely, as they have for decades, on claim administrators, various auditing processes, sampling for fraud detection, follow-up notices to explain the claims process, and other techniques tailored by the parties and the court to avoid or minimize fraudulent claims.”<sup>161</sup> What “auditing processes” and “other techniques”? While such processes and techniques may, in fact, exist, there were none presented in the court record, and the court appeared to just assume, with no evidence discussed, that they not only existed but were sufficient to address the concerns in the case before it. Thus, it is unclear whether a district court can presume such techniques exist with no further inquiry (and whether that presumption can be rebutted), or whether a plaintiff must present evidence of such techniques and their effectiveness.

Finally, *Briseno* did address the due process concern that a defendant “have an opportunity to dispute whether class members really bought the product or used the service at issue.”<sup>162</sup> While recognizing that such a due process right existed, the court again pointed to unspecified “auditing processes,” “sampling,” and other techniques used by claims administrators—who do not represent the defendant and have no duty to zealously advocate

---

158 Judges’ Class Action Notice and Claims Process Checklist and Plain Language Guide, Federal Judicial Center (2010).

159 844 F.3d at 1129.

160 *Id.*

161 844 F.3d at 1130 (citations and quotations omitted).

162 *Id.*

on its behalf.<sup>163</sup> It then effectively nullified this due process right to challenge illegitimate claims by concluding that the total liability is a simple calculation of “the price premium attributable to the allegedly false statement that appeared on every unit” multiplied “by the total number of units sold.”<sup>164</sup> It concluded that “the identity of particular class members does not implicate the defendant’s due process interest at all because the addition or subtraction of individual class members affects neither the defendant’s liability nor the total amount of damages it owes to the class.”<sup>165</sup> But this is far too simplistic. The defendant has a due process right to ensure that whatever its liability, any damages be distributed in a fair and just manner so that absent class members are bound by the decision and do not bring a second action based on inadequate representation or lack of notice.

The *Briseno* court summed up its weighing of the relevant considerations with the following observation: “Practically speaking, a separate administrative feasibility requirement would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members—in precisely those cases that depend most on the class mechanism.”<sup>166</sup> Denying any meaningful remedy through an application of Rule 23 that is too strict—as perhaps is the case in the Third Circuit’s analysis—is a valid concern. But the Ninth Circuit arguably went too far in the other direction by denying a class action defendant any meaningful right to defend against the class claims simply by a plaintiff’s *alleging* widespread consumer claims against a broad and unidentifiable class.

\*\*\*

In sum, none of the courts of appeal that have addressed the “ascertainability” issues that accompany the class certification decision—including “administrative feasibility” concerns—have properly considered all of the relevant due process and other considerations. The Second, Third, Fourth, Fifth and Eleventh Circuits have ignored certain of the relevant considerations while overweighting others, such as, arguably, refusing to ever permit class membership to be established through sworn affidavits because of the burden and expense for a defendant to challenge such proof. And the Sixth, Seventh, Eighth, and Ninth Circuits have disregarded or underweighted other factors, such as the means of providing notice to a broad and diffuse class that would satisfy due process, or a class action defendant’s legitimate rights to ensure that all (or nearly all) class members received such notice so they would be bound and to challenge invalid class member claims.

If the circuits cannot resolve these critical differences and derive guidelines that provide proper and thorough consideration of all relevant due process and other concerns, the Supreme Court must resolve the current circuit split with a full analysis of these difficult but important issues.

---

163 The court further observed that the defendant “does not explain why such procedures are insufficient to safeguard its due process rights.” 844 F.3d at 1131. But it is the *plaintiff* who bears the burden at the class certification stage to establish that the class members’ claimed damages stemmed from the defendant’s actions that created the legal liability. *Comcast Corp.*, 133 S. Ct. at 1435. It is not the defendant’s burden to prove that it cannot be done.

164 844 F.3d at 1132.

165 *Id.* (citation and quotations omitted).

166 *Id.* at 1129.

# BELOW-COST PRICING: RECENT DEFENSE-FRIENDLY DECISIONS

By Ryan M. Sandrock and Stephen Chang<sup>1</sup>

A below-cost pricing claim under California's Unfair Practices Act (UPA) appears at first blush to be easier to plead and prove than a predatory pricing claim under the Sherman Act. The standard refrain under federal law is that discounts are generally pro-competitive and true anticompetitive predatory pricing is rare. Thus, a federal plaintiff must show that the defendant's below-cost pricing would drive competitors out of the market allowing the defendant to later "recoup" its losses. Unlike a Sherman Act plaintiff, however, a UPA plaintiff need not show recoupment. Moreover, relevant costs under the UPA include additional costs than under federal law—seemingly making it easier to show the price is below-cost. Several recent cases, however, show that, despite the California law's seemingly easier standard, plaintiffs have had problems prevailing on Section 17043 claims.<sup>2</sup>

## I. CALIFORNIA BELOW-COST PRICING CLAIMS UNDER SECTION 17043

Section 17043 of the UPA provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."<sup>3</sup> The elements of a Section 17043 claim are (1) a below-cost sale; (2) undertaken for the purpose of injuring competitors or destroying competition that; (3) causes a competitive injury.<sup>4</sup>

*Below-Cost:* California employs a fully allocated cost standard to determine whether a sale has violated section 17043.<sup>5</sup> Cost for a distributor is the invoice cost, plus the vendor's full cost of doing business or a markup of six percent on the invoice cost.<sup>6</sup> Plaintiffs must

---

1 Ryan Sandrock is a partner in the San Francisco office of Sidley Austin LLP, a member of the firm's Antitrust Practice Group, and was one of the lawyers for QDI in the *RDL* case. Stephen Chang is an associate in the same office.

2 More detailed background regarding the differences between the state and federal standards is set forth in Ara Jabaghourian & David Meyer, *Proving Wrongful Purpose Under the Unfair Practices Act: Plaintiff and Defense Perspectives*, 22 No. 2 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 40 (Fall 2013). That Article also provides detail regarding the stringent "purpose" requirement under Section 17043.

3 Cal. Bus. & Prof. Code § 17043.

4 *Bay Guardian Co. v. New Times Media LLC*, 187 Cal. App. 4th 438, 453 (2010).

5 *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 275 (1983); *Blue Sky the Color of Imagination, LLC v. Mead Westvaco Corp.*, No. 10-cv-02175, 2010 WL 4366849, at \*5 (C.D. Cal. Sept. 23, 2010).

6 Cal. Bus. & Prof. Code §§ 17026, 17029. Cost as applied to production is the "cost of raw materials, labor and all overhead expenses of the producer." *Id.*

allege defendant's sales price, its cost in the product, and its cost of doing business to plead a Section 17043 claim.<sup>7</sup>

*Improper Purpose:* A plaintiff must show that defendant acted with the purpose of injuring a competitor. This is a more rigorous requirement than intent.<sup>8</sup> Under Section 17071, plaintiffs are entitled to a rebuttable presumption of purpose or intent to injure competitors ("improper purpose") if they can show both (a) one or more acts of selling or giving away an article or product below-cost and (b) proof of injurious effect of such acts.<sup>9</sup> The presumption may be rebutted by showing that the sales were made in good faith and not for the purpose of injuring competitors or destroying competition.<sup>10</sup>

*Causation:* A plaintiff must show a causal connection between the defendant's below-cost sales and harm to plaintiff.<sup>11</sup>

*Remedies:* A plaintiff can recover treble damages, attorney's fees, and costs for violations of the UPA's pricing provisions.<sup>12</sup> Criminal misdemeanor fines of up to \$1,000 and six months imprisonment are also possible.<sup>13</sup>

*Affirmative Defense—Meeting Competition:* The UPA's provisions on below-cost pricing do not apply "to any sale made . . . [i]n an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade."<sup>14</sup>

Unlike a predatory pricing claim under federal law, a Section 17043 claim does not require that a plaintiff prove: (1) that defendant had a dangerous probability of recouping its investment in below-cost prices or (2) that prices were below an appropriate measure of defendant's costs—average variable costs—in the short term.<sup>15</sup>

The differences between below-cost pricing under Section 17043 and Section 2 has created a concern that Section 17043 prohibits all discounts. In *Fisherman's Wharf* Justice Ruvolo described defendant's concern that the denial of its motion for summary judgment "sound[ed] the death knell of the blue plate special, the Saturday matinee, and

---

7 *G.H.I.I.*, 147 Cal. App. 3d at 275. See also *Code Rebel, LLC v. Aqua Connect, Inc.*, No. CV-13-4539, 2014 WL 46696 (C.D. Cal. Jan. 3, 2014) (dismissing 17043 claim for failure to allege defendant's sales price and costs). Section II *infra* contains an extensive discussion of recent cases discussing pleading standards for Section 17043 claims.

8 *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1153–54 (9th Cir. 2008).

9 Cal. Bus. & Prof. Code § 17071.

10 *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1049 (9th Cir. 1981).

11 *Fisherman's Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal. App. 4th 309, 330 (2003); *Dealers Wholesale Supply, Inc., v. Pac. Steel and Supply Co.*, No. C-81-3038, 1984 WL 775 (N.D. Cal. July 6, 1984).

12 Cal. Bus. & Prof. Code § 17082.

13 Cal. Bus. & Prof. Code § 17100.

14 Cal. Bus. & Prof. Code § 17050.

15 See *Bay Guardian*, 187 Cal. App. 4th at 459 (declining to find an implied recoupment requirement within Section 17043); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (U.S. 1993) (defining recoupment under federal law); *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1394 (8th Cir. 1993) (describing federal average variable cost requirement).

discounted events for the elderly and children.”<sup>16</sup> He declared, however, this concern to be “hyperbole [that] ignores the significant evidentiary hurdles [a plaintiff must] overcome in order to prove its predatory pricing claim under section 17043.”<sup>17</sup> Recent cases suggest that Justice Ruvolo might have been correct in calling for discounting defendants to rest easy.

## II. MOTIONS TO DISMISS: DEFENSE-FRIENDLY PLEADING DECISIONS IN RECENT SECTION 17043 CASES

Motions to dismiss have proven to be an increasingly difficult hurdle for plaintiffs in Section 17043 cases. This trend is exemplified by three recent defense-friendly Northern District of California decisions where motions to dismiss were granted for failure to adequately plead below-cost pricing.

*A White and Yellow Cab v. Uber Technologies, Inc.*: In a decision issued on March 30, 2017, Judge Jeffrey S. White granted ride-share company Uber Technologies’s motion to dismiss plaintiff White and Yellow Cab’s Section 17043 below-cost pricing claim.<sup>18</sup> Plaintiff was a “traditional taxi company” based in Santa Ana, California which alleged that Uber operated “*de facto* taxis” that did not hold a “taxi license or any other form of license.”<sup>19</sup> Plaintiffs alleged that Uber “within the meaning of [the UPA] distributed or sold and continue[] to distribute or sell *de facto* taxicab services through [their] app at charges which are below costs for [Plaintiff] and other authentic taxi companies.”<sup>20</sup> The Court held that, unlike in *G.H.I.I* where plaintiffs’ pleadings were found sufficient despite not alleging a “definite cost of doing business,” plaintiffs in *Uber* had not alleged *any* facts regarding Uber’s prices, the cost of Uber’s product, or Uber’s cost of doing business.<sup>21</sup>

*Medina v. Microsoft*: Judge Richard Seeborg granted Microsoft’s motion to dismiss plaintiff Antonio Medina’s Section 17043 claim, finding that Medina had not met Section 17043’s pleading standards.<sup>22</sup> Medina, a 3D camera inventor who owned the company Multivision, alleged that Microsoft had sold a 3D camera at a “subsidized, below cost price” which “destroyed Multivision’s competition” by impeding the sale of Medina’s 3D camera.<sup>23</sup> Judge Seeborg found that Medina’s complaint did not sufficiently allege a Section 17043 claim as it merely stated that Microsoft sold its camera at a “subsidized,

---

16 *Fisherman’s Wharf*, 114 Cal. App. 4th at 330.

17 *Id.* (noting that plaintiffs must also prove causation and improper purpose to prevail on their Section 17043 claim).

18 *A White & Yellow CAB, Inc. v. Uber Techs., Inc.*, No. 15-CV-05163, 2017 WL 1208384, at \*11 (N.D. Cal. Mar. 31, 2017). The Court granted the motion with leave to amend plaintiff’s Section 17043 claim. *Id.* at \*12.

19 *Id.* at \*3.

20 *Id.* at \*11.

21 *Id.*

22 *Medina v. Microsoft Corp.*, No. C 14-0143, 2014 WL 4243992, at \*5 (N.D. Cal. Aug. 26, 2014). The Court granted the motion with leave to amend plaintiff’s Section 17043 claim. *Id.*

23 *Id.* at \*2.

below cost price” and that Microsoft had struck an agreement with other defendants in order to increase its price once Microsoft had a dominant market share.<sup>24</sup>

The Court held that, unlike plaintiffs in *G.H.I.I* where plaintiffs had been in a poor position to speculate about cost allegations, Medina—who owned a 3D printing company—ought to have been capable of making reasonable allegations regarding Microsoft’s sales price, product cost, and cost of doing business based on “his own company’s cost experiences.”<sup>25</sup> As such, *Microsoft* suggests that if a plaintiff has reasonable access to cost information—including because they manufacture a similar product—the court will grant motions to dismiss and not provide any lenience in the pleading standard.

*Eastman v. Quest Diagnostics Inc.* (“QDI”): Plaintiffs alleged that QDI violated Section 17043 by selling testing services in the physician market below cost.<sup>26</sup> The Court granted QDI’s motion to dismiss because plaintiffs “[had] not pleaded QDI’s prices or costs, nor did plaintiffs provide any authority in the opposition brief indicating that this is not required.”<sup>27</sup>

Together, *Uber*, *Microsoft*, and *QDI* show that despite case law suggesting that it is easy for a plaintiff to successfully plead a Section 17043 claim,<sup>28</sup> it is defendants in recent cases that have successfully won motions to dismiss by asserting that plaintiffs did not plead below-cost pricing with sufficient detail. Simply reciting the term “below-cost” is not enough.

### III. IMPROPER PURPOSE AND CAUSATION: *DIXON GAS & RDL*

Two recent defense-friendly cases show the significant evidentiary hurdles plaintiffs face in proving the causation and improper purpose requirements in Section 17043 claims.

#### A. *Dixon Gas Club v. Safeway, Inc.*: Failure to Prove Improper Purpose

Plaintiff Dixon Gas Club, LLC operated a retail fuel station off the I-80 exit in the City of Dixon in Northern California.<sup>29</sup> Safeway, which in addition to operating a large chain of grocery stores also operates a number of retail fuel stations, recognized three types of gas station competitors: (1) “Majors” such as Shell, Chevron, and Texaco who operated at higher costs than Safeway; (2) “Pricers” such as Arco or Racetrack that operated at lower prices and (3) “Hypermarkets” that, like Safeway, sold food in addition

---

24 *Id.* at \*5.

25 *Id.*

26 *Eastman v. Quest Diagnostics Inc.*, 108 F. Supp. 3d 827, 837–38 (N.D. Cal. 2015). The Court granted the motion with leave to amend plaintiff’s Section 17043 claim. *Id.* at 838.

27 *Id.*

28 See, e.g., *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 276 (1983) (finding pleadings sufficient when plaintiffs were in a poor position to speculate regarding defendant’s costs); *Solyndra Residual Tr., by & through Neilson v. Suntech Power Holdings Co.*, 62 F. Supp. 3d 1027, 1047 (N.D. Cal. 2014).

29 *Dixon Gas Club, LLC v. Safeway Inc.*, No. A139283, 2015 WL 4557388, at \*2 (Cal. Ct. App. July 29, 2015), *reh’g denied* (Aug. 18, 2015), *review denied* (Oct. 14, 2015). *Dixon* is an unpublished opinion and citation is restricted under California Rules of Court Rules 8.1105, 8.1110, and 8.1115.

to fuel.<sup>30</sup> Safeway had a general practice between 2004 and 2006 to survey on a daily basis the fuel prices of select nearby stations and then set prices based on the surveyed price.<sup>31</sup>

Safeway’s practice was to set “retail” prices two cents per gallon higher than the price of its lowest surveyed competitor if fuel margins were positive. If Safeway had negative fuel margins, it would set retail prices at four cents per gallon higher than the price of its lowest surveyed target competitor.<sup>32</sup> From 2004 to 2012, Safeway offered a promotion that provided Safeway Club Card holders a savings of three cents below street price. Thus, under Safeway’s general pricing policy Club Card holders paid one cent less when fuel margins were positive and one cent more when fuel margins were negative.<sup>33</sup>

Internal Safeway documents and Safeway employees verified that the core focus of the company was its grocery business, such that the goal of the fuel business was to “maximize traffic in the main store, not necessarily to maximize revenue per gallon of gas sold.”<sup>34</sup> Safeway accounting documents confirmed that the fuel discount promotional programs led to increased grocery store revenue.<sup>35</sup> At trial, Safeway produced evidence that several grocery store competitors had similar fuel-discount promotions in the Northern California area.<sup>36</sup>

Safeway moved for judgment pursuant to California Code of Civil Procedure Section 631.8 after Dixon’s case-in-chief. The trial court granted the motion despite finding that there was evidence that Safeway had engaged in below-cost sales during at least some relevant periods of time to Dixon’s detriment.<sup>37</sup> Dixon timely appealed after the trial court entered judgment for Safeway.<sup>38</sup> The Court of Appeal ultimately found that Safeway did not act with the purpose of injuring its competitors, but with the purpose of improving its grocery business and to compete against fuel-based discounts offered by grocery competitors.<sup>39</sup>

Justice Jenkins emphasized that the harsh remedies under the UPA were likely designed by the legislature to apply only when below-cost sales and loss leader pricing are done with the *purpose* of injuring competitors.<sup>40</sup> The Court relied on *Cel-Tech*, a case that emphasized the difficulty of meeting this requirement under California law. In *Cel-Tech*, the California Supreme Court analyzed the improper purpose requirement, noting that

---

30 *Id.* at \*2.

31 *Id.*

32 *Id.*

33 *Id.* at \*3.

34 *Id.*

35 *Id.*

36 *Id.* at \*4.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at \*5 (citing *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 179 (1999)).

Section 17043 specifically used the word purpose rather than rather than merely “intent” or “knowledge.”<sup>41</sup>

The Court of Appeal found that substantial evidence existed to support the trial court’s finding that Safeway did not act with the purpose to injure or destroy competition in the fuel market when setting its fuel prices.<sup>42</sup> Justice Jenkins pointed to Safeway documents and testimony which revealed that the company was looking to attract grocery customers and compete against other supermarkets that had implemented fuel-pricing discounts.<sup>43</sup> In a footnote, the Court noted that Dixon was likely entitled to a presumption of improper purpose, but that the trial court had a sufficient evidentiary basis for finding that Safeway had rebutted this presumption.<sup>44</sup>

*Dixon* shows that even if a plaintiff can show all the other elements of a below-cost pricing claim, they can still fall short if a defendant can provide evidence that the pricing was simply an attempt to compete.

### **B. *Rheumatology Diagnostics Laboratory, Inc., et al. v. Aetna, et al.* (“RDL v. QDI”): Failure to Connect Claimed Below-Cost Pricing to Lost Sales**

Several companies that provide clinical laboratory test services sued their competitor Quest Diagnostics Incorporated (QDI).<sup>45</sup> Plaintiffs alleged that QDI violated the UPA by selling laboratory services below-cost “for the purposes of injuring plaintiffs and destroying competition” leading to plaintiffs’ loss of actual and potential customers.

Plaintiffs’ below-cost pricing claims largely survived the motion to dismiss, and the parties proceeded to discovery. QDI then moved for summary judgment, challenging plaintiffs’ evidence regarding causation and purpose.<sup>46</sup> On causation, QDI argued that plaintiffs had failed to connect particular instances of below-cost pricing to lost sales.<sup>47</sup>

---

41 *Cel-Tech*, 20 Cal. 4th at 174–75.

42 *Dixon*, 2015 WL 4557388, at \*8.

43 *Id.*

44 *Id.* at \*8 n.10.

45 Other defendants, including Aetna, were named in the lawsuit, but the predatory pricing claims were raised only against QDI. *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-CV-05847, 2013 WL 5694452, at \*16 (N.D. Cal. Oct. 18, 2013) (“RDL I”). The Court dismissed other claims unrelated to plaintiffs’ UPA claims. *Id.* at 10.

46 The Court denied the motion as to purpose for claims where plaintiffs showed causation, finding that the Section 17071 presumption applied. *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-CV-05847, 2015 WL 1744330, at \*21 (N.D. Cal. Apr. 15, 2015) (“RDL II”). In a later ruling, the Court denied plaintiffs’ request for a ruling that QDI could not rebut that presumption. *Rheumatology Diagnostics Lab., Inc. v. Aetna, Inc.*, No. 12-CV-05847, 2015 WL 3826713, at \*6 (N.D. Cal. June 19, 2015) (“RDL III”).

47 *RDL II*, 2015 WL 1744330, at \*13 (citing *Dealers Wholesale*, 1984 WL 775, at \*9 (granting summary judgment for defendant on UPA claim where plaintiff “failed to establish the existence of any causal link between actions taken by the defendants and harm caused to the plaintiff.”); Judicial Council of California Civil Jury Instructions § 3301 (“Below Cost Sales—Essential Factual Elements”) (requiring plaintiff to establish “that [name of plaintiff] was harmed” and “that [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm”)).

The Court agreed with QDI as to some of plaintiffs' claims, finding that plaintiffs had not provided sufficient evidence and analysis of the causation requirement.<sup>48</sup> The court accepted for purposes of the motion that there were below-cost prices but faulted plaintiffs for not providing sufficient evidence to show the impact of those prices. For example, the court noted that some plaintiffs did not submit declarations specific to their claimed losses and instructed their expert to assume, rather than show causation.<sup>49</sup>

The Court's decision shows that identifying below-cost prices is just the start for plaintiffs. Plaintiffs must then present evidence connecting those prices to lost sales. What evidence is sufficient will vary depending on each case. And, of course, plaintiffs must also provide evidence of improper purpose, a hurdle that tripped up plaintiffs in the *Dixon* case as set forth above.

#### **IV. CONCLUSION**

Plaintiffs face significant difficulties pleading below-cost pricing, as well as significant evidentiary challenges in establishing that any below-cost pricing actually caused injury and that the defendant acted with an actual improper purpose. These requirements go a long way toward insuring that the blue plate special and Saturday matinee remain lawful pricing practices.

---

48 *RDL II*, 2015 WL 1744330, at \*13–20.

49 *Id.* at \*18.

# CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW UPDATE: PROCEDURAL LAW

By Thomas Greene<sup>1</sup>

## I. INTRODUCTION

This outline provides a selection of litigation developments that may be of particular interest to members of the Antitrust, Unfair Competition Law and Privacy Section, presenting procedural developments in the area of jurisdiction, arbitration, motion practice, discovery, trial, evidence, patent and copyright procedures, and new federal and state laws, regulations and rules.

## II. JURISDICTION

### A. California Supreme Court Clarifies Special Jurisdiction in State Courts

#### *Bristol-Myers Squibb Co. v. Superior Court*<sup>2</sup>

This case arises from multiple actions filed in San Francisco Superior Court against Bristol-Myers Squibb, the manufacturer of Plavix, a drug for the treatment of cardiovascular disease, and McKesson Corporation, a San Francisco-based distributor of Plavix and other drugs. These actions alleged that defendants misled consumers by claiming that Plavix was more effective than other similar drugs, and safer and easier on a person's stomach than aspirin. The complaints alleged that the clinical value of the drug was outweighed by undisclosed risks of heart attack, stroke and death.

Cases before the San Francisco Superior Court included approximately 86 cases on behalf of California consumers and 592 cases on behalf of residents of 33 other states. The parties agreed that jurisdiction was proper for claims of California residents because they were injured in California. The question before the California Supreme Court was whether California trial courts also had jurisdiction over Bristol-Myers with respect to the claims of non-residents.

Referencing recent U.S. Supreme Court decisions, the court rejected the argument that state courts had *general jurisdiction* over Bristol-Myers. General jurisdiction exists when a firm is "at home" in the forum state, as determined by the U.S. Supreme Court's decisions

---

1 Thomas Greene is a Trial Attorney with the United States Department of Justice Antitrust Division and prior to that was Special Trial Counsel with the Federal Trade Commission. The views expressed in this Article are those of the author and do not necessarily reflect those of Antitrust Division or Federal Trade Commission. This Article is adapted from a presentation delivered at the Golden State Antitrust, Unfair Competition and Privacy Law Institute on November 3, 2016 and reflects developments as of that date.

2 1 Cal. 5th 783 (2016).

in *Goodyear*<sup>3</sup> and *Daimler*.<sup>4</sup> <sup>5</sup> Under the high court’s jurisprudence, a corporation is typically “at home” in a state in which it is incorporated or has its principal place of business.<sup>6</sup> This was not the case with Bristol-Myers and California.

Although California did not have general jurisdiction over the company, the court found that California courts had special jurisdiction over Bristol-Myers. According to the court, “[t]he question of whether a court may exercise specific jurisdiction over a nonresident defendant involves examining (1) whether the defendant has ‘purposely directed’ its activities at the forum state; (2) whether the plaintiff’s claims arise out of or are related to these forum-directed activities; and (3) whether the exercise of jurisdiction is reasonable and does not offend ‘traditional notions of fair play and substantial justice.’”<sup>7</sup> Perhaps the most interesting aspect of this formulation is that it ignores recent U.S. Supreme Court’s decisions on jurisdiction.

Turning to the facts of the case, the court found meaningful that:

- Bristol-Myers sold 187 million Plavix pills from 2006 to 2012 to California consumers, reaping \$918 million in revenue;
- The company’s major distributor and co-defendant, McKesson, is headquartered in California; and
- The company maintained five offices in California, employing approximately 164 researchers and 250 sales personnel.

The court also observed that:

- Since the company would necessarily be defending itself in San Francisco on the California claims, its lawyers would be commuting to California regularly; and
- The actual discovery would likely occur where Bristol-Myers officers and employees were located.

Concluding its opinion, the majority found that:

[I]n light of BMS’s extensive contacts with California, encompassing extensive marketing and distribution of Plavix, hundreds of millions of dollars of revenue from Plavix sales, a relationship with a California distributor, substantial research and development facilities, and hundreds of California employees, courts may, consistent with the requirements of due process, exercise specific personal jurisdiction over nonresident plaintiffs’ claims in this action, which arise from the same course of conduct that gave rise to California plaintiffs’ claims.<sup>8</sup>

---

3 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

4 *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

5 *Bristol-Myers Squibb*, 1 Cal. 5th at 797, *et seq.*

6 *Id.* at 796.

7 *Id.* at 799 (internal citations omitted).

8 *Id.* at 813.

The majority opinion drew a strongly worded dissent from Justice Werdegar. She argued that “[t]he key issue here is therefore whether the claims of the real parties in interest (plaintiffs residing in states other than California) arise out of, or are otherwise related to, BMS’s activities in California.”<sup>9</sup> She noted that “the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation.”<sup>10</sup> Here, she says, there is no such link, and that the court is seeking to create “the equivalent of general jurisdiction in California courts.”<sup>11</sup>

This decision has been stayed “to permit defendants to file a petition for writ of certiorari with the Supreme Court of the United States.”<sup>12</sup> Assuming that certiorari is not granted or the case survives review, this is potentially one of the most important procedural decisions of the year.

### III. ARBITRATION

#### A. California Supreme Court Determines “Who Decides” Whether an Arbitration Agreement Permits or Precludes Classwide Arbitration

##### *Sandquist v. Lebo Automotive, Inc.*<sup>13</sup>

The issue before the California Supreme Court in this case was “*who decides* whether [an arbitration] agreement permits or prohibits classwide arbitration, a court or the arbitrator,” when the parties have not specified who makes the choice?<sup>14</sup>

As a condition of employment at Lebo Automotive, petitioner was required to sign about 100 pages of preprinted forms. Anxious to start work as a salesman, petitioner did not review the forms closely. Included in the papers were three different—but substantively similar—arbitration agreements in which he agreed to arbitrate all but a handful of specific issues. Petitioner, who is African-American, ultimately sued Lebo, alleging that he had been subject to discrimination, harassment and retaliation. His complaint brought claims on behalf of himself and “a class of current and former employees of color.”<sup>15</sup> Lebo responded with a motion to compel individual arbitration based on the form agreements.

The court starts with a finding, urged by Lebo, that the question of who decides the issue of classwide arbitration “must be conducted, at least initially, through the prism of state law.”<sup>16</sup> Focusing on the likely “expectations” of the parties based on the language of the agreements, the court found that the language favored resolution by the arbitrator. This was buttressed by two presumptions. First, “under state law as well as under federal

---

9 *Id.* at 817.

10 *Id.* at 818 (citations omitted).

11 *Id.* at 816.

12 *Bristol-Myers Squibb Co. v. Supreme Court*, 2016 Cal. LEXIS 7897, at \*1 (Sept. 21, 2016).

13 1 Cal. 5th 233 (2016).

14 *Id.* at 241 (emphasis in original).

15 *Id.* at 241–42.

16 *Id.* at 244.

law, when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration [citations omitted].” Second, “[w]here, as here, the written agreement has been prepared entirely by the employer, it is a ‘well established rule of construction’ that any ambiguities must be construed against the drafting employer and in favor of the nondrafting employee.”<sup>17</sup>

The court rejects Lebo’s argument that prior California appellate cases had established a presumption that class arbitration was a matter for courts. Rejecting Lebo’s reading of, among other cases, *City of Los Angeles v. Superior Court*,<sup>18</sup> the court concludes that “[n]either *City of Los Angeles* nor any other state case establishes a presumption [that] the availability of class arbitration is to be decided by courts.”<sup>19</sup>

Turning to federal cases, the court relied on the U.S. Supreme Court’s decision in *Green Tree Financial Corp. v. Bazzle*,<sup>20</sup> where a plurality concluded that “nothing in the FAA [Federal Arbitration Act] subjects the ‘who decides’ question to any contrary pro-court presumption.” Accordingly, the plurality concluded “this matter of contract interpretation should be for the arbitrator, not the courts, to decide.”<sup>21</sup>

The court distinguished between “gateway questions,” which are properly decided by courts, and other questions, which are presumptively left to the arbitrator. Gateway questions under federal law include “whether there is an enforceable arbitration agreement or whether it applies to the dispute at hand.”<sup>22</sup> “Once gateway questions have been settled, . . . the FAA switches presumptions for issues affecting the manner in which an arbitration is to be conducted,” such that, procedural questions are “presumptively not for the judge, but for the arbitrator to decide.”<sup>23</sup>

The court rejects the argument that the importance of the class arbitration issue makes it a gateway question that should be resolved by a court. In so ruling, the court focused on the expectations of the parties, concluding that the parties “most likely intend and expect that the arbitrator should resolve all issues.” If the parties’ intent was otherwise, the court argued, they could and would “express their contrary intent.”<sup>24</sup>

Reviewing respondent’s argument that class arbitration affects others who signed the arbitration agreement, the court argued that the class arbitration rules used by JAMS and the American Arbitration Association fully protect the rights of absent class members.<sup>25</sup> The majority opinion then remands the question of classwide arbitrability to the arbitrator.<sup>26</sup>

---

17 *Id.* at 247-48 (citations omitted).

18 56 Cal. 4th 1086 (2013).

19 *Lebo Automotive*, 1 Cal. 5th at 250.

20 539 U.S. 444 (2003).

21 *Lebo Automotive*, 1 Cal. 5th at 250.

22 *Id.* at 251-52.

23 *Id.* at 252 (emphasis in original omitted) (citations omitted).

24 *Id.* at 255-56 (citations omitted).

25 *Id.* at 258.

26 *Id.* at 261.

Justice Kruger dissented, arguing that U.S. Supreme Court decisions after *Green Tea Financial* eroded its apparent holding. Moreover, she argued, “at least to date, every federal court of appeals to consider the issue on the merits has held that the availability of class arbitration is a question for a court, rather than an arbitrator, ‘unless the parties clearly and unmistakably provide otherwise.’”<sup>27</sup>

This is an important decision because it concludes that an arbitrator may decide whether an arbitration agreement precludes class arbitration in the absence of clear language in the arbitration agreement. This may well pave the way for more arbitration class actions in the future. In the short term, this decision is also an invitation to review your clients’ arbitration agreements to determine if they need to be clearer about whether class arbitration is available.

Although an important decision, it is also one that appears to be in tension with more recent decisions of the U.S. Supreme Court and federal circuit courts. It is highly likely that this case, or another case relying on this decision, will be subject to a petition for certiorari. This is an instance in which the make-up of the U.S. Supreme Court may be dispositive.

#### IV. MOTION PRACTICE

##### A. California Supreme Court Clarifies SLAPP Treatment of “Mixed” Claims

###### *Baral v. Schnitt*<sup>28</sup>

California law provides for a special motion to strike if a party is challenging a Strategic Lawsuit Against Public Participation (SLAPP). Originally designed to protect activists, this has evolved into one of the most powerful tools available to state court defendants. Specifically, “[u]nlike any other motion in the procedural toolbox, the filing of an anti-SLAPP motion (1) stays all discovery absent court permission; (2) precludes amendment of the complaint; (3) forces the plaintiff to make an early proffer of proof generally without the benefit of discovery; (4) provides for an award of attorney fees if the moving party prevails; and (5) provides for automatic appeal if the motion is denied and stays all other proceedings in the case.”<sup>29</sup> In antitrust practice, such motions might lie against bogus claims of *Noerr*-protected speech or sham litigation.

The issue before the California Supreme Court was “[h]ow does the special motion to strike operate against a so-called ‘mixed cause of action’ that combines allegations of activity protected by the statute with allegations of unprotected activity?”<sup>30</sup> A unanimous court in an opinion by Justice Corrigan concludes that:

---

27 *Id.* at 267 (citations omitted).

28 1 Cal. 5th 376 (2016).

29 *Baral v. Schnitt*, 233 Cal. App. 4th 1423, 1442 (2015).

30 *Baral v. Schnitt*, 1 Cal. 5th 376, 381 (2016) (emphasis in original).

The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected *conduct* from the undue burden of frivolous litigation. It follows, then, that courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity.<sup>31</sup>

The court concludes its opinion with a brief tutorial on SLAPP procedures:

For the benefit of litigants and courts involved in this sometimes difficult area of pretrial procedure, we provide a brief summary of the showing and findings required by section 425.16(b). At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.<sup>32</sup>

If you are in state court, this can be a potentially powerful tool, and one that has just been broadened by the California Supreme Court.

## **B. Mediation Does Not Toll 5-Year Time-To-Trial Deadline; Case Dismissed**

### ***Gaines v. Fidelity National Title Insurance Co.***<sup>33</sup>

Litigants in California state trial courts operate under a 5-year, time-to-trial deadline.<sup>34</sup> The issue in this case was whether an order entered pursuant to a stipulation vacating the trial date while the parties engaged in mediation and completed discovery tolled this rule.

Justice Corrigan, writing for the majority, concluded that tolling was not appropriate, and sustained the lower court's dismissal of the action pursuant to California Code of Civil Procedure section 583.310. She focused on the distinction between a complete stay (which tolls the 5-year statute) and a continuance (which does not).<sup>35</sup> A complete stay

---

31 *Id.* at 393.

32 *Id.* at 396.

33 62 Cal. 4th 1081 (2016).

34 Cal. Code Civ. Proc. § 583.310.

35 *Fid. Nat'l Title*, 62 Cal. 4th at 1091-92.

stops “the prosecution of the action altogether,’ making it impossible to bring the action to trial.”<sup>36</sup> In this case, the court found that the stipulation and order merely extended an existing trial date to a date well within the 5-year statutory period. The Court also noted that the stipulated postponement was “not occasioned by an extrinsic proceeding, court order, or law barring action” and so did “not qualify for automatic tolling.”<sup>37</sup>

The majority also rejected the argument that the 5-year statute should be tolled because of circumstances that make it “impossible, impracticable or futile” to bring the action to trial.<sup>38</sup> “Ordinary delays,” according to the court, are already built into the generous 5-year, time-to-trial period.<sup>39</sup> And the delay here was occasioned by “ordinary steps in the prosecution of the action,” specifically mediation, the need for a defendant to make an appearance and conduct discovery and for another party to file defensive pleadings. The court concluded that the “trial court was within its discretion to find that the conduct of mediation and partial stay of proceedings were not so exceptional, extenuated or beyond [plaintiff’s] control as to qualify as a circumstance of impossibility, impracticability, or futility” within the meaning of the statute.<sup>40</sup>

Justice Kruger dissented, arguing that the plaintiff was being penalized for trying to mediate his claim against multiple defendants. She specifically argued that “[t]he stay at issue in this case operated, in all relevant respects, precisely in the same manner as a ‘complete’ stay subject to automatic tolling.”<sup>41</sup>

The decision results in dismissal of plaintiff’s action. This harsh result has at least three potential fixes. First, the 5-year rule is not Draconian so all counsel need to be mindful of when a case is getting close to the deadline. Missing this deadline is an invitation to a malpractice suit. Second, any agreement to adjust the trial date or temporarily stay the proceeding should be a complete stay, rather than a partial stay. Third, in the alternative, any partial stay should be accompanied by a stipulation that the partial stay will toll the 5-year trial period.

## V. DISCOVERY

### A. Federal Courts Implement Proportionality and Spoliation Rules

#### 1. Proportionality

Last year’s amendments to Federal Rule of Civil Procedure 26(b)(1) provide that:

Unless otherwise limited by court order, the scope of discovery is as follows:  
Parties may obtain discovery regarding any nonprivileged matter that is

---

36 *Id.* at 1094 (citing *Bruns v. E-Commerce Exch., Inc.*, 51 Cal. 4th 717, 726, 730 (2011) (internal citations omitted)).

37 *Id.*

38 *Id.* at 1100 (citing Cal. Civ. Proc. Code § 583.340(b)).

39 *Id.* at 1102.

40 *Id.* at 1105.

41 *Id.* at 1110.

relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.* Information within this scope of discovery need not be admissible in evidence to be discoverable.<sup>42</sup>

The effect of this language was to include the concept of “proportionality” in the scope of federal discovery. Although the concept had appeared in other parts of the federal rules before this amendment, this new placement touched off a wave of decisions interpreting this provision.

### **a. Decisions on Proportionality by California Federal Courts**

*Razo v. Timec Co.*<sup>43</sup> is a case of alleged age discrimination against a long-time employee. Plaintiff sought discovery related to the company's “on the Run Welders Group,” a group of skilled employees that included plaintiff. Defendant objected to what it characterized as national discovery. Plaintiff responded by limiting the request to a 2-year period and only as to California, the local area where he worked. With these limitations, the court found plaintiff's discovery demand proportional.

*Oracle America, Inc. v. Google Inc.*<sup>44</sup> involved a request by Oracle to add 27 Google custodians for ESI collection and production. Google objected that the request was disproportionate to the needs of the case. The trial court noted that neither party “submitted a proper analysis of the Rule 26 proportionality factors.”<sup>45</sup> Although this may be explainable by the fact that the new rules had just become effective, this case strongly suggests that counsel who do not address the proportionality factors do so at their peril.

*Carroll v. Wells Fargo & Co.*<sup>46</sup> revolves around pre-certification discovery in a putative wage-and-hour class action. Plaintiffs sought “contact information for each putative class member.”<sup>47</sup> Preliminarily, defendant argued that such discovery was not proper until a class was certified. The court rejected this attack, noting that the “United States Supreme Court has recognized the importance of permitting counsel to communicate with potential class members for the purpose of gathering information, even prior to class certification.”<sup>48</sup>

Turning to its proportionality analysis, the court concluded that an offer from plaintiffs to limit their request to a 25% sample was “fair and proportional to the needs of the case.”<sup>49</sup>

---

42 Emphasis added.

43 2016 U.S. Dist. LEXIS 53769 (N.D. Cal. Apr. 21, 2016).

44 2015 U.S. Dist. LEXIS 163956 (N.D. Cal. Dec. 3, 2015).

45 *Id.* at \*8-9.

46 2016 U.S. Dist. LEXIS 121630 (N.D. Cal. Sept. 8, 2016).

47 *Id.* at \*2.

48 *Id.* at \*6.

49 *Id.* at \*9.

*MicroTechnologies, LLC v. Autonomy, Inc.*<sup>50</sup> presents a discovery battle over the deposition of Sushoven Hussain, a former executive for Autonomy, in London. The trial court reviewed each of the proportionality factors in Rule 26, finding that “the deposition of Hussain would be proportional to the needs of this case.”<sup>51</sup> This summary analysis provides a good overview of how courts address these factors.

The court also rejected Hussain’s arguments that the deposition would be oppressive, specifically that his deposition would be contrary to the Hague Convention and increase his risk of facing criminal charges in England and the United States.

*Goes Int’l AB v. Dodur Ltd.*<sup>52</sup> reports on the resolution of a discovery dispute arising from the alleged illegal copying of a video game, which copies were distributed around the world. A significant conduit for these sales was Apple’s iTunes Store. The plaintiff sought information on worldwide sales of the allegedly stolen software. The court found that the discovery request was relevant to plaintiff’s case, and concluded that “[t]he production requests here . . . should not be an excessive burden.”<sup>53</sup> The court also noted that since the parties were “moving toward settlement discussions,” the “requested discovery may ‘likely benefit’ both parties in that endeavor by helping to accurately fill out the picture of this developing lawsuit.”<sup>54</sup>

## **b. Decisions on Proportionality by Federal Courts Outside of California**

*Wagoner v. Lewis Gale Medical Center, LLC*<sup>55</sup> involved a fired security guard. He subsequently filed suit alleging that the medical center did not reasonably accommodate his dyslexia.

Plaintiff sought discovery of potentially relevant e-mails of two custodians over a four month period and specified search terms like his name and dyslexia. Defendant countered that its system did not automatically preserve e-mails for more than three days, so recovering the requested e-mail would be disproportionately expensive for the case at hand.<sup>56</sup>

The court concluded that the requested discovery was relevant. It also concluded that proportionality does not simply weigh the costs of responding to discovery, citing a case for the proposition that “the Court cannot relieve Defendant of its duty to produce those documents [relevant e-mails] merely because Defendant has chosen a means to preserve

---

50 2016 U.S. Dist. LEXIS 32713 (N.D. Cal. Mar. 14, 2016).

51 *Id.* at \*6-7.

52 2016 U.S. Dist. LEXIS 13748 (N.D. Cal. Feb. 4, 2016).

53 *Id.* at \*11.

54 *Id.* at \*12.

55 2016 U.S. Dist. LEXIS 91323 (W.D. Va. July 13, 2016).

56 *Id.* at \*8.

evidence which makes ultimate production of relevant documents expensive.”<sup>57</sup> The court also rejected a request that plaintiff pay for the recovery of the requested e-mail.

The defendant was ordered to produce the requested e-mails during the period specified using the search terms selected by plaintiff.<sup>58</sup>

*First Niagara Risk Management v. Folino*<sup>59</sup> is a case against First Niagara’s former First Vice President for violating a sales contract that contained non-compete and anti-employee solicitation provisions. This action was based on Folino’s creation of a competing company, Trident Risk Advisors.

Niagara demanded that Folino search his personal electronic devices and personal e-mail account for a long list of names, including the names of 78 clients.<sup>60</sup> Although the court agreed that the request was “rather broad,” it nonetheless found that the request was proportional. The court observed preliminarily that limited discovery had already revealed significant evidence that Folino had violated the non-compete and anti-poaching provisions of his contract. Looking at the factors, the court found that:

- Importance of the issues at stake: The court found that Folino’s alleged activities are of “grave importance” to Niagara, so this factor favors the plaintiff.
- Amount in controversy: This was unknown at this time so this factor favors Folino.
- The parties’ relative access to information: Folino has had complete access to this information and plaintiff has had none. This favors Niagara.
- Parties’ resources: Niagara is a corporation but Folino recently sold his business to Niagara for \$5 million so this factor favors neither party.
- Importance of discovery: This factor tilted “heavily in favor of First Niagara.”
- Expense of discovery v. benefits: Admittedly, the court concludes, this may be expensive to Folino but this expense is outweighed by the needs of the case.<sup>61</sup>

In an effort to counter this conclusion, Folino argued that Sedona Conference Principle 6 should decide the question. Principle 6 provides that the responding party is in the best position to determine what is available and, therefore, should be able to dictate device discovery. The court rejected this analysis noting that the federal rules trump the Sedona principles. The court ordered the requested discovery, but denied First Niagara’s motion for costs and fees.

---

57 *Id.* at \*9 (citation omitted).

58 *Id.* at \*11.

59 2016 U.S. Dist. LEXIS 106094 (E.D. Pa. Aug. 11, 2016).

60 *Id.* at \*10.

61 *Id.* at \*11-13.

*Elkharwily v. Franciscan Health System*<sup>62</sup> is a case about denial of hospital privileges. Plaintiff sought “all emails and text messages concerning Plaintiff between employees, agents or attorneys of Defendant.” Another request demanded all email messages between any of Defendant’s employees and any employee of a major insurer; any former employer of plaintiff and communications with the National Practitioners Data Bank.<sup>63</sup>

Defendant demurred, arguing that it does not maintain an archiving system so costs to restore backup tapes would be an estimated \$157,000. Defendant further argued that:

- The requested e-mail from the archives were of minimal discovery value;
- Plaintiff had not exhausted more easily accessible information;
- Plaintiff had not identified what kind of material might be found in the archived e-mail, characterizing the request as “an extremely expensive fishing expedition.”<sup>64</sup>

Plaintiff did not apparently dispute these points, but argued that the defendant should have preserved e-mail in an accessible format.

