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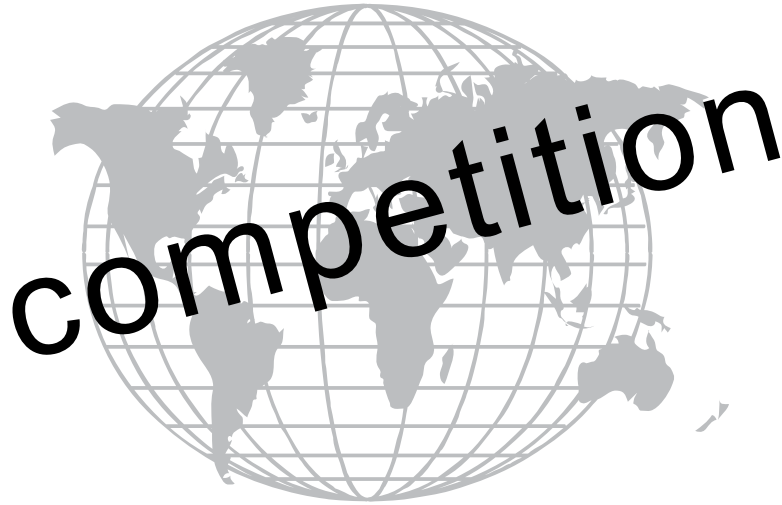

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Spring 2019

GOLDEN STATE INSTITUTE'S 28TH ANNIVERSARY EDITION

COMPETITION

The Journal of the Antitrust, UCL and Privacy Section of the
California Lawyers Association

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CHAIR'S COLUMN

Lee F. Berger[1]
U.S. Department of Justice
Washington, DC

With thanks to the authors, editors and other contributors, our Section is pleased to present you with another edition of *Competition*. This issue covers a variety of articles on important antitrust, unfair competition and privacy law topics, including discussions from our flagship program, the Golden State Institute (GSI), an annual day-long conference that takes place each fall. **This year's GSI will be held on Thursday, November 14, 2019, at the historic Julia Morgan Ballroom in San Francisco, California.**

The Antitrust, UCL and Privacy Section now enters our second year under the newly-formed California Lawyers Association. Membership remains steady, our Section and the CLA remain in the black, attendance at our annual Golden State Institute is up, and membership engagement remains strong. We are on solid footing to continue our growth.

With separation from the State Bar of California has come structural changes to our Section. The Section now has a committee system to handle some of our most important activities: the Privacy Committee coordinates all programming and publications regarding privacy matters; the Publications Committee produces and edits *Competition* and our monthly electronic newsletter, *e-Briefs*; the Education Committee organizes our webinars and live events; and the Treatise Committee edits and publishes *California State Antitrust and Unfair Competition Law, Revised Edition*. These committees have created additional leadership opportunities, enabling more Section members to get actively involved in the educational work of our Section.

Post-separation, the Section is also expanding the scope of our work beyond the educational services we offered under the State Bar. For example, we are focusing on increasing networking opportunities for our members, both as attached to live educational programs and as stand-alone events. The Section is instituting a mentoring program to provide opportunities for members to grow their experiences and advance their careers through formal mentoring relationships with other Section members in their practice areas. We are also working more closely with the California Young Lawyers Association to develop the skills and interest of emerging attorneys in antitrust, consumer protection, and privacy law, while also creating an additional pipeline for new Section membership.

At the same time, the Section's Executive Committee is taking a hard look at our existing activities, to make a realistic evaluation of the effectiveness of our work. If educational programming or publications are not as useful or well-attended as they once were, we should adjust our efforts to best serve our members. On the other hand, we should expand or duplicate programming and publications that are most useful for our members. This is a difficult and careful analysis that should be conducted with both hard data and a wide array of viewpoints.

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1 Any views expressed in this column by Mr. Berger are his own and not those of the United States Department of Justice.

More than ever, the engagement of our members is vital to all of the activities and processes discussed above. I would be grateful to hear from you directly on what you like about the Section's current activities, and what we could improve. Executive Committee members are also calling members directly to get their views—please take a few minutes to talk with us if we call. Moreover, if you would like to get involved in our activities—for example, organizing a webinar, or writing an article for *Competition* or *e-Briefs*—we welcome your activism. As we roll out our mentoring program this year, please consider serving as a mentor. Finally, you can always join our many live programs, webinars, and networking events. If you would like to discuss your views about or getting involved in our Section activities, please email me at lee.berger@calawyers.org.

EDITOR'S NOTE

Elizabeth C. Pritzker
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The 28th Golden State Institute Edition

For the 28th year in a row, the Antitrust, UCL and Privacy Section held its Golden State Institute. As in the past, leading jurists, enforcers and practitioners gathered to discuss cutting-edge issues touching on these topics—ensuring GSI's place as the preeminent competition law conference in the Western United States. This edition of *Competition* reproduces many of the superb presentations featured at the 28th Annual GSI.

The day began with a survey of recent developments in California antitrust, unfair competition, and privacy law by "the three Toms": Tom Papageorge, head of the Consumer Protection Unit of the San Diego District Attorney's Office; Tom Greene, a trial attorney for the Antitrust Division of the U.S. Department of Justice; and Tom Dahdouh, Regional Director of the Federal Trade Commission's Western Region. The exhaustive review of substantive developments in California and federal antitrust and privacy law, presented by **Tom Papageorge**, is reprised here. **Tom Greene** provided a survey of recent California procedural developments; that, too, is reprinted here.

Following tradition, GSI featured panels on two recent "Big Stakes" antitrust trials. In the first panel, trial counsel involved in the *In the In re: Processed Eggs Products Antitrust* direct purchaser trial, in which major egg producers were accused of conspiring to control and limit the nation's egg supply, thereby increasing egg prices, discussed the trial and the path it ultimately took to a defense verdict. **Mindee J. Ruben**, counsel at Lite, DePalma, Greenberg in Philadelphia and co-lead counsel for plaintiffs, provided the plaintiff perspective, while Dechert LLP partner **Steven E. Bizar**, lead trial counsel for defendant R.W. Sauder offered the defense perspective. **Lee F. Berger**, Trial Attorney at the U.S. Department of Justice, Antitrust Division, moderated the discussion. A second panel discussed the recent *In re Solodyn* reverse payment "pay-for-delay" pharmaceutical trial. O'Melveny & Myers LLP partner **Kenneth R. O'Rourke** moderated the discussion between plaintiffs' trial counsel, **Richard A. Arnold** and **Anna T. Neill**, both of Kenny Nachwalter PA, and trial counsel for defendant Impax, **J. Douglas Baldridge** and **Lisa Jose Fales**, of Venable LLP.

GSI was honored to host a fascinating panel discussion with current antitrust enforcers **Bruce Hoffman**, Director of the Bureau of Competition at the United States Federal Trade Commission, and **Doha Mekki**, Counsel to the Assistant Attorney General in the Antitrust Division of the United States Department of Justice. **Karen E. Silverman**, a partner at Latham & Watkins LLP, moderated the conversation. **Ashley Bauer**, also a partner at Latham & Watkins, helped in preparing a transcription of the discussion for this edition of *Competition*.

Addressing current events in privacy, **Jennifer Lynch**, Surveillance Litigation Director at the Electronic Frontier Foundation, and **Tracy Shapiro**, a partner at DLA Piper LLP, discussed the media and consumer concerns over social media misuse of personal information, including Cambridge Analytica's harvesting and use of people's Facebook

profiles for political purposes, and the California state legislature's efforts to provide enhanced privacy protections for consumer data under the California Consumer Privacy Act, which takes effect on January 1, 2020. **Dominique-Chantale Alepin**, Assistant Director for the Western Region of the Federal Trade Commission, and **Elaine Call**, Senior Privacy Counsel at LinkedIn, moderated the discussion which is reprised here.

The conference concluded with the ever-popular judges' panel. This years' panel featured a panel of federal judges with backgrounds and experiences managing class actions, antitrust cases, and other complex litigation. Three distinguished Northern District of California jurists—**Judge William H. Alsup**, **Judge Edward M. Chen**, and **Magistrate Judge Laurel Beeler**—offered their insights and perspectives on these issues in a panel discussion moderated by **Jill Manning**.

This issue of *Competition* also includes excellent articles by Steven N. Williams, Bethany Caracuzzo, and Lesley E. Weaver and Anne K. Davis.

Steven Williams, a partner at the Joseph Saveri Law Firm, tackles *Apple v. Pepper,* the leading antitrust case before the U.S. Supreme Court this term, and its implications for indirect purchaser standing under *Illinois Brick*. A "live" Section webinar on the *Apple v. Pepper* case is scheduled for shortly after the Supreme Court issues its decision, and will be available for download thereafter on the CLA website.

Bethany Caracuzzo, Special Counsel at Pritzker Levine LLP, writes about another key Supreme Court case, *Frank v. Gaos*, and what it means for Article III standing at the class certification stage and for class action settlements. She also covers the justices' commentary on cy pres-only settlements—the reason why certiorari was granted by the Court in the first place—even though the Court's per curiam decision does not address the issue.

In their article, **Lesley Weaver** and **Anne Davis**, both of Bleichmar Fonti & Auld, LLP, provide a useful summary of the European Union's recently-enacted General Data Privacy Regulation, or GDPR. Their article also explores what this new regulatory regime means to practitioners who represent litigants subject to the GDPR, and who must simultaneously comply with the GDPR's strict personal data privacy protections as well as their broad U.S. discovery obligations.

This edition of *Competition* would not have been possible without the many individuals who lent their time and talent to GSI and to the terrific range of articles and topics being published here. Additional (and greatly appreciated) editorial assistance and cite-checking was provided by members of the Publications Committee and Privacy Committee. Thank you all for your continued contributions to *Competition*, and for your enduring commitment the Antitrust, UCL, and Privacy Section.

Vol 29, No. 1 Spring 2019

The Journal of the Antitrust, UCL and Privacy Section of the California Lawyers Association

TABLE OF CONTENTS

CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW UPDATE: SUBSTANTIVE LAW

By Thomas A. Papageorge[1]

I. INTRODUCTION

This outline provides a selection of substantive appellate and litigation developments that may be of particular interest to members of the Antitrust, UCL and Privacy Section. These developments include cases brought under the Cartwright Act, the Unfair Practices Act, the Consumers Legal Remedies Act, the Unfair Competition Law and False Advertising Law, as well as related developments regarding covenants not to compete and public enforcement actions.

II. CARTWRIGHT ACT (BUSINESS AND PROFESSIONS CODE § 16720 *ET SEQ.*)

A. In Two Opinions, District Court Applies the *Aspen Skiing* Exception to an Aerospace Industry Refusal-to-Deal Case and Finds Tied Product Allegations Sufficient for a Tying Claim to Proceed

1. *Packaging Systems, Inc. v. PRC-Desoto International, Inc., et al.*[2]

2. *Packaging Systems, Inc. v. PRC-Desoto International, Inc., et al.*[3]

Plaintiff Packaging Systems, an aerospace products firm, alleged Cartwright Act restraints of trade and other state and federal antitrust violations arising from an asserted refusal-to-deal agreement among plaintiff's suppliers and competitors in the aerospace sealant industry. Defendants PRC-Desoto and PPG Industries made an aerospace sealant for commercial and government uses. Plaintiff purchased the sealant from the two defendant companies at wholesale and repackaged it in special injection kits for retail sale to aircraft maintenance companies.

PPG announced that it would cease sales of the sealant to firms repackaging it for resale. Packaging Systems filed suit in the U.S. District Court, Central District, alleging, *inter alia,* unlawful monopolization and tying arising from defendants' refusal to deal with plaintiff. Defendants responded that Packaging Systems could not properly allege that the defendants had an antitrust duty to deal with Packaging Systems or were unlawfully tying these products.

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1 Thomas A. Papageorge is head of the Consumer Protection Unit of the San Diego District Attorney's Office. The views expressed here are those of the authors and do not necessarily reflect those of the San Diego District Attorney's Office. These are a selection of developments prepared for presentation at the Golden State Institute on November 8, 2018, reflecting developments as of that date.

2 268 F.Supp.3d 1071 (C.D. Cal. 2017).

3 2018 WL 735978 (C.D. Cal., February 6, 2018).

(1) In its July 14, 2017 decision, the district court rejected defendants' duty-to-deal analysis. Judge Otis Wright found these circumstances analogous to *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*,[4] defendants terminated a profitable relationship with the plaintiff for allegedly anticompetitive reasons. Plaintiff alleged PRC-Desoto and PPG refused to continue to sell the sealant to Packaging Systems even at profitable retail prices without a legitimate business justification, but continued to sell to other non-repackaging resellers. The court found unpersuasive PPG's claims that safety considerations motivated the changed policy.

Judge Wright held the plaintiff's allegations were sufficient to bring the case within the *Aspen Skiing* exception to the general rule that a monopolist has no duty to deal with its competitors. "Drawing all inferences in Plaintiff's favor, the Court concludes that this case plausibly fits within the *Aspen Skiing* exception . . . PPG's abrupt decision to end this course of dealing suggests that it was willing to sacrifice short-term profits for the possibility of charging inefficient monopoly prices in the long run."[5] The court also found sufficient the plaintiff's pleading of unlawful secret rebates in violation of the California Unfair Practices Act.[6]

(2) The district court had also ruled that Packaging Systems did not adequately plead its tying claim under the Cartwright and Sherman Acts, but granted leave to amend. Plaintiff filed an amended complaint with further details defining the alleged tying and tied markets.

On February 6, 2018, Judge Wright ruled on defendants' subsequent motion to dismiss the amended tying claims for inadequate pleading of the relevant product markets and other defects. The court denied the motion, finding Packaging Systems' allegations of the tied market and other aspects of its allegations sufficient. "'Both Section 1 and the Cartwright Act prohibit illegal tying arrangements,' and the elements of § 1 tying claim for the most part mirror that of the Cartwright Act."[7] Under the "commercial realities" test, the plaintiff's tied product market of "end-user packaging consistent of kits, syringes and [small] cans" is "sufficient for the purposes of defining the relevant product market at the pleading stage."[8]

The court also found adequate allegations of coercion to buy the bundled package of products: "Consumers are forced to buy both the sealant and the kits/syringes/cans from PPG. These allegations are sufficient to plead coercion." Regarding the required pleading of distinct tying and tied products, plaintiff properly alleged "the seller has foreclosed competition on the merits in a product market distinct from the market for the tying item."[9]

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4 472 U.S. 585 (1985).

5 *Packaging Systems, Inc. v. PRC-DeSoto International, Inc., supra*, at 1076.

6 See discussion, *infra*.

7 *Id.* at 4.

8 *Id.* at 5.

9 *Id.* at 6.

B. Ninth Circuit Concludes a Subsidiary Cannot Claim Intent Different From Its Parent Under the *Copperweld* Doctrine

Arandell Corp. v. Center Point Energy Services, Inc.[10]

Providing an important insight into the intracorporate conspiracy analysis of *Copperweld Corp. v. Independence Tube Corp.,*[11] the Ninth Circuit held that a wholly-owned subsidiary in a Section 1 and state antitrust law case cannot claim its actions were for purposes other than those of its parent: "[F]or antitrust purposes, it is legally impossible for firms within a single 'economic unit' to act together in furtherance of the same price-fixing scheme for independent and distinct purposes."[12]

Under this analysis, the subsidiary could not claim that it acted for a legitimate purpose while "disavowing the anticompetitive intent" of its parent.[13] Thus, there was a triable issue of conspiracy liability under both the Sherman Act and the Wisconsin antitrust statute.[14] (The Ninth Circuit's opinion in *Arandell* may prove important in cases with disparate parent/subsidiary situations, such as situations where plaintiffs seek to establish antitrust liability in cases involving foreign parent companies and their U.S. subsidiaries.)

Other Cartwright Act and state antitrust law developments:

In re Lipitor Antitrust Litigation.[15] The class action allegation of plaintiff pharmacists that an alleged reverse settlement agreement regarding Lipitor was a per se violation of the Cartwright Act was insufficient to state a cognizable claim under the Act. Since the California Supreme Court[16] concluded that reverse settlement agreements must be judged under the rule of reason rather than the per se rule, the plaintiffs' decision to proceed under a per se theory doomed its Cartwright Act conspiracy claim, which did not adequately allege required elements including the requisite value of the reverse payment.[17]

In re Korean Ramen Antitrust Litigation.[18] In a nationwide Cartwright Act class action alleging collusion among California-based ramen makers, District Court Judge William H. Orrick rejected defendants' challenge to certification, holding that California's Cartwright Act was not materially different from other states' laws such that decertification would be required. Previously Judge Orrick had ruled against defendants claims: (1) that the statute of limitations barred plaintiffs' Sherman Act, Cartwright Act, and Unfair Competition Law claims; (2) that principles of international comity required deference to a ruling in defendants' favor by the Korea Fair Trade Commission; and (3) there was inadequate evidence of a price-fixing conspiracy to proceed in a U.S. antitrust forum.

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10 900 F.3d 623 (9th Cir. 2018).

11 467 U.S. 752 (1984).

12 *Id.* at 637.

13 *Id.* at 637-638.

14 *Id.* at 645.

15 772 Fed.Appx. 132 (3rd Cir. 2018).

16 *In re Cipro Cases I & II*, 61 Cal.4th 116 (2016).

17 *In re Lipitor Antitrust Litigation, supra*, at 136-137.

18 2018 WL 1456619 (N.D. Cal., March 23, 2018).

***UFCW & Employers Benefit Trust v. Sutter Health,* S.F. Super Ct.**[19] State antitrust class actions are less common after CAFA but remain significant for California practitioners. Here, the Superior Court granted plaintiffs' motion to certify a class of self-funded health plans and state agencies in a state antitrust/unfair competition case. Healthcare-benefits trustee UFCW claimed that defendants violated California's Cartwright Act and Unfair Competition Law by illegally increasing hospital pricing and forcing competitors into anticompetitive provider agreements. The Superior Court granted UFCW's motion for class certification, but also foreshadowed the challenges for plaintiffs here, given that the "landscape of this case, with its many services, prices, and discounts" presented a "complex economic picture."[20]

III. UNFAIR PRACTICES ACT (BUSINESS AND PROFESSIONS CODE § 17000 *ET SEQ.*)

A. Secret Rebates Allegation Survives Demurrer in Aerospace Sealants Antitrust Case

Packaging Systems, Inc. v. PRC-Desoto International, Inc., et al.[21]

In *Packaging Systems*, discussed further above, District Court Judge Wright also concluded that plaintiff Packaging Systems adequately pleaded that defendant PRC-Desoto International and PPG unlawfully offered secret rebates or discounts to injure competition within the meaning of California's Unfair Practices Act, Business and Professions Code section 17045. While rejecting certain of the claimed secret discounts, the district court found sufficient allegations for plaintiff to go forward on its core UPA theory.

The district court summarized the key competitive injury allegation as follows: "Offering discounts to Plaintiff's competitors and customers not offered to Plaintiff has a tendency to substantially reduce Plaintiff's customer base. Over the long run, this will put Plaintiff out of business. And once PPG loses its biggest competitor in the retail distribution market, PPG will be free . . . to charge supracompetitive prices for sealant to end-users. Plaintiff has therefore demonstrated that PPG's price discrimination has a tendency to harm competition."[22]

B. District Court Recognizes Standing for Third-Party Plaintiffs in UPA Actions

Arena Restaurant and Lounge LLC v. Southern Glazer's Wine and Spirits, LLC[23]

In an Unfair Practices Act action alleging both unlawful loss leaders (Bus. & Prof. Code § 17044) and sales below cost (Bus. & Prof. Code § 17043) in liquor wholesaling, the district court for the Northern District of California concluded that Business and

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19 Case No. CGC-14-538451 (Aug. 14, 2017).

20 Order at 9. Special thanks to Elizabeth C. Pritzker for her note on this development.

21 268 F.Supp.3d 1071 (C.D. Cal. 2017).

22 *Id.* at 1080.

23 2018 WL 1805516 (N.D. Cal. 2018).

Professions Code section 17070 authorizes standing for all injured parties, including parties that are not direct competitors of the defendants, to pursue Unfair Practice Act damage actions.

Citing *O'Shea v. Epson America, Inc.*,[24] the district court concluded that section 17070 broadly provides standing for "'[a]ny person or trade association' to recover damages for UPA violations" without limiting such standing to injured competitors. The court held: "Plaintiffs are not barred as a matter of [standing] law from bringing §§ 17043 and 17044 claims" and thus the plaintiffs here "have standing to sue." The court found plaintiffs' initial factual allegations inadequate to sustain its loss leader and sales-below-costs claims but granted leave to amend to correct the pleading deficiencies.

IV. COVENANTS NOT TO COMPETE (BUSINESS AND PROFESSIONS CODE § 16600 *ET SEQ.)*

A. Plaintiff Fails to Qualify for Trade Secrets Exception to California's Non-Competition Covenant Prohibition

Romo Productions, Inc., v. Paradise Sewing, Inc., et al.[25]

Apparel manufacturer Romo sued its sewing subcontractor Paradise for breach of a contract containing an unenforceable covenant not to compete. Plaintiff argued it could enforce that portion of its contract addressing theft of trade secrets because provisions addressing such theft constitute an exception to California's prohibition on non-competition agreements.

The Fourth Appellate District held Romo failed to adequately plead and prove that the trade secret exception to California's general prohibition should apply here. "There was no evidence that Paradise obtained business from [Romo's competitor] Drifire by misappropriating Romo's alleged trade secrets; to the contrary, the only evidence on this topic was that Romo suggested to Drifire that it contact Paradise directly. We conclude the trial court did not err in granting the nonsuit motion as to the breach of contract cause of action."[26]

V. CONSUMERS LEGAL REMEDIES ACT (CIVIL CODE § 1750 *ET SEQ.*)

A. Car Buyer May Sue Under CLRA/UCL When Car Dealer Fails to Disclose Safety Recall

Gutierrez v. CarMax Auto Superstores California[27]

Used-car buyer Gutierrez sued CarMax under the CLRA and UCL, claiming Car Max failed to disclose a known brake system recall involving safety issues. Reversing

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24 2010 WL 11459911 (C.D. Cal. 2010).

25 2018 WL 2307984 (May 22, 2018) (unpublished; not citable).

26 *Id.* at 6.

27 19 Cal. App. 5th 1234 (2018).

demurrer, the Fifth Appellate District concluded: "[T]hese allegations are sufficient to plead the existence of a duty to disclose information about the safety recall on the ground CarMax made partial representations about the vehicle's braking and lighting systems and those representations were likely to mislead for want of communication of the facts about the recall."[28]

"Gutierrez's allegations about the rigorous inspection of the vehicle's braking and lighting systems, and its misleading character in the absence of a disclosure about the safety recall, are sufficient to plead . . . a duty to disclose."[29]

B. Car Buyer Can Bring UCL Case Even If Dealer Offers Correction Sufficient Under CLRA

Flores v. Southeast Automotive Liquidators, Inc.[30]

Car buyer Flores sued used-car dealer Southcoast Automotive for several deceptive practices in the sale of a faulty used car. Southcoast argued that its adequate corrective offer satisfied its obligations under the CLRA and barred any other action by Flores.

The Second District held an offer of correction may preclude a CLRA claim but does not bar a buyer from suing for damages based on the UCL and fraud. "Dealer's reasonable correction offer prevented Flores from maintaining a cause of action for damages under the CLRA, but it did not prevent her from pursuing remedies based on other statutory violations or common law causes of action based on conduct under those laws. Even after defendant's satisfactory CLRA offer to ameliorate, plaintiff can still pursue UCL action."[31]

VI. UNFAIR COMPETITION LAW (BUSINESS AND PROFESSIONS CODE § 17200 *ET SEQ.*)

A. Arbitration and Unconscionability Issues in Consumer and Employment Contracts After *Concepcion, Sanchez, Iskanian,* and *McGill*

Arbitration after *AT&T Mobility, LLC v. Concepcion*.[32] The U.S. Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion,*[33] holding that the Federal Arbitration Act (FAA)[34] preempts conflicting state law, has created a formidable barrier for many UCL or FAL actions challenging the unfair trade practices or employment policies of defendants using contracts with mandatory arbitration clauses.

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28 *Id.* at 1262-1263.

29 *Id.*

30 17 Cal. App. 5th 841 (2018).

31 *Id.* at 850.

32 563 U.S. 333 (2011).

33 563 U.S. 333 (2011).

34 9 U.S.C. § 1 *et seq.*

Since *Concepcion*, the California Supreme Court has recognized in *Iskanian, infra,* and elsewhere the broad preemptive effect of the FAA and has abrogated several California doctrines limiting mandatory arbitration. However, the Court has also demonstrated a commitment to identifying limits to *Concepcion*. As a result, the relationship between arbitration provisions and contract law principles (such as unconscionability) remains the subject of extensive litigation.

Following *Iskanian* and *Sanchez*, California plaintiffs now often seek to use alternative legal mechanisms, including the Labor Code Private Attorney General Act and unconscionability principles, in an attempt to reach beyond arbitration clauses and bring disputes over consumer contracts and employment practices before courts instead of arbitrators.

Aftermath of *Sanchez v. Valencia Holding Co.*[35] In 2015, the California Supreme Court delivered its widely anticipated opinion in *Sanchez v. Valencia Holding Co.*, 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. The Court held that *Concepcion* prohibits the use of unconscionability principles or other state doctrines to prohibit whole *categories* of arbitration (such as class-action arbitration provisions) or to otherwise interfere with the FAA's policy promoting arbitration. But while avoiding such categorical prohibitions or interference, California courts must undertake case-by-case factual analysis of any allegations of unconscionability to determine whether unconscionable contract terms are present.

FAA principles and the California Supreme Court today. The California Supreme Court's commitment to the continuing viability of contract principles such as unconscionability, and its mandate that such cases be reviewed on their specific facts, have permitted some latitude to plaintiffs challenging certain unfair arbitration terms, so long as those contract principles are not applied so as to discriminate against whole categories of arbitration or unduly interfere with the fundamental attributes of arbitration.[36]

Many commentators see support within the California Supreme Court for carving out exceptions to the broad sweep of *Concepcion*.[37] While *Concepcion* has certainly changed arbitration doctrine in California, and while challenges to protected aspects of arbitration will often fail, it appears that the California Supreme Court will continue to seek limits on the scope of the FAA and *Concepcion*. Examples include:

PAGA actions: *Iskanian v. CLS Transportation.*[38] The Supreme Court held that *Concepcion* impliedly overruled *Gentry v. Superior Court*,[39] and thus mandatory arbitration provisions must be enforced even when they require arbitration of wage-and-hour issues

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35 61 Cal. 4th 899 (2015).

36 See, e.g., *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017), *infra* (FAA does not bar action for public injunctive relief); *Carlson v. Home Team Pest Defense, Inc.*, 239 Cal. App. 4th 619 (2015).

37 See, *e.g.*, R. Novotny, "Gauging the Future of *Iskanian* and FAA Preemption in California," *Los Angeles Lawyer*, March 2015, p.10.

38 59 Cal. 4th 348 (2014).

39 42 Cal. 4th 443 (2007).

protected by California's labor laws. However, the Court further ruled that an arbitration agreement requiring the employee to give up the right to bring representative actions under the Labor Code Private Attorney General Act of 2004[40] is against public policy and unenforceable.

By carving out PAGA representative actions from the realm of private arbitration governed by the FAA, the *Iskanian* opinion has prompted a wave of plaintiffs' lawsuits and class actions utilizing this exception in employment and wage-and-hour disputes.[41]

Public injunctive relief: *McGill v. Citibank, N.A.*[42] Analyzing an arbitration provision purporting to bar bank employees from seeking public injunctive relief, the California Supreme Court held that such relief remains available to private plaintiffs under the UCL, FAL and CLRA. The Court ruled: "[I]nsofar as the arbitration provision here purports to waive McGill's right to request in *any* forum such public injunctive relief, it is invalid and unenforceable under California law."[43]

The Court rejected Citibank's claim that the FAA necessarily preempts California's public injunctive remedy. By including the FAA's "saving clause" preserving traditional contracts defenses, Congress intended "'to make arbitration agreements enforceable as other contracts, but not more so.'"[44] The Court thus held that "the FAA does not require enforcement of a provision in a predispute arbitration agreement that, in violation of generally applicable California contract law, waives the right to seek *in any forum* public injunctive relief under the UCL, the CLRA, or the false advertising law."[45]

The following lists some of the more prominent UCL appellate opinions applying these principles to recent factual situations in the post-*Concepcion* legal environment:

1. Arbitration Clauses Enforced

Sanchez v. Valencia.[46] (See discussion, *supra*.)

Iskanian v. CLS Transportation.[47] (See discussion, *supra*.)

Poublon v. C.H. Robinson Co.[48] A former employee sued defendant employer C.H. Robinson for wage misclassification. Plaintiff objected to arbitration, alleging her employment contract mandated unconscionable defendant-imposed arbitration. The Ninth Circuit reviewed the claimed unconscionable terms and held the arbitration requirement

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40 PAGA; Labor Code §§ 2698 *et seq*.

41 *See, e.g., Williams v. Superior Court (Pinkerton Governmental Services, Inc.)*, 237 Cal. App. 4th 642 (2015), and *Franco v. Arakelian Enterprises, Inc*., 234 Cal. App. 4th 937 (2015), and others.

42 2 Cal. 5th 945 (2017).

43 *Id*. at 961; emphasis original.

44 *Id*. at 962.

45 *Id*. at 969; emphasis original.

46 61 Cal. 4th 899 (2015).

47 59 Cal. 4th 348 (2014).

48 846 F.3d 1251 (9th Cir. 2017).

could be enforced once improper terms were severed. "[We conclude that the dispute resolution provision is valid and enforceable once the judicial carve-out clause is extirpated and the waiver of representative claims is limited to non-PAGA claims."[49]

OTO, LLC v. Koh.[50] The First Appellate District held "waiver of the various employee-friendly wage claim provisions of the Labor Code does not make an arbitration agreement unconscionable so long as the resulting arbitration procedure is 'affordable and accessible,'" as it was here.[51]

2. Arbitration Clauses Rejected

McGill v. Citibank, N.A.[52] (See discussion, *supra*.)

Baxter v. Genworth North America Corp.[53] Plaintiff Baxter alleged her employment termination was racially motivated and sought to void the arbitration term of her employment contract as unconscionable. The court summarized the procedural and substantive aspects of California unconscionability: "[t]he former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results."[54] Defendant's arbitration provision was unconscionable under this standard. Plaintiff "had no opportunity to negotiate" and no "meaningful choice in the matter"[55] and the substantive terms were so one-sided as to plaintiff's rights and remedies that there were "ample grounds to support a conclusion" of unconscionability.[56]

B. California Supreme Court Holds State Law Unconscionability Principles Apply to Payday Loans

De La Torre v. CashCall, Inc.[57]

In an opinion of significance for UCL litigation generally and for the unconscionability principles discussed above, the California Supreme Court has held that, notwithstanding a Financial Code provision exempting consumer loans of $2,500 or more from interest-rate ceilings, the interest rates on these larger loans may still be determined to be unconscionable under the Unfair Competition Law[58] through the application of California's general contract principles of unconscionability.

The Court emphasized that the interest rate is the price of a loan, and the price term, like any other term in a contract, may be unconscionable. The Court concluded that no

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49 *Id.* at 1274.

50 14 Cal. App. 5th 691 (1st DCA, 2017).

51 *Id.* at 710.

52 2 Cal. 5th 945 (2017).

53 16 Cal. App. 5th 713 (1st DCA, 2017).

54 *Id.* at 721.

55 *Id.* at 723.

56 *Id.* at 737.

57 5 Cal. 5th 966 (2018)

58 Bus. & Prof. Code § 17200 *et seq.*

California law, including the Financial Code provision at issue here, prohibits a court from making an inquiry into the nature of a consumer loan agreement of at least $2,500 and the interest rate provided there for possible unconscionability.

"In short, California courts have the authority to decide whether contract provisions, including interest rates, are unconscionable. Our respect for the Legislature's prerogative to shape economic policy through legislation is why we have kept the doctrine relatively narrow and are careful to observe its nuances. But this is no reason for courts to absent themselves from the picture entirely."[59]

C. First Amendment Principles and State Regulation of Commercial Free Speech

Nationwide Biweekly Administration v. Owen.[60] Plaintiff, offeror of a biweekly loan payment program, sought to enjoin two California district attorneys from enforcing California's false advertising laws. Addressing commercial free speech, the Ninth Circuit affirmed the trial court's denial of a preliminary injunction against the district attorneys, holding that "the required disclosures are meant to protect against consumer confusion and are therefore permissible under *Zauderer.*"[61] "The First Amendment does not generally protect corporations from being required to tell prospective customers the truth."[62]

First Resort, Inc. v. Herrera.[63] The Ninth Circuit upheld a San Francisco ordinance regulating pregnancy-counseling services against a wide-ranging constitutional challenge by an anti-abortion counseling clinic. The court held San Francisco's ordinance regulated only unprotected commercial speech, and thus was not facially invalid under the First Amendment. Further, the ordinance was not unconstitutional as applied since it did not regulate protected speech. "Because the Ordinance regulates advertising designed to attract a patient base in a competitive marketplace for commercially valuable services, we hold that the Ordinance regulates 'classic examples of commercial speech.'" Since "the Ordinance only regulates false or misleading commercial speech—a category of speech afforded no constitutional protection—First Resort's . . . facial challenge fails."[64]

National Institute of Family and Life Advocates v. Becerra.[65] In an opinion with potential impact on UCL enforcement of state-required affirmative disclosures to consumers, the U.S. Supreme Court examined California's law requiring pro-life pregnancy centers to make specified disclosures about available reproductive services including abortion. The Court held that even under the *Zauderer* intermediate scrutiny standard, the disclosures required by California would violate the First Amendment as unjustified and unduly burdensome compelled speech. Exempting some clinics from the disclosure requirements fit poorly with the law's objective of providing low-income

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59 *Id.* at 1020.

60 873 F.3d 716 (9th Cir. 2017).

61 *Id.* at 721.