The court denied the request but did allow the discovery to proceed, but “only at Plaintiff’s expense, payable in advance.”<sup>65</sup>

*In re Bard IVC Filters Products Liability Litigation*<sup>66</sup> involved requested discovery directed at foreign firms handling regulatory filings for the defendant. Defendant argued that while some local subsidiaries in foreign countries did communicate with local regulators, “Bard’s United States operations ‘supply all the pertinent information, answer all the questions [and] [t]hey provide the documentation and translations back and forth.’”<sup>67</sup> Based on testimony supporting this proposition, the court concluded that “most of the communications with foreign regulators originate in the United States and thus will be captured by the ESI searches currently underway.”<sup>68</sup>

Although the court concedes limiting discovery to U.S. sources may not capture everything, the “relevancy of these [other] communications is uncertain.”<sup>69</sup> The court concludes that “the burden and expense of searching ESI from 18 foreign entities over a 13-year period outweighs the benefit of the proposed discovery—a mere possibility of finding a foreign communications (sic) inconsistent with United States communication.”<sup>70</sup>

---

62 2016 U.S. Dist. LEXIS 99795 (W.D. Wash. Jul. 29, 2016).

63 *Id.* at \*2.

64 *Id.* at \*6-7.

65 *Id.* at \*9.

66 2016 U.S. Dist. LEXIS 126448 (D. Az. Sept. 16, 2016).

67 *Id.* at \*125-26.

68 *Id.* at \*128.

69 *Id.*

70 *Id.* at \*130.

### c. Proportionality—Analysis

As the Rolling Stones observed:

“You can’t always get what you want  
But if you try sometimes well you might find  
You get what you need.”<sup>71</sup>

This could be the overarching way to think about proportionality issues, specifically:

- Courts will reward those who seek what they need, rather than what they want;
- Courts will expect all parties to address the proportionality factors;
- Relevant evidence need not be produced if such discovery is disproportionate;
- Courts will typically rely on the responding party for information on the costs of producing requested discovery;
- If the proposed discovery does not seem likely to generate useful information, the burden on the demanding party is essentially insurmountable, particularly if costs are substantial;

An archaic computer system will not save a responding party if the proportionality factors otherwise favor production.

## 2. Spoliation—Sanctions

Last year’s rule amendments added a new subsection (e) to Federal Rule of Civil Procedure 37. This change limited the circumstances under which the most powerful spoliation sanctions could be imposed. This subsection provides that:

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information’s use in the litigation may:
  - (A) presume that the lost information was unfavorable to the party;
  - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
  - (C) dismiss the action or enter a default judgment.

---

71 The Rolling Stones, “You Don’t Always Get What You Want” from the Rolling Stones’ 1969 album Let it Bleed. Lyrics at <http://www.azlyrics.com/lyrics/rollingstones/youcantalwaysgetwhatyouwant.html>.

## a. Decisions on Spoliation Sanctions by Federal Courts in California

*Nuvasive, Inc. v. Madsen Medical, Inc.*<sup>72</sup> is a decision vacating a prior order for sanctions for spoliation because “the Court did not make any finding that NuVasive intentionally failed to preserve the text messages so that defendant could not use them in this litigation.”<sup>73</sup> “Instead, the Court found that NuVasive was at fault for not enforcing compliance with the litigation hold.”<sup>74</sup>

Based on this record, the court vacated its prior sanction order. However, the court noted that the amended rule does not preclude a jury from hearing about destruction of evidence. As a consequence, the court allows the parties “to present evidence to the jury regarding the loss of electronically stored information and will instruct the jury that the jury may consider such evidence along with all other evidence in the case in making its decision.”

*InternMatch, Inc. v. Nxtbigthing, LLC*<sup>75</sup> was a trademark case. Plaintiff claimed that defendant had hijacked its trademark. Defendant countered that it had used the mark before plaintiff, but that the original electronic documents supporting that claim had been destroyed by a power surge caused by lightning strikes.

Because of the destruction of the electronic originals, defendant was going to use paper copies of these documents at trial, created just before the lightning strike incident. The court noted this created a critical problem because the paper documents did not “include valuable information such as the creation and modification history of the files.”<sup>76</sup>

After an extensive review of the evidence that supported defendant’s claim, including defendant’s failure to notify his landlord of the supposed damage from an otherwise unrecognized lightning strike; rejection of his insurance claim; and dissembling about his relationship with an electrician who supposedly repaired damage from the strike, the court concluded that defendant had “willfully failed to preserve relevant evidence.” The court:

- Imposed an adverse inference instruction;
- Denied the ability of the defendant to use the paper documents at trial;
- Ordered defendant to pay a monetary sanction.

---

72 2016 U.S. Dist. LEXIS 8997 (S.D. Cal. Jan. 26, 2016).

73 *Id.* at \*5 (emphasis in original omitted).

74 *Id.* at \*5-6.

75 2016 U.S. Dist. LEXIS 15831 (N.D. Cal. Feb. 8, 2016).

76 *Id.* at \*15-16.

## **b. Decisions on Spoliation Sanctions by Federal Courts Outside of California**

*O’Berry v. Turner*<sup>77</sup> arose from an accident involving a truck and a car. At issue in this decision was a demand for the truck driver’s driving log and electronically stored information from PeopleNet concerning the truck he was driving.

Electronic driver logs contain information on miles driven, hours driven, and starts and stops. The PeopleNet data includes information generated 30 seconds before and 30 seconds after a “triggering event,” like an accident. For these 30-second periods, the data retained includes speed, revolutions per minute, switches and odometer data.<sup>78</sup>

The truck driver’s manager did not retain the electronic versions of either the driver log or the PeopleNet data. Rather, he printed reports of the log and placed it in a manila folder. The manila folder was lost during a move during which the manager was absent.

The court concluded that “[a]ll of these facts, when considered together, lead the court to conclude that the loss of the at-issue ESI was beyond the result of mere negligence. Such irresponsible and shiftless behavior can only lead to one conclusion—that ADM and Archer Daniels Midland Company acted with the intent to deprive Plaintiff of the use of this information at trial.”<sup>79</sup> Based on this assessment, the court imposed an adverse inference instruction sanction on defendants.

*Cat3, LLC v. Black Lineage, Inc.*<sup>80</sup> was a case about alleged infringement of a trademark. Of particular importance was when the defendant became aware of the other trademark.<sup>81</sup> After an extended investigation that included a forensic examiner, it was found that plaintiff had two versions of critical e-mails. In the set initially turned over to the defendants, the e-mail domain names included the disputed trade name. However, just underneath these versions, the examiner found a virtually identical copy with domain names that did not contain the disputed mark.

Magistrate Judge Francis determined that he could proceed either under Rule 37 or under the inherent powers of the court. If, however, he proceeded under the inherent powers of the court, he determined that “clear and convincing evidence” of spoliation is required.<sup>82</sup> The court concludes: “There is clear and convincing evidence, then, that the plaintiffs manipulated the emails here in order to gain an advantage in litigation. To be sure, that evidence is largely circumstantial. But circumstantial evidence may be accorded equal weight with direct evidence.”<sup>83</sup>

---

77 2016 U.S. Dist. LEXIS 55714 (M.D. Ga. Apr. 27, 2016).

78 *Id.* at \*7.

79 *Id.* at \*13.

80 164 F. Supp. 3d 488 (S.D.N.Y. 2016).

81 *Id.* at 491.

82 *Id.* at 499.

83 *Id.* at 500.

Although more substantial sanctions could have been imposed, the court imposes a two-part remedy: (1) plaintiffs cannot use their versions of the disputed e-mails at trial, and (2) plaintiffs must pay all reasonable costs and fees “incurred by the defendants in establishing plaintiffs’ misconduct and securing relief.”<sup>84</sup>

*GN Netcom, Inc. v. Plantronics, Inc.*<sup>85</sup> was a case involving alleged monopolization, unfair competition and tortious interference arising from Plantronics’ implementation and enforcement of its Plantronics Only Distributor program.<sup>86</sup>

Just as the case commenced, Plantronics’ vice president for sales, the executive responsible for the Plantronics Only program, directed his subordinates to delete specific e-mails and e-mail chains. He himself also permanently deleted between 36,000 to 90,000 e-mails.

Plantronics sought to defend itself by arguing that the company had set a litigation hold, so should not be responsible for the VP’s actions. The court found this unpersuasive because (1) the company would get the benefit of his actions and (2) evidence indicated that Plantronics was on notice that the executive was destroying e-mails. Specifically, the court found that the vice president “acted in bad faith with an intent to deprive GN of discovery, and given his position as a senior executive. . . [so his] actions undertaken in bad faith can properly be attributed to Plantronics.”<sup>87</sup>

The court imposes dramatic sanctions: (1) Monetary sanctions for reasonable fees and costs incurred by plaintiff leading up to the order; (2) A “punitive sanction” in the amount of \$3 million; (3) A possible evidentiary sanction if requested by plaintiff and considered reasonable when requested; (4) An adverse inference instruction.

### **c. Spoliation Sanctions-Analysis**

Courts are not finding it difficult to impose substantial sanctions on egregious instances of spoliation behavior under amended Rule 37. A few specific observations:

- Courts are willing to proceed under either Rule 37 or their own inherent power to protect the integrity of the judicial process;
- Courts are drawing inferences from circumstantial evidence to support the intent requirement of Rule 37(e);
- Courts are prepared to punish bad conduct severely.

---

84 *Id.* at 502.

85 2016 U.S. Dist. LEXIS 93299 (D. Del. Jul 12, 2016).

86 *Id.* at \*2.

87 *Id.* at \*25.

## VI. TRIAL

### A. Northern District Court Judge Requires Disclosure of Social Media Use in Jury Selection

*Oracle America, Inc. v. Google, Inc.*<sup>88</sup>

Judge Alsup of the Northern District gave lawyers a choice. They could choose to check out the jury venire on social media sites such as Facebook or LinkedIn. However, if they made this choice, they would have to reveal to the venire that they had been rummaging around potential jurors' social media posts.

The court posited three major legal reasons for limiting searches of prospective jurors' social media presence:

- This would erode respect for the court's standard admonition that jurors not conduct their own Internet searches on the lawyers and the case;
- Information from social media sites about jurors would facilitate improper personal appeals to particular jurors via jury arguments or examinations patterned after preferences discernable from social media research;

Jurors are not "public" persons, therefore, their privacy should be protected.<sup>89</sup>

Although the court indicated that it had discretion to impose an outright ban on social media searches, it offered additional time for voir dire if all parties would forswear use of social media searches of potential jurors.<sup>90</sup> In making this offer, the court observed that a recent ABA ethics opinion permitted lawyers to conduct "passive reviews" of potential jurors' social media. However, the ABA "cautioned that judges may limit the scope of the searches that counsel could perform regarding that juror's social media 'if a judge believes it to be necessary, under the circumstances of a particular matter. . .'"<sup>91</sup>

This is a reasoned decision that many judges may find attractive given the concerns jurors (and judges) have about jurors losing their privacy simply because they serve on a jury. On the other hand, Judge Alsup nicely summarizes the kinds of useful information that can be obtained from popular social media sites like Facebook, LinkedIn and Twitter.<sup>92</sup>

---

88 172 F. Supp. 3d 1100 (N.D. Cal. 2016).

89 *Id.* at 1102-03.

90 *Id.* at 1103.

91 *Id.* at 1107.

92 *Id.* at 1105-06.

## VII. PATENT PROCEDURE

### A. U.S. Supreme Court Affirms PTAB Procedures

#### *Cuozzo Speed Technologies, LLC v. Lee*<sup>93</sup>

This is the first case to reach the U.S. Supreme Court on the operations of the Patent Trials and Appeals Board (PTAB).<sup>94</sup> The Court affirmed two major aspects of PTAB's procedures:

- In a challenge to PTAB's decision to consider the obviousness of claims not specifically raised by the petitioner, the Court affirmed the statutory "no appeal" rule, except in circumstances in which the decision involved are "closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review."<sup>95</sup>
- The Court rejected petitioner's argument that PTAB should use the standard used by the Federal Circuit on the scope of claims, endorsing PTAB's regulatory authority to use a "broadest reasonable interpretation" standard, and suggesting that such a standard encourages patent applicants to "draft [their claims] narrowly."<sup>96</sup>

This continues PTAB's impressive string of victories protecting its stringent review of low quality patents.

## VIII. COPYRIGHT PROCEDURE

### A. U.S. Supreme Court Clarifies Standard for Determining Fee Awards in Copyright Actions

#### *Kirtsaeng v. John Wiley & Sons, Inc.*<sup>97</sup>

Petitioner came to the United States to study mathematics. While at Cornell, he observed that textbooks sold in the U.S. were far more expensive than those available in his native Thailand. He began importing books from Thailand, and was ultimately sued by Wiley for infringement of their copyrights. Petitioner successfully argued that the first-sale doctrine applied, and he could do what he wished with books he had purchased abroad.

---

93 136 S. Ct. 2131 (2016).

94 For further discussion of PTAB, please see Thomas Greene and Thomas A. Papageorge, *Update on California State Antitrust and Unfair Competition Law and Federal and State Procedural Law*, 23(1) COMPETITION: J. ANTL. & UNFAIR COMP. L. SEC. ST. B. CAL. (Spring 2014), and Thomas Greene and Thomas A. Papageorge, *California State Antitrust and Unfair Competition Law and Federal and State Procedural Law*, 24(1) COMPETITION: J. ANTL. & UNFAIR COMP. L. SEC. ST. B. CAL. No. 1 (Spring 2015).

95 *Cuozzo*, 136 S. Ct. at 2141.

96 *Id.* at 2144-45.

97 136 S. Ct. 1979 (2016).

Petitioner sought \$2 million in fees and costs from Wiley under the Copyright Act. The Supreme Court noted that Section 505 of the Copyright Act<sup>98</sup> “authorizes fee-shifting, but without specifying standards that courts should adopt, or guideposts they should use in determining when such awards are appropriate.”<sup>99</sup>

The high court concludes that “objective reasonableness” of the losing party’s case is “an important factor in assessing fee applications—not the controlling one.”<sup>100</sup> The Court notes that trial courts “must take into account a range of considerations beyond reasonableness,” including potential litigation misconduct and repeated instances of overaggressive assertions of copyright claims. The case was remanded because of the Court’s perception that in Second Circuit courts, the objective reasonableness test had ossified into the exclusive test of whether fees could be shifted.<sup>101</sup>

## **IX. NEW FEDERAL LAWS, REGULATIONS AND RULES**

### **A. Congress Creates New Federal Cause of Action for Taking of Trade Secrets**

#### ***Defend Trade Secrets Act of 2016***<sup>102</sup>

The new Defend Trade Secrets Act was enacted on May 11, 2016. The Act provides for:

- A private action, under which the trade secret owner may seek an ex parte order “providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.”<sup>103</sup>
- Potential remedies include injunctive relief and damages for actual loss and unjust enrichment.<sup>104</sup>
- An increase in the fine available in a criminal action from a maximum of \$5 million to “the greater of \$5,000,000 or 3 times the value of the stolen trade secret to the organization, including expenses of research and design and other costs of reproducing the trade secret that the organization has thereby avoided.”<sup>105</sup>

The Defend Trade Secrets Act provides a federal alternative to actions under California’s Uniform Trade Secrets Act.<sup>106</sup> If you handle trade secret issues, this is a statute you need to review closely.

---

98 Codified at 17 U.S.C. § 505.

99 *Kirtsaeng*, 136 S.Ct. at 1984–85.

100 *Id.* at 1988.

101 *Id.* at 1988–89.

102 Pub. L. No. 114-153 (2016).

103 18 U.S.C. § 1836(b) (2)(A)(i).

104 18 U.S.C. § 1836(b)(3).

105 18 U.S.C. §1832(b).

106 Cal. Civ. Code §§ 3426–3426.11.

## 1. FTC Increases Penalties Pursuant to the Federal Civil Penalties Inflation Adjustment Act

### *Adjustment of Civil Monetary Penalty Amounts*<sup>107</sup>

The Federal Civil Penalties Inflation Adjustment Act of 1990<sup>108</sup> authorized federal agencies to increase civil penalties to reflect inflation. On June 30, 2016, the Federal Trade Commission amended 16 C.F.R. section 1.98 to reflect these increases. While all penalties were increased, those most important to Section members are:

- Section 7(A)(g)(1) of the Clayton Act (premerger filing notification violations under the Hart-Scott-Rodino Act)—Increase from \$16,000 to \$40,000.
- Section 11(i) of the Clayton Act (violations of cease and desist orders issued under Clayton Act section 11(b))—Increase from \$8,500 to \$21,250.
- Section 5(l) of the FTC Act (violations of final Commission orders under section 5(b) of the FTC Act)—Increase from \$16,000 to \$40,000.
- Section 5(m)(1)(A) of the FTC Act (unfair or deceptive acts or practices)—Increase from \$16,000 to \$ 40,000.
- Section 5(m)(1)(B) of the FTC Act (unfair or deceptive acts or practices)—Increase from \$16,000 to \$40,000.

These new penalties became effective on August 1, 2016, and apply to violations that predate the effective date.<sup>109</sup>

## 2. New Rules Effective December 1, 2016

On April 28, 2016, the U.S. Supreme Court forwarded Congress proposed changes in the Federal Rules of Bankruptcy Procedure, Appellate Procedure, Civil Procedure and Criminal Procedure.<sup>110</sup> Changes most likely to affect Section members include:

**(1) Appellate Procedure.** The major change is a recalculation of the page limits available for appellate briefs and motions. In 1998, the rules converted pages based on an estimated 280 words per page. In this round of changes, it was assumed that one page represented 260 words. For a principal brief, this conversion results in a limit of 13,000 words, rather than the prior 14,000 words.<sup>111</sup> This represents a reduction of 3-4 pages, depending on which conversion factor one uses.

---

107 16 CFR Part 1, 81 Fed. Reg. 42476 (June 30, 2016).

108 Pub. L. No. 114-74 (2015).

109 Adjustments of Civil Monetary Penalty Amounts, 81 Fed. Reg. 42478; see also Pub. L. No. 114-74, 701(b)(3).

110 Amendments Adopted by Supreme Court—Pending Congressional Review, available at <http://www.uscourts.gov/rules-policies/pending-rules-amendments>; see also <https://www.supremecourt.gov/orders/ordersofthecourt/15>.

111 See, e.g., Advisory Note to Amended Rule 32(a)(7).

This slim-down is reflected in all appellate pleadings. The fastest way to assess the new limits is to review the Appendix, located after a new Form 7.

Amended Rule 29(b) provides new guidance on amici briefs during consideration of whether to grant rehearing. Amici briefs supporting a petition for rehearing are due “no later than 7 days after the petition is filed.”<sup>112</sup>

**(2) Civil Procedure.** This year’s amendments are far less substantial than last year’s. Rule 4(m) provides that if a defendant is not served within 90 days after the complaint is filed, the court must dismiss without prejudice. There are exceptions to this rule recognizing that service in other countries can take longer than 90 days. Prior to this year’s amendments, these exceptions were handled as cross-references to Rule 4(f) (service on an individual in a foreign country) and Rule 4((j)(1) (service on a foreign country). This left unclear what happens when serving a corporation or other similar entity. This is fixed by adding a new cross-reference to Rule 4(h)(2), which addresses service on business entities at a place outside any judicial district of the United States.

Amended Rule 6 may be a sleeper. Hitherto three days were added to time limits for responding to motions or other pleadings on the assumption that such paper would be served by mail. This makes no sense for electronic filings. Rule 6(d) is clarified to limit this 3-day extension to situations other than electronic filings.

**(3) Criminal Procedure.** There are two major changes in the Rules of Criminal Procedure. Rule 4 is adjusted to address a “gap” in the current rule, which currently makes no provision for organizational defendants who fail to appear in response to a criminal summons.<sup>113</sup>

The second is an amendment to Rule 41(b)(6) that provides that “a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within *or outside the district*.”<sup>114</sup> This authority is cabined in by amended subparagraphs (b)(6)(A) (location of information not known) and (b)(6)(B) (if the media have been damaged or the information is contained on computers in multiple districts).

## **B. New State Laws and Rules**

### **1. New State Law: AB 1909 (Lopez)—Falsifying Evidence**

This legislation amends section 141 of the Penal Code. Prior law made it a misdemeanor for a person and a felony for a peace officer to knowingly plant, manufacture or conceal evidence with the specific intent that the action would result in a person being charged with a crime.

---

112 Amended Fed. R. App. P. 29(b)(5).

113 Advisory Note for Amended Rule 4.

114 Emphasis added.

This law makes it a felony for any “prosecuting attorney” to “alter, modify, or withhold” “relevant exculpatory material or information” with the specific intent that the evidence will be concealed “upon a trial, proceeding or inquiry.” Governor Brown signed this legislation on September 30, 2016, and it will become effective January 1, 2017. This bill was prompted by alleged withholding of evidence by the Orange County District Attorney’s Office.<sup>115</sup>

## 2. New State Rules

The California courts have issued a number of new rules effective in 2016.<sup>116</sup> There are two that may be significant to Section members.

First, until recently, a grant of review by the California Supreme Court resulted in automatic depublication of the relevant lower court opinion. This, in turn, made such decisions uncitable. Amended Rule 8.1105, effective July 1, 2016, ends this practice, but requires that any such lower court decision be “accompanied by a prominent notation advising that review by the Supreme Court has been granted.”<sup>117</sup> The Supreme Court retains authority to order that an opinion certified for publication by a lower court is not to be published or that an opinion not certified for publication be published. The Court also retains the power to order depublication of part of an opinion at any time after granting review.<sup>118</sup>

A distant second are amendments to the rules applicable to expedited jury trials.<sup>119</sup> Adjustments appear to be minor. For example, the time allowed for each side—including voir dire—is increased from 3 hours to 5 hours.<sup>120</sup>

---

115 C. Goffard, Prosecutors who withhold or tamper with evidence now face felony charges, *Los Angeles Times* (Oct. 4, 2016), available at <http://www.latimes.com/local/lanow/la-me-prosecutor-misconduct-20161003-snap-story.html>.

116 California Courts, New & Amended Rules, at <http://www.courts.ca.gov/3025.htm>.

117 Cal. Rules of Court, rule 8.1105(e)(1)(B).

118 Cal. Rules of Court, rule 8.1105(e)(2).

119 Cal. Rules of Court, rule 3.1545 *et seq.*

120 Cal. Rules of Court, rule 3.1550.

# CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW UPDATE: SUBSTANTIVE LAW

By Thomas A. Papageorge<sup>1</sup>

## I. INTRODUCTION

This outline provides a selection of litigation developments that may be of particular interest to the members of the Antitrust, Unfair Competition Law and Privacy Section presenting developments in cases brought under the Cartwright Act, the Unfair Practices Act, the Consumer Legal Remedies Act, the Unfair Competition Law, and False Advertising Law. The outline also highlights developments regarding covenants not to compete and privacy law.

## II. CARTWRIGHT ACT

### A. First Appellate District Revives Class Action against Ford Canada

#### *In re Automobile Antitrust Cases I and II*<sup>2</sup>

The First Appellate District breathed new life into a long-pending California class action against carmaker Ford Motor Co. of Canada and others, and in doing so provided a detailed insight into the contemporary application of the pleading standards governing Cartwright Act conspiracy cases after *Aguilar v. Atlantic Richfield Co.*<sup>3</sup>

In 2003, groups of California car purchasers brought later-consolidated class actions alleging that Ford Motor Co. (Ford Motor), Ford Motor Co. of Canada (Ford Canada), and various other car manufacturers, distributors, and trade associations violated the Cartwright Act and the Unfair Competition Law by conspiring to prevent the export of Canadian cars into California. In July of 2016, at the end of a decade-plus litigation process that eliminated many of the original carmaker defendants, the First Appellate District affirmed summary judgment as to defendant Ford Motor Co., but reversed the Superior Court's grant of summary judgment as to Ford Canada.

The First Appellate District, per Judge Reardon, first resolved key evidence questions, and then held that under the conspiracy pleading standards of *Aguilar*, the evidence of Ford Motor's alleged coordination with competitors and others was not sufficient to allow a jury to conclude that it was "more likely than not" that it was part of an unlawful agreement. However, as to Ford Canada, the appellate court found that plaintiffs had introduced sufficient evidence "that tends to exclude . . . the possibility

---

1 Thomas A. Papageorge is the head of the Consumer Protection Unit, San Diego District Attorney's Office. The views expressed in this Article are those of the author and do not necessarily reflect those of the San Diego District Attorney's Office. This Article is adapted from a presentation delivered at the Golden State Antitrust, Unfair Competition and Privacy Law Institute on November 3, 2016 and reflects developments as of that date.

2 1 Cal. App. 5th 127 (2016).

3 25 Cal. 4th 826 (2001).

that the [defendants] acted independently rather than collusively,” necessitating remand for further proceedings as to that defendant.<sup>4</sup>

*Factual background.* At issue was an alleged industrywide reaction by carmakers and others to the problem of “cross-border sales” of new cars. During 2001 to 2003, arbitragers purchased new cars in Canada at favorable prices (given changing currency exchange rates) and then brought those cars into the U.S., in violation of carmaker anti-export policies, for resale at prices lower than U.S. dealers could charge. The plaintiffs alleged that the major carmakers and various distributors and trade associations conspired to strengthen and enforce their anti-export policies to halt this arbitrage process, resulting in unlawful higher prices for U.S. car buyers.

Over the lengthy course of the litigation, most of the defendant car manufacturers, including GM and Chrysler affiliates and a number of international carmakers, were dismissed out of the case, went bankrupt, or settled. Ford Motor and its Canadian affiliate were the principal remaining defendants. The Superior Court ultimately certified the class but granted the summary judgment motions of both Ford Motor and Ford Canada.

**Evidence admissibility.** As a key threshold issue, the First District decided the admissibility of several crucial portions of the plaintiffs’ evidence. Most important was the statement of a Toyota Canada executive, Pierre Millette, who testified that at a major trade group meeting “everyone supported the concept of trying to keep the vehicles in Canada” and that there was “some consensus” on the anti-export plan among “everyone at the meeting.”

The court concluded that Millette’s testimony about the “consensus” was not subject to exclusion as hearsay since the testimony was his “general impressions and conclusions” rather than the reporting of third-party statements.<sup>5</sup> And testimony from his “personal knowledge and observations” was not inadmissible expert opinion evidence.<sup>6</sup>

**Sufficient evidence to establish conspiracy.** The First Appellate District next analyzed the plaintiffs’ evidence in order to rule on the Superior Court’s grant of summary judgment in favor of both Ford Motor and Ford Canada. The appellate court expressly undertook to determine if the evidence presented met the California Supreme Court’s standard for adequate pleading of agreement as enunciated in *Aguilar v. Atlantic Richfield Co.* There the Supreme Court required that a trial court ruling on Cartwright Act conspiracy pleadings must determine that there is sufficient evidence to permit a reasonable jury to conclude that “it is more likely than not” that a defendant entered into an illegal agreement with another alleged co-conspirator.<sup>7</sup>

In contemporary antitrust pleading analysis after *Mitsubishi*, *Twombly*, and *Aguilar*, this determination turns on the sufficiency of the so-called “plus factors” that tend to eliminate the possibility of independent decision-making by the alleged conspirators.

---

4 1 Cal. App. 5th at 152 (citations omitted).

5 Id. at 144.

6 Id. at 147.

7 Id. at 151.

**Ford Motor.** As to Ford Motor Co., the First District affirmed the Superior Court’s grant of summary judgment, finding that the plaintiffs’ “plus factor” evidence was insufficient to adequately show Cartwright Act conspiracy.

First, the appellate court determined that, under the intracorporate conspiracy standard of *Copperweld Corp. v. Independence Tube Corp.*,<sup>8</sup> the communications between Ford Motor and its wholly-owned Canadian subsidiary Ford Canada were not probative evidence of illegal conspiracy since the two related firms were not separate entities capable of antitrust conspiracy. Next, the court ruled that Ford Motor’s motive to stop cross-border sales could not demonstrate conspiracy by itself without more. Finally, the court ruled insufficient the plaintiffs’ proof of internal messages within the corporation and their proof of Ford Motor’s efforts to gather information about other competitors’ actions.

Based on this finding of insufficiently probative “plus” factors, the court ruled that no reasonable jury could properly conclude that Ford Motor had entered into an illegal agreement.<sup>9</sup>

**Ford Canada.** As to Ford Canada, the Court of Appeal again applied the *Aguilar* standard but reached a different result, holding that the plaintiffs’ evidence here was sufficient to permit a jury to find Ford Canada had engaged in an unlawful agreement. At the outset, the appellate court rejected Ford Canada’s argument that Ford’s long history of anti-export policies prior to the alleged conspiracy disproved the existence of the alleged unlawful agreement, concluding that even collusive agreement to perpetuate existing industry policies could form the basis for a Cartwright Act violation.<sup>10</sup>

The First District then considered the evidence supporting the theory of an alleged unlawful industry agreement involving Ford Canada. The court evaluated the plaintiffs’ additional “plus” factors, including the motivations of the alleged conspiracy group, the communications among the defendants aimed at reducing the cross-border sales, the efforts of Ford Canada and others to limit exports, and the information shared among the distributors.

Unlike the proof regarding Ford Motor, this evidence was sufficient for a reasonable jury to conclude that Ford Canada was party to an anticompetitive conspiracy. Taken together, the Millette testimony, the meeting evidence, and the other contextual factors constituted “evidence that tends to exclude the possibility that the alleged co-conspirators acted independently rather than collusively. Thus, [the evidence] is sufficient to support reversal of the trial court’s summary judgment decision in favor of Ford Canada.”<sup>11</sup>

**Conclusion.** This careful differentiation between these related fact-patterns is of special interest to all California practitioners dealing with Cartwright Act conspiracy cases. Here, as to one defendant, the First District found insufficient the plaintiffs’

---

8 467 U.S. 752 (1984).

9 *In re Auto. Cases I and II*, 1 Cal. App. 5th at 159.

10 *Id.* at 160.

11 *Id.* at 168 (internal citations omitted).

evidence of intracorporate discussions of plans, invitations to meet with competitors, and certain types of information exchanged among competitors—factors that have been used successfully in prior federal and state collusion cases. But the same court found credible witness testimony, meeting details, and certain related facts sufficient to meet the plaintiffs’ burden as to another defendant.

A review of the types of “plus factors” that did—and did not—suffice to support an inference of agreement here will be important to those litigating Cartwright Act collusion cases and especially to those designing discovery plans to search for evidence of the requisite factors.

**Note on federal court analysis.** The First District also provided an important reminder for California practitioners in the post-CAFA era when many state law class action claims, including antitrust and consumer claims, are pursued in federal court. In the First District’s review of the issue of Cartwright Act conspiracy here, the court’s opinion specifically noted that the federal district court’s previous analysis of the viability of state law conspiracy claims “was not binding on [the California court] in any way.”<sup>12</sup>

## **B. Second District Affirms Summary Judgment for DirecTV**

### ***Basic Your Best Buy, Inc. v. DirecTV, Inc.***<sup>13</sup>

In an unpublished decision providing an insight into state group boycott and distributional restraints analysis, the Second Appellate District affirmed a trial court’s grant of summary judgment to DirecTV in an antitrust lawsuit brought by plaintiff Basic Your Best Buy (Basic), one of DirecTV’s previous authorized retailers.

Basic, terminated as a reseller by DirecTV, claimed it was then forced to sell its valuable sales leads at below-market prices because of DirecTV’s collusion with remaining retailers who would have bid more for the leads. Basic sued DirecTV under the Cartwright Act, alleging a conspiracy to restrain trade consisting of DirecTV’s actions prohibiting other dealers from bidding on Basic’s sales leads, which actions limited competition in the market for those sales leads.

The Second District affirmed the trial court’s grant of summary judgment, holding that DirecTV was not a horizontal competitor of its alleged co-conspirators, the authorized resellers barred from bidding on the leads. Regarding the relationship between DirecTV and its resellers, the court interpreted the opinion in *Bert G. Gianelli Distributing Co. v. Beck & Co.*<sup>14</sup> to require that the plaintiff in a group boycott case involving a supplier must produce evidence that horizontal competitors “used their economic power or position to influence the manufacturer to act, not for its own advantage, but solely for the advantage

---

12 *Id.* at 137, n.8.

13 No. B258061 (Cal. Ct. App. 2nd Dist., Jan. 29, 2016) (unpublished). Unpublished cases are presented here for their insights into relevant legal trends, but such opinions may not be cited or relied on by a court or a party in any action in California state courts (*see generally*, California Rules of Court, rule 8.1115; *Dunbar v. Albertson’s, Inc.*, 141 Cal. App. 4th 1422 (2006); *Faitz v. Ruegg*, 114 Cal. App. 3d 967 (1981).

14 172 Cal. App. 3d 1020 (1985).

of those competitors.”<sup>15</sup> The appellate court held that in fact DirecTV had coerced its authorized dealers, rather than the reverse, so there could be no per se horizontal group boycott on these facts.<sup>16</sup>

The appellate court also considered the plaintiff’s vertical restraints theory and concluded that Basic had provided insufficient product market evidence to support a vertical price-fixing cause of action.<sup>17</sup>

This unpublished opinion provides an insight into one California appellate court’s analysis of group boycotts with vertical and horizontal elements. In particular, it raises a significant question whether the *Gianelli* opinion should be viewed as establishing a more stringent requirement in Cartwright Act cases than is found in analogous federal Sherman Act opinions regarding proof of the requisite horizontal element in such group boycott cases.

### **C. First District Rejects Enforcement of Healthcare Provider’s Arbitration Clause in Cartwright Act and UCL Action**

#### ***UFCW & Employers Benefit Trust v. Sutter Health*<sup>18</sup>**

Plaintiff, a healthcare benefits trust for group of employees (UEBT), brought a putative class action against defendant Sutter Health, a healthcare provider in the trust’s health network, for damages, restitution, and injunctive relief under the Cartwright Act and the Unfair Competition Law (UCL). UEBT claimed that the terms of Sutter Health’s provider contracts effectively prevented its employee members from seeking lower-cost services, forcing the employees to pay supracompetitive prices for Sutter Health’s services.

The Superior Court denied the provider’s motion to compel arbitration on the grounds that the plaintiff UEBT was not a direct signatory to the contract with the arbitration clause, which was signed by a contracting agent for plaintiff. Defendant appealed. The First Appellate District affirmed the Superior Court’s refusal to mandate arbitration, holding that neither the Knox-Keene Act nor the doctrines of equitable or ostensible agency operated to make an arbitration agreement between Sutter Health and a contracting agent for the employees’ healthcare trust binding on the trust itself.

Defendant Sutter Health had moved to compel arbitration on the basis of a mandatory arbitration clause in Sutter Health’s “Provider Contract” with Blue Shield, and also a provision purporting to bind Blue Shield’s payors to that clause. When the plaintiff trust later contracted to use Blue Shield’s provider network, it did so under an agreement that expressly disavowed any contractual relationship between UEBT and providers. Nonetheless, Sutter Health subsequently claimed that the Provider Contract applied to all disputes between Sutter Health and any payors, via the agreement with contracting agent Blue Shield, even when the payors themselves were not signatories to that contract.

---

15 *Id.* at 1047.

16 *Basic Your Best Buy, Inc.*, *supra* n. 13, slip op. at 12.

17 *Id.* at 15.

18 241 Cal. App. 4th 909 (2015).

The First District affirmed the trial court’s denial of this motion to compel arbitration, holding that the healthcare benefits trust is not bound to arbitrate its claims “pursuant to an agreement it had not signed or even seen.”<sup>19</sup>

In so ruling, the court held that: (1) The Knox-Keene Health Care Service Plan Act<sup>20</sup> does not require adherence to the arbitration provision in the underlying contract since that statute protects health care providers from being compelled to adhere to contracts they did not approve (it does not regulate the conduct or duties of payors in the healthcare system); (2) Plaintiff did not avail itself of the terms of the Provider Contract, so it was not equitably estopped from rejecting the arbitration provision in that contract; and (3) Ostensible authority did not apply here, since the employees’ use of Blue Shield cards to obtain medical services from Sutter Health did not bind them to this contract: “[W]e fail to see how UEBT members’ use of Blue Shield cards to obtain services from Sutter providers reasonably suggests that UEBT had authorized Blue Shield to bind UEBT to all terms of the Provider Contract.”<sup>21</sup>

#### **D. Other Cartwright Act developments:**

##### ***Salveson v. JP Morgan Chase & Co.***<sup>22</sup>

The District Court here ultimately dismisses the Cartwright Act cause of action brought against the defendant national bank, but the court provides a detailed discussion of its interpretation of Cartwright Act standing, including the observation: “When considering the application of the directness factor to a Cartwright Act claim, the Court is aware that California law allows recovery for antitrust injuries that result from a more attenuated and indirect causal chain than is permitted under federal law.”<sup>23</sup>

##### ***Oneok, Inc. v. Learjet, Inc.***<sup>24</sup>

The U.S. Supreme Court noted that the states have “long recognized power to regulate combinations in restraint of trade” in tandem with the Sherman Act, citing *California v. ARC America Corp.*<sup>25</sup>

##### ***In re Capacitors Antitrust Litigation***<sup>26</sup>

The Northern District of California held here that indirect purchasers of capacitors sufficiently alleged the injury-in-fact required to establish Article III standing to bring their antitrust conspiracy suit against defendant capacitor manufacturers under the Sherman Act, the Cartwright Act, and the UCL.

---

19 *Id.* at 914.

20 Cal. Health & Safety Code § 1375.7(d).

21 *Sutter Health*, 241 Cal. App. 4th at 932.

22 166 F. Supp. 3d 242 (E.D.N.Y. 2016).

23 *Id.* at 263.

24 135 S.Ct. 1591 (2015).

25 490 U.S. 93 (1989); *Oneok*, 135 S.Ct. at 1602.

26 106 F. Supp. 3d 1051 (N.D. Cal. 2015).

## *Feitelson v. Google, Inc.*<sup>27</sup>

Internet users/consumers brought this putative class action against defendant Google, operator of the predominant Internet search engine, alleging that Google restrained trade in the Internet search market by a collusive arrangement with cell phone manufacturers. The District Court granted Google's summary judgment motion, finding the consumers' allegations of antitrust impact and injury too speculative and remote to confer standing, and reiterating that antitrust tying statutes, including California's Cartwright Act tying provision (Cal. Bus. & Prof. Code § 16727), are applicable only to tangible commodities and thus do not apply to services such as the Internet search service here.

### III. UNFAIR PRACTICES ACT

#### A. What "Costs" Count in an Unfair Practices Act Below Cost Pricing Case?

##### *California Public Records Research, Inc. v. County of Stanislaus*<sup>28</sup>

The Unfair Practices Act prohibits businesses from selling any article or product at less than its cost for the purpose of injuring competitors or destroying competition.<sup>29</sup> The courts have held that "cost" in the Unfair Practices Act means fully allocated cost. There are many ways of fully allocating costs, but "[t]o be legally acceptable, the allocation of indirect or fixed overhead costs to a particular product or service must be reasonably related to the burden such product or service imposes on the overall cost of doing business."<sup>30</sup> *California Public Records Research, Inc. v. County of Stanislaus* is largely devoted to a dispute over the appropriate measure of reproduction costs in a Public Records Act matter, but the opinion includes a worthwhile discussion of the "reasonably related" standard used in interpreting "costs."<sup>31</sup>

### IV. COVENANTS NOT TO COMPETE

#### A. First District Upholds Injunction against Enforcing Franchisor's Non-Competition Clause

##### *Robinson v. U-Haul Co. of California*<sup>32</sup>

Plaintiff Robinson, a former U-Haul franchisee, pursued two lengthy lawsuits against franchisor U-Haul, alleging violations of California's prohibition on covenants not to compete (Cal. Bus. & Prof. Code § 16600 *et seq.*) and of the Unfair Competition Law. At issue was the non-competition clause in U-Haul's standard franchising contract and U-Haul's alleged long history of malicious prosecution in enforcing the clause it knew to be unlawful in California.

---

27 80 F. Supp. 3d 1019 (N.D. Cal. 2015).

28 246 Cal. App. 4th 1432 (2016).

29 Cal. Bus. & Prof. Code § 17043.

30 *Turnbull & Turnbull v. ARA Transp., Inc.*, 219 Cal. App. 3d 811, 822 (1990).

31 246 Cal. App. 4th at 1455-56.

32 4 Cal. App. 5th 304 (2016).

After ten years of proceedings, during which U-Haul eventually ceased enforcement of its invalid non-competition clause, the Superior Court entered judgment for plaintiff Robinson on his malicious prosecution and UCL causes of action. The trial judge then issued a permanent injunction and an order authorizing plaintiff to recover \$834,008 in private attorney general's fees pursuant to Civil Code section 1071.5. Defendant appealed the injunction and the fees order.

The First Appellate District upheld both trial court orders, after first commenting that the form of noncompetition agreement used by U-Haul was certainly unlawful under section 16600, and noting that the defendant no longer contested this.

As to the injunction, the First District concluded that where an unlawful practice has ceased, “[t]here is case authority saying an injunction may be denied on that basis . . . [b]ut simply because a request for permanent injunctive relief *may* be denied based on voluntary submission to its terms does not mean such a request *must* be denied on that basis.”<sup>33</sup>

The trial court's decision properly depends on the case circumstances. “Where, as here, a company has not taken action to bind itself legally to a violation-free future, there may be reason to doubt the bona fides of its newly established law-abiding policy.”<sup>34</sup> Further, where, as here, there is evidence of a long-term practice, the trial court has good reason to impose an injunction:

“Evidence of such an ingrained, long-term, knowingly illegal corporate practice provides support for a finding of likely repetition in the future.”<sup>35</sup>

The trial court's injunction was affirmed, as was the trial court's determination that this was a matter of special public interest warranting private attorney general fees.

## V. CONSUMER LEGAL REMEDIES ACT

### A. Fourth District Rejects Inadequate Class Settlement in Consumer Legal Remedies Act (CLRA)/False Advertising Law (FAL) Weight Loss Case

#### *Duran v. Obesity Research Institute, LLC*<sup>36</sup>

In a strongly critical opinion, the Fourth Appellate District rejected as unfair and inadequate the proposed nationwide settlement in a consumer class action under the CLRA, UCL, and FAL against weight-loss supplement firm Obesity Research Institute (ORI) and Wal-Mart Stores (Wal-Mart).

Plaintiff Duran filed a putative nationwide class action alleging that the defendants falsely claimed that ORI's products, Lipozene and MetaboUp, have “miracle” weight-loss benefits allowing one to lose weight “without changing your lifestyle.” Plaintiff and

---

33 *Id.* at 315 (emphasis in original) (internal citations omitted).

34 *Id.* at 316.

35 *Id.*

36 1 Cal. App. 5th 635 (2016).

defendants then submitted a proposed claims-made nationwide settlement providing that class members submitting a claim without receipt would receive \$15, and those submitting receipt(s) would receive one refund of double the unit price paid (roughly \$28 to \$68). The settlement also provided that ORI would cease making certain assertions in product advertising, and defendants agreed to plaintiff's attorneys' fees of \$100,000.

The Fourth District reversed the trial court's approval of the settlement and remanded with instructions to re-evaluate the fairness of the settlement after adequate notice was provided to the nationwide class. The court first determined that the notice to class members contained three clear factual errors about the settlement, and also that the notice method, using a settlement Web site and publication in *USA Today*, was clearly inadequate. "The judgment must be reversed because the class notice failed in its fundamental purpose—to apprise class members of the terms of the proposed settlement . . ." and "[t]he erroneous notice injected a fatal flaw into the entire settlement process and undermines the court's analysis of the settlement's fairness."<sup>37</sup> Further, the publication notice did not have "a reasonable chance of reaching a substantial percentage of class members."<sup>38</sup> Thus the appellate court remanded for adequate notice and reconsideration after that notice.

The Fourth District was also rejected as inadequate the proposed injunctive relief, which only modestly changed the "lifestyle" claims and only required change from "millions of people" experiencing successful weight-loss to "countless people." The court concluded: "[I]t is difficult to conceive how this injunctive relief adds value."<sup>39</sup>

The appellate court was also harshly critical of the overall fairness of a nationwide class action that would have returned only \$31,800 to victims while securing \$100,000 in attorneys' fees. The court alluded to evidence suggesting potential collusion between plaintiffs' and defense counsel to forestall more meaningful relief in a similar pending action, but ultimately determined "not to resolve these accusations" at this time.<sup>40</sup>

Counsel in consumer class actions should carefully review the court's strongly worded critique of this settlement. The court's ire is thinly veiled and suggests that California courts may scrutinize the fairness of such consumer settlements more closely in the days ahead.

---

37 *Id.* at 638.

38 *Id.* at 651 (citations, quotations omitted).

39 *Id.* at 652.

40 *Id.* at 654, n.5.

## VI. UNFAIR COMPETITION LAW

### A. SCORECARD: Arbitration and Unconscionability Issues in Consumer and Employment Contracts after *Concepcion*, *Sanchez*, and *Iskanian*

The U.S. Supreme Court’s decision in *AT&T Mobility, LLC v. Concepcion*,<sup>41</sup> upholding the preemptive effect of the Federal Arbitration Act (FAA)<sup>42</sup> on inconsistent state policies, has erected a formidable barrier to UCL or FAL actions challenging the unfair business practices or employment policies of defendants using contracts with mandatory arbitration clauses.