62 *Id.*

63 860 F.3d 1263 (9th Cir.2017).

64 *Id.* at 1274.

65 138 S.Ct. 2361 (2018).

women with information about state-sponsored services. As a result, California's law was "underinclusive" and thus defective under the First Amendment.[66]

Interpipe Contracting, Inc. v. Becerra.[67] Some observers have suggested that a broad reading of the Supreme Court's opinion in *National Institute* would jeopardize the constitutionality of other state-mandated affirmative disclosures, perhaps including Proposition 65 notices and some other forms of required consumer disclosure.

However, the Ninth Circuit has recently distinguished *National Institute,* suggesting limits to its applicability. **"**First, *National Institute* expressly did not reach the issue of viewpoint discrimination.[68] Second, the law there was underinclusive because exempting some clinics from the information requirement fit poorly with its objective of "providing low-income women with information about state-sponsored services."[69]

D. UCL Preemption/Bar Arising From 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, continue to yield important results.

1. Holdings of No Preemption of or Bar to UCL Actions

a. UCL/FAL Not Preempted by Federal OSHA in Worker Deaths Case

Solus Industrial Innovations, LLC v. Superior Ct.[70]

The California Supreme Court has unanimously held that the Orange County District Attorney's Office UCL and FAL claims in a worker death case were not preempted by the federal Occupational Safety and Health Act of 1970.[71] The Court, per Chief Justice Cantil-Sakauye, held that the federal Occupational Safety and Health Act does not expressly or impliedly preempt the UCL/FAL action here, nor does this enforcement effort implicate obstacle preemption. "In the absence of a clear and manifest congressional purpose to preempt claims such as the UCL and FAL claims asserted in this action, such claims are encompassed in the presumption against preemption that arises upon a state's assumption of responsibility under the federal OSH Act to regulate worker safety and health."[72]

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66 *Id.* at 2375.

67 898 F.3d 879 (9th Cir.2018).

68 Citing *National Institute of Family and Life Advocates v. Becerra, supra*, at 2370 n.2.

69 *Interpipe Contracting, Inc. v. Becerra, supra*, at 902, n.17.

70 4 Cal. 5th 316 (2018), *cert. denied sub. nom. Emerson Electric Co. v. Superior Ct.*, 139 S.Ct. 376 (Oct. 15, 2018).

71 29 U.S.C. § 651 *et seq.*

72 *Id.* at 347.

This decision is important in the OSHA sphere and also as a sign of the willingness of the California Supreme Court to provide a counterweight to the U.S. Supreme Court in other arenas, particularly consumer and environmental protection, by upholding California's authority to protect its own workers, consumers and environment with its state statutes and regulations.

b. California's UCL Not Preempted in Lipitor Litigation

In re Lipitor Antitrust Litigation[73]

In the massive class action challenging the marketing of the cholesterol drug Lipitor (above), the District Court for New Jersey held that California's Unfair Competition Law was not preempted because reliance is not required for UCL "unlawful" or "unfair" business practice cases, although claims based on certain other states' antitrust and consumer laws were preempted.[74]

2. Holdings of Preemption of or Bar to UCL/FAL Actions

Nat'l Institute of Family and Life Advocates v. Becerra[75]

E. UCL Standing After Proposition 64

1. Allegations of Reliance Unnecessary for Private Standing in Unlawfulness or Unfairness UCL Actions

In Re Effexor Antitrust Litigation[76]

In the consolidated national class action involving the antidepressant drug Effexor, the New Jersey District Court concluded that the class plaintiffs (identified as "EPP") adequately pleaded sufficient facts to go forward on its claims based on the "unlawful" and "unfair" prongs of the UCL. Defendants sought dismissal of the UCL claims for plaintiffs' failure to plead reliance. "[C]ontrary to Defendants' assertion, reliance is only required 'when a [UCL] claim is premised on allegations that the Defendants engaged in fraudulent business practices . . .' Here, EPPs claims are predicated on unlawful and unfair business practices."[77]

The EPPs challenged unlawful and unfair business conduct, including "sham litigation, fraudulent procurement of the PTO, and reverse settlement agreement." As such, "at the very least, [EPPs] allege a claim premised on the unfair prong . . . Therefore, because EPPs allege sufficient facts to sustain an Unfair Competition Law claim based on

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73 2018 WL 4006752 (D. New Jersey, Aug. 21, 2018).

74 *See also First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir.2017) (*supra*).

75 138 S.Ct. 2361 (2018) (*supra*).

76 2018 WL 4466050 (D. New Jersey, Sept. 18, 2018).

77 *Id.* at 18.

unfair business practices, Defendants' motion for judgment on the pleadings with respect to this claim is denied."[78]

2. Private Plaintiffs Have Standing in Retail Discount Pricing Case

Hansen v. Newegg.com Americas, Inc.[79]

3. UCL Standing/Jurisdiction for Actions Against Practices on Indian Tribal Lands

People v. Rose.[80] The Attorney General brought an action under the UCL and other statutes against a cigarette seller operating on Indian lands. The Shasta County Superior Court ordered injunctive relief and civil penalties of $765,000, and defendant appealed. The Third District held: (1) California has jurisdiction over cigarette sales on Indian land allotments; and (2) the findings of fact fully supported the trial court's conclusion that defendant had notice of the illegality before the sales for which the penalties were imposed.

But note *People v. Huber,*[81] where a panel of the First Appellate District distinguished between preemption analysis and subject matter jurisdiction in concluding that the trial court lacked subject matter jurisdiction for the Attorney General's UCL action against allegedly unlawful business practices on tribal lands. (Rehearing was granted and the prior opinion is not citable.)

4. Alleged Misleading Yahoo! Security Claims Give Rise to UCL Standing

In re: Yahoo! Inc. Customer Data Security Breach Litigation.[82] Class action plaintiffs' allegations that they would not have signed up for the paid Yahoo! service if they had known that the service was not as secure as Yahoo! represented were sufficient to establish standing to bring an action under the UCL.

VII. FALSE ADVERTISING LAW (BUSINESS AND PROFESSIONS CODE § 17500 *ET SEQ.*)

A. Private Plaintiff Has FAL/UCL Standing to Challenge Misrepresentations of "Former" Prices and Discounts

Hansen v. Newegg.com Americas, Inc.[83]

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78 *Id. See also In re Lipitor Antitrust Litigation* 2018 WL 4006752 (D. New Jersey, Aug. 21, 2018) (reliance not required for unlawfulness or unfairness UCL claims; see discussion, *supra*).

79 25 Cal. App. 5th 714 (2018) (see discussion in "False Advertising Law," *infra*).

80 16 Cal. App. 5th 317 (2017) (review denied, S245291, Jan. 17, 2018).

81 27 Cal. App. 5th 672 (2018) (rehearing granted/not citable).

82 313 F.Supp.3d 1113 (2018).

83 25 Cal. App. 5th 714 (2018).

Relying on *Kwikset Corp. v. Superior Court*[84] and *Hinojos v. Kohl's Corp.,*[85] the Second Appellate District held a private plaintiff had standing under the Unfair Competition Law, False Advertising Law, and the Consumers Legal Remedies Act to sue retailer Newegg for misrepresenting "former" prices and discounts.

Hansen bought computers from Newegg, relying on representations that the advertised prices were less than "former prices" and were discounts. Hansen's suit alleged these advertised savings were false and that he would not have bought the items had he known the statements were untrue. The trial court sustained Newegg's demurrer on the theory that the plaintiff suffered no cognizable injury unless the computers were defective or worth less than he paid. The Second Appellate District, per Acting Presiding Judge Zelon, reversed, holding the complaint adequately alleged that plaintiff suffered an economic injury and thus the plaintiff had standing.

Reviewing statutory history and Proposition 64's impact on private standing, the court concluded: "[Although the proposition's 'voters clearly intended to restrict UCL standing, they just as plainly preserved standing for those who had had business dealings with a defendant and had lost money or property as a result of defendant's unfair business practices.' Under *Kwikset*, 'if a party has alleged or proven a personal, individualized loss of money or property in any nontrivial amount, he or she has also alleged or proven injury in fact.'"[86]

The court rejected Newegg's theory that *Kwikset* applies to a product's attributes, not to representations on matters such as former price. "We agree with the Ninth Circuit's conclusion [in *Hinojos*] that under *Kwikset*, the UCL and FAL's standing requirements are satisfied when a consumer has alleged that he or she relied on fictitious former price information in making a purchase, and would not have made the purchase but for the misrepresentation."[87]

The Second District cited *Kwikset* for the underlying policy to be served here: "The UCL and false advertising law are both intended to preserve fair competition and protect consumers from market distortions. [Citations.] Contrary to that general purpose, if we were to deny standing to consumers who have been deceived by label misrepresentations in making purchases, we would impair the ability of consumers to rely on labels, place those businesses that do not engage in misrepresentations at a competitive disadvantage, and encourage the marketplace to dispense with accuracy in favor of deceit."[88]

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84 51 Cal. 4th 310 (2011).

85 718 F.3d 1098 (9th Cir.2013).

86 *Id.* at 723.

87 *Id.* at 729.

88 *Id.* at 726.

B. Fourth Appellate District Holds False Advertising Challenge in "One A Day" Vitamins Case May Proceed

Brady v. Bayer Corporation[89]

Plaintiff Brady alleged Bayer made untrue and misleading representations in marketing its One A Day gummy vitamins because the bottle's front label states "One A Day" when, as noted only in fine print on the back label, the proper dosage its two gummies for consumers above age four. The Fourth Appellate District overruled the trial court's grant of a demurrer to Brady's UCL and Consumers Legal Remedies Act complaint.

The superior court, relying on an unpublished district court opinion on similar facts, had sustained the demurrer, holding as a matter of law that no reasonable consumer could be misled. Brady appealed and the Fourth Appellate District reversed: "[W]e conclude Bayer has failed to appreciate the degree to which their trade name One a Day has inspired reliance in consumers, and we hold an action alleging they violated California's [CLRA and UCL] and express warranty law (Com. Code § 2313) should have survived demurrer."[90]

The disclosure appeared on the bottle's back label "in the smallest lettering on the bottle, an ocular challenge even when the bottle is full-sized and held in good light." The court determined "[t]he issue before us is whether that language is enough to overcome the prominent and arguably advisory brand name of the product. We think not."[91]

Bayer's defense was that its consumers are sophisticated and do not rely on manufacturer statements but rather perform extensive research to determine their vitamin needs. "Bayer wants us to conclude that trust is not part of One A Day's success. They argue that modern consumers carefully read and analyze the formulations of the vitamins on the market and make their choices based upon their own expertise . . . Bayer says consumers look at the label and decide just how much selenium, biotin, pantothenic acid and zinc they need and then make their purchase after comparing those values with the labels on the vitamin bottles. [¶] That's a stretch."[92]

The court rejected district court opinions that the labels were not misleading because reasonable consumers would carefully scrutinize the back label to determine the correct dosage. "We could hardly disagree more." Some buyers may be sophisticated "back-label scrutinizers," but most ordinary consumers are not. "Not every vitamin-buyer is a health-conscious consumer preoccupied with exact dosages." After all, this particular product is not one likely to appeal to sophisticated consumers. "They're gummies, for crying out loud."[93]

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89 26 Cal. App. 5th 1156 (2018).

90 *Id.* at 1159.

91 *Id.* at 1162.

92 *Id.* at 1163.

93 *Id.* at 1174-1175, and n.20.

While the law regarding misleading product labels is "varied" and is complicated by preemption issues, the court identified four "themes" to aid in its analysis:

1. **Common sense.** If a consumer claim defies common sense, sustaining a demurrer may be appropriate. The court cited various food-related cases as examples such as *Hill v. Roll Internat. Corp.*,[94] ("green drop" on Fiji Water label not deceptive).

2. **Literal truth/literal falsity.** The literal truth may often protect a manufacturer, but not always. "But there is no protection for literal falseness." The court cited the example of *Benson v. Kwikset Corp.,* [95] involving locksets claimed to be "Made in USA" but were not.

3. **The front-back dichotomy.** Disclosures on a package's back may sometimes limit the tendency of a label to mislead. But the court noted "an especially perceptive decision" of the Ninth Circuit, *Williams v. Gerber Prods. Co.,*[96] where the list of ingredients on the back label did not overcome the misrepresentations on the front side (various fruits shown on the front, but the ingredients only included white grape juice). Statements on the back label should "*confirm* representations on the front, not *contradict* them."[97]

4. **Brand names misleading in themselves.** The court saw this as the essential issue in this case, and cited numerous opinions holding that brand names can be misleading. The advantage of a descriptive brand name is that it requires of the consumer "'little thought, little explanation, little effort to build understanding of what the offering actually is.'" Indeed, as the Attorney General noted: "'Most of the time when people encounter your name, you won't be there to explain it to them. *And they won't have the time or interest to read about it on your website or the back of the box*.'"[98]

"[A]ll four themes that emerge from the case law uniformly point to the same result in this case: allowing Brady's claim to proceed beyond the pleading stage." Most significant was front-back dichotomy, as the front of the package made it appear that only one gummy was required and the two-gummies disclosure on the back was "printed in nano-type."[99]

The Fourth District summarized its analysis: "[T]hese laws prohibit 'not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.' [Citation.] Thus, to state a claim . . . based on false advertising or promotional practices, 'it is necessary only to show that "members of the public are likely to be

94 195 Cal. App. 4th 1295 (2011).

95 152 Cal. App. 4th 1254 (2007).

96 552 F.3d 934 (9th Cir. 2008).

97 *Id.* at 1172.

98 *Id.* at 1170; emphasis by the court.

99 *Id.* at 1172.

deceived.'" (*Kasky v. Nike, Inc.*, 27 Cal.4th 939, 951 (2002). We cannot say there was no 'capacity, likelihood or tendency to deceive or confuse the public' here."[100]

C. Child Labor Claims Not Affecting Candy Functionality Are Insufficient to Establish FAL Standing

Hodson v. Mars, Inc.[101]

Class action plaintiffs sued candy manufacturer Mars, Inc., for FAL misrepresentations and other violations, alleging Mars failed to disclose child labor in the manufacture of the candy. The Ninth Circuit held: "Plaintiff has not sufficiently alleged that the defect in question—the existence of child labor in the supply chain—affects the central functionality of the chocolate products. Therefore, without either relying on or overruling *Wilson v. Hewlett-Packard Co.,* 668 F.2d 1136 (9th Cir.2012), we hold that plaintiff has not established that Mars had a duty to disclose the labor practices on its labels."[102]

VIII. PUBLIC ENFORCEMENT OF UCL, FAL AND RELATED STATUTES

A. Code of Civil Procedure § 394 Venue Rule Is Inapplicable to Public Enforcement Actions

GameStop, Inc. v. Superior Court (People)*103*

GameStop, a secondhand dealer of electronics and video games, sought transfer of venue to a neutral county of an UCL enforcement action brought by the Riverside and Shasta District Attorney's Offices for violations of the Secondhand Dealers Law.[104] The Fourth Appellate District held the mandatory removal provisions of Code of Civil Procedure section 394 for cases brought by counties or local agencies were inapplicable to UCL actions brought by district attorneys in the name of the People to enforce the law.

The Fourth District concluded: "The People . . . constitute the party-plaintiff in this UCL action, the entity with the substantive right and standing to bring the action against GameStop . . . [A]n action brought in the name of the People of the State of California, as a party, is not brought by a county, or other local agency, and the district attorney, as the legal representative, is not a party thereto."[105]

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100 *Id.* at 1173. Special thanks to Merced DDA Richard Michaels for his contributions here.

101 891 F.3d 857 (9th Cir.2018).

102 *Id.* at 862.

103 26 Cal. App. 5th 502 (4th DCA, 2018), rehearing denied (Sept. 17, 2018).

104 Bus. & Prof. Code § 21625 *et seq.*

105 *Id.* at 511.

B. Fourth Appellate District Affirms Limits on Statewide Jurisdiction for District Attorneys

Abbott Laboratories, Inc. v. Superior Court (Rackauckas)[106]

A county district attorney (represented by private contingent-fee counsel) brought a UCL action against pharmaceutical manufacturers alleging a conspiracy to prevent generic versions of prescription drugs from reaching the market. On appeal after the trial court denied defendants' motion to strike, the Fourth Appellate District held that a county district attorney does not have extraterritorial jurisdiction to recover statewide monetary relief under the UCL, a view supported by the California Attorney General and the California District Attorneys Association (CDAA).

The court concluded: "[W]ith respect to civil actions, a district attorney has no plenary power . . . Rather, it is settled that a 'district attorney has no authority to prosecute civil actions absent specific legislative authorization . . .'"[107] Here, "[t]here is no indication the Legislature sought to write the UCL so broadly as to permit county district attorneys to collect penalties from violations occurring outside their county boundaries for their own county treasurers. To the contrary, it is reasonable to conclude the Legislature intended to prevent local prosecutors from "step[ping] outside [their] jurisdictional boundaries . . . in order to recover extraterritorial civil penalties," which would "raise . . . concerns that scarce government resources might be wasted on duplicative, overlapping, and competitive investigations of possible [violations]."[108]

"[T]he District Attorney is free to enter into agreements with the Attorney General or sister district attorneys to obtain a delegation of authority, or engage in joint prosecutions, where the District Attorney believes there is public benefit to a multi-jurisdictional action."[109]

The underlying issue in *Abbott Laboratories* is the concern over the recent phenomenon of private contingent-fee counsel approaching unwary district attorneys or city attorneys, seeking access to public UCL/FAL authority in order to bring actions the private attorneys cannot pursue today under Proposition 64. For example, in 2015 the district attorney for Trinity County (population 13,000) was convinced to hire private contingent-fee counsel—in disregard of AG and CDAA ethical norms—and then claimed sole authority to bring the Volkswagen diesel case for the entire state of California. The California Attorney General's Office and CDAA have consistently held such contingent-fee compensation to be improper in public enforcement actions under longstanding ethical principles (see discussion, below).

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106 24 Cal. App. 5th 1 (2018); review granted, order requesting depublication denied, 237 Cal.Rptr.3d 178 (2018).

107 *Id.* at 20.

108 *Id.* at 28; *People v. Hy-Lond Enterprises, Inc.*, 93 Cal. App. 3d 734 (1979).

109 *Id.* at 20.

C. Contingent-Fee Arrangements in Public UCL/FAL Enforcement Actions

California District Attorneys Association and Attorney General policy on prosecutorial neutrality. The ethical norms of CDAA and the California Attorney General's Office prohibit the use of outside private contingent-fee counsel in three types of public enforcement actions, including cases where ongoing business activity is challenged under statutes such as the UCL and FAL. This policy is not based on due process concerns but rather on the California legal and ethical principles adopted by the California Supreme Court in *County of Santa Clara* v. *Superior Court*[110] and *People ex rel. Clancy v. Superior Court*,[111] CDAA's ethical manual provides:

> **"IX. Prosecutorial neutrality.** Prosecutorial neutrality is required in those civil law enforcement actions where important constitutional concerns are implicated, ***ongoing business activity is threatened***, or there is a threat of criminal liability. Private contingent fee attorneys may not appropriately represent the People in such cases. One or more of these issues are commonly present in consumer and environmental civil law enforcement actions brought by prosecutors on behalf of the People. (*County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35.); see also *People ex rel. Clancy v. Superior Court* (1985) 3 Cal.3rd 740."[112]

In this regard, the California Supreme Court has cited with approval the *ABA Standards for Criminal Justice, Prosecution Function* [comment to former Std. 2.3(e)]: "'It is clear that [case-by-case] fee systems of remuneration for prosecuting attorneys raise serious ethical and perhaps constitutional problems, are totally unacceptable under modern conditions, and should be abolished promptly.'"[113]

American Bankers Management Co., Inc. v. Heryford.[114] Private class-action law firms from Texas persuaded the District Attorney of Trinity County (population 13,000) to hire them on a contingent-fee basis to bring UCL actions in federal court against national credit-card firms. Defendants sought dismissal on federal due process grounds, but the Ninth Circuit rejected that due process challenge. Analogizing to False Claims Act principles, the court concluded: "[W]e hold that the contingency-fee arrangement at issue here does not offend [federal] due process" principles.[115]

However, the Ninth Circuit acknowledged the separate California ethical standards for such matters, and refused to merge the two sets of principles: "Similarly, the California Supreme Court's decisions in *People ex rel. Clancy v. Superior Court*, 39 Cal.3d 740 (1985), and *County of Santa Clara v. Superior Court*, 50 Cal.4th 35 (2010), were based not on federal

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110 50 Cal. 4th 35 (2010).

111 3 Cal. 3d 740 (1985).

112 CDAA, *Professionalism* (2016), Ch.XI, Part IX; emphasis added.

113 *County of Santa Clara v. Superior Court*, *supra*, 50 Cal.4th at 49.

114 885 F.3d 629 (9th Cir.2018).

115 *Id.* at 637.

due process principles, but on 'the courts' general authority "to disqualify counsel when necessary in the furtherance of justice.'"[116]

D. First Appellate District Opinion Creates Split of Authority on Jury Trial Right in UCL Actions

Nationwide Biweekly Administration, Inc. v. Superior Court (People)[117]

Creating a split among California courts, the First District held defendants in UCL public enforcement actions have a right to jury trial as to liability: "[T]he 'gist' of the statutory causes of action asserted against [defendants] are legal, thereby giving rise to a right to jury trial. However, following the approach taken by the United States Supreme Court in *Tull v. United States* (1987) 481 U.S. 412 . . . we also conclude the right to jury trial extends only to the issue of liability and that the amount of statutory penalties, as well as whether any equitable relief is appropriate, is properly determined by the trial court."[118]

Numerous appellate courts over the past forty years have held that UCL actions brought by the People are primarily equitable in nature and should be decided by a trial court, not a jury.[119] *Nationwide Biweekly* thus creates a substantial split of authority on this important procedural issue, and the California Supreme Court, which granted review on September 19, 2018, will now address that split.

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116 *Santa Clara*, 50 Cal. 4th at 48 [quoting *Clancy v. Superior Court*] (*American Bankers Management Co., Inc. v. Heryford, supra*, at 638, n. 12.).

117 24 Cal. App. 5th 438 (2018), review granted, S250047, Sept. 19, 2018.

118 *Nationwide Biweekly Administration, Inc. v. Superior Court*, supra, at 470–471.

119 See, *e.g., People v. First Federal Credit Corp.*, 104 Cal. App. 4th 721 (2002); *People v. Bestline Products, Inc.*, 61 Cal. App. 3d 879 (1976); *People v. Witzerman*, 29 Cal. App .3d 169 (1972); see also, *People v. Superior Court (Kaufman)*, 12 Cal. 3d 421, 431, n. 9 (1974).

CALIFORNIA AND FEDERAL ANTITRUST LAW UPDATE: PROCEDURAL DEVELOPMENTS

By J. Thomas Greene[1]

I. SERVICE

Parties May Not "Contract Around" Service Requirements of the Hague Convention

Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., Ltd.[2]

This appeal had its origin in a failed investment by an American investment fund in a Chinese company that was to produce fonts for various languages. Once the deal went south, Rockefeller Technology, the investor, pursued contractual arbitration in Los Angeles against Changzhou SinoType, the font maker. The Chinese company asserted that the writing that Rockefeller relied on was not an agreement but a 'bei wang lu,' or a summary of negotiations up to the date the writing was signed but not a binding contract.[3] Ultimately Changzhou refused to participate in the arbitration and a $414 million default judgment was entered against it.

Fifteen months later, Changzhou challenged the arbitrator's decision, arguing that service by mail (which was referenced in the writing that Rockefeller asserted was a memorandum of understanding) was contrary to the Hague Service Convention. Changzhou further argued that since "no personal jurisdiction [was] obtained . . . the resulting judgment [is] void as violating fundamental due process." (*Id*. at 120; citation omitted).

The court conducted a careful textual analysis of the Hague Service Convention, which provides that service can be effectuated "by a particular method requested by the applicant unless such method is incompatible with the law of the State addressed." Hague Service Convention, 20 U.S.T. 361, 362-363, reprinted in 28 U.S.C.A Fed. R. Civ. P. 4, note at 130 (West Supp. 1989). Since China had objected to service by mail, the agreement—assuming there was an agreement—did not and could not sidestep the plain text of the Convention. The court concluded that parties may not "contract around" the Convention's service requirements. *(Id*. at 131-133.)

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1 Thomas Greene is a trial attorney for the Antitrust Division of the U.S. Department of Justice. The views expressed here are those of the author and do not necessarily reflect those of the Antitrust Division or the U.S. Department of Justice. These are a selection of developments prepared for presentation at the Golden State Institute on November 8, 2018, reflecting developments as of that date.

2 24 Cal. App. 5th 115 (2018), *rev. granted*, 2018 Cal. LEXIS 7239, 238 Cal. Rptr. 3d 118 (Sep. 26, 2018).

3 The court explained that a "'bei wang lu' is a memorandum of understanding between the parties that records the current state of negotiations but does not create a binding contract. The court noted three other potential writings used in commercial negotiations in China. A 'yi xiang shu' is a letter of intent to enter into a contract. A 'xie yi' is an agreement which is usually, but not always, binding. And a 'he tong' which is a formal contract that is legally binding. (*Id*. at 124.)

This case could be a sleeper. Although couched in careful analysis, the court's conclusion will be surprising to many lawyers handling international trade disputes. The California Supreme Court has granted review, so further insights on these issues can be expected in 2019. Review was restricted to one question: "Can private parties contractually agree to legal service of process by methods not expressly authorized by the Hague Convention?"

II. FORUM NON CONVENIENS

Forum Selection Agreement Does Not Foreclose Dismissal under Forum Non Conveniens Doctrine

Quanta Computer Inc. v. Japan Communications Inc.[4]

Plaintiff, a Taiwanese company, entered into a contract to manufacture and sell cellular telephones to defendant, a Japanese company. The parties' contract included a forum selection clause providing that any dispute be resolved in a California court under California law. "Nothing in the creation, performance, or alleged breach of the contract [had] any connection to California." (*Id.* at 441.)

The Second District Court of Appeal concluded that the forum selection clause conferred jurisdiction on California state courts (*Id.* at 448) but given the lack of contacts with California it could not require California courts to hear disputes under the contract. The appellate court agreed with the trial court that the parties had alternate, adequate forums in Japan, Taiwan and Singapore, and that U.S. Supreme Court authority holds that "the jurisdiction with the greater interest should bear the burden of entertaining the litigation." (*Id.* at 448) (citing *Piper Aircraft Co. v. Reyno*, 445 U.S. 235, 260-261 (1981)). In this case, the availability of alternative forums and the lack of contacts with California supported dismissing the case without prejudice based on the doctrine of forum non-conveniens. (*Id.)*

Of particular interest to those dealing with international arbitrations, the court discusses at length a prior provision in the Code of Civil Procedure (Code Civ. Proc. § 410.30(b)), which waived forum non-conveniens challenges in order to "attract to our legal community international transaction[s]-particularly international arbitrations." (*Id.* at 449; citation omitted). However, this provision was subject to a sunset clause and was not re-enacted, so it was no longer applicable. (*Id.)*

III. FOREIGN LAW

U.S. Courts Not Required to Treat a Submission from a Foreign Government Concerning its Law as Conclusive Under Fed. R. Civ. P. 44.1

Animal Sci. Prods. V. Hebei Welcome Pharm. Co.[5]

This case arose in the context of private litigation concerning vitamin C price fixing. Two Chinese defendants asserted that their collective decision to increase prices

4 21 Cal. App. 5th 438 (2018).

5 __ U.S. __, 138 S. Ct. 1865, 201 L.Ed.2d 225 (2018).

and reduce output was compelled by the Chinese Ministry of Commerce. Based on this predicate, the defendants asserted that they were shielded from U.S. antitrust law by: (1) the act of state doctrine; (2) the foreign sovereign compulsion doctrine; and (3) principles of international comity

The basis for these defenses was an amicus brief filed on behalf of the Chinese Ministry of Commerce that asserted that "the conspiracy in restraint of trade alleged by U.S. purchasers was in fact 'a regulatory pricing regime mandated by the government of China.'" *Animal Sci. Prods.*, 201 L. Ed. 2d at 229.

The legal issue before the Supreme Court was whether U.S. courts are required under Fed. R. Civ. P. 44.1 to conclusively accept a foreign government's construction of its own law. The answer was a unanimous "no."

Although federal courts should "carefully consider a foreign state's views about the meaning of its own laws [] a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials." (*Id.* at 233-234; citations omitted).

Under Rule 44.1, the scope and meaning of foreign law is a question of law (*id.* at 232) and review on appeal is de novo. (*Id.)* "Relevant considerations," for reviewing courts, "include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions. (*Id.* at 234.)

Using these factors, the Court determined that the amicus brief did not properly state the law of China. The Court gave particular weight to the statement of Chinese authorities that with China's entry into the World Trade Organization (WTO), it had "'g[i]ve[n] up export administration of vitamin C.'" (*Id.)*

This decision clarifies the weight and factors to be used in assessing the statements of foreign jurisdictions about their own law. As such, this decision provides much needed clarity to potentially case-determinative legal issues.

IV. CALIFORNIA'S ANTI-SLAPP STATUTE IN FEDERAL COURT

Planned Parenthood Fed. of America, Inc. v. Ctr. For Med. Progress[6]

This case arises from undercover operations mounted by an anti-abortion advocacy group. Planned Parenthood, the plaintiff, asserted that operatives for the Center for Medical Progress "Had used fraudulent means to enter into their conferences and gain meetings with their staff for the purpose of creating false and misleading videos that were disseminated on the internet." (*Id.* at 831.) In addition, Planned Parenthood alleged that

6 890 F.3d 828 (9th Cir. May 16, 2018), *modified*, 897 F.3d 1224 (9th Cir. Aug. 1, 2018).

the Center had unlawfully recorded the conversations of its physicians while at meals.[7] Defendant Center for Medical Progress asserted that its actions were protected by the First Amendment or otherwise lawful.

The Center challenged the suit in federal court under California's anti-SLAPP statute[8], filing a special motion to strike under Cal. Civ. Proc. Code § 425.16. This statute is designed to protect "a person's right of petition or free speech," the Center's core defense. Under this California law, a successful SLAPP motion can lead to immediate dismissal or an immediate appeal, during which time further proceedings, including discovery, are stayed. (*Id.* at 832-833.)

In parsing the potential conflicts between the anti-SLAPP law and the federal rules, the court concluded that:

> [W]e hold that, on the one hand, when an anti-SLAPP motion to strike challenges only the legal sufficiency of a claim, a district court should apply the Federal Rule of Civil Procedure 12(b)(6) standard and consider whether a claim is properly stated. And on the other hand, when an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Federal Rule of Civil Procedure 56 standard will apply. But in such a case, discovery must be allowed, with opportunities to supplement evidence based on the factual challenges, before any decision is made by the court. A contrary reading of these anti-SLAPP provisions would lead to the stark collision of the state rules of procedure with the governing Federal Rules of Civil Procedure while in a federal district court. In this context, if there is a contest between a state procedural rule and the federal rules, the federal rules of procedure prevail. (*Id.* at 834.)

This is a thoughtful decision that provides useful guidance on the use of anti-SLAPP procedures in federal court.

V. CLASS ACTIONS

SCOTUS Limits Tolling of Statutes of Limitation for "Stacked" Class Actions

China Agritech, Inc. v. Resh[9]

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7 For example, Center operatives recorded the conversation of two Planned Parenthood physicians without their consent while they were eating lunch. Planned Parenthood argued that this violated California's all-parties consent requirement for recordings. Cal. Pen. Code §§ 632,634. The Center responded that the recording was proper because either (1) the conversation was in a public place or (2) the conversation was in aid of violations of law so the Center, arguably, came within the law enforcement exception to the all-parties rule in the statute. (*Id.* at 832.)

8 SLAPP stands for Strategic Litigation Against Public Participation. The statute was designed to protect public advocacy though a discovery freeze and immediate appeals of denials of SLAPP motions to state appellate courts.

9 __ U.S. __, 138 S. Ct. 1800 (2018).

This case is about equitable tolling in the class action context. Under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), the timely filing of a class action tolls the statute of limitations for all persons included in the class complaint. If the class is not certified such persons can intervene as individual plaintiffs in the still-pending action. The question presented in *Resh* is "whether *American Pipe* tolling applies not only to individual claims, but to successive class actions as well." (*Id.* at 1801.)

Writing for a unanimous Court, Justice Ginsberg concludes that "Our answer is no." (*Id.* at 1804.) She writes: "*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or file individual claims if the class fails. But *American Pipe* does not permit the maintenance of a follow-on class action past the expiration of the statute of limitations." *(Id.)*

The Court rejects a plaintiff-friendly analysis from the Ninth Circuit on the grounds of precedent and policy in Rule 23 favoring early resolution of class certification. She concludes: "The watchwords of *American Pipe* are efficiency and economy of litigation, a principal purpose of Rule 23. Extending *American Pipe* tolling to successive class action claims does not serve this purpose." (*Id.* at 1811.)

What does serve that purpose is the filing of "multiple" class actions, "[a]nd sooner rather than later filings are just what Rule 23 contemplates." Such filings, she argues, "may aid a district court in determining, early on, whether class treatment is warranted and, if so, which of the contenders would be the best representative." (*Id.*)

This case strongly militates in favor of filing competing or partially competing class actions early in the life of a case, even though such "[m]ultiple timely filings might not line up neatly" and could be "filed in different districts, at different times—perhaps when briefing on class certification has already begun." *(Id.)*

CAFA Exception for Local Controversies Requires Evidence that Two-Thirds or More of the Proposed Class are Citizens of the Forum State

King v. Great Am. Chicken Corp.[10]

The Class Action Fairness Act generally provides that class actions filed in state courts may be removed to federal court when (i) the aggregate amount in controversy is over $5 million; (ii) there are more than 100 putative class members; and (iii) any member of the class of plaintiffs is a citizen of a state different from any defendant. (28 U.S.C. § 1332(d)(2)(A), (d)(4)(B).)

However, a district court must decline jurisdiction under the local controversy exception in 28 U.S.C. § 1332(d)(4)(A) and the home-state controversy exception in 28 U.S.C. § 1332(d)(4)(B). To invoke either exception, one must prove that "two-thirds or more of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed." (28 U.S.C. § 1332(d)(4)(A(i)(I).)[11]

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10 *903* F. 3d 875 (9th Cir. 2018).

11 Subdivision 1332(d)(4)(B) reads "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."

Here, defendant rebuffed discovery related to the citizenship of the class but stipulated that "at least two-thirds (at least 67%) of the putative class are shown with addresses in California." (*Id.* at 877). The trial court refused to order discovery but did remand the case to state court based on the stipulation. (*Id.)*

"The burden of establishing that a CAFA exception applies . . . is on the party seeking to remand." (*Id.* at 878.) But, the Ninth Circuit opined that the "burden of proof placed upon a plaintiff should not be exceptionally difficult to bear." (*Id.*; citation omitted). Notwithstanding this low hurdle, here, the court did not think that the plaintiff had carried its burden because the stipulation could be read as only agreeing that the plaintiff barely met the 2/3's standard numerically and (i) even a small number of non-citizens would mean that the standard was not met and (ii) even a few class members emigrating to other states would likewise mean that plaintiff could not meet its burden.

While there was an "impression" that the plaintiff had met her burden, it was "guesswork." (*Id.* at 880.) The court denied the remand back to state court but directed the district court to give plaintiff reasonable discovery on the citizenship of class members. In the alternative, if defendant claims that the burden of such discovery is "onerous," "it is free to propose a stipulation that would better address [plaintiff's] burden. (*Id.* at 881.)

This decision nicely lays out a discovery roadmap to support remanding state class action back to state court based on the local controversies doctrine.

Rule 23 Amended in Latest Revisions of the Federal Rules of Civil Procedure

Amendments to Fed. R. Civ. P. 23 became effective on December 1, 2018.

Rule 23(c)(2)(B) is amended to provide that notices to the class or putative class should "the best notice practicable under the circumstances." Recognizing modern methods of communications, the rule recognizes that notice may be given by U.S. mail, electronic means, or other appropriate means. The Advisory Note suggests that court should consider the "means or combination of means most likely to be effective in the case before the court." The rule requires that notices must be clear and concise, in plain, easily understood language." The Advisory Note comments that what is appropriate will depend on the likely audience, noting that a notice in a securities fraud action may be different from a general consumer case.

Rule 23(e) is amended with respect to notices and approval of settlements. Parties are obligated to provide sufficient information to the court to enable it to determine if notice is appropriate, and notice is only appropriate if the court can approve the settlement and certify the settlement class or classes. (Rule 23(e)(1).) Parties must identify any agreement made in connection with the proposed settlement. (Rule 23(e)(3).) A settlement notice must also give class members or putative class members a new opportunity to be excluded. (Rule 23(e)(4).)

Rule 23(e)(1) frontloads the settlement approval process by requiring parties to provide the court with "information sufficient to enable the court to determine whether to give notice if the [settlement] proposal to the class."

Rule 23(e)(2) provides a summary of procedural and substantive factors that the court should use in assessing a settlement. According to the Advisory Note, this was written to "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." These factors are identified as "core" considerations but this list does not preclude or displace any additional factors that have been mandated by various circuits.

Objectors must "state with specificity the grounds for their objections." (Rule 23(e)(5).) The Advisory Note states that "objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them." Payments for forgoing or withdrawing an objection to the settlement are prohibited. (Rule 23(e)(5).)

An amendment to Rule 23(f) makes clear that the decision to direct notice to the class or putative class "does not grant or deny class certification," therefor, "an appeal under this rule is not permitted."

These are smart, clarifying amendments to this critical rule.

Sargon Standard of Admissibility for Expert Opinion Applies to All California Proceedings, including Class Certification

Apple v. Superior Court[12]

This was a putative class action on behalf of purchasers of iPhone 4's and 5's. Plaintiffs claimed that a defective power button, also known as the sleep/wake button, reduced the value of these phones. At issue in this appeal was expert testimony supporting class certification.

The trial court decided that it did not need to analyze the expert opinion supporting certification under *Sargon Enterprises, Inc. v. Univ. of S. Cal.*, 55 Cal.4th 747 (2012). *Sargon* updated analysis of the admissibility of expert opinion under California Evidence Code § 802, strengthening the role of state trial judges as gatekeepers for unreliable expert opinion.[13] Despite challenges by Apple to plaintiffs' experts on the grounds of expertise, use of improper inputs and an unreliable methodology, the trial court determined that *Sargon* only applied at trial, and so a *Sargon* analysis was unwarranted

The court of appeal rejected this analysis, concluding that 'there is only one standard for admissibility of expert opinion evidence in California. *Sargon* describes that standard." (*Apple,* 19 Cal. App.5th at 1106.) The court noted that at class certification, a "court may find that it need not rule on the admissibility of certain expert opinion evidence offered in connection with class certification because it is irrelevant or unnecessary for its decision [] But where, for example, expert opinion evidence provides that basis for a plaintiff's arguments regarding numerosity, ascertainability, commonality, or superiority

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12 19 Cal. App. 5th 1101 (2018).

13 The court summarized *Sargon* as requiring that a trial court act "as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Id.* at 117.) (citing *Sargon*, 55 Cal. 4th at 771-772.)

(or a defendant's response thereto), a trial court must assess that evidence under *Sargon*." (*Id.* at 1120.)

Although the appellate court stated that there was "at least a reasonable chance" that one of plaintiff's experts could be excluded under *Sargon* (*Id.* at 1123), the case was remanded for reconsideration in light of this opinion. (*Id.* at 1126.)

State Legislature Adjusts Cy Pres Rules

SB 847 (Committee on Budget and Fiscal Review), Ch. 48, Statutes of 2018

SB 847 is a budget bill that was signed into law by Governor Brown on June 27, 2018. Although budget bills are not typically substantive, this legislation amends California Code of Civil Procedure section 354 with respect to *cy pres* remedies in class actions. This replaces language inserted in this same section in a 2017 budget bill. (AB 103 (Committee on Budget).) The major difference is that in the 2017 amendments, 25% of unspent funds went to the Equal Access Fund of the Judicial Branch. This year's version emphasizes the need to fund nonprofit organizations whose work "will benefit the class or similarly situated persons." Indigent legal services are listed but not given a preferential set-aside.

VI. DISCOVERY AND PRIVACY

A. European Union's General Data Privacy Regulation Now Effective; Implications for U.S. Discovery

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016[14]

European Data Protection Board, *Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/6779*, Adopted 25 May 2018[15]

The European Union's sweeping General Data Privacy Regulation (GDPR) became effective on May 25, 2018. (GDPR art. 99(2).) The GDPR was intended to replace prior EU and member state privacy laws.[16] (GDPR recitals 9-13.) The GDPR could have a significant impact on criminal and civil discovery in the United States and sets the stage for constitutional litigation on its potential extraterritorial impact on U.S. courts. Despite its sweep and importance, however, the GDPR is not a beacon of clarity.[17]

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14 https://eur-lex.europa.eu/legal- content/EN/TXT/?uri=uriserv%3AOJ.L_.2016.119.01.0001.01.ENG.

15 https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines- 22018-derogations-article-49-under-regulation_en.

16 German authorities took advantage of what appear to be minor opportunities for member states to implement the GDPR to add back privacy requirements and remedies that were not brought forward from prior EU privacy statutes. Federal Date Protection Act (June 20, 2017), https://iapp.org/resources/article/the-german-act-to-adapt-data-protection-law-to-regulation-eu-2016679-and-to-implement-directive-eu-2016680-english/. Whether the German statute is consistent with the GDPR is likely to be tested by the consistency mechanism contained in the GDPR itself. GDPR art. 63 et seq.; *see also* Sontje J. Hillberg & Marie Leutloff, *The New German Privacy Act*, Deloitte, *https://www2.deloitte.com/dl/en/pages/legal/articles/neues-bundesdatenschutzgesetz.html.*

17 Alison Cool, Op-Ed, *Europe's Data Protection Law is a Big, Confusing Mess*, N.Y. Times (May 15, 2018), https://www.nytimes.com/2018/05/15/opinion/gdpr-europe-data-protection.html.

The protection of personal data is a fundamental right in the European Union. (GDPR recital 1, citing Charter of Fundamental Rights of the European Union, Art. 8(1) and Treaty on the Functioning of the European Union, Art. 16(1).) The GDPR "lays down rules relating to the protection of *natural persons*" with respect to their "*personal data*." (GDPR art. 1; emphasis added.)[18]

"Personal data" is broadly defined to include: "any information relating to an identified or identifiable natural person ('data subject"); an identifiable natural person who can be identified directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more specific factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person." (GDPR art. 4(1).). Additional protections are extended to "special categories of information," that include racial data, political opinions genetic data, data concerning health or a natural person's sex life or sexual orientation. (GDPR art. 9.) The law also provides special protection to the information of children. (GDPR recital 38, GDPR art. 8; conditions applicable to a child's consent to processing.).

European data regulators have a broad range of enforcement tools. These range from warnings to reprimands to issuance of corrective orders. (GDPR art. 58.) They can also impose fines. For the most egregious violations of the regulation, penalties can be up to 20 million euros or 4% of worldwide sales, whichever is higher. (GDPR art. 83(5).) A private right of action for "compensation" is provided for infringement of the regulation. (GDPR art. 82(1).)

The GDPR guarantees privacy rights that are far more extensive than those available under U.S. law. These include:

- Right to information about whom to contact about one's data. (GDPR art. 14.)
- Right to information about what data is being collected and what it will be used for. (*Id.)*
- Right to access the information collected. (GDPR art. 15.)
- Right to rectification, that is, the right to review and correct inaccurate information (GDPR art. 16.)
- Right to erasure, also known as the right to be forgotten. (GDPR art. 17.)

Limits on processing of personal data apply broadly to:

- Processing of data by or for a controller or processor in the EU, "regardless of whether the processing takes place in the Union or not." (GDPR art. 3(1).)
- Processing of personal data of "data subjects who are in the Union" by a controller or processor *not* established in the Union if (a) the processing is related to the offering of goods and services" in the EU, even if no payment is made by

18 The regulation "does not cover the processing of personal data which concerns legal persons and in particular undertakings [i.e. businesses] established as legal persons." (GDPR recitals 14.)

the data subject or (b) the monitored behavior "takes place within the Union." (GDPR art. 3(2).)

- The data subject has given knowing consent or processing is in accordance with legal requirements. (GDPR art. 6.)

Only knowing consent is adequate and notices must be "clear and in plain language." *(Id.)* This means that "[n]atural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing." (GDPR recital 39.) And it "shall be as easy to withdraw as to give consent." (GDPR art. 7.)

Discovery-Related Provisions

Within the parlance of the GDPR, U.S.-based discovery is a demand for a "transfer" of protected data to a "third country," here the U.S. (GDPR art. 44.) Such transfers, including subsequent "onward" transfers to another third country, may take place "only if, subject to the other provisions of this Regulation [and], the conditions laid down in this chapter are complied with." (*Id.*)

Alternative approaches include:

- Transfers based on an adequacy decision, that is, a determination by EU data authorities that the third country meets minimum privacy rules, including enforcement structures that are analogous to the GDPR. (GDPR art. 45.) The U.S. is not such a jurisdiction.

- Transfers subject to appropriate safeguards. (GDPR art. 46.) The EU-U.S. Privacy Shield agreement provides a framework within which companies willing to bind themselves to, among other things, liability for violations of privacy rules can receive EU personal information.[19] Large and small companies have already been certified under this agreement.[20]

- Binding corporate rules. Specific model corporate rules can also be used as a basis for transferring EU personal data to a third country. (GDPR art. 47.)

- Transfers based on an international agreement. (GDPR art. 48.) The example used is a mutual legal assistance treaty [MLAT] in force between the requesting third country and the EU or a Member EU State. This provision is not exclusive and is specifically "without prejudice to other grounds for transfer." (*Id.*)

- Derogations for specific situations. (GDPR art. 49.) These are the most important for litigators. A "derogation" in this context is a qualified exception to the GDPR. These derogations have been usefully analyzed by the European Data Protection Board ("GDPB)") in a guidance document issued on the effective

19 *See* Privacy Shield Framework, https://www.privacyshield.gov/welcome.

20 *See* Privacy Shield List, https://www.privacyshield.gov/list.

date of the GDPR.[21] Article 49 provides a series of alternative ways to transfer personal data subject to the GDPR to a third country, including:

- When the data subject has "explicitly consented" to the transfer after being informed of the possible risks of the transfer. (GDPR art. 49(1)(a).) However, the EDPB says it is "essential" that in seeking consent data subjects be informed of the "specific risks resulting from the fact that their data will be transferred to a country that does not provide adequate protection and no adequate safeguards aimed at providing protection for the data are being implemented." (EDPB Guidelines at 7.)

- When the "transfer is necessary for important reasons of public interest." (*Id.* at (d).) The EDPB recognizes that this provision may be used by both public and private entities. "The essential requirement" of this provision is the "finding of an important public interest and not the nature of the organization (public, private or international organization) that transfers and/or receives the data." (EDPB Guidelines at 11.)

- When "the transfer is necessary for the establishment, exercise or defence[22] of legal claims. (GDPR art. 49(1) (e).) "This covers a range of activities for example, in the context of a criminal or administrative investigation in a third country (e.g. anti-trust law, corruption, insider trading or similar situations)." (EDPB Guidelines at 11.) What is "necessary" "This 'necessity test' requires a close and substantial connection between the data in question and the specific establishment, exercise or defense of the legal position." (*Id.* at 12; see also GDPR recital 111) (transfer must be "necessary in relation to a contract or a legal claim").

The GDPR does not limit the article 49 derogation to occasional use. (GDPR art. 49(1)(e).) However, the EDPB suggests that such a limit exists based on a recital in the GDPR. (EDPB Guidelines at 11.)

The Art. 49(1)(e) "derogation can apply to activities carried out by public authorities in the exercise of their public powers (Article 49(3)." (EDPB Guidelines at 11.)

- Finally, a savings provision provides that a transfer can be made if "not repetitive, concerns only a limited number of data subject, is necessary for the purposes of compelling legitimate interests pursued by the controller which are not overridden by the interests or rights and freedoms of the data subject" and the controller provides "suitable safeguards" and informs supervising government agencies and the data subject of the transfer. (GDPR art. 49(1), second subparagraph.) This appears to be a savings provision that makes possible transfers not contemplated by other articles of the GDPR, but only under highly restrictive circumstances. (EDPB Guidelines at 14-17.)

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21 European Data Protection Board, *Guidelines 2/2018 on derogations of Article 49 under Regulation 206/679* (May 25, 2018), https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22018-derogations-article-49-under-regulation_en . (hereafter "EDPB Guidelines").

22 The English text of the GDPR consistently uses U.K. spelling conventions.

- An example of a compelling interest "might be the case if a data controller is compelled to transfer the personal data in order to protect its organization or systems from immediate harm or from a severe penalty which would seriously affect its business." (EDPB Guidelines at 15.)

- "Safeguards might include . . . measures aimed at ensuring deletion of the data as soon as possible after the transfer, or limiting the purposes for which the data may be processed following the transfer." (EDPB Guidelines at 16.)

Extraterritorial Application of the GDPR?

Push comes to shove with the GDPR when a responding party refuses to either protect information by way of a litigation hold in Europe or refuses to turn over EU information in a U.S. legal action. This is not unplowed ground.

The key U.S. Supreme Court case is *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist.*, 482 U.S. 522, 544, n. 29 (1987). At issue in *Aerospatiale* was a French blocking statute that imposed titular criminal penalties on French companies that responded to U.S. discovery. The court conducted a comity analysis and rejected the French statute as a limit on U.S. discovery.[23]

More recent cases use this same analysis. Two cases involving the German privacy law that predated the GDPR are particularly salient. In *Pershing Pac. West, LLC v. MarineMax, Inc.,* 2013 U.S. Dist. LEXIS 33473 (S.D. Cal Mar. 11, 2013), the court conducted a searching comity analysis and rejected the German law as determinative. Two points are important. First, the demanding party could demonstrate that alternate sources of relevant information were inadequate, so the requests were necessary. (*Id.* at *21.) Second, in balancing the respective national interests, the court found that the disputed discovery sought documents related to the subject of the dispute, diesel engines. "Any personal information of German citizens," the court wrote, "contained in any documents can be redacted, subject to a subsequent in camera review if necessary. Alternatively, a protective order can be requested." (*Id.* at *26.)

In *St. Jude Med. S.C. v. Janssen-Counotte*, 104 F. Supp. 3d 1150, 1165 (D. Or. 2015), the court likewise determined the necessity of the discovery requested, noting that "Germany's interest in prohibiting disclosure of documents that incidentally contain personal data is, by the very terms of the Directive, tempered by countervailing interests in the efficient conduct of discovery under judicial supervision and the just resolution of litigation. Indeed, these interests are shared by the United States." As in *MarineMax*, the court focused on the need for the requested documents (*id.* at 1166), and concluded that analysis of the comity factors favored discovery.

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23 The EU's Advocate General argued to the European Court of Justice, the equivalent of the U.S. Supreme Court, that the right to be forgotten should not apply globally, specifically rejecting extraterritorial application of a precursor of the GDPR. *See* Press Release, Court of Justice of the European Union, Advocate General Szpunar proposes that the Court should limit the scope of the dereferencing that search engine operators are required to carry out to the EU, Release No. 2/19 (Jan. 10, 2019), https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-01/cp190002en.pdf; *see also* Owen Bowcott, *'Right to be forgotten' by Google should apply only in EU, says court opinion*, The Guardian (Jan. 10, 2019), https://www.theguardian.com/technology/2019/jan/10/right-to-be-forgotten-by-google-should-apply-only-in-eu-says-court.

Approaching Discovery in a GDPR World

The GDPR does not spell the doom of discovery of EU-based documents and records. If responding parties have not or cannot assuage EU privacy concerns by (i) getting consent from data subjects, (ii) joining the Privacy Shield or (iii) using binding standard contracts, the Article 49 derogations provide a useful alternative. The most useful provisions are in Article 49(1)(d) for "public interest' transfers and Article 49(1)(e) for transfers necessary for the "establishment, exercise or defence of legal claims."

Both provisions require a showing of necessity that dovetails nicely with the requirements of U.S. comity analysis. This suggests that litigants need to have good arguments about why the requested discovery is necessary. At least in *MarineMax* and *St. Jude,* this meant demonstrating that alternate sources of the needed discovery were unavailing.

Demanding parties may also be well served by having potential U.S. solutions for protecting private information. Protective orders such as those suggested by the magistrate judge in *MarineMax* may be good models. It will also make a demanding party's comity burden in a U.S. court easier if it can offer other orders that would protect private information in ways that are consistent with the standards of the GDPR.

In general, until the full contours of practice under the GDPR becomes clear, providing at least some of the protections available under the GDPR will ease the burden on responding parties in the European Union while sharpening and strengthening the arguments of demanding parties facing a comity analysis in U.S courts.

B. California Consumer Privacy Act Signed into Law

AB 375 (Chau), Ch. 55, Statutes of 2018

A new California law is substantially similar to the EU's General Data Protection Regulation. The California Consumer Privacy Act of 2018 enacts a framework for protecting personal information. This legislation displaces the earlier California Customer Records Act (codified at Civ. Code § 1798.81.5) that protected a person's name in conjunction with other data such as a Social Security number or credit card number. The new law will become effective on January 1, 2020. (Civ. Code § 1798.198.)

The new legislation ensures the following:

- The right to know what personal information is being collected
- The right to know if one's personal information is sold or disclosed and to whom
- The right to veto sales or disclosures of personal information to third parties
- The right to access their personal information
- The right to equal service and price if one exercises one's privacy rights.

"Personal information" is broadly defined to include any "information that identifies, relates to, describes, is capable of being associated with, or could be reasonably

linked, directly or indirectly, with a particular consumer or household. (Civ. Code § 1798.140(o).) The legislation provides for civil enforcement by the Attorney General. (Civ. Code § 1798.155.) It also provides a private cause of action for injured consumers. (Civ. Code § 1798.150.)

Nothing in the Act, however, restricts a firm's ability to comply with federal, state or local laws, or to comply with civil, criminal or regulatory inquiry, investigation, subpoena, or summons." (Civ. Code § 1798.145.) This should make this Act far less problematic to litigators than the GDPR.

One potential implication of the California Consumer Privacy Act is that it might be certifiable as an adequate privacy protection regime under GDPR Article 45. Even if formal certification were not obtained, the mere existence of this Act could be part of a comity analysis concerning the extraterritorial scope of the GDPR.

VII. STATE COURT TRANSCRIPTS

Verbatim Record Required in State Civil Actions for Those Who Qualify for Waiver of Initial Court Filing Fees

Jameson v. Desta[24]

In the aftermath of the financial crisis, the California Legislature dramatically cut court funding. One response in many courts was to force litigants to pay for their own court reporters. Previously, court reporters in state courts were covered by filing fees.

In this case, Chief Justice Cantil-Sakauye concluded that under California's in forma pauperis doctrine and Gov. Code § 68086(b), litigants who qualified for waiver of filing fees should also receive transcripts of their proceedings without charge. Although partly grounded on the Government Code, her analysis is sufficiently broad to potentially include low-income litigants who do not qualify for fee waivers under § 68086.

For trial courts across California, this is likely the most important case of the year because it forces them to find additional money in still constrained court budgets. That said, the Chief's arguments are compelling, particularly her discussion of litigants whose appeals were dismissed because they had no record of what happened in lower courts.

VIII. ARBITRATION

Arbitration Agreement Held Unconscionable

Baxter v. Genworth North America Corp. (*see* discussion, *supra*, in "Substantive Law")[25]

Legislature Clears Roadblock to International Commercial Arbitrations

SB 766 (Monning), Ch. 184, Statutes of 2018

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24 5 Cal. 5th 594 (2018).

25 16 Cal. App. 5th 713 (1st DCA, 2017).

Many international companies prefer to resolve commercial disputes with other international companies by arbitration. Unfortunately, California essentially forwent this work when the California Supreme Court was misunderstood to have concluded that non-U.S. lawyers participating in international arbitrations in California might be engaging in the unauthorized practice of law. (*Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119 (1998).) Although this was not a necessary reading of *Birbrower*, penalties under Cal. Bus. & Prof. Code § 6126 for the unauthorized practice of law in California are stiff: a fine of up to $1000; up to one year in county jail; or both. As a result, international arbitrations in California plummeted.

Chief Justice Cantil-Sakauye subsequently empaneled a special panel to investigate international commercial arbitrations in California and how standard practices in international arbitrations could be squared with California rules regulating lawyer competency. A major report by this panel led to what became SB 766.[26]

The new law provides that lawyers are qualified to represent clients in an international commercial arbitration if (i) they are admitted to a bar in a U.S. state or territory or (ii) admitted to practice in a foreign jurisdiction. Cal. Code Civ. Proc. § 1297.185. They may represent clients in an international commercial arbitration if, among other things, the work flows from representations of a company in the lawyer's home jurisdiction. Cal. Code Civ. Proc. § 1297.186. Non-California lawyers taking advantage of this new statute must agree to be subject to the California rules of professional responsibility where applicable to their work. Cal. Code Civ. Proc. § 1297.188. This legislation became effective on January 1, 2019.

For lawyers, this legislation creates new opportunities for work on international commercial arbitrations in California. This could be substantial. For example, in 2011, New York firms were expected to garner $400 million in fees for work on international commercial arbitrations.[27]

Although potentially lucrative, this is a technical area of law. For those new to international commercial arbitrations, the Supreme Court Task Force Report, noted above, is a good introduction to what is involved. For clients—ranging from high-tech giants to farmers and ranchers selling abroad—this creates the potential for their disputes to be resolved locally, as opposed to London, New York or Singapore. This means that they may need new arbitration provisions in their international contracts. Whether you are a California arbitrator or someone who counsels clients doing business internationally, this legislation is a big deal.

IX. CRIMINAL PROCEDURE

Service on Foreign Defendant that Provides Actual Notice Sufficient under Fed. R. Crim. P. 4

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26 International Commercial Arbitration Working Group, Report and Recommendations (April 10, 2017), https://newsroom.courts.ca.gov/news/court-working-group-recommends-proposal-for-international-commercial-arbitration.

27 Emily Sacher, *Losing the fight in dispute resolution*, Crain's (Oct 30, 2011), http://www.crainsnewyork.com/article/20111030/SUB/310309990/losing-the-fight-in-dispute-resolution.

In re Pangang Group Co. Ltd.[28]

This case arose from a prosecution of a Chinese company on charges of conspiracy to commit economic espionage, 18 U.S.C. § 1831(a), and attempted economic espionage. (18 U.S.C. § 1831(a)(3) and (4).) The issue before the court was the scope of Fed. R. Crim. P. 4(c)(3)(D)(ii) language that "a summons is served on an organization not within a judicial district of the United States . . . (ii) by any other means that gives notice . . ."

In this case, the Chinese government refused to effectuate service on its wholly owned company, defendant Panang. After a searching analysis of the text of the rule and the Advisory Committee Report, Circuit Court Judge Ikuta determined that service is effective if it gives notice notwithstanding its potential effect "on the practice of special appearances by criminal defendants." (*Id*. at 1058-1059.)

SCOTUS Appeal Mooted by Enactment of CLOUD Act

United States v. Microsoft[29]

This appeal arose from a law enforcement demand under the Stored Communications Act for e-mails related to a potential drug trafficking prosecution. Microsoft countered that since the e-mails were stored in its servers in Dublin, this was unlawful. The District Court ordered production of the disputed materials. (*In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp*., 15 F. Supp. 3d 466 (S.D. N.Y. 2014).) The Second Circuit reversed, concluding that requiring Microsoft to disclose the electronic communications in question would be an unauthorized extraterritorial application of the Stored Communications Act. (*In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp,* 829 F. 3d 197, 222 (2nd Cir. 2016).)

Last year the Supreme Court granted certiorari on the issue of whether, pursuant to the Stored Communications Act, 18 U.S.C. § 2703, a U.S. provider of e-mail services must disclose to the Government electronic communications under its control even if it stores the communications abroad. (*United States v. Microsoft Corp*., 583 U.S. __, 138 S. Ct. 356 (2017).)

Earlier this year, the Court concluded that this appeal was moot because of an intervening amendment to the Stored Communications Act had resolved this question. (*Microsoft*, 138 S. Ct. at 1188.) This amendment provides that:

> A [service provider] shall comply with the obligations of this chapter to preserve, backup, or disclose the contents of a wire or electronic communications and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record or other information is located within or outside of the United States. (Pub. L. 115-141, CLOUD Act § 103(a)(1); amending the Stored Communications Act, codified at 18 U.S.C. § 2701 *et seq*.)

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28 901 F. 3d 1046 (9th Cir. 2018).

29 584 U.S. __, 138 S. Ct. 1186 (2018).

This was a win for law enforcement but a disappointment to privacy advocates.[30]

California Supreme Court Finds That Stored Communications Act Allows Production of Information Configured as "Public"

Facebook, Inc. v. Superior Court (Hunter)[31]

This case arises from subpoenas from two criminal defendants seeking Facebook posts from their victim and a prosecution witness. After an extended analysis of the privacy protections guaranteed by Shared Communications Act, 18 U.S.C. § 2703, the California Supreme Court determined that (1) posts which were limited to specific "friends" could not be produced by Facebook, but that (2) "a provider may properly be subject to the burden of compliance with a subpoena when a user implicitly consents to disclose by configuring a social media communication as *public.*" (*Id.* at 1290; emphasis original).

Warrant Required to Obtain Cell-Site Location Information

Carpenter v. United States[32]

Cellular customers' devices interact with cell towers several times per minute. Each interaction is recorded and retained by cell service providers for their own business purposes. These time-stamped records connect a user to a specific tower at a precise time.

Under the Stored Communications Act, 18 U.S.C. § 2703(d), government officials can obtain this information when they can offer "'specific and articulable facts showing that there are reasonable grounds to believe' that the records are sought 'are relevant and material to an ongoing criminal investigation.'" (*Carpenter*, 138 S. Ct. at 2212.) No warrant was assumed to be required.

Defendant was charged with multiple counts of robbery and additional counts of carrying a firearm during the commission of a federal crime of violence. Cooperating witnesses testified that Carpenter was the leader of an operation that resulted in at least six robberies. Prosecutors used cell tower information to place defendant near four of these robberies. Defendant sought to suppress the cell tower information, arguing this information could only be obtained via warrant.

In an opinion authored by Chief Justice Roberts, the Court opined that the privacy issue at the heart of Carpenter's appeal "lie at the intersection of two lines of cases," one dealing with a person's expectation of privacy in his physical location and movements while the other line of cases holds that a person can have no reasonable expectation of privacy in information he voluntarily turns over to third parties. (*Id.* at 2215–2216.)

After an extended examination of these two lines of authority, the Court concludes that "[g]iven the unique nature of cell phone location information," the Government's

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30 *See* Matt Ford, *Congress may have just nixed a Supreme Court case on digital privacy,* New Republic (Mar. 25, 2018), https://newrepublic.com/minutes/147631/congress-may-just-nixed-supreme-court-case-digital-privacy.

31 4 Cal. 5th 1245 (2018).

32 __ U.S. __, 138 S. Ct. 2206 (2018).

acquisition of the cell-site records "was a search within the meaning of the Fourth Amendment." (*Id.* at 2220.)

The majority spends the rest of its opinion arguing that this decision is "a narrow one," commenting that it does not preclude access to so-called "tower dumps" (a download of information on all cellular devices connected to a particular cell tower during a particular period) or security cameras or business records and does not address surveillance involving foreign affairs or national security. (*Id.)*

In a dissent written by Justice Kennedy and joined by Justices Thomas and Alito, Kennedy argued that the majority's analysis could upend ordinary law enforcement access to financial information shared with banks and other financial information. (*Id.* at 2222 *et seq.*) Three other dissents—Justice Thomas, Justices Alito and Thomas, and Justice Gorsuch—forcefully critique that underpinnings and implications of the majority opinion. This spate of dissents forecasts further litigation arising from this decision.

Exclusion of Two Gay Veniremen Violates *Batson/Wheeler* Doctrine

People v. Douglas[33]

In this case, defendant Brady Dee Douglas was told by his former boyfriend, a male prostitute, that Jeffery B., the victim, had shorted him money following a prearranged sexual encounter. Defendant Douglas, with a co-defendant, then tracked down the victim and demanded payment. This was followed by a high-speed chase during which the defendant shot at the victim's car several times. A jury found Douglas guilty on various counts, including attempted second-degree robbery and assault with a semiautomatic firearm.

Two veniremen at trial were gay; both were dropped from the jury by prosecution peremptory challenges. When the prosecutor was challenged on these exclusions, he argued that there were reasons for dropping both jurors for reasons independent of their sexuality. But the prosecutor went on to say that since the victim was a closeted man, they might treat his testimony in a biased way. The trial court accepted these rationales; the court of appeal reversed.

In doing so, the Third District Court of Appeal rejected use of a more prosecution-friendly approach to "mixed" situations in which challenges are used for legitimate and illegitimate reasons. Instead, the court applied a per se rule under which a showing of any group bias violates *People v. Wheeler*, 22 Cal. 3d 258 (1978), the California equivalent of *Batson v. Kentucky*, 476 U.S. 79 (1986). (*Douglas*, 22 Cal.App.5th at 1175-1176.) On this basis, the appellate court ordered a new trial. (*Id.* at 1176.)[34]

33 22 Cal.App.5th 1162 (2018).

34 Note that peremptory strikes against protected classes may also be unlawful in civil proceedings. *See, e.g. Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (peremptory strikes by defense of black potential jurors in civil action brought by black plaintiff impermissible).

X. ETHICS

Failure to Disclose Representation of a Client Suing Another Client Violates Rules of Professional Responsibility

Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co. Inc.[35]

This appeal arose from the defense of a *qui tam* action brought against J-M Manufacturing by various public entities. The core allegation was that J-M had misrepresented the strength of plastic pipe it had sold to over 200 public entities for use in their water and sewer systems. Unbeknownst to J-M, one of those entities—South Tahoe Public Utility District—was represented by the same firm in an unrelated action. Both J-M and the public entity had signed arbitration agreements that included waivers of any conflicts; however, neither client was advised of the other representation.

Attorneys for South Tahoe discovered the dual representation of J-M and filed a disqualification motion in the federal *qui tam* action, which was granted. By this time the law firm had done 10,000 hours of work for J-M. At the time it was disqualified, the firm was owed $1 million in unpaid fees. The firm sued for payment and sought arbitration. The arbitrator awarded fees to the firm, which decision was sustained in superior court. The court of appeal reversed concluding that the firm had violated the requirements of rule 3-310, and review was granted by the California Supreme Court.

The first question for the Supreme Court was whether it had the power to overturn an arbitrator's decision. The court concluded "an agreement to arbitrate is invalid and unenforceable if it is made as part of a contract that is invalid and unenforceable because it violates public policy." (*Id.* at 78-79; citations omitted).

The next question was whether the general waiver of conflicts signed by J-M was enough to clear the firm of its conflict. The court concluded that "[R]ule 3-310(C)(3) embodies a core aspect of the duty of loyalty [and that] the client's consent to dual representation must be based on disclosure of *all material facts the attorney knows and can reveal*." (*Id.* at 84; emphasis added.) "Assessed by this standard, the conflicts waiver here was inadequate." (*Id.)*

Before releasing the case back to the lower court, the Supreme Court opined on the court of appeal's conclusion that violation of rule 3-310 "categorically" barred any recovery of remaining fees by the firm. Given that there is a potential equitable remedy for the firm, the Supreme Court commented that "[t]he degree to which forfeiture is warranted as an equitable remedy will necessarily vary with the equities of the case." (*Id.* at 90.) But "[w]hen a law firm seeks fees in quantum meruit that it is unable to recover under the contract because it has breached an ethical duty to its client, the burden of proof . . . lies with the firm." And "the firm must show that the violation was neither willful nor egregious, and it must show that its conduct was not so potentially damaging to the client to as to warrant complete denial of compensation." Moreover, the lower courts "must be satisfied that the award does not undermine incentives for compliance with the Rules of Professional Conduct." (*Id.* at 95.)