Since *Concepcion*, the California Supreme Court has acknowledged (in cases such as *Iskanian v. CLS Transp. L.A., LLC*<sup>43</sup>) the broad preemptive scope of the FAA and has abrogated prior California doctrines limiting mandatory arbitration. However, the relationship between arbitration provisions and unconscionability principles remains the subject of extensive litigation.

Significantly, in the wake of *Iskanian* and the Supreme Court’s 2015 *Sanchez v. Valencia Holding Co.*<sup>44</sup> opinion, plaintiffs are now turning to new legal theories and mechanisms—including the Labor Code Private Attorneys General Act—to reach beyond arbitration clauses and bring disputes over consumer contracts and employment practices before trial courts instead of arbitrators.

The following “scorecard” first reviews the California Supreme Court’s two major statements on arbitration and unconscionability principles in the past two years, and then surveys some of the recent and prominent UCL appellate opinions applying those principles to a variety of factual situations in the post-*Concepcion* legal environment:

#### 1. California Supreme Court Upholds Auto Contract Arbitration Provisions But Affirms Continuing Applicability of Unconscionability to California Contracts

##### *Sanchez v. Valencia Holding Co.*<sup>45</sup>

In *Sanchez v. Valencia Holding Co.*, the lead case on this issue statewide, the Second District Court of Appeal had held that the class-action waiver and arbitration clause in the industry-standard auto contract were unconscionable under general California contract principles, notwithstanding the Federal Arbitration Act and *Concepcion*.<sup>46</sup>

---

41 563 U.S. 333 (2011).

42 9 U.S.C. §§ 1–16.

43 59 Cal. 4th 348 (2014).

44 61 Cal. 4th 899 (2015).

45 *Id.*

46 201 Cal. App. 4th 74 (2011), *rev'd*, 61 Cal. 4th 899 (2015).

In August of 2015 the California Supreme Court delivered its long-awaited opinion, upholding the arbitration clause in the industry-standard auto purchase/sale contract but emphasizing that unconscionability principles remain applicable to all California contracts and must be applied to each set of facts on a case-by-case basis.

## 2. California Supreme Court: *Concepcion* Abrogates *Gentry* But Does Not Bar Labor Code Private Attorneys General Act (PAGA) Actions

### *Iskanian v. CLS Transportation Los Angeles, LLC*<sup>47</sup>

Significantly altering the landscape of labor law rights in California, the Supreme Court held that *Concepcion* impliedly overruled *Gentry v. Superior Court*,<sup>48</sup> and thus mandatory arbitration provisions must be enforced even when they require arbitration of wage and hour issues protected by California’s labor laws. However, the Court also ruled that an arbitration agreement requiring an employee to give up the right to bring representative actions under the Labor Code Private Attorneys General Act (PAGA)<sup>49</sup> is against public policy and unenforceable.

The holding in *Iskanian*, carving out PAGA actions from the realm of private arbitration governed by the FAA, has given rise to a new wave of plaintiffs’ lawsuits and class actions utilizing this exception in employment and wage-and-hour disputes. Examples, among many others, are: *Williams v. Superior Court (Pinkerton Governmental Services, Inc.)*,<sup>50</sup> *Franco v. Arakelian Enterprises, Inc.*,<sup>51</sup> and *Mohamed v. Uber Technologies, Inc.*,<sup>52</sup> discussed below.

## 3. Arbitration Clauses Valid and Enforceable:

*Sandquist v. Lebo Automotive, Inc.*<sup>53</sup> Addressing the “who decides?” (court or arbitrator) issue regarding class arbitration, the California Supreme Court affirmed a Second District decision and held that California contract law, and not federal principles under the Federal Arbitration Act (FAA), governs the question of whether class arbitration is available under a valid California contract. The Court concluded that there is no state law presumption that the “who decides?” question be allocated to a court, rather than to the arbitrator, thus the Supreme Court enforced the contract’s terms specifying that the arbitrator should decide in the instant case. (See further discussion, *infra*.)

---

47 59 Cal. 4th 348 (2014).

48 42 Cal. 4th 443 (2007), *superseded by statute as stated in Vitolo v. Bloomingdale’s, Inc.*, No. CV 097728, 2011 WL 13162460 (C.D. Cal. May 23, 2011).

49 Cal. Labor Code §§ 2698–2699.5.

50 237 Cal. App. 4th 642 (2015).

51 234 Cal. App. 4th 94 7 (2015).

52 836 F.3d 1102 (2016), *amended and superseded on denial of reh’g* by 848 F.3d 1201 (9th Cir. 2017).

53 1 Cal. 5th 233 (2016).

*Nguyen v. Applied Medical Resources Corp.*<sup>54</sup> The Fourth Appellate District enforced the arbitration clause in an employment contract required as a condition of employment, finding no procedural unconscionability since the provision called for arbitration under AAA rules applicable to both parties, and finding no substantive unconscionability as the agreement to arbitrate was a mutually-binding condition of employment. However, under the principle announced in *Lebo Automotive*,<sup>55</sup> the Fourth District held that the trial judge erred in denying class certification rather than referring the class certification decision to the arbitrator as provided in the contract.

*Tompkins v. 23andMe, Inc.*<sup>56</sup> The prevailing-party clause and the forum-selection clause in defendant's contract were not unconscionable where they were expressly bilateral in application and where there was no showing that the expense of arbitration in the designated forum would have imposed an extreme burden on the plaintiffs.

#### 4. Arbitration Clauses Rejected and/or Limited:

*Carlson v. Home Team Pest Defense, Inc.*<sup>57</sup> The First Appellate District held the arbitration provision in a retailer's employment contract was unconscionable and unenforceable notwithstanding the FAA and *Concepcion*. The court expressly relied on the California Supreme Court's opinion in *Sanchez* for the proposition that unconscionability principles remain applicable to California contracts and are not ousted entirely by FAA principles, but rather must be adjudicated on a case-by-case basis. As *Concepcion* itself states, the FAA savings clause allows arbitration terms to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability."<sup>58</sup>

The First District held that the arbitration agreement in this case was both procedurally and substantively unconscionable and was thus unenforceable, and noted that its conclusion was supported by the Supreme Court's opinion in *Sanchez*, which endorsed continued appropriate application of unconscionability principles to California contracts.<sup>59</sup>

*Long v. Provide Commerce, Inc.*<sup>60</sup> The Second Appellate District rejected the enforcement of an arbitration term in internet seller Provide Commerce's online "browsewrap" agreement. The plaintiff consumer did not unambiguously agree to the term, which was only accessible via a hyperlink at the bottom of the computer screen, simply by placing an order through Provide Commerce's online website. The appellate court held that the hyperlink reference did not put the plaintiff on reasonable notice of the website's terms of use.

---

54 4 Cal. App. 5th 232 (2016).

55 1 Cal. 5th 233.

56 840 F.3d 1016 (9th Cir. 2016).

57 239 Cal. App. 4th 619 (2015).

58 *Id.* at 637 (citations, quotations omitted).

59 *Id.* at 640.

60 245 Cal. App. 4th 855 (2016).

***Mango v. College Network, Inc.***<sup>61</sup> The Fourth District rejected enforcement of the arbitration term in the consumer contracts of defendant The College Network, an education company headquartered in Marion County, Indiana. The appellate court found the provision both procedurally and substantively unconscionable, primarily because the forum selection clause required arbitration in Marion County, Indiana, and was thus inherently unequal and unfair.

***Esparza v. Sand & Sea, Inc.***<sup>62</sup> The Second District rejected enforcement of an arbitration clause included in an employer’s “employee handbook” containing “policies, practices, and procedures” of the company, rather than in a mutually agreed employment contract. The employee’s signing of an acknowledgement of receipt of the employees’ handbook was not sufficient to establish the employee’s agreement to a binding arbitration agreement.

***UFCW and Employers Benefit Trust v. Sutter Health.***<sup>63</sup> Plaintiff, an employees’ healthcare benefits trust, brought a class action against defendant Sutter Health, a healthcare provider in the trust’s health network, for damages, restitution, and injunctive relief under the Cartwright Act and the UCL. The healthcare benefits trust claimed that the terms of Sutter Health’s provider contracts effectively prevented its employee members from seeking lower-cost services.

The First Appellate District affirmed the trial court’s refusal to enforce arbitration, holding that neither the Knox-Keene Act nor the doctrines of equitable or ostensible agency operated to make an arbitration agreement between Sutter Health and a contracting agent for the employees’ trust binding on the trust itself. (See discussion in Cartwright Act section, *supra*.)

## **5. Arbitration Clauses Limiting PAGA Rights Rejected:**

***Franco v. Arakelian Enterprises, Inc.***<sup>64</sup> In a case decided earlier but subsequently remanded after *Iskanian*, the Second District held that plaintiff employee’s right to prosecute a Private Attorneys General Act (PAGA) action could not be waived, and that the Federal Arbitration Act (FAA) does not preempt California’s state-law rule precluding pre-dispute waivers of enforcement rights under the PAGA.

The court determined that the class-representative waiver in plaintiff’s employment contract was itself enforceable under the principles of *Concepcion* and *Iskanian*. However, because the rights asserted in an action under PAGA are those of the state rather than of the plaintiff-employee, the right to prosecute such an action cannot be waived by private agreement.

---

61 1 Cal. App. 5th 277 (2016).

62 2 Cal. App. 5th 781 (2016).

63 241 Cal. App. 4th 909 (2015).

64 234 Cal. App. 4th 947 (2015).

*Mohamed v. Uber Technologies, LLC.*<sup>65</sup> The Ninth Circuit distinguishes between two separate forms of defendant Uber’s contract with its drivers, finding one plaintiff’s purported contractual waiver of PAGA rights to be unenforceable, but ruling that the enforceability of another version of the contract must be decided by the arbitrator.

## **6. Supreme Court Addresses “Who Decides?” Issue and Holds the FAA Does Not Override State Law Interpretation of California Contracts**

### *Sandquist v. Lebo Automotive, Inc.*<sup>66</sup>

In a decision with significance for the future viability of class arbitrations, the California Supreme Court has concluded that state contract law, not FAA principles, governs the issue of “who decides?”—the court or the arbitrator—whether class arbitration is available.

Plaintiff, a former employee of defendant Lebo Automotive, filed a class action discrimination complaint against his former employer alleging violations of the Fair Employment and Housing Act (FEHA) and the UCL. After defendant’s successful motion to enforce arbitration, the Second District reversed, finding that the question of whether the parties agreed to arbitration of class claims was for the arbitrator, rather than the court, to decide.

The California Supreme Court granted review and affirmed the Second District’s decision, holding that California contract law, and not federal principles under the Federal Arbitration Act (FAA), govern the question of whether class arbitration is available under a valid California contract. The Court determined that there is no state law presumption requiring that the “who decides?” question be allocated to a court rather the arbitrator.

Writing for the Court, Judge Werdegar concluded: “[W]e agree . . . that the determination whether a particular agreement allows for class arbitration is precisely the kind of contract interpretation matter arbitrators regularly handle. . . . [W]e find nothing in the FAA or its underlying policies to support the contrary presumption, that this question should be submitted to a court rather than an arbitrator unless the parties have unmistakably provided otherwise.”<sup>67</sup> Thus, the trial court’s original choice to decide the class arbitration availability issue itself was reversible error, and the Court remanded for the arbitrator to make the class-arbitration availability decision, as provided in the contract.

The opinion provides further evidence that the current California Supreme Court will seek ways to support the continuing vitality of California contract law principles even as it applies the mandate of the FAA and *Concepcion*.

---

65 836 F.3d 1102 (2016).

66 1 Cal. 5th 233 (2016).

67 *Id.* at 260.

## B. SCORECARD: Preemption of UCL Actions by Federal or State Regulatory Schemes

The California and federal courts continue to wrestle with the multi-faceted issue of the applicability of the Unfair Competition Law to specific business practices and contexts where other regulatory schemes are involved. Claims of federal preemption, or preclusion or bar by state regulatory schemes, have again produced a number of important results this year.

### 1. Holdings of no preemption of UCL action:

***Quesada v. Herb Thyme Farms, Inc.***<sup>68</sup> The California Supreme Court reversed the Second Appellate District and held unanimously that state false advertising claims challenging produce allegedly mislabeled as “organic” are not preempted by the federal Organic Foods Act.<sup>69</sup> (See discussion in False Advertising Law, below.)

***Ebner v. Fresh, Inc.***<sup>70</sup> The Ninth Circuit ultimately upheld the grant of a cosmetic maker’s motion to dismiss plaintiff’s UCL/FAL class action alleging deceptive packaging. However, the plaintiff’s case was not preempted by the federal Food, Drug, and Cosmetic Act<sup>71</sup> since the defendant’s obligations under both the FDCA and California’s Sherman Law<sup>72</sup> are identical. “Because the Sherman Law does not amount to something ‘different from or in addition to’ what federal law already requires, under 21 U.S.C. § 379s [of the FDCA], preemption does not bar Plaintiff’s claim.”<sup>73</sup>

### 2. Holdings of preemption of UCL action:

***People v. Delta Air Lines, Inc.***<sup>74</sup> The California Attorney General’s Office brought a UCL action against defendant Delta Air Lines for alleged violations of California’s Online Privacy Protection Act<sup>75</sup> involving its website and mobile application (Fly Delta), including failure to establish a privacy policy and notify consumers about its uses of the accumulated personal identifying information.

The First Appellate District sustained the trial court’s demurrer without leave to amend, concluding that the Attorney General’s UCL suit was preempted by the federal Airline Deregulation Act<sup>76</sup> (ADA) which expressly bars any action under state law “related to the price, route, or service of an air carrier.” (See further discussion, *infra*.)

---

68 62 Cal. 4th 298 (2015).

69 7 U.S.C. § 6501 *et seq.*

70 838 F.3d 958 (9th Cir. 2016).

71 21 U.S.C. § 301 *et seq.*

72 Cal. Health & Safety Code § 109875 *et seq.*

73 *Ebner*, 838 F.3d at 965.

74 247 Cal. App. 4th 884 (2016).

75 Cal. Bus. & Prof. Code §§ 22575-22579.

76 49 U.S.C. §41713 *et seq.*

The First District summarized: “We therefore hold that state enforcement of the OPPA’s privacy policy requirements as applied to Delta’s Fly Delta mobile application is expressly preempted by the ADA. To compel Delta to comply with the OPPA would effectively interfere with the airline’s “selection and design” of its mobile application, a market mechanism ‘appropriate to the furnishing of air transportation service,’ for which state enforcement has been held to be expressly preempted by the ADA.”<sup>77</sup>

***Roberts v. United Healthcare Services, Inc.***<sup>78</sup> Plaintiffs sued defendant United Healthcare, a healthcare provider, for alleged misrepresentations in marketing Medicare Advantage plans. The Second Appellate District held that the federal Medicare Act expressly preempts this UCL/FAL action, and further concluded that the plaintiffs’ claims of denial of benefits were subject to dismissal for failure to exhaust the administrative remedies of the Medicare Act before proceeding with this action.

### **3. First District Upholds Injunction against Former Practices in UCL/Non-Competition Clause Franchise Case**

#### ***Robinson v. U-Haul Co. of California***<sup>79</sup>

In a longstanding non-competition clause/UCL challenge by former franchisee Robinson against truck-rental franchisor U-Haul, the First Appellate District upheld both the trial court’s injunction and its order for private attorney general’s fees. Defendant appealed, asserting it had ceased enforcement of the unlawful non-competition clause and thus should not be enjoined.

The First District concluded that where an unlawful practice has ceased, “[t]here is case authority saying an injunction may be denied on that basis . . . [b]ut simply because a request for permanent injunctive relief *may* be denied based on voluntary submission to its terms does not mean such a request *must* be denied on that basis.”<sup>80</sup> The trial court’s decision properly depends on the circumstances of the case. “Where, as here, a company has not taken action to bind itself legally to a violation-free future, there may be reason to doubt the bona fides of its newly established law-abiding policy.”<sup>81</sup>

Further, the First District concluded that where there is evidence of a long-term practice, the trial court has good reason to impose an injunction even on behavior that has ceased: “Evidence of such an ingrained, long-term, knowingly illegal corporate practice provides support for a finding of likely repetition in the future.”<sup>82</sup>

The trial court’s injunction was affirmed, as was the trial court’s determination that this was a matter of special public interest warranting private attorney general fees.

---

77 *Delta Airlines*, 247 Cal. App. 4th at 906.

78 2 Cal. App. 5th 132 (2016).

79 4 Cal. App. 5th 304 (2016).

80 *Id.* at 315 (emphasis in original) (internal citations omitted).

81 *Id.* at 316.

82 *Id.*

## VII. FALSE ADVERTISING LAW

### A. California Supreme Court: Federal Organic Foods Act Does Not Preempt FAL/UCL Case

#### *Quesada v. Herb Thyme Farms, Inc.*<sup>83</sup>

Continuing in its mission to instruct that “labels matter,”<sup>84</sup> the California Supreme Court reversed the Second Appellate District and held unanimously that state false advertising claims challenging produce allegedly mislabeled as “organic” are not preempted by the federal Organic Foods Act (OFA).<sup>85</sup>

Plaintiff Michelle Quesada, a purchaser of organic herbs, brought a putative class action against defendant herb grower Herb Thyme Farms, alleging violations of the false advertising law, the UCL, and the Consumers Legal Remedies Act through false claims on product labels that the defendant’s herbs were organic. Herb Thyme Farms allegedly mixed organic and non-organic products in packages labeled “Fresh Organic” and in some cases put entirely non-organic produce into packages so labeled. The trial court granted judgment to defendant Herb Thyme Farms on the pleadings, and the Second Appellate District affirmed.

The Supreme Court reversed and remanded. Writing for the Court, Justice Werdegar concluded that the federal Organic Foods Act does not expressly preempt a suit under California’s general consumer protection laws based on allegedly improper labeling of products as “organic,” nor does the OFA impliedly preempt such a lawsuit under the doctrine of object preemption.<sup>86</sup>

The Court summarized its findings: “When Congress entered the field in 1990, it confined the areas of state law expressly preempted to matters related to certifying production as organic, leaving untouched enforcement against abuse of the label ‘organic.’”<sup>87</sup> Importantly, a “central purpose [of the U.S. Congress in] adopting a clear national definition of organic production was to permit consumers to rely on organic labels and curtail fraud . . . ,” so “prosecution[s] of such fraud . . . can only serve to deter mislabeling and enhance consumer confidence.” Thus, the Court concluded that the Congressional purposes are directly promoted, rather than hindered, by state consumer protection lawsuits of this kind.<sup>88</sup>

---

83 62 Cal. 4th 298 (2015).

84 *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 327 (2011).

85 7 U.S.C. § 6501 *et seq.*

86 *Quesada*, 62 Cal. 4th at 324.

87 *Id.* at 303.

88 *Id.* at 303, 316–17.

## VIII. PRIVACY ISSUES AND PUBLIC ENFORCEMENT ACTIVITIES

### A. AG's UCL Privacy Action against Delta Air Lines Is Grounded by Federal Airlines Deregulation Act

#### *People v. Delta Air Lines, Inc.*<sup>89</sup>

The California Attorney General's Office brought a UCL action against defendant Delta Air Lines for alleged violations of California's Online Privacy Protection Act<sup>90</sup> involving its website and mobile application (Fly Delta), including failure to establish a privacy policy and notify its consumers about its uses of the accumulated personal identifying information.

The First Appellate District sustained the trial court's demurrer without leave to amend, concluding that the Attorney General's UCL suit was preempted by the federal Airline Deregulation Act (ADA),<sup>91</sup> which expressly bars any action under state law that is "related to the price, route, or service of an air carrier."

The First District summarized its holding: "We therefore hold that state enforcement of the OPPA's privacy policy requirements as applied to Delta's Fly Delta mobile application is expressly preempted by the ADA. To compel Delta to comply with the OPPA would effectively interfere with the airline's "selection and design" of its mobile application, a market mechanism 'appropriate to the furnishing of air transportation service,' for which state enforcement has been held to be expressly preempted by the ADA."<sup>92</sup>

### B. District Attorneys and AG Enforce Invasion of Privacy Act in Recording Disclosure Case

#### *People v. Wells Fargo Bank, N.A.*<sup>93</sup>

The District Attorneys of Los Angeles, San Diego, Riverside, Ventura and Alameda Counties and the Attorney General jointly brought a civil law enforcement action under the Unfair Competition Law alleging that defendant Wells Fargo Bank's employees failed to provide timely and adequate notice of Well Fargo's recording of confidential communications between bank employees and its customers, a practice unlawful under California's Invasion of Privacy Act, Penal Code sections 632 and 632.7.

The law enforcement action was concluded with a stipulated final judgment, entered in Los Angeles Superior Court, in which Wells Fargo agreed to provide full and timely disclosure of its recording of its confidential communications with customers and agreed to pay \$8.5 million in civil penalties, agency costs, and restitution.

---

89 247 Cal. App. 4th 884 (2016).

90 Cal. Bus. & Prof. Code §§ 22575-22579.

91 49 U.S.C. §41713 *et seq.*

92 *Delta Airlines*, 247 Cal. App. 4th at 906.

93 LA Super. Ct. No. BC 611105 (Mar. 28, 2016).

# ROUNDUP OF 2016 FEDERAL ANTITRUST AND PRIVACY COURT DECISIONS

By Thomas N. Dahdouh<sup>1</sup>

2016 was marked by several significant defense victories in conduct cases—particularly in the realm of Sherman Act Section 2 monopolization cases. At the same time, the government’s winning streak in merger challenges continued unabated, although two of those wins required a trip to the appellate court. And for the second time in twenty years, the FTC was able to successfully block the merger of Office Depot and Staples. On the privacy front, the FTC issued an important decision in *LabMD*, and fallout continues from the Supreme Court’s decision in *Spokeo*. Below I describe the cases and offer some commentary on the opinions.

## I. MARKET POWER DETERMINATIONS IN “TWO-SIDED” PRODUCT MARKETS: *UNITED STATES V. AMERICAN EXPRESS CO.*<sup>2</sup>

In 2010, the DOJ filed complaints against Visa, MasterCard, and American Express over rules they applied to their merchants.<sup>3</sup> Visa and Mastercard settled with the DOJ; American Express took the matter to trial. At bottom, the American Express rules prohibited merchants from steering consumers to use non-American Express cards. The rules prevented merchants from offering incentives to use rival cards, indicating preference, and disclosing merchant fees to consumers. The DOJ claimed that the credit card companies’ rules effectively blocked merchants from rewarding lower-cost competitors with increased volume.<sup>4</sup> Now, it should be noted that the DOJ did not challenge the rule on mischaracterization of American Express fees or the rule barring fees on Amex transactions. It should also be noted that the lower court had analyzed the credit card rules as vertical restraints under Section 1’s rule of reason, but also viewed these restraints as akin to Section 2 exclusionary practices because they hinder interbrand competition.<sup>5</sup> The lower court found for the government.

The Second Circuit reversed.<sup>6</sup> According to the appellate court, the trial court improperly looked only at the merchant-side of the market, ignoring the cardholder side.<sup>7</sup>

---

1 Regional Director, Western Region, FTC. The views expressed herein are my own and do not represent the views of the Commission, any Commissioner or anyone else for that matter. This article is adapted from a presentation delivered at the Golden State Antitrust, Unfair Competition and Privacy Law Institute on November 3, 2016 and reflects developments as of that date. I want to thank Roberta Tonelli for assisting me in the preparation of this article.

2 838 F.3d 179 (2d Cir. 2016).

3 *United States v. Am. Express Co.*, 88 F. Supp. 3d 143 (E.D. N.Y. 2015), *rev’d*, 838 F. 3d 179 (2d Cir. 2016).

4 *Id.* at 151 (noting the rules “prevent[ed] merchants from steering additional charge volume to their least expensive network”).

5 *Id.* at 167–68.

6 *Am. Express*, 838 F.3d at 184.

7 *Id.* at 197.

Viewing both sides of this “two-sided” market changed the direct evidence of market power.<sup>8</sup> Two-sided markets, also called two-sided networks, are economic platforms having two distinct user groups that provide each other with network benefits. Two-sided networks can be found in many industries. Examples include credit cards (composed of cardholders and merchants); healthcare (patients and insurers); recruitment sites (job seekers and recruiters); search engines (advertisers and users); and communication networks, such as the internet. The two markets interact and complement each other, creating positive feedback loops: consumers, for example, prefer credit cards honored by more merchants, while merchants prefer cards carried by more consumers.

According to the appellate court, the evidence of American Express raising prices without losing merchants, which the lower court felt showed market power,<sup>9</sup> was really just American Express offering greater rebates and incentives to consumers.<sup>10</sup> Similarly, the appellate court felt that the more general evidence that American Express had a “loyal” cardholder base, which the lower court felt also showed market power,<sup>11</sup> was, again, just evidence that customers valued American Express cards greatly because American Express offered greater quality.<sup>12</sup> Since greater quality is akin to lower prices, the appellate court felt that that evidence did not show market power so much as it showed that American Express was popular with cardholders.<sup>13</sup> The problem with this tack is that customer loyalty—an unwillingness to switch—is often evidence of market power.<sup>14</sup> Injecting the inherently subjective notion of quality improvements into market power determinations may also not be helpful.

The Second Circuit also noted that a significant percentage of merchants do not use American Express at all, and seemed content that this somehow militated against a finding of market power.<sup>15</sup> But, this is a marketplace where price discrimination is possible. It is at least plausible that the credit card companies know which merchants are likely to want the kind of customer that is an American Express cardholder and thus can successfully price discriminate against particular merchant customers. Consequently, the proper inquiry for the market power determination is not what the merchants outside the price discrimination market—the inframarginal ones who are not now accepting American Express—do in the face of a price increase. Rather, it is what the *marginal* merchants in that market do—the ones who may be utilizing American Express now but may drop off in the face of a price increase.<sup>16</sup> One must remember the test for market power is what happens to marginal customers in the face of a price increase—if they stay it is significant evidence of market power.

---

8 *Id.* at 200-04.

9 *Am. Express*, 88 F. Supp. 3d at 195-202.

10 *Am. Express*, 838 F.3d at 202-03.

11 *Am. Express*, 88 F. Supp. 3d at 191-95 (the court called this phenomenon “cardholder insistence”).

12 *Am. Express*, 838 F.3d at 202-04.

13 *Id.* at 204.

14 *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995).

15 *Am. Express*, 838 F.3d at 203-04.

16 See FTC HORIZONTAL MERGER GUIDELINES, §4.1.4 (Product Market Definition with Targeted Customers) (2010).

Interestingly, the third peg that the lower court had rested a finding of market power on, American Express's 26.4% market share, was *not* rejected out of hand by the appellate court as possibly showing market power.<sup>17</sup> This is true as a matter of analysis—proof of actual effects can serve as an alternative proof of market power even where a defendant's market share is not so impressive.<sup>18</sup> But the Second Circuit felt that that level of market share alone could not itself support a finding of market power, given the problems with the lower court's other findings on market power.<sup>19</sup>

At times, the Second Circuit's market power section reads as if it were not just talking about market power, but also balancing the anticompetitive potential of the restraints at issue against the asserted business justifications.<sup>20</sup> Under the rule of reason, the test is whether a restraint is likely to have anticompetitive effects and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects. But that inquiry is very different from the market power test. Consequently, much of the Second Circuit's market power section may be criticized for mixing up two inquiries that really ought to remain separate. For example, at one point in the market power discussion, the court appears to suggest that determining whether American Express has market power might somehow “disturb the present functioning of the payment-card industry.”<sup>21</sup> The court states, “[w]e conclude that, so long as Amex's market share is derived from cardholder satisfaction, there is no reason to intervene and disturb the present functioning of the payment-card industry.”<sup>22</sup> Whether a particular practice is on balance anticompetitive is a separate inquiry from whether a company has market power. In other words, a company can have market power, but its practices may in fact not be anticompetitive. The Court of Appeals appears to be conflating the two inquiries.

There is also a telling footnote in the opinion about how barring American Express from enforcing these rules could reduce American Express' market share.<sup>23</sup> The Second Circuit strayed from its proper focus in the market power section. While the possibility of reduced market share is *definitely* relevant to a rule of reason balancing analysis, it is not a proper subject for the market power analysis. Market power analysis ought not be a value-laden exercise—it is an objective determination of whether or not a company has “power over price”—that is, the ability to raise price without significant loss so as to render the price increase unprofitable or the power to exclude competition.<sup>24</sup>

Next, the Second Circuit chided the district court for focusing too much on higher prices for merchants.<sup>25</sup> According to the Second Circuit, the lower court needed to also

---

17 *Am. Express*, 838 F.3d at 200 n.47.

18 *See Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (finding market power through evidence of actual effects even though defendant had a market share in the 20% range).

19 *Am. Express*, 838 F.3d at 200–04.

20 *Id.*

21 *Id.* at 204.

22 *Id.*

23 *Id.* at 204 n.51.

24 *Graphic Prod. Distrib., Inc. v. Itek Corp.*, 717 F.2d 1560, 1570, 1572 n.20 (11th Cir. 1983).

25 *Am. Express*, 838 F.3d at 204–06.

consider *benefits* to cardholders.<sup>26</sup> But, even in this regard, there are telling red flags that do not jibe with the Second Circuit’s conclusion that American Express does not have market power. Indeed, the Second Circuit concedes that the district court was correct that higher prices to merchants were *not* passed through 100% to cardholders in the form of benefits.<sup>27</sup> As the court noticed, “the record suggests—and Amex conceded at oral argument—that not all of Amex’s gains from increased merchant fees are passed along to cardholders in the form of rewards.”<sup>28</sup> The absence of a full pass-through is striking evidence against the Second Circuit’s conclusion that American Express does not have market power. But, since the appeals court says that it is *plaintiff’s* burden to show how the practice in question raised prices to *all* consumers—both cardholders and merchants, DOJ lost.<sup>29</sup>

The court may have unnecessarily muddied the analytical waters by conflating market power analysis with the rule of reason balancing test. By doing so, it has raised questions about whether any market participant in a two-sided market could *ever* have market power. And that in turn raises some questions about whether this decision is going to be used to greenlight exclusionary conduct in two-sided markets. Healthcare, for example, has similar two-sided markets with the actual decision-maker (consumer) divorced from the actual payor (insurance companies/businesses). Payors have often sought to steer patients to lower cost providers by, for example, lowering copays for those lower cost providers or otherwise encouraging patients to use them. Payors will employ “tiered networks,” and place lower-cost providers in the top tier, where patient copays are lower. These efforts have generally been thought of as procompetitive for the very reason that DOJ brought the American Express case—steering by customers is generally procompetitive because it increases *interbrand* competition. More recently, however, some providers have sought to restrict payors’ ability to steer patients. Just last year, the Department of Justice sued the Carolinas HealthCare System, alleging that the anti-steering rules that it imposed on payors violated Section 2.<sup>30</sup> And, in that litigation, defense counsel has filed supplemental briefing on a motion to dismiss asserting that the Second Circuit’s decision in American Express requires dismissal of DOJ’s complaint.<sup>31</sup>

## II. EXCLUSIONARY DE FACTO OR LOYALTY DISCOUNTS: *EISAI V. SANOFI-AVENTIS U.S., LLC*<sup>32</sup>

In this case, the Third Circuit took a decisive step back from its aggressive approach to *de facto* exclusive dealing—particularly so-called “loyalty discounts.”<sup>33</sup> In *LePage’s Inc. v. 3M*, the Third Circuit held that a 3M loyalty rebate program, which provided above-cost

---

26 *Id.*

27 *Id.* at 205.

28 *Id.*

29 *Id.*

30 Complaint, *United States v. The Charlotte-Mecklenburg Hosp. Auth.*, No. 3:16cv311 (W.D.N.C. June 9, 2016).

31 Defendant’s Supplemental Memorandum, *The Charlotte-Mecklenburg Hosp. Auth.*, No. 3:16cv311 (W.D.N.C. Sept. 26, 2016).

32 821 F.3d 394 (3d Cir. 2016).

33 *Id.* at 408-09.

price discounts to customers who purchased a bundled group of products, violated Section 2 of the Sherman Act.<sup>34</sup> Prior to *LePage's*, some thought that a loyalty discount scheme that remained above price could never violate the antitrust laws. Then, in *United States v. Dentsply*, the Third Circuit found violative of Section 2 Dentsply's unwritten, but strongly adhered to rule, that its distributors could not carry competing products.<sup>35</sup> Because Dentsply had agreements with key distributors, the Court found that its rules violated Section 2, even though the agreements were unwritten and there was no evidence of enforcement.<sup>36</sup> Finally, in *ZF Meritor, LLC v. Eaton Corp.*, the court condemned market share and related discounts and rebates for the defendant's heavy-duty truck transmission products.<sup>37</sup> In all these cases, the Third Circuit has led the way in rejecting formulaic "one-size-fits-all" tests for Section 2 exclusive dealing in favor of a fact-based inquiry into the procompetitive and anticompetitive effects of *de facto* exclusive dealing. In my article, *Restoring Balance in the Test for Exclusionary Conduct*, I argue that formulaic "one-size-fits-all" tests do not encompass the multitude of potentially anticompetitive practices by monopolists and are likely to bless clearly anticompetitive conduct.<sup>38</sup>

This most recent decision, *Eisai v. Sanofi-Aventis*, involves Lovenox—an injectable anticoagulant—that was marketed with "cliff" type discounts that rose the higher the percentage the hospital or GPO was purchasing of Lovenox via-a-vis other anticoagulants.<sup>39</sup> According to the plaintiff, it was hard to switch out this drug because Lovenox was necessary for certain type of cardiac situations.<sup>40</sup> Plaintiff alleged that Sanofi-Aventis required customers to enter into anti-steering provisions.<sup>41</sup> That is, GPOs and hospitals also had to agree not to steer patients away from Lovenox by using restrictive formulary practices. It is interesting that this is the second conduct case involving anti-steering provisions to be decided in 2016. Finally, plaintiff alleged that Sanofi-Aventis ran a "fear, uncertainty, and doubt" campaign to undermine Eisai's rival product, Fragmin.<sup>42</sup> According to plaintiff, Sanofi-Aventis paid doctors to write articles raising concerns about rival product, Fragmin.<sup>43</sup> Plaintiff alleged that these discounts, along with the other restrictions and conduct noted above, were exclusionary and violated Section 2.<sup>44</sup>

The Third Circuit ruled for the defendant.<sup>45</sup> The Court discounted evidence of a "few dozen" out of 6000 hospitals that said they wanted to buy more Fragmin, but could not

---

34 324 F.3d 141, 157 (3d Cir. 2003) (*en banc*).

35 399 F.3d 181, 184 (3d Cir. 2005).

36 *Id.* at 191-96.

37 696 F.3d 254 (3d Cir. 2012).

38 Thomas N. Dahdouh, *Restoring Balance in the Test for Exclusionary Conduct*, 24 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 51, 51-52 (Spring 2015).

39 *Eisai*, 821 F.3d at 399-401.

40 *Id.* at 400-01.

41 *Id.* at 400.

42 *Id.* at 400-01.

43 *Id.* at 401.

44 *Id.*

45 *Id.* at 410.

because of the program.<sup>46</sup> The court felt this percentage was too small.<sup>47</sup> As I noted in my article, *Restoring Balance in the Test for Exclusionary Conduct*, “Intermediate distributors will often say that the contracts were ‘sleeves off a vest’ in that their behavior would not have been different, even without the contracts. . . . [But] it is virtually impossible for anyone . . . to predict what would have happened but for the monopolist’s exclusionary conduct. It is no more relevant for the final analysis whether [intermediate distributors] testify as to what they think they would have done without the contracts in place. This kind of ‘Monday morning quarterbacking’ is precisely why the D.C. Court of Appeals in *United States v. Microsoft* warned against placing a heightened causation requirement into monopolization law.”<sup>48</sup> Rather, the D.C. Circuit held that it is sufficient that the plaintiff show that the conduct reasonably appears capable of making a significant contribution to the creation or maintenance of the company’s monopoly position.<sup>49</sup>

The Court of Appeals also discounted the analysis of plaintiff expert Einer Elhauge.<sup>50</sup> His report described how the discounts foreclosed competition because many buyers had to buy Lovenox due to the drug’s unique profile for cardiology care.<sup>51</sup> The court thought there were no barriers to a rival getting FDA approvals for cardiology care.<sup>52</sup> According to the court, an “equally efficient” rival could have done it.<sup>53</sup> Then again, we have learned that rivals to monopolists often are not equally efficient precisely because they are running up against a monopolist. As I have previously written, “it is rare that, in a problematic market, a rival to a monopolist (with seventy plus percent market share) will enjoy the same economies of scale and scope as the monopolist. Exclusionary conduct can foreclose a significant part of the market (for example, the most efficient distribution channels) while leaving the hypothetical equally efficient competitor with enough theoretical space to compete. . . . [T]he proper test is *not* whether there is sufficient room for a rival to somehow survive, but rather whether there is space for the rival to pose a serious threat to the defendant’s monopoly.”<sup>54</sup>

In perhaps the most worrisome part of the opinion, the Third Circuit attempted to distinguish its previous cases on loyalty discounts.<sup>55</sup> The court said *LePage* was just about bundled products where the monopolist is tying products that it alone makes with ones where it faces rivalry.<sup>56</sup> Here, by contrast, the court said, the focus of anticompetitive

---

46 *Id.* at 404.

47 *Id.*

48 Dahdouh, *supra* note 38, at 66 n.75 (citing *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)).

49 *Microsoft*, 253 F.3d at 79.

50 *Eisai*, 821 F.3d at 404–07.

51 *Id.* at 404–05.

52 *Id.* at 406.

53 *Id.*

54 Dahdouh, *supra* note 38, at 64 (emphasis in original).

55 *Eisai*, 821 F.3d at 405–07.

56 *Id.* at 405.

concern is about one product only.<sup>57</sup> The court also distinguished *ZF Meritor and Dentsply*.<sup>58</sup> According to the court, those cases were about situations where the loss of the discounts could imperil supply.<sup>59</sup> Here, the buyer just lost the discounts—there was no threat to cut supply.<sup>60</sup> While there is some evidence in those two cases that the loss of discounts could imperil supply, and certainly “muscling” type allegations do up the ante in showing that a monopolist’s conduct was exclusionary, it is not clear that that was the deciding factor in finding those contracts exclusionary. Indeed, in the *Intel* case,<sup>61</sup> the Federal Trade Commission found suspect the significance of the minimum share discounts involved—so-called “all unit” discounts that were so large that relatively miniscule reductions in purchases could result in the loss of *all* the discounts.<sup>62</sup> Economic analysis explains that discounts that apply to all of the units that the buyer has purchased if and only if the buyer has met its volume or market share target can create a powerful incentive to meet or exceed the share target.<sup>63</sup> The Commission sought to challenge Intel’s rebate programs even though there was no evidence that Intel had ever threatened an OEM’s supply.<sup>64</sup>

Another interesting aspect of the decision is that the evidence of Sanofi–Aventis paying doctors to write articles raising doubts about Fragmin is never mentioned by the court.<sup>65</sup> Deception is the type of “cheap exclusion” that may lead to anticompetitive effects.<sup>66</sup> Exclusionary practices that are both inexpensive to undertake and incapable of yielding any cost-reducing efficiencies are “cheap” in both senses of that term and are most likely to appeal to a firm bent on maintaining market power by anticompetitive means.<sup>67</sup> So what happened to the evidence of “fear, uncertainty and doubt”?

One saving grace in this opinion is that the court refused to apply *Brooke Group* to summarily dismiss claims where there is no evidence of below-cost pricing.<sup>68</sup> In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the Supreme Court held that predatory pricing allegations required a showing of prices below Average Variable Cost (“AVC”) during the predation period as well as proof that the predator will likely recoup any lost profits thereafter.<sup>69</sup> But, this test does not apply to claims of exclusion from loyalty discount contracts because the focus there should properly be on the *foreclosing* effect of those

---

57 *Id.* at 405–06.

58 *Id.*

59 *Id.* at 406.

60 *Eisai*, 821 F.3d at 406–07.

61 *In re Intel Corp.*, 128 F.T.C. 213 (1999).

62 Dahdouh, *supra* note 38, at 53, 53 n.20 (referencing *In re Intel Corp.*, 128 F.T.C. 213).

63 *Id.* at 53 n.20.

64 *Id.* at 53 (referencing *In re Intel Corp.*, 128 F.T.C. 213).

65 *Eisai*, 821 F.3d at 401.

66 Dahdouh, *supra* note 38, at 53.

67 *Id.*

68 *Eisai*, 821 F.3d at 408.

69 509 U.S. 209, 222–23 (1993).

contracts, *not* on the price level set by the discounts.<sup>70</sup> The Third Circuit rightly rejected this approach, which would, in essence, end any possible challenge to loyalty discounts.

### III. “PRODUCT HOPPING” SECTION 2 MONOPOLIZATION CLAIMS: *MYLAN PHARMACEUTICALS, INC. V. WARNER CHILCOTT PLC*<sup>71</sup>

In 2015, the Second Circuit, in *New York v. Actavis PLC*, found “product hopping” unlawful as Section 2 monopolization.<sup>72</sup> In that matter, the New York State AG’s office alleged that the defendant withdrew its previous version of Namenda, a drug used to treat Alzheimer’s, and replaced it with an extended release version in order to thwart generic competition.<sup>73</sup> (Under Hatch-Waxman, generics can rely on a name-brand drug company’s original NDA approval to gain faster, less costly FDA approval of a generic version.)<sup>74</sup>

As I wrote in my article last year, *2015: A Year of Big Plaintiff Wins in Antitrust and Privacy Cases*, the *Actavis* decision was a stunning result.<sup>75</sup> Challenges to product design changes as exclusionary conduct have generally not fared well in court—and for good reason. Courts have generally shown a high level of hostility to second-guessing product design decisions by companies.<sup>76</sup> However, the Second Circuit had plenty of evidence in *Actavis* that the legitimate explanations for withdrawing its old product were pretextual.<sup>77</sup>

As in the *Actavis* case, plaintiff Mylan alleged that Warner engaged in a pattern of changes allegedly to thwart generic competition in Doryx, a tetracycline used to treat severe acne.<sup>78</sup> Warner switched from capsule to tablet, then developed larger dose tablets, and then “scored” the tablets.<sup>79</sup> Here, though, the Third Circuit ruled for the defendant and, furthermore, expressed serious concerns about courts getting involved in assessing product design changes.<sup>80</sup> Why was this situation different?

First, the Third Circuit found a broad market, undercutting any notion that the defendant here had monopoly power.<sup>81</sup> The court found a broad market of oral tetracyclines used for acne.<sup>82</sup> It credited evidence that, as Doryx’s prices went up, its sales went down

---

70 Dahdouh, *supra* note 38, at 58.

71 838 F.3d 421 (3d Cir. 2016).

72 787 F.3d 638, 659 (2d Cir. 2015).

73 *Id.* at 649.

74 *Id.* at 644.

75 Thomas N. Dahdouh, *2015: A Year of Big Plaintiff Wins in Antitrust and Privacy Cases*, 25 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 51, 52-54 (Spring 2015).

76 *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 286 (2d Cir. 1979) (“[A]ny firm, even a monopolist, may generally bring its products to market whenever and however it chooses.”).

77 Dahdouh, *supra* note 75, at 51-52.

78 *Mylan*, 838 F.3d at 431.

79 *Id.* at 429-31.

80 *Id.* at 440-41.

81 *Id.* at 431.

82 *Id.*

and other tetracycline sales went up.<sup>83</sup> It also engaged in price promotions at times in competition with other oral tetracyclines used for acne.<sup>84</sup> There is some concern that the Third Circuit may have missed the mark here in setting such a broad product market. In particular, the Court may have incorrectly applied the “hypothetical monopolist” test. That test generally looks at the ability of the defendant to impose a small but significant and non-transitory increase in price (“SSNIP”).<sup>85</sup> This test necessarily starts with the monopolist’s product and then adds competitors if and only if the evidence shows that a SSNIP of 5% by the monopolist would be defeated by existing competitors.<sup>86</sup> As the *Merger Guidelines* warn, “[b]ecause the relative competitive significance of more distant substitutes is apt to be overstated by their share of sales, when the Agencies rely on market shares and concentration, they usually do so in the *smallest* relevant market satisfying the hypothetical monopolist test.”<sup>87</sup> Here, by contrast, the Third Circuit did not start at the narrowest product market and work out from there; nor did it focus on the ability of the monopolist to raise price by a SSNIP successfully. Instead, it focused on the fact that there was a correlation between the prices that Doryx charged and the prices that other oral tetracyclines for acne charged.<sup>88</sup> A correlation, however, is simply not enough to determine a proper relevant product market. There is *always* some interrelation between closer and more distant competitors but that does not set the proper delineation of a relevant product market.

Once the court found a broad product market, Warner’s resulting 18% market share was insufficient to show monopoly power.<sup>89</sup> The court also rejected plaintiff’s expert’s opinion on direct evidence of monopoly power, insisting that it would want to see evidence of an abnormally high price–cost margin.<sup>90</sup>

In the better supported part of the opinion, the court went on to find Warner’s business justifications for the product design changes non-pretextual.<sup>91</sup> The capsule version had resulted in esophageal problems and shelf-stability issues.<sup>92</sup> “Scoring” allowed patients to cut capsules in half.<sup>93</sup> Both of these are clearly valid business justifications to make the design changes that Warner made.

Finally—and just as importantly, the court expressed concern about federal courts being turned into “innovation sufficiency tribunals.”<sup>94</sup> This concern about federal courts

---

83 *Id.* at 437.