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35 6 Cal.5th 59 (2018).

This sends a powerful signal to firms to disclose conflicts when they are known to the firm. This may necessitate new internal systems of review and control to make sure that firms and agencies comply with their ethical duties.[36]

California Supreme Court Approves Major Rewrite of the Rules of Professional Responsibility

California Rules of Professional Conduct (Effective Nov. 1, 2018)[37]

This is the most substantial revision of California ethics rules in decades. You will need to read these rules yourself and take an additional class or classes to become completely conversant with these new requirements.[38]

The old rules had numbers like 3-120 (relating to sexual relations with a client). The new rules use a format used for California statutes, e.g. Rule 1.8.10 (the analogous, although more demanding, version of former Rule 3-120).

There are also more rules. This reflects the splitting of old rules into different sections to improve clarity. It also reflects the desire to have the rules explain what the requirements are in the text of the rules themselves, rather than requiring California lawyers to review both a rule and its various interpretations to sort out what is required.

These rules endeavor to maintain former rules that stood the test of time, while changing the organization and adding some content to bring our rules more into line with the model ABA rules used widely by other jurisdictions.

Highlights include:

- Rule 1.1.5 now requires that payment of advance fees must be deposited into a client trust account; prior Rule 4-100 did not include this requirement although it was considered a good practice.

- Rule 1.5 provides more guidance on what may make a fee unconscionable. The rule also authorizes and regulates fixed fee arrangements and true retainers.

- Rule 1.51 continues to permit pure referral fees but requires agreements to divide fees to be consented to by the client in writing. This disclosure is required at the time a fee-splitting agreement is entered into among the lawyers or "as soon thereafter as reasonably practicable."

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36 Rule 3-310-the centerpiece of this decision- has been superseded by Rule 1.7. The language of the new rule is consistent with the language of former Rule 3-310, so this case remains a timely warning about effective management of dual representations.

37 http://www.calbar.ca.gov/Portals/0/documents/rules/New-Rules-of-Professional-Conduct-2018.pdf; *see also* Rules Cross-Reference Table, http://www.calbar.ca.gov/Portals/0/documents/rules/Cross-Reference-Chart-Rules-of- Professional-Conduct.pdf.

38 A reasonably priced, 3-part webinar series on these rules is offered by the California Lawyers Association at: https://calawyers.org/CLE-Events/The-Revised-Rules-of-Professional-Conduct. Other CLE providers also offer programming on these rules.

- Rule 1.7 regulates conflicts of interest among current clients. This shifts away from the check list approach in former Rule 3-310 to a rule that focuses on risk and whether another representation would be "materially limited" by another client relationship. However, the rule requires a written disclosure of even non-material conflicts.

- Rule 1.8.3 prohibits a lawyer from preparing an instrument of will for a client that gives the lawyer or someone related to the lawyer, a substantial gift unless the recipient is related to the client or the client has sought the advice of an independent lawyer.

- Rule 1.8.10 substantially shifts toward a bright-line test with respect to prohibited sexual relations with a client. It replaces the former Rule 3-110 that prohibited sexual relations if, for example, they were not consensual. The new rule broadly prohibits sex between lawyer and client unless the physical relationship existed before the lawyer-client relationship.

- Rules 5.1, 5.2 and 5.3: Rule 5.1 clarifies the extent to which an attorney-manager is responsible for subordinate attorneys. Rule 5.2 makes plain that subordinate lawyers have independent ethical duties but can rely on a "supervisory lawyer's reasonable resolution of an arguable question of professional responsibility." ("Reasonable" is defined in Rule 1.0.1 to mean "the conduct of a reasonably prudent and competent lawyer.") Rule 5.3 clarifies the responsibilities of lawyers for the conduct of their non-lawyer assistants.

- Rule 8.4.1 carries forward former rule 2-400's prohibition on discrimination, harassment and retaliation. However, the prior rule required prior adjudication by a tribunal of competent jurisdiction, but not the State Bar Court. Under the revised rule, discrimination and other complaints can be brought directly to the State Bar. Taken together with the augmented responsibilities of attorney-managers, this rule change merits special attention by all firms, but particularly large firms.

- Rule 9.9.5 requires active California attorneys and attorneys permitted to practice in California under Rules 9.44, 9.45 and 9.46 to be fingerprinted. The California Bar has set April 1, 2019 as the date by which in-state attorneys must get this done.[39]

California Supreme Court Approves a New Code of Judicial Ethics

California Code of Judicial Ethics[40]

A new California Code of Judicial Ethics became effective on October 10, 2018. If you are a state judicial officer, this is a must-read document. This new code indicates that the California Supreme Court is working hard to update ethics standards across the justice system in California. Highlights include:

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39 http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Fingerprinting-Rule-Requirements/For-In-State-Attorneys.

40 http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf.

- Amended Canon 2A, relating to judicial impropriety or appearance of impropriety, requires that a judge "Not make statements, whether public *or private*, that . . . are inconsistent with the impartial performance of the adjudicative duties of judicial office." The Advisory Committee Commentary advises that judges "must exercise caution when engaging in any type of electronic communication including communication by text or email, or when participating in online social networking sites."

- Canon 2B prohibits judges from lending their prestige to advance the pecuniary interests of the judge or others.

- Canon 3E(2) requires judges to disclose on the record information relevant to disqualification, including campaign contributions above a small amount

- Canon 5A strictly limits judicial participation in the political process while Canon 5B limits what those seeking judicial office may do during judicial campaigns or the appointment process. This canon allows judges to seek endorsements and contributions for their elections but prohibits solicitations from those under their supervision.

XI. NEW RULES

A. Federal Developments

New federal procedural rules became effective on December 1, 2018. The most accessible way to review these rules and their underlying analyses is to read the explanatory materials sent to Congress by the Chief Justice.[41]

Highlights include:

1. Rules of Appellate Procedure

- Appellate Rules 8, 11, and 39 are adjusted to reflect a change in Civil Rule 62(b) eliminating the antiquated term "supersedeas bond." Instead, the phrase "bond or other security" is substituted.

- Appellate Rules 25 and 26 requires a person represented by counsel to file electronically, although exceptions are allowed by order of the court. For electronic filings, no separate proof of service is required on the theory that the electronic system retains a record of any filing.

- Appellate Rules 28.1 and 31 deal with the time to file briefs after elimination of the "3-day rule" which added three days to time limits due to delays in mailing. The drafters, however, decided that the old time frames were better, and concluded that the time to file a reply brief should be 21 days.

41 http://www.uscourts.gov/sites/default/files/2018-04-26-congressional_package_final_posted_to_the_website_0.pdf

- Appellate Rule 29 makes national what was a local rule in some appellate courts that forbade the filing of an amicus brief that would cause the recusal of one or more judges.

2. Rules of Civil Procedure

- Civil Rule 5 makes useful adjustments to the service and filing requirements in light of the almost universal use of electronic filing. If represented by counsel, all filings must be made electronically. This rule can be adjusted by local courts or individual courts to take into account the sophistication of litigants, particularly *pro se* litigants. The amended rule provides for a uniform, national protocol for the signature of documents. Like the analogous appellate rules, this rule also waives the necessity of a separate proof of service.

- Civil Rule 23 changes have generated the most comments of any changes this year. These changes are discussed in the section on class actions.

- Civil Rules 62 and 62.5 deal with bonds and sureties. Rule 62 extends the period of the automatic stay to 30 days. It eliminates a reference to the antique "supersedeas bond" and substitutes "bond or other security." This change in language is designed to make clear the non-bond forms of security are allowed.

3. Rules of Criminal Procedure

- Criminal Rule 12.4 augments disclosure requirements. Any non-governmental corporate party must disclose any parent corporation or and publicly held corporation that owns 10% or more of its stock. If there is an organizational victim, unless the government shows good cause, it must file a statement identifying any such organizational victim, including any information that would have been required to be disclosed by any non-governmental corporate party.

- Criminal Rules 45 and 49 do not take the same approach of the appellate and civil rules in making electronic filing the default option, subject to local changes. Instead, Rule 49 provides detailed rules for electronic and paper service of documents and how such service should be effectuated. Rule 45 is amended to add 3 days to deadlines for filings made via non-electronic means.

B. State Developments

1. Legislation

Two bills stand out and both are effective January 1, 2019. SB 954 (Ch. 350, Stat. of 2018) amends California Evidence Code sections 1122 and 1129. The effect of these amendments is to require specific disclosures to clients on the confidentiality of mediations in California.

AB 2230 (Ch. 317, Stat. of 2018) amends Code of Civil Procedure sections 660, 663a, 2030.300, 2031.310 and 2033.290 to give additional time to ask for a new trial or a mistrial. The old rule was 60 days; the new rule provides 75 days.

2. Rules of Court

No new state rules appear to be particularly important for section members. However, all new and amended state rules can be found at: http://www.courts.ca.gov/3025.htm.

IN RE: PROCESSED EGG PRODUCTS ANTITRUST LITIGATION: A PANEL DISCUSSION WITH TRIAL COUNSEL

By Lee F. Berger[1]

In the In re: Processed Eggs Products Antitrust Litigation[2], often referred to as the *Eggs* litigation, direct and indirect purchasers of eggs accused major egg producers of conspiring to control and limit the nation's egg supply, thereby increasing egg prices through a number of allegedly interrelated anticompetitive practices. Specifically, plaintiffs allege that defendant egg producers violated Section 1 of the Sherman Act by developing and implementing a sham animal welfare program, exporting eggs at a loss, and reducing egg production in periods of oversupply through coordinated actions. Those alleged coordinated actions included reducing chick hatches, promoting early molting and slaughtering hens early. The defendants denied these allegations.

Ten defendants settled, but after more than a decade of litigation three egg producers—Rose Acre Farms, R.W. Sauder and Ohio Fresh Eggs—went to trial against the direct purchaser class. Plaintiffs sought more than a billion dollars in damages before trebling.

Trial started May 2, 2018, in the Eastern District of Pennsylvania, before Judge Gene Pratter. Judge Pratter rejected the application of the per se rule to the alleged conspiracy, meaning that the plaintiffs had to prove under the rule-of-reason that the conspiracy had an anticompetitive effect.

After a six week trial and six days of deliberations, the jury concluded that two of the defendants, R.W. Sauder and Ohio Fresh Eggs, were not involved in an alleged conspiracy. While the jury found that defendant Rose Acre was involved in the alleged conspiracy, it rejected liability by finding the conspiracy did not have an anticompetitive effect. An appeal is pending. Litigation between opt-out plaintiffs and defendants continues with a trial scheduled to begin on October 28, 2019.

The panel discussed this major antitrust trial and the path it took to verdict. Each side made a short opening statement: one from plaintiffs and one from defendants. Then, there was a question and answer discussion about some of the more interesting developments that led to the verdict in the case.

The Panelists

- **Mindee Reuben** is co-lead and liaison counsel for direct purchaser plaintiffs in the *Eggs* litigation. Ms. Reuben is counsel at Lite, DePalma, Greenberg in Philadelphia and represents plaintiffs across the country in a broad range of antitrust and complex consumer case class action matters. She regularly serves as lead, co-lead or liaison counsel. For example, Ms. Reuben has held leadership roles in the *Generic Pharmaceuticals Pricing Antitrust Litigation*, the *Blue Cross/Blue Shield Antitrust Litigation*, the *Broiler Chicken Antitrust Litigation*, the *Lithium Ion*

1 Mr. Berger is Chair of the Executive Committee of the Antitrust, UCL and Privacy Section and a Trial Attorney as the United States Department of Justice. Any views expressed in this panel by Mr. Berger are his own and not those of the United States Department of Justice.

2 Case No. 2:08-md-02002-GP (E.D. Penn.)

Batteries Antitrust Litigation and the *Polyurethane Foam Antitrust Litigation*. Ms. Reuben is a lecturer of law at the University Of Pennsylvania School Of Law, where she teaches legal writing to LL.M. students. Ms. Reuben is also one of the founding members of the Women Antitrust Plaintiffs' Attorneys, a national organization of women who focus their practices on cartel and other antitrust practices. Ms. Reuben writes and speaks frequently on matters regarding antitrust cases and class action litigation.

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Plaintiffs' Opening Statement

MS. REUBEN: Good morning, everyone. My name is Mindee Reuben. Thank you for the introduction very much. I was one of many lawyers who represented the direct purchaser plaintiffs in this case.

I will tell you before I begin that the case was actually bifurcated between liability and damages, so the opening statements, at least from my perspective, are mostly about the liability piece, and the only part that we talked about was not about damages, but just about the percentage overcharge for the first part of the case. Much of which I will talk about are things that actually were said or talked about as they were presented in our opening statement.

The question that was presented to the jury by the plaintiffs was whether or not major U.S. egg producers conspired to limit the supply of eggs in order to raise the price of eggs. You cannot have an egg without a hen to lay it. So, if you want to raise the price of eggs by limiting the supply of eggs, what do you do? You limit the supply of hens that are laying those eggs, because the fewer hens you have, the fewer eggs you have. And the fewer eggs that you have, the more money that you are going to make as a producer. And what the evidence will show here is that is exactly what happened.

Who was involved in limiting the supply of eggs? The plaintiffs allege that there were a variety of egg producers and companies from across the United States that were involved in these actions to reduce the supply of hens and increase the price of eggs. For the purposes of trial we were focused on three entities, Rose Acre Farms, Ohio Fresh Eggs and RW Sauder.

Let me just say, you should not be fooled. These are not small companies. These companies are big. They have giant hen houses and hundreds of thousands of hens that

lay millions of dozens of eggs over the year. This is agribusiness. This is not your local farm store.

In addition to these companies there were a couple of other key players. One was the UEP—United Egg Producers—which was a trade association of the producers in the United States, and it had about ninety percent of the egg producers in the U.S. as members, and it was run by and controlled by those same producers. And, all of those companies were all members of the UEP during the relevant time period.

The other key player here was the USEM. It was originally part of UEP and then spun off, but the evidence will show that the real purpose of the USEM was to export eggs out of the United States in order to reduce supply and increase price in the United States.

Who are the plaintiffs that have brought this case? The plaintiffs who have brought this case are TK Ribbings Family Restaurant, Lisciandro's Restaurant and Eby-Brown Company, which is a wholesale distributor to convenience stores. They are both large and small, and they represented all of the plaintiffs in this case because they are a part of a class action, and each of these plaintiffs purchased directly from the producers that were involved in the litigation.

Now, the big question: How did they do it? How did the defendants reduce the supply of eggs in order to raise prices? The evidence will show that the producers engaged in both short and long term supply reduction strategies, and that these strategies were actually recommended by an economic advisor to the UEP and its members as a way of reducing supply. And, what did the economic advisor say? More eggs, less price; fewer eggs, more price.

Starting around 1999, and continuing throughout the relevant time period, there were both short and long term strategies. The short term strategies—early molting, slaughtering hens, limiting new hens, and exports—were all designed to get eggs out of the U.S. market. The only one you might not be familiar with is early molting. When a hen lays eggs, it goes through a natural period where it stops laying eggs for a little bit because it is tired, and then it goes back to laying eggs. Early molting means you stop them from producing eggs earlier than usual, and you do that by withholding their food. So, if you want to take eggs out of the market on a short term basis, you stop feeding your hens, and they stop laying eggs.

It became apparent quickly that these short term adjustments were simply not cutting it. They were not cutting it because they were not enough to control the supply over the long term and increase profitability over the long term. So according to, again, the producers' economic advisor, in order to control supply over the long term you have to remove extra hens from the nation's flock on a permanent basis. One of the ways he said you could do that was by giving the birds more space. Specifically, he said that if the industry adopted a policy of 48 square inches—which, by the way, is smaller than this piece of paper—as a minimum floor space allowance for birds, millions of extra birds would be eliminated. Because the more space that a bird has, the less space that there is for another bird. Fewer hens means fewer eggs, and that means more money. This precise idea was communicated to the producers.

As this is all going on there is this emerging issue which relates to animal welfare of the hens laying eggs. And, you will likely hear evidence that big companies, companies like McDonald's, were looking for ways to deal with the animal welfare concerns that were in the industry. But what the evidence will show is that the United Egg Producers and its members, in response to that, latched on to this animal welfare issue as a way of achieving long term control over supply. You will hear that even though the Producers did take some steps to address animal welfare predominantly through a long term program called "The Certified Program," the process was really dominated by focus on controlling supply.

The Certified Program was designed as a way for egg producers to market their eggs as animal welfare certified. 'We took good care of our hens. Don't worry about it, McDonald's.' So, in late 1990s, early 2000s, the UEP decides, 'let's get a committee together to come up with a bunch of really good ideas about how to help the animals.' It was supposed to be an independent committee, but it was not because one of the members was the UEP economic advisor who was telling the producers the ways to come up with long term solutions to increase profitability in the industry.

The Scientific Advisory Committee issued its recommendations in 2000. Those recommendations included minimum cage space requirements, but that was not the end of the process, because it is the UEP producer committee made up of producers and not scientists that really developed the Certified Program. Once those terms and conditions came out, the Scientific Advisory Committee did not want to have anything to do with the Certified Program.

One of the terms of the Certified Program that the producers committee came up with was the 100 Percent Rule. The 100 Percent Rule required that in order to be animal care certified under the UEP program, 100 percent of the producers' facilities had to be in compliance with the rules and regulations of the certified program. It did not matter that your clients may not have wanted certified eggs, because some did not. And it did not matter that as a producer you could actually say 'I will produce certified eggs over here, and I will produce non-certified eggs over there, so there is no chance of commingling,' which producers could do.

Why did they insist on it? Because, as the evidence will show, the 100 Percent Rule had nothing to do with animal welfare and everything to do with wanting to maximize the impact of control of supply. Because if you want to sell certified eggs and you have to have 100 percent of your facilities comply with the cage space requirements, you are going to have more cage space per bird, which means fewer hens. And, again, fewer hens, fewer eggs, more money. Do not forget, ninety percent of the industry was a member of UEP.

Another aspect of the Certified Program that demonstrates that supply control was the primary focus of the Certified Program was the audit program. Under the audit program, people went out to the farms and said, 'are you doing all the things you should be doing under the Certified Program?' Included among that were a whole number of animal welfare questions: 'Can your birds stand upright? Do they have enough water? When you decide to slaughter them, are you doing it humanely?' All these things. What the evidence shows is that you could fail every single one of the animal welfare components of this audit you can still pass the Certified Program and still be UEP certified. In fact, as the evidence

will show, the only way to automatically fail the Certified Program audit had nothing to do with animal welfare and had everything to do with management and supply.

Was the Certified Program a cover story for supply reduction? Consider this: There is a newsletter called "United Voices" which was sent out by the UEP to all of its members. It is on a bi-weekly basis or so. You will see that throughout the time period, it was basically used as a vehicle to communicate the short term supply recommendations and adjustments and to tell how successful these short and long term programs were doing. For example, in March 2002, shortly after the Certified Program was adopted, the UEP predicts that the adoption of the Certified Program will result in the reduction of 13 million hens. A little bit more than a year later, the UEP is now telling everybody that they are having the best prices that they have had. The May 2003 prices were the best that they had in many years, and they attribute it to the Certified Program and short term supply management.

Fast forward to June 2008, towards the end of the class period, and it is the same story. They are again touting record egg prices, except now it is not just for a month, it is for a year. And, again, it is the Certified Program and the short term supply recommendations that they are talking about. There is no mention about the animal welfare part of this.

So, now you have short term supply recommendations and long term strategies all working together to reduce the supply of the eggs in the U.S. But where are the three defendants in all this? Each of the three defendants, Rose Acre, Sauder and Ohio Fresh were all members of the UEP and the Certified Program. About that, there is no dispute. In fact, all of the companies participating in this agreement were UEP members and members of the UEP certified program.

Rose Acre, who is the second largest producer of eggs in the United States, joined the UEP and adopted the program in 2002. It adopted the program, even though you will hear evidence about the fact that some of the senior management was a little bit concerned about the true purpose of the program. Rose Acre told its customers that it was reducing its hen population to comply with the Certified Program, and explained that prices were going up because the supply was going down. It even approved an early molt and slaughter program as part of this. With regard to exports, as Rose Acre was a member of the USEM, it decided to let USEM leadership know that any time they discussed issues that stabilize and possibly influence the market, those conversations should be kept a little bit confidential.

RW Sauder became UEP certified in 2002, and officially joined the UEP in 2004, although it had been involved with UEP for many years before that. The evidence is going to show that RW Sauder admitted that UEP made recommendations to manage supply, including early molt and early slaughter. And, although RW Sauder did not buy the short term recommendations, it did become certified and did reduce its flock size in regard to the Certified Program. The evidence will also show that when explaining the cost of why eggs went up to a customer, it pointed to the Certified Program and the reduction in hen supply.

Ohio Fresh joined the UEP and became a certified member in 2004. It signed a written commitment to reduce hen supply by slaughtering its hens early and otherwise complying with all of the requirements of the Certified Program.

The plaintiffs retained an expert, a leading agricultural economist named Dr. Gordon Rausser to look at the defendants' transactions. What did the data show? The data showed that supply reduction efforts worked. The short term and supply reduction efforts taken by the producers caused there to be fewer eggs on the market than there otherwise would have been had these suppliers not gotten together and engaged in this behavior. As we know from the producers themselves, because fewer hens mean fewer eggs, mean more money in the producers' pockets. The prices actually went up.

You may hear that some of the producers claimed that their flock size did not actually decrease, but increased. But, you will also hear those same producers testify about the fact that they were reducing flock size and telling their customers that they were reducing flock size, for example, because of the Certified Program and because of these short term management principles.

Economically, what did all of that mean? Economically, that meant that the overcharge to the purchasers, like Lusciandro's Restaurant, TK Ribbing and Eby-Brown, and the rest of the class, was that there was 19.81 percent. The fewer the hens, the fewer the eggs, and the more money.

Thank you.

Defendant's Opening Statement

MR. BIZAR: Thank you, Judge Berger.

Ladies and gentlemen, my name is Steve Bizar. I represent RW Sauder. RW Sauder is a commercial egg farmer based right outside of Lancaster, Pennsylvania. From 2000 through 2008, which is the period that is relevant for this case, the business was owned and operated by Paul Sauder, who is the third generation of his family to work in the egg business. Mr. Sauder's grandfather founded the business in the 1930s. Mr. Sauder's father expanded the business, and Mr. Paul Sauder himself expanded it further. RW Sauder employs 400 people, 60 percent of whom work in the Lancaster area. It is the only business he's ever known.

Paul Sauder began in the business when he was old enough to go out to the hen house and collect eggs by hand. He has now passed it on to his son, Mark, who is the fourth generation of the family to be in the egg business. So, all told, the Sauders have been in the commercial egg business for 80 years. They know egg laying hens, and they know eggs. They're independent-minded business people.

So the plaintiffs, Ms. Reuben, they make a very serious claim here. They claim that RW Sauder conspired with other egg producers to reduce the supply of eggs in the United States so that they could raise prices. Sauder did no such thing, not ever. Sauder never conspired or agreed with any other commercial egg farmers to reduce the supply of eggs in the United States. Paul Sauder will testify at this trial, and you will hear it from him directly.

Let's look at the plaintiffs' charges. They are specific charges. One of them is what Ms. Reuben referred to as short term supply recommendations, or what UEP—United Egg Producers—calls temporary flock management measures. Those are measures that

plaintiffs claim were illegal because they reflected an agreement to reduce supply, and they consisted of reducing the hatch of chicks, putting hens into molt early, or slaughtering hens early.

Sauder did no such things. Sauder never participated in any of those temporary flock management measures, not ever. In fact, UEP, in its own internal documents which the plaintiffs will show you, referred to Sauder as one of the egg farmers that was not participating in the temporary flock management measures. They left Sauder off the list of those farmers that were participating.

There is a really good reason for this. Sauder made its decisions about how to manage its flocks two years before it put those flocks into the hen houses, when it ordered the flocks from the breeders. And those decisions, which hens would molt when, which hens would go to slaughter at which time, those were never changed. Mr. Sauder never once followed the UEP's temporary flock management recommendations, and you are not going to see any documents that suggest otherwise. Sauder had invested his hens, and he did what he thought was best for his business and for his flocks.

Let's look at the second charge, the charge about exports. Plaintiffs claim that members of another trade organization, United States Egg Marketers—or, USEM—agreed to export U.S. eggs and send them abroad so they could raise prices in the United States. We will show you that this charge against Sauder is also totally false. The charge is that members of the USEM agreed to export eggs to get the domestic price of eggs up. Sauder was not a member of the USEM, not ever. Not ever. Sauder did not conspire or agree with any members of USEM to export eggs at a loss. Sauder was not a member of the USEM.

Sauder, at one point in time, filled out an application to join USEM, but he never paid the fee and he never became a member. And because Sauder was not a member of USEM, he could not vote on when USEM would take an export or the terms at which the export would take place. He had no role with respect to when, whether, how, how much, or at what price USEM would be exporting eggs. He never once voted in support of an export. He will testify to that. And Ms. Linda Reichert, who is a USEM employee, and who is on plaintiffs' witness list and who will be coming to this trial, she will testify to that as well.

Why did Sauder not join USEM? Sauder is an independent-minded, Lancaster area business man. He did not want to give up the power to another company, to another organization to tell him what to do with his eggs. It is that simple. He did not want anyone else to tell him how to handle his eggs.

Plaintiffs will show you, and we do not dispute this, that Sauder sold eggs to USEM that were going into exports. And because Sauder chose to sell eggs to USEM, USEM sometimes called him a "supporter" or a "contributor," in their documents. All that means is that when Sauder had extra eggs, when he had surplus eggs, he sold those eggs to USEM or to other export customers. There is a very good reason for that, by the way. Egg demand in the United States is seasonal. Demand is highest from Thanksgiving through Christmas and then around Easter, and during other periods of the year it is flat. You cannot adjust your flocks just for the periods when demand is high, so you have eggs hatching, then you have chickens laying eggs every day, six out of seven days a week, and sometimes in a year, January, February, sometimes early March and the summer months, you have excess

eggs, and so you need to have outlets for those eggs. Sometimes Sauder sold his excess or surplus eggs for export, and sometimes he sold them to USEM for export, but he never controlled the price at which USEM sold its eggs. He never voted on those exports. He had no role with respect to how USEM exported eggs. In fact, USEM actually complained to Mr. Sauder that he was selling the eggs to them at a price higher than the price they wanted to pay. He was actually making money by treating them at arms' length, just like any other customer.

Let us go back to the other trade organization, not USEM, but UEP. This is a group that, as Ms. Reuben pointed out, Sauder joined in 2004. And even before Sauder joined UEP, he attended UEP meetings. They were open. It was the trade organization, the industry organization for the egg industry, and RW Sauder is in the egg industry. He attended those meetings to find out what was happening in the industry, what government regulations to expect. Sometimes officials from the United States Department of Agriculture or other government officials were there as well.

In 2000, UEP developed a program that Ms. Reuben called the Certified Program. It is the Certified Program. It was entirely voluntary. Nobody forced anybody to join the program, and some very large producers did not. But, the Certified Program was designed to improve living conditions for egg-laying hens in a commercial environment, to produce uniform, science-based, guidelines for the humane treatment of hens across the industry. It was developed as pressure mounted in Europe and the United States in the late 1990s from animal rights activists and from customers, companies like McDonald's or Walmart, to ensure the more humane treatment of egg-laying hens. And, the UEP relied on independent animal welfare experts, animal welfare scientists. You will hear from Dr. Jeffrey Armstrong, who at the time was a professor at Purdue University. He is now a president at California Polytechnic State University in San Luis Obispo, the most beautiful town in the world, and he is passionate about the work he did steering the UEP Scientific Advisory Committee. Dr. Armstrong assembled a dream team of animal welfare scientists, and they developed what they believed were humane, science-based recommendations for the treatment of egg-laying hens in commercial settings. That became the basis for the UEP's certified program.

Sauder implemented the Certified Program, make no mistake about it. Mr. Sauder was proud of that when he did it, and he is proud of it today. Mr. Sauder's company was one of the first egg farming companies to implement the Certified Program. In fact, he tested it on one of his farms to see how the hens did, and they did better than the hens that were not in that setting, so he implemented the program at all of his farms. He was very proud of it. He was so proud of it that he spoke about it to the Lancaster paper in 2003. After joining the UEP in 2004, he joined their public affairs committee, and he went around the country touting the benefits of the program. He invited CBS News' "60 Minutes," into one of his hen houses so he and Dr. Armstrong could answer questions about the program. These are hardly the actions of somebody involved in illegal antitrust conspiracy.

Against people who spent their entire lives around egg-laying hens, people like Paul Sauder or Dr. Armstrong, plaintiffs and their lawyers bring their third, and really most offensive charge, which is that the entire Certified Program is really just a sham. And, while they take shots at every aspect of the program—and ladies and gentlemen we are

going to be spending some time talk about hen poop, how the hens go to the bathroom and what happens with that poop—they really challenged three distinct aspects of the program, and you heard Ms. Reuben speak about them.

The first is the cage space, the requirement that the hen's cage space be increased from 48 square inches to 67 square inches. Second, the 100 Percent Rule: the requirement that if you participate in the program you do it for all your hen houses, for all your farms. Third, the prohibition against backfilling, which is the restriction on adding hens from other flocks to supplement the hens who died from natural causes.

I want to just briefly address these three challenges. Cage space: Sauder never agreed to participate in the Certified Program to reduce the size of its flocks. The Certified Program was, and is, a legitimate animal welfare program that gave customers a new product. They wanted certified eggs, eggs coming from hens raised in more humane living conditions. Eggs that farmers wanted to have to sell and that customers wanted to be able to buy so they could compete with other kinds of eggs, organic eggs, free range eggs. The fact is that Sauder and every other company that participated in the Certified Program remained totally free to add hens, to add cages, to build barns, to increase the size of their flocks. There is nothing in any of the Certified Program guidelines—and you will have these in the jury room with you, they will be admitted into evidence. There is nothing in any of the Certified Program guidelines for any year that says anything about the number of hens that you can have, or the number of hen houses, or the number of cages. So, as you increase the cage space, you can add, you can reconfigure your cages to add hens. And people did, and Sauder did, despite what Ms. Reuben says.

Mr. Sauder will also testify that managing hens more humanely is good for production. They got about 20 more eggs per year by giving the hens more room. And the eggs were a better quality, there were fewer breaks, there were fewer defects. They decreased mortality and they increased productivity. Mr. Sauder, and the other companies that joined the Certified Program, sided with the hens, and they got more eggs from each hen as a result. And the overall supply of eggs in the United States increased. It increased by 20 million egg-laying hens during the period from 2000 to 2008, the period that is relevant to this case, 20 million more.

100 Percent Rule. We will show you that the plaintiffs' claims about the 100 Percent Rule are totally baseless. Mr. Sauder, the Animal Welfare Committee of the UEP, the Scientific Advisory Committee, they felt that the 100 Percent Rule was necessary for the integrity of the program. You couldn't say that you were for humane living conditions for your hens if you treated the hens in this hen house humanely but you discriminated against the hens in this hen house and treated them inhumanely. You put these hens in 67 square inches and kept these hens in 48 square inches. You needed to treat all of your hens humanely to be a certified producer. That gave the program integrity. Ms. Reuben mentioned audit failures. You will not see a single audit failure for adding more hens, for adding more cages, for building more barns. There is nothing about the 100 Percent Rule that prevented or prohibited egg farmers from ramping up their supply.

Finally, the backfilling ban. Mr. Sauder will explain to you, Dr. Armstrong will explain to you that you expect to lose about 2 to 2.5 percent of all your hens through natural causes. So, imagine 100,000 hens in a hen house, 2000 to 2500 of them will die

just of natural causes during the life cycle of that flock. Backfilling is the practice of taking hens from other flocks and putting them into the hen house.

There are two really good reasons why the UEP's Scientific Advisory Committee came out against backfilling. The first has to do with pecking orders. Turns out that the pecking order is not just something that happens on a schoolyard. Pecking order applies to what happens to hens inside a cage. There is a dominant hen, and there are subservient or submissive hens, and when you add hens from other flocks to that cage, you disrupt the pecking order. Ladies and gentlemen, when hens peck each other to death, that's really not good for animal welfare. Fighting in the cages is not good for animal welfare.

The second reason has to do with diseases, something called immunocompetency. And, we all have had experience with this. We know about this from our families or from our children. When your children go back to school in the fall, a lot of times they get exposed to new germs. When your family gets together at the holidays, you may get exposed to new germs. When you fly on a plane from Philadelphia to San Francisco, you may get exposed to new germs. The same thing is true for hens. These hens were all born the same day. They were all raised together, 80-to-100,000 of them in any hen house. And, when you inject new hens with different immunocompetencies into that hen house, you run the risk of disease. And, ladies and gentlemen, there are diseases that you cannot vaccinate against, exotic diseases like Avian Newcastle, Avian Flu. When one hen gets that disease, the FDA or the USDA requires the farmer to depopulate—to kill, to slaughter all of the hens. That only has to happen once for an egg farmer to understand that it's really not worth the risk.

But, none of that matters for RW Sauder, because RW Sauder has never backfilled. The ban on backfilling in the Certified Program did not apply to RW Sauder. Mr. Sauder's father did not do it, his grandfather did not do it, he did not do it, and his son is not doing it. The plaintiffs claim that they know better than a guy who is part of a family that has been egg farming for 80 years.

Now, you saw some slides from plaintiffs. We do not have any fancy slides. We are just a farmer from Lancaster. You will see a bunch of documents. There are a lot of lawyers sitting on their side of the courtroom, there are not a lot of lawyers on our side of the courtroom.

Ladies and gentlemen, you are not going to see documents and you are not going to see slides that really pertain to Paul Sauder or Mr. Sauder's company, RW Sauder, because they did not conspire or agree with anyone to reduce the egg supply.

Thank you very much.

Question and Answer

MR. BERGER. Thank you both. I wanted to start with a question for both of you. No one likes surprises during or right before trial, but in April of this year, shortly before the *Eggs* trial began on May 2nd, the largest defendant, Rose Acre Farms, suffered a salmonella outbreak which sickened 45 people, causing 11 hospitalizations, and the recall of 206,000,000 eggs. That is not welcome news for defendants, and a potential opportunity for plaintiffs. How do you believe that the outbreak would have influenced

the jury? Do you think it was relevant to issues that were at hand? Did the outbreak affect jury selection? How was the issue dealt with at trial?

MR. BIZAR: First of all, the relevant period for the case was 2000 to 2008. The outbreak was in 2017-2018, so, it was outside the relevant period.

I had a pretty good sense that the judge was not going to allow it to be an issue in the case. It was very prejudicial, obviously, and it was outside the relevant period, so I felt pretty comfortable. And Judge Prater really called balls and strikes the entire case. Even when she was ruling against us, I felt very much like her strike zone was fair. So, I did not think it was going to come in unless somebody implicated it in their direct examination testimony and somehow opened the door to it, and then it was fair game on cross.

It never came up in jury selection. She exercised a very tight control over that in jury selection. I do not think it came up in jury selection.

I felt confident we would be okay, but I was sure glad it was not my client, because the facility that Rose Acre had this outbreak at was one of the facilities that they touted during the trial where they had expanded their production—it was in North Carolina, and one of their answers, as Sauder's answer, was that we expanded, and that this is one of the facilities that was integral to that.

MS. REUBEN: The case was tried under the rule-of-reason, and as a result the defendants were permitted to put on procompetitive justifications for what they did. And some of those procompetitive justifications were better quality, safer eggs, and safer process, more humanely raised. Our perspective, at least, was that we have to try. You have a giant outbreak, you have the same company operating on almost the identical guidelines that were in effect during the relevant time period is now facing the biggest salmonella outbreak.

How do you not go to the judge and say that is relevant? If defendants will get up and say this is a better, safer, cleaner egg, we should get to come back and say, 'ehh, not so much.' And what is interesting here is, it sort of goes back to this whole audit thing I was talking about. When you read the reports about what was going on at this facility, there were dead rodents, there were insects flying everywhere, the clerks were not using proper processes, they were skipping steps in the watching process. All these things are on those audit reports. Rose Acre was still certified.

Rose Acre filed a motion to preclude it, and they won. The Court essentially said that this was 10 years after the fact, but if something came up during trial as Mr. Bizar said, that we could revisit it. Correct me if I'm wrong, but Rose Acre had an animal welfare expert that did talk at some point in his report or his testimony about these being a better, safer, cleaner process, and that expert was not presented at trial, which was probably a good decision.

MR. BIZAR: It was all the defendants that had the animal welfare—

MS. REUBEN: It was a shared one.

MR. BIZAR: I was going to put him on, and we decided not to present him.

MR. BERGER: You decided not to present him, in part, because of this?

MR. BIZAR: No. It was a long trial. You have to really be mindful of the jury. And, we felt that we had covered the animal welfare story so extensively with Dr. Armstrong, who had come in from California to testify, and testified very favorably for us, and we felt like other people had echoed it. It just seemed like it would be too much. I felt terrible not calling him because I had opened promising him to the jury as one of the witnesses who would testify about the Certified Program, but they seemed relieved when I said I decided not to call him because we were conscious of their time. That they had enough, although it took them six and half days to reach their verdict.

MR. BERGER: Right up to and during trial important issues arose for both parties regarding admissibility. I would like you to talk about how your decisions on when and how to raise document admissibility issues may have shaped the outcome of the trial.

MS. REUBEN: In all of your cases you probably enter into stipulations about business records, and what will be business records, what will be admissible, what will be authentic, those type of things, right? You have all these stipulations, and then you get closer to trial, you have to exchange not just your exhibit list, but you have to lodge objections to the exhibit list as well and exchange them. In a perfect world, some of those objections actually get resolved in advance of trial.

But we were about a week before trial, and we did not have resolution on any of our exhibits, including ones that we might want to use in our opening. That put us a little bit between a rock and a hard place because you do not want to be talking about things that you know are clearly not admissible or a little bit fuzzy during your opening statement.

So, it was about a week or so before trial we filed a motion, and it was something called a motion to confirm admissibility of exhibits. We filed a motion. The Court was not happy with us about our timing, to put it mildly, and so we revisited the motion and we shortened our list of documents. The long and the short of it is that the Court said okay for some, no for others, and everything at the end of it could get revisited during the course of the trial. Even if she had said no about an exhibit for your opening statement, depending on how things developed at trial, you could revisit it.

It was an interesting lesson in that if we had perhaps known earlier the answers to some of these questions or had tried to resolve them earlier in advance of trial, and I imagine if I was on the other side of the aisle it would have been helpful for me to know too, what I could use, not use. It would have saved a lot of time and energy for all of the parties, and probably shorten the trial somewhat.

For us probably the biggest impact was how it affected our opening. We had a lot to talk about. We were there for a long time talking in our opening statement about all kinds of evidence. But there were things we really would have liked to have used and could not. So, the moral of the story is plan ahead as much as you can, try to get these things resolved as much as you can. Over the long term it did not make much of a difference because the Court did allow us to raise some of these documents again, but I think the opening, it really did have some impact on how the case was presented at the outset.

MR. BIZAR: I will add a couple of different observations. I have tried a lot of cases, and only three or four antitrust cases, but the one thing I noticed that is a common for the antitrust cases is you get these multi-defendant cases or multi-plaintiff lawyer cases where there are different firms working together, and different lawyers in those cases on both sides take differing approaches to admissibility during the discovery phase. If you have only thought about admissibility at trial, you have already waited too long. You have huge, huge problems with admissibility if you have not figured out a way to use the discovery that you have gotten in admissible format when you take the depositions in the discovery phase of the trial. Not just because you need them to get past summary judgment if you are the plaintiff, or you need them to preserve your rights to effectively cross examine some witness for some defendant who is not appearing at the trial because they have settled, but you really cannot go back and fix it after the fact. Here I think the plaintiffs' presentation, and even to some degree the defense presentation, were somewhat affected by those kinds of issues going into the trial.

I think one interesting thing that we learned was that when the judge made instructions to the jury about the admissibility of documents for notice but not for the truth, and there were a large number of trade association newsletters and other kinds of trade association documents I think that the plaintiffs had wanted to get in as business records but which were not allowed in as business records because they were not really business records, but which the judge allowed them to admit for a limited purpose and to publish for notice, not for the truth. Those documents went back with all the documents to the jury room. Maybe that is why it took them six days! But they separated out all the exhibits and they put the exhibits that were just for a limited purpose in a separate binder, separate and distinct from the other exhibits, and they did not look at them, so they told us after the trial, which I thought was an incredibly interesting piece of news.

Let me give you another little tidbit or war story. In talking about the 100 Percent Rule, there is evidence that that rule was important not just to the integrity of the program, for the program sponsors for the UEP, but also the customers, the Food Marketing Institute, a big trade organization for supermarkets, including some of the supermarkets that were in the plaintiffs' class. The Food Marketing Institute wanted the 100 Percent Rule, they supported it, so too did a lot of other producers and customers.

One company that opposed it violently was a company called Sparboe Farms, which was a featured part of the plaintiff's case. They had been a defendant. They settled and they entered into a cooperation agreement. There were four Sparboe witnesses on the plaintiffs' trial list. Two of them they dropped and never brought, and two of them had really relevant testimony that we wanted to use, and then they cancelled their appearance during the trial. So, they only brought the witness that had never been deposed. We had this fantastic video with information about Sparboe. Sparboe had not been a part of the Certified Program, they had done their own thing. They had been attacked by an animal rights group in an undercover operation to get footage of their commercial egg farming practices, which were horrendous. That had become the basis for an ABC news exposé that was broadcast very broadly that led to the loss of half their biggest customers, including McDonald's and Target. Just incredible damage to their business. Then they came back to the UEP Certified Program and embraced the 100 Percent Rule as a result of that.

We had this video. We had both the undercover video and we had the ABC news video. We wanted to use it. And, in fact, a couple of the Sparboe witnesses that the plaintiffs pulled from their witness list had testified about it at their deposition. So, even though it was after the relevant period, we had a basis for using it. I alluded to it in my opening argument. As the jury went out for their lunch break, the plaintiffs' lead trial lawyer went bat shit crazy, yelling to the judge about what I had done, mentioning this exhibit that I had not told them I was going to use in advance. I did not show an exhibit. I had no slides, no video, nothing. I went in bare. (Very uncomfortable for a Dechert lawyer.) The judge said, "Well, there is nothing I can do about it. He mentioned it, and if he does not somehow deliver on his promise, you will be able to bring it to the jury's attention and punish him for it." That was, I think, the right result.

Then the first Sparboe witness testified, Garth Sparboe, and he walked right into it. I mean he testified about it on direct, and then that opened the door for me to cross-examine him about it, and I did not have to show the video. I did not have to establish authenticity for this TV program, which is very hard to do. And I did not have to run the risk of a rule-of-completeness objection that would allow them to play other parts of it as well. So, it just worked out beautifully, but by surprise.

MS. REUBEN: It is funny how your perspective about how things happened, like you thought Steve went crazy. From our perspective, we had been talking about this exhibit with the defendants and whether or not they were planning to use it. We asked defendants, "You guys going to use it?" They said, "We don't know because we don't know what your witnesses are going to say, but if we're going to use it, we'll let you know." Because we had said we want to object to it; we want to take it up with the Court. So, defendants clearly knew that we were going to object to the admissibility of the document. And then it pops up in opening argument?

MR. BIZAR: It didn't "pop up," I just mentioned it.

MS. REUBEN: It was a little more than just a "mention."

MR. BIZAR: I "mentioned" it three times.

MS. REUBEN: So the cat is out of the bag at that point. But the reason that we were so upset about it, about how it happened is, we sort of felt like we had clearly said it's not admissible, we are going to fight you on it, and then it came up in the opening argument.

MR. BIZAR: And then the witness, I actually—

MS. REUBEN: The witness did walk into it.

MR. BIZAR: The witness I actually did want to use it with, Ken Klippen, and they pulled from the trial.

MS. REUBEN: Right. It would be unusual for us to point out the fact that you did not use it, because I do not think we wanted to draw more attention to.

MR. BERGER: I have loads more questions, but I do want to give folks a chance. If anyone has questions they would like to ask, here is your opportunity.

QUESTION BY KENNETH O'ROURKE: Yes, I have one. Hi, I am Ken O'Rourke. I have a question. This is a trial in the agricultural industry, alleged anticompetitive activity and so forth. Two words I have not heard from the panelists are Capper-Volstead [Act], the statutory exemption for that industry to price fix.

MR. BIZAR: It is on Judge Berger's list, by the way.

MR. O'ROURKE: I AM just curious if it played out in your trial, and how.

MR. BIZAR: Let me respond quickly. Capper-Volstead is an act that gives antitrust immunity for agricultural cooperatives. It is really hard to establish Capper-Volstead immunity. You have to be operating a farm, basically. It is sort of an outdated statutory exemption. If I have another agricultural case, you will see me somehow use it, notwithstanding that.

There were two ways it was raised. One was with respect to the UEP, the initial trade organization. The second one was with respect to the USEM. My client destroyed the Capper-Volstead exemption for UEP because it was difficult to explain relationship where they do not actually operate the farms, but they take all the output of more than 100 family farms and they have a right to those farms' eggs. And, so, that was sufficient. Capper-Volstead was blown out long before I got in the case. I was only involved in the trial as to the defense because of RW Sauder.

We still wanted it to be applicable to USEM, which RW Sauder was not a member of. So, it fell to Rose Acre or other defendants to try to establish it, and it was the longest, most tortured, part of the trial, from my perspective.

MS. REUBEN: Not just yours.

MR. BIZAR: If they had gotten it, it would have been a nice defense for us on exports, but getting to it was like the Bataan Death march of trial experiences. And they, were not going to get there. So, I was advocating the whole time to just drop it. And Mindee and her colleagues, very graciously, moved for a directed verdict on our affirmative defense. . . .

MS. REUBEN: We wanted to put Steve out of his misery.

MR. BIZAR: And they got it, and I was happy.

MS. REUBEN: Yeah. Capper-Volstead started all the way back with the answers and affirmative defenses. All the defendants asserted Capper-Volstead, and then we moved for summary judgment affirmatively and we won on UEP. But we did not win on USEM because we did not put up enough evidence. It was torturous. I will not even bore you or confuse you with it. We did not prove it. But then we get to trial and we file our motion for directed verdict on this 50 percent rule with regard to USEM. And, I think we also made a similar challenge that we did to Sauder as well, but with other members of the USEM, to try to get it bounced.

The long and the short of it is, it came down to this language in the statute of, what does the term "value" mean? The statute says, "The Association shall not deal in products of non-members to amount greater in value than such are handled by the members." And

Rose Acre, in its defense, really focused on volume and some way to translate volume into value. We focused on value. We said you can figure out the value, you just did not do it. But, talk about torturous. We filed a motion for directed verdict. We have a conference inside the courtroom. The judge comes back and says, "I need you to answer these three questions, like how would you actually calculate it?" We are all trying to do the math. Then we submit those papers.

The judge decides finally that "value" actually means the price that the buyer pays for the eggs and not the volume, but she does not grant our motion for directed verdict because the defendants had not yet closed the case. So we go back into trial, and it turns out they do not put on any more evidence. That might have been a witness issue, frankly. There was a witness that had been there and then left, and they may not have been able to get back—

MR. BIZAR: Linda Reichart.

MS. REUBEN: Yeah, Linda Reichart. Then we renewed our motion for directed verdict, and then it was finally granted because the Court found that defendants had not provided enough information on that issue. It may be one of the few times that plaintiffs have actually moved for a directed verdict and gotten it. I have to give a shout out here because Jeannine Kenney, from the Hausfeld firm, was the one who really took the laboring oar on that motion and did really a fabulous job on it.

MR. BIZAR: We should send her a Christmas gift.

MS. REUBEN: You should.

MR. BERGER: I saw another question in the middle back there.

QUESTION BY SUSAN SAYLOR: Hi. I'm Susan Saylor, with the Attorney General's office. I observed really different styles between the two parties, and it made me curious about who your jurors were and whether or not you got feedback on which arguments were effective with them.

MS. REUBEN: I am not going to answer this question just because we have post-trial motions going on we are probably taking up on appeal, so it is a little bit of an uncomfortable place for me to be right now.

MR. BERGER: Steve?

MR. BIZAR: First of all, we had a jury of 12 which is, I think, important in a long trial, and we lost a couple along the way, and so I think it was ten at the end of the day that deliberated; is that right?

MS. REUBEN: Yes.

MR. BIZAR: They were a mix of people. We talked to them extensively after the trial. At least with respect to my client, they were very comfortable with him. They trusted him as a farmer, and viewed him as an honest broker. That was an important piece of news.

QUESTION BY PETER HUSTON: I think everyone is always interested in jury research, mock jury. If you could each address that, I think that would be interesting.

MR. BIZAR: RW Sauder did no mock jury exercises. We had a jury profile. In a case like this you are dealing with commercial egg farming. Commercial agriculture is not necessarily perceived well by millennials, so you want to be mindful of that. It is actually better in some ways for the hens than when they run around. It is easier to care for them and keep them out of things they should not be in. But the reality is, we were concerned about millennials on the jury.

MS. REUBEN: Both sides actually had jury consultants in the room when they were picking a jury. Rose Acre had one and the plaintiff had one that was there when they were picking the jury. It was a mix. It was about 50/50 men and women.

MR. BIZAR: It was seven—

MS. REUBEN: Seven men.

MR. BIZAR: Seven women.

MS. REUBEN: I cannot remember what was left at the end of the day. It is like I blocked it out of my mind.

MR. BIZAR: At the end, we lost one of each.

MS. REUBEN: Yes.

MR. BERGER: Thank you.

IN RE: SOLODYN ANTITRUST LITIGATION: LESSONS FROM A "BIG STAKES" REVERSE PAYMENT PHARMACEUTICAL TRIAL

By Kenneth R. O'Rourke[1]

PANELISTS

- For the Plaintiffs**: Richard A. Arnold** & **Anna T. Neill**—Kenny Nachwalter PA
- For the Defendant**: J. Doug Baldridge** & **Lisa Jose Fales**—Venable LLP
- Moderator: **Kenneth R. O'Rourke**—O'Melveny & Myers LLP

I. INTRODUCTION AND OVERVIEW

In 2014, Impax Laboratories, Inc., was sued for allegedly conspiring with Medicis Pharmaceutical Corp. to delay launching a generic version of Medicis' branded acne drug, Solodyn. Antitrust cases were filed by direct purchaser plaintiffs, including wholesale pharmacies such as Kroeger, and by end-payor plaintiffs, including health plans and benefit plans that paid the price of members' Solodyn prescriptions. The Judicial Panel on Multidistrict Litigation consolidated the class actions and direct action cases, and transferred them to the United States District Court for the District of Massachusetts.[2]

The consolidated case was tried for 10 days before Judge Denise J. Casper in March 2018. On March 29, 2018, in the midst of the trial, the cases settled, and Judge Casper discharged the jury before a verdict was reached.

Had the case gone to the jury, it would have been only the second jury verdict in such a so-called "pay-for-delay" or "reverse payment" action since the U.S. Supreme Court clarified the standards for these types of claims in 2013.

Trial counsel for certain direct purchaser plaintiffs and for defendant Impax shared their experiences trying the case with the Golden State Institute in November 2018 during a panel discussion moderated by Kenneth O'Rourke.

MR. O'ROURKE:

Good morning. My name is Ken O'Rourke. I'm with O'Melveny & Myers. I have the privilege of moderating the discussion about our next big stakes 2018 antitrust trial. This case is quite different from the last one. The industry is pharmaceuticals. The type of case is sometimes called "pay-for-delay." When you hear someone call these cases pay-for-delay, it is a plaintiff's lawyer. Defense lawyers contend these cases stem from procompetitive reverse payment settlements.

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1 Kenneth R. O'Rourke is a partner of O'Melveny & Myers LLP, where he litigates complex cases and represents clients in high-stakes US and international disputes. Mr. O'Rourke served as counsel for Impax in various matters including the underlying FTC investigation, which was closed before the MDL trial.

2 The multidistrict litigation is *In re Solodyn Antitrust Litigation*, D. Mass., Case No. 14-md-02503.

These cases are becoming more common. They are going to trial more often. While pharmaceutical reverse payment cases have been around for more than a dozen years, it was not until 2013 when the Supreme Court decided *FTC v. Actavis*[3] that we received Supreme Court direction on what the standard is for proving these cases. Long story short, it is the rule-of-reason. In these cases, that rule often can mean most anything to anybody. It certainly makes the litigation and trial more interesting.

The trial that we are focused on involved a drug called Solodyn. Solodyn is an acne medicine—a high value, popular acne medicine. This case was brought by buyers of Solodyn—both a class of buyers and separately by large wholesale pharmacies, Kroeger, for example, which has pharmacies in 35 states. Kroeger's is a large purchaser of drugs, including Solodyn.

Plaintiffs—the buyers—allege there was an anti-competitive reverse payment or a pay-for-delay deal between Medicis, the brand maker of the drug, and several generic drug makers. The core allegation is there was a pay-off to the generics to keep them out of the market for years, so that while they're out of the market, Medicis, the branded company, can enjoy monopoly profits.

We know from common experience when there is a new brand drug in the market, prices for that drug are often quite high. Then, when generic companies finally enter the market, prices often crater. The allegation is that the delay in the entry by these generics caused harm, financial harm to the buyers; that is, to consumers and to everyone else in the drug distribution chain.

With this brief background, I'll introduce our panelists. We are fortunate to have the trial lawyers who litigated these cases.[4]

Doug Baldridge is with the Venable law firm. His partner is Lisa Jose Fales. They were trial lawyers for the defense, for Impax. Impax, at the time, was a Hayward, California, based generic pharmaceutical maker that has since merged into another company, but at the time it was one of the generic makers of Solodyn.

Richard Arnold was a trial lawyer for direct purchasers, for the large independent buyers. Anna Neill is his partner. They are both from the Kenny, Nachwalter firm in Miami.

We are first going to have a short tutorial on the law and facts of this case, and then we have questions for each of the trial lawyers. Lisa, will you tell us more about reverse payment settlements and why they are so often the subject of antitrust lawsuits.

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3 *FTC v. Actavis, Inc.*, 570 U.S. _____, 133 S. Ct. 2223 (2013).

4 This article is intended for general educational purposes. The panel discussion presented here has been edited stylistically and substantively for publication. The views expressed are those of the speakers to which the views are attributed and not necessarily to those of their clients, firms or other firm lawyers. Importantly, the speakers do not necessarily concur with statements made by their litigation adversaries simply because those statements are not expressly rebutted here.

A. Development of The Legal Standard

MS. FALES: You bet.

Good morning. I will tell you that as defense counsel we call these early entry settlements. I think Ken did a nice job explaining where these cases come from. They involve underlying patent litigation, hotly contested, that is then settled between a brand drug company and a generic pharmaceutical company.

There is something of value, typically a payment, that flows from the brand to the generic; hence, the concept of a reverse payment. Plaintiff's view is that that payment delays the entry of the generic drug that's covered by the brand's patent. Defense argues that, in fact, these settlements are procompetitive because they eliminate litigation risk and uncertainty that's inherent in every patent infringement case and ensure early entry by the generic.

When there is a settlement of the litigation, generics typically get a license from the brand for years of early entry. You're going to hear from Anna in a few minutes that in this case Impax got a license that allowed it to enter the market six and a half years earlier than the expiration of the brand's patent. That's entry with certainty. And, the license covered not only the patent that was at issue in the underlying patent litigation, but any subsequent patents that the brand company procured.

That's where this case comes from. In terms of the law, Ken touched on the *FTC v. Actavis* case. That is a seminal case in this area. Supreme Court case, summer of 2013, and it literally changed the legal landscape for the antitrust analytical framework under which these patent litigation settlements are considered.

Prior to *Actavis*, most of the courts used the scope of the patent test. And what the scope of the patent test says is, look, as long as the drugs covered in the underlying patent litigation settlement agreement are within the scope of the brand's patent—both the patent's claims on the drugs and by time—the settlement is not unlawful. The Third Circuit took a different view. The Third Circuit applied a "quick look" approach. If there is a so-called reverse payment, that is prima facie evidence of an unlawful restraint of trade.

The case went up to the Supreme Court. The Supreme Court rejected both of the standards used by the lower courts. We're not going with scope of the patent, we're not going with "quick look." Instead, the Court said we're going to use a traditional rule-of-reason analysis. We are going to apply to these patent litigation settlement agreements a traditional rule-of-reason analysis.

And interestingly the Supreme Court said, you lower courts figure out in your infinite wisdom how to apply the traditional rule-of-reason analysis to these incredibly complicated cases which have, of course, the underlying patents in them and, as well, other things you are going to hear about in our discussion.

What is essential in the *Actavis* ruling is that the first step before you even get to the traditional rule-of-reason analysis is that—and the burden of proof issue is contested—the plaintiffs have to establish that there was a large and unjustified or unexplained payment.

As I said, there is a different viewpoint on just about everything in these cases, but in particular there is a difference on who bears the burden of proof. Our judge—Judge Denise Casper, who was superb—said that the plaintiffs have to prove whether or not there was a large payment from the brand company, the holder of the patent, to the generic to settle, and then the burden shifts to the defense to establish whether the payment was justified or explained.

So, what you're going to hear about today is the concept of large and unjustified, as well as other critical issues in our case and the court's struggle with trying to apply the *Actavis* decision.

This morning, Doug, Richard and I had coffee, and the one thing we all agreed on is that there is a paucity of the Supreme Court giving the lower courts any direction on how to structure the rule-of-reason—and no definition for what constitutes "large." So, that's a critical and central part of these cases, and you are going to hear particularly about it in the *Solodyn* trial.

MR. ARNOLD: There must have been something in that coffee. I don't remember agreeing to that.

MR. O'ROURKE: Well, we can say the Supreme Court did lawyers a favor by leaving it open as to exactly how the rule-of-reason operates as applied to these cases. The Court has given counsel on both sides the opportunity to convince their judge how to try the case and the procedures for doing so.

Let's turn back to the facts of the *Solodyn* case. Anna, tell us more about the case. Give us the who, what, where, when and why.

B. Factual Background

MS. NEILL: Sure. I'll just say before I get started, that was a great introduction, Lisa. And, I think we tend to disagree on almost everything except that Judge Casper was superb. She was fantastic.

This case is based on the underlying patent case, on a patent known as the '838 patent that covered the acne drug, Solodyn. The patent was owned by the brand company, Medicis. That patent issued back in 1999, with an expiration date in 2018.

About seven, eight years after that patent issued, Impax, a generic company, filed an Abbreviated New Drug Application (or ANDA) to bring a generic version of the Solodyn drug to the market.

And, at that time Impax wanted, purportedly, to get certainty as to whether or not the patent would be enforced against its generic version of Solodyn, so it sent a letter to the brand company asking for a covenant not to sue it and asserting that the '838 patent was invalid, unenforceable and not infringed, and if Medicis were to assert the patent against Impax, that would be improper. Not receiving a satisfactory response, Impax then filed a declaratory judgment complaint seeking a judicial ruling that Medicis' '838 patent would not block Impax's entry.

That declaratory judgment action was dismissed for lack of standing as to Impax. The court found there was not a sufficient case or controversy. Impax appealed, and it was during the appeal that Impax negotiated a reverse payment settlement with the brand company, Medicis.

That settlement was entered into in November of 2008. On that same day, Medicis and Impax signed two agreements: (i) a license and settlement agreement which gave Impax an entry date of November 2011 for its generic product, and (ii) a joint development agreement that, among other things, provided for a $40 million payment to Impax and additional milestone payments totaling approximately $23 million as Impax completed various new drug development steps.

That is a brief chronology. One other thing to point out is that in 2008 there was a request by a third party for a re-examination of the '838 patent, and the '838 patent was ultimately upheld during that re-exam in 2010.

A couple of more things that are relevant, particularly to the causation part of this case. Medicis, the brand company, ended up launching what were called add-on strengths of the drug, Solodyn. So, the Solodyn product was originally available in three different strengths, and in 2009 and 2010 Medicis withdrew some of those strengths and launched other strengths. We refer to this approach in changing strengths as a "product hop"; it's part of the brand company's life cycle management to avoid generic competition.

Finally there were three other generic drug companies that also filed ANDAs as to Medicis' Solodyn product. All three of those were approved by the FDA. All three of them then entered the market very briefly for a day or two, sold large volumes of Solodyn, and then all three of those ended up settling with Medicis as well.

So, there was some product, some generic product that was launched into the market very briefly in December 2009, early 2010.

MR. O'ROURKE: Thank you, Anna.

II. PROVING A LARGE AND UNJUSTIFIED PAYMENT TO THE GENERIC

MR. O'ROURKE: One of the key issues that arose from *Actavis*, and we've heard about it already today, is whether there has been a so-called large and unjustified payment. That's one of the elements for plaintiffs to prove. Lisa, give us, very briefly, the legal standard on whether there has been a large payment. Then I'll ask Richard and Doug to talk about how they went about to prove or disprove it.

MS. FALES: Well, the only thing I would say in response to Anna's comment about Medicis, the brand, ostensibly engaging in a product hop strategy to restrain competition, is that we represented Impax, the generic. Medicis wasn't at the trial. We didn't represent Medicis. We don't control Medicis. Impax had nothing to do with Medicis' strategies, whatever they may or may not be.

So, on the question of proving a large and unexplained payment of some type, let me address that just quickly. The plaintiffs take the view that "large" is limited to two

considerations, either that the payment from the brand to the generic exceeded the brand's saved litigation costs, or the payment induced the generic to abandon its patent litigation and settle the lawsuit. Of course the terms of all settlements induce people to abandon the litigation and settle their lawsuits.

I'm not quite clear on what that absolutely means, but those considerations, I think plaintiff's counsel will admit, are somewhat aspirational in the sense that no court in the five and a half years since *Actavis* has been litigated—and it has been heavily litigated—has litigated what constitutes a large payment.

That view has never been adopted by any court and, instead, what the courts have said—and I will take it to this particular court in the *Solodyn* case—in order to determine whether a payment is "large," you look at the facts and circumstances that existed at the time when the parties entered into the transaction to determine whether or not it is large.

Judge Casper said that in this case, specifically rejecting the plaintiff's view that we could only argue those two conditions.

Judge Mitchell Goldberg, in the *Modafinil*[5] case—another case that Doug and I tried—said exactly the same thing, that you look at the facts and circumstances of the case and that you can consider the value of the patent, and related to that, what the brand stands to make under that patent relative to the payment. So, that's the state of play on the law for purposes of this discussion.

MR. O'ROURKE: Richard, tell us about proving whether there was a large payment in this case. We've heard reference already to a $40 million payment and to another $23 million in milestone payments, but was all the money paid to Impax large enough and substantial enough under *Actavis*?

A. Importance of Trial Themes

MR. ARNOLD: Thank you. And, Lisa, of course we've got to recount this a little bit. Anna and I have other cases with Doug and Lisa, and we will probably end up trying at least one more of these, maybe two. And we tried one separately that they didn't.

There are a number of comments here that I want to temper a little bit. But to answer any question about trial tactics, you have to first understand what you're trying to accomplish.

Lisa is correct on the court's ruling, but we felt we could meet the standard. It's just a matter of trying to prevent some of the evidence that they put in. She's correct on the rulings. She's also correct that we maintain we had the correct reading of *Actavis*, and we will continue to make that motion. And, one of these days one judge is going to actually read *Actavis* correctly.

Now, let me just make something real clear here. I want to talk about Judge Young in Boston, Judge Collier in Chattanooga, Tennessee, Judge Goldberg in the Eastern District of Pennsylvania, and Judge Casper in Boston. And, all four of those judges were excellent

5 *In re: Modafinil Antitrust Litigation*, E.D. Pa., Case No. 2:06-cv-01797.

trial judges. We may have disagreed with their ruling on what evidence came in, but we certainly didn't disagree with the way they conducted the trial. The trials were done very well. Judge Young stubbed his toe a couple of times where he admitted it on the record, so it's not like I'm saying anything out of school.

However, the answer to how you try to prove it's a large payment has to be put in context with the theme of your case. You see—especially from the plaintiff perspective and I know it's the same for the defense—Doug tries cases, and Lisa, they try cases a lot, like we do—you have got to, first of all, develop a theme to put that question in context. Juries look at cases as a whole. They don't look at individual issues like we do. And, so, you need to have an overall theme to a case.

By the way, this case, this particular case we're talking about, because of a technicality, was not a Hatch-Waxman case; however, the theme that relates to the structure of the industry fits this case just like it does the others, and that theme is simple.

We have a system set up, I call it the "grand bargain." Congress and the state legislatures have put together a drug manufacturing and distribution set-up that has what I call the grand bargain with three partners in it: (i) the brand companies, (ii) the generic companies, and (iii) the consumers—the people that basically end-up paying the end price for these drugs.

And, the bargain is simply this: we want drug companies to go out and produce drugs and help us fight disease. That's a very expensive proposition. When they discover something that's significant, they should be allowed to make some money on it. We do not attack the high prices of brand drugs on the initial launch of an innovative drug, and we make that clear to a jury. That's not why we're here.

The bargain is that if the brand company, through research and development, develops an important and useful drug, they then can through the FDA process file an NDA—a New Drug Application—getting a period of exclusivity, and sometimes getting a patent that also sometimes helps extend that period of exclusivity. They have a right—if that molecule is good enough—they have a right to make a bunch of money on that, and they do. It's all over the newspaper. You read about it all the time. They charge very high prices for that. They're recouping their investment. They're being motivated to fight disease for all of us. There is nothing wrong with that. However, there are other parts of the bargain.

The other part of the bargain is, we've created a channel for generic drugs. This generic industry is created effectively by statute. Generic drug companies have low costs for a very simple reason. They have low costs because they don't have to do the research again. I'm not going to get into all the technical parts of it, but they are free to file what is known as an ANDA—that is an Abbreviated New Drug Application. They get to come in and use the research basically that's already been done by the branded drug company. All they have to do is prove that they're bio equivalent to the branded drug and that it's safe and effective, and then they're allowed to come into the market with their generic drug.

The second part of that is if the generic company gets in first, they get six months exclusivity where they can make a decent amount of money. The other part of that is, we have 50 states that have generic substitution laws, some of them automatic, all of them with some type of permissive way to do substitution. So, what does that mean? That

means generic companies don't have to hire marketing people. They don't have to have those drug reps going around trying to convince doctors that this is the right drug and they should be writing it in prescriptions. Their cost basis goes way down. Basically, their cost is the cost of manufacturing, plus cost of litigation when they get involved in lawsuits with branded companies.

Now branded companies, their bargain is they get to reap a lot of profit. Generic companies' bargain is they are filling a role in society by coming in and bringing in lower priced drugs, and their way to come in has been eased all the way through.

And guess what, at the bottom of this grand bargain are consumers who basically pay the high prices, or pay through insurance and co-pays and everything else. It's a tax—rent is being charged in society for these drugs. We pay them because we get in return good drugs, but when the game is up and it's time for these generics to bring in a new drug, "we"—that is all of us who consume drugs—get rewarded by being able to now get inexpensive drugs that do the same exact thing. But when that system gets cheated, that's when these cases come in to play.

One thing that we didn't point out, Lisa brought it up: they represent generics. In all of these cases, we sue the brand too. In this case, Medicis and other generics had settled with us before trial. Doug and Lisa are excellent trial lawyers, and they're very difficult to settle with. And so, we were trying a case against them by themselves. The real bad actor here, in our theory of the case, was Medicis, but the generics were enablers, and that's why we were presenting the case against them.

You have to understand the theme to start out with. There's an asymmetry in the drug industry. A billion dollar drug to a brand company is only a $100 million drug to a generic, sometimes divided by three or four, and maybe even five other generics. So, when you're looking at what type of payment is large enough to disincentivize generics from coming into the market, persisting and launching at risk. You hear a lot about this. Because of that asymmetry, it has two impacts on this industry.