84 *Id.*

85 U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, § 4.1.1 (2010) [hereinafter MERGER GUIDELINES], available at <http://ftc.gov/os/2010/08/100819hmg.pdf>.

86 *Id.* at § 4.1.2.

87 *Id.* at § 4.1.1 (emphasis added).

88 *Mylan*, 838 F.3d at 437.

89 *Id.* at 437–38.

90 *Id.* at 434–35.

91 *Id.* at 438–41.

92 *Id.* at 439.

93 *Id.*

94 *Id.* at 440–41.

being required to second-guess product design changes is legitimate. It is for this reason that product design monopolization challenges rarely succeed. The court also faulted plaintiff for failing to market a generic of the capsule for 20 years, and, once it got a generic of the tablet launched, selling it for prices *above* defendant's branded prices.<sup>95</sup>

#### **IV. INTERNATIONAL COMITY CONCERNS BAR SUIT AGAINST VITAMIN CARTEL: *IN RE VITAMIN C ANTITRUST LITIGATION***<sup>96</sup>

This multi-district litigation began in 2005 when plaintiffs brought suit against China's four main Vitamin C producers and an affiliate.<sup>97</sup> The defendants were accused of fixing the prices and volume of Vitamin C producers exported from China to the United States and worldwide.<sup>98</sup> After a three week trial, a jury in the Eastern District of New York returned a \$54 million verdict against two Chinese Vitamin C producers. This verdict was trebled to \$162 million.<sup>99</sup>

On appeal, the Second Circuit reversed, finding that the lower court should have abstained because of objections from the Chinese Government.<sup>100</sup> As the Court noted, "because the Chinese Government filed a formal statement in the district court asserting that Chinese law required Defendants to set prices and reduce quantities of vitamin C sold abroad, and because Defendants could not simultaneously comply with Chinese law and U.S. antitrust laws, the principles of international comity required the district court to abstain from exercising jurisdiction in this case."<sup>101</sup>

The court in its opinion listed several possible qualifiers or limitations to its decision's applicability to other contexts. The Court emphasized that the Chinese Ministry of Commerce had provided a sworn statement in support and filed an amicus brief in support of the motion to dismiss, apparently a first by the Ministry before a United States court.<sup>102</sup> The court noted that Chinese export policies could have been addressed through World Trade Organization processes—and indeed the USTR had done exactly that in 2002. The court emphasized that the Chinese government had expressed deep dissatisfaction with the lower court's ruling and that the case had adversely affected US-Chinese relations.<sup>103</sup> The Court noted that there is no evidence that "[d]efendants acted with the express purpose or intent to affect U.S. commerce or harm U.S. businesses in particular."<sup>104</sup>

---

95 *Id.* at 438-39.

96 837 F.3d 175 (2d Cir. 2016).

97 *Id.* at 179.

98 Judgment, *In re Vitamin C Antitrust Litig.*, No. 05-CV-0453 (E.D.N.Y. Mar. 14, 2013).

99 *Id.*

100 *In re Vitamin C Antitrust Litig.*, 837 F.3d at 179.

101 *Id.*

102 *Id.* at 180-81, 186, 189.

103 *Id.* at 193-94.

104 *Id.* at 193.

## V. PRICE-FIXING IS STILL A PER SE OFFENSE: *GELBOIM V. BANK OF AMERICA CORP.*<sup>105</sup>

The Second Circuit in this matter reversed dismissal of a suit claiming that sixteen of the world's largest banks colluded to depress the LIBOR.<sup>106</sup> LIBOR stands for the London Interbank Offered Rate and serves as the first step to calculating interest rates on various loans throughout the world.<sup>107</sup> Plaintiffs alleged a horizontal price-fixing conspiracy.<sup>108</sup> The district court had dismissed for failure to plead anticompetitive harm.<sup>109</sup> The Court of Appeals rightly reversed, noting that price-fixing is a *per se* offense, and, hence, no showing of anticompetitive harm is necessary.<sup>110</sup>

## VI. “PRICE DISCRIMINATION” MARKETS IN MERGER ANALYSIS: *FTC V. STAPLES*<sup>111</sup>

This is the second win in a row for the FTC in challenging a merger based on a narrow “price discrimination” market definition. In *FTC v. Sysco Corp.*,<sup>112</sup> the FTC successfully alleged a product market of broadline food service distribution services sold to national customers. In arguing for a narrower market focused on national customers, the FTC relied upon the *Merger Guidelines* to suggest that a market may be defined around a subset of customers targeted for price discrimination.<sup>113</sup>

This action involved a challenge to the merger of the two largest business-to-business office supply vendors in the United States, Staples and Office Depot/Office Max.<sup>114</sup> As with the *Sysco* lawsuit, the FTC alleged that, for large businesses with multiple locations across the country, Staples and Office Depot/Office Max were the only two suppliers of office consumables able to meet their needs.<sup>115</sup> Interestingly, as in *Sysco*, the court largely found the narrow market alleged by the FTC, but did so on the basis of the qualitative factors set forth in the Supreme Court's decision in *Brown Shoe Co. v. United States*.<sup>116</sup>

The court found a “cluster” market of consumable office supplies to business customers, using the *Brown Shoe* factors.<sup>117</sup> According to the court, the evidence showed that larger

---

105 823 F.3d 759 (2d Cir. 2016).

106 *Id.* at 765.

107 *Id.*

108 *Id.* at 766.

109 *Id.* at 770.

110 *Id.* at 771.

111 2016 U.S. Dist. LEXIS 84444, 2016-1 Trade Cas. (CCH) ¶ 79,626 (D.D.C. May 10, 2016).

112 113 F. Supp. 3d 1, 37 (D.D.C. 2015).

113 *Id.* at 38-39 (citing MERGER GUIDELINES, §3 (“Targeted Customers and Price Discrimination”)).

114 *Staples*, 2016 U.S. Dist. LEXIS 84444, at \*3-5; Memorandum Decision, *FTC v. Staples, Inc.*, No. 15-2115, at 2, 8-9 (D.D.C. May 17, 2016).

115 Memorandum Decision, *Staples*, No. 15-2115, at 10 (D.D.C. May 17, 2016).

116 *Id.* at 24-31, 46-47 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)).

117 *Id.* at 20-21.

businesses relied on these two companies for their office consumables.<sup>118</sup> The court further found that Staples and Office Depot together held 79% of this market.<sup>119</sup> According to the court, bidding data showed heavy head-to-head competition, as did internal documents.<sup>120</sup> The court found that regional players were too small to handle needs of national buyers, and that Amazon's relatively new "Amazon Business" service was too inexperienced in RFP process.<sup>121</sup> Consequently, for the second time in two years, courts have upheld the FTC's narrower "price discrimination" product market, but on the basis of the *Brown Shoe* factors rather than on an explicit adoption of the *Merger Guidelines'* price discrimination product market test.<sup>122</sup>

## VII. HEALTHCARE MERGER CHALLENGES: "NEW SCHOOL" ANALYSIS WINS AT THE APPELLATE LEVEL:

### *FTC V. PENN STATE HERSHEY MEDICAL CENTER*<sup>123</sup> AND *FTC V. ADVOCATE HEALTHCARE NETWORK*<sup>124</sup>

2016 saw two district court losses for the FTC that were quickly reversed at the appellate level. Both district court losses came about because, in one way or another, the district court judge followed "old school" healthcare merger law. In both cases, the appellate courts reversed, firmly adhering to the FTC's new way of viewing healthcare mergers.

In the 1990's and early 2000's, the FTC and other government antitrust law enforcers lost many merger challenges because the district courts adopted broad geographic markets. A now classic example is *California v. Sutter Hospital System*, where the court adopted a geographic market encompassing the San Francisco East Bay all the way to the Central Valley.<sup>125</sup> That decision and others relied on a test originally developed using data from coal and beer markets by Kenneth Elzinga and Thomas Hogarty.<sup>126</sup> This test focused on patient inflow and outflow data. The problem is that healthcare markets do not behave like beer and coal distribution systems. This analysis assumed that if some patients before a merger are being treated outside an area, more will follow if prices increase. But the evidence shows that patients who are seeking care outside a proposed area are not doing so because of price, but for other reasons, such as that they work outside the area. Therefore, the assumption that others will seek care elsewhere

---

118 *Id.* at 60-61.

119 *Id.* at 49.

120 *Id.* at 57.

121 *Id.* at 61-72.

122 *Id.* at 74-75.

123 838 F.3d 327 (3d Cir. 2016).

124 841 F.3d 460 (7th Cir. 2016).

125 130 F. Supp. 2d 1109, 1127 (N.D. Cal. 2001).

126 Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45 (1973); *Sutter Hosp. Sys.*, 130 F. Supp. 2d at 1120-24.

if some have done so is not valid. Indeed, an FTC retrospective analysis demonstrated anticompetitive price increases from mergers that courts refused to enjoin.<sup>127</sup>

As the court decisions described below explain, a key insight into modern analysis of geographic markets in healthcare combinations is that insurers, not individual consumers, are the price-setting bargaining entities. The relevant geographic market is the one to which the major health insurance providers can steer their customers. It is health insurance companies that must cobble together provider panels that are sufficient to attract larger employers to their plans. And if a health insurer says it cannot steer ultimate customers to far away locations for physician services, then providers in those locations do not belong in the relevant geographic market.

Understanding the practicable options that health insurers can turn to in a particular geographic market in the event of an acquisition also informs the competitive effects analysis. The more important a provider is to an insurer, the more bargaining power or leverage that provider has. This insight profoundly shifts the analysis from patient flow to the negotiating strength of a firm before and after a merger. And it changes the geographic market *and* competitive effects analysis.

***Penn State Hershey Medical Center:*** In this matter, the FTC challenged a merger of the two largest hospital systems in Harrisburg, Pennsylvania—Hershey and Pinnacle.<sup>128</sup> The district court had denied a preliminary injunction, relying on “old school” theories of geographic market/competitive effects.<sup>129</sup> The Third Circuit reversed.<sup>130</sup> It found that the district court erred in focusing on the likely response of patients to a price increase, completely neglecting any mention of the likely response of insurers.<sup>131</sup> The court chided the lower court for falling into the “silent majority fallacy”—just because patients are now traveling from outside the geographic area does *not* mean that they affect the prices that those unwilling to travel pay.<sup>132</sup> Rather, patients use services based on non-price factors such as location and quality.<sup>133</sup> The court also faulted the lower court for falling into the “payor problem”—the lower court ignored fact that insurance companies are the true payors.<sup>134</sup> If they cannot steer Harrisburg residents outside the geographic area, then those areas outside are *not* in a relevant geographic market.<sup>135</sup> The payors repeatedly said that they could not successfully market a plan in the Harrisburg area without Hershey and Pinnacle.<sup>136</sup> In fact, one payor that attempted to do just that (with Holy Spirit, a Harrisburg-area hospital) lost half of its membership.<sup>137</sup>

---

127 Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction* (FTC, Working Paper 293, Nov. 1, 2008).

128 838 F.3d at 334.

129 *Id.* at 334–35.

130 *Id.* at 353.

131 *Id.* at 342–43.

132 *Id.* at 340–41.

133 *Id.* at 341.

134 *Id.* at 340–43.

135 *Id.* at 341.

136 *Id.* at 343.

137 *Id.* at 345–46.

It also found fault in the district court's reliance on private agreements between the hospitals and two insurers as obviating any likelihood of harm from the merger.<sup>138</sup> The court, like the Ninth Circuit in *Saint Alphonsus Medical Center–Nampa, Inc. v. St. Luke's Health System, Ltd.*,<sup>139</sup> expressed skepticism about the likelihood of an efficiencies defense.<sup>140</sup> The court required that efficiencies be “merger specific” (the efficiencies can only be achieved through a merger and not other less restrictive arrangements, such as joint venturing or contracting), “verifiable” (concrete and not speculative), and “cognizable” (procompetitive).<sup>141</sup> The court found Hershey's argument that the deal would allow it to forego building a 100-bed tower to alleviate a capacity constraint too speculative, since the evidence was not clear it was necessary, and in and of itself an output reduction, and thus not cognizable.<sup>142</sup>

***Advocate HealthCare Network:*** In this matter, the FTC challenged the merger of two hospital systems in Chicago's northern suburbs.<sup>143</sup> The lower court denied a preliminary injunction, finding that some patients were willing to travel outside the northern suburbs, which was the locus of the FTC's proposed geographic market.<sup>144</sup> The Seventh Circuit reversed in an opinion that goes through at some length how the FTC, courts and economists have honed their understanding of geographic markets in healthcare.<sup>145</sup> At bottom, the court credited testimony from insurers that “it would be difficult or impossible to market a network to employers in metropolitan Chicago that excludes both NorthShore and Advocate.”<sup>146</sup> Evidence in the case showed that “no health insurance product [had been] successfully marketed to employers in Chicago without offering access to either NorthShore hospitals or Advocate hospitals.”<sup>147</sup> The combination of the two entities would thus increase its bargaining leverage over insurers, leading to higher prices.<sup>148</sup>

The lower court also had criticized the FTC's proposed market because it had excluded academic medical centers.<sup>149</sup> The Court of Appeals disagreed, finding that the evidence consistently supported the notion that academic medical centers were viewed as significantly different from local community hospitals.<sup>150</sup> Finally, the Court of Appeals remanded the matter back to the district court for further proceedings.<sup>151</sup>

---

138 *Id.* at 343–45.

139 778 F.3d 775 (9th Cir. 2015).

140 *Penn State Hershey Med. Ctr.*, 838 F.3d at 347–51.

141 *Id.* at 348–49.

142 *Id.* at 350–51.

143 841 F.3d at 464.

144 *Id.*

145 *Id.* at 468–73.

146 *Id.* at 465.

147 *Id.*

148 *Id.* at 470–71.

149 *Id.* at 473–74.

150 *Id.*

151 *Id.* at 476.

## VIII. DOJ NEWSPAPER MERGER CHALLENGE UPHELD: *U.S. V. TRIBUNE PUBLISHING CO.*<sup>152</sup>

Judge Andre Birotte, a well-respected former United States Attorney for the Central District of California, granted the DOJ's request for a temporary restraining order preventing the owner of the *Los Angeles Times* from acquiring the Orange County *Register* and Riverside County *Press-Enterprise* in a bankruptcy auction.<sup>153</sup> The judge found a relevant product market of English-language daily local newspapers in Orange and Riverside Counties as well as advertising in those newspapers.<sup>154</sup> In doing so, the court rejected defendants' argument that Internet-based sources of local news and advertising constrain local newspapers because defendants' evidence relied on Internet-based *aggregators*, not content *creators*.<sup>155</sup> Using this product market, the court found that the deal would have resulted in Tribune controlling some 98 percent of local newspaper daily circulation in Orange County and 81 percent in Riverside County.<sup>156</sup>

There is an interesting discussion distinguishing *dicta* in *Reilly v. Hearst Corp.*,<sup>157</sup> where the Northern District had questioned whether daily newspapers could be considered a relevant product market distinct from Internet-based news.<sup>158</sup> Although the Northern District in that case had questioned whether daily newspapers could be considered a standalone product market separate from Internet-based sources, Judge Birotte felt comfortable in finding a narrower product market, because, as noted above, much of the Internet-based content was produced by aggregators, not content creators.

## IX. PRIVACY AT THE FEDERAL LEVEL: *IN RE FTC V. LABMD, INC.*<sup>159</sup>

In a unanimous opinion issued July 2016, the Federal Trade Commission ruled that LabMD, a Georgia-based clinical testing laboratory, had violated the FTC Act by having inadequate computer security for records containing protected health information (PHI) and sensitive personally identifiable information (PII).<sup>160</sup> The matter is now on appeal to the Eleventh Circuit, which recently granted a stay of the order.<sup>161</sup>

According to the FTC, LabMD's security practices were unreasonable, lacking even basic precautions to protect the sensitive consumer information maintained on its computer system: 1) failing to use an intrusion detection system or file integrity monitoring; 2) neglecting to monitor firewall traffic; 3) failing to provide data security training to its employees; and 4) failing to delete any of the 750,000 patient records it

---

152 2016 WL 2989488, 2016-1 Trade Cases ¶79,544 (C.D. Cal. Mar. 18, 2016).

153 *Id.* at \*1.

154 *Id.* at \*3-4.

155 *Id.* at \*4.

156 *Id.* at \*5.

157 107 F. Supp. 2d 1192 (N.D. Cal. 2000).

158 *Tribune Publ'g*, 2016 WL 2989488, at \*4.

159 2016 FTC LEXIS 128, 2016-2 Trade Cas. (CCH) ¶79,708 (F.T.C. July 28, 2016).

160 *Id.* at \*1-2.

161 *LabMD, Inc. v. FTC*, 2016 U.S. App. LEXIS 23559 (11th Cir. Nov. 10, 2016).

had collected between 2008 and 2014, including records culled from its physician-clients' databases despite never having performed testing for those patients.<sup>162</sup>

The FTC believed Section 5 of the FTC applies in this instance. In order to allege that a practice is “unfair” under its statute, the FTC must show that it is “likely” to cause substantial consumer injury.<sup>163</sup> The Commission was faced with the question of whether there was likely substantial consumer injury when there was no evidence of actual use of the highly personal information.<sup>164</sup> The FTC ruled that a showing of “significant risk” of injury is sufficient to satisfy the “likely to cause” standard set forth in the Act.<sup>165</sup> The Commission emphasized that the focus on the likelihood that the practice will cause harm is at the time the practice occurred, not on the basis of actual future outcomes.<sup>166</sup> The Commission noted that consumers typically have no way of finding out that their personal information has been part of a data breach.<sup>167</sup> The Commission also emphasized that Congress intended to give the Commission the power to address potential harmful practices *in their incipency*.<sup>168</sup> Indeed, the legislative history of the Federal Trade Commission clearly shows that Congress intended the FTC to have the power to stop harmful practices in their incipency.<sup>169</sup> As the Commission put it, “[w]e need not wait for consumers to suffer known harm at the hands of identity thieves.”<sup>170</sup>

## X. PRIVACY IN CLASS ACTION UCL LITIGATION

### Article III Standing Issues Generally:

Privacy class actions have struggled to overcome one key defense—the claim that the plaintiffs do not have standing because they cannot show injury. Article III’s “case or controversy” language requires (1) Injury in fact; (2) Fairly traceable to the defendant’s conduct; and (3) Capable of redress by the courts.<sup>171</sup> Earlier decisions dismissed data-breach privacy suits for lack of standing, finding the potential for harm from data breaches too speculative, but, more recently, courts have found injury sufficiently pled. Or, as Judge Koh put it in *In re Adobe Systems, Inc. Privacy Litigation*: “[W]hy would hackers target and steal personal customer data if not to misuse it?”<sup>172</sup>

In *Remijas v. Neiman-Marcus Group, LLC*, the Seventh Circuit overturned a district court’s dismissal of a class action brought against Neiman Marcus, the high-end retailer,

---

162 *In re LabMD Inc.*, 2016 FTC Lexis 128, at \*1-2.

163 *Id.* at \*22.

164 *Id.* at \*27-28.

165 *Id.* at \*59-60.

166 *Id.* at \*67.

167 *Id.* at \*67-68.

168 *Id.* at \*27-28.

169 Thomas N. Dahdouh, *Section 5, the FTC and Its Critics: Just Who Are the Radicals Here?*, 20 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 1, 4-9 (Spring 2011).

170 *In re LabMD*, 2016 FTC LEXIS 128, at \*68.

171 *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1211 (N.D. Cal. 2014).

172 *Id.* at 1216.

for allegedly unreasonable data security practices that allowed hackers to obtain consumers' financial information.<sup>173</sup> The Court found that the class could show "injury-in-fact" and thus had standing to sue.<sup>174</sup> The Court specifically rejected the defendant's argument that the class's injuries were too speculative because the hackers had yet to use the personal information for fraudulent charges.<sup>175</sup> Following the *Adobe* decision from this past September in the Northern District of California, the Court found, as the *Adobe* court did, that "Neiman Marcus customers should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur."<sup>176</sup>

In *dicta*, though, the Court rejected two other theories of injury. First, it rejected an "overcharge" theory because the store failed to invest in an adequate security system.<sup>177</sup> In this regard, the Court seemed to disagree with *Resnick v. AvMed, Inc.*<sup>178</sup> The court also rejected a theory that consumers have a property right to their personal information, finding no such right under federal or state law.<sup>179</sup> The Court also found that the class had pled causation and redressability sufficient to meet all three requirements for Article III standing.<sup>180</sup> While other stores had experienced similar breaches during the same time period, it was certainly plausible that the plaintiffs' injuries stemmed from the Neiman breach.<sup>181</sup> The Court rejected the notion that reimbursement for fraudulent charges obviates any redressability claim, noting that the consumers have not been reimbursed for mitigation expenses (credit monitoring) or future injuries.<sup>182</sup> The Court also noted that credit and debit card issuers have limitations on when they will reimburse for fraudulent charges.<sup>183</sup> The Seventh Circuit recently reaffirmed this view.<sup>184</sup>

In *Galaria v. Nationwide Mutual Insurance Co.*, the Sixth Circuit reached a similar holding.<sup>185</sup> This matter involved a 2012 data breach at an insurance company.<sup>186</sup> Plaintiffs' allegations of "a substantial risk of harm, coupled with reasonably incurred mitigation costs [i.e. purchasing credit report and monitoring services, reviewing bank statements and similar information, instituting credit freezes or modifying financial accounts], are sufficient to establish a cognizable Article III injury at the pleading stage of the litigation"

---

173 794 F.3d 688, 690 (7th Cir. 2015).

174 *Id.* at 696-97.

175 *Id.* at 693.

176 *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)).

177 *Id.* at 694-95.

178 693 F.3d 1317, 1328 (11th Cir. 2012).

179 *Remijas*, 794 F.3d at 695.

180 *Id.* at 696-97.

181 *Id.*

182 *Id.*

183 *Id.* at 697.

184 *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966-67 (7th Cir. 2016).

185 2016 U.S. App. LEXIS 16840 (6th Cir. Sept. 12, 2016).

186 *Id.* at \*2-3.

under *Spokeo*.<sup>187</sup> “[A]lthough it might not be ‘literally certain’ that Plaintiffs’ data will be misused . . . [w]here Plaintiffs already know that they have lost control of their data, it would be unreasonable to expect Plaintiffs to wait for actual misuse—a fraudulent charge on a credit card, for example—before taking steps to ensure their own personal and financial security . . .”<sup>188</sup> The Sixth Circuit noted that its decision may create a circuit split with the Third Circuit, which held in *Reilly v. Ceridian Corp.*<sup>189</sup> that the mere increased risk of identity theft does not create Article III standing.<sup>190</sup>

### **Article Three Standing Issues for Statutory Violations: The Impact of the Supreme Court’s *Spokeo* decision: *Spokeo Inc. v. Robins*<sup>191</sup>**

For statutes that fix statutory damages—most importantly in the privacy arena, the Fair Credit Reporting Act—the issue is whether the availability of statutory damages alone gets a plaintiff past the standing requirement. Plaintiff claimed that Spokeo, a people search engine, reported incorrect information about him.<sup>192</sup> Plaintiff claimed an FCRA violation on behalf of a class of victims.<sup>193</sup> This could entitle him and the other class members up to \$1,000 for each alleged FCRA violation on behalf of the class.<sup>194</sup> Spokeo had disclaimers on its website that it was not a credit reporting agency. But remember that the definition of a credit reporting agency subject to FCRA revolves not just around what the company *says* it is. If a company advertises its services so that it is reasonable to expect that its customers are using the information for one of these purposes—credit, employment, insurance, rental—(or if the company knows customers are using the information for one of these purposes), the company may fall within the definition of a credit reporting agency and the requirements of FCRA.<sup>195</sup>

The Ninth Circuit had held that a “violation of a statutory right is usually a sufficient injury in fact to confer standing.”<sup>196</sup> But the Supreme Court reversed and remanded.<sup>197</sup> According to the Court, an “injury-in-fact” sufficient to confer standing under Article III must be both “concrete and particularized.”<sup>198</sup> “Concrete” means “‘real,’ and not ‘abstract’” but is not “necessarily synonymous with tangible.”<sup>199</sup> Post-*Spokeo*, it is no

---

187 *Id.* at \*9 (referencing *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

188 *Id.* at \*10 (internal citations omitted).

189 664 F.3d 38, 43 (3d Cir. 2011).

190 *Galaria*, 2016 U.S. App. LEXIS 16840, at \*12-13.

191 136 S. Ct. 1540 (2016).

192 *Id.* at 1544.

193 *Id.*

194 *Id.* at 1545.

195 *Id.*; Fair Credit Reporting Act, 15 U.S.C. § 1681(a)(d)(1).

196 *Spokeo*, 136 S. Ct. at 1546 (citations omitted).

197 *Id.*

198 *Id.* at 1545.

199 *Id.* at 1548-49.

longer sufficient to “allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.”<sup>200</sup>

Defendants are now raising *Spokeo* challenges to privacy suits brought under state and federal laws. Here are some examples of recent lower court decisions that show different ways lower courts are analyzing this issue:

- Video Privacy Protection Act:<sup>201</sup> One lower court held that a violation of the VPPA on its own constitutes a concrete, cognizable injury under *Spokeo*.<sup>202</sup>
- Cable Communications Policy Act:<sup>203</sup> Another lower court held that retention of personally identifiable information (including address, telephone number, and SSN) beyond the statutorily-prescribed time period was a bare procedural violation where there was no allegation that the PII was disclosed, used, or accessed by a third party.<sup>204</sup>

These two decisions suggest that courts will look to pre-*Spokeo* case law to determine whether a statute created a procedural versus a substantive right. Where the court believes that the statute is merely a “procedural” right, it will scrutinize the allegations closely for claims of concrete injury. But where the statute creates a substantive rights, courts will accept complaints with no further evidence of concrete injury. This area is evolving, however, and a further appeal to the Supreme Court is likely.

## **XI. GOOGLE COOKIES LITIGATION: *IN RE GOOGLE INC. COOKIE PLACEMENT CONSUMER PRIVACY LITIGATION***<sup>205</sup>

This case concerns Google’s actions in circumventing web browser “cookie blockers.”<sup>206</sup> Cookies—particularly third party cookies—are used by advertising companies to help create detailed profiles on individuals.<sup>207</sup> Both Microsoft’s and Apple’s browsers gave users the ability to either refuse all cookies or to indicate when a cookie was being sent.<sup>208</sup> Google, however, had discovered loopholes in those browser’s cookie blockers that allowed it to continue placing cookies on browsers.<sup>209</sup> Google took these actions despite explicitly stating in its Privacy Policy that users “can reset your browser to refuse all cookies or to indicate a cookie is being sent.”<sup>210</sup> Google settled with the FTC on federal charges related

---

200 *Id.* at 1549.

201 18 U.S.C. § 2710 *et seq.*

202 *Yerшов v. Gannett Satellite Info. Network Inc.*, No. 14-cv-13112-FDA (D. Mass. Sept. 2, 2016).

203 47 U.S.C. § 551(e).

204 *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930, (8th Cir. 2016).

205 803 F.3d 125 (3rd Cir. 2015).

206 *Id.* at 130.

207 *Id.* at 130-31.

208 *Id.* at 131.

209 *Id.* at 132.

210 *Id.*

to this situation, paying a \$22.5 million settlement.<sup>211</sup> The Third Circuit dismissed nearly all state and federal law claims, *except* the California Constitution claim relating to invasion of privacy and state tort law.<sup>212</sup>

## **XII. CONCLUSION**

2016 will be remembered for some remarkable wins for the defense on the conduct side, but also for several strong decisions for federal law enforcers in the merger area. On the privacy side, the law is clearly developing, but is very much in a “stay tuned” mode.

---

211 *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, 803 F.3d at 132-33.

212 *Id.* at 153.

## KEYNOTE ADDRESS: A CONVERSATION WITH CALIFORNIA SUPREME COURT JUSTICE CAROL A. CORRIGAN

Panelists: Cheryl Lee Johnson and Kathleen Tuttle<sup>1</sup>

*For the fourth year in a row it has been our good fortune to have a member of the California Supreme Court as our keynote speaker. At this GSI, we welcomed Associate Justice Carol A. Corrigan. The questioners were two former chairs of the Antitrust Section, Cheryl Johnson and Kathleen Tuttle. Johnson and Tuttle began the presentation with a brief introduction followed by questions posed to Justice Corrigan. What follows is an edited transcript of that conversation.*

MS. JOHNSON: It is our great honor to have with us today California Supreme Court Justice Carol Ann Corrigan. A few words about the Justice's background. She was born in Stockton, the only child of a librarian and a Stockton Record newspaper reporter. The first in her family to receive a college degree, she graduated magna cum laude from the all-girls Holy Names College (now, University) in Oakland, where she was the Student Body President and received the Founders Medal. She briefly pursued a doctoral program in clinical psychology at St. Louis University, before the law called. She attended U.C. Hastings Law School where she was the Notes and Comments Editor of the *Hastings Law Journal*. After receiving her JD in 1975, she worked twelve years as a deputy district attorney for Alameda County, the last two as a Senior Deputy.

In 1987, she was appointed to the Alameda County Municipal Court bench and in 1991, was elevated to the Alameda Superior Court. Three years later, in 1994, Governor Pete Wilson nominated our honored guest to the California Court of Appeal, where she served for twelve years. During that time, she also served on a number of judicial administrative bodies, including the California Judicial Council, which determines policies for the entire state court system. Then-Chief Justice Ron George selected her to lead the Judicial Council Task Force on Jury Instructions, and she devoted ten years to rewriting the state's jury instructions into plain English. She received the 2003 California Judicial Council Jurist of the Year award, in part, for her relentless efforts reforming the state's jury instructions.

MS. TUTTLE: In 2005, Governor Schwarzenegger nominated our guest to the California Supreme Court. That made Justice Corrigan the fifth woman in history to serve on our highest court. In 2014, Chief Justice Tani G. Cantil-Sakauye tapped Justice Corrigan to lead the Commission on the Future of California's Court System.

When not serving as a "beacon on the bench," Justice Corrigan has taught law at several law schools and is very active in civic affairs. She is a long-time board member of the Holy Names University, Saint Vincent Day Home, and Goodwill Industries. She has taught at the National Institute of Trial Advocacy, receiving its Robert E. Keeton Distinguished Faculty Award, and for many years taught at the California Judicial College. Last year, she received the Judicial Counsel's Excellence in Judicial Education

---

1 Cheryl Lee Johnson is Deputy Attorney General, Antitrust Law Section, Office of the California Attorney General; Kathleen J. Tuttle is the Deputy-in-Charge, Antitrust Section, Los Angeles District Attorney's Office.

Award. She has served on the President's Commission on Organized Crime, and was a Special Consultant to the President's Task Force on Victims of Violent Crime.

We are fairly certain Justice Corrigan gets little sleep.

MS. TUTTLE: You actually went to school for clinical psychology, but then switched to law. How did this change come about?

JUSTICE CORRIGAN: When I graduated in 1970, there just weren't a lot of women rushing off to law school, nor were there schools letting them rush in. I knew I wanted an advanced degree, and I said to my parents I was going into clinical psychology, which my parents both thought was voodoo, but they were supportive. So I went off to study for a doctorate and after a year and a half, it occurred to me all the people in the psychology department were nutty. I was really getting along quite famously with the law students, a couple of whom were women, and I thought I could do this. I called my parents and said what if I come home to California and went to law school? My mom said "Terrific!" Now, if I would have said "Mom and dad, I'm going to come home and become a hooker," my mother would have said "Terrific!" But I had always been interested in the law, I read fairly broadly in the law. When I finally figured out somebody like me could pursue such a degree, that was it for me, and I got to come home to California.

MS. TUTTLE: You are probably using some of your psychological insights in your legal career.

JUSTICE CORRIGAN: Occasionally. I worked as a psychometrist when I was in the graduate department. So in dealing with psychiatric defenses, it was helpful to speak the lingo.

MS. TUTTLE: During your law school days, far fewer women were in the legal profession. What career opportunities did women have when you graduated and what inspired you to become a prosecutor instead of, say, going into private practice?

JUSTICE CORRIGAN: Well, it is a multifaceted answer. I knew I wanted to do trial work, and there weren't a huge number of big firms reaching out to hire girls to go into their litigation department. I was lucky enough to score an interview with the Alameda County PD's Office. I was very interested in criminal law, and I was trying to figure out which side I wanted to be on. A friend of mine in college introduced me to a neighbor of hers, who was a judge, and a very wise woman. She said you know, that's perfectly fine to go to the PD's Office, that's fine and you'll be great there, but think about the fact that if you become a prosecutor you're the one that gets to make the decisions instead of being the supplicant all the time, and you may find that you have more discretion. I was very, very lucky to have landed in the Alameda County DA's Office. It was then and is now a great place to start your career.

MS. JOHNSON: You devoted a decade to rewriting California jury instructions. Thus, "innocent misrecollection is not uncommon" became "people sometimes honestly forget things". Do you think these changes made a difference and why do you think these reforms were valuable?

JUSTICE CORRIGAN: I hope they made a difference; I spent ten years doing it. It seemed so intuitive to me. We ask civilians to come to court to apply the law. And if you've ever been a trial lawyer, you know the judge begins by saying, "ladies and gentlemen, you have to figure out what the facts are, and I will explain what the law is, and then you'll take that law as I explain it to you and you apply the facts." That's great. Jurors think "this is unusual for me, I am not exactly comfy here, but that's okay because the judge is going to explain it to me." Then the judge launches into these instructions that sound like they were originally written in Serbo-Croatian, translated via Greek, to something that sounds like it's from the Middle Ages, which is an awfully gimpy system, when you think about it. If you're going to ask people to decide great big important things, and you tell them they have to do it according to a certain set of rules, it would be ever so entertaining if they actually understood what the rules meant. That was Chief Justice George's vision when he brought together the task force, and we tried very hard to live up to that charge. It was not easy.

The law lives in its language. We don't know anything about the law except what we say about it in words. You can't look at it under a microscope, can't taste it or weigh it. All we know about the law is what we say about it in the language that's given to us. So we knew we were going to have to be taking precedent and translating it into more understandable language. If you change the words, there's a pretty reasonable risk you may change the meaning. So that's why it took us ten years to figure it all out. It was daunting, but well received. They are using them around the state still. So I guess that's a good thing.

MS. JOHNSON: I know a lot of the lawyers are unclear on how the instructions are updated, especially in areas where the law is uncertain and quickly developing. Can you enlighten us?

JUSTICE CORRIGAN: There is a standing committee under the Judicial Council, and that is staffed by the original working lawyers. Part of their job, now that they have this body of extensive instructions, is to constantly monitor the changes in the appellate decisions and modify the instructions accordingly.

It certainly happens that from time to time—you know how those judges are—they change the rules, and the instructions have to be updated or the law has been changed. If you find that there is either an instruction which is not completely accurate or if you are experiencing the application of some new law and you find the standard instructions don't cover that principle, by all means, you should write to those committees because they meet several times a year, and they generally put out drafts of their recommended changes for public comment so that we can make sure that we don't overlook something. So it is an ongoing effort. Once we got the two big books done, the updating continues just as happens with your research materials, I'm sure.

MS. JOHNSON: Let's talk about the process that got you to the Supreme Court. Governor Schwarzenegger cited your pure brilliance and unimpeachable integrity. Those are good things to have and it is high praise from The Terminator. Are there other factors that helped propel your nomination to the Supreme Court?

JUSTICE CORRIGAN: Other than sheer luck? You know, I really couldn't answer that question with any degree of accuracy, but I will tell you two stories about my nomination.

So we went to be interviewed by the Governor, and in the room were the Governor and his appointment secretary and his chief of staff, now Justice Peter Siggins, who was his legal affairs advisor. So I am ushered into the conference room with this great big table and the Governor pulls out my chair for me, and across from me is Justice Siggins. And I had never met the Governor before, but my mother didn't raise a stupid daughter. So I tried to be reasonably ready to meet the man. And everybody who did know him said a couple of things, that he is humorous and has a very intuitive sense about people.

I was being considered with two other candidates who were very cerebral, very formal gentlemen. And I don't tend to be all that formal, so I was kind of planning this as I was driving up and thinking okay, you could try to be more scholarly and more cerebral and more formal and you'll come across as a complete doofus, and you will not be giving the Governor an opportunity to really evaluate the candidate. So I thought I should just be me, as crazy a concept as that is. So I sit down and say "Governor, let me ask you, is this the seat with the ejector button on it?" And he said, "Oh, yes, I have the controls right here." I said, "Oh, that's good, if I said something foolish, I wouldn't want you to send Mr. Siggins out the window." I thought he is either going to love that or I am going back to the Court of Appeal and I am going to die there.

Time goes by and he has to evaluate who he is going to appoint. I have been known for staying late at work. There's a message on my home answering machine at 5:15 p.m., "this is so and so from the Governor's office and the Governor would appreciate it if you called us back." Now I am yelling at the telephone. So now it is like 7:00 p.m. or later. So I call. And the phone rings and the janitor answers the phone. It is all very secret. Everything is kind of under wraps and you're not supposed to give away any of the Governor's secrets. So I am trying to speak in code to this gentleman and trying to return a call. He says, "lady, I don't know what to tell you, they are all gone."

Fortunately the aid who called gave me a cell phone number, and I called that number and there's a message. So I have talked to the janitor and I have left a message on some nameless, faceless fellow's cell phone. I am pretty sure that the Governor doesn't call you to say you are not getting the job. So, now I am walking in my kitchen talking to the cat. Finally the phone rings and it's the aide and he says, "Oh, thanks so much for calling. The Governor's at a dinner and he asked whether or not it would be convenient for him to call you later when the dinner is over." I did not say "No, if he can't talk to me now, forget it." So I said "Of course, and please tell the Governor that obviously he's having a long day and if it would be more convenient tomorrow morning, that would be fine, too." So now I hang up again and there's more pacing in the kitchen talking to the cat. About 10:15 p.m. the Governor was kind enough to call, and it wasn't with bad news and it was very well received. As many of you may well know, when you are contacted by the Governor's office, they usually say you can't tell anybody this. We are going to release this, there will be a press conference in three days, so please don't tell anybody. So I swore the cat to secrecy, and why he made this decision, you'd have to ask him.

MS. TUTTLE: You are certainly the voice of experience in this room about all things judicial. Do you have any advice for people here who may be interested in, or who aspire to the Bench, about specific things they may do to enhance their chances of appointment?

JUSTICE CORRIGAN: It doesn't hurt if you get a good reputation as being a smart and honest lawyer.

MS. TUTTLE: Should they get a cat?

JUSTICE CORRIGAN: It would help. Or a small dog. But I think generally speaking, appointing authorities from all sides of the aisle are looking at people who they really can repose confidence in. They don't know you, so they are going to be talking to other people that know you. So, it is the degree to which you can be out in your communities, letting people get to know you as a professional and as someone more broadly interested in the community and in the way law operates to make our communities better.

So I was so lucky to be able to be involved in teaching and publishing and serving on boards. The advantage of that is not just building up your resume but letting people from all walks of life to get to know you and see what kind of judgment you have and whether or not you can sit in a ballroom and get through a luncheon and have your shoes on the right feet. All those things that people want to get a sense of before people want to give you one of these jobs.

MS. TUTTLE: You have said regarding your Supreme Court appointment, "It is a chance to be squarely on the firing line because we see some of the most challenging and pressing legal questions of our day." Has it lived up to your expectation?

JUSTICE CORRIGAN: Oh, yeah. People ask: Do you like your job? And I always say: If you can't be happy doing this job, there's just no hope for you. It is a fascinating job on the cutting-edge of the evolution of the law, and we are all law nerds, so it doesn't get any better than that. To be able to help guide the future of California jurisprudence by writing these opinions in words, the only weapon available to us, is not only a fascinating job but a tremendous honor. And there are days when I think, wow, no one would have predicted this.

MS. JOHNSON: Now, historically the Court spends about 25 percent of its time dealing with habeas petitions and death penalty appeals. And then you have thousands of civil cases vying for review. What qualities make a case most likely to be reviewed by the California Supreme Court? And is there something a practitioner can do to enhance their chances of getting a review?

JUSTICE CORRIGAN: The whole Court meets every Wednesday usually for a morning, and we talk and we look at the cases where we have received petitions for review. There may be anywhere from 50 to 200 in number, and the list is divided into the A list and the B list, the B list being the snowball's-chance-in-hell-list.

Here's how you get on the A list: You write a good brief. That helps. And all the briefing is initially reviewed by a member of the central staff who writes a memo for the members of the Court. We are looking for a number of things. Is there a conflict

in the law? Is this a question of policy that has to be resolved? Does this case raise an issue that is likely to recur? Is this a good vehicle procedurally to take on that question or is there some little wrinkle in the way the case was tried that is going to make it tough for us to get to the legal issue? Has the case been published? Because if it hasn't been published, whether it is right or wrong, it is not going to create any broader mischief. Was there a dissent below? The difference between the Court of Appeal and the Supreme Court is that when you are on the Court of Appeal, you are functioning as a Court of error correction. So you are looking backwards to see what happened in the trial court. Did something terrible go wrong there and do you need to intervene in order to restrike the balance?

On the Supreme Court, for our discretionary review, we are generally not operating as a court of error correction. We are operating as a court of policy. So we are not looking backwards so much as much as we are looking forward. Obviously there's overlap always, but we take cases where we feel as though it is important for us to either clarify the law or make a policy statement about what the law is or should be. Often it happens that there's a new initiative or there's new legislation or there has to be clarity brought.

So to the degree you can keep those criteria in mind in petitioning for a review is helpful—because we only grant review in about three percent of cases for which review is sought. Your whole goal at the outset is simply to get us to pay attention to see that there's some good reason to take this one.

MS. TUTTLE: You say you need to write a good brief. What, in your mind, makes for a good brief and what approaches are effective and what is a total turnoff?

JUSTICE CORRIGAN: As with most things, there are very few ways to do what we do well, and there are lots of ways to do it badly. A good brief is one that answers those questions and tees up the policy question for the Court. We are not looking at your case in terms of whether you or your client should win. We are looking at it in terms of what kind of rules should we write that will help guide everybody going forward.

As to oral argument, it is always interesting to me because we will look out and say what's the rule we should write? It is amazing the frequency with which the advocate will look back and across his forehead goes "what a great question. Never thought of that." That's a question at the forefront for us. How should we use these weapons called words and articulate a rule that everybody can apply with some measure of accuracy and predictability?

So there's that. Focus, focus, focus. It is important to have good record citations so that when you say this happened in the trial court, we can actually confirm it did happen in the trial court. Don't lie. Don't overreach. I think it's important strategically to determine whether or not you want to settle for a narrow victory that may serve the interest of your client or may resolve the aspect of the question that's involved in your case, or whether or not you want to swing for the fences. It's important to know which before you write the brief and show up for argument.

And then there are all the things you know. Don't yell in the brief, which means don't put things in capital letters and bold and multiple exclamation points. It's hardly ever a good idea to attack the trial court or the lawyer on the other side. You never know

whether the trial court judge might have stood up with one of us at our weddings or we went to grade school together.

But the degree to which you can articulate the question to be answered with specificity and then focus all of your briefing and argument to the resolution of that question. That's the way we are approaching the case, and we are counting on you for help. So if we are both shooting at the same target, it is advancing the ball.

MS. JOHNSON: As you're advancing the ball, is it helpful to have amicus briefs? Do you read them and what value do they have?

JUSTICE CORRIGAN: I think one of the things that we are all mindful of is that we are not experts in your field often, but we are going to be writing a case that may have to do with banking or the trucking industry or healthcare and the law of unintended consequences is always playing in the background. So when we articulate one of these really splendid rules that we come up with, it is reassuring to know we don't have to shut down all of banking in America because we come up with a rule that has some fallout that was not anticipated.

I think that is one service that the amicus briefs perform. It gives the Court a broader understanding of the field in which we are writing. It also gives the advocates an opportunity to share the effort. When you're the lawyer for the client, you have a certain approach that you need to take or that you want to take and you may find that your friends who write the amicus briefs can articulate things that perhaps your client wouldn't be thrilled to articulate or they may be able to recast the argument in a different way than you, as the primary advocate, are prepared to embrace.

MS. JOHNSON: If your opponent comes with five or ten amicus briefs, aren't you at a disadvantage if you don't muster a lot of amicus briefs to counter such a fulsome presentation??

JUSTICE CORRIGAN: We are not quite that stupid. If you have written a good brief and you have made your case effectively and if you have told us what we need to know, if we get ten amici on the other side that say if we go your way it will be the end of Western civilization as we know it, sometimes that really doesn't help. It is an overreach by an advocate.

You should be prepared to address those briefs or what may be telling arguments or what may have some surface appeal. Sometimes that happens, too. Sometimes, someone comes in and argues, of course, all right thinking people think this and it seems to track and make some level of logical sense. So you need to be prepared to say it is not exactly quite like that. I think the amici can be very helpful, but they seldom turn the tide either way.

MS. TUTTLE: I sometimes think that most of us lawyers became lawyers because we love to talk. What helps you the most when people appear before you for oral argument?

JUSTICE CORRIGAN: Write this down. Here's the most important tip for oral argument. Just like your mother told you, eat a good breakfast. Since I have been on the courts of review, I have had two lawyers pass out at oral argument, and they didn't eat a good breakfast. One was flying up from Los Angeles, and I forget what the story was

with the other guy. We know that occasionally appearing in a court of review can be a little nerve-producing. So you might want to go light on nutrition because then you won't be queasy. Think about it this way: If you eat a good breakfast, you might throw up, but if you don't eat a good breakfast, you might pass out. If you pass out you're done. If you throw up, you can keep arguing. You don't have to have huevos rancheros, but have enough nutrition to advance your argument.

Once you have a good breakfast, be clear on what it is you want to accomplish at oral argument. We have read all your briefs and the record and we have a draft opinion that everybody has reviewed and responded to in writing. So you are right down at the point of the pencil now. The way we approach oral argument is in part to test-drive the draft. We want to make sure that we don't hit the speed bump of unintended consequences. We want to be prepared to ask you what you would think if we were to write this or that kind of a rule. Be prepared to say you can't write it that way because it will shut down the trucking industry. I know you have heard this a thousand times, here are two answers not to give: "I will get to that in a minute." No, now would be a good time. Or, "that's really not a very good question." Stupid. Occasionally you may be sorely tempted to give that latter answer, and you might even be right. But a good advocate is prepared to say, "Well, your Honor, if I could address that in this way.....," or "I could change the question just slightly." Sometimes when a politician is asked a tough question they answer a different question. That's a high-risk strategy because we notice that.

First of all, answer the question directly. Don't give us a 20-minute peroration on the question. If it can be answered yes or no, that would be great, and then explain. Or, if it can't be answered yes or no, explain why it can't be, or some variation on the theme. But you do want to be responsive to the question, because that's the primary value of oral argument from our perspective. We come to oral argument with those issues in play, and this is your last best chance to grab us back from the brink of oblivion. Being responsive to the question is second to eating a good breakfast.

MS. TUTTLE: Can you think of an instance or two where you remember oral argument really turning the tide or making a difference?

JUSTICE CORRIGAN: I think often oral argument doesn't necessarily turn the case around, but it can influence the way the opinion is drafted and how the rule is articulated, and the breadth with which we embrace the question. So you may not be able to completely lead us in a different direction, but you can nibble around the edges, and the edges may be important to you and your client.

You have all heard that you seldom win your case at oral argument, but you can lose it. My very first oral argument on the Court had to do with whether or not the City of Berkeley could allow the Boy Scouts to operate their Sea Scout program at the Berkeley Marina, I think that was the issue, it was Berkeley, the Boy Scouts and money. And the lawyer who was representing the Scouts was a Scout father lawyer, very capable fellow but constitutional and public interest law weren't necessarily in his wheelhouse. Part of the issue was whether or not this was showing favoritism to a private group; whether as a public policy, the City of Berkeley should be able to make public spaces available to a private group. They were going on and on about the Boy Scouts and saying how wonderful they were, which was fine. And one of my colleagues said "what if it wasn't

the Boy Scouts? Suppose it was the Hitler Youth, would you say Berkeley should make that space available to them as well?” And he said “Absolutely, it is the same principle.” Okay. It might be, but that doesn’t go down very easily. Now you are embracing the Hitler Youth, and you didn’t have to go there.

You have to be mindful of that. In part, we are trying to look over the horizon to see if we write the rule this way, how far will it go, and how much latitude are we building into the rule? So those are the cases in which the mask comes off and you begin to become more concerned about the long-term consequences of not just deciding this case with a slip at the Berkeley Marina and the Boy Scouts, but how much more broadly might this go.

MS. JOHNSON: I will pivot to ideology. In a *Daily Journal* article you said you wanted to be a judge that is known as not being necessarily predictable but not wildly unpredictable. Elsewhere people have described you as a moderate and having an ideology and being a “beacon on the bench”. Do you think you have an ideology and what role do you think it has in decision-making?

JUSTICE CORRIGAN: The term “ideology” is one of those Rorschach card terms. It means many things to many people and there are all kinds of ideologies. My belief is that we didn’t get these jobs just because we are smart and good-looking. We were given these jobs with a huge amount of authority to apply the law as it’s enacted by the people or their elected representatives and to foster the policies that underpin those laws.

We are not “Ambassadors without portfolio” emboldened to do good by our own likes. We have a wonderfully diverse state and political system, and judges, I think, need to be mindful of that. We are not there just to call the balls and strikes along the way that we like the case to come out. So if I have any ideology, I would say that that is it. I try to go where the law takes me, not necessarily where I’d like to take the law.

MS. JOHNSON: Over the last three years we have seen the Court welcome three new justices, all from heavily academic backgrounds, all under 47, and all from Yale Law School. How have these judges changed the Court’s culture and decision-making?

JUSTICE CORRIGAN: The Court’s like a little family of seven people, and any time you change somebody in the family, you are going to change the dynamic of the family. These three new colleagues are wonderful, blindingly smart, dedicated people. Because they have come to the Court from a different route than some of us others did, they bring a different perspective. They enrich the Court in ways that go beyond just having been a trial lawyer and trial judge. So that part has been wonderful. We try not to hold it against them that they went to Yale, and that goes for anyone. They are so accomplished in their own right.

Particularly with Justice Kruger, who was an oral advocate before the Supreme Court on a number of occasions, she brings that measure of insight into appellate advocacy that many of the rest of us don’t have at the forefront of our experience. They have brought a wonderful intellectual rigor. They have brought wonderful new ideas. They are looking at the diamond through a lot of different facets, and that’s all to the good.

MS. JOHNSON: Chief Justice Tani Gorre Cantil-Sakauye chose you to lead the commission on the future of California’s court system. We know this is an extremely

important commission. What is its mandate and mission, and what do you hope it will accomplish?

JUSTICE CORRIGAN: It has a very broad mandate, and it is essentially to say here we are in the first quarter of the 21st Century, look at the way we do what we do in our courtrooms and see what we can do differently, and more effectively to make justice more efficient, but more accessible to people.

When you think about it, what you encounter in a courtroom today is very similar to what you would see if you watched any of the great courtroom dramas going back to the beginning of the 20th Century. Remember that great Spencer Tracy film, "Inherit the Wind" where they were doing the Scopes Monkey Trial? We do things pretty much the same. We don't have the fellow with the big handlebar mustache taking it down in shorthand, but you would recognize what we do every day going back 100 years or more in court proceedings.

We live in one of the most expansive forward-looking places on the planet. There might be things we can learn in the last couple hundred years and from all of our technology. A lot of what we are looking at is trial court efficiencies and accessibility issues. A couple of examples. In every county in California, every morning in the dark, thousands of prisoners are awakened, given a sack lunch, put on a bus, driven in traffic to a courthouse where they sit in a holding cell for a 90-second arraignment at usually about 4:30, and then driven back. That is blindingly inefficient. There is no reason we can't do video arraignments and appearances, not only in criminal but in civil courts.

The ability of people to access the courthouse and the justice that reposes there in ways that don't require them to drive 50 miles each way or that don't require that they take an entire day off are aspects of what we are looking at.

If you are doing an arraignment in Redding and the defendant speaks Hmong, well, what we do now is we put the case over, we find somebody who speaks that language. We pay them to drive to Redding for a 90-second arraignment, and then pay them to go back again at the next appearance and the next one. There's no reason why we can't do a much better job of making translation services available for those defendants and civil litigants as well by using technology.

We are looking at the way we prepare court records, the way we store them and the way we all have access to them that takes advantage of not just a court reporter sitting in that room doing whatever it is they do on those little machines.

So we are looking at those issues along with lots of others.

MS. TUTTLE: We are so grateful to have you here with us today. You have said at least once that you view yourself as an old-fashioned book freak who enjoys sitting in her Oakland home reading philosophy, history and mystery books. If marooned on an island, what books would you want with you?

JUSTICE CORRIGAN: Shakespeare. Because if I didn't say Shakespeare, you'd all think I was a Neanderthal.

MS. JOHNSON: Since you are an Oakland resident, do you have any favorite team that you support?

JUSTICE CORRIGAN: It is hard to be an Oakland team supporter these days because they keep leaving, or trying to. I am a fairly big sports fan. I have to confess, and I know this will alienate half of your audience, I am not a huge baseball fan, although I was very happy to see the Cubbies win. I am a big football fan, but more college, so Notre Dame football.

MS. JOHNSON: She has a Notre Dame cover for her iPhone.

MS. TUTTLE: Because you teach there.

JUSTICE CORRIGAN: I do. I am an adjunct professor there.

MS. JOHNSON: I will ask one final question. Could you share a memorable experience from your time as a prosecutor.

JUSTICE CORRIGAN: I see Sam Miller in the back of the room. And his wife, Maude, was a public defender when I was in the District Attorney's office. We had a murder case together. She came to me—and this was in the era when the prosecution, quite rightly so, had to give complete discovery, but the defense had to give none. That was a pretty exciting ride if you were a prosecutor, because you rested, and then all kinds of exciting things happened. That was a very closely held strategic advantage that defense counsel loathed to give up.

But in those days, Maude came to me and said you really should think about this case because you need to give this guy a break. She sat in my office. I had a big stack of paper in which maybe I could find the right document. Maude's preparation materials were color coordinated and tabbed and very organized. She laid out her defense for why this defendant had acted in self-defense. It was a risky move because she didn't have to give me any of that. As a result of that presentation, my investigator and I went out and talked to a lot of people in the community, and we said, you know, some people have told us that Fred acted in self-defense and the witness said oh, yeah, everybody in town knows that the other guy was a bully and poor Fred had to act in defense. Having done that investigation, I was in a position to dismiss the case.

To me, that is as important a part of being a good prosecutor as winning the cases that you should win. I was schooled in the Alameda DA's office to believe that every time you walk into a courtroom, you never ask a judge or jury to do something you wouldn't do if the roles were reversed. They said, when you go to court, you should have the mindset that justice is a conviction not because justice is always a conviction, but because you have made a judgment that here in this case justice is a conviction. And if it isn't, you shouldn't pursue one.

So if you have the latitude as a lawyer to be able to operate in that kind of environment where you are getting paid to do the right thing by your own lights, it doesn't get much better than that. That's why I often say that was the best job I ever had, including the job I have now. So that's not so bad.

MS. JOHNSON: Again, Justice Corrigan, we thank you so much for being here today.

# UNITED STATES V. AB ELECTROLUX AND GENERAL ELECTRIC COMPANY: A PANEL DISCUSSION WITH TRIAL COUNSEL

Moderated by Peter Huston<sup>1</sup>

## I. INTRODUCTION AND BACKGROUND

Each year the Federal Trade Commission and Antitrust Division of the DOJ are notified of hundreds of proposed mergers and acquisitions. They only investigate a small fraction of those. An even smaller fraction get a full “second request.” A smaller fraction still are challenged with complaints seeking to enjoin the deals. And only some of those actually go to trial. In short, merger trials are rare.

One of those rare merger trials took place in late 2015 when the DOJ sued to stop the \$3.3 billion sale of General Electric’s appliance business to Electrolux, a Swedish company. GE sold appliances under its own name with various subbrands, including GE Monogram, GE Profile, and GE Café. They also sold under the Hotpoint label. Electrolux sells under its own name but also sells under the more well-known Frigidaire brand and under the Tappan brand. They also manufactured the products for Sears to sell under the Kenmore brand.



GE and Electrolux obviously are not the only manufacturers of appliances. Whirlpool is a major player, and Whirlpool about ten years ago purchased Maytag. Also in the market, are Samsung, LG, Viking, Wolf, Bosch, which owns Thermador, Miele, Fisher & Paykel, Dacor, Beko (a new brand coming into the United States), and others.

---

1 Peter Huston is an antitrust and white collar partner in Sidley Austin LLP’s San Francisco office.



Nevertheless, on July 1, 2015, the DOJ sued to block the deal, and the parties agreed to complete all discovery within three months. Discovery closed on September 30th, and nine days later the case went to trial in the District of Columbia before Judge Emmet Sullivan.

The DOJ focused its challenge on ranges, cooktops, and wall ovens. The trial lasted four weeks. There were twenty-four witnesses, including experts. With only one day of trial remaining, GE backed out of the deal, so the case never went to verdict. GE was able to abandon the deal because the merger agreement had a reverse breakup provision that allowed then to back out of the deal as of December 7th, and it just so happens that the last day of trial landed on December 7th. Under the merger agreement, GE not only got to back out of the deal, they collected \$175 million dollars. GE later went on to sell its appliance business to a Chinese company, Haier, for \$5.6 billion, which is actually \$2.3 billion more than they were going to get from Electrolux.

Counsel for the parties discussed the trial at the Golden State Institute.

The panel

- **Ethan Glass.** Ethan was the lead trial lawyer for the government in the case. At the time of trial, Ethan was the Assistant Chief of the Litigation III Section at the Antitrust Division. He was with the division for almost nine years. In addition to working on the GE/Electrolux trial, Ethan was part of the trial team in the DOJ's case against American Express. Ethan is now a partner at Quinn Emmanuel in Washington, D.C.
- **David Gelfand.** David was the Deputy Assistant Attorney General at the Antitrust Division during the case and was at the counsel table throughout the trial. As Deputy Assistant Attorney General David was involved in virtually

all aspects of antitrust enforcement, and was heavily involved in other major merger matters including the proposed Halliburton/Baker Hughes deal that was abandoned and the U.S. Airways/American Airlines merger. David is currently a partner at Cleary Gottlieb in Washington, D.C.

- **Paul Denis.** Paul was the lead trial lawyer for GE. Paul is a partner at Dechert in Washington, D.C. He's the deputy chair of the firm's Global Litigation Practice and co-chair of its Antitrust Group. Paul is known as one of the country's preeminent antitrust litigators, especially when it comes to merger litigation. He is ranked nationally with Chambers, Benchmark, Who's Who, Legal 500, among a number of other accolades. He's considered a go-to lawyer for high-profile merger cases and has been involved in a long list of them, including the American Airlines, US Airways, Office Depot, Office Max, Whole Foods and Wild Oats, among many others.
- **John Majoras.** John was the lead lawyer for Electrolux. John is a partner at Jones Day in Washington, D.C. and Columbus, Ohio. He co-leads the firm's Business and Tort Litigation practice, and coordinates the firm's Global Competition Law Practice. John is another go-to lawyer for companies when they face high-profile merger challenges and other litigation. He has been lead lawyer in many other merger cases, including the Steris/Synergy merger that was unsuccessfully challenged by the FTC. He was also the lead lawyer for American Airlines in the government's challenge of its merger with USAir. He's also been the lead lawyer in numerous class action cases.

MR. HUSTON: Ethan, let us know why the DOJ brought this case in the first place. There are obviously a lot of alternatives in the marketplace. I'm wondering why the DOJ devoted a significant amount of its resources to challenging this deal. What was the harm that you were seeing?

MR. GLASS: Well, thank you, Peter, and hello, everybody. So first, as an advocate I would like to say that I think we have a pretty good idea where the judge was going to land, and I think we can see a lot of the judge's thinking in the Staples/Office Max decision, where a lot of the same issues were being litigated. But what was the problem with this merger? The problem was that the evidence, the contemporaneous business records, showed that GE and Electrolux were pounding each other, pounding each other to the benefit of consumers.

At trial, I give the judge a hypothetical consumer. I think the judge focused quite a bit on her plight. I called her Mrs. Smith. Mrs. Smith walks into a store. It doesn't matter to her that there are 20 sellers. If she can't afford a Miele, she doesn't even know what a Miele is. She's got \$500 in her wallet. She's looking at the options on the floor, and she had three choices: The GE, the Frigidaire, and the Maytag.

Now, this wasn't just a theory that the government came up with. This is what the documents and the data showed, and so I would commend everybody when you're approaching the Department of Justice, we may have a lot of good ideas, a lot of good theories, might have regressions, fancy work done, millions of dollars spent, but in the end, when the documents show that the two merging parties are very significant

competitors, and the data supports it, I think you are going to see a challenge every single time. And so, Peter, that was the concern with this merger. The concern was that Mrs. Smith was going to pay more after this merger if the Court didn't block it.

MR. HUSTON: Paul or John, any reaction to that? What say you?

MR. DENIS: Well, I will start with Mrs. Smith. Actually, she was a very compelling figure in the case—a lot of credit to Ethan and David and the team for coming up with Mrs. Smith and keeping her out of the discovery process. It was very frustrating not to be able to depose Mrs. Smith. We tried to introduce Mr. Jones, but he didn't do a very good job. Mrs. Smith did a lot better job. I think the fundamental difference between the case that the government was putting on and the case that John and I were putting on was that the government was looking backwards. They only wanted to look so far back. They didn't want to look back to Whirlpool, Maytag. We wanted to look forward. We wanted to look at how the marketplace was evolving, where it was going to evolve with this merger, and we wanted the judge to evaluate the transaction in that context.

Certainly Electrolux and GE competed. There is no debate about that. We weren't going to contest that. But what we were contesting was how that market going to work after this transaction, what we learned from Whirlpool/Maytag, and what we have learned from other appliance markets that evolved overtime.

MR. MAJORAS: It's kind of interesting to hear in Ethan's presentation the discussion about Mrs. Smith, and that's what this case was about. I think it's fair to say that as the case was tried, there was a great deal of discussion about this person as a representative of a person in a certain economic status and whether they could buy a range if they walked into a store. What's pretty fascinating, though, is that as we all walked into the courtroom at the opening of that trial, I think all of us expected—I would be curious to hear what Dave and Ethan would say about this—all of us expected the real issues to be over the contract channel, the builders and suppliers who bought massive amounts of appliances and installed them in apartment buildings and developments. That had been the central focus of the discovery, it had been the central focus of a lot of discussions in terms of the effects the deal might have.

I would say that the overall market for cooking appliances and retail is certainly part of the Complaint, but we felt pretty good about that aspect going into the case because the overlaps, the documents that we were hearing about really were in this contract channel. As I look back at the case, probably one of the more fascinating pieces of it was this good tactic, and the judge picked up on Mrs. Smith. He asked a lot of questions. He cared about Mrs. Smith. But if you actually looked at the Mrs. Smiths that were out there and the people buying the low end of the price points on those ranges, it was developers, the apartment builders and things like that. So from a competition standpoint, to say the DOJ was protecting Mrs. Smith, I won't argue with them. They could look at it a number of different ways. But I think from the pure antitrust issues, the interesting antitrust issues in the case, I think all of us thought it was going to be on this contract channel. And the fact that the case then kept going back to Mrs. Smith was really pretty interesting.

MR. GELFAND: As somebody who was overseeing this—I was actually the Acting Assistant Attorney General on the matter because Bill Baer was recused—I had to

constantly be thinking about the case, not just from the perspective of somebody sitting with Ethan and being involved in the strategy, but also as a client in this case, trying to decide on behalf of American consumers whether we wanted to try and settle, whether we wanted to go to verdict, et cetera. Just put aside for a moment technicalities about how one defines a market. I have a lot to say about that, and I'd like to get into that a little bit. But there were just two very large categories of customers that were going to be hurt by the merger, and it was not backward-looking. It was forward-looking. These two companies continued to compete very vibrantly against each other. All indications were that that was going to continue. Other players were not going to come anywhere near in the coming years what these two were doing, and it was a 3-to-2 in the great majority of the contract market.

So the contract market are people building apartment buildings, people renovating apartment buildings in multi-unit or building housing developments where you buy hundreds or even thousands of appliances at a time. Those people don't go to Home Depot and look at Samsung and look at Wolf. They go to three companies, and they say, "Make us a bid," and it's highly negotiated. GE and Electrolux were two of the very important competitors in that space, and we had tons of bid data. It was very clear that they were constantly butting into each other. Whirlpool, as well. We gave Whirlpool full credit. It was a 3- to-2. It wasn't a 2-to-1. But in that space involving hundreds of millions of dollars of annual sales, it was a 3-to-2, a very serious issue.

And then on the consumer side, which was alleged in our Complaint in overall market, lower priced appliances, especially cooking appliances, in this \$400, \$450, \$500 price range, there were basically three companies that were accounting for the great majority of that, too, and they competed against each other, they negotiated with retailers, and they got floor space. Samsung and LG were there. They were a little higher price point. There was no evidence that they were going to move down. So those were really the two big categories of customers that we were trying to protect, and nothing in the trial persuaded me that we got that wrong.

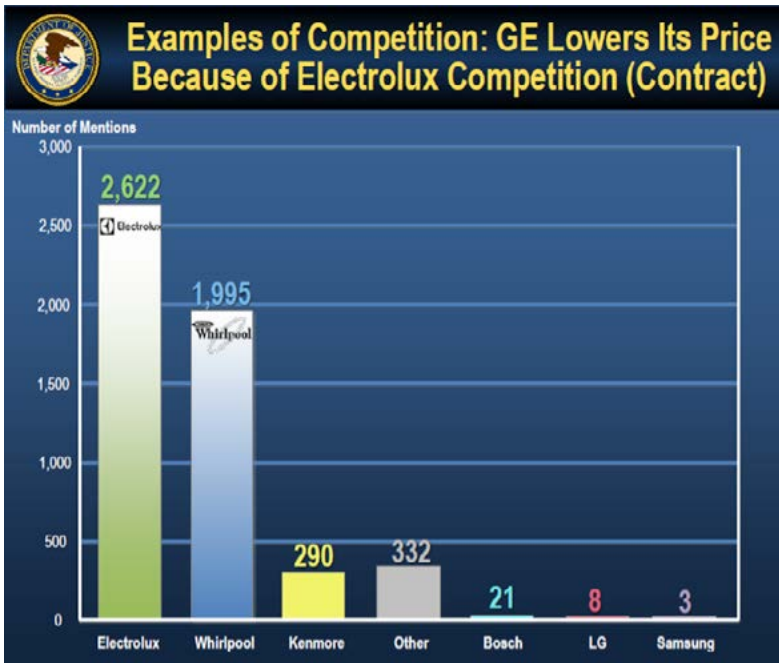
MR. HUSTON: So we've mentioned markets and market definition. The Complaint alleges six relevant market. One for ranges, one for cooktops, one for wall ovens, and then it circles back and does it all over again and it alleges a market for each of those things in the contract channel, or for contract purchasers. And from looking at the transcript, it does look, despite the hypothetical Mrs. Smith, that there were a lot of battles over this contract channel. So a couple of questions about that. First, was it really necessary to allege so many markets? I'm assuming that those last three markets, the contractors, is some sort of submarket or would you call it a price discrimination market? The authorities, the academics, some of the economists, seem to have some trouble with submarkets, so maybe you can speak to that.

MR. GLASS: So it's true, there were six markets. The only friendly amendment is it was sales in the United States. There was no dispute over geographic market. So I guess I would respectfully disagree that the contract markets were the focus of the trial. We found six markets that were the focus of the trial. There was extensive evidence that they competed in all six markets, that competition would be significantly reduced in all six markets, and I think it was important to challenge in all six markets to give the judge the full understanding of the harm that would come from this merger. That said, I would

agree with you, Peter, that there is a lot of debate about how to treat price discrimination markets. Now we've kind of entered into the very technical piece of this panel.

Price discrimination markets I think are hard. They are hard for everybody. They are hard to understand. They are hard to explain. They are hard to analyze. I think we did a pretty good job of explaining to the judge how price discrimination markets work, but the reality is that even in a relatively lengthy trial like ours, over four weeks, twenty-four witnesses, the judge gave us an opportunity to make oral presentations by the lawyers on almost a daily basis, that is still not enough time to educate a lay judge on the nuances of economics like price discrimination markets. So we relied upon tools like *Brown Shoe*. There was a comment in the previous panel that *Brown Shoe* is still good law. It is still good law. And I think Judge Posner and other jurists recognize that there is a benefit to *Brown Shoe*. Not only is it controlling law, not only does it guide the decisions, but the question here isn't if an academic had unlimited resources and unlimited data, what would they have done? It's taken to a lay judge who has a limited amount of time, by the government, which has a limited amount of resources, and the question is do we feel good enough that this transaction is going to harm competition that it should be stopped? *Brown Shoe* is pretty good at that, and *Brown Shoe* itself recognizes this concept of submarkets. In fact, I believe the shoes there were a market within a market. So I think as practitioners, as trial lawyers, we shouldn't get lost in the numbers, the economics, the merger guidelines, because *Brown Shoe* makes the analysis relatively easy. How do the participants in the markets treat each other? Do they treat each other as competitors or not? And that helps you define markets.

And I think here when you look at our so-called price discrimination market, the documents and the data pretty well showed that the three participants looked at each other—and Peter, if you don't mind, can we turn to the slide?



This is meeting competition data from General Electric. Now, our economist, Professor Michael Whinston, looked at how many times General Electric lowered its price because of Electrolux, for the customers he defined as contract general customers. And you will see that overwhelmingly in the contract channel Professor Whinston found that General Electric lowered its price first for Electrolux, then Whirlpool, and then almost nobody else. These are the types of data that we found compelling. I don't want to take the entire time. I could speak the entire time.

MR. HUSTON: Let me ask the defense to weigh in on that. I sense that product market in this contract channel was kind of driving you to distraction as far as how it was described in the pleading versus how it was being proved up at trial. So I will throw it open to either Paul or John to discuss product market.

MR. DENIS: So if you listen to Peter's description of the contract markets, you heard some of the ambiguity that was in this case. What you could not tell right off the bat from the government's presentation was: Were they talking about a channel of distribution? Were they talking about a particular set of customers? Or was it a little bit of both? So we focused on that because we had these six markets. As you know, the government only needs to win on one of them in order to get an injunction. I think the government having six markets was a smart strategy for them, but it did force us to pay a lot of attention to so-called contract channel markets. We needed to break those. Right? We couldn't have the judge taking them as a given, and those markets were for us much more difficult. I think we were actually pretty successful in getting the judge to see our way. We never got to an opinion, but hope springs eternal. We did not focus on parsing out the law of price discrimination or the economics of price discrimination. We could have done that. It would not have worked. Most judges don't want to listen to that. Most antitrust lawyers don't want to listen to that. But we did focus on the language of the Complaint. What we focused the judge on was that you could define a market around customers or you could define a market around channels. There were different ways to do it, and we talked about a bunch of cases in the course of our little colloquies with the judge. So he was familiar with the idea that there were different ways to do it.

**Who is Buying It vs. How It is Bought**

	Direct	Distribution	Retail
INDIVIDUALS	X	X	X
REMODELERS	X	X	X
SINGLE-FAMILY BUILDERS	X	X	X
MULTI-FAMILY BUILDERS	X	X	X
PROPERTY MANAGERS	X	X	X
HOTEL/MOTEL	X	X	X
GOVERNMENT	X	X	X
OEM (Mobile/Pre-fab)	X	X	X

What we focused on is that the government could define the market in either of the accepted ways. So the case was really about all these different customers down the left-hand side of the slide, individuals like all of us who buy appliances, and then the remodelers, the builders, property managers and whatnot. These are all different customer groups. They bought in different ways, but they bought across channels. So they could buy directly from the manufacturer, they would buy through a distributor, or they could go into a retail store, a Home Depot, a Lowes, a Sears and buy appliances. And we were able to show that all these different customers actually availed themselves of all of these alternatives. You didn't get a lot of direct buying by individuals, but you got some. So we focused the judge on who is doing the buying versus how the product is bought. So who was doing the buying was what was alleged in the Complaint.

The Complaint talked about contract channel customers, customers who bought in the contract channel. The government wanted to focus upon just these particular customers, the remodelers, the builders and whatnot, not the individuals here. But when they put on their case, the evidence left out all of those purchases by those customers at retail. If the case was supposed to be about those customers, why don't we have any data on that? How are we going to make a *prima facie* case to evaluate that claim? To us that was a big hole in the proof, and it was something that the judge could grasp quite quickly. He needed to have data on all of the purchases in order to figure out how to make a *prima facie* case. What the government kept saying is, "No, no, no, no. You have our case all wrong. Our case is about the channel. It's sales through this particular channel." But the Complaint read differently. Being able to exploit that difference unsettled the judge about the contract channel claims, and we needed him to see that that part of the case really lacked a foundation, lacked fundamental proof so we could focus him on the retail side of the case.

MR. GELFAND: I'm glad, Paul, that you put that up, and I know Ethan has a slide, too. He even has a thing or two to say about the comparison. But let me make this point. It's a very important point for us. We had some soul-searching to do here in this area of the law. The way this case was litigated was it was very thoughtfully done by Paul and John and their colleagues, in the way that we often defend cases, which is to say to the government, "Well, there are a lot of technical problems with the way you've defined the market. You haven't quite gone out to the fourth decimal place in classifying everybody who is part of it. You left a few people out. You put a few people in that don't quite make sense." The world doesn't often work in perfect ways that make it feasible to just say, "There is this group and then there is that group." Sometimes it does. But the question we have is whether we want to turn these cases into kind of reasonable doubt cases where the defense is able to say to a Court, "The government has failed in its proof on what the market is," or do we really want to get at who is getting harmed and what the impact is on competition? And I think the courts are increasingly rejecting this kind of approach ultimately. It can be effective. I think the two hospital cases that we saw, the one in Pennsylvania, the one in Illinois at the District Court level were both rejected by the District judges on these kind of technical arguments. There are some people in, some people out.

Of course, the Court of Appeals reversed both of them, saying, no, there is a more common sense, more simple way. There was no question here that there was going to be hundreds of millions of dollars of bid competition that was going to be reduced from 3 to

2, and the defendants themselves classified customers as contract channel customers. And for lack of a better word, it was close enough for government work. I mean, these people were really going to be hurt, and they're negotiated deals and it's big competition. Go back to the bid data that Ethan showed. So do we want these cases to become exercises in battles of economists and reasonable doubt and did you really prove it and did you hit the fourth decimal place, or do we want courts to zero in on whether competition is really going to be hurt in a big segment of the commerce? I will use that word instead of "market."

Ultimately, in Staples/Office Depot, all these same kinds of argument were made by the defendants there, and Judge Sullivan rejected them. He said, "I can deal with this. I can deal with a set of products being sold to a set of customers who depend on competition between the two defendants, and it's important competition, and that's going to be lost as a result of the merger." That's why he enjoined that transaction. I think it's a great argument and debate for us to have. What is the role of market definition? How much proof needs to be brought to bear on this? How perfect does it have to be? Where do we want the judge paying attention during the trial, on all of this stuff, or do we want them paying attention on what the actual competitive effects are?

MR. HUSTON: Well, let me follow up on that, because it's been mentioned a couple times now that this stuff is complicated. You've got to present it to a judge and he's got to make a decision. The statute itself is relatively simple, a transaction that "substantially lessens competition." So that's easy enough, but then we've got, as Ethan mentioned, the merger guidelines. You've got all this case law that's out there. You have got economists doing their thing. So I guess one question I have is can a lay judge even do this? Does it make sense to have lay judges presiding over these mergers or should there be some sort of specialist judge? A second kind of corollary question, it goes to what you mentioned, Dave, and Ethan mentioned earlier, we're dealing—at least the government is putting on its case relying on really ancient cases. *Brown Shoe* is over 50 years old. The *Philadelphia National Bank* structural presumption, which seems to be the centerpiece of the government's case not only in this trial but in virtually all the trials that it's had since that case, those are old cases. And maybe the way that those two questions come together, is it necessary to have some simplifying structure like a *Philadelphia National Bank* presumption in order for judges to be able to do this? I will throw that up and whoever wants to, grab it.

MR. MAJORAS: Everybody looks to me first. Volunteering, as it were. It's an interesting question whether there ought to be some type of specialized bench. We've talked about this at various times in different jurisdictions. It's a question that frankly is not worth spending a lot of time answering because I don't think it's going to happen. So setting that aside, when you are trying these cases, fundamentally it's not that different from any other trial that we put on. You are trying to assess who is your audience, what is it that's going to be attractive to them in terms of their background, their knowledge. I mean, when you are choosing a jury and trying a case to a jury, you are spending your time doing that. You are going to talk to certain juries differently than you might talk to others. It's no different than when you have judges who are hearing these cases. Some will be more sophisticated possibly in terms of background and what they've done than others might, but that doesn't mean you can simply say, "Well, we will put on the number-crunching case and then just complain that the judge didn't get it."

So in putting the case together, I think there are ways to present the case, and you've got to figure out what are going to be things that the judge can latch on to, that the judge thinks is important, especially as the case goes on, and then hopefully they fit with the economics and the theory of what we're all trying to accomplish here. I actually think that's what happened in this case. As we went through all these market definition issues, especially on the contract channel, two things came out, at least to me. Of course, everybody falls in love with their own evidence, so I remember our evidence and I can tell they remember their evidence. But one of the things the judge did focus on in the contract channel is that the players in that channel who were selling and buying in that channel themselves couldn't identify where the sales were going in a lot of cases and how they were being disbursed. And that seemed to be important to him. At one point, perhaps one of the most telling parts of the trial, someone was testifying and the witness brought up the contract channel, and the judge says, "I don't care about the contractors. The contractors can protect themselves." Now, he didn't do that in Staples, obviously, so he may have decided against us ultimately in the decision process. But I think that easily by that point in the trial and I think perhaps earlier, everyone realized that this case was going to come down to the Mrs. Smith part. So we had to change our approach. We put on all the evidence that we were going to put on, and the record is clear with what all the sides wanted to put there, so if it ever got to appeal, which it was never going to do, you at least had it out there. But we had to pivot in the case. It became about Mrs. Smith, and it became difficult then for us to be able to explain why is it that you have these different price points to actually protect the lower price points, because as you move up and you move up in features, you are going to have this constraint on the ability to ever raise the prices at the low end. Would we have convinced the judge of that? I don't know. But you try the case to the audience, and I think we would try this case differently to Judge Sullivan than we would to other judges. It doesn't mean it's good, bad or otherwise. We ultimately were trying to put on the evidence that still gets to the fundamental issues of competition.

MR. DENIS: I'll just throw in a couple thoughts on that. I agree with John, we are stuck with generalist judges, and I don't think that's a bad thing. The more time you spend worrying about whether your judge can handle your case, the worse off you are going to be. You have to respect the judge's ability to decide the case. And if you have doubts about his or her ability to decide the case, the judge will figure that out. You have to go in respecting the judge and expecting him to be able to learn what you have to teach him. If you don't, you are in trouble. We had to teach Judge Sullivan a lot. He had never had an antitrust case of substance. He had done other things, but he didn't know this stuff. Nevertheless, he was quite a willing student, and he loved actually mixing it up with the lawyers. We would have these discussions at the beginning of the day. We'd have witnesses sitting there waiting to testify, and the judge would want to talk about something we had been doing the day before. We went on 45 minutes some days.

MR. MAJORAS: Three hours.

MR. DENIS: It was such a strange process. But I think Ethan approached it the same way we did. You had to respect the fact that the judge wanted to learn this. You had to assume that he was capable of doing it. And if you had the attitude that you were the antitrust lawyer who knew this stuff better, you were probably not going to convince him. I think we both spent a lot of time on that. The other aspect of it—this goes to Dave's comment—Judge Sullivan had a really strong sense of right and wrong, sort of a

good and evil kind of guy. He used to be a judge on the Superior Court in D.C. and did a lot of criminal cases. He had a real core sense of right and wrong, good and evil, and he wanted to hear a positive story. He also wanted to make sure that he was protecting the Mrs. Smiths. We were definitely challenged in our ability to put on a positive story. We didn't have much of an efficiencies case. The government kind of made a lot of fun of our efficiencies case, for good reason. We didn't have a lot of weapons on that score. The government did a real good job of keeping the white hat on, trying to put the black hat over on us. So we did have to attack on some more technical bases because we didn't have a great compelling efficiencies story to tell or a real motivator for the judge to see why this deal was going to make it better off for Mrs. Smith in the future. We had some tools available to us and not others.

MR. HUSTON: Dave, let me ask you about that. So John mentioned that this sort of trial is not much different than other trials. That's true to the extent you are putting on witnesses and trying to get the facts out. But it occurs to me that merger trials are different than other trials in one key respect, which is that in most trials, even most antitrust trials, you are trying to look at what happened and who was injured, if anyone. But merger trials, obviously, are different. You are looking forward, trying to predict what's going to happen in the future, and my sense is that puts a lot of judges in an uncomfortable position. And maybe that is a reason to try to boil it down for them and make it simple by using things like the structural presumption. But, as I said before, a lot of economists and antitrust scholars are more and more uncomfortable with just relying on market shares and whether market shares and concentration is really a good predictor of what's going to happen in the future.

MR. GELFAND: It's a very good question, and I'm sure everybody in this room has had difficulty of explaining to a client, or thinking about how you explain it to an agency, or, for those who have litigated these cases, to a judge how to predict the future. It's hard to do and imperfect, and the statute itself talks about "may" substantially lessen competition, recognizing that there is going to be some imprecision in that. I think you have just got to pull together the evidence. You have got to pull together the evidence of existing competition and if there is no reason to believe that's likely to change going forward, that's a predictor of the future. You know, it's not just about market shares and structural presumption, there is work that could be done looking at how the two interact with each other and what's likely to happen to prices and the upward pricing pressure. There are some tools that the economists can bring to bear on this.

There is good old-fashioned evidence in the form of business plans and testimony, who else is going to grow and how much are they going to grow and who is going to have the products that can fill the void when competition is eliminated between these two players? I personally don't think the presumption is as bad as a lot of us on the defense say—I'm now on the defense side. I'm so conflicted. I still say "we" sometimes, talking about the DOJ. I'm like in this difficult transitional period. It's just a presumption. It's rebuttable. All of the evidence that you might want to say, Well, that's what we should really be talking about, you get to talk about it. We get to talk about it. Defendants get to talk about it. The presumption is just a starting point. The shares are high enough, the concentration is high enough that it's a red flag. But you get to come in, we get to come in and say, "Well, but it overstates the competitive significance because, yes, they have their share today, but their technology is a little outdated. Customers don't use

them as much anymore. Their cost structure isn't competitive anymore." There are three entrants that we developed through discovery who all have business plans showing they are actually going to enter—I personally don't think the true hypothetical entry works very well with judges, because that's even more speculative than predicting competition based on existing competition. And at the end of the day if you can come in and show the presumption overstates the competitive significance of the two parties, the defense gets to win. And that's what these guys do. They're experts at it. They are very good at it. They have won cases doing exactly that.

The Republic is still safe, until Tuesday. And people are still able to do deals. Very few deals get challenged. It's not like the agencies are going crazy with the structural presumption or something. But when the agencies find a very difficult competitive problem like this, that's a starting point for the Court.

MR. HUSTON: One thing I mentioned earlier is that Whirlpool and Maytag had merged a little less than ten years ago. Whirlpool I think was the largest manufacturer and Maytag was up there, as well, maybe the third largest manufacturer. The DOJ at that time thoroughly investigated that deal but did not block it. And they said that even though the companies had high market shares, the deal was not likely to reduce competition because there were lots of other appliance suppliers out there, including, even back then, LG and Samsung. Why isn't that something that the defense can point to as, "Listen, you let that deal go through. You said there was plenty of competition. You even pointed to some of the same competitors we're pointing to now." Why didn't that put a road block in front of the DOJ?

MR. GLASS: So I guess my prosecutor streak will come out in this. I did not find any of the discussions about Whirlpool and Maytag illuminating in any way. The Department of Justice made a decision, exercising prosecutorial discretion, not to challenge a merger ten years prior where the focus was on washers, dryers, other products than those at issue in this case. Lots of things changed between that merger and the one that we're here to talk about today, including the so-called Great Recession. I candidly didn't find any of the discussions about Whirlpool/Maytag to be probative.

One thing that I will note, and I think this is helpful for all of us who are practitioners who use economists greatly, is that in the defendants' economic expert's backup material, he had run a regression on the Whirlpool/Maytag merger. This regression was designed to show that the Whirlpool/Maytag merger actually resulted in lower prices. I believe he testified that it did show that Whirlpool/Maytag resulted in lower prices for washers and dryers. However, when one digs into the backup material, looks at it with a trained eye, we noticed that actually that regression showed that prices went up after the Whirlpool/Maytag merger for ranges, cooktops, and wall units. So I did not think that that was probative, just like I didn't think the other evidence was probative, but it was a practice pointer, I think for all of us, that there is a lot of moving parts going on, a lot of work being done. I don't think the agencies find the citation of their prior matters against them to be very compelling, and I don't think Judge Sullivan did in this case either. And, in fact, perhaps if one were to credit the Whirlpool/Maytag merger, it might have supported the government's position, not defendants' position.

MR. GELFAND: One difference is that after Whirlpool/Maytag, GE and Electrolux remained independent competitors. But under this logic, every merger for the rest of the history of the industry is fine, right? Going from 10 to 9, well, that was fine, so you should be able to go from 9 to 8. Well, that was fine, so you should be able to go from 8 to 7. So that's one point. The second point is there weren't the same issues. There wasn't the same contract channel issue. There wasn't the same bid data at issue. Maytag had been kind of a failing brand. That was an important part of the evidence that had come in. And so, you know, it is what it is, a 10-year-old deal involving different products, involving a lot different companies, involving a less concentrated industry than this merger was going to result in. It just had very little probative value.

MR. MAJORAS: They hated it, obviously, when we kept bringing up the earlier merger, which we did frequently. Actually, there are parts of what Ethan said I agree with and parts that I strongly disagree with. One part that I absolutely agree with, and that is the transition of going from where you are working on an investigation and trying to convince the agency not to challenge the merger to actually going into litigation over the merger. I think too many pure antitrust lawyers want to be able to argue all the economic stuff that I can't understand and don't want to understand—what the agency ought to be thinking when it makes decisions about agency policy and are they doing things differently or not. Obviously, they didn't think that they were doing things differently and that's all fine and good. But once you get to the litigation, the fact that the agency made a decision, whether it's a similar case or reasonably similar—take your pick; I won't argue with it—that's not an effective point in litigation. The judge doesn't care. That's not a precedent. You can't get up there and argue it. And, in fact, in a number of cases I've had, I argue with people internally. They say, "We're going to win this case. Look what they did previously." I say, "Stop, stop. That is not going to work."

In this case, I think the part of it that worked is, yeah, there were some nice aspects of the DOJ's statement when they closed the Maytag-Whirlpool investigation that we brought up, but it wasn't the fact that they closed a transaction regarding similar clients earlier. It was the ability to do a retrospective on what happened after the closing of that deal. Now we can agree to disagree—we certainly did previously—as to what that study revealed. And I absolutely disagree with Ethan's characterization of what was in the backup material that the expert had. Those are arguments. You'd have to see all the evidence and reach your own conclusions on that. But the importance of that in the litigation was, here is something that was done previously. And we said, You know what? They got it right. Here is why we know they got it right. Here is what the impact was on competition going forward in these analogous products, and that's a reasonable thing to look at as you are trying to anticipate what will happen going forward here. So I'm not surprised that Ethan didn't find any probative value in that. I would be surprised if he is surprised that I found it very probative. It wasn't the principal part of the case, but it was I think an interesting part of the case. And it wasn't the fact that the decision was made. It's once the decision was made, what can we take from that looking at the economics?

MR. DENIS: The debate over this is an interesting insight into trial strategies. What the government did was they had an argument they really, really didn't like and they were uncomfortable with. So they created a diversion and they said, "Well, the defendants are trying to tell the Court that we should be able to merge because you let this other merger go ten years ago." That was not the argument. That was a caricature of the argument.

What the argument was really centered on was that if you took the government's upward pricing pressure ("UPP") techniques, applied them to Whirlpool/Maytag and asked, "What would they have predicted ten years ago?" and then compare that prediction to what happened, you found that the UPP was a really, really bad predictor of what was going to happen in the future. And their economist built his testimony—and the only real economics in his testimony—around UPP. They had multiple aspects of their case, as any smart plaintiff would, and they had stuff about documents that we talked about earlier. But their economist's testimony was centered entirely on UPP. And validating UPP from prior experience in the industry was, we thought, a sensible way of responding to a theory that the government wanted to advance, and the Court clearly did not understand. Joe Farrell understand UPP. Carl Shapiro gets it. Maybe four other people do. Judge Sullivan was not going to go into the depths of UPP. But we were going to show him that if you try this tool somewhere else to see if it works, you find that it doesn't. That's what the Whirlpool/Maytag issue was all about. It wasn't about we deserved to have our deal done because these other guys ten years ago got theirs done. It was all about a really technical point that the judge otherwise was not going to get his arms around.

MR. HUSTON: I have got more questions, but I want to make sure that if anyone in the audience has questions for any of our panel members they get an opportunity to ask them. So any questions?

UNIDENTIFIED SPEAKER: I just wanted to ask, at what point did the trial get terminated? How far—had the defense started?

MR. GLASS: The defense had rested and we were going to have one day of rebuttal witnesses for the prosecution for the plaintiffs. The morning of that day there was the announcement they had abandoned it.

MR. MAJORAS: Essentially four weeks of trial.

UNIDENTIFIED SPEAKER: So I was interested in your comments, David, particularly about what Judge Sullivan said in Office Depot/Staples. I was not able to watch your trial, but I was in that Office Depot/Staples trial, and he did not say that in court. He said that in his opinion, certainly, but that case had no defense. None. And I guess my question is, when a judge really has to wrestle with both sides of economics and both sides of real argument, it's kind of a different scenario, and I guess I thought that the case that Sullivan made, the decision that he made appeared so clear in Office Depot/Staples because he only had one side.

MR. GELFAND: Well, I don't know. I think if you look at the Sysco decision, Judge Mehta looked at a lot of competing economic evidence, and at the end of the day he really fell back on what the testimony looked like, what the documents looked like, I think at some level what is common sense about how that market worked, looked like. I mean, you see a lot of bidding against each other and chances are there is going to be a lot of competition lost.

UNIDENTIFIED SPEAKER: Well, and now you are switching hats after the government has won several cases. They have won the vast majority of the cases they have brought to trial recently, with the exception of John Majoras' win in Synergy/Steris.

MR. MAJORAS: Thank you very much.