Number one is the brand company. Let's use an example. There's a term in the drug industry called "blockbuster" drugs. When they have a billion dollar drug, they call that a blockbuster drug; that's standard. They're looking at protecting a billion dollars' worth of revenue. These generics who are going to launch are looking at grabbing off 20 percent of that, if they're lucky. And in Solodyn, Impax's projections were they were looking for something like $37 million to $40 million on this deal, and that was greater, probably, than what they were going to make on the deal.

So, when you start talking about "large," it depends on whether you're talking about the branded company or the generic company. If you compare what Medicis was going to make on the drug to what share these people would like to have of that, if they were a brand company then it would be hundreds of millions of dollars.

This case pivoted on the size of whether $40 million was sufficient or large enough. And, we had an interesting debate on that.

MR. O'ROURKE: Thank you.

B. Proof at Trial

MR. O'ROURKE: Doug, was the payment to Impax large?

MR. BALDRIDGE:

As Lisa said, the plaintiffs' bar looks at *Actavis* as having said the way you judge "large" is comparing it to the brand's saved litigation costs, as well as did the payment induce settlement. Plaintiffs file that motion in every case. Respectfully, because the Supreme Court left it very uncertain, plaintiffs have lost every time. And as Judge Casper said solidly, no, you need to look at the business context in which the payment took place to determine whether it's large. So, the way we tried it was very simple: compare them, compare the amounts.

If you take the amount of money made by the brand on sales of Solodyn, its billions of dollars—I believe a couple billion dollars. Compare it to the payment they alleged that my client received, about $40 million. It's less than a half a percent of the going-forward revenue made by the brand on sales of the Solodyn product. What does that mean? Half a percent, even to a jury, is not large. That's one point.

The second point is that the plaintiffs in another context say, this patent was weak. You—the generic—would have won that patent case. Well, my answer would be to the jury, are we so stupid to only take a half a percent of the going-forward revenue on a patent case we would have won? That, in and of itself, shows the strength of the patent, as well as that the payment is not large.

What we're learning in these cases is that within the rule-of-reason you can do almost anything to put forth, comparatively or otherwise, why a payment is not large. What I learned in the *Modafinil* case with Richard was, I can't compare the amount of payment to the size of the worldwide pharmaceutical market, because I was stopped from doing that, and I think rightfully so. So, we have kept the comparisons within the box of what the actual revenues are on the drugs. That's basically the way we have tried it.

MR. O'ROURKE: Lisa, quick comment?

MS. FALES: Yes. I was going to add that it's a two-part test, right? It's large and unexplained. So, even if the plaintiffs can check the box on "large," they still have to establish that the payment was unexplained. And, basically what plaintiffs say about the payment is, it's a sham. Whatever the defendants say the payment was for, it wasn't.

So, what is "unexplained"? The Supreme Court says you look at traditional settlement considerations, and there is a litany of them, about five. For purposes of this case, the issue was, was there fair market value for the goods or services that the generic, Impax, provided to the brand in exchange for the $40 million?

I don't want people to sit here and think there were was $40 million that was freely handed over. That's not the case at all. There was, as I said earlier, a joint development agreement. That joint development agreement covered an obligation on Impax to work mightily to develop the next generation Solodyn, as well as four other generic dermatological drugs. And, guess what, Impax succeeded. Impax brought Adoxa to the

market. It's on the market today, being sold earlier than it would have been, benefiting the healthcare system and consumers, because of the joint development agreement.

What the plaintiffs say in these cases is, the joint development agreement didn't really mean anything. That joint development agreement was just a way for the brand to funnel cash to the generic. Guess what, my client—our client—spent four years developing these drugs—four years, 50 meetings between scientists, technical people all over the country. These scientists and technical people didn't know anything about a settlement agreement or patent litigation. They were tasked with one thing: "Go out and develop these drugs."

We had very good witnesses, including the former general counsel of Medicis, who was the chief negotiator for Medicis, who gave superb testimony on all of the work that his client and our client did together to develop drugs under this joint development agreement. It was a legitimate fair market value transaction.

MR. O'ROURKE: Thank you, Lisa.

MR. ARNOLD: Well, let me just add one thing. Everything she said is true, except she left out one small fact. They were paid under that contract for all of that activity separately from the $40 million that was plugged into that contract at the last minute. And the amount, $40 million, happens to coincide exactly with the $37 million to $40 million their client said inside they would have to have to not go to market with their generic version of Solodyn.

And, in addition to that, the thing that's always missing from the defense case is the documents. It's a great story. The problem is, we've got thousands of documents, and there's not anything to back that part of it up. There is plenty to back up the fact there was a $40 million payment.

We told the jury at the beginning, we're not saying this whole agreement is bogus. We told them that this agreement is valid if you take one paragraph out and put it over here, all of a sudden this is a valid agreement. These people are being paid for everything they're being asked to do.

The problem is, there's a $40 million paragraph in here. It really belongs over there in the settlement agreement, but if they put it in the settlement agreement they all go to jail, so they put it over here in this agreement so that it could look like a joint development agreement.

That's our view of her eloquent argument about why we should have never went to court.

MR. BALDRIDGE: No one has gone to jail yet, and the *Nexium* jury did find that the documents were there.

MR. ARNOLD: Actually, no they didn't. They found anticompetitiveness by your client. They just found there was no causation, period.

MR. O'ROURKE: All right. We won't reach agreement on that issue today.

III. ROLE OF THE UNDERLYING PATENT AT TRIAL

MR. O'ROURKE: We talked about the fact that the rule-of-reason comes into play in these types of cases. We've also heard that the patents are a big part of what led to the litigation and to the delayed entry allegations. Anna, I'd like to turn back to you. Tell us about how the patents and the patent infringement allegations play into these antitrust trials. If you have to try a patent case in order to win your antitrust case, you have a trial in a trial.

So, how did this play out?

MS. NEILL: You're exactly right. One thing that we always have to keep in mind throughout these cases is, it's an antitrust case—it's not a patent case. That being said, obviously what happened with the patent in the underlying case and the settlement is critical.

We basically took the approach that we need to establish that Impax knew that the patent was bad; it was no good. In fact, they're the ones who came up with the arguments and they're the ones who told Medicis in a letter, your patent is bunk. We know it; you know it. If you try to enforce your patent against us, we're going to sue you for anticompetitive behavior. That letter was from Impax. They're the ones who said this to the brand company, Medicis, back in 2008.

What we wanted to do is, first and foremost, use Impax's own words against it. We wanted to say it again and again, and show the jury this letter. Look, Impax said they knew that the patent was bad, and if Medicis tried to use the patent against Impax then that would be anticompetitive, that would violate the antitrust laws.

So, that being said, there's also the issue of causation. We alluded to it briefly. But in order to establish that our clients were injured by the anticompetitive behavior, we have to show that Impax would have come to the market without this agreement.

And, part of what we are faced with in these cases is trying to overcome the generics' argument that they wouldn't have been able to come to the market, they wouldn't have defeated the patent, or they wouldn't have launched at risk of the patent.

For those reasons, showing that the patent was, in Impax's mind a baseless patent they weren't concerned with, is super important. But, we also want to show the patent is baseless objectively and give the jury this additional evidence. We did have patent experts, we had a scientist who came in and talked about the patent and why everyone would have known that this patent was obvious and therefore invalid.

We also had another expert. The former head of the U.S. Patent and Trademark Office, the PTO, who talked about the inequitable conduct that Medicis engaged in, in obtaining the patent. And then, we also had another expert, a professor and patent expert, talk about the fact Impax did not infringe the patent. He also opined that, based on what he had heard from the other experts, this was one of the worst patents he had ever seen. And, he would only give the brand company a less than 5 percent chance of prevailing on that patent.

MR. ARNOLD: Can I add one thing, real quickly?

MR. O'ROURKE: Quickly.

MR. ARNOLD: You notice all the conduct she's talking about there is Medicis' conduct. The balance in the trial on a case like this, if the brand company is there, then you hammer them and you drag the generics in at the end. When they're not there, you have got to be careful.

You want to tell the same story, but you've got to keep more of the spotlight on Impax in this case, otherwise Doug gets up and says, that's a great case. I don't know why we're here. And, I would have to agree with him, unless we tie the generic to the brand.

And, so, not only do you not want to get down into the details on the patent too much, you also realize that all of the real bad conduct with the patent was done by the brand, not the generics.

MR. O'ROURKE: Great points.

Doug, he's foreshadowed what you were going to say, but please tell us how you try these cases from the defense perspective when the patents are a key issue but you don't want to overplay them with the jury.

MR. BALDRIDGE: Putting it in context, it's pretty obvious when you're entering into a license agreement that allows you to get on the market before the expiration of the patent, the plaintiff has to put on the case that you would have won that patent litigation or gotten it into market. That's the context within which plaintiffs' argument falls. And what the plaintiffs, in our view, have been unable to defend against is the fact that there's always risk of losing that patent case, and there is no obligation that the generic take on that risk.

You can bring in as many patent experts as you want to say this patent is not good. In fact, the patent expert that Anna just mentioned sat on the stand and saw, as certain as the sun comes up tomorrow, Impax would have won that patent case. And Richard and I were, truthfully, chuckling a little bit about that this morning. No matter what the evidence is, you cannot remove the risk of having lost.

Most of these cases, the Hatch-Waxman cases, occur in the District of New Jersey. You have a 37 percent chance of winning a patent case as a generic in the District of New Jersey. So, no matter what case is put on, every witness is going to answer on their side and ours that, yes, you're still at risk.

So, then the question becomes, well, were we obligated to take on that risk, to bust the patent so that other potential competitors could come in with us and eat the pie with us? And, the answer is no.

Now, Anna mentioned in her opening about how in this particular case the patent had been challenged and upheld. That was a good fact for us. So, it was hard for them, in some sense, to argue that this was a bogus patent, notwithstanding all of our claims against it in the patent litigation because the patent had been upheld. You have other cases where patents have not been upheld, so it gets a little more complicated.

MR. O'ROURKE: Doug, allow me to follow up.

IV. PRIVILEGED INTERNAL ANALYSES

MR. O'ROURKE: Anna mentioned that there was a letter from Impax to Medicis, an advocacy letter saying your patent is no good, in essence. You would also expect that there's a lot of internal analyses that generic companies do analyzing the brand's patents and deciding what is the level of risk of losing the patent infringement case and being hit with damages if we were to enter. Much of that analysis is privileged, and much of it, though, may be favorable to your side because it shows the generic knowing it is at risk of losing.

How do you, if at all, work with these issues?

MR. BALDRIDGE: What's interesting in most of these cases—and Richard and Anna's team did this is a little less than some of the other plaintiffs' counsel—is the plaintiffs try to bust the generic's attorney-client privilege. They say it would be impossible to make your decision about risk of the patent and risk of litigation without incorporating the privilege analysis, which necessarily must come in.

Our position has been, and evidence in these cases has shown, that the business decision makers, non-lawyers, don't care about whether it's a risky patent case or not a risky patent case. All they care about is, if I lose, I'm going to pay treble damages that might be hundreds of millions of dollars. If I launch at risk, my upside is only the amount I make on sales less some amount, so there's no way that it's worth taking the risk of a big loss given the risk of a patent case. That's inherent in every patent case, unrelated to the merits of this particular patent. So, that's how we have avoided privilege, and that's why privilege hasn't come in.

Now, in *Nexium* there were privileged documents from the brand—not the company we were defending—that came in because they crossed that line between the risks inherent in patent litigation versus the risk as to the particular patent.

MR. O'ROURKE: Anna, notwithstanding the fact that pharma companies may face a large patent judgment if they enter and are found to have infringed, there are times when there are so-called "at risk" launches. Generic companies will sometimes launch their products into the market all but assuming they will get sued for patent infringement.

What are your views on the kinds of documents that you're going to see or not see about whether and how the company evaluated its own risk of having to pay damages?

MS. NEILL: Well, it's interesting because in this instance, Impax actually was prepared to launch. They made three months' worth of product. They had a document showing that they had contracted for about 84% of the generic market. They had a launch date ready to go, and so that's exactly the type of evidence that we love to have, that we love to rely on and show the jury. Look, what type of company is going to spend millions of dollars to make a bunch of pills just to turn around and throw them out?

And, so, they can have somebody come in and say, well, we were never going to launch at risk. From our perspective, if you were never going to launch at risk, perhaps you should have told someone that before they spent millions of dollars making three months'

worth of supply. They also had taken orders from our clients for their generic product that they were planning to launch at risk.

So, again you can say, well, we were never going to launch at risk, but if you were never going to launch at risk you certainly wouldn't go to one of your biggest buyers, Walgreens, and say, hey, Walgreens, we're going to have this great product on the market. You want to buy some? And sign them up, and then, come back later and say, oh, no, no, we were never going to do that. You're going to basically ruin the relationship with your customer.

That's exactly the types of evidence we would like to have, and did in this case.

MR. O'ROURKE: Is there a short answer from the defense side of the table? A short answer to the question of, if you have these documents saying that you're prepared to launch, and you've gone out to customers to get orders but you're really not going to launch, is there an answer for the jury as to why we see these kind of documents?

MR. BALDRIDGE: That's not what the documents say. Bottom-line, if you look for a launch date in the documents, almost 100 percent of the time that launch date will be the end of the 30-month stay under Hatch-Waxman, which is just a placeholder date. It's impossible to really pull it away from the end of what Hatch-Waxman says about the time period you can't launch within. So, they just knock in 30 months from that point, and that's how we explain it.

V. BALANCING THE PROCOMPETITIVE BENEFITS AND ANTICOMPETITIVE HARM

MR. O'ROURKE: Let's change to the procompetitive justifications that are argued in these cases. Lisa, let me turn to you. In your trial, what were the procompetitive benefits or justifications for these payments that we've been hearing about?

MS. FALES: I think I've touched on them but, you know, the first thing is, how do you look at the procompetitive justifications? The plaintiffs take the view that you only look at the actual payment and not at all of the license and settlement agreement terms or the terms of any other agreements that may have been entered into.

We don't take that view and, quite frankly, with all due respect, the courts don't take that view. The courts say you look at all terms of the agreements at issue, and you look at the business context of those agreements. And, in fact, the procompetitive justifications, or benefits, or efficiencies that flow from all of those agreements are relevant to the rule-of-reason balancing test that we all know how to do.

So in this case, under the license and settlement agreement, as we have said, there is over six and a half years of early entry. That is the opportunity for the generic to come onto the market with 100 percent certainty and no risk. We also got a license to future patents. So, to the extent that Medicis procured additional patents that could be asserted against us to keep us off the market, we got a license to those as well. That's the license and settlement agreement.

Then we touched on the joint development agreement. Under that agreement we were tasked with developing—and we spent four years trying to do this—four other generic dermatological products, and we succeeded. We got Adoxa to the market. We had another product which we succeeded in developing and, guess what, the brand sued us and blocked us under its patent. Go figure. So, we succeeded on those fronts.

We also worked diligently for these four years to develop the next generation of Solodyn. This is, as you have heard, a $2 billion product that was very valuable to Medicis to have—and valuable to the healthcare community and to patients. It was an improved, next generation Solodyn, a Minocycline ER drug. And, the goal was to minimize the side effects of Solodyn. We worked mightily to do that, and we came out with various prototypes. Ultimately they were not that much better. We could get it more efficient, then the side effects were higher, and vice versa.

So, all of these things are, in fact, procompetitive justifications for the alleged unlawful payment.

MR. O'ROURKE: Anna, that's a long list of alleged procompetitive benefits. At trial how are you overcoming their showing of that long list of benefits flowing from the underlying agreements?

MS. O'NEILL: Well, first and foremost, I would say that none of those benefits flow to anyone who is actually purchasing Solodyn. So, those benefits are not within the relevant market as we would define it.

Certainly, and as Richard pointed out earlier, to the extent that the joint development agreement was a proper agreement and was used to develop great new products, that's wonderful. Medicis could have paid the milestone payments, they could have paid Impax the $23 million, and they did. The $40 million was just gravy. It was just there to help Impax decide that they were going to launch their product several years after the date they were otherwise planning to do so.

And, as to the early entry, we're going to argue again and again, about the six and a half year early entry because, of course, that's a great procompetitive justification if you're talking about the dissent in the *Actavis* case, which Justice Roberts pretty much said the scope of the patent is, as long as you're coming in early, that's procompetitive.

Well, we think that *Actavis* has made clear that arguing it is procompetitive because you're coming in before the end of the patent is not legally acceptable.

MS. FALES: I'd just add, we love Richard, we love Anna and their team. The one thing that continues to amuse me is that they never let the developed law stand in the way of a good story.

MR. ARNOLD: I haven't used all my time. A couple of things. One is, remember, we're the plaintiffs. We get to go first. We're telling the story a little piece at a time. That's not how we told the story. Secondly, Lisa's 100 percent correct about the court rulings, but all those court rulings were made before we started the trial, in the sense that we already knew basically what the evidence was going to be coming in.

Here's the two small facts that have been left out of this entire thing. One, Impax did get in before the patent expired. Impax did agree to a three-year delay, but the reason that three-year delay was put in—and, this is why I was also telling you about why the brand wasn't there at trial. Medicis already knew they had a terrible patent, so what they did is they were working on a product hop. It was going to take them three years to make sure they got this market moved to their new product. So, at the time Impax came in, the product that they were going to come in with wouldn't have been worth anything anyway, and Medicis went to work on that right away.

Secondly is, they weaponize these people by giving them what is known as an authorized generic license, that is, the generic could come in with the blessing of Medicis to bring in a product which we used to call it in the old days a "fighting brand." They basically put a brand up there that any generic looking at it says, well, wait a minute. Even if I come to this market, these guys are sitting right here with Medicis as an authorized generic. Now they weren't allowed to launch that unless somebody else got in the market. And, if they let someone else in the market, they were allowed to bring the authorized generic in the market.

It was those two things, the weaponization of this authorized generic and assisting them in the product hop, so that by the time they got in, this supposed procompetitive benefit was instead a mercenary gesture on your part by coming into the industry and lowering prices on the drug, the drug you're going to lower the prices on simply is not where Medicis would be with the product.

MR. O'ROURKE: I sense there's strong disagreement with that viewpoint from the defense side of the table, but rather than go there, I want to go to the next question.

Richard, back to you. We've heard about the procompetitive benefits, and we've heard that Impax launched other pharmaceutical products that had benefits for consumers. These events all happened in the future because of this deal. We've also heard there was a subsequent patent office ruling upholding the validity of the patent. These events, of course, happened after the settlement agreement itself was signed.

When is it, as we perform our rule-of-reason analysis and we're balancing the procompetitive benefits and the alleged anticompetitive harm of this alleged delay, are you looking at all of these events. Is it from the perspective of the time the ink is drying on the settlement deal, or do you go out into the future to look at what's actually happened after the settlement was signed?

MR. ARNOLD: The truth is that it's only fair to analyze it from the point of view of what was being looked at, at the time that people did the deal. That's why we concentrate on the idea that they knew how weak this patent was, and they were clear about it.

They were prepared to launch. As Doug was saying a minute ago, this was kind of normal procedure, but it's actually not. You don't manufacture the drug, you don't go out and get people to do this and take orders unless you're planning on launching. And, if you're not planning on launching, you at least have a board of directors' minute or two to say you're not going to launch, which they didn't—it seemed to be missing from their files. And so, that part of it we concentrate on. That's what was going on right then, and that's analyzing that point of view.

However the cases that we have tried, it turns out that most of the subsequent events seemed to underscore that what the generics thought was going to happen actually did happen. That is, that this was a weak patent and things weren't working out, and those types of things. And, so, we wanted to bring in evidence of things like that. They obviously don't.

But, I said it depends because I promise you if the evidence made it look more like they were right, they would want it in also. So, that's the struggle between us.

And, it depends. Depends on what the facts look like at the end. However, there is no question all of us recognize we've got to prove what the circumstances were at the time the deal was entered.

MR. O'ROURKE: Doug?

MR. BALDRIDGE: Richard says, it all depends on the facts. And we spend a lot of time fighting over what counts after the fact versus the day of the settlement, to the extent it favors our respective clients. But, the courts have pretty much adopted, you look at it on an ex-ante basis as of the date of settlement. What were the facts as of the date of settlement? And the issue is, would we have launched at risk? And the situation of generics, you almost always have the fact that the generics didn't have final FDA approval to launch a product as of the date we settled, so as a matter of law we couldn't have launched anyway as of that day.

As of that date of settlement there was a valid patent that barred us from launching as well, and so on and so forth. That's the reason that we focus on the ex-ante date, and it's also what the court told us to do at this point.

MR. ARNOLD: And let me just say real quickly. And, Doug—and we—as I said, we've tried several of these, and not in the trial we're talking about now, Solodyn; rather in the one we tried the year before. Doug and Lisa did a great job of coming up with an expert who basically was able to testify as to everything that happened on the date of the settlement, and had his memory erased for every day after that. So even when the judge actually allowed us to ask a few questions about subsequent events, this guy didn't remember any of it. It was very well done, actually.

MR. O'ROURKE: We haven't reached agreement on any of these issues today. And we're coming to the end of our session. The natural next question I should be asking is, okay, so what did the jury decide; who won?

In this particular case we never got the answer from the jury. The parties ended up settling about halfway through the trial. It was right about the time the plaintiffs closed their case, closed their evidence. The parties settled. The judge thanked and excused the jury. So, we're going to have to wait for another trial to actually get a jury's answers.

But, speaking of questions, we have a few minutes left, and if anybody in the audience has a question, we saved a couple of minutes for you.

VI. RELEVANT PRODUCT MARKET

JAMES KEYTE, with the Fordham Competition Law Institute: With the rule-of-reason we're usually litigating market definition. I'm curious in these reverse payment cases if you do that anymore. You're fighting about whether the molecule is the market. Just wondered if you would address this topic.

MS. FALES: Yes, we absolutely do. The plaintiffs take the view that the relevant product market is the brand and its A-B generic substitute. We take the position, depending on the drug in the case, here it was an acne medicine, and there are dozens and dozens of drugs that treat acne. We had an excellent expert, a guy named Guy Webster who was a world renowned dermatologist, who testified as to his practices regarding substitution of drugs for Solodyn.

Plaintiffs had an expert, a dermatologist who they ended up not calling because in her deposition she admitted that she uses substitutes for Solodyn, other tetracyclines. So, market definition absolutely is an issue. There's not much we agree on, except that we appreciate and like each other. Market definition is hotly contested in these cases.

And you can hear from all of this, there are dozens of expert witness, there are dozens of fact witnesses. For every document that they say says "X," we have a fact witness who says it says "Y." They say we overpaid. We had Dennis Carlton of the University of Chicago, and we had Greg Bell of CRA, both of whom said there wasn't an overpayment here. So, you can see how dynamic and hotly contested these issues are.

MR. BALDRIDGE: I would just say, as a jury trial lawyer, it's pretty easy for people to understand there are a lot of substitutes to treat acne. So, even if it's not the right standard, which plaintiffs' counsel would argue it's not the right way to look at this, it's a pretty easy thing to say everything from oatmeal to sunlight treats acne.

MR. ARNOLD: Except for a very simple thing. This is an antitrust case, and price sensitivity is clearly the best way to define a market. And the data, including the charts and data out of their files, show that there's very little price sensitivity with a launch of new acne drug.

Yet with Solodyn, there is a huge drop in price when an A-B rated generic comes into the marketplace, and that's the economic basis for claiming the molecule is the market.

MS. FALES: I would just say that our expert on that issue was Sumanth Addanki of NERA, who did a superb job showing, in fact, that there is price sensitivity. It's a very difficult concept in pharmaceutical markets because it is so complicated as to who pays for the drug and what price they pay, so you don't have the data that you need to do cross-elasticity of demand the way the plaintiffs would suggest, but Sumanth did an excellent job on that issue.

VII. CONCLUSION

MR. O'ROURKE: Our time is up. Great discussion. I ask all of you, please join me in thanking our terrific trial panelists. [Applause.]

ANTITRUST ENFORCEMENT PANEL: A CONVERSATION WITH TWO ENFORCERS

By Ashley M. Bauer[1]

The Golden State Institute was honored to host a panel discussion with current antitrust enforcers, including **Bruce Hoffman**, Director of the Bureau of Competition at the United States Federal Trade Commission, and **Doha Mekki**, Counsel to the Assistant Attorney General in the Antitrust Division of the United States Department of Justice. The discussion was moderated by Karen E. Silverman, Partner in the San Francisco office of Latham & Watkins LLP.

MS. SILVERMAN: This is quite an honor, truly, and thank you for your interest in the Institute. I think you're going to find the conversation this afternoon—and we are going to make it a conversation—pretty interesting. We are going to try to get a dialogue going, and we will reserve some time for questions. So, keep track of those because we are going to move through a couple of different categories with our panelists; although, if you think there is something really pressing, certainly we are happy to be interrupted.

We have a gender-balanced panel. So, when I say this is Bruce, you know exactly who I'm talking about. Bruce Hoffman is the Director of the Bureau of Competition at the Federal Trade Commission. Before that, he was in private practice, where we had the pleasure of working together on a couple of matters. Specifically, Bruce was the head of Shearman & Sterling's Antitrust & Competition Group, which is a global practice. Before that, he was chair of Hunton & Williams' antitrust practice. He's been doing this for what I'm going to say is a very long time, because I've been doing it a long time. He will tell you and show you that he is a graduate of University of Florida.

MR. HOFFMAN: And, my homemade orange and blue Apple watch band.

MS. SILVERMAN: And, then Doha Mekki has joined us from the Department of Justice, where she is Advisor and General Counsel to the Assistant Attorney General. She is sitting in for Barry Nigro, who is sorry he could not be here today. But we are delighted to have Doha in his stead. I know that she has some interesting things to say. She will be channeling Barry a little bit, but is also very much her own woman.

One of the things that has occurred to me being out here in San Francisco is we don't get as much time as some of our Washington D.C. colleagues do just getting to know you a little bit. Things like: what is interesting to you, how you came not just to your practice in general but also what inspired you from an antitrust perspective, and what you enjoy most about your practice. I wanted to let you know that's part of what we're hoping to get out of this panel today—a sense of who you are and how you came to this practice. We're also going to cover some questions about mergers, as well as nonmerger civil work. We're going to talk a little bit about technology, and the exogenous factors that can affect investigations. And then we'll wrap it up with some Q&A at the end.

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1 Ashley M. Bauer is a partner in the San Francisco office of Latham & Watkins LLP and a member of the firm's Litigation & Trial Department.

So, on with mergers. I think we're going to start with nonhorizontal mergers. There has been a lot in the news these days with the CVS-Aetna deal, the Time Warner-AT&T deal, and the Amazon-Whole Foods deal. These are deals that have lots of strategic implications, but do not raise the traditional horizontal merger questions, or if they do, they're driven more by the nonhorizontal aspects. There is a renewed focus on these types of deals from what we can tell; not just from the docket that you all maintain, but also from your speeches on these issues during the hearings that have been going on in Washington. These mergers also raise very specific questions: how do you protect against overenforcement? How do some of the adjacencies in the product markets implicate potential competition issues? What kinds of evidence are most probative in a case where you're not looking at classically horizontal overlap? How do you protect against false positives or the trap of having to prove negatives? And do you put that trap on the parties or do you put that trap on the government?

So, with that, I am going to ask Bruce to start us off on with his thoughts and any summaries about vertical or nonhorizontal mergers.

MR. HOFFMAN: Thanks, Karen. So, first off, let me thank the California Lawyers Association and everybody involved in giving us the opportunity to come out here and speak. This is a fantastic antitrust bar. I've had the pleasure of working with a lot of people in this room. I've had cases out here, and I've also had the great pleasure of working closely with the California Attorney General's Office, particularly through our western regional office here in San Francisco. That office is made up of a phenomenally talented and hard-working group of lawyers handling antitrust and consumer protection issues, intimately involved in some of our most cutting-edge cases and investigations. So, it's really a great group of people; it's a real pleasure to be out here. Thank you.

And, let me also give my standard disclaimer. The views I express and the things I say do not necessarily represent the views of the Federal Trade Commission, or any Federal Trade Commissioner, or even my own views, depending on the context—we'll see.

In terms of nonhorizontal or vertical mergers, I don't know how many folks out here are merger practitioners, but I find merger law absolutely fascinating. A friend of mine—he's a family lawyer—once told me after listening to me talk about a merger on the phone: "I've never known what you do; I still have no idea what you do, but it is far more boring than I imagined possible." And, nonhorizontal mergers, can you get better than that?

But, in any event, let me say something. Earlier there was some conversation about economists taking over the antitrust world. That's actually largely why I got into antitrust; I was interested in economics, but I couldn't do the math. I moderated a panel on vertical and nonhorizontal mergers at the FTC hearings that are going on right now, and, on that panel, we were asked a question which ran something like this: given that the implied benefit from the elimination of double marginalization is isomorphic to the harm implied by concentration in horizontal mergers, why would we make any assumptions *a priori* about the direction of the arrow? And, I thought, how come you asked the lawyers' panel this question and not the economists' panel?

So, when we look at vertical mergers, one of the things that we think about—and this came out of the *AT&T* case,[2] which, of course is a DOJ case—is that implied in any nonhorizontal merger is a built-in efficiency. And, what I mean by that is, when you've got a firm that makes something and then they buy a firm that distributes it, that is going to be inherently cost-reducing because you eliminate the incentive of each firm at that level to charge its own markup or take out its own profit. Rather, they could just do the internal transfers at marginal costs. And, so you have this built-in effect. Carl Shapiro, who is the Department of Justice's expert in the *AT&T* case, recognized this and mentioned it at the hearing. This effect creates some inherent differences in how we look at nonhorizontal versus horizontal mergers.

But, I don't think this is really the time and place to go into too much detail on that, although I will answer questions. For more information, I would look at the transcripts coming out of the FTC hearings last week, which I think are worth reading. I also gave a long speech on this just about a year ago in Washington, which is up on the FTC website.[3] And, John Sallet, who was the Deputy Assistant Attorney General in the Antitrust Division under the Obama administration, gave a long speech on vertical mergers as well. A lot of these issues are fleshed out in detail there.

One of the critical things to remember when we look at these mergers is that there is a fundamentally different starting point for horizontal mergers and vertical mergers. Horizontal mergers have an implied anticompetitive effect; it doesn't always happen, it can be outweighed by efficiencies, but it's an inherent condition of a horizontal merger. This is not the case with a vertical merger.

MS. MEKKI: I think that's exactly right. Let me also start off by saying thank you to the California Lawyers Association for having me. Hopefully the biggest reveal I will make today is that I am not, in fact, Barry Nigro, but I am nevertheless happy to be here, and I think this will be a very good conversation.

Let me also add a disclaimer: I am here in my personal capacity, and the views I will express today are not necessarily those of the U.S. Department of Justice or its Antitrust Division.

Back to the point of nonhorizontal mergers. I agree with everything that Bruce has said. I would also note that one of the reasons why larger nonhorizontal mergers have captured attention from lots of observers, including antitrust enforcers, the private bar, academics, legislators, and others, is because sometimes large deals, while inherently procompetitive, can fundamentally alter the way consumers experience the delivery of goods and services. And, sometimes it takes work to sort out what should go in the procompetitive effect bucket, and what might actually be an anticompetitive effect. There are layers of challenges that we experience from sorting that out. The first is the categorization, and the second is how you balance those potential effects. Then remedies are of course a whole different can of worms.

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2 *United States v. AT&T Inc.*, Case No. 17-cv-02511-RJL (D.D.C.).

3 Available for download at: https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf.

But, notwithstanding those powers and the fascination that large mergers—in particular large nonhorizontal mergers—can draw, I would say that the day-to-day nuts and bolts investigation of those kinds of mergers is really not that much more complicated than anything else the agency does. They are going to rely on myriad interviews of industry participants, likely the issuance of compulsory process, document review, testimony, and then we get to the real work of sorting out which way the evidence seems to point.

MS. SILVERMAN: Is predicting anticompetitive effects quantitatively different in a nonhorizontal context? I ask that because certainly the economics are different, as you suggest. So, it follows that the quality of evidence is going to be a little bit different given that you're making different kinds of predictions.

As both agencies have been grappling with this lately, are you discovering that there are new ways to think about evidence which would be helpful for the parties to understand? For example, is there certain evidence in this context that matters more, or may be underweighted? Is there evidence that you wish you could see more of or that you're tired of seeing too much of? Are there patterns evolving in your agencies' minds about how parties should attack this? I know that the folks involved in the CVS-Aetna deal spent a lot of time in various categories of evidence. Was that time well spent? Were there different ways to be thinking about it? What's useful to you? Is there anything emerging now?

MS. MEKKI: I would just say that the cornerstones of any investigation are going to be documents, data which drives the economic modeling, and testimony. And, all three of those sources are going to tell us something about how a market is structured, including the availability of suppliers up and downstream. But, of course, all of the action is really with the economics. We are really fortunate at the Antitrust Division to have a bullpen of PhD economists who are not only our in-house economists, but also academics. They do a great job of thinking about what kinds of tools can be brought to bear so that we make the right decision about any kind of merger—especially the kinds of blockbuster nonhorizontal mergers that we have talked about today.

We've talked about behavioral economics. We've talked about the kind of modeling that we can use to predict foreclosure effects, and testing those merger simulations and modeling for the robustness of results when we tinker with different types of data. So, I would just underscore that data, supported by documents and testimony, is really important. In any kind of merger enforcement decision, I think there are the different categories of data that ultimately tell a story which points in one direction.

MR. HOFFMAN: I completely agree with that. The points that Doha made about the three types of evidence are important to understand because I think of it as a three-legged stool. Although that analogy may be slightly inaccurate, which I will get to in a minute. But, ultimately, we look for all three of those things: documents, testimony, economic modeling. And then the question I usually ask when thinking about bringing an enforcement action is: do we have at least two? If two are really strong, or pretty strong, then I'm less concerned if the third isn't so strong. If we only have one or none, then that makes it a lot more difficult to think about an enforcement action.