UNIDENTIFIED SPEAKER: So how are you going to fight cases going forward? How are you going to defend your client? What do you think is the best way to defend a case now?

MR. GELFAND: You look at competition in the market. You ask the question of how important is competition between the two parties to the future of competition, who else is in the market and how close is the competition, and what were the trend lines, what can we get people to testify about. You look at the documents. You say that the shares overstate the competitor's significance. You rebut the presumption. You put on good economists. I'm not saying you don't put on economists. They're smart people. They've got a lot to say, and they're very important evidence. It's how you do your work. It's how you do your job.

MR. HUSTON: Other questions?

MR. LYNCH: This is a question for John. At the end of the merger it seemed like GE did fine. They sold the company for a larger amount than they would have if the merger had gone through. But you represented a company in a very harsh enforcement environment for a big company, like the one you represented. What was the company's motivation and how do you advise the client as to the cost/benefit analysis of going into this? Because Paul candidly said that the efficiencies wasn't a really strong argument. So what was the thinking going into this that you thought you would win?

MR. MAJORAS: Well, again, like with any case, there are strengths and weaknesses that you are assessing, and it's not always simply a question of do you think we're going to win or lose and what's your percentages? And we get that all the time. I thought as the case went forward, and even as the case was going, I felt good about what we had done, about what we had presented. There was certainly a number of warning signals from things that the judge said, but then sometimes we'd leave one day thinking, "Oh, he's killing us." The next day we'd come back, "he loves us." One of the great thing with Judge Sullivan is he was very expressive. He often let you know what he thought about things, including sometimes witnesses on the stand, which at times could be disconcerting, when he would get into arguments with witnesses, and I was just watching the fire burn, and there was nothing I could do. It was a third-party witness. It was the craziest thing I have ever seen.

But going to your question, it's not simply a question, can you win or lose. The question also comes down to the strategic importance to the company of that merger going through. And to the extent that importance is very high, you may be willing to take greater chances in litigation than other situations when you are saying, "I'm only going to go forward if I have got a 90 percent chance of winning."

So in advising the clients, you have got to make sure you understand their business motivations. What's behind their decision of going forward? What does it mean if you lose? What does it mean if the deal should break apart altogether, and then compare that to the relative strengths in the case, and you help them make their decision.

MR. HUSTON: Thank you. Final thoughts?

MR. GLASS: I just need to say this. There was a lot of zealous advocacy going on here. These trials happen very quickly after investigations. There is a lot of interaction amongst the lawyers. We had violent disagreements. There were lots of points on which we disagreed. But I want to say I am proud of everybody on this panel as the leadership, all of our teams maintained themselves with the highest decorum and professionalism, and I think this could be a model. I really think it's important to remember that you can disagree and you can represent your client, but you can also treat each other well. I want to thank Paul, John, and of course, my friend Dave. This is a really important piece of what we do. And what we do requires us to take positions that are at odds with each other, but it does not mean that we have to treat each other poorly. So I just wanted to make sure I said that.

MR. MAJORAS: Hear, hear. We agree.

MR. DENIS: Well said.

# **IN RE: COX ENTERPRISES, INC. SET-TOP CABLE TELEVISION BOX ANTITRUST LITIGATION: A PANEL DISCUSSION WITH TRIAL COUNSEL**

*Moderated by Jill M. Manning<sup>1</sup>*

In 2009, subscribers of Cox's cable service sued the company for allegedly tying the service to its box rentals. The Judicial Panel on Multidistrict Litigation consolidated the cases and transferred them to the Western District of Oklahoma. Following the district court's ruling that the case could not proceed as a class action, the plaintiffs re-filed similar suits around the country and sought to certify classes for isolated geographic regions. The cases alleged violations of the Sherman Act and state antitrust and unfair competition laws.

U.S. District Court Judge Robin Cauthron denied Cox's motion to dismiss the suit and rejected Cox's argument that the plaintiffs had failed to present facts demonstrating the existence of a properly defined geographic market. About a year later, the judge certified a class for certain of Cox's premium cable subscribers in the Oklahoma City market. Cox moved to compel arbitration. The district court denied the motion on the grounds that Cox had waived its right to arbitration by extensively participating in the litigation. The case proceeded to trial.

After a nine-day jury trial, the Oklahoma federal judge entered a verdict for plaintiffs, finding that Cox had violated antitrust law by tying premium cable services to set-top box rentals and awarded \$6.31 million in damages that the plaintiffs believe could be trebled under antitrust law.

That was not the end of the story, though. Following the verdict, Cox filed a motion for judgment as a matter of law, arguing that the plaintiffs' evidence was insufficient to support the verdict and the jury instructions were flawed. The judge granted the motion, plaintiffs appealed and the matter is now pending before the Tenth Circuit Court of Appeals.

Counsel for the plaintiff and defendants shared their experiences with the Golden State Institute in a panel discussion moderated by Jill Manning.

MS. MANNING: Let me start by introducing our panelists. For the plaintiffs, joining us today is Todd Schneider, the founding partner of Schneider Wallace Cottrell Konecky & Wotkyns and its senior partner. He is a long-time civil rights advocate with an extensive background in employment and consumer rights litigation. With numerous court victories in cases involving consumer and securities fraud, race, gender and national origin and disability discrimination, he is a published author and lectures widely. He is president of the San Francisco Trial Lawyers Association and serves on its Board of Directors. He has served as a member of the Board of Governors of the Consumer Attorneys of California, and as a vice president for the organization. Mr. Schneider was named 2005 Trial Lawyer of the Year by the San Francisco Trial Lawyers Association and has been honored as a super-

---

1 Partner at Steyer Lowenthal Boodrookas Alvarez & Smith LLP in San Francisco and member of the Executive Committee of the California State Bar Antitrust, UCL and Privacy Section.

lawyer in the area of class actions and mass torts by San Francisco Magazine for each year that the list has been published. Welcome, Mr. Schneider.

Also on the plaintiffs' side, we are joined by Kyle Bates, an associate with Schneider Wallace who participated in the trial. Mr. Bates will offer a fresh and unique perspective from the young lawyer's perspective in the trial. Thank you so much for joining us, Mr. Bates. Welcome.

MR. PFEIFFER: Young as opposed to the rest of us.

MS. ZWISLER: Speak for yourself.

MS. MANNING: For the defense side, we have Peggy Zwisler, a partner in the Litigation and Trial Department of Latham & Watkins' Washington, D.C. office. She is a past global co-chair of Latham's nationally recognized global antitrust and competition practice. She is an antitrust lawyer with more than 40 years of experience. She has successfully represented antitrust defendants in numerous trials and achieved significant victories for them on both procedural and substantive dispositive motions. She has defeated class certification motions involving industries as diverse as cars, cranberries, graphic processing chips, and contact lenses. Every significant legal publication that ranks antitrust lawyers and trial lawyers has ranked Ms. Zwisler at the top of the list. Thank you so much for being here Ms. Zwisler.

Last, but certainly not least, we have Al Pfeiffer, the vice chair of Latham & Watkins' Global Litigation and Trial Department and former co-chair of the firm's Antitrust and Competition practice. He has extensive experience in civil antitrust cases, civil and criminal government antitrust investigations, and other competition-related commercial cases.

With more than 25 years of antitrust experience covering numerous industries, Mr. Pfeiffer has a wide range of practical experience, having won numerous trials, arbitrations, summary judgments and appeals in antitrust communications and other complex cases. He has developed a particular focus on claims involving dominant firm conduct in the information technologies and telecommunications areas. Mr. Pfeiffer also advises companies regarding the antitrust aspect of acquisitions, joint ventures, and distribution agreements. He has successfully represented clients involved in investigations conducted by the U.S. Department of Justice and the California Attorney General. Thank you so much for joining us today, Mr. Pfeiffer.

MS. MANNING: This was a bellwether antitrust trial. How did that affect how the case was tried?

MR. SCHNEIDER: Interesting, right? We initially filed a national class. The Court in its ruling found that, and I'm paraphrasing, that because of differences in local markets it wasn't going to certify a national class. So we refiled regional classes. This first case went forward as a bellwether, and we had to, as plaintiffs, think about how the evidence in this case could be used in other markets as we went forward in the other bellwethers. It does change your thinking, because everything you do has a domino effect.

We spent hours and hours and hours trying to puzzle how the dominoes would fall going forward. And the problem with able lawyers on the other side is they do the

same thing. And if you can't forget where their dominoes are and your dominoes are, you could walk down a path that leads you to victory in one trial and a loss in another, so it's really interesting.

MR. PFEIFFER: I may have a somewhat different perspective on that, because my answer to that would have been "not at all." In terms of how we actually tried the case, I can't think of a day where we were thinking—apparently, we were getting more credit than we deserved from our opposing counsel. But I can't think of a day where we were really thinking about, "Well, this is a bellwether." This is one in a series. Instead, we were thinking about, "How do we win this case? What are the things we're doing today? What's the part of the story we're telling today? What are the plaintiffs trying to do today?" It was very much in the moment in that sense.

What was a factor that affected the trial, the specific day-to-day life of the trial, was the fact that this was a trial of a case in which the Court had already certified a class. And I think for the plaintiffs, as well, that was the issue you had to deal with. You've got one plaintiff there who is the one representative testifying, and you have to have that person both embody the group and also make clear to the jury and have the appropriate instructions given to make clear to the jury what we're doing, even though they are only seeing Mr. Healy, the named plaintiff in the case.

MS. ZWISLER: And that actually caused a lot of conversation, because you have to figure out do you have a plaintiff or do you have plaintiffs with an "s"? And we made it as a convention in the trial. I think the judge made the decision that we would say "plaintiff," even though the individual plaintiff was representing a class. And we never got to interview the jury after the conclusion of the trial, because in that district the Court precluded that from happening unless everybody did it together or something like that. So we don't know how it worked. But it seemed to me it would be confusing. In other class actions that I have tried, antitrust class actions, we've always referred to the plaintiffs in the plural. As a defendant, I would prefer it to be in the plural, this huge plaintiff class chasing my small multi-billion dollar family-owned client.

So it really was plaintiff, Mr. Healy, who was a delightful man who testified against a large corporation. So I didn't like that convention, but the judge is the one who decided it.

MR. SCHNEIDER: You know, I think that we as lawyers spend a lot of time on hand wringing about these things. And we didn't interview the jury, but I think at the end of the day it might be lost on them. Whether we called it "plaintiffs," "plaintiff," "a group of panels," whatever you call it, I think they understood that it was the customers against the company. But we, like they, spent hours and hours and hours discussing these minute details. I'm not sure that it was time well spent.

MS. MANNING: Speaking of the clients in this case, what strategies do you employ when you are trying or defending a case where the corporation is a defendant? How does that affect your strategy?

MR. SCHNEIDER: Well, we joke that on opening statement we could have had a really short opening which could have been, "We think your cable bill is too high."

MS. ZWISLER: It probably would have worked.

MR. SCHNEIDER: Again, I think that there are attitudes that jurors bring into a trial, just like a judge does, just like witnesses do, and a lawyer does. From the plaintiff's perspective, I think there is probably a distrust of corporations in the world, which can't hurt. I don't think at the end of the day that that biases a corporation in any way. I think jurors get through that pretty quickly and decide cases on their facts.

MS. ZWISLER: So he's right, that one of the challenges of representing a corporation generally is that our jury—general jury research, not anything particular with this case—will tell you that a lot of the population has a distrust of corporations. So—at least the people who will sit on your jury may have that distrust.

As a defense lawyer, most of the time I always have to humanize the company that I'm representing. It was particularly a challenge in this case, because what Todd just said, which is that "Your cable bill is too high" is the truth. Now, it's not the truth the cable bill is too high, but cable companies typically have a bad reputation. Now, we have market research that will tell you that Cox's reputation, however, is positive and all of that. But the fact remains that jurors may assign that general attribute to corporations.

As the defense lawyer we had to humanize the company, and I will give you two thoughts on that. One is it is a family-owned company. It was founded by a guy who was a governor of Ohio, James Cox—we put this in the opening statement and we had pictures going back from the 1890s and everything—I should have brought them with me. And then it's his descendants who today still run the company and own the company, which was not the word we used. We just said they ran the company, but they do own this 14-billion-dollar company. It's I think the fourth generation. So in our opening statement I put up—right before the trial, Forbes had run an article—thank you, Forbes—on the family and taken pictures of the family and the family-owned company, Cox Communications. So we put up the picture of the family and we talked about who they were.

The other way to humanize a corporation, and maybe this is obvious, but is that you have to bring the people to the courtroom, the live people who made the decisions so that they can sit in the chair and tell the jury why they did what they did. Most corporations make decisions—humans make the decisions, so you've got to humanize the people to the jury. And that depends on who your witnesses are. Just like everything else in the trial, the credibility of the witnesses and the lawyers is what's going to win the day.

So you want to elide the difference between the big, bad corporation and the five or six nice people that you brought in to sit in a chair and tell the jury their story. So that's what we did. And we had an advantage in that regard, which was that Todd wanted to call several of them adverse, and that means in the plaintiffs' case. And we made an agreement—he generously agreed to do this, sometimes we'd have to fight this in front of the judge—but when our business people came and testified in his case we would get to put in our case right in the middle of his.

So we humanized our people right from the get-go because he had to call them or wanted to call them live.

MR. PFEIFFER: One other thing that we probably should fess up on that we tried to do to humanize the client was to show things that the client had done for the industry,

which was fine. We were able to talk about how they had basically built out this cable competition in the Oklahoma City area. We were also trying to show that they were basically a good corporate citizen, and the judge was having none of it. We were just absolutely cut off.

MS. ZWISLER: Right. Well, Todd objected. That's why we got cut off. The Judge said, "It's not relevant. I understand it's a good company. Not relevant."

MR. SCHNEIDER: No, and she made clear she meant it.

MS. ZWISLER: No, she didn't play poker very well.

MR. SCHNEIDER: I think it's also important to recognize that the only entities in the courtroom that have a bigger jury bias against them than the corporation are the lawyers. I have tried cases I think all over this country, and you walk into the courtroom, you open your mouth, and the first thing the jury thinks is: This is a lawyer. He's not telling me the truth. I don't want to be here anyway. Why is he wasting my time?

So I think it's important to humanize yourself, to laugh with the jury, if you can. If there is a time that you can poke fun at your own client or your own case, do something so that the jury believes that you are a human and not a robot just there to try and convince them that whatever your point of view happens to be is the right point of view, so that they don't feel manipulated, honestly. I think both sides did a reasonable job of doing that at this trial. We will talk about funny moments of the trial later, but I think those are really important.

MS. MANNING: Okay. So tell us, what was a funny moment during the trial?

MR. SCHNEIDER: You see that? We prepped for this thing.

I mean, for me they were both funny and embarrassing. Al and I did the experts in this case, and he has this technique that is actually quite effective, where he listens to your expert's testimony, he writes down key words that they say, and then he walks up to the ELMO and writes down those keywords and tries to make them look like they were silly for using them.

It's a good thing. "You define this word as this, but if you read this treatise, it means this. You are stupid, aren't you?"

MR. PFEIFFER: I did not actually ask that question.

MR. SCHNEIDER: I'm paraphrasing. But my only counter to that was to write down the same words on the ELMO. I wasn't prepared for the words he was going to write down, so I had to handwrite them and say, "You know, you used this word, Witness. Can you explain to the jury what you actually meant versus what this person is trying to do to you?"

So one of my biggest flaws is that I can't spell. So I wrote down the word "separate" and I spelled it wrong, and the judge corrected me. And I crossed it out and I wrote it a second time and misspelled it again. And I was just red, and it was a funny moment.

MS. ZWISLER: My favorite moment at the trial was when we had Steve Necessary on the stand. So Steve Necessary is an employee of Cox. Todd called him live and then I got up to go and tell the entire story of my case through my witness.

And we had a lot of technology in the courtroom. We had technology to show pictures and stuff like that, but we also brought set-top boxes, we brought a cable card, which is what you put in the back of a TiVo to make it be able to access your cable provider. We had these big television sets that are cable-ready, and you stick the card in the back of the television set. So I'm taking Steve through this. The jury is paying attention, everybody is loving it, and I wanted him to get down off the witness stand and show the jury how simple it is to take this little cable card, which is the encryption stuff that allows the stranger device to access the cable system, and stick it in the back of the television set, in part to keep the jury awake, but in part because you could see how easy it is to do this. So Todd did not like that, and he objected. And he said, "Your Honor, I object. Relevance" or something. So we go up to have our sidebar.

MR. SCHNEIDER: She's paraphrasing.

MS. ZWISLER: I don't remember exactly. It was like, "Your Honor, I object. This hurts us and so let's not do it."

MR. SCHNEIDER: If you read the Federal Rules of Evidence, that is an objection.

MS. ZWISLER: Steve Necessary's testimony was one of the turning points for the defense in the trial because the Judge hadn't understood the technology and how it worked and all of that, and we took him through the entire story of why this was not a violation of the antitrust laws, but it was through the facts that we did this, so we're teaching her. So Todd is saying, "I don't want Mr. Necessary to get off the stand. There is no evidence that this Samsung or other DVR was ever in Oklahoma City. They just brought it here for the trial." And I made my argument, "Your Honor, it's very important." The judge says, "I'm going to overrule your objections, Mr. Schneider, and it's for the best of reasons. I want to see how it works."

MR. SCHNEIDER: There is another objection that she overruled when you objected to something our witness was saying, and her reasoning for overruling it was, quote, "The jury doesn't understand what she's saying anyway."

MR. PFEIFFER: I have a different, less substantive one. The plaintiffs were in the midst of examining a witness. It was a pretty important witness, and the room is silent. Everybody is paying attention.

In the back of the gallery in the audience, a cell phone goes off very loudly. The judge, who was great—we loved the judge, but she was not fooling around—shoots a look, just freezes the gallery. Silence. It stops. Ten, 15 seconds later, the same phone, loud, goes off again. She says, "Who is that? Stand up. Turn off your phone." Who stands up but one of our expert witnesses. And she says to him, "Get out of my courtroom." We did not end up putting him on the stand.

MS. ZWISLER: But not for that reason.

MR. PFEIFFER: That was only funny after.

MS. MANNING: I hope it wasn't one of your economic experts.

MS. ZWISLER: It was.

MR. PFEIFFER: We had two economists. We decided we'd do the job with one.

MS. MANNING: So obviously economic evidence is critically important in antitrust cases. How do you choose and prepare experts differently in a jury trial?

MR. SCHNEIDER: Wow. So the first thing you have to explain to them is that they have to speak English. That sounds like a flip thing to say. But, you know, these are people that are used to talking to lawyers, and when they are not talking to lawyers, they are talking to graduate students. And they are very fluent in economics, obviously.

Our jurors—I don't remember the demographics of this jury—but typically are not college educated. Sometimes have not even completed high school. And you are talking about what are of necessity very high-brow economic principles. And you've got to get your expert to step back and explain it in the most lay terms they can, while at the same time protecting your appellate record.

Where those two things collide is, in my view, where the secret sauce is in preparing an economics expert. It is critical make it both factually and academically correct, while simple enough for a juror to understand. And, look, I don't know whether we failed or succeeded at it, but they apparently got it.

MR. PFEIFFER: So I think you could sum it up as sort of the difference between the panel before us [See *UNITED STATES V. AB ELECTROLUX AND GENERAL ELECTRIC COMPANY: A PANEL DISCUSSION WITH TRIAL COUNSEL*, supra], which was talking about how they tried a bench trial, and our trial. That's the wonky side. We're the Donald Trumpian side here.

MS. ZWISLER: No, we are not.

MR. PFEIFFER: Not in that sense.

MR. SCHNEIDER: The court reporter wrote that down.

MR. PFEIFFER: But I agree with Todd. You really have to work hard with the experts. Two things: Obviously, they have to have just absolute unimpeachable credibility. So from the get-go you want to be working with them so they are not stretching themselves, not exposing themselves to things that they can get dinged on.

But, also, they have to be able to just, as Todd said, speak English to the jury, in a very simple believable way. Not come across like they are pandering to them. But they really have to take economics and put it into understandable, day-to-day things, things that will be familiar to the jury. That's a real challenge, and more of a challenge that we face, for sure.

MS. ZWISLER: Can we tell the story about your expert?

MR. SCHNEIDER: You mean where the judge threatened to strike all of her testimony if she didn't answer your questions?

MS. ZWISLER: Yes. It was the first in my experience of putting experts on in trials of all sorts. And this expert I think illustrated exactly what Todd said. She was not that experienced in testifying to a jury, and so she was teaching it like it was a graduate school class, to some degree. And then when Al started asking her questions on cross, her technique about answering the cross-examination questions wasn't very practiced and so she just tried to teach him what was wrong about his question, even though she had already answered the question in deposition in a different way, and the judge became as frustrated as the jury about that.

MR. SCHNEIDER: I don't quite remember it quite that way, but I get what you are saying.

MR. PFEIFFER: I think I would describe it as she was certainly too defensive in how she was approaching my questions, particularly ones where she should have known that I had deposition testimony and she shouldn't have fought, and the judge got very tired of the fighting. I think that's a fair characterization, Todd. Right?

At one point she called us up to a bench conference as the lawyers and said, "I'm going to break with our rule against talking to a witness while they are under cross-examination, because I want you," saying to Todd, "to go talk to your witness and tell her to stop doing what she's doing and start answering his questions or I'm going to strike her testimony in its entirety."

MR. SCHNEIDER: I actually thought that that was a practical solution for a judge.

MR. PFEIFFER: I agree.

MR. SCHNEIDER: I think both sides wanted to get the testimony out, to get it in front of the jury. And what many witnesses, not only experts, don't remember is that there is something called redirect. So even if you feel like you are getting beat up on a cross, a good lawyer is going to get up at redirect and let you fix it by explaining what you really mean, and to fight under cross is really not a safe place to fight to begin with.

And the judge knew that, too. And so it was just a very practical way to move the trial forward without having this big back-and-forth fight between a lawyer cross-examining a witness and the witness. So obviously she's done this before, our judge—not my expert. But our judge had done this before, and I thought she handled it really well.

MR. PFEIFFER: I agree. I thought that was a very practical way to deal with it.

MR. SCHNEIDER: Going back to a prior question I was asked, though, how does the fact that this is a bellwether affect how you try a case? I think with regards to the experts, it was one place where at least we thought about it a lot. Unless you are going to put on, you know—and I can't remember how many—

MS. ZWISLER: Seventeen.

MR. SCHNEIDER: Yes, seventeen. So unless we're going to use seventeen different experts and seventeen different bellwethers, everything my expert says on the stand is going to be fair game for the next trial. So you have got to think about that in

the way that you put on your expert, because essentially each trial is a new deposition and new fodder for cross-examination for your expert.

MS. MANNING: Kyle, I want you to jump in here. Some important nuts-and-bolts aspects of trial are things like designating deposition transcripts and creating exhibits. How did you efficiently communicate with the other side on some of those issues?

MR. BATES: That's a great question. This trial presented a challenge for us in that about four or five of the witnesses who we were going to present testimony from were third-party witnesses, other people who worked in the cable industry who weren't appearing live at trial. One big takeaway for me—and these depositions happened a while ago, and the case had been going on a long time—but when you are deposing a third-party witness—you are not thinking about trial maybe at this point. But for these four or five witnesses, their deposition testimony was all we had, and that was what we presented at trial. And the judge had a very practical rule. She only wanted to hear deposition testimony one time, and so whoever was going to present a third-party witness by deposition testimony, both sides had to agree on what portions of that testimony was going to be read into the record. And so we were talking sometimes very late at night with the lawyers for the defendants.

And that's the other practical point for the young lawyer, whatever side of the bar you practice, when you find yourself in trial like this and you are talking about this issue late at night with your adversary, be gracious to them; be professional to them. There were times at 2:00 a.m. where I was tired and I made a mistake, and there were times that the lawyers at Latham, it was 2:00 a.m. and they were tired and they made a mistake, but we worked really well together. They were great to work with, and I thought we did a good job presenting that testimony.

MR. SCHNEIDER: You know, it's interesting. We as first chairs in trials focused like a laser on what's going on the next day, what we're doing, what's going to happen when we get to the courtroom. I have got to tell you, what went on behind the scenes, and we both had just legions of second, third, fourth, fifth chairs in this trial, it seemed, they worked together. They worked towards a common goal of figuring out what the next day was going to look like. They fought the fights that were important. If they fought the fights that weren't important they didn't tell us about it, which was great, so I don't know if they did or didn't. And the trial went so smoothly because you had these dedicated, smart people putting all these pieces together, and it just ran. I can't you how impressed I was with both sides on that.

MS. MANNING: Sometimes unexpected things happen during trials, no matter how much planning you do. And in this trial, the judge's mother passed away in the middle of the trial. Describe how that affected you and how it affected the trial.

MS. ZWISLER: So we were in the middle, actually, of Todd's expert economist, a late morning on—I think it was a Monday, and the judge got a note, and she interrupted the testimony, and she said, "I hate to do this," and she said out loud with the jury sitting there, "I have just gotten a note that my 90-year-old mother has been found unresponsive," and there was an audible gasp both from the jury and from us, of course. So she recessed the trial.

Those of you who have been in jury trials know that the judge is the parent of the jurors. The jury trusts the judge more than they trust the lawyers. If the judge is hard on the lawyers, they see that. If the judge demonstrates respect for the lawyers and the witnesses, they get that. And they make a lot of decisions in the trial about the credibility of the witnesses and the lawyers based on what they see the judge do. So I think they bond with the judge in each of these trials. So when that happened, they gasped and she stopped the trial.

So we recessed and came back a couple hours later, and she decided to go ahead with the trial and to explain to the jury—she wanted to apologize to the jury that she had told them that her mother was found unresponsive and felt that she needed then to tell them that she had died. So that was difficult. And the judge didn't tell the jury that. The clerk did. But she said, "Let's take the rest of the afternoon off, and then we will start again in the morning."

We both said all the things that you do when somebody faces that. She said two things to us. One is, "She was 90 years old. She was still living in her own home. She went the way she wanted to. We're not going to do the funeral this week because my children don't live in Oklahoma City. We will do it over the weekend." And the third thing she said, "I appreciate so much your accommodating me in this instance, and just give us the afternoon off." We both said, all four of us—five, however many people were back in chambers, "Your Honor, whatever you need. Whatever you need." She said, "We have the jury here and your clients and you have invested a lot of time in this trial, and I really do want to see it through."

MR. SCHNEIDER: It was interesting. It's a moment when you have to kind of step back from the battle and remember that judges are human. You know, we both told her, "If you need a mistrial, Judge, yeah, we have spent a lot of time and money but certain things are more important." So I think both sides realized. I'm not sure how or if it affected the trial itself. I mean, it was a somber note. I think, oddly enough, it bonded the jury even more with the judge. They bought her a nice condolence card that they all signed and things like that.

But I think it could have affected the trial if, A, the judge didn't handle it so graciously and gracefully. I think all of us sort of just defaulted to, "Whatever you need, Judge. We're here for you." I think that's the right and the best way to do it.

MS. ZWISLER: You may be sitting there thinking, Of course. All humans react like this to something like that. I tried a case once where something happened personally and the other side would not agree to recess the trial. It was in Wilmington, Delaware. I was trying a case against the government. So there were ten government lawyers there, and we were running on the clock, meaning that each side had a certain number of hours to get the evidence in over the course of the six-week trial.

I said, "I have got to go back to Bethesda," which for those of you who don't know, Bethesda is a suburb of Washington. Wilmington in Delaware is about a two-hour drive. And they would not agree unless we took the hours out of our client's time. So if we had 48 hours for the trial and 64 hours for the trial, and we needed to get off the afternoon, "You can do that, I will be happy to do that, but you are going to have to deduct these

four hours this afternoon from your client's time." So I took that to the judge. I didn't even get the first sentence out of my mouth. She said, "We're not taking this time from anybody. Do you need tomorrow, too?" That's what happened.

This piece of this trial was unremarkable. You are thinking, Of course, all people would be kind about that, and even in the middle of the trial. And that didn't happen in that instance, and they paid for it, in my view.

MR. PFEIFFER: The judge could have had different timing. Everybody was actually prepared to lose the jury if we had to support the judge, even though everybody liked the jury. We had a really good group. But that was sort of how it could have affected things, but the judge was remarkably strong about it. It worked out well.

MS. MANNING: As we mentioned earlier, this trial took place in Oklahoma City. What survival skills do you employ when you are trying a case far away from home?

MR. PFEIFFER: Don't eat the sushi.

MR. SCHNEIDER: I was going to say, "Get used to barbecue."

MS. ZWISLER: You told us that would be the last time.

MR. SCHNEIDER: I think that you guys had an advantage, because you have got different resources. They were able to have real office space using their local counsel's office, and I assumed, though I wasn't there, support staff that goes along with that. We were—I don't want to use the word "ragtag," but we were working out of the hotel. I think next time if I was going to camp out for a trial of this length, I might actually do what you did and rent some temporary office space. I thought that was a good idea.

MS. ZWISLER: We rented temporary office space and we had a secretary, but that's all we did. We weren't in our local counsel's office.

One of the survival skills, whether it's an antitrust trial or not, that's long is—well, we've tried a couple of cases together so we enjoyed it. We have this thing called post game shows. Maybe this is the same thing everybody does but—so we all come back to the trial site, and we had brought most of our young people into trial every day so that they could keep up. The trial was going pretty quickly, so we needed to make sure that they knew everything. So most of them were there every day. And that traded off depending on which witness was up. So we had this post game show. We'd come home from the trial, we'd go into a conference room, and we'd sit around and blow off steam, telling stories about the trial, "Can you believe what he said? Can you believe what the judge said?" and just do that, and it's really bonding.

The other thing that I always encourage is that we cater in dinner Sunday through Thursday so that we eat as family during the week and then we go out for—especially the younger people go out Friday and Saturday. You build such a team spirit in a trial that those two pieces of survival skills I think made it a lot easier for us to get through the 2:00 in the morning and be back here at 6:30 in the morning kind of a day.

MR. PFEIFFER: I think those kind of team things, family, building that sense, are critical. But you also need, whatever your individual decompression device is, you have to have that.

MS. ZWISLER: Chardonnay.

MR. PFEIFFER: You have to bring it with you. Peggy runs every day; even in trial, goes for a run. I bring my bike with me wherever I go. The bike came along for the five or six weeks, whatever it was, we were in Oklahoma City. Actually, Oklahoma City has an incredible bike trail system, it turns out. But you need to find whatever your device is and keep doing that. Take a little bit of a break, even an hour a day, whatever it is, to do something that's your decompression.

MR. SCHNEIDER: Yeah, I think that's super-important. By the way, our post game show was called cocktail hour.

MR. SCHNEIDER: Remembering to sleep is much more difficult on the road than it is at home, at least for me. You know, when you are working out of the hotel and you are there and everything is right there and you just pop up and say, "Oh, I have got an idea," and start working on it, it's different than when I'm at home and I'm in my own environment. For me, getting at least most of a night's sleep is super-important for the next day, and I felt like in the hotel in Oklahoma I had to remind myself of that.

MS. MANNING: How about you, Mr. Bates? Is there anything you would like to share about survival skills you employed during the trial?

MR. BATES: I would just say, especially if you knew it was going to be a long trial, and we knew this was going to be at least three weeks, you know, if you can get home for—even if it's just one day on the weekend, at least in the beginning part of the trial, that's a good idea. In the first weekend of the trial, I went back.

There was one direct flight a day, Oklahoma City to San Francisco, and so we took that the first weekend of the trial, and that was great, because that ended up being the only time that I was able to be back here in San Francisco for almost four weeks.

My wife is not an attorney, so when you are talking to someone who is not a trial lawyer, they don't really understand that you have got to be there the whole time. So the last weekend of trial we had closing arguments that Monday, we had a wedding out here in California, and my wife said, "What do you mean, you are not coming?" So if you can get home at least in the beginning of the trial, that's always good.

MS. MANNING: How do you keep the jury's attention during a long trial, especially when it involves complicated economic issues?

MS. ZWISLER: So in an antitrust trial you have complicated economic issues, and that's not the way to think about a trial. A trial is like a Broadway play. That's what I always say. In fact, sometimes I use a saying in opening statement that tells a story. I forget which piece I used in this trial, but it likens being in a trial to being in a play, and that's the way I think of it. So the antitrust trial is really no different than any other. It has economics but you have to make them in English. We all know that.

How do you keep the jury involved? Well, the jury is used to seeing multi-sensory devices, so like when I first started doing trials in the '70s, everything was on paper, so there was no video. There was no PowerPoint. There was nothing. The whole thing was paper. So people read depositions to the jury. "Your Honor, may I publish this exhibit to the jury?" "Yes." What did that mean? Walk up to the jurors and hand them the document. Of course none of that is done anymore.

To keep their attention, you need to be mindful of the three senses: The visual, oral, and kinesthetic. That's the manipulative and things like that. And that's why we brought those actual set-top boxes and televisions and cable cards to the courtroom, because you want to address the learning styles of the population that's in the jury. Seventy percent of the population in the United States are visual learners. So they are used to seeing—especially now with videogames and everything—things on the screen. And the juries now are sensitized to watching, in the old days, LA Law and now Law and Order where they see trials. So you need to use the screen. You need to give them manipulatives. You need to sing and dance so they pay attention, change the tone of your voice, change the pace of what you are doing.

In federal courts you have to stick behind the podium pretty much, but you need to be kind of an entertainer and try to keep their attention. But mostly mixing those techniques. Any jury trial, you will need to do that, and especially ones that are drawn, as most antitrust trials are.

MR. SCHNEIDER: I can't believe I'm about to say this, but I agree with most of what Peggy said.

MS. ZWISLER: That is the first time.

MR. SCHNEIDER: She's referring to what I call the Jon Stewart effect. If you notice on any of those shows, whether it be Fox News, whether it be Jon Stewart, whether it be any of that stuff, when they are talking, there is always the square box next to their head with some relevant picture in it. It may be a document, it may be a picture of a person, but something to ground the viewers' eyes while using their ears, and that's how we as modern consumers of information have learned to consume information. So you have got to do that. But I think as important is that, we as lawyers think of trials as checkboxes, right? You have got to check off all of your elements, and when you have hit all of your elements, you then go to closing argument and you explain to the jury how all the elements fit together.

My view of a trial is that's dead wrong, that you have got to try a case linearly. The jury needs to know why you are doing it now and what you are doing, and so you have got to try to figure out in your examination how to explain to the jury within the bounds of the rules of evidence why you are doing what you are doing, because they want to know that. It's not okay just to wait until the close to explain to the jury how the pieces fit together, and they frankly don't remember your opening, so that won't work for you either.

You have got to do it as you go along, and that's how you keep a juror involved in the case. And then, as Peggy said, particularly on cross, you have got to be a showman. They expect the Perry Mason moment. You are never going to get the Perry Mason moment. But build your cross towards some moment, whether it be a document that you

want to get in, if you have got an admission in a deposition, your admission, whatever it is, you have got to build to that moment. That keeps them watching because they know in your next cross there is going to be a moment.

MR. PFEIFFER: I think it can be a particular challenge for the defendants, because we're going second. As Peggy said, some of our case has already come in during the case in chief. At that point you are really trying the patience of both the Court and jury, so you want to make sure you are not telling your story by having three people get up and say the same thing. And you make a lot of cuts of people you were intending to call. The phone going off was not the only reason we didn't call that economist. It was because we really did have two of them. We thought, we can cover this with one.

MR. SCHNEIDER: It wasn't my killer cross, that I didn't waste my time preparing?

MR. PFEIFFER: We didn't tell him immediately we were doing that.

MS. MANNING: Unfortunately, our time is running out soon. I want to make sure that we have a few minutes for questions from the audience. Does anyone have any questions for our panel? Yes, Mr. Alioto.

MR. ALIOTO: What was the basis of the judge throwing out the jury verdict?

MS. ZWISLER: Truth.

MR. SCHNEIDER: I'm going to pass on answering that—well, I can give you her basis was that she didn't believe we proved the foreclosure element. As for my editorial, I am just going to wait until we argue our appeal in two weeks.

MR. PFEIFFER: I was going to say, the appeal is being argued in two weeks, so I don't think anybody wants to say too much.

MS. ZWISLER: I said it all. Our case was true.

MR. ALIOTO: Well, how about just this: Did she state any particular case that she was relying on?

MS. ZWISLER: The answer to that is no, because the question, and this is in the appeal, was is it Cox's fault and is it—put aside the legal dispute as to whether it's necessary—that there is nobody that sells set-top boxes at retail that can access any cable provider's video on demand?

The only way you could get Cox video on demand, Time Warner video on demand, Comcast video on demand is to rent a set-top box from the cable provider, because that box has to talk to the head end in order to access video on demand, whereas TiVo doesn't talk to the head end. TiVo receives the signal just like the set-top box does and displays its own thing. So what the appeal in part is about—there are 14 issues on this appeal, but this particular aspect of it, which was the win, was that the judge held that it was necessary in a tying case to prove that there was competition foreclosed for set-top boxes and the plaintiffs had presented no evidence at all that Cox had anything to do with the decisions of Cisco and Samsung and Sony not to sell set-top boxes at Best Buy. So that's the factual basis for the Court's ruling.

MR. ALIOTO: Did she deny directed verdict?

MS. ZWISLER: We made the directed verdict at the close of the plaintiffs' evidence and she said, and this was public, so I'm not telling stories out of school, she says to me, "I'm 90 percent sure I'm going to grant your motion for a directed verdict." I thought she was sarcastic, Al thought she was telling the truth. But then she said, "Do you have your witnesses here?" We said, "Yes." She says, "Go forward with the witnesses. If I don't grant it, then at least we will have some of the witnesses done." So she took it under advisement, and then she granted it—she let the jury come back, and then she granted it after that.

MR. PFEIFFER: Technically, she had us refile it at that point and then granted it.

MR. SCHNEIDER: I am not going to argue my appeal now. All I can say is that no evidence is in the eye of the beholder, and the jury has the right to weigh all inferences with regard to the evidence that's in front of them, and the judge shouldn't be making inferences.

MR. ALIOTO: That's right.

MS. MANNING: I think we know which side Mr. Alioto is on.

MS. ZWISLER: Stay tuned on that one.

MS. MANNING: Yes. We will wait to hear from the 10th Circuit. Any more questions from the audience? Mr. Riehle?

MR. RIEHLE: Yes. Sometimes courts allow you to have summations during the course of the trial. You had a four-week trial. Did you ask for that? Did the Court allow that?

MR. SCHNEIDER: We didn't ask for it. Al had several summations in the form of questions.

MR. PFEIFFER: We didn't ask for it. I think, in part, everybody got the pretty strong sense she would not have allowed that. This was a judge who was in control of her courtroom. She did not want us taking control of it.

MR. SCHNEIDER: An interesting thing did happen, though. After we had finished our case, while the defense was presenting their case, she said, "Do you guys mind if the jury starts asking questions as long as they give them to me first?" which happens all the time in trials. Of course, the defense said, "That's great," and I said to her, "Wait a minute. It's a huge advantage to them to know what the jury is thinking during their case when I had no idea what the jury was thinking in my case." So she thought about it and she said, "That's right. Let's do it this way. I will wait for them to ask a question, and if I think that's true, we won't ask the question." The first question came in, and she said, "Yeah, it would be a huge, unfair advantage." But then she ended up reading us the question while the jury was out. All of us just went white. Like, "Oh my God, I can't believe we didn't talk about that."

MS. ZWISLER: There was no actual summation and Todd was only half-joking by saying that Al was putting the summation into the questions with the plaintiffs' expert.

So the opening statement tells your story, and then your main witnesses tell your story, and then your expert tells your story, and then in closing you tell the story.

So while the lawyers aren't speaking, as you plan the trial—this is just not an antitrust trial; this is the same with everything—you want to use the same vocabulary and the same theme—obviously, you have themes, and you want to use the same vocabulary, so basically the jury is learning by repetition through each of the iterations, including your expert, because the expert is just a mouthpiece for the opening and closing statement.

MR. PFEIFFER: No, that was quite right. I took it as a compliment.

MR. SCHNEIDER: You did an able job arguing his case while cross-examining my witnesses, which is what we're supposed to do.

MS. ZWISLER: Yes. So did you, though. Mostly on the fact witnesses. Because, you know, in a lot of class actions I tell the jury in the closing, "The plaintiffs didn't bring anybody to this courtroom who sat in that chair and told you that"—fill-in-the-blank defendant—"did what the plaintiff is complaining about. We, on the other hand, brought all these live people in here and they sat in that chair from the company and they told you what they thought, and that's why you should vote for us." It's a credibility kind of thing. But that credibility can certainly be heard during the cross-examination.

And antitrust trials have a tendency to—just like everything else—be decided solely on the basis of the credibility. So if the plaintiffs' lawyer is successful in crossing your corporate witnesses in a way that makes them look like they can't be believed, then obviously the jury is going to react to that.

MS. MANNING: Unfortunately, we are out of time. I want to thank our panelists for sharing their experiences and insights in trying the *Cox* antitrust case, and we will anxiously await the opinion from the Tenth Circuit Court of Appeal.

## **ASSESSING DAMAGES IN PRIVACY CASES: A PANEL DISCUSSION WITH ANDREW SERWIN, JAY EDELSON AND GARRETT GLASGOW**

*Moderated by Dominique-Chantale Alepin<sup>1</sup>*

The growth of the internet and other technologies and the explosion of available data has put privacy and cybersecurity cases in the spotlight. These cases raise a host of thorny questions. Among the most difficult are questions concerning what damages are, or should be, available to plaintiffs. The Golden State Institute was pleased to feature a distinguished panel of thought leaders in this area to discuss this important and fascinating topic.

### The panel

- Andrew Serwin is a partner at Morrison & Foerster and Global Co-chair of Morrison & Foerster's market-leading Privacy + Data Security group. He advises a number of Fortune 500 and emerging companies alike, with a particular emphasis on: international compliance; health privacy; mobile; behavioral advertising; the Electronic Communications Privacy Act and wiretap issues; electronic marketing concerns; social media; and compliance with FTC requirements. He also handles some of the highest-profile data security incidents and privacy enforcement and litigation matters in the world.
- Jay Edelson is the founder and Chief Executive Officer of Edelson, PC. He is widely recognized as a leader in consumer class action litigation, technology law, corporate compliance issues, and consumer advocacy. He has appeared on dozens of local, national, and international television and radio programs, and was named one of "40 Illinois Attorneys Under 40 To Watch" by the Chicago Daily Law Bulletin. Mr. Edelson's involvement with the first class action settlement for text message spam earned him the nickname "the Spam Slammer" and he was also named a "Legal Rebel" by the American Bar Association Journal. He is regularly asked to advise legislators on issues related to his practice, including consumer issues involving the recent federal bailouts and technology issues such as those involving mobile marketing.
- Garrett Glasgow is a Senior Consultant at NERA Economic Consulting. He specializes in applied economic and statistical analyses related to market competition, intellectual property, and environmental cases. He holds a Ph.D. in Social Sciences from the California Institute of Technology. Prior to joining NERA, Garrett was an Associate Professor of Political Science at the University of California, Santa Barbara.

---

<sup>1</sup> Assistant Regional Director for the Federal Trade Commission's Western Region focusing on consumer protection and completion issues including data security and privacy law enforcement. Prior to joining the Federal Trade Commission Dominique was in private practitioner for over a decade, representing technology companies in government investigations, litigation and class actions.

MR. SERWIN: I would like to provide an overview of 100 years of privacy theory and 50 years of Federal Trade Commission law. I want to start with how we monetize privacy in a damages model. Privacy is really a societal norm that expresses concern over the collection, protection and processing and retention of an individual's information. Privacy has nothing to do with a company's information. Cyber security is a much broader field in certain ways. When we look at privacy, we are really dealing with these societal norms. And different societies come to different conclusions about those societal norms.

In the United States, there have been two theoretical constructs. First, we have Privacy 1.0: Warren and Brandeis and the right to be let alone.<sup>2</sup> The basis of Warren and Brandeis's model was the instant camera which implicated the right to be let alone. In FTC parlance, this comes down to "notice and choice." You should have areas where you are safe from having your privacy invaded. You should have choice around whether someone takes a picture of you with an instant camera and then published it in a newspaper.

Second, we have Privacy 2.0: Dean Prosser. Prosser, writing in the 1960s, was concerned about a court-created mess. As he noted, "Judge Biggs has described the present state of the law of privacy as 'still that of a haystack in a hurricane.' Disarray there certainly is; but almost all of the confusion is due to a failure to separate and distinguish . . . four forms of invasions, and to realize that they call for different things."<sup>3</sup> Those four privacy torts described by Prosser are: (1) intrusion upon seclusion, (2) appropriation of name or likeness; (3) publicity given to private life; and (4) publicity placing a person in false light. Europe is different.

In Europe, privacy is seen as a fundamental human right stemming from World War II and some of the databases that were used. But the U.S. view has a lot to do with a property view of information.

The FTC is the main privacy regulator in the U.S. They are not a data protection authority in European sense, but they do have a consumer protection jurisdiction, and included within that is privacy. They use "deception" and "unfairness" to bring enforcement actions against companies in the privacy and cybersecurity space. Deception comes down to a misrepresentation that is likely to mislead consumers acting reasonably. But unfairness has nothing to do with representation, it has to do purely with consumer harm. Was there consumer harm and was there an offsetting benefit to competition or to consumers? If the injury is not reasonably avoidable, that is a basis for FTC action.

When we look at Privacy 1.0, which is notice of choice, which is the Warren and Brandeis model, that is really tying out to the FTC's deception authority. The consumer is told something that wasn't true, and the consumer made a choice based on deception and notice of choice. Unfairness, because it is a harm-based model, applies to both Prosser privacy torts and to cases where a representation is present.