In the specific context of nonhorizontal mergers, though, what I would say is that I think the economic modeling is getting better, but it's nowhere near as robust or well-articulated as it is in the case of horizontal mergers. For example, primarily for modeling the effects of vertical mergers, we look at different kinds of foreclosure models using Nash bargaining-type solutions to try to determine what's going to happen post transaction. We also have looked at or used a tool called vGUPPIs, which is essentially a mechanism that attempts to determine the pricing pressures created by the transaction. These tools, though, have a whole lot larger range of uncertainty than similar tools in the horizontal merger context do. And, in fact, if you go to fully articulated models using our current best understanding of the way vertical markets work, you often find that very small changes in your assumptions can actually change the sign of the result that you're getting. So, in other words, you go from showing a merger as harmful to showing a merger as beneficial just by changing one small assumption. Generally our horizontal merger models are not nearly that susceptible to huge changes based on small changes in assumptions.

So, I actually care a little less about the predictions of economic models in vertical merger cases, and I care a little bit more about what the documents and the testimony say. Because if the documents and testimony point strongly towards there being a problem, but the model is uncertain, that's not going to necessarily deter me from thinking we should have a case.

MS. SILVERMAN: Let's switch gears. I've got a million more questions. I could talk about this a long time. But, for everybody else, let's switch to another subject that's near and dear to a lot of our hearts up here, which is antitrust in technology. Specifically, we're talking about algorithms, platforms, and, in a world that's going to be saturated with new what I call "frontier technologies," how we should be thinking about the intersection of those technologies and what is really driving and pushing the outcomes in traditional antitrust rules.

What I did not realize when we started to develop this topic was that we have an expert on the panel. I'm pointing to you, Bruce. At the age of 15 you developed your own database?

MR. HOFFMAN: Oh, yeah. That was one of my many wrong career choices.

MS. SILVERMAN: Well, we're trying to get you to tell us the story.

MR. HOFFMAN: So what I told Karen earlier was, we were talking about career mistakes we made and things we did before going to law school. And, so mine was—I actually have many, it's a long litany of mistakes and accidents which basically describes my entire career, and a few random bits of luck. But, when I was about 15, I was really interested in computers. I wrote computer programs and a database program and sold it to a couple of companies. But I thought it was boring to do that, and also the pay was more uncertain. Whereas there was a Hardee's near my house which was offering not just minimum wage, but also you could get a burger every shift, which happened to include the mushroom and Swiss burger. So I ditched the computer programming and went to work at Hardee's. In any event, that's why I'm here today, I suppose.

MS. SILVERMAN: So, we'll look to you for prognosticating on where this is taking us.

MR. HOFFMAN: Yeah, I've got a great track record.

MS. SILVERMAN: Okay. But when we were discussing this earlier, it was about distinguishing between the technology and how you think about consumer welfare in a world where it's not always about dollars and cents: it's about time and attention, it's about privacy, and it's about interconnectivity. And then who gets to connect with whom and on what terms, and how we think about biases in the system. Arguably, the range of consumer welfare interests is expanding, and, with that, my questions are: are the antitrust rules also expanding, or do we need to be thinking about new law enforcement approaches to these questions?

These are the questions that a lot of people are debating. We're certainly not going to be the first ones to resolve them today, but I thought it would be important to hear from both of you on what the current thinking is. I realize that it differs based on whether you're talking about some of these platform technologies, or whether you're talking about nascent or frontier technologies, whether its ARVR or those powered by AI.

MR. HOFFMAN: Well, I guess I'll start due to my credentials that I established a moment ago. So, a couple of things.

First of all, we've had antitrust in this country now for a good bit over 100 years. I think roughly every 10 years some new technology will arise and there will be great hand-wringing, and the commentary from various sources will always say: oh, well, is antitrust out of date? Do we need to change our fundamental approaches to antitrust to accommodate the new technology, whether it's cars or supermarkets or the Internet or now big data algorithms?

The answer I would give to that is—I don't see any compelling evidence that we need fundamental changes in our approach. In fact, one of the reasons I got interested in antitrust is because antitrust law is basically results oriented in the sense that it's a set of commands that say: we need to try to achieve the best economic outcome, we need to try to achieve the best results for consumers, and we're worried about conduct and mergers that harm consumers. Beyond that, and outside of Hart-Scott-Rodino (HSR) which is very specific and nit-picky, we have a lot of freedom to adapt antitrust enforcement to the current best learning, whether it's legal or economic. In other words, antitrust has proven very able to evolve with the times.

Does that mean I am saying today that exactly the way we look at every issue should remain unchanged? Absolutely not. What I'm saying is the fundamental structures of antitrust have been very adaptable and very capable of evolving with changes in technology. And, I don't yet see any reason to think that's not the case.

Now, having said that, the questions presented by the development of the technologies we're talking about are very interesting. This is one of the subjects of the hearings at the Federal Trade Commission that we're doing in an effort to get better information so we can determine whether changes to our approach should be considered. Would the changes just be details, or are larger changes to our approach necessary? All of those questions are on the table. But, ultimately, I do think there would have to be a lot of evidence that we would have to gather, or be presented with, to say: well, we need to fundamentally change the concepts of antitrust.

Let me just give you one small example of that in the algorithm space. So, a lot of people have talked about the algorithm space, or they use it as shorthand for computers crunching equations really fast so they can run through lots of data and observe correlations in huge data sets on a scale that would be very challenging for humans to do. People looking at this space say that the algorithms must somehow inherently either allow firms to collude more effectively by themselves or, potentially worse, reach the same outcome that you would get from firms price fixing but without any humans ever intervening or colluding. Well, that's an interesting theory. If it were the case that it was so, then we might have to think really hard about what to do about that. But there is no evidence that suggests this is true.

For starters, there's a theoretical reason why it may be really difficult for algorithms to reach a collusive outcome. I won't go deep into bargaining theory and game theory, but the basic issue is that when you have algorithms looking at pricing, for example, what they're effectively looking at is the equivalent of an infinitely repeated game with multiple players. There's a theorem in game theory called the Folk Theorem, which says that under those conditions, I'm going to shorthand it, but, basically, anything is possible. So there is a theoretical reason why you might say it's not obvious that algorithms, that machines themselves, would ever be able to get to the collusive outcome because they might never be able to figure out why they're observing any particular state of play at a particular moment. In fact, there have been experiments on this where people have tried to get machines to get to a collusive outcome without human intervention, and they've been unable to do it because the machines, frankly, will get tons of prices and tons of data and they don't know what to do.

Now, you can program machines to fix prices. And, the DOJ brought a case involving poster sales on this issue, which Doha probably knows more about than I do and could talk about; I'm giving you an opportunity for that.

MS. MEKKI: Happy to do it.

MR. HOFFMAN: But, there's nothing about that which says algorithms are so fundamentally different that they require us to totally rethink antitrust concepts. Could it be the case that they become so, or that further information shows us that's true? Certainly. We don't know the future; that's one of the reasons antitrust law changes all the time.

MS. MEKKI: As usual, Bruce is spot on. You're not going to get much disagreement from me. But one thing I will note is Assistant Attorney General Makan Delrahim's statements on this precise issue. He is a fan of the consumer welfare standard; he believes it is flexible enough to take on embryonic, emerging, and rapidly evolving markets. I think the reasoning behind that is, despite robust discussion—good academic discussion—which I think is healthy and important for the antitrust bar as a whole to be engaging in, there's always a concern that conflating the goals of antitrust with notions of political and social justice risks subjecting those goals to the possible lobbying and rent-seeking behaviors that antitrust enforcers are not very well equipped to handle. And, in fact, that reduces transparency and leads to poor outcomes for businesses and, frankly, enforcers alike.

Regarding algorithms, I noted recently that the UK's Competition and Markets Authority (CMA) released a really interesting study about the capabilities of algorithms. I

think that we have taken the view that algorithms can have procompetitive benefits, but they can also be used by cartelists to monitor compliance with a collusive scheme, or to detect accidental overstepping from a scheme.

The wall décor case[4] that Bruce mentioned is a really interesting example of why the tools that we currently have in place were, frankly, enough to deter anticompetitive conduct notwithstanding the use of algorithms. In that case, two individuals agreed to a collusive scheme, right? So there is the *Monsanto/Spray-Rite* standard—a conscious commitment to a common scheme. But the algorithm was really just the mechanism by which they executed the collusive agreement.

This leads us to the question of what is the actual capability of algorithms. And, I certainly won't do the armchair tech-geek thing; I don't even profess to be an armchair economist. But it's worth thinking about the actual capabilities of algorithms. I don't believe there has been a study yet that has determined algorithms are actually capable of colluding on their own without a human programming the algorithms to behave in a certain way. And I think that's consistent with the CMA's finding.

MS. SILVERMAN: So, again, moving on probably more swiftly than a lot of questions in my mind would suggest, we're going to turn to the status and highlights of civil nonmerger enforcement. What, sitting here today, do you most want us to know about your work and your programs in that area? And, let's start with Doha.

MS. MEKKI: In civil nonmerger world, the Antitrust Division has been very active. Earlier this year we filed a consent decree in *United States v. Knorr-Bremse AG and Wabtec*.[5] That one is near and dear to my heart because it's a case I led before coming to the Front Office. And that was also the first no-poach filing that the Antitrust Division had issued since the October 2016 HR guidance, where we announced our intent to criminally prosecute naked no-poach and wage-fixing agreements. There's probably not enough time to go into all of the details of that, but the reason it was resolved civilly, notwithstanding the fact that the Antitrust Division alleged that the agreements were *per se* unlawful, was because the companies had withdrawn from the agreement before the October 2016 bright line that was announced.

Other interesting civil nonmerger matters, we have a pending litigation in the Western District of North Carolina, *United States and the State of North Carolina v. Carolinas Healthcare System*.[6] That is a case about steering between the hospital and major commercial health insurers. Before that there was also a settlement that we entered into with certain Michigan hospitals who had allocated markets for advertising in Michigan.[7] And, then shortly before that, in March of 2017, we entered into a settlement with AT&T, DirecTV, and certain other broadcasters over information sharing schemes affecting the broadcast of Dodger's baseball games.[8]

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4 *United States v. Aston*, Case No. 15-cr-00419-WHO (N.D. Cal.).

5 *United States v. Knorr-Bremse AG*, Case No. 18-cv-00747-CKK (D.D.C.).

6 *United States v. Carolinas Healthcare Sys.*, Case No. 16-cv-00311-RJC-DCK (W.D.N.C.).

7 *United States v. Hillsdale Cmty. Health Ctr.*, Case No. 15-cv-12311-JEL-DRG (E.D. Mich.).

8 *United States v. DirecTV Group Holdings, LLC*, Case No. 16-cv-08150-CAS (C.D. Cal.).

MS. SILVERMAN: Get no love in this room.

MS. HOFFMAN: Come on, you're doing good for the viewers.

MS. SILVERMAN: No one here watches the Dodgers.

MR. HOFFMAN: There's no one here from Los Angeles?

So, civil nonmerger is a big slice of the FTC's enforcement agenda, in part because the DOJ gets the criminal cartels, so there is a substantial piece of antitrust enforcement that we don't deal with and that the Antitrust Division does. We may therefore put slightly more resources into the civil nonmerger context, just simply by the choices available to us.

We have a very busy trial docket, which includes a case in trial right now in our administrative court. Just for those of you who don't know, the Federal Trade Commission can bring cases in federal court for certain kinds of relief and under certain circumstances. But, our default litigation mechanism is to bring cases in administrative court, before an administrative law judge. After which the cases can go for final decision to the Commission itself, where the five Commissioners decide. The case can then be appealed to the Federal Circuit Court of Appeals, going into the federal court system at that juncture. Overall, about half of our conduct cases are brought in front of the administrative court.

We have one of those cases in trial right now involving what we allege to be an agreement among the three largest distributors of dental products in the country to refuse to offer discounts or otherwise deal with buying groups of independent dentists.[9] That case was investigated and is being handled primarily by our San Francisco office. So, we have a team working on it from across the agency, but the primary trial team and lead trial lawyer, Lin Kahn, are in our office out here. However, that team is mostly spending its time in D.C. right now. I came out here and went to the office today, but most of the offices are empty because they're all in D.C. trying this case.

We have the *Qualcomm* case,[10] which involves a set of very complex facts having to do with standard setting; brand commitments, which is fair, reasonable, and nondiscriminatory royalty commitments; and other things. It's a highly complex case. That's set to go to trial before Judge Koh out here in January.

We have a number of other cases that are about to go to trial or recently went through trial. We had the *AbbVie* case,[11] which was a pay-for-delay case that went through a bench trial last spring and resulted in a judgment this summer of about $500 million in disgorgement to the Federal Trade Commission, and then ultimately from there to consumers. We have the *1-800 Contacts* case pending on appeal in front of the Commission.[12] We have a case involving the Louisiana Realtors Board, which is actually

9 *In re Benco Dental Supply Co., et al.*, FTC Docket No. 9379, FTC File No. 151-0190.

10 *FTC v. Qualcomm Inc.*, Case No. 17-cv-00220-LHK-NMC (N.D. Cal.).

11 *FTC v. AbbVie Inc.*, Case No. 14-cv-05151-HB (E.D. Pa.).

12 *In re 1-800 Contacts, Inc.*, FTC Docket No. 9372, FTC File No. 141-0200.

on interlocutory appeal in front of the Fifth Circuit having to do with the application of the state action doctrine.[13]

So, we have a large number of civil nonmerger cases going on right now, and we're always looking for more. If anyone out there has great ideas of cases we should bring, call anybody at the Commission, send us an email—it's an area that we really would like to bring more cases. I should say the last time I was at the Commission, which was from 2001 to 2004, we brought more conduct cases during that period than either agency has brought at any other time, certainly since the 1970s. That period set a high watermark for the number of conduct cases that were brought. And, I know that Joe Simons[14] is interested in repeating that or exceeding it. So if you have ideas, we're all ears.

MS. SILVERMAN: I'm going to accelerate one of our topics here. If either of your agencies had to pick what you would like to be working on, independently of what parties are bringing you, what you would like to make progress on within your agencies?

MR. HOFFMAN: Well, I guess I'll start. We talked about this before, but I have a particular interest in finding conduct cases where the victims are in marginalized communities. And there's two reasons for that.

One is, though I don't know as a matter of fact that there's a lot of antitrust violations directed at the non-English speaking, lower income, or marginalized communities, I have no reason to think there is not. We do know that communities like that, because at the FTC we also do consumer protection, are disproportionately targeted for fraud and consumer protection violations. So, at least as a starting point, there is no reason to think that they're not also being subjected to cartel behavior, or the consequences of non-compete agreements and exclusive dealing that go too far. Moreover, the harm suffered would be a lot more impactful to people living in those kinds of circumstances than the harms that large companies suffer when they're subjected to antitrust violations. Companies lose some money, but they typically don't make decisions about whether they're going to have food on the table based on that. So, I think the bang for the buck might be high.

The second thing is that these are very hard cases for us to find. We get a lot of complaints about anticompetitive conduct from sophisticated companies. And, the reason for that is sophisticated companies hire really good lawyers, like a lot of the lawyers in this room, that know who to call and what to say. So they come to us and they make very effective and persuasive presentations about antitrust problems, then we go and investigate and sometimes we bring cases. The kinds of communities that I'm talking about don't have that kind of access. These are people who don't necessarily know who to call or what to say. If I were making resource allocation decisions where I wasn't worrying about handling the docket that's already in front of us, I would really like to put more energy into this.

And, the other thing that I would like to do a little bit more of is working on our prospective analysis of mergers to do a better job of testing and refining the tools that we use to figure out if mergers are harmful. But, that would really be bad, so I'll stop there.

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13 *Louisiana Real Estate Appraisers Bd. v. FTC*, Case No. 18-60291 (5th Cir.).

14 Joseph J. Simons has served as Chairman of the FTC since May 1, 2018.

MS. SILVERMAN: But, before we leave that, would these prospective merger analyses be fairly academic or would these be attached to particular industries?

MR. HOFFMAN: So briefly, one of my long-standing complaints about merger review and merger analysis is that we don't do real science; right? By that I mean—real science is hypothesis testing. I construct a hypothesis, if X then Y, and then I test it. Ideally, I test it with a controlled study where I have control groups. That's really hard to do in the merger context.

Leaving that aside, I would want to make a prediction beforehand of what will happen and then see if it comes true. And, if it comes true, then I have a reason to think that my prediction was valid, and if it doesn't come true, then I might want to see why. We don't do that; it's very difficult to do that in the merger context. What we tend to do is we look at mergers after the fact and we try to figure out what happened and why. Did we get it right? Did we get it wrong? The trouble with that is, storytelling isn't really science. And, it's extremely difficult when you're looking at something ex post to disentangle all the things that produce the result that you observe.

What I would actually really like to do, and I will say we're actually doing some of this, is find mergers that are extremely close cases, or ideally mergers that we think are harmful but we were somehow prevented from stopping them. Like some exogenous thing takes place where legally we can't proceed, or we litigate and lose. By the way—I don't mean to suggest that we want to litigate and lose. We like to win. But we do lose sometimes, which parenthetically is a great virtue of our system in this country; the government does not always win.

When we lose, we then have a test case. If we litigate and lose, it's because we thought the merger was bad. And so, what we're trying to do, and I would like to do more of, is more rigorously and in more detail articulate, using the best available economic tools, what we think the effect will be from a merger. Where will the prices go up? Where will quality go down? Where will consumers suffer, and why? Then take that prediction and test it against what actually happens to determine how right we were or how wrong we were, and if so, why. I think we really need to do more of that because it is a continuing problem in the antitrust enforcement world that we have these great economic tools, but we still have some underlying lack of confidence about how accurately they describe the real world.

MS. MEKKI: For me, I would spend a lot more time focusing on labor issues. It's a little bit disingenuous; my policy portfolio in the front office is both civil and criminal labor antitrust issues, and so I get to spend a lot of time thinking about these issues already—it's really to my bosses' credit. Assistant Attorney General Delrahim, Principal Deputy Andrew Finch, and Criminal Deputy Richard Powers are really interested in these issues, and they have given me a lot of room to think about what direction the Antitrust Division should run on these issues. But, it is not a topic where there is a lot of consensus yet. The FTC did a great job of putting on labor monopoly hearings; one was with a legal panel, one was with an economist panel, and the difference of opinions were on full display.

Nonetheless, I think labor is an interesting product because people are a kind of product. It's not an antitrust issue that is necessarily intuitive to the business community. Most of the time that you think about antitrust problems, you're thinking about tangible, downstream, widget products. Whereas, it's not intuitive to think about buy-side harms and input labor markets that might be affected by harmful transactions or bad conduct. And, so, I love the fact that the labor economists and industrial organization experts are just now getting into a room to talk about what labor economists have been worried about, and whether there's room in the antitrust context for going after bad conduct and transactions that harm labor.

The other piece that's really interesting to me about labor is that people are the very object of antitrust law solicitude. And, it's interesting to think of ways that antitrust law can work to the benefit of these people.

MS. SILVERMAN: Really interesting, and I'm sure some of the questions will come back to both of those issues. I would be remiss to miss the opportunity to ask about what we can be doing better. So, when practitioners come in to see you, whether these are practical or theoretical issues, I think we would all benefit by knowing what irritates you, what works, and what you need more from us on that would be productive to help move, not just matters, but thinking along.

MR. HOFFMAN: Yes.

MS. MEKKI: Yes, I have a number of things on my list.

MS. SILVERMAN: I thought so.

MS. MEKKI: So, in no particular order, I'll offer three observations that are very much my own. I would like to see practitioners use customer advocacy more effectively. There are lots of times that I can remember when I was actually working up investigations where companies would come in, or lawyers would come in, and give you this big stack of declarations or affidavits from customers that would all say the same thing—this merger is fine. I have options in the market. It does not matter if these two companies merge.

I'd just go back to basic, solid antitrust principles. When you make representations about what customers think of a merger, think about what customers are best suited to talk about. Customers are not particularly good at telling us the likely competitive effects of a merger. That is a subject that is largely dominated by economic analysis. Customers are really good at explaining the mechanics of a bidding market. They're very good at telling us how they respond to price increases. They're very good at describing the availability of suppliers or their impressions about what company, if any, might be poised to enter in the next couple of years. And, so I think customer advocacy is very important, but it should be used effectively.

In the same vein, I would be careful about customer education campaigns.

MR. HOFFMAN: Euphemistically named.

MS. MEKKI: It is no secret that we spend a lot of time—particularly in the early days of an investigation—talking to market participants. It is my observation that companies

have a lot more incentive to tell the agency the truth. And sometimes it is not favorable to a company, or to a lawyer's credibility, when a company tells us facts that are materially different than what is contained in a declaration or a letter of support. So, that's one thing.

A second tip would be to recognize the power of the initial review period, especially the first meeting or the first presentation with an agency. That is a beautiful time, no impressions have been formed, or very few impressions should have been formed about the merger. Bring in businesspeople who are competent and well suited to talk about the things that are going to be interesting to the agencies.

There is nothing better than when lawyers come in to that first meeting and they say: here are the other competition authorities who are going to be looking at the transaction. Here is the waiver, or we are going to commit to getting you waivers in "X" amount of time. I can commit to overlap charts or top customers or something like that. It just enables us to do our work very quickly. And, there is nothing better than closing a merger that does not raise competition concerns very quickly.

The final thing is to follow up effectively. In the initial review period I think lawyers are very good at calling agency staff and saying: "What are you hearing? Do you have concerns?" That's good, and sometimes it can help increase transparency for a company. It can also help narrow the scope of issues, even if you believe a second request or a Civil Investigative Demand (CID) is coming. Even after a second request or a CID has been issued, there are many meaningful opportunities to engage with staff.

I won't say the matter, but there was one I led a couple of years ago when the second request had been negotiated, but no documents and data had come in. The lawyers got into a room; we actually went over to the law firm and just talked about what we expect to happen over the coming months. We got to ask questions like: "Have you seen these documents? What kind of story are they going to tell?" We talked about where we think we might need depositions. We let them know that if this happens, we think we're going to need more of this kind of evidence. We discussed whether there were problems with the data. It was just a very good level-set conversation that I think was very beneficial to the merging parties, but also helpful for us because it allows agency staff to communicate not only with their section or shop management, but also with the front office.

MR. HOFFMAN: I think those are great points; I agree with every one of them. I would add two things.

First, I'm constantly surprised by how frequently people come in to us, and we ask them questions and they don't answer them. They will say: well, it's an interesting question, but I'd really rather talk about something totally different that you didn't ask me about, so I'm going to do that now. Or we will ask them things in writing, and then we don't get back a response to what was asked. Instead, we get some advocacy that's totally unrelated to the question we asked. We ask questions for a reason. They are not generally just some random thought that happens to flit across the minds of the lawyers or the economists that are in the room. We ask questions because they go directly to the issues that we're considering.

To take something from what Justice Cuéllar said earlier—answer the question even if it's bad. It does you much, much, much more benefit to say: this is a problem for us. Let

me answer your question, and then I'm going to tell you why we're going to solve this problem, or why the problem should not dictate the outcome.

I actually learned that in high school debate, but I learned it subsequently from watching David Boies, among other things, in a case I had against him years ago. He got asked a question by the judge about a case that was really bad for him. And, he said: oh, Judge, that case is terrible for us, but let me tell you why I think you could still rule for us notwithstanding that case. And, that was a great answer. It was a great answer. You could see it had an immediate effect on the demeanor of the judge. And, so too with us. I may be fairly easy to fool, but the staff is not easy to fool. They are not going to miss issues. They are going to figure it out. If there is a problem in the merger, they are going to find it. Tell us about it. Answer our questions. That's one.

Second, this is really just a process point, but it actually gets at something that Judge Alsup made clear in a case that I was on with a number of people here in this room. And, I am sure many of you have had this experience, but I think it's a really serious issue. We would like to see more opportunity being given to junior lawyers, and frankly, more diverse lawyers on the teams that come in front of us to actually talk.

We have a lot of situations where troupes of lawyers will descend on us, briefcases in hand, handing us 90-page PowerPoints that we've never seen before the meeting. I think, well, that's great, this will be a nice doorstop. I'm not otherwise ever going to look at it. In any event, that's a whole other issue. But, the sole purpose of the more junior lawyers who come to these meetings often appears to be to carry the stacks of the 90-page PowerPoints that I'm never going to read, and then hand it to me so I can stare at it and then put it away. That's a bad use of their time, and I think it's actually bad for the development of the bar.

The reason I mentioned Judge Alsup is that he has a policy of requiring you to designate a junior lawyer, under certain parameters of what "junior" means, who actually gets to argue motions and do things in his court. I think that's a really darn good thing.

I had the great advantage, when I started out practicing law, of starting out as a litigator in Miami at a small law firm—a 40-lawyer firm—which meant that I was handed a case and told: go litigate this. That was it—no instructions, no supervision, no nothing. I was in court a week after I passed the bar arguing a motion to dismiss that I dreamed up and wrote with absolutely no guidance. Although, I later concluded this was probably not the best training method, and I went to a bigger firm where they actually taught you how to do things.

But, I spent a lot of my early legal career in court all the time, and that is a rare thing these days. Particularly, at the kind of large firms that practice in front of us, the junior lawyers have very crimped opportunities for development. I think that's a bad thing for the profession, it's a bad thing for junior lawyers, and I think it also has a negative effect on diversity because it means that the more junior lawyer pool, which is more diverse, does not get the opportunity to do things on their feet, or sitting in a chair talking to us, that would really help them develop in their careers.

So, we are really encouraging people to consider that when they're thinking about coming in and making presentations to us. It's something that we would value. It's not that we're not going to listen to you if you don't. We know you, you're experienced lawyers,

you're here before us, you're more senior—that's fine, we'll listen to you. But, we really would like it if people would make more of an effort to find ways to give more of a role to other folks on the team.

MS. SILVERMAN: Okay. With that, we're going to open up to the floor. We have a few other questions.

QUESTION BY JAMES KEYTE: James Keyte, from the Fordham Competition Law Institute. I have a question about customer testimony, and it reminded me—Ken Heyer wrote about this a while ago—that certainly the DOJ and the FTC wouldn't commit to not using customer testimony in analyzing mergers. At the end of the day, the customer testimony very often reflects what really is going on. Economists can't always measure and identify elasticity and other things.

So, I was just taken by your comment about customer affidavits and declarations submitted by parties, given that, at the same time, certainly the DOJ and the FTC are looking for customers who will complain. If you take the Sysco merger, the DOJ and FTC only had one or two customers complain. But, those complaints were very important for the government. So, if they're important for the government, I would think they would have to also be important for the merging parties as well.

MS. MEKKI: It's a fair question. I think some nuance is helpful. Certainly my comment was not intended to suggest that customers are never important or never useful, but I think it's important to think about how customers are used.

There is a reason why economists, especially testifying economists, and their teams often are participating or listening in when there are interviews being done during the litigation phase. It's because they're taking that information and ultimately running their economic analyses, especially when they're writing expert reports. But, I think it is a mistake to suggest that customers can do the predictive exercise of figuring out what a market, or the world, might look like after a merger.

Again, I would go back to the examples that I cited earlier. Customers are very good at telling us how they experience market mechanics; they're essentially potential fact witnesses. They're not going to be expert witnesses. They're very good at bringing to mind examples of natural experiments. So, for example: here is what happened the last time Company A acquired one of its rivals. That's really their utility.

MR. HOFFMAN: And, just to add to that briefly, James. One thing I want to say is, first of all, it's not the case that we look for customers who complain. We want to find out what customers are saying. This is an important point because, having now spent time back and forth between government and private practice, one of the fundamental differences between those two things is that in government we're not advocates up until the time when we go to court. What we're trying to do is figure out what the right answer is.

And, by the way, I don't mean to say anything derogatory about this. I think our system is an advocacy system for good reasons, and I think it's very effective. It's good that when you're in private practice or when you're litigating in the government, you become an advocate, push for a side, and then there's a neutral decision maker. That is absolutely

fine. But that's not where we start in the investigative stage. We're trying to find out what we should think about things. So I wanted to address that predicate.

On the secondary point, I think what Doha said is right. I think the question is: what can customers competently testify to? A lot of times we find customers loaded up to say something that they might actually not know about, and that comes apart when you start asking them about it. For example, sometimes they are told to say: well, this merger won't hurt us; I love it. When you ask: why is that? They don't know. Or the other way. Sometimes, customers are sure that a merger is going to hurt them. We ask: why, and what experience do you have on which to base that assumption? They may not know.

So, we try to figure out not just what customers are saying, but why they are saying it and what experience do they have that would allow them to form a reasonable basis for making an assumption about how the transaction will affect them in the future. It's more a matter of competence, accuracy, and real knowledge, as opposed to categories writ large.

MS. MEKKI: Actually, I just have one more follow-up. I remembered about two years ago at the ABA Spring Meeting there was a fantastic judges' panel that featured John Bates from D.C., the Honorable Amit Mehta who presided over the Sysco-US Foods trial, and also Judge Winmill who handled the St. Luke's Hospital merger. They made these same observations. I think Judge Bates, in particular, has talked about the value that he places on expert economic testimony when he is deciding cases. And, he has also drawn a distinction between what customers can competently say, and what an expert is really useful for in informing courts about a merger.

MS. SILVERMAN: Peter, do we have time for one more or is that it?

MR. HUSTON: One more, as long as we keep the answers short.

QUESTION BY UNIDENTIFIED SPEAKER: This question is for Mr. Hoffman. So, what happened with that motion to dismiss when you were a brand-new lawyer?

MR. HOFFMAN: Well, I won. That's what I remember, so I would have forgotten if I had lost. But I actually, bizarrely enough, I found a decision of the Queen's Bench from around 1700 that was relevant and I cited it. This was a state court motion to dismiss. I was sitting across the table from the judge, and, while I'm reading this Queen's Bench decision, the lawyer from the other side said: are you kidding? That was his argument. And, the judge said: this is really cool.

MS. SILVERMAN: Thank you very much.

SOCIAL MEDIA, RIGHT TO PRIVACY AND THE CALIFORNIA CONSUMER PRIVACY ACT

By Dominique-Chantale Alepin[1]

I. INTRODUCTION

By the spring of 2018, media and consumer outrage over social media misuse of personal information had reached fever pitch. On March 17, 2018, three news organizations including the New York Times, published stories revealing that Cambridge Analytica had harvested the personal data of millions of people's Facebook profiles without their consent and used it for political purposes.[2] It was a watershed moment in the public understanding of how much personal data was being stored on social media, and the use and misuse of that data.

In California that spring, the group "Californians for Consumer Privacy" had been putting together a sweeping privacy initiative for presentation on the ballot for California voters. Given the mounting concern over the use and misuse of personal data, the initiative quickly garnered enough signatures—629,000—nearly twice the required minimum to appear on the ballot statewide in the November 2018 election.[3]

As they collected signatures, Californians for Consumer Privacy told California lawmakers that it would remove their initiative from the ballot in exchange for passing and signing a reasonable privacy bill by June 28, 2018. The California legislature was under immense pressure to meet this demand and pass legislation—a privacy law passed through the ballot process could prove unworkable both for industry and for consumers. For once a ballot initiative passes and is enacted, it cannot be amended by the state legislature. Instead, any amendments generally must be made through other initiatives. Practically speaking, that means it can be very difficult to amend ballot initiatives once they are voted into law. And for a privacy law where things are always in flux, being unable to amend the law would be impracticable.

On June 21, 2018, Californians for Consumer Privacy and the California Legislature struck a deal: in exchange for withdrawing the initiative, the state legislature would pass an agreed version of the California Consumer Privacy Act ("CCPA").[4] The initiative

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1 Dominique Alepin is the Assistant Director for the Western Region of the Federal Trade Commission. Special thanks to Joshua Le, University of California, Berkley Law School (Boalt), Class of 2019, for his work drafting and editing this article.

2 Matthew Rosenberg, Nicholas Confessore & Carole Cadwalladr, "How Trump Consultants Exploited the Facebook Data of Millions." *The New York Times*, (March 17, 2018), https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html; and Emma Graham-Harrison & Carole Cadwalladr, "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach," *The Guardian*, (March 17, 2018), https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election.

3 Nicholas Confessore, "The Unlikely Activists Who Took on Silicon Valley—and Won," *The New York Times* (August 14, 2018), https://www.nytimes.com/2018/08/14/magazine/facebook-google-privacy-data.html.

4 California Consumer Privacy Act of 2018 ("CCPA"), Cal. Civ. Code §§ 1798.100, et seq (2018).

was withdrawn and on June 28, 2018, the CCPA was signed into law by Governor Jerry Brown.

The CCPA appears to be a consumer success story—citizens pressured their government to enact privacy laws that would help protect them from the misuse of their data by social media and other companies. But the story does not end there.

First, the CCPA has already been amended once and its implementation delayed until January 1, 2020, to allow for further amendments and to provide the California Attorney General the opportunity to promulgate rules and regulations interpreting the Act's various provisions. As the discussion below reflects, there are particular provisions of the CCPA that have very broad definitions and may have unintended effects on products and applications, market power and other market dynamics.

Second, the CCPA does not address all uses and misuses of personal data by social media companies—there is still more work to do. And a greater level of transparency for consumers as to the workings of social media companies (including the collection and use of personal data) would help remedy some other identified problems with social media platforms.

PANELISTS

The panelists below discuss those issues and more:

- **Jennifer Lynch, Electronic Frontier Foundation**. Jennifer Lynch the Surveillance Litigation Director with the Electronic Frontier Foundation where she worked to protect user privacy and civil liberties at both the federal and state level. While at EFF, Jennifer founded the EFF Street Level Surveillance Project, which informs advocates, defense attorneys, and decision makers on potentially invasive police tools.

- **Tracy Shapiro, DLA Piper LLP.** Tracy Shapiro is a Partner with DLA Piper LLP. Her practice focuses on privacy, data security, advertising, and marketing practices. She regularly represents and counsels social media companies on privacy issues. Tracy was also at the Federal Trade Commission where she worked in the Division of Privacy and Identity Protection and the Division of Advertising Practices. Following her time at the FTC, she worked at Yahoo!, advising in-house clients on privacy, advertising and marketing issues.