MR. EDELSON: I wanted to provide an overview of the privacy cases that are being brought. Privacy is a large world, that can be split it up into two buckets. One

---

2 PRIVACY 3.0--THE PRINCIPLE OF PROPORTIONALITY, 42 U. Mich. J.L. Reform 869, (2009)

3 *Id.* (citing William L. Prosser, Privacy, 48 Cal. L. Rev. 383 (1960)).

is the common law. In the common law, most people think of data breach cases. But there is also a “silent piece”: data security cases. Over the last year, plaintiff’s attorneys have started bringing cases when they have seen there’s an existing vulnerability in a company’s website, but there hasn’t necessarily been a data breach.

The reason these are “silent” cases is they are brought under seal. They are brought under seal because if there’s a vulnerability, you don’t want to alert the hackers to it, as that would do a lot of harm to the class. Those cases are working through the courts now. Although there has been some law developed, not everybody knows about it. There’s a big fight about when those cases get unsealed. So that’s another part of the common law.

The second part of privacy is the statutory privacy cases. The laws surrounding privacy is an odd patchwork of State and Federal laws. They tend to be passed reactively. For example, one of the most famous laws, the Video Privacy Protection Act<sup>4</sup> was passed because the video rental history of Robert Bork, the Supreme Court nominee, had been published in the newspaper. Senators freaked out, saying, “Oh, my goodness, we don’t want our constituents to know what we have been renting.” That precipitated the passage of many of these statutes.

And the patchwork of state laws is largely resultant of the retroactive passing. For example, Alaska cares very much about genealogical information. It is the only state in the country that has a law addressing that.<sup>5</sup> Illinois cares about biometric information.<sup>6</sup> Illinois and Texas are the only states that have statutes addressing that. Michigan cares about what publications you read and what music you listen to, what videos you watch.<sup>7</sup>

Statutory cases all have large statutory penalties associated with them. Statutory damages can range from \$500 per person for a Telephone Consumer Protection Act case,<sup>8</sup> to, in Alaska, \$100,000 if you intentionally make a profit from disclosing genealogical information.<sup>9</sup> And since the cases are almost uniformly brought as class actions, damages are quite large.

The issue of large damages is what precipitated *Spokeo Inc. v. Robbins*.<sup>10</sup> The Chamber of Commerce looked at large privacy damage cases and thought it was not fair for businesses to face huge class action lawsuits when all that they did, according to them, was merely violate a statute. They argued to the Supreme Court that there needed to be something more: “real-world harm.”

In *Spokeo*, the Supreme Court did something fairly clever. The Supreme Court wanted to separate the good cases from the bad cases. The Court held that you have to look at the harm that’s being alleged and ask, is that the type of harm that Congress

---

4 Video Privacy Protection Act of 1988, Pub. L. 100–618, 102 Stat. 3195.

5 Alaska Genetic Privacy Act, 2004 Alaska Sess. Laws ch. 176, § 1.

6 Biometric Information Privacy Act, 2007 Ill. Laws 994.

7 Video Rental Privacy Act, 1988 Mich. Legis. Serv. 378 (West).

8 Telephone Consumer Privacy Act, 47 U.S.C. § 227(b)(3)(A) (2012).

9 ALASKA STAT. § 18.13.020 (2016).

10 *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540 (2016).

cared about? If so, then you have standing in federal court, and you can bring suit. If not, you can't.

A lot of lawyers think it is great when these cases are dismissed from federal court because they think they go away. But they actually don't. They go to state court. That is the ultimate irony of *Spokeo*. Generally, defense attorneys want to fight the weakest case in federal court. But some of these weak cases, because of *Spokeo*, are ending up in state court. And some jurisdictions are a lot more lax than federal court.

*Spokeo* also held that intangible harms could count, including the risk of a future harm. That could include a future data breach, if there's enough of a connection. Although that part seems good for plaintiffs, and it may ultimately be our undoing if we pay too much attention to it.

MR. GLASGOW: I want to discuss six different types of economic damages that have been discussed and /or tried in various privacy cases: (1) actual financial injury, (2) the cost of mitigating potential future harm, (3) risk of future harm, (4) alternative purchase decisions, (5) lost value of information, and (6) lost value of privacy.

First, we have actual financial injury. In one sense, this is the most straightforward type of damages that we can calculate. For example, if there was a data breach and credit card information is stolen, we would need to figure out which charges were fraudulent for consumers and total them up. There is comparatively less speculation as compared to the other damages theories.

However, causation is more difficult with actual financial injury. Although we can look up the fraudulent charges, causality is a lot more difficult to determine. Credit card charges and fraudulent charges are fairly common, how can we link it to this particular case? When there's been a data breach, and a consumer notices a fraudulent credit card charge that emerges at a later date, was that unlawful charge due to that data breach, or was it a different data breach?

While it is a difficult question to tackle, there are some ways of proving causation in the aggregate. We can look at aggregate patterns to see if among the customers for a particular company, there is a certain baseline rate of fraudulent charges. If that rate goes up right after a data breach, there is evidence that there have been fraudulent charges.

MS. ALEPIN: Do plaintiffs allege this type of actual financial injury in privacy cases? And in what situations are plaintiffs able to allege this type of damage?

MR. EDELSON: Not many. Individual actions are where these type of damages are usually alleged. But data breach cases are difficult to bring as individual actions. The economics are against it. And when people have fraudulent charges on their credit card, the banks generally pay for them. So there would not be actual damages in those cases.

However there are some actual damage data breach class actions. For example, in *Greene v. MtGox, Inc., et al.*<sup>11</sup>, the plaintiff alleged actual financial injury. That case

involved virtual currency. Hundreds of millions of dollars of bitcoin was the data that was breached. And that was clear, direct actual damages.

And the theory of actual financial injury is also brought as a class action on behalf of the banks.

MS. ALEPIN: Mr. Serwin, are there particular problems that you see with alleging this type of injury in a privacy class action lawsuit?

MR. SERWIN: Sure. Recently there have been Article III standing arguments made in the beginning of privacy class actions. Although these standing arguments were dealt with at the 12(b)(6) stage, the same arguments are also made at summary judgment and class certification because of the causation issues. Judges are beginning to scrutinize whether there is causation on a class-wide basis. This is especially true in the credit card cases where consumers are, in most cases, not liable for fraudulent charges. Those are the cases where it is harder to come up with a damage theory because usually consumers are reimbursed by the banks.

MR. GLASGOW: The second theory of damages is the cost of mitigating potential future harm. As with actual financial injury, it is very easy to tally the costs consumers are going to take to mitigate potential future harm. For example, the cost of credit monitoring, or the time spent changing passwords or closing accounts and opening new accounts. These are the kinds of things that are easy to keep records of, and there will be actual dollar amounts that we will assign to these tasks.

Here, causation will be less of a concern than with actual financial injury because we can see consumers undertaking these activities in response to the data breach or another privacy case. Something happens that causes someone to be concerned about their personal data, concerned about their privacy, so they undertake actions to try to protect it.

But as discussed before with actual financial injury, a lot of times the consumers don't actually bear this cost. One of the standard playbooks after a data breach now is to offer free credit monitoring to anyone affected. So in many cases, just as with banks reimbursing for fraudulent credit card charges, the costs of mitigating future harm is often covered by the company that suffered the data breach or who has been put at risk.

MS. ALEPIN: So are lawsuits seeking to recover time that people spend, for example, changing their passwords on multiple different sites after a data breach?

MR. EDELSON: I feel like the first comment I am going to come across as a defense lawyer. I swear I am a plaintiff's lawyer. I am really excited about a couple of the damages theories. On the mitigation costs for future harm, I think the courts have it wrong, but the courts are pretty clear.

To me, the big damage in a data breach is the upending of someone's life. If you deal with clients, it is awful. If you told someone you can either spend months trying to fix your credit and change all your passwords, or you can have \$10 stolen from your wallet, they would say, I'd rather lose the \$10. But courts don't recognize that. Courts have not been receptive to the idea that consumers can recover for their lost time.

MR. SERWIN: I think a discussion of *Clapper v. Amnesty Int'l USA* would be instructive.<sup>12</sup> *Clapper* was a warrantless surveillance case. And the question was what was the harm if you didn't know you were surveilled under a classified program?

The reason that case is so relevant is there is always this issue of how do you know? If I go buy credit monitoring, and I can't actually tie up causation, is that actual harm or am I manufacturing harm?

And there's a variety of different views that people have on that. That's one of the core issues against causation is where a lot of these issues really get bought out, I think.

MR. GLASGOW: The third damages theory is the risk of future harm. We talked about mitigating potential risks or mitigating the effects of some kind of privacy violation. But what about the fact that just maybe consumers have been put at risk of future harm? They haven't undertaken any activity yet; they haven't purchased credit monitoring. But the fact that their data has been leaked into the wild and some hackers have their hands on it has created a future risk. Their financial security data is now less secure because of a data breach or because of another privacy violation.

To calculate these damages, we look at expected future loss. For example, suppose there was a data breach and some information is stolen. We have seen enough data breaches now, so there's a lot of information out there about different types of information being stolen. So for these types of data breaches, we can ask what kinds of future financial losses or problems do customers tend to encounter? If you have certain types of information stolen, what is your future expected risk?

We will have a probability of some sort of loss, or some kind of estimation of what the average expected loss for people that had this type of data stolen. And from an economic perspective, calculating expected future loss is not very hard to do. For example, in *Remijas v. Neiman Marcus Group, LLC*,<sup>13</sup> the court held that loss from future harm could be recoverable. In that case, information from about 350,000 payment cards was stolen, and, very quickly, about 9,000 fraudulent charges appeared. Because of the high incidence of fraudulent charges, it looked like there was a high risk of future harm.

But the same caveats are going to apply. For example, offering free credit monitoring will tend to mitigate some of this future risk.

MR. EDELSON: Risk of future harm is the fool's gold of the *Spokeo* case. A lot of data breach attorneys were super excited when they read the Supreme Court's opinion that consumers could have standing for intangible harms including potential risk of future harm. People were slapping me on the back saying "Great job."

But my view is that's the wrong road to go down. There are two strategies in bringing data breach cases. One strategy is allege the cause of action that will get by a motion to dismiss and then settle the case. By alleging a risk of future harm, we are just going to get

---

12 568 U.S. \_\_\_\_; 133 S. Ct. 1138 (2013).

13 794 F. 3d 688 (7th Cir. 2015).

by a motion to dismiss. There are certainly reasons that defendants will settle a data breach case, but settlements based on risk of future harm tend to be really bad.

For example in the Target data breach settlement, which stemmed from one of the most high profile data breaches we've seen, virtually no money went to class members. The reason is because the damages theories class counsel were pushing involved a risk of future harm.

But there are other lawyers who take a different view. They are asking how do you come up with a damage model which is not just going to survive a motion to dismiss, but it is going to survive summary judgment, trial, and will be able recover actual money for class members.

MR. SERWIN: One of the ironies of this theory is, Jay is right. It is great to say you can have future economic harm, but you can easily start carving the class up into people that have maybe never been part of a breach, if that person exists, versus someone who has been in five or ten. So how do you really know that the same information has been lost five times, and what caused the alleged or risk probability of loss in the future?

I think future economic harm is a difficult damages theory to use in privacy cases. Although it might survive a 12(b)(6) motion to dismiss, if you actually had to go to trial on it and you had class members that had been in ten breaches with the same data, I don't know how you would actually prove it out if you had to.

MR. GLASGOW: The fourth way to conceive of damages in a privacy case would be an alternative purchase decision. Would the consumer purchase the product if the true privacy policy or the data breach risk was known? You entered into a contract with a company and purchased something from them, but whether it was through a misleading privacy policy or poor data management practices, the company breached your personal information.

The concept of an alternative purchase decision is actually pretty common in consumer class actions when there have been misrepresentations or defects with products. In those cases, plaintiffs allege that, if they had known this was a defective product, consumers wouldn't have purchased the product, or the consumer wants their money back or compensation for being misled in this purchase.

There are some well-known methods for calculating damages in these types of cases. Essentially, we conduct a survey to see what types of values consumers place on different characteristics of the product. We then ask, if one of those characteristics was not actually available at the time, how much less would the consumers have wanted to pay, or would they have just purchased something different?

A well-known case where this damages method was used was in *In re: LinkedIn User Privacy Litigation*.<sup>14</sup> That case involved a data breach of purchasers of LinkedIn Premium. In examining the theory of damages, the Court punted, holding that because they said there was nothing different about the privacy policy between LinkedIn free and LinkedIn premium, consumers didn't purchase any "extra privacy" with LinkedIn premium.

The alternative purchase decision theory of damages could be used in cases where a privacy policy was misrepresented or where there's been a data breach and people didn't understand the actual chance of such a breach.

MR. EDELSON: My law firm, Edelson PC, represented the plaintiffs in *LinkedIn*. And there was a revised opinion after the one Mr. Glasgow discussed. We moved for, and were granted, reconsideration of the order granting defendant's motion to dismiss. But a better example of this damages theory in practice was *Resnick v. AvMed, Inc.*<sup>15</sup> *AvMed* involved health insurance premiums and allegedly insufficient data security practices. We looked there are how much people would pay for health insurance if they knew that all their health records could have been exposed. We hired an expert to do surveys. And lo and behold, people said I really wouldn't want to pay for that product. So better theories result in better settlements. When we settled *AvMed* and *LinkedIn*, because our argument were based on diminution of value and benefit of the bargain, we would have been able to get a class certified and go to trial. And our settlements recognize that. Those were the first settlements where people started getting money without having to show any other harm because they overpaid for the service.

MS. ALEPIN: But are those damages limited to those where consumers pay for the service?

MR. EDELSON: If you don't pay, it is a free service, and it is a much more abstract argument in terms of what you lost. Although you might still be able to point to consideration paid, and diminution of consideration. But I was a philosophy major in college, and that one would be a big stretch for me to even be able to articulate. And the courts have said, such as in *LinkedIn*, if you're suing over something that's free, it is going to be hard to claim that you lost value in it.

MS. ALEPIN: Mr. Serwin, any thoughts?

MR. SERWIN: A lot of what the Internet is based on is free service. So the alternative purchase decision theory will really only be used in certain cases.

The other thing is that we have been going down this path in the U.S. of pricing privacy. But the notion that you would pay more for privacy has been rejected by the consumers of the big companies. So I think one of the challenges with causation today is proving that actual consumers, or at least enough consumers in a class, would make a different buying decision. And that's where I think you will have dueling experts and different theories on what the value was, but also who would have made a different decision.

MR. EDELSON: I want to rebut that. I don't think it actually matters about the individual. If I buy a watch and I think I'm getting a watch worth X, and in fact, it is missing a feature, even if I don't care about the feature, I still got less than what I paid for. That's the theory.

But we have not seen class certification decisions on that. We have seen motions to strike class allegations based on that theory, which plaintiffs have won. But it is an argument that we will obviously deal with down the road.

MR. GLASGOW: A fifth theory of damage is based on the lost value of information. For example, in a data breach or where a company is selling personal data with third parties. Clearly hackers think this information is valuable; they are going to some effort to steal it. And companies that share this information, sell it, and market it are also finding it valuable. So the question becomes: are customers being deprived of the economic value of their information because hackers are stealing it and companies are selling it. Can we put value on somebody's personal information?

We have seen experts try to value how much this information is being bought and sold for. But this is not something that's often done openly. But in *In re Zappos.com, Inc.*,<sup>16</sup> the experts tried to estimate the black market price of stolen records. And they came up with as much as \$30-45 per record.

But in *In Re: Yahoo! Inc. Customer Data Security Breach Litigation*,<sup>17</sup> we see a very different number. Hackers are selling records in batches, say \$100 for 100,000 records. Some people think the reason that this price is so much cheaper is because the data breach happened quite a while ago and maybe all the valuable information has been mined and accounts have been closed.

But the challenge with that approach is demonstrating that the consumer has actually lost out because of the data breach. Can plaintiffs demonstrate that there was an actual market in which consumers would profit from their personal information? Sure the hackers can steal it and use it, and the marketers can use it, but are the consumers missing out in some way, and how does this affect what we think about claiming the lost value of information as damages?

MR. EDELSON: We made this argument roughly a decade ago in *Claridge v. RockYou, Inc.*<sup>18</sup> There, the Court actually, I don't want to say accepted it, but allowed us to get by a motion to dismiss while expressing a tremendous amount of skepticism. Later the judge said that she regretted that decision.

But the lesson that I took, and it's exactly what Mr. Glasgow was saying, is that that argument was a little bit ahead of its time. I believe that there actually is a market that is burgeoning where people can now go and sell their personal information individually.

For example, I can take information about myself, my name, my age, my address and actually sell it to data miners and get a certain amount of money for that. In England there's a company that's been doing this for a while, and other companies are starting to experiment with it. This reconciles with the view of Silicon Valley. Silicon Valley understands that if they have access to your data, it is worth money, and companies are willing to buy it from you.

---

16 108 F.Supp.3d 949, 954 (D. Nev. 2015)..

17 *In re: Yahoo! Inc. Customer Data Security Breach Litigation*, case number 5:16-md-02752 (N.D. Cal.).

18 785 F. Supp. 2d 855 (N.D. Cal. 2011).

Once people start saying that this value of privacy makes sense, I think that we are going to see that argument brought more often in front of the courts. But I do think that is a real theory that hopefully will be accepted by the courts in the coming years.

MR. SERWIN: I think, as it stands right now, this is a theory that is difficult at best. I think one of the challenges down the road is that the data that might be the most valuable, people wouldn't sell. You are not going to sell your Social Security number and name to a hacker. So there's not really a market for that.

MR. EDELSON: But people would buy it, right?

MR. SERWIN: But I don't think the plaintiff is being deprived of the economic value of their information because they are not going to sell it. Then you get into a debate of if there's data that could arguably be sold, it is probably lower value data, and may only have value in an aggregated way for a company. I think this is a fight we are going to have down the road, but I there are some inherent challenges. There is data that is breached that people just inherently wouldn't sell, and it might go to other theories, but if you're not going to sell it, you haven't lost economic value.

MR. EDELSON: What a profound irony would it be where the really important data is the stuff we are not going to allow damages for, it is only the simple stuff.

MR. GLASGOW: So the sixth and final theory is a loss of privacy. Does privacy itself have an intrinsic value? I am not aware of any cases where anyone has actually attempted to calculate the economic value of privacy, but I can take two minutes to walk through how that might be done.

First, would there be any precedent for saying privacy itself has any kind of intrinsic value? In economic damage cases or natural resource damage cases, economic experts have analyzed the intrinsic value of the environment. This is known as "existence value" or "passive use value." This is the kind of value that individuals get just knowing that the environment is pristine.

For example, in the case of Exxon Valdez, there was a very large oil spill in a remote area that most people would not visit and there was not a lot of economic activity there. But people were still very upset that this pristine environment had been damaged. And in those cases, courts have actually explicitly ruled that lost environmental existence value can be compensable. So this could lead to a theory where we'd say there's an existence value from privacy that comes from the knowledge that your personal data is secure and hasn't been stolen by hackers and shared by third parties in some unauthorized way.

Of course, there could be some argument that just because your data has been stolen does not mean it has been accessed. And we see a lot of this in hard drive cases: your hard drive has been stolen, but you can't prove anybody looked at it. So just because there is a data breach and records were stolen, you can't prove that your records were breached.

So is there such a thing as loss of privacy and something we can claim as damages and how we could go about doing that? I will give you a very quick example. My colleague, Sarah Butler, and I just wrote an academic article looking at how one would calculate

the value of privacy, particularly personally identifying information and non-personally identifying information.<sup>19</sup>

We did a hypothetical survey where consumers shopped for streaming video services. There were different characteristics of the hypothetical video streaming services. One of those characteristics was the data sharing policy. We asked whether the consumers would rather we kept all the data secure or would it be okay if the hypothetical company shared non-personally identifiable information like which movies you watch, or also shared personally identifiable information such as email address? We examined three possible privacy policies to see how do people make trade-offs, whether they would still purchase a service that shared some data, would they pay less for it, or are they indifferent? This is called conjoint analysis, which is regularly used in courts for lots of class actions, lots of consumer-related cases.

Thinking about the options you see here, which streaming service would you be most likely to purchase?

(1 of 11)

<b>Catalogue Size</b>	5,000 movies and 2,500 TV episodes	5,000 movies and 2,500 TV episodes	2,000 movies and 13,000 TV episodes	2,000 movies and 13,000 TV episodes	NONE: I wouldn't choose any of these.
<b>Availability of Content</b>	T.V. episodes next day, movies in 3 months	T.V. episodes in 3 months, movies in 6 months	T.V. episodes in 3 months, movies in 6 months	T.V. episodes next day, movies in 3 months	
<b>Commercials</b>	Yes	None	None	Yes	
<b>Privacy Policy</b>	Share usage	Share both usage and personal	Collect but not shared	Share usage	
<b>Monthly fee</b>	\$8.99	\$10.99	\$8.99	\$6.99	
	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	

The above slide is just an example of the choice task we gave to our survey respondents. The whole point is consumers are making trade-offs: how much would you pay for the service, what's the privacy policy, how many videos are available, how fast is the streaming service and so on. We are treating privacy as just another feature of the product; how much privacy does this product offer you and what kind of trade-offs between money and privacy are consumers willing to make?

What we can take away from this analysis is a calculation of willingness to pay. We came up with some interesting results that we wouldn't expect. First, consumers on average didn't value the non-personally identifiable information very much. We estimated 85 cents a month, and that was statistically insignificant, so we couldn't even rule out zero. In this hypothetical, if it was movies that were being watched (not tied to your account), this kind of aggregated data would not give us much of a basis for claim damages. People didn't seem to care very much if somewhere out there was an anonymous list of all the shows consumers watched in the last month.

19 Glasgow, Garrett, and Sarah Butler. 2017. "The Value of Non-Personally Identifiable Information to Consumers of Online Services: Evidence from a Discrete Choice Experiment." *Applied Economics Letters*. 24(6): 392-395.

But if we add personally identifiable information to it, the numbers shot up, and became statistically significant. It came out to about \$5.50 a month that people would be willing to pay to avoid having their personally identifying information shared along with their non-personally identifying information.

And their willingness to pay for “privacy” was similar to the willingness to pay for other products that people found desirable: more content, faster availability and not showing commercials. So theoretically, at least, we can look at different kinds of privacy policies and what kind of information is being shared out there and place a value on that information. This could be the core for some kind of damage calculation.

MR. EDELSON: This theory is very similar to the idea of diminution of value, but it gets around the problem of what if there’s a free service.

MR. SERWIN: But one of the things on privacy, is privacy is not binary. I understand what Mr. Glasgow is doing here, but I have researched a lot on demographics and privacy, and people have different views.

So even if someone is privacy centric, they may care about different sets of information. Not everybody is going to have the same view. There are some people who will not care, fundamentally not care, but they sure care if the government does and vice versa. So I think one of the challenges in this space, just from a theoretical basis, is just because I care about privacy, I don’t care the same way you might.

And it does break down by certain demographic features, and I think that’s one of the challenges, frankly, from a regulatory standpoint and a company standpoint when you try to roll these privacy policies out. How do you understand who your customer is? How do you make sure you are meeting their expectations to the extent you can even discern them?

MR. EDELSON: I think that is going to be one of the big arguments in the next couple years, especially when it comes to class certification.

Our view representing plaintiffs is if I buy a car and it doesn’t have seatbelts in the back and the fair market value of a car without seatbelts in the back is less than one with seatbelts in the back, I get to claim damages. It does not matter if I have kids or not, does not matter if I am ever going to use it. I bought something worth less than what I thought I was paying for. I think the defense bar desperately wants there to be subjective views on privacy because then the cases all go away. But I do not think that’s how the law works.

## CRIMINAL ANTITRUST ENFORCEMENT DURING THE OBAMA ADMINISTRATION

*The Golden State Institute was honored to have Renata Hesse, Acting Assistant Attorney General of the Antitrust Division of the United States Department of Justice speak about criminal antitrust enforcement during the Obama Administration. Following her remarks, she was joined by several of her colleagues from the Division for a panel discussion. The panel included Brent Snyder, Deputy Assistant Attorney General for Criminal Enforcement, Kate Patchen, Chief of the San Francisco Office and Matthew Lunder, Counsel to the Director of Criminal Enforcement. The discussion was moderated by Niall Lynch, Partner in the San Francisco office of Latham & Watkins LLP.*

### Remarks by Renata Hesse

Good afternoon. It's been my honor to serve as Principal Deputy Assistant Attorney General for the past four years, and twice during that time as Acting Assistant Attorney General. Recently I've spoken about our civil enforcement program, its work here at home and with our international partners and about the importance of our cooperative relationships with state and federal enforcers. I'm grateful for this opportunity to talk to you today about the division's criminal program.

The statistics from the past eight years are undeniably impressive, and we are justifiably proud of them. But conviction tallies and fine amounts alone are an inadequate accounting of our accomplishments. The measure of success for any criminal-enforcement program is not merely the number of cases it successfully prosecutes, but also the breadth of critical industries it touches in various sectors of the economy, and the impact on American consumers. It's been my privilege to both watch and participate in the development of the division's criminal program, and I have come to deeply appreciate the sound policy objectives and appropriate exercises of prosecutorial discretion that sustain it.

Throughout the Obama Administration, the division added steadily to its established record of successful prosecutions in significant sectors of the domestic and global economies. Some cases are big and well publicized. Others are small and relatively unknown. But all demonstrate our prosecutors' commitment to finding, stopping, punishing and deterring antitrust crimes. We consciously forged an integrated antitrust-enforcement regime, through our relationships with other agencies and within the division itself—across civil and criminal sections. And we've demonstrated for the defense bar and business community, in cases I'll touch on briefly today, our positions with respect to important aspects of criminal enforcement—like compliance and corporate probation, our carve-out practice, the requirements of leniency and how we evaluate the relative culpabilities of both corporate and individual subjects.

As for what we can measure in numbers, in recent years we've obtained the largest fines in the division's history. The auto parts cases now total nearly \$2.9 billion in criminal fines, surpassing the international cartel investigation before it—the air transportation investigation totaled \$1.8 billion. And last year we announced over \$2.5 billion in criminal fines and penalties from corporate offenders in a single investigation in the financial-services sector. At the same time, we continue to hold individuals accountable for the crimes imputed to their corporate employers, asking for sentences that reflect their seriousness and send a powerful deterrent message. During the past eight

years we obtained well over 300 individual convictions while maintaining a 23-month average prison sentence.

Much has been said about the Yates Memo, and there's no need for me to repeat here its admonitions about corporate cooperation and individual accountability. Most of you knew the division was committed to this even before the department emphasized the policy and revised the U.S. Attorney's Manual. It's no secret that we believe the most effective deterrent to antitrust felonies is prison time for those who commit them. But this does not mean that for us the Deputy Attorney General's directive was a redundancy. It was an opportunity to reflect on our practice, and to refine how we assess cases against individuals. It informed how we talk about them within the division, and publicly. We asked: What more can we do to align our practices and policies with the department's priorities?

Our real-estate foreclosure-auction cases exemplify individual accountability—we've prosecuted those who would profit from the misfortunes of others, people who suffered foreclosures during a national financial crisis. To date we've obtained convictions against 70 individuals in California, four are on trial this week and 14 more indicted individuals await trial. In Georgia, in addition to one company conviction, we obtained another 20 individual convictions, and two more await trial there. In Alabama and North Carolina, we've obtained 12 and two individual convictions, respectively, in addition to two company convictions in Alabama.

This investigation is not an exception. If we look at our corporate and individual convictions across all investigations, in the past four years alone we have obtained convictions against 118 individuals and held accountable a corresponding 78 corporate offenders. And looking back across the past eight years, the ratio of individual to corporate convictions is more than two to one—353 individual to 150 corporate convictions.

The criminal program's reach extends outside the United States, and foreign-national fugitives feel its sting, too. Over the past eight years, 56 foreign defendants living abroad were sentenced to serve time in U.S. prisons for their crimes, compared to 34 during the prior 10 years. Just two weeks ago, another fugitive—the third in the past two years—was extradited to the United States on charges brought by division prosecutors. An Interpol red notice allowed Bulgarian authorities to apprehend and deliver him here to face the charges against him. He was immediately arraigned and remanded to the custody of U.S. Marshals, where he awaits trial.

Our record shows our success in major industrial sectors that impact the domestic and global economies, and hit everyday consumers in the pocketbook—like the real-estate and auto-parts cases I just mentioned. But think about a sector like shipping, and all it includes—how it adds to the cost of almost every product we buy. Throughout the last decade we've discovered and prosecuted conspiracies involving air freight, freight forwarding and international and domestic ocean shipping. Air and water shipping impact overland shipping logistics, and our presence is felt there, too. In our current international ocean-shipping investigation, four corporate offenders have pleaded guilty and together will pay nearly \$235 million in criminal fines. Antitrust prosecutors charged eight individuals and have to date obtained convictions against four of them. The rest remain fugitives susceptible to some version of the Bulgarian fate that befell the defendant I just mentioned.

We've made our mark in the electronic-components industry, a sector critical to our information technology, and so to our economy and its connection to the world's. In the Liquid Crystal Displays (LCDs) investigation, at the trial of AU Optronics here in San Francisco—I know many of you are familiar with it—we proved to the jury the overcharge justifying a \$500 million fine. Two senior executives were each sentenced to 36 months in prison and another to 24 months. And now our prosecutors are investigating a long-running conspiracy to fix the prices of capacitors, a small electronic component with myriad uses. Like LCDs, they are ubiquitous in our devices—desktop and laptop computers, flat-screen televisions, game systems and digital cameras. They are also critical to car-engine and airbag systems, home appliances and office equipment. Yet another product integral to the daily lives of consumers at home and around the world. Five corporate defendants have now pleaded or agreed to plead guilty and will together pay over \$34 million in criminal fines. And just yesterday, a grand jury indicted five more individuals in this ongoing investigation, bringing the total to six.

But as I said, the division's accomplishments comprise more than just successful prosecutions in critical economic sectors. Looking closer, at the details of specific resolutions, we see our prosecutors' commitment to fairness in their pursuit of just outcomes. Like considering the sanctions that other jurisdictions might levy in evaluating the fairness of our own. In a recent auto-parts case, we worked closely with our friends at the Competition Bureau in Canada—the conspiracy affected both our nations. Although the Bureau could have brought charges, it decided to forgo them, and we based the corporate fine on commerce that affected both the United States and Canada. The investigation culminated in a guilty plea and sanctions that appropriately addressed the criminal conduct affecting us both. A reasonable and common-sense resolution furthered a basic principle of criminal justice: no offender should escape the fair consequences of its crimes.

We applied the same principle when confronting ability-to-pay claims. We want defendants with legitimate claims to make them. Our objective is to protect the economy; to punish and deter corporate offenders, yes, but not to put competitors out of business and their employees—many of whom have nothing to do with their employers' crimes—out of work. But we are appropriately skeptical of ability-to-pay claims, and carefully scrutinize them with the help of outside experts, because it would be unfair for an offender who can pay to avoid this consequence. Until recently, we had not given a corporate offender with a fine reduced because of inability to pay any further reduction—for cooperation or otherwise. But if a company in financial distress faces the same fine, regardless of whether it cooperates, it has no incentive to incur the additional cost of cooperating. So we now consider additional sentencing credit for companies that demonstrate inability to pay, but nevertheless provide valuable cooperation. To earn credit for cooperating, any pleader must provide assistance that adds value to our investigation. And if it has value, it does whether an ability-to-pay claim reduces a fine or not. This is fair. And it reinforces the incentive structure we maintain. We can distinguish spurious ability-to-pay claims from legitimate ones while incentivizing cooperation. Three companies with fines reduced for inability to pay recently received additional sentencing credit for cooperation.

Compliance and remediation have become more central to our corporate resolutions and sentencings. In the AU Optronics case we used a corporate monitor for the first

time—where even after conviction at trial the company refused to acknowledge its wrongdoing. More corporate sentences have included probation, especially where our and the sentencing court's confidence is low that a defendant is committed to rehabilitating itself with appropriate compliance measures. We remain unwilling to credit compliance programs that failed to detect or deter the antitrust crimes for which we prosecute a corporate defendant. The sentencing guidelines do not allow credit for nominal or ineffective programs, and if we're prosecuting your client, you'll have a difficult time arguing that its compliance program was neither.

But the news in this area is not all bad. We recognize, and have credited, extraordinary forward-looking efforts to change corporate culture, where senior executives demonstrate that compliance is a top corporate priority, and companies implement structural safeguards—like requiring anyone promoted to a management position to have first served as a compliance officer for a designated period of time. Efforts like these not only weigh against a sentence including probation, but in exceptional cases can also qualify for a modest reduction to a criminal fine.

Two weeks ago today, we announced our decision to consistently initiate criminal investigations from the outset where we find credible allegations that employers have agreed among themselves on employee compensation, or to not solicit or hire each others' employees. This is not entirely new—we've investigated employer collusion criminally before. We've also investigated it civilly, like the agreements among technology companies not to poach employees, which resulted in civil consent decrees. But colluding to fix wages is no different than colluding to suppress the prices of auto parts or homes sold at auction. Naked wage-fixing or no-poach agreements eliminate competition in the same irredeemable way as per se unlawful price-fixing and customer-allocation agreements do. So we will approach them the same way, using our professional judgment, and considering all the factors that ordinarily weigh on our discretion as criminal prosecutors.

This thoughtful engagement with our work informs the choices we make every day. I've had the privilege of observing and engaging in these exercises of professional judgment from a close vantage point—confronting the interesting and sometimes difficult questions that our investigations and prosecutions present. We are not without guidance. There are statutes, policies, rules of procedure and professional conduct designed to point us in the right direction or sometimes to at least remind us of what we cannot do.

But every decision comes down to a moment of judgment made in the course of events. And there are many critical moments in every matter, when we make choices from among options. We decide which principles apply, and consider various interpretations of their proper applications. If there were not these moments of decision, if the applicable rules were obvious and pointed us to the one and only right answer each and every time, there would be no room for error. And there would be no need for professional judgment and prosecutorial discretion.

Professional judgment is about seeing more than one possibility, and then choosing the best option from among them. Put simply, prosecutorial discretion is about knowing, all things considered, what is most important and doing what is right. And throughout my time as a Principal Deputy Assistant Attorney General, and now Acting Assistant Attorney General, the one thing I am most confident of is that we've always tried to

choose the best option, and do what is right for American consumers. Did we always make the best decision? That's for others to decide. Did we always try to choose the course that benefitted consumers the most—to do what was right? Yes.

This process requires thought, and frankly, humility. Each investigation, negotiated resolution and trial, is a unique opportunity to ask whether our choices led to outcomes that serve the principles it is our duty to defend. And the answers in this investigation inform our judgment in the next. So we learn from our mistakes, ponder the consequences of roads not taken and wonder about alternative strategies yet to be employed. Our successes too are opportunities to reflect on what we did right, and what we can do better.

We also learn quickly in unfamiliar contexts while applying the same principles of justice to conspiracies operating in new markets, where offenders use complex technologies to commit their crimes. We prosecuted a conspiracy to fix the prices of posters sold online—the antitrust laws reach even crimes committed using algorithms in cyberspace. Our financial-services cases present an ongoing challenge—one we welcome—to extend our criminal enforcement into the most complex markets, to think about how the Sherman Act applies to new scenarios and to test innovative investigative techniques and analyses for gathering, understanding and evaluating evidence.

We've obtained corporate and individual convictions in cutting-edge investigations. In the online-posters investigation, a grand jury indicted one corporate conspirator and one individual, and another individual pleaded guilty. In heir location services—another unique market where we found antitrust offenses—one heir-finding firm, its owner and another individual pleaded guilty. A grand jury indicted another firm and its co-owner. Convictions in the financial-services sector represent an increasingly significant portion of the division's record. In the LIBOR investigation: six corporate and seven individual convictions, two of these after trial. In tax liens: three corporate convictions and 13 individual convictions, including one after trial. And we prosecuted 20 individuals in the munibonds investigation and obtained 17 convictions—in addition to one corporate conviction—three of them after trials. Accountability in the financial-services cases over the past eight years amounts to a total of over 15 years in prison for 11 individual offenders, and, not counting the extraordinary fines in the foreign-exchange matter, a total of \$1.3 billion in corporate fines and penalties.

We have also redoubled our efforts to protect the integrity of our investigations—civil and criminal. Two weeks ago, prosecutors filed obstruction-of-justice charges against a former executive of a motor-coach-operating company. He concealed evidence and tried to destroy documents during the course of a civil merger investigation, and gave false and misleading statements during litigation. Obstruction crimes like this make headlines, publicizing the consequences of trying to corrupt the merger-review process. Prosecuting them criminally protects the integrity of our civil investigations, and we continue to pursue them with as much vigor as ever. And this is just one example of a civil investigation leading to a criminal prosecution. Price-fixing prosecutions, too, can begin with evidence referred from civil attorneys.

Department policy requires all components to cooperate with one another and maximize remedies for the United States. We've made this a top priority, not only in

our coordination with other agencies conducting investigations parallel to ours, but also within the division. Antitrust attorneys on both the civil and criminal sides of the house appropriately communicate across civil and criminal investigations when necessary. As a result, civil attorneys can be even more vigilant about finding and referring to prosecutors evidence of possible crimes discovered during civil investigations. Not because they care about this more than before, but because they know what to do—and what not to do—with such evidence when they find it. The risks inherent to cross-proceedings coordination are tempered in light of reliable internal procedures allowing our attorneys to readily consult about referring evidence.

Our leniency policy remains the criminal program's single-most powerful case generator, and continues to serve as an example to our partners around the globe as they develop and improve their own. We learn in this context, too, in an ongoing conversation that requires us to think about the justifications for our choices. We've noted that in type B corporate leniency scenarios, those employees of the applicant who admit to their criminal conduct and cooperate are usually included in the corporate leniency agreement. But we've also thought about how Deputy Attorney General Yates' directive might apply here, too, with respect to some culpable individuals, when the policy allows for more discretion with respect to granting them leniency.

Some suggest that the costs of applying for leniency are becoming too high, especially for multinational corporations that touch the economies of several nations, many of whom have leniency programs of their own. If potential applicants become any less sure about the fate of their people, the argument goes, potential applicants will become more reserved about self-reporting the results of their internal investigations. But the costs of applying are only one side of the scale. The risks of not applying—of waiting—are on the other. And the prospect of individual sanctions is a high risk to run here in the United States, as it will be in other jurisdictions now considering them for their own competition laws.

Like all good prosecutors, ours observe ethical standards. And we should not overlook the most immediate one, if not the most important, in the professional life of every prosecutor—an evidentiary threshold of American criminal law. We must prove our cases beyond a reasonable doubt. And not to just anyone. Not to each other, or to someone at the division asked to approve a recommendation to prosecute—but to a trial jury. This most basic constraint on our prosecutors' discretion informs every judgment they make during even the earliest stages of an investigation—whether conducting a voluntary interview, contemplating execution of a search warrant or evaluating evidence obtained with a grand jury subpoena. It applies to each and every case, whether the defendant is in the United States likely to put us to our proof, or beyond our borders, hoping against red notice, border watches and extradition. We prosecute because we have evidence, and are prepared to seek indictment and a trial on the merits. As of today we have 15 criminal cases headed for trial across the country over the coming months. And this is in addition to the 26 criminal cases we've already tried during the past eight years.

The criminal program's success is the result of the careful judgment, vigilance and hard work of its prosecutors. Their accomplishments over the past eight years are significant developments in the division's recent history. I have every confidence that the Antitrust Division will continue honing its criminal practice to always better serve

traditional principles of criminal justice. Our successes are hallmarks of the thoughtful exercise of discretion we strive to realize in every criminal prosecution we bring. And when our judgment is sound, we feel that we have done it right. We remind ourselves that every judgment we make is a wielding of the government's power, and that this power ultimately belongs to the people—to those it is the duty of every prosecutor, antitrust or otherwise, to protect. This is the touchstone of our prosecutors' discretion. And I am proud to be alongside them as they do their part to safeguard the domestic and global economies, and to ensure that the benefits of fair competition inure to us all.

## **Panel Discussion**

MR. LYNCH: Thank you, Renata, that was very informative, provocative, and interesting comments. And we want to get into some of these issues in more detail with Renata and the rest of her criminal antitrust enforcement team at the Antitrust Division. Let me kick it off with Renata. You listed very impressive criminal enforcement statistics in your speech, and they are impressive. Not to be a critic, but would like to highlight one wrinkle, and that is, in the most recent fiscal year, ending September 2016, the Antitrust Division obtained less than \$400 million in criminal fines. I can't believe I am saying that. In the days working with the Antitrust Division in the 1990s, that figure would have been spectacular, but as you raise the bar higher you are judged differently. But this is the smallest fine total since 2005 and dramatically lower than the billion dollar fine totals in the previous four fiscal years. What, if anything, accounts for this drop-off in the amount of criminal fines?

MS. HESSE: I guess I'll start by saying part of what I was trying to do was to reset a little bit how we think about success, because I think that's an important thing to do, and that's just not an excuse because our fine tallies were lower this year. And I really do believe that where we are prosecuting, and the number of individuals we are prosecuting, and the number of other investigations we have open, which right now is around 100, is really a more important measure of what we are doing and how successful we are.

But I think the boring explanation for this is that all of our investigations kind of have a trend line, and we are at the tail end of some of our biggest investigations. And so we are now at the point where we are indicting holdouts that we may never actually see come here because they are fugitives and individuals. So we are coming to the tail end of some of the larger investigations, including auto parts, and we are at the beginning of some other investigations.

So I expect as those other investigations start to pick up, that we'll see the trend line moving up again. I don't know how high it will move up again. And, as I said, I am not sure I really care, because the important thing is where we are prosecuting. And in particular, one of these investigations is an incredibly important part of the economy that matters a lot to consumers, so we'll hopefully have more news in that area. I think fundamentally the explanation is that we are at the tail end of some and the beginning of others.

MR. LYNCH: So defense counsel don't need to worry?

MS. HESSE: Yeah, there's still plenty of work.

MR. LYNCH: My next question is for Kate.

Kate, you are based in San Francisco, and as you know, the Northern District of California has the most cartel multi-district litigation cases of any district in this country, and I would imagine three-quarters to two-thirds of the people in this room have worked on various MDLs in the Northern District that probably resulted from investigations in your office.

But given the interest in the overlap between civil and criminal antitrust cases, how does follow-on civil litigation help or complicate your efforts to investigate cartel conduct, and to what extent has civil litigation helped the DOJ to obtain discovery that is located outside the U.S. and beyond the reach of your subpoena power?

MS. PATCHEN: Thanks. Before I begin with what you said, I need to give the disclaimer that the views expressed in my presentation today are my own and not necessarily those of the Department of Justice.

To answer the first part of your question, civil litigation is important. It's important for victims of antitrust violations to seek treble damages as a remedy for harm done by conspiracies, so it plays an important role in the system.

However, occasionally we have a conflict between the rules of civil discovery and our ongoing grand jury investigations, and at times those discovery requests interfere with the government's ability to investigate and prosecute cartel cases. An example would be when a civil litigant attempts to use civil discovery to identify grand jury witnesses or witnesses providing information to the Department of Justice.

Also discovery can be used in order to uncover communications between the civil litigants and the government, which would reveal or expose the scope of a grand jury's investigation. In those cases, we often intervene, as many of you know, in the civil litigation for a limited stay of discovery and always attempt a stipulation with the parties and advance those stays. And the purpose of that is, of course, to protect the integrity of the grand jury investigation and protect the government's ability to do its job.

Separate and apart from protecting the grand jury investigation, as trial attorneys, we also have a concern that civil litigation may result in additional impeachment evidence against our trial witnesses. This may happen if materials are used or witnesses are deposed early on in the civil investigation before all available discovery and evidence has been gathered and reviewed. So we are also mindful of that type of interference as well.

I think the second part of your question is to what extent civil litigation helps the DOJ obtain discovery from abroad. By way of background, I should talk a little bit about the LCD investigation. During the LCD investigation, the government served grand jury subpoenas on the civil litigants for documents in the United States that had come into the United States for purposes of civil discovery. The recipients of those subpoenas moved to quash the grand jury subpoenas, and the issue ultimately went all the way up to the Ninth Circuit on appeal.

On appeal, the Ninth Circuit applied a simple rule that the grand jury subpoenas trump civil protective orders for the documents. As a result, the government was able to

get those documents and use them in the prosecution of AUO and its executives. So in that sense, because the civil defendants brought documents into the country in response to the civil litigation, the DOJ was able to obtain and use those documents. Some of those documents were used at trial but it is difficult to know how much the jury relied on them in reaching its verdict.

Certainly, whenever or however a document arrives in the United States, it can be helpful for a criminal investigation. For that reason, we would want to subpoena it and can use our grand jury subpoenas to gain that evidence and to use it at trial.

MR. LYNCH: Thank you very much, Kate. That's very interesting, and obviously something for any defense counsel to be concerned about. Documents located outside the United States, which are initially outside the reach of a grand jury subpoena, may ultimately end up in the United States through civil discovery.

Going back to you, Renata, I have another follow-up question. It relates to something you referred to in your speech about the new guidelines for HR professionals. What was the motivation for your recent guidance to HR professionals and what does this mean for future enforcement? And further, a few years ago, the DOJ brought no-poaching cases civilly, so why the change to a criminal enforcement?

MS. HESSE: The goal of the guidance was to reach the community of HR professionals who are on the front lines in this area and that may be in the best position to identify when this kind of conduct is happening and to give them some guidance about what they should be looking for and what they should do if they see something that fits within the guidance that we have given. The conduct discussed in the HR guidance is just as bad as any other kind of collusive conduct, as I said, price-fixing, customer allocations, it is the same kind of thing.

We have previously pursued this type of conduct civilly, in some cases, because there was an ancillary procompetitive justification for the conduct in those cases. And the guidance is not intended to say we will never again pursue this conduct civilly. But if you think about the conduct and what it does for workers in terms of suppressing wages and other forms of compensation, it really belongs in the criminal category to begin with.

And so we are going to start it there, and we are going to do the investigation that way from the beginning. If, in the end, there are facts or considerations that cause us to exercise our prosecutorial discretion in another way, then we'll take another path.

But at the beginning it certainly seems right to say that there's no difference between fixing the price of an auto part and fixing the wage that you pay someone. So that's really why we did it. We wanted to put people on notice that—and in particular, since we had these civil cases before—that we are going to begin looking at this kind of conduct criminally. So now you all know and won't come in and say, "Oh, but you have always done this civilly. Why are you doing it criminally?" Well, we are going to do it criminally.

So if you find conduct like this in your client's documents or elsewhere, then you should be calling Brent and not one of our civil folks to begin with. And we'll see what happens with it.

MR. LYNCH: I will take the moderator's prerogative and editorialize, very briefly, without commenting on the guidance, I will say one thing. The guidance suggests that if HR professionals have any questions, to call up the DOJ. I would suggest that the penalties are criminal and your employees could go to jail. I would suggest caution dictates to contact antitrust counsel first before confessing to a crime to the DOJ, but that's just me.

MR. LUNDER: I suppose it depends on the quality of the advice.

MR. LYNCH: Moving along, I have a question for you, Brent, and that is, in light of the Yates Memo which Renata discussed, has the Division made changes to its corporate leniency policy that reduced the protections for individuals?

MR. SNYDER: Before I answer the question, I want to add one thing to Kate's answer about our abilities to subpoena documents once they come into the United States for purposes of civil discovery.

If your client is going to inevitably bring documents into the country in response to civil discovery, it might as well turn them over to us subject to the protections of grand jury secrecy. Your client will receive cooperation credit for having done so. If your client brings them into the country, and we have to subpoena them, it won't get any cooperation credit. We will end up with the documents just the same. So I would suggest when you find yourself subject to civil litigation, that you seriously consider just giving us the documents. Because one way or the other, we are likely to get them.

With respect to the question about our leniency policy and whether there have been any changes to it with respect to coverage for individuals, there haven't been.

First, for those of you who might not know what the Yates Memo is, it was a memorandum issued by the Deputy Attorney General last year emphasizing to Department of Justice attorneys that we should be prioritizing the prosecution of individuals, especially in corporate cases.

Over the course of the past year, the Antitrust Division has made some public statements regarding leniency coverage for individuals that really just put a fine point on what our leniency policy has always said, and those would include some of the statements that Renata made today.

Under Type A leniency, which applies when we have no prior knowledge of the conspiracy that's being reported, Type A leniency includes coverage for all current directors, officers, employees of the company who provide full, complete and candid cooperation. That's always been the case since 1993, and that hasn't changed.

With respect to Type B leniency, which applies in situations when a company seeks leniency where we have already initiated an investigation or are aware of the conspiracy that's being self-reported, our leniency policy has always given us more discretion, both to deny leniency if we are close to having a prosecutable case, and also to cover fewer than all current directors, officers and employees of the company. So, again, that's what the policy has always been since 1993, so there has not been any change to it.

We don't often exclude current directors, officers and employees from a leniency even in a Type B situation, and we don't anticipate that that's likely to change substantially in the future. But our policy does allow it, and it is a question that we will be asking of counsel who seek leniency markers in Type B leniency situations where we already have developed significant evidence. And it's important for counsel to understand that distinction, because that is the primary distinction between Type A leniency and Type B leniency.

Counsel sometimes express surprise when we advise them that we have more discretion in that area, but, again, that has always been the case and it is expressed on the face of our leniency policy, which has been in place since 1993.

Finally, our leniency policy hasn't ever required us to cover former directors, officers and employees of a company in a leniency letter. To the contrary, they are presumptively not covered by leniency. Nonetheless, our practice has often, but not always, been to cover former directors, officers, and employees. In those situations where we provided coverage for formers, however, we haven't always been consistent in the approach that we have taken.

Our recent statements have clarified that if we exercise our discretion to cover former directors, officers, or employees in a leniency letter, we are going to take a consistent approach by including the former directors, officers, or employees who are covered by name rather than by just providing blanket coverage for all former employees. Not all former employees need coverage and not all former employees are going to provide the cooperation that would justify coverage.

Giving blanket coverage also raises the risk to us of inadvertently covering somebody who is a former employee of the leniency applicant but who may be a current employee and potentially a target of our investigation at a co-conspirator.

And so by not providing blanket coverage for former employees, we are reducing the risk to ourselves of inadvertently extending coverage to somebody who otherwise, by virtue of their role in a conspiracy at a competing company, we might end up charging.

MR. LYNCH: So if I have it right, you have to opt in as a former, you have to explicitly list the name of the employees in the letter?

MR. SNYDER: That's right. And we have been doing this for a while now. So if a company comes in and gets Type A leniency, all of its current employees are covered, and it says that broadly in the leniency letter. But then we can also extend the coverage to former employees as well, and we will simply name them by name either in the letter itself or in an addendum attached to the letter. And if those former employees are people that are necessary for the company to perfect its leniency, then those former employees will get coverage.

If they can provide cooperation that's valuable to our investigation, those former employees can be covered by name. But we are not going to say all former employees of the company receive coverage automatically.

MR. LYNCH: Very interesting. Let me pose my last question to Matt.

Matt, the Division offers waivers of inadmissibility as part of a memorandum of understanding (MOU) between the Antitrust Division and Immigration and Customs Enforcement (ICE) to foreign national defendants who submit to U.S. jurisdiction and agree to plead guilty. Can you explain the waiver process and talk about the issues a waiver holder might encounter and how to deal with them?

MR. LUNDER: Sure. For some reason the people at this end of the table don't speak for the Department of Justice, so I have to give the same disclaimer that Kate made.

For those of you who are not familiar with the waiver of inadmissibility, this is a bargained for term of a plea agreement in a criminal case. And it allows a foreign national to avoid the usual consequences of a felony conviction, which is: Once you leave the United States, you can't come back. It is a result of an MOU between the Antitrust Division and ICE, which as successor to the Immigration and Naturalization Service, which met its fate with the creation of the Department of Homeland Security.

So ICE now carries on the duties under the MOU with the Antitrust Division. What we have done at the division is make whoever is in the position that I currently hold, Counsel to the Director of Criminal Enforcement, the sole point of contact with all of the agencies involved in the waivers of inadmissibility, because there are issues that arise that often have to be dealt with.

You can always—if you have a client who has a waiver or is bargaining for a waiver, you can always deal with the prosecutor of any office that is handling your case, but any questions will ultimately be referred to the Counsel to the Director.

The purpose of the waiver is to induce a foreign national, who isn't subject to the jurisdiction of the United States, to submit to the jurisdiction of the United States, plead guilty and cooperate in exchange for this benefit of being able to return to the United States to carry on business and to travel for that purpose.

There are several other agencies involved in the process. I think the best way to think about this is on the front end, the prosecutor who you are dealing with in the criminal case will petition ICE to grant the waiver. And this process can take a few months, at least. The reason for this is there is a process by which ICE has to ask several other agencies if they object to granting the waiver, and the process of sending out that request and getting back those answers, given the bureaucracy, takes some time.

Once the waiver is in place, it becomes a term of the plea agreement. The waiver is granted by a letter from the office of the principal legal advisor at ICE. The letter is attached to the plea agreement, and becomes part of the plea agreement that's filed with the Court.

The issues that we are seeing, I think, more often, are on the back end of the process, where the waiver holder submits to the jurisdiction of the United States, pleads guilty, serves time in a U.S. prison, leaves the country—that's the point at which the waiver becomes operative—and then goes to the consulate in the home country to apply for a visa. The problem is if the waiver holder goes to the consulate, say, six or eight weeks before his business trip is scheduled, he's not going to have his visa in time because there's another internal process.

You have the State Department that's got to communicate with the Department of Homeland Security, which, I'll say euphemistically, is subject to bureaucratic complexities like you have never seen.

So the waiver holder goes to the consulate, submits a visa application. This is what happens: First, the consulate denies the visa. A lot of times everybody says, "Oh, the United States is breaching the term of the plea agreement. They denied the visa." Well, there has to be a denial, because that's what the waiver is for, it waives the denial. So the consulate will always initially deny the visa application.

Once they have denied the visa application, they then send it to a dark hole called the Admissibility Review Office, which is within Customs and Border Protection, which is within the Department of Homeland Security, to confirm that this person already has a waiver and to authorize the consulate in the home country to go ahead and issue the visa. This is where there's a serious backlog, in the Admissibility Review Office.

If you think about this, right now, given the current environment in terms of immigration policy, these are not going to the top of the stack to be processed. So we have seen backlogs of three months. We have seen backlogs of even longer.

So we are now beginning to tell counsel, if you have a client who has bargained for a waiver, advise the client to make part of their reintegration into their professional life to get a visa in place. Because visas issue for five-year periods. So if you have a client who is going to be returning to the United States to do business, you can have that visa approved hopefully well in advance of any business trip. It creates a five-year window in which the person can travel.

MR. LYNCH: So the words I heard were "bureaucratic," "dark hole" and "serious backlog." Is this a recent phenomena or is it progressively getting more challenging or anything you can point to?

MR. LUNDER: My experience dealing with these issues leads me to the conclusion that you have a problem that you see in a lot of areas of the federal government, which is a dramatic increase in the amount of applications, in the amount of petitions that need to be processed with no corresponding increase in funds, budget allocation and no corresponding increase in personnel, and so things take longer.

And so, now that we have consolidated the whole waiver issue with this position, I think we are beginning to build a better network with the other agencies, more personal contacts in the right place to deal with these issues when they arise. But I think it is just that sort of a problem.

MR. LYNCH: I see. As a victim of your own success, you are charging so many foreign nationals that now the waivers are piling up, so a mixed blessing.

## MANAGING ANTITRUST AND COMPLEX BUSINESS TRIALS: A DISCUSSION WITH THREE FEDERAL DISTRICT JUDGES

Moderated by Steve Williams<sup>1</sup>

In 2016, the Golden State Institute carried on its recent tradition of hosting a panel of trial court judges. This feature is always a crowd pleaser and this year was no exception as we heard from three distinguished federal district court judges who have a wealth of experience managing complex business litigation.

### The panel:

- The Honorable Denise Cote was appointed to the United States District Court for the Southern District of New York in 1994. Judge Cote received her Bachelor of Arts degree from St. Mary's College, a Master of Arts degree in History from Columbia and a JD from Columbia Law School. She clerked for Judge Jack B. Weinstein of the Eastern District of New York. Prior to taking the bench, Judge Cote had experience in private practice and also as a federal prosecutor with two tours through the Southern District of New York US Attorney's Office, first as an Assistant United States Attorney and later as Chief of the office's Criminal Division. She also served in Washington DC as Special Assistant to the Assistant Attorney General for the DOJ's Criminal Division. Judge Cote has presided over several antitrust cases during her judicial career. Among the most recent are the high profile and significant e-books trial, *United States v. Apple*, and litigation involving allegations of price fixing in the credit default swap market.
- The Honorable Lucy H. Koh was appointed to the United States District Court for the Northern District of California in 2010. Judge Koh received her Bachelor of Arts degree from Harvard and her JD from Harvard Law School. Prior to taking the federal bench Judge Koh was a California Superior Court judge in Santa Clara County. Prior to becoming a judge, she worked in private practice in Silicon Valley. She also has served in Washington, D.C. as a special assistant to the U.S. Deputy Attorney General and as a Women's Law and Public Policy Fellow on Sen. Ted Kennedy's U.S. Senate Judiciary committee staff. Among the high profile antitrust matters that Judge Koh has presided over is *In re High Tech Employee Antitrust Litigation* which involved allegations of agreements among high tech firms not to poach each other's employees. She is also presiding over the Federal Trade Commission's challenge of Qualcomm's alleged abuse of its market power.
- The Honorable James Donato was confirmed to the United States District Court for the Northern District of California in 2014. Judge Donato received his Bachelor of Arts degree from the University of California at Berkeley. He received a Master of Arts degree in History from Harvard and his JD from Stanford Law School. He clerked on the Ninth Circuit for Judge Procter Hug. Judge Donato is currently presiding over the antitrust cases involving allegations of price fixing of capacitors and resistors.

---

<sup>1</sup> Steve Williams is a partner with Cotchett Pitre & McCarthy, LLP in Burlingame, California.

MR. WILLIAMS: Can you tell us a little about your background and experience in antitrust or complex commercial cases, any general thoughts about presiding over those cases, and tips, do's or don'ts, things that you have found particularly effective, or perhaps not effective.

JUDGE COTE: I'll begin this section of our discussions with you. I want to begin by thanking my law school classmate, Cheryl Johnson, for this invitation and Steve for the work he's done in helping to organize this panel.

It's a privilege to be here and to meet my two colleagues on my right and my left. I have been on the bench the longest of the three of us, and as you know, in the Southern District of New York, we have a very substantial docket with complex civil matters. I'd say the largest portion of our complex civil caseload is probably securities work, but we do quite a bit of patent work, commercial litigation generally, certainly antitrust and intellectual property work.

I think most of my colleagues would agree with this: We love our civil docket, the complexity and variety of it. We enjoy presiding over cases where counsel are well-qualified in representing their clients with vigor, and it's a real privilege to be a federal judge and have the opportunity to serve the public in this capacity on this kind of docket. And indeed, we all do both pro se litigation and criminal litigation as well.

So what have I learned in my years of presiding over complex civil cases? I think the main things I have learned are how important it is for the judge to be hands-on in managing the litigation. I keep control of all discovery. I only use my magistrate judges for settlement purposes, and therefore, the two things I do early on are setting a schedule for the case that seems reasonable and appropriate to the specific piece of litigation.

I do it in consultation with counsel. I expect you to come to the initial conference fully prepared to describe to me the central facts of the case, the legal issues, to be responsive to questions I might have so I can get a better handle on how complex it is and how much time is going to be needed for discovery. I hope you'll come with some creative ideas about how to manage the cost of discovery, perhaps staging discovery to get to the core issues first and reduce some of the burdens. I want you to be able to discuss what you need in order to have meaningful settlement discussions at an earlier stage. As we know, most cases settle, a few don't, and each of us has had the experience of presiding over some cases that didn't settle, but most cases settle. So the issue is how can you equip yourselves and your clients to have the information you need to evaluate the risks of litigation in an informed way?

I like counsel to be cooperative with each other in zealously representing their clients, but that means on the discovery front to—when there are problems—really meet and confer in a serious way to tee up disputes. I take discovery disputes in a letter no longer than two pages, and then I just get counsel on the phone, hear you out and give you a ruling. I try to give rulings that can be applied across a case on a number of issues to reduce the burden of constantly haggling over issues and to give predictability to counsel. I try to set a schedule that is reasonable but fairly firm, and certainly by the point in the case where we set a trial date, from my point of view, it is firm, and it does not move.

So I don't want to take up all the time. Those are a few thoughts.

MR. WILLIAMS: Thank you. Judge Koh?

JUDGE KOH: So our docket is similar to what Judge Cote described, and I would say the most challenging thing for me for a really complex case is how to narrow the case so that we are not litigating the whole thing the whole time from beginning to end. It is a negotiation with the parties to figure out what is a middle ground, where one party may want to litigate everything. But if we can come to some agreement about a phased process, it is helpful because we have very limited resources to deal with very complex issues.

The lawyers in these cases are always superb and raise first-impression issues constantly. So if there are points where we can narrow what's going to be the subject of fact discovery, then narrow further what's going to be the subject of expert discovery, narrow further what's going to be the subject of *Daubert* motions, narrow further summary judgment, and narrow further pretrial conference issues, and narrow further what's going to trial.

I think that makes the case more understandable for the jury—to have a limited scope case to decide—and also makes it more manageable for us. Because these types of cases can be really crushing. We only have three law clerks. We are also trying to keep our other civil and criminal cases moving. And at any given time at least two of my law clerks will be managing something else. So it is me and one law clerk trying to manage a complex case in many instances. So we really need the help of the parties to make it manageable for us.

JUDGE DONATO: Let me start by telling you how happy I am to be here. I wasn't exclusively an antitrust lawyer in practice, but I did a lot of it. But on the bench and in practice, I was thrilled by the degree of civility and professionalism that you all as complex business lawyers and antitrust lawyers bring to these really hard cases. I am happy to see that continues in the cases I have now in front of me as a judge. Thank you for that. It makes handling the cases a lot easier when you all treat each other with the degree of respect and decency that I have seen.

My background in practice is mainly monopolization and exclusionary conduct, so Section 2 and Section 3 cases. And our docket here is mainly price-fixing cases, Section 1 cases. I agree with Judge Koh and Judge Cote that there are significant, different management problems that I now see presiding over the case as opposed to representing a party in the case. I totally agree with everything my two colleagues have said. And things I would emphasize for you in terms of just general principles: one, come up with solutions, don't just identify problems. If you have a roadblock or problems or things aren't working well, I want to hear how you want me to consider resolving those. So it really helps when you come to a status conference or a case management conference with some solutions and not just identifying some problems.

And I also, I put a lot of emphasis on the value of oral argument. I tend to do a lot of it, particularly in antitrust cases. I know it varies from judge to judge. I like it, and I put a lot of work into getting ready for it. So when I walk into oral argument, I have read your briefs more than once. I have a law clerk who has spent even more time reading your briefs. We have read all the key cases, not every case, and I am having oral argument because I need your help to understand something. So I see this as an evolving dialogue

over the life of these cases that can go on for three or four years. It is important to me when you come to oral argument you be more on top of the cases and the facts than I am, and you are able to answer very specific questions about what you said in your briefs, including legal questions, at a fairly high level of granularity. So I would recommend that oral argument is not, at least with me, not just an opportunity to repeat at a high level what you said in your briefs, we are past that, I want to get into the nuances and details because that's where I am struggling and that's where you can help me out. The best way for you to do that is to be on top of what you have said in your briefs and know the cases and the footnotes in the cases and all those little details. That really makes my job a lot easier.

MR. WILLIAMS: Thank you. Judge Cote, could you give us your thoughts or expectations in terms of oral argument, what you expect from attorneys who appear before you?

JUDGE COTE: Bottom line is I don't have it. That's a bit of a joke. When I came on the bench, I had individual practices that expected oral argument on all motions. So I'd come to the bench for an oral argument with a draft opinion, expecting to hear argument and rule from the bench, because the judge I clerked for frequently did that. And I found it didn't work for me. So what I do now is, my individual practices require counsel to write me if I haven't decided their motion within two months of it being fully submitted. So I try to stay on top of my motions, decide my motions, get those opinions out there. But if I'm having difficulty deciding a motion based on my understanding of the law and the issues presented in the briefs, I will either have a conference call with counsel or issue an order that identifies the specific points that I need to hear oral argument on. So people will come prepared to respond to the specific questions I have identified, and they are free to argue anything else, but I hope that saves them, and more importantly, their clients who are spending money on preparing for the lawyers to prepare for oral argument, helps that dollar to be used efficiently.

So how many times do I have oral argument in complex cases? Again, maybe because I am managing discovery and discovery disputes, I have a lot of contact with counsel over the course of the discovery period. But, for instance, for summary judgment or motions to dismiss or motions in limine, I have oral argument infrequently. I usually find that identifying for me the correct standard of law and reading the briefs is sufficient.

MR. WILLIAMS: Judge Donato, could you tell us about your practices in terms of motions in limine and *Daubert* motions before trial, how do you like to handle them and what do you find effective and ineffective in having those things presented to you?

JUDGE DONATO: Sure. So there is, in my experience on the bench, a confusion about motions in limine, intentional or not. Now, motions in limine are not expressly provided for in the Civil Rules or the Evidence Code. They have just come to be. They serve a very practical purpose, in my view, at least one practical purpose, and that is to pre-digest any major evidentiary issues so you don't have to burn time during trial with sidebars, which I don't do, or disputes before or after the jury's in the room or get hung up in your presentation because you don't know whether one of your key things is going to get in, or whether one of your opponent's key things is going to get in. In my view, a

motion in limine properly addresses one thing only, should this evidence be admitted, is it prejudicial or inadmissible for some other reason, that's it.

That's what I wrestle with, that's why I put it in my standing order, although it has minimal effect. What I wrestle with is after summary judgment and after *Daubert* motions, what people call motions in limine which are really stealth summary judgment motions or stealth expert disqualification motions. I will not consider those at that point. We are a couple weeks before trial. The deadlines are clear. We have plenty of time to do those. Motions in limine, in my view, is the wrong vehicle and wrong time to raise those issues. Now, there are lots of evidentiary issues that could be and should be addressed in motions in limine. Bring them on. That's what they are there for. Anything past that, in my view, is not a correct use for motions in limine.

MR. WILLIAMS: Judge Donato, how about *Daubert* motions, do you have live testimony from the experts or do you consider those on paper, do you have oral argument on those motions?

JUDGE DONATO: It depends. I front-load *Dauberts*. My *Daubert* deadlines are the same as my dispositive motion deadlines. That's several months before trial, four to six months. I do that because *Daubert* motions are a mountain of work and doing them at the last minute is just a train wreck for my schedule, and I don't think it is very good for the parties involved either. Most of the time I can do it on the papers. You've got to remember in *Daubert*, we are really doing only one thing: Should this testimony go forward, is it admissible? It is not whether it is shaky. If it is shaky, you do cross-examination, and that's how you get shaky taken care of. This is really, is it reliable, valid, based on acceptable practices, is it admissible. When you have that touchstone, you can eliminate a lot of *Daubert* issues, in my experience, fairly quickly. I don't have hearings that often, but when I do, it is because something has concerned me and I can't answer it on the papers and I'd like to hear the experts and lawyers.

I'd say I have hearings 20 percent of the time. Most of it can be dealt with easily because they are really cross-examination and going to the weight of the evidence, not really going to the admissibility. It is kind of a waste of time for everybody and your client's money to do that, but people seem to do it anyway.

MR. WILLIAMS: Judge Koh, can you tell us about your views on *Daubert* motions?

JUDGE KOH: I generally will have them briefed with summary judgment in case some of the summary judgment motions are dependent on the *Daubert* rulings. But if it is too difficult to rule on everything simultaneously, there might be a bifurcated ruling system. That way at least they are considered and analyzed simultaneously because many of the summary judgment motions will depend on how *Daubert* motions are ruled upon. So even if the opinion is issued later on the *Daubert* motion, it will at least have been analyzed simultaneously.

If there's going to be an exclusion of an expert report, then I try to build in time to give leave to amend because I don't want a party going to trial without a damages theory, for example. So we try to build in the *Dauberts* early enough so that if there has to be a new report created and depositions need to be taken, then we can still have that happen before the pretrial conference.

MR. WILLIAMS: How far before the pretrial conference will you resolve *Daubert* motions?

JUDGE KOH: I usually have the hearing on summary judgment motions and *Daubert* motions at least two months before the pretrial conference.

MR. WILLIAMS: Can you tell us, Judge Koh, whether you have any special rules for cases that are high profile or newsworthy cases in terms of the attorneys' conduct or parties' conduct about commenting in the press?

JUDGE KOH: For trial I don't have a special rule, but it depends on the case. It is a case-by-case basis. If there's going to be a lot of media, then we will reserve a certain number of chairs for media. We also make sure that there are power strips in the courtroom so that the media can be tweeting and whatever else they are doing, and they have power to do so. Now, I heard Judge O'Toole, who is in Boston who had the Boston Marathon case. It was not a first come/first serve basis for whoever gets the media seats. In that instance, because they had so many victims and family members of victims come, they needed to have—and they had such international interest in their trial—that they actually had to select which media would get certain seats, and they had to rotate people out during the duration of the trial. I haven't had to have that happen.

If there is media interest and public interest that you can't accommodate, then we have had sometimes up to two overflow courtrooms that have monitors with the witnesses, monitors with the attorneys and sound so that anyone else who didn't make it into the courtroom, which is generally first come/first serve, can still hear and see what's going on in the courtroom. I don't have any restrictions on the parties. I mean, I think we have to be careful with that because they have First Amendment rights that we need to be respectful of.

But one thing that we do do, also, for the media is that any time there's a jury note, we actually file it on ECF. So if you're a journalist in some other part of the country or not in the courthouse, you can see that a note has been received, and you can see the substance of it. We also file the response to the jury note on the docket. We file at the end of the day. "The jury has adjourned and will resume tomorrow morning." We actually file a notice—the juror note that says we have a verdict—and provide time, usually about half an hour, for everyone to get to the courtroom, so they can all be there to receive the verdict. We also set up a media phone tree so that the media can notify each other when something happens in case they don't have ECF access.

The one thing we do for our jurors is that—to try to resist the temptation of reading about the trial while it's happening—our librarian has put together, at least is willing to put together, and has done so for at least the three Apple-Samsung jury trials, just a scrapbook that puts together all the articles that have been written about the trial. It is only given to the jurors when they are discharged. Because then, if they know they are not going to miss anything because they are going to get a copy of everything at the end, we are hoping that will relieve any temptation to look at things before their service has been completed. We would do that in any case where that would be an issue.

MR. WILLIAMS: Judge Cote, can you tell us how you handle evidentiary issues during trial, what methods you use, what's effective and ineffective in arguing evidentiary issues and when you would take briefing on those issues?

JUDGE COTE: I applaud and try to follow what Judge Donato described as his approach to motions in limine. I think they are very important to tease out in advance of trial the critical evidentiary issues. They help educate me so I can think about the issues in advance of trial. But some of the briefing, I think, is to sensitize the Court to issues where I can't give you a final ruling until I see context during the course of the trial. But I become much better educated because of the motions in limine, and I can give a presumptive ruling. Sometimes it's accompanied by a caution, if you open the door on this issue, then my ruling may change, or you have to give notice or whatever. Sometimes the rulings have layers of complexity to them, but I find motions in limine to address evidentiary issues before trial very helpful. So at the trial, like Judge Donato, I don't have sidebars. I say that; I explain all of this in the final pretrial conference.

I think the most important thing for litigators is that they not be surprised, that they can prepare, that they understand the rules of the road, that they know the procedures that will be followed during the course of the trial, and they can concentrate on the evidence as opposed to trying to wonder what I am going to do or how the trial's going to be conducted.

We meet from 9:00 to 9:30 each day, the lawyers and I, to deal with any new issues that have come up or they anticipate coming up that day. Then we have witnesses on the stand from 9:30 to 5:00, lunch break, mid-afternoon, mid-morning recess, jury is dismissed promptly at 5:00. So I get somewhere between five and a half, six hours of testimony in each day. So counsel, if they want to raise evidentiary issues, they know to do it first by talking to their opponent. I will ask, "Have you raised this first with your adversary?" Frequently things are worked out when they do that. But if they have done that, then I'll use that time between 9:00 and 9:30 to hear argument about things that hadn't been anticipated in advance of trial, or after 5:00 o'clock, but we don't invade the jury's time with evidentiary disputes.

MR. WILLIAMS: Judge Koh, could you tell us about jury selection in your courtroom, do you use questionnaires, what input do you permit the attorneys to have in questionnaires, and who conducts the voir dire?

JUDGE KOH: So for voir dire, the parties submit proposed questions, and I try to incorporate at least all of the topics, if not all of the questions, in my voir dire. If I think the question is, perhaps, seeking information that is not proper or too argumentative, I won't include it in my own. Then I give the attorneys an opportunity to do voir dire as well. That is limited in time, and that is also in negotiation with the parties—how much time each side gets. Hopefully with the proposed questions and then the attorney voir dire, hopefully we have been able to cull the information that the parties want from prospective jurors. So I actually don't do a questionnaire. I think it increases the time. Then you have to photocopy it, and everyone wants to research it. And I like to give a trial estimate that's going to stick. So to try to narrow things to the bone of what is necessary, I actually don't have questionnaires.

I am also concerned in the cases that are big enough that would need a questionnaire that they are going to start surveilling the jurors' houses, interviewing neighbors and doing massive amounts of research, and I'd like to discourage that. Obviously the online research is going to happen, checking on bankruptcies and court filings and whatnot, but I would prefer to limit actual in-person investigation that goes on of potential jurors. But I don't put any limits on jurors' use of social media other than giving the Ninth Circuit model of conduct instruction, which says you cannot use any social media to discuss the instant case or any of the parties or any issues in the case.

MR. WILLIAMS: Have any of you put any limitations on attorneys using social media to investigate potential jurors and the jury pool, Facebook or other social media?

JUDGE COTE: I have not.

JUDGE DONATO: Well, as you know, it is a big topic in our district. At least one of our judges has spent a lot of time thinking carefully about it and has identified significant issues about it. I am still personally formulating my opinion.

Now, there are old, hard-and-fast rules that stand, whether it is using a telephone, knock on the door or online media, you cannot have contact with the juror. You can't do that. That rule is across the board no matter how you do it, whether you are touching them through Facebook or sending a private detective to their place of business, you can't do it. Short of that, I am not sold yet on whether a ban on just looking on social media is a valuable thing. It is 2016. The world has given us more information and more access to information than we've had before. I am not necessarily opposed to having that.

As a practical matter, in my courtroom, voir dire and jury selection goes very fast. You are generally in on a Monday morning at 9:00 a.m., and we have a jury impaneled typically by noon, and you are doing opening statements that afternoon. So you are not going to have the time to dial people up on peremptories and everything else happening and figure out some question that you want me to ask or you want to propose to ask.

So the issue that I have heard is people research jurors as time goes on and then pitch their closing arguments, for example, to the juror. If you have a juror who loves to cook, you may suddenly come up with a number of chef analogies in your price-fixing case. Now, whether that's a real risk or not, I am not persuaded yet. I am still a little bit on the fence, and I want to proceed cautiously because it is not necessarily bad or unfair to do jury research as long as you do not break the cardinal rule, which is you don't interact with them.

MR. WILLIAMS: Judge Cote, I believe you use time limits in your trials. Can you describe how you use them and under what circumstances you provide relief from any time limits?

JUDGE COTE: Yes, I use time limits in every civil trial, jury or non-jury. I decide what the time limit should be in consultation with counsel at the final pretrial conference. I frequently give them advance notice that that will be one of the topics that we will discuss at the final pretrial conference. I study carefully the witness list. By this time, I hopefully am very familiar with the case. I am making my own judgment of

what the case requires, but I want to hear from counsel. It's rare where we don't reach agreement at the final pretrial conference.

They may talk me into a bit more time than I had thrown out as a suggestion, but we usually come to an agreement. Exceptions to that are rare. I don't include the summation because when I used to include the summation, then I would have to make exceptions to make sure they had enough time to have the summation argument. So I prefer that that not be included. So basically the clock is running whenever the attorney is on their feet in front of the jury for opening, direct, and for cross-examination. I keep the clock. I tell counsel at the end of each day what time they have used, and towards the end of the trial how much time they have left each day. If counsel want, they can agree on some neutral timekeeper other than me; that's fine with me, too. I give them that option, but usually they don't choose that option. It's very effective, I think, very effective. Frequently people leave time on the clock. It is a way of managing the trial, managing your resources, thinking carefully about which witnesses are important and how much time you want to spend on a particular topic. Usually it's split the same amount for plaintiffs and defendants, but there have been a few exceptions, in my experience, where it made sense to make exceptions. We talk about all of that ahead of time.

MR. WILLIAMS: Judge Koh, do you use time limits or any other means to make sure trials keep moving and stay focused?

JUDGE KOH: In all civil trials there are time limits. In criminal cases, you cannot impose any time limits. I do put time limits on both opening and closing. Any time you are speaking, the clock is ticking. And I try not to spend any time when we have a jury present, whether they are in or out of the courtroom, on evidentiary objections. So we unfortunately do those at night. We do the rulings at night so you know in advance of the next day what exhibits or demonstratives or witnesses or deposition excerpts are in or out, and we don't waste the jury's time on that. Obviously there can be spontaneous verbal objections during the trial, but for anything big that needs to be briefed or something that needs ruling in advance so you can prepare your demonstrative clips, that we rule on one day in advance.

MR. WILLIAMS: Judge Donato, do you do anything to encourage participation by young attorneys at trial?

JUDGE DONATO: Well, the answer is yes. I am happy to say that my colleagues who preceded me to the bench have really set the mark for that. I am at this point a merely very enthusiastic supporter of it. The number of trials that we do these days is way down. So in our district, the last time I looked, we have about a one and a half percent trial rate. So 98.5 percent of all cases don't go to trial. So it is a rare opportunity.

If we are going to propagate and continue a trial lawyer, jury trial system, you have to train people. They have to have the opportunity to get up in court and do witnesses. You all had that, and somebody made that opportunity available to you. I just see the judges in our district have been very consistent in requiring in all their cases that you at least think about it. We can't order you to do it for obvious reasons, but we do encourage it. In my experience, the roadblock is often the client. It can be hard, and particularly in a big antitrust case where there may be conduct remedies that are really significant

for your client's business, let alone huge damages that are going to get trebled, it can be understandably a little bit uncomfortable to go to your client and say, "We'd like to have this wonderful third-year associate do one of the witness exams." I know from my own experience as a lawyer and kind of reading between the lines in court, clients often don't want to do that. But I really would recommend to you, as your point of responsibility, to be candid, that you get your clients to a space where they know that younger lawyer enough to trust that person. That means before you get to trial, they have seen that lawyer in action, they have read that lawyer's work, and they get a comfort level with it and they are willing to say, "Sure, they can do that witness."

Obviously you are probably not giving that younger lawyer a mission critical witness. But you should be able to get in every case some set of witnesses. And they don't just have to be throwaway custodians, but some meaningful set of witnesses that young lawyers can do. I would like to see more of it. It's been a little bit of a problem.

MR. WILLIAMS: Judge Cote, graphics are a big part of presentation in cases. What do you find effective and ineffective in the use of graphics, and how do you expect the parties to exchange those things and resolve issues of graphics before bringing them to court?

JUDGE COTE: Yes. Graphics are wonderful. I remember when I started trying cases, you know, we had these binders of exhibits and the jurors would be given volumes of exhibits, sometimes more than one, and you know, turn to Tab 342, Page 6, and it was important, but this is certainly a better world that we live in today. So I think a facility with technology is essential for the modern courtroom lawyer. You have to have good tech support. You have to have command of how that technology is going to work in the courtroom. You have to test it out yourself. You have to come before the trial opens and make sure it's working in the way that you want it to work. It's not a responsibility you can pass off to anyone else.

I require graphics to be shared in advance with each other. I think it works both ways. I expect the parties to come up with what they think in the particular case will work best for them, whether it is sharing them a week ahead of time or 24 hours ahead of time. Whatever is good for one side is good for the other. So I haven't found a lot of disputes about that. The main thing is to not be blind-sided. So that if there is an objection or dispute about a particular presentation in terms of a demonstrative, let us say, that I have time to rule, and they have time to revise it in accordance with my ruling without holding up the trial.

I think lawyers by and large are fabulous working with the technology. They are great using it with examination of witnesses, particularly cross-examination. They can go to the snippets of the deposition that serve as impeaching evidence instantaneously. They can pull up the right document with highlighted portions that they want the jury to focus on. Every juror has access to little screens, plus the big screen in the courtroom. Everybody can see everything quickly and efficiently.

Of course, when it comes to summations, I have one comment. I think you have to be careful not to overly-rely in the summation context on the graphics and the electronics. I have seen overreliance. A lawyer has this extraordinary opportunity to

build a relationship of trust with a judge and with a jury. And you want to be able to reap the rewards of what you've built in that courtroom at the time of summation and speak directly as a human being to these jurors. If it is not a jury, to me. So you want to make, I think, intelligent decisions about when the graphics, when the technological support is going to give you bang for your buck and not over-rely on it. It should not be a PowerPoint presentation in summation, in my view.

MR. WILLIAMS: Judge Koh, do you allow any direct address to the jurors during the course of trial by the attorneys, for example, in closings or statements to the jury?

JUDGE KOH: I don't do that. The Ninth Circuit model jury instructions on conduct says the jury has to keep an open mind and not start making any decisions about the issues until after they have heard the views of all of the other jurors and have discussed all the evidence with the other jurors in deliberations. So I would prefer that all of the evidence come in, because I especially would not want, if there's only been the plaintiff's case, for there to already be conclusions and arguments made, when the defense hasn't been able to put on their case. So I actually don't allow that because I do want the jurors to keep an open mind until they have heard everything and all the evidence, read all the final jury instructions, heard all of the closing arguments, and then at that point, still hopefully have an open mind until they start deliberating.

MR. WILLIAMS: When a plaintiff calls a defense witness as part of its case, how do you handle that? Do you permit the defense to use that witness to put their case on, or do you have the witness recalled during the defense case?

JUDGE DONATO: I have a strong preference, and so far every trial I have had has agreed, the trial lawyers have agreed with this, the witness comes on once and only once. I think it is better for the jury and litigants, and it makes the experience a lot more efficient for the jury. So you get on, you ask your questions, they don't get terribly hung up on who is doing direct, redirect, cross, re-cross, rebuttal. As you know, the Federal Rules of Evidence expressly say that we can permit examination on cross that is effectively a direct examination. So the rules give us, as district judges, a lot of leeway to find a practical, easy-to-present way to run the case. So I really favor one-time-only on the stand. By the way, it eliminates a lot of back-and-forth of beyond-the-scope objections and technical sideshows. Things that just really gum up a trial and waste time, in my view, and do not materially add to a better jury trial product.

MR. WILLIAMS: Given that, how much leeway do you give the attorneys in terms of, say, a witness is being presented direct, cross, re-cross, re-direct, how much time or leeway do you give the attorneys, or do you find that's managed by the time limits?

JUDGE DONATO: Like my colleagues, I give overall time limits. They can spend it however they want. They have a witness they want to spend six hours with, that's their call. I make it clear at the beginning, because I completely agree with Judge Koh, there should be no mystery about what the rules are. These are the rules, you are going to be held to them. You will not get extra time if you mismanage your clock unless there's some extraordinary reason for it. So within that, if you have got 15 hours per side, you can choose to use your time any way you want. That's up to you.

MR. WILLIAMS: I'd like to ask for each of you, do you ask witnesses questions and do you permit the jurors to ask questions of witnesses? And if you do, under what circumstances do you do that?

JUDGE COTE: In a jury trial, I do not ask questions, and I do not permit the jurors to ask questions. I am in a circuit that strongly discourages jurors being able to ask questions, in part, because of concerns about what Judge Koh recognized just a moment earlier in a different context, the need for jurors not to become advocates but to keep an open mind.

In a non-jury case, I do feel free to ask questions. It is often better that I restrain that urge, but when I really need clarification, I do not hesitate.

MR. WILLIAMS: Judge Koh?

JUDGE KOH: I don't ask any questions of any witnesses, and I have done it both ways in allowing jurors to ask questions. And my concern with that was in virtually every instance, we were not really able to answer the jurors' questions. So it was dissatisfying for them, and it took time to figure out how to respond to the question, and it sort of messed up the time estimate. So I don't allow it anymore, but I did try it in a couple of trials.

MR. WILLIAMS: When you permitted jurors to ask questions, whose time was that out of, or was it excluded?

JUDGE KOH: This is when I was in Superior Court, and I didn't have time limits at that time.

JUDGE DONATO: I am actually a big proponent of allowing jurors to do it. I have had very good luck. I fully appreciate the concerns. I just did a patent trial last month, very complicated patent trial, and the jurors asked a lot of outstanding questions, in my view. The questions really helped them get a handle on a case that was really difficult for everybody to understand. So I encourage it. Every juror in all my cases gets a binder. It has a lot of things in it, but one of the things it has is a blank form, about ten pages of blank forms, per juror, for questions.

What I do is after the exam is done, before I discharge the witness, I ask the jurors, are there any questions? And after I do that the jury leaves for a few minutes, the witness is still under oath, I talk about it with the lawyers, then bring them back in. It has not proved to be a time problem. I have been able to do it efficiently. I do not charge either side for that time. I have been lucky. Our circuit is not hostile to it, so that makes a big difference. The Ninth Circuit is open to it. There's a best practices jury manual from the Ninth Circuit Committee that, in my view, encourages it.

You have to, as Judge Koh says, play it by ear and get the right case. I can imagine there might be a case where I would be less inclined to let that happen, but my presumption is the jury will be asking questions.

I personally do not ask questions. It is totally fine. As you know, the Federal Rules of Evidence say we can do it. I don't do it because I don't want to disrupt what the lawyers are doing. There may be a question that I think is important, and there may be a trial lawyer wanting to play this out in a different way. I don't want to step on someone's script

by asking it at the wrong time. I also worry that judicial questions get way too much weight when the jury hears them. I have asked once or twice, but I try hard not to.

MR. WILLIAMS: Judge Cote, I imagine one of the things before trial that is very difficult for the Court are the parties' designations of deposition testimony and objections and counter-objections to deposition testimony. How do you handle resolving those issues before trial?

JUDGE COTE: Thank you. I like to take objections to depositions in the following way: I like an individual witness' deposition color-coded with the excerpts that the plaintiff wants marked with one color, the excerpts that the defendant wants marked in another color, and then the parties' objections in the margin. Then I can go through them and rule and I have the entire deposition in context before me, and that's fairly efficient. But there are complex civil cases where there may be 20 witnesses and hundreds of objections. And so if it's going to be a massive undertaking, I may ask each side to identify ten exemplars of objections. I rule on those, ask them to apply them across the board for that witness or the witnesses. And if it doesn't resolve all their problems, then give me another ten. As a result, I can, with care, examine the particular kind of issue that one party is having with deposition testimony, give them my citations to the authorities I am relying on in making my rulings, and I have found that fairly efficient and helpful.

The Antitrust, Unfair Competition Law and Privacy Section was established by the State Bar of California in 1981 for the purpose of furthering the knowledge of its members in federal and state antitrust and unfair competition law. The focus of the Section is on litigation, counseling and government contracts.

The Section is governed by an Executive Committee appointed by the Board of Governors of the State Bar of California.

### **SECTION MEMBERSHIP**

There are no prerequisites to membership. All interested attorneys, judges, non-attorneys, paralegals, law students and out-of-state attorneys are invited to enroll in the Section. New Bar admittees can be enrolled free for the first year upon written request to the Section.

### **JOURNAL**

The Section publishes *Competition*, a periodic journal. Members who wish to author articles or assist with publications are encouraged to contact the Editor.

### **PROGRAMS**

The Section presents an annual MCLE-accredited institute, and Antitrust Lawyer of the Year Award, as well as programs at the Section Education Institute and the State Bar of California Annual Meeting.

### **MEMBERSHIP BENEFITS**

- Free annual subscription to the Section's journal, *Competition* to keep members current on issues and developments.
- Discount on all Antitrust, Unfair Competition Law and Privacy Section programs.
- Discount on the California Antitrust and Unfair Competition Law treatise.
- Discounts on any Section publications.
- Opportunity to participate in Section and Committee activities.
- Opportunity to meet other members of the Antitrust, Unfair Competition Law and Privacy Section.

**ENROLL NOW AND START RECEIVING YOUR MEMBERSHIP BENEFITS!**

## ANTITRUST, UCL AND PRIVACY SECTION ENROLLMENT FORM

You can join the Antitrust, Unfair Competition Law and Privacy Section ONLINE by visiting:  
[www.calbar.org/join-a-section](http://www.calbar.org/join-a-section)

Or, if paying by check or joining as a Judge, a Non-Attorney, or a Non-Attorney Law Student,  
please use the form below.

Please enroll me as a member or associate member of the  
Antitrust and Unfair Competition Law Section of the State Bar of California

Name: \_\_\_\_\_ State Bar Number: \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

E-mail: \_\_\_\_\_

### SECTION ENROLLMENT FAX/MAIL FORM:

- |  |                       |
|--|-----------------------|
| <input type="checkbox"/> Attorney (Members) and Non-Attorneys (Associate Members)  | \$75                  |
| <input type="checkbox"/> Judges (Associate Membership)   | FREE (Join Form ONLY) |
| <input type="checkbox"/> Non-Attorney Law Student<br><i>(Up to 3 Complimentary Sections for Non-Attorney Law Students)</i> | FREE (Join Form ONLY) |

Enclose your check, payable to The State Bar of California and mail to:

**Section Enrollments; State Bar of California; 180 Howard Street; San Francisco, CA 94105-1639**

If paying by credit card, you may mail this form to the above address or fax to:

**Section Enrollments at 415.538.2368**

### CREDIT CARD INFORMATION (mandatory if faxing registration)

I authorize The State Bar of California to charge my program registration and/or fees as noted above to my VISA or Mastercard account. **(No other cards will be accepted)**

Account number: \_\_\_\_\_ Expiration Date: \_\_\_\_\_

Cardholder's Name: \_\_\_\_\_ Cardholder's Signature: \_\_\_\_\_

For further information, please contact the Antitrust, Unfair Competition Law and Privacy Section at 415.538.2554 or visit our website at [www.calbar.org/antitrust](http://www.calbar.org/antitrust)

The State Bar of California  
Antitrust, UCL and Privacy Section  
180 Howard Street  
San Francisco, CA 94105-1639