- Moderators—**Dominique Alepin** and **Elaine Call**. Dominique Alepin is the Assistant Director for the Western Region of the Federal Trade Commission. Elaine Call is Senior Privacy Counsel at LinkedIn.

II. PANEL DISCUSSION

MS. CALL. Four or five years ago when I told people that I was a privacy lawyer, I would get blank stares. I think that has definitely changed today. You cannot open a newspaper and read something about privacy, for better or worse, or the latest breach, it seems to be on the headlines truly daily. Ms. Shapiro, what do you see as the most important or challenging issue that social media has with respect to privacy?

MS. SHAPIRO: I think that, as we saw with Facebook and Cambridge Analytica, it would have to be the ways social media companies are providing access to consumer's information. Social media companies have a good grasp on what they collect and they are using the information, but once they start making data available, for example, via APIs, to third-party applications, or to other data providers, then there is a risk that you start to lose control over who is obtaining, collecting and using your data.

MS. ALEPIN: Ms. Lynch, coming from a consumer perspective, what do you see as the biggest privacy issues arising from social media?

MS. LYNCH: There are a few notable ones. First, we do not know what companies are doing with our data. We do not know what they are collecting about us, and with whom they are sharing the data. And we have very little control as consumers over what happens to the data. Companies can track us all throughout the Internet—whether it is reading an article on the New York Times, searching for a wedding dress, or sharing information with our friends. Companies are collecting a broad amount of information.

More troubling perhaps, companies like Facebook are collecting biometric data as well, including facial recognition data. Most people do not realize that those companies are collecting biometric data. And if people do realize it, they do not understand the implications of it.

Going back to the issues revealed by the Cambridge Analytica incident. Sensitive personal data collected by some companies is being shared with third parties. It is very difficult to track where the data is going. With Cambridge Analytica, not only did Facebook users not have a lot of control over what data was shared when they interacted with Cambridge Analytica directly, those users' friends had no knowledge that their data was being shared too. These issues go beyond the consumer's direct relationship with a social media company.

MS. ALEPIN: You mentioned biometric data. Recently Microsoft president Brad Smith called for federal legislation on facial recognition.[5] He demanded that tech companies exercise more responsibility when implementing facial recognition technology to accommodate the need to retain privacy and control over personal information. As social media companies begin to collect data and implement these technologies, do you feel a similar need for increased transparency and caution? And is legislation the only way to achieve this?

MS. LYNCH: I definitely think we need more transparency and caution, and I am at the point where I think that legislation is the only way to achieve that. A few years ago, EFF was involved in a working group process at NTIA, the National Telecommunications and Information Administration. The working group got together a bunch of consumer and biometric companies and tried to come up with meaningful regulations for the use of face recognition. But the process was flawed from the beginning, and not even because the federal agency intended it that way. They fully tried to allow consumer groups, advocacy groups, to be involved. But consumer groups are small, we have small budgets

5 Brad Smith, "Facial recognition: It's time for action," Microsoft blog (December 6, 2018), https://blogs.microsoft.com/on-the-issues/2018/12/06/facial-recognition-its-time-for-action/.

and we cannot be involved in every meeting. And social media companies and biometric associations are large and they can fund people to be at all these meetings.

What the consumer groups tried to do in those meetings was to set a baseline. We tried to ask companies just to sign on to say that they would not allow tracking or collection of facial recognition data in public without a consumer's opt-in consent. And companies were not even willing to get to that point, when we knew that people around the country were concerned about the collection of facial recognition data and really did not want companies to be holding onto this data.

And so all the consumer advocacy groups could do at that point was to walk out. We could no longer be a part of a process where we couldn't have a meaningful voice. Which is why I think that legislation is, at this point, really the only way we can see change. We're starting to see that happen with a law that passed in Illinois in 2008, the Biometric Information Privacy Act (BIPA) of 2008,[6] which requires opt-in consent from consumers before a company can collect and share their biometric data. BIPA is unique as well because, while three states have biometric privacy statutes on the book, only BIPA allows for a private right of action. Legal questions surrounding that law are starting to be litigated, both in Illinois and in California,[7] and there are ongoing attempts in the state to roll back the law's protections. I hope that law can be a model for future legislation.

MS. ALEPIN: In *LabMD v. Federal Trade Commission*,[8] the FTC's order was shot down by the 11th Circuit because of its reference to "reasonable" data protection measures which the Court believed was too vague to be enforceable.[9] In essence, regulators and private plaintiffs have been relying on companies to implement "reasonable" data measures. Ms. Shapiro, is there a need as articulated by the Eleventh Circuit to be more prescriptive or specific as to what "reasonable" data protections mean and what companies should or should not do?

MS. SHAPIRO: Well I think it's a very big challenge, being more prescriptive. First, the FTC has given a lot of guidance as to what they mean by "reasonable" data security, both in their consent decrees, where they have kind of laid out the elements of what a reasonable security program looks like, and they have also given a lot of business guidance. Having said that, in counseling a lot of companies, I sympathize that data security is challenging to navigate. You get a report back from your outside consultant who has many things that you need to fix immediately. But you don't have the resources, and it can be hard to figure out what to prioritize, what are the real security threats and what the FTC will really care about.

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6 740 ILCS 14/1, et seq.

7 *See In re Facebook Biometric Information Privacy Litigation*, 185 F. Supp. 3d 1155 (N.D. Cal. 2016) (holding the Illinois law applies and the plaintiffs had stated a claim under BIPA); Rosenbach v. Six Flags Entertainment Corp., No. 123186, 2019 WL 323902 (Ill. Jan. 25, 2019) (holding that a plaintiff does not need to have suffered damages in order to recover for violations of BIPA.).

8 *LabMD, Inc. v. Federal Trade Commission*, 894 F.3d 1211, (11th Cir. 2018). The FTC had accused LabMD of failing to maintain "basic" data security practices, which resulted in the unauthorized disclosure of over 9,000 individuals' personal information. As a result, the FTC determined that LabMD had engaged in "unfair" business practices under the FTC Act and entered an order mandating that the company maintain a "reasonable" data-security program.

9 *Id* at 1236.

If Congress were to attempt to implement a law that spells out what "reasonable security" means, that would likely change in six months. And I think companies will be more frustrated by having an overly prescriptive law that tells them what their data security programs need to look like than they would be by having a broad standard that gives them the flexibility to kind of stay with the times.

MS. CALL: We are definitely seeing some legislative activity around biometric information and facial recognition technologies in the US. Two other states followed Illinois including Washington and Texas in passing their own biometric data protection statutes.

Recently, Europe passed its General Data Protection Regulation (GDPR)[10] which became effective on May 25, 2018, and it specifically calls out biometric information as a sensitive category of data that merits increased privacy and security guardrails. Generally, consumers in Europe will need to opt-in before companies can use that information, similar to the BIPA in Illinois.

Ms. Lynch, can you explain the differences between an opt-in and opt-out regime, and do you think that opt-in schemes are necessary to protect consumers?

MS. LYNCH: I think that is an important point. The difference between an opt-in and an opt-out is that in an opt-in system, Facebook has to come to me and ask if it would be ok to collect my personal information. And I have to reply in the affirmative. Facebook has to do that for each specific thing that is under the regulation, whether it is personal information collected under GDPR, or specific biometric information collected under BIPA.

In an opt-out scheme, Facebook is already collecting my facial recognition data, and I have to hunt through the privacy settings on my Facebook account to find what used to be called "tag suggestions" and unclick that. It was very confusing for consumers—the button was not even called "face recognition" and consumers were not prompted to "opt-out."

I think the key is there needs to be meaningful opt-in. It cannot just be hidden somewhere in the terms of service. It needs to be a brand new pop-up that describes for the consumer that the company is collecting more information, what that information is, and get the consumer's meaningful consent to the collection of that information.

MS. CALL: Ms. Shapiro, can you provide a brief overview of the protections afforded consumers under the CCPA?

MS. SHAPIRO: The CCPA was introduced and enacted in the span of a couple of weeks earlier this summer, which is rather remarkable. It was recently amended, and it goes into effect on January 1, 2020. The CCPA gives consumers several basic rights: (1) the right to know what a company's data practices are, including what information they collect about consumers;[11] (2) the right to opt-out of the sale of their personal information;[12]

10 Regulation [European Union (EU)] 2016/679 (April 27, 2016).

11 Cal. Civ. Code § 1798.100

12 Cal. Civ. Code § 1798.120

(3) the right to access certain data and have it deleted;[13] and (4) the right to receive full service from companies at an equal price even if they exercise those privacy rights.[14]

So first, with the right to know is a disclosure obligation. A company will need to disclose what personal information the company will collect, how they will use it, what types of personal information will be shared with third parties, what categories of third parties they are, and what rights consumers have to access their data.[15]

Second, with the right to opt-out of the sale of personal information,[16] most companies are relieved because they think that they do not "sell" personal information. But the way that "sale" is defined by the CCPA is very broad. It is any disclosure to a third party of personal information when you get valuable consideration in exchange.[17] Companies will need to do an assessment of all the third parties, including all the service providers they work with and then do a legal analysis of what they receive from those third parties to see if they are receiving valuable consideration in exchange for that disclosure.

Third, on access rights, the CCPA allows consumers the ability to access what categories of data have been collected and sold about them.[18] It also gives consumers the right to *specific* pieces of information that a company has collected about them. They can find out the sources of that information, where you got it from, how you are going to use it, and the third parties who you've shared it with.

Fourth, the CCPA requires companies to dispose of a consumer's personal information upon their request,[19] though there are numerous exceptions. For example, if the company's use of the data is consistent with the context that you collected it in, and consistent with consumer expectations, then you don't have to delete the data. And there are other exceptions like preventing fraud, data security, research and exercising free speech.[20]

Finally, there is the right to get equal service and price even if you opt out of having your data sold or access requested.[21] Companies can discriminate and offer different prices or quality of goods and services if the difference is "reasonably related to the value provided to the consumer of the consumer's data."[22]

MS. CALL: What is the scope of the application of the CCPA? Does the CPPA govern the personal data of all Californians? How will it affect businesses outside of California?

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13 Cal. Civ. Code § 1798.105

14 Cal. Civ. Code § 1798.125.

15 *See* Cal. Civ. Code §§ 1798.100, 1798.110, 1798.115, 1798.130.

16 Cal. Civ. Code § 1798.120.

17 Cal. Civ. Code § 1798.140 (t)(1).

18 *See* Cal. Civ. Code §§ 1798.110, 1798.115.

19 Cal. Civ. Code § 1798.105.

20 Cal. Civ. Code § 1798.105(d).

21 Cal. Civ. Code § 1798.125 (a)(1).

22 Cal. Civ. Code § 1798.125(a)(2).

MS. SHAPIRO: Businesses are concerned that the CCPA is in fact a national law because most online companies are dealing with at least one California consumer who comes to their website or uses their app.

There are a few prerequisites for the CCPA to apply to a business. First, the business must be for profit, non-profits are excluded.[23] Second, it is only if you're collecting California residents' information, and you have to be doing business in California. It is unclear at this point what that means. Finally, one of three conditions have to be met: (1) you have gross annual revenues of over $25 million a year; (2) you buy, receive or sell, alone or in combination, the personal information of 50,000 or more California consumers per year, or; (3) you derive 50% or more of your revenue in a year from selling consumers' personal information.[24] With this criteria, it makes it easy for a small app or local California newspaper to qualify under the CCPA.

MS. CALL: When does the CCPA go into effect?

Ms. Shapiro: It will go into effect in January 1, 2020.[25] But the law was just amended in September 2018, and there has been an extension on enforcement. It is very likely that it will not be enforced until July of 2020.

Also, the California Attorney General was tasked with promulgating rules under the law, and he has a deadline of July 2020.[26] Enforcement starts the six months after those rules come into effect or July 2020, whichever comes first.

MS. CALL: And it was amended once. Do we anticipate additional changes being made?

MS. SHAPIRO: We do. This law is a mess. It has sentences that are not complete—they just cut off at the end. Then it references sections that do not exist, and many portions contradict each other.

So the legislature has indicated that they would spend some time cleaning it up. They started with a first round of amendments. There is still a lot of lobbying happening in Sacramento by businesses, and it is expected that when they go back into session in January, the legislature will look at further amendments.

Ms. Alepin: Ms. Lynch, the CCPA is the first piece of legislation here in the U.S. geared towards developing rights for consumers and addressing data privacy. What are its greatest strengths and weaknesses?

MS. LYNCH: I fully agree that the law is a mess. But looking at the history of the law, there's an explanation for that. The CCPA was originally put on the ballot as part of the initiative process with 600,000 signatures. The initiative process in California is a particularly challenging way to enact a law, and that is because it is extremely difficult

23 Cal. Civ. Code § 1798.140(c).

24 Cal. Civ. Code § 1798.140(c)(1)(A)-(C).

25 Cal. Civ. Code § 1798.198.

26 Cal. Civ. Code § 1798.185.

to change an initiative once it is on the books. Nobody in California really wanted this to be on the ballot as an initiative because privacy is complicated, as we all know. That is why we are all fully employed as privacy attorneys. Initiatives on the ballot should be straightforward and simple—they should not have these long provisions which require additional initiatives to pass in order to amend the original initiative.

The reason this was written and passed through the legislature so quickly—in less than two weeks—was because, if it had not been passed before the end of June, it was going to be on the ballot as an initiative, Californians were going to vote for it, and they would likely have passed it. That is part of the reason why it is such a big mess.

I think that there are areas where the law can be improved. For example, the CCPA prohibits businesses from charging more for privacy protections, but they can offer incentives and payment for people to waive their privacy rights[27], which in essence means that people who are not waiving their privacy rights are paying more because they are not waiving their privacy rights and therefore not getting those incentives.

Another shortcoming is that there is no private right of action except in the case of data breaches.[28] The CCPA is to be enforced by the California Attorney General. But the right for consumers to sue over a data breach already exists in California. So you could never get lawsuits like those that we have seen under the Illinois biometric privacy law which are important to vindicating consumer rights.

There is no user consent required for data collection, which is a problem. Similar issues appear for data sale. The right to know provision, which is quite nice that we can know that certain data, very specific data, is collected on us, but it is only certain *categories* of data that we can find out about. For example, if my social media company is sharing my data with Bank of America, I can learn that they are sharing my data with banks, but not necessarily Bank of America.

MS. CALL: Ms. Shapiro, as you counsel clients across industries, what do you see as being the challenges companies may encounter with the CCPA?

MS. SHAPIRO: One is the incredibly broad definition of personal information.[29] It is very similar to the GDPR in that respect. You are not just talking names, addresses and phone numbers but persistent identifiers, IP addresses. The CCPA may be quite burdensome, most especially when it comes to things like access and deletion rights. We have seen companies struggle with this in the context of GDPR. When you get an access or deletion request from one of your customers, the company may only have their IP address. It is incredibly challenging to know how you can authenticate them.

Then there is the risk that if all the consumer provides is their IP address, the company could end up turning over sensitive personal information to a different individual. For example, your roommate asks for information using the common IP address from your apartment. I think that is a concern for many people.

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27 *See* Cal. Civ. Code § 1798.125(b)(1).

28 *See* Cal. Civ. Code § 1798.150(a)-(c).

29 Cal. Civ. Code § 1798.140(o)(1).

Another issue is what Ms. Lynch raised. You can incentivize users to opt-in, but the incentive you provide them needs to be reasonably related to the value of their data. You need to make an assessment of what the data is worth, and you can only charge them that amount. But this seems impractical in practice. For example, let's say I shared with this analytics provider that you clicked on these three links and that you entered these search terms. How would you estimate the value of that? I think that will be really challenging.

Many of my clients are tech companies who became successful by offering a fermium model and a premium model. By offering a freemium model that is supported by ads, they got a bunch of users because those users do not have to commit to anything. Eventually, the service became popular and people started to pay a monthly fee for the service. It may not be possible under this law with these restrictions on treating everyone equally and giving them all the same price.

MS. CALL: Going back to the EU's GDPR, I think the last two weeks before this law was signed by the governor, much was imported or borrowed from the GDPR and incorporated into the CCPA, including data subject rights. Are there similarities between the GDPR and the CCPA?

MS. SHAPIRO: Definitely. There are many similarities, including the broad definition of personally identifiable information (PII). Traditionally, the U.S. has had a more limited definition of PII.

One big difference that I think Ms. Lynch touched on is that the GDPR focuses on *processing* personal information, so it sets regulations around the collection of information—including your use of it. In contrast, the CCPA is really about *collection* of information, so there regulations are set around the disclosure and sharing of personal information.

Under the GDPR, you need to have a legal basis to collect and use data, whether that is consent or if it is from a contract, or to comply with a legal obligation or legitimate interest. The CCPA does not do that. You are still free to collect and use whatever data you want to collect, as long as that is disclosed in your privacy policy.

In terms of disclosure, on the GDPR side, for those who have done GDPR compliance, it is quite a burdensome undertaking in terms of getting data protection agreements in place for all of your service providers. But the CCPA is less onerous. You do not need to have a contract in place. You just need to make sure there is a provision that says that the service provider cannot make secondary use or disclosure of the data.

On access and deletion, they are similar, though GDPR is actually a bit more burdensome in terms of access and likely requires the identification of specific third parties, which Ms. Lynch was referencing that the CCPA lacks.

There is one area where the CCPA is more onerous. Under the GDPR, as long as you have a legal basis for collecting the data, then you have a legal basis for sharing the data. An exception is if your legal basis was consent, then the user has the right to withdraw consent at any time. So there is essentially an opt-out there. But if you were relying on legitimate interests, then users do not have the ability to opt-out of the sharing of their data under the GDPR. That is in the CCPA. The CCPA is a bit more tough.

MS. ALEPIN: Ms. Lynch, we talked about how under the GDPR, a personal data breach is defined as a breach of security leading to an accidental or unlawful destruction, loss, alteration or unauthorized disclosure of personal data. This would include both accidental and deliberate causes. Take, for example, Cambridge Analytica and the Russian hackers. In your mind, should data breaches be limited to traditional notions of cyberattacks resulting in personal data being lost or stolen, or should that definition be expanded? Would that provide necessary rights to consumers?

MS. LYNCH: One of the things that we saw right after Cambridge Analytica is a lot of people were really upset that Facebook had known about this sharing of data with Cambridge Analytica and the misuse of data by Cambridge Analytica for a year or two by the time it made its way into the press, and Facebook never told any of its users whose data had been shared and co-opted by Cambridge Analytica.

Those writing about the situation say it was a data breach and that Facebook should have told users. But Facebook contends it was not a data breach because it was not as if Facebook was hacked—Facebook knew exactly what was going on. They knew that Cambridge Analytica and other companies had access to the data. They did not feel like they had the obligation to tell their customers. And it did not meet the criteria for a data breach under California data breach laws or any of the other 49 states' data breach laws, so there was no obligation to tell users.

I wonder where we would be if Facebook had just come out and said that companies had access to people's personal data, and we are sorry, and we will not let it happen ever again.

They did not, so here we are. So should we change the law to cover situations like Cambridge Analytica? I think that if companies are not going to be proactive about telling their customers about this kind of misuse of their data, then perhaps we need to change the law.

MS. CALL: Ms. Shapiro, your thoughts.

MS. SHAPIRO: I do think it makes sense for there to be a customer notification if there is an unauthorized access to personal information. Perhaps it makes sense for these laws to include an element of harm analysis so not every access of personal information becomes an issue. Because, for example, as I have seen with my clients, there are accidental disclosures all the time where there are minimal risks of harm. For example, a business to business ("B2B") company sends a document to one customer instead of another. They immediately contact us, tell us that we have made a mistake, and delete the file, etc. Incidents like that strike me as silly and unnecessary to provide customer notification, and not particularly useful because the user will immediately want to know "what type of information"? I think some harm consideration would make sense for a breach provision.

MS. ALEPIN: Ms. Lynch, we talked before about some specific privacy issues that arise in the social media context. We talked about users not knowing what data is being collected about them and where that information is going. How does the CCPA address those issues?

MS. LYNCH: The CCPA covers some of those issues. As Ms. Shapiro said, the CCPA has a broad definition of user personal information, so it can cover things like biometric data. But I think we will really see over the next year to eighteen months how the law is amended.

And, we will see whether the CCPA will be preempted by federal legislation. There is a big push right now to enact some form of federal legislation. A number of congress members have proposed privacy bills. Companies are certainly pushing for federal legislation so that there is preemption of the CCPA. Preemption also makes sense if you are a company operating in all 50 states or around the world. However, from a consumer perspective, the fear with preemption is that federal legislation could make the privacy protections weaker for consumers than what we've been able to secure in California and Illinois.

MS. CALL: Turning to some of the operational challenges with the right to delete—also known as the right to be forgotten in Europe and which is codified in the EU's GDPR. This comes up when, for example, I post a picture of myself and someone reposts it, maybe with a comment that I do not appreciate. And I reach out to the company asking that they delete the reposting.

For companies, this process can be complicated and requires a lot of engineering work and resources. There are large companies who deal with millions of users on their platforms that are looking for ways to create self-serve tools where their users can do this on their own, including accessing information and downloading it in an acceptable, easy-to-read format. I think the struggle there is not only the actual technical issues with deleting it, but the balancing that needs to take place with respect to the reposters' First Amendment rights.

MS. LYNCH: I think the right to be forgotten or the right to delete would be extremely challenging to implement in the United States because we have the First Amendment. The First Amendment not only protects your right to speak, but it also protects your right to hear and see information. Especially when that information is a matter of public concern.

So in the EU, if there is data about a person that is embarrassing, the person can go to the data custodian and request that the information be taken down. Under the way the GDPR is structured, the company needs to erase the personal data without undue delay. Now there are exceptions where the company is not required to erase the data. But it is very difficult for, say, Google to figure out what information should be left up and what should be taken down.

What we have already seen with countries that do not have the First Amendment or the right to free speech but do have this right to be forgotten is that the people making requests to delete information are people with a lot of money and power, whether that be politicians or wealthy people with oil interests. They are trying to hide matters concerning the environment or their past that we would consider in the US is a matter of public concern.

The other thing we have seen in the EU is that people are able to ask for truthful information to be taken down about them. So, perhaps you were arrested when you were

in your 20s and now you are in your 50s and trying to run for office. That arrest record is there because you were actually arrested. That file is somewhere within a government agency. What EU citizens have been requesting in legal proceedings is not for the information to be purged from government records, but for search engines like Google to "de-list" it–meaning remove a user's ability to find the information unless you know the exact website and web page that it is on.

We have also seen the EU try to enforce this globally which has come up with issues in the US because of its conflict with the First Amendment. I think that the right to be deleted or forgotten is one aspect of the GDPR that will not be implemented in the US.

MS. ALEPIN: Ms. Shapiro, you mentioned there has been quite an outcry from Silicon Valley and tech companies about the CCPA. Can you discuss the reaction of tech companies and the newfound focus on federal legislation?

MS. SHAPIRO: I think there has been a lot of concern with the law on behalf of start-ups and their ability to monetize their products. In order to get off the ground, start-ups rely on the ability to do the advertising in their apps or in their products or even have analytical tools that are free. For the products that are offered for free, consumers allow some use of their data to perform analytics. But if you cannot ask for data to perform the analytics, it is very possible that you cannot offer your product for free and therefore cannot use that business model to start your company.

Also, compliance obligations can be a barrier to entry for many small companies. We see this with the GDPR all the time. Many of the clients that I work with were in the EU and with the advent of GDPR, they decided to exit and only work in the US. They did not have the resources to undergo GDPR compliance.

I think many companies will not have the option to just pull out of California. Compliance with CCPA could be prohibitive in terms of companies getting into the market. That raises concerns that the CCPA could hurt competition because it would favor large Silicon Valley giants who have enormous teams of privacy lawyers.

Another concern, not just about the CCPA, is related to the patchwork of state legislation that has started to be pieced together. We saw in 2003 that California enacted a data breach notification law and a number of other states followed suit. It is possible when all is said and done that we will end up with 47 or so different state privacy laws that are not always consistent, which will make compliance really hard. That issue has led to a number of companies to push for federal privacy legislation.

MS. ALEPIN: Ms. Lynch, the EFF has called for greater transparency of social media companies and their practices, including disclosure of its algorithms and ad practices. For example, since social media companies have the capability of targeting specific classes of consumers with specific ads, there have been concerns that housing ads or financial aid ads can be specifically targeted to exclude subsets of the population.

Is what is needed generally when it comes to social media greater transparency about what their practices are?

MS. LYNCH: I think greater transparency would help all around. You mentioned housing and financial services. Within the last year, the Housing and Urban Development Agency (HUD) filed a Fair Housing Act complaint against Facebook because of discrimination that was happening in the way the company was implementing its algorithm for who was seeing ads.[30] Facebook's ad platform allowed advertisers to display housing ads to only men or women, not show ads to Facebook users interested in disability assistance, not show ads to users interested in childcare or parenting and not display ads to users interested in certain countries. Most of us would not think of Facebook as an employment or housing agency, but that's where most people are seeing ads for jobs and housing these days. There are specific laws at the state and federal levels regarding employment and housing discrimination, which prohibit age, disability, and gender discrimination. Yet, employers and landlords can place ads on Facebook using exactly those criteria.

Even more than that, Facebook's algorithm can look at an ad that was not targeted in a discriminatory fashion and its analytics will tell it that only white men aged 18-30 were looking at the ad, and it will then start showing the ad only to white men between the ages of 18-30. Therefore, even if an employer or financial institution tries not to be discriminatory, the way that Facebook's algorithm works on targeting ads can have a discriminatory effect. If there was more transparency from Facebook on how it was targeting ads, that would really help advertisers and law enforcement determine if there were problems.

On another front, researchers have tried to dive into Facebook's algorithms to understand its ad targeting and figure out the social and psychological effects on society, but Facebook has really pushed back on that. Facebook has claimed it is a form of computer hacking or a violation of their terms of service, and Facebook has threatened legal action against researchers that are really just trying to do research on this important platform. I think it will be important going forward to try to protect the researchers who are trying to figure out how companies are collecting and using data and targeting ads and how social media is impacting our society.

MS. ALEPIN: How can we as consumers demand more transparency from social media platforms?

MS. LYNCH: We have to push our legislators to make changes. That was what happened with the CCPA. As I said, more than 600,000 people signed the ballot. When people are concerned, they can really effect change.

30 *Assistant Secretary for Fair Housing & Equal Opportunity v. Facebook, Inc*, No. 18-085 (U.S. Dep't of Housing and Urban Development Aug. 17, 2018) (Housing Discrimination Complaint).

MANAGING CLASS ACTIONS AND COMPLEX LITIGATION—A VIEW FROM THE BENCH

By Jill M. Manning[1]

In 2018, the Golden State Instituted continued the tradition of hosting a panel of judges with backgrounds and experiences managing class actions, antitrust cases, and other complex litigation. Three distinguished Northern District of California jurists—**Judge William H. Alsup**, **Judge Edward M. Chen**, and **Magistrate Judge Laurel Beeler**—offered their insights and perspectives on these issues in a panel discussion moderated by **Jill Manning**.

MS. MANNING: Good afternoon. My name is Jill Manning, and I am honored to be here today to serve as the moderator of this distinguished panel of federal judges from the Northern District of California, all of whom have a wealth of knowledge and experience in managing complex and class-action litigation.

To my immediate right, please welcome Judge William Alsup. Judge Alsup graduated from Harvard Law School and served as a law clerk to Justice William O. Douglas of the United States Supreme Court. He worked in private practice in San Francisco and as an assistant to the United States Solicitor General in the United States Department of Justice. He briefly served as special counsel in the antitrust division of the Department of Justice. He was nominated by President Bill Clinton to a seat on the United States District Court for the Northern District of California, the seat vacated by Thelton Henderson in 1999. Welcome, Judge Alsup.

To Judge Alsup's right is Magistrate Judge Laurel Beeler. Judge Beeler graduated with honors from the University Of Washington School Of Law. She served as assistant U.S. Attorney in the Northern District, prosecuting complex white-collar cases with parallel civil components. She was a law clerk to the Honorable Cecil F. Poole, United States Court of Appeal for the Ninth Circuit, and then civil appeals division chief at the Ninth Circuit's office of staff attorneys. She was appointed as a Magistrate Judge to the Northern District in 2010. Welcome, Judge Beeler.

To Judge Beeler's right, we have Judge Edward Chen. Judge Chen graduated from the University of California at Berkeley School of Law. After graduating, he clerked for U.S. District Judge Charles B. Renfrew and U.S. Court of Appeals Chief Judge James R. Browning. He joined the legal staff of the ACLU Foundation of Northern California in 1985, where he served until joining the court in 2001. From 2001 to 2011, Judge Chen served as a federal magistrate judge for the Northern District of California. Judge Chen was nominated by President Obama to the United States District Court in 2009. Welcome, Judge Chen.

We're thrilled to have each of you here today.

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1 Jill Manning is a partner at Steyer Lowenthal Boodrookas Alvarez & Smith LLP, in San Francisco, California, and the immediate past Chair of the Antitrust, UCL and Privacy Section of the California Lawyers Association.

Let's jump right into questions for the panel. Why don't we start by hearing about your experience in antitrust or complex civil cases and your practices and procedures for presiding over those cases.

JUDGE ALSUP: For 25 years I was a lawyer at Morrison & Foerster and I did mostly complex cases and antitrust starting in the 1970s, and some of you are from that era. I had the honor of going up against Joe Alioto, Senior, the mayor, and so that was my background.

But, I would not call myself an antitrust lawyer, but I do know the general outline of antitrust principles. And, since becoming a judge, I just did my share. So I am not a specialist in this field, but of course we do many, many complex cases and class actions.

MS. MANNING: Judge Beeler?

JUDGE BEELER: I echo what Judge Alsup said. In my old job as the Assistant U.S. Attorney, I was the manager of the office, and some of my responsibility was supervising parts of the criminal division, including being a friend to the Antitrust Division. I saw some of the antitrust division folks here today, so I had that experience as an AUSA. I always liked issues involving competition. And, as Judge Alsup said, antitrust law is part of the portfolio of business that we have with other complex litigation in the Northern District.

JUDGE CHEN: We did not do a lot of antitrust cases at the ACLU, but I have had my share of privacy cases. In fact, I ended up being sort of a privacy expert, particularly under Constitutional law and a lot of complex and UCL cases.

And, that's one of the great things about being a judge on this court; no matter where you come from, whether you come from a civil practice with antitrust background, or a civil rights background, or a criminal background, you're going to learn this stuff very quick one way or the other. And, so, we've all had our share.

And, as you know, this district seems to be a very popular one for complex class actions. And, part of it is we bring it on ourselves because we've taken on a disproportionate share of MDL cases. Many of you are involved in some of the MDL cases we have. I think I saw a statistic the other day, we have either the highest or second highest number of MDL cases, if you look at the statistics over the past several years.

So, I have had large, complex, multi-class action cases. I have one pending now. And we talk a lot about handling class actions. In fact, we just had a retreat a couple weeks ago, and one of the topic we were talking about is how do we manage these cases, how do we handle the lawyers, and how do we handle the lead counsel motions and awarding fees? We're fortunate to have a wealth of experience and varied legal backgrounds on the court, as well as such a range of interesting cases.

MS. MANNING: Thank you. The discovery process can be lengthy and expensive in complex litigation. How involved or uninvolved are you in discovery motions, and what is your philosophy on how to effectively manage the discovery process?

Judge Beeler, would you like to start?

JUDGE BEELER: Sure. But, it's always fun to hear from Judge Alsup on this stuff. We all pay attention to Judge Alsup, right? I'm not kidding. I'm being completely serious.

I understand that the Manual on Complex Litigation[2] teaches that you're supposed to have that active style of case management. I take it to heart. Sometimes. I will say sometimes. One of my colleagues referred to it as the great spigot of work. That was how Judge Gilliam referred to it recently. And, so there's always this kind of tension between what you can manage and how should you approach it.

But I do think that active involvement is important. And, so I have two things that I think about: 1) regular case management conferences, not just one; and 2) the joint letter brief process. The parties need to get together and talk with each other first and at least try to resolve the dispute or some modification of that process.

Sometimes I do what Judge Alsup does. I invite the lawyers in to get to know each other first for a little bit of time before coming to see me. That's been helpful in some contexts.

And then, the other thing I think about is deadlines. We have to manage cases with an eye toward deadlines, and so I'm a big believer in setting case deadlines to move things along.

MS. MANNING: We will hear from you next, Judge Alsup.

JUDGE ALSUP: Well, I think discovery is very important. My approach is to keep the discovery disputes and not refer them to a magistrate judge, for a couple reasons. One is to avoid the delay of an appeal from whatever that decision is to me, and second, if the lawyers know that the trial judge is the one who is going to see how they're behaving, then they don't misbehave as much.

JUDGE BEELER: I think that is totally true. Because what happens is you'll see I have more discovery disputes in referral cases than I do in my own cases and that's without regard to the complexity of the case.

JUDGE ALSUP: So, what I will do is this. Let's say you have a discovery dispute and you write me a three-page letter, or less, and I get that on Monday. I don't wait for an opposition. I send out an order that day saying, "On Thursday we will have a discovery conference, and you will come in at 8:00 o'clock and meet with your opponent in the jury room until 11:00 o'clock."

JUDGE CHEN: And turn off the air while they're in there.

MS. MANNING: Do you provide snacks?

JUDGE ALSUP: The jury gets snacks. The lawyers get no snacks.

And, they sit there and try to work it out. The odds are 60 percent that the problem will be solved before 11:00 o'clock. Really. They come out and they say, "We've solved the problem. Can we go home?" And, I say, "Yes.".

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2 Manual for Complex Litigation, Fourth (Federal Judicial Center, 2004).

But, in 40 percent of the cases, they still have the problem. So they come out and we have a regular meet-and-greet on the record in the courtroom. I then do rough justice.

Now, you would think, well, how can the judge do rough justice in a case like that because it's so complicated? Listen, for 25 years I did the same kind of cases, and then I've seen them for almost 20 years as a judge. I can tell what the problem is just when the lawyers come in. Almost without hearing anything, I know what the problem is. So, I can cut right through the BS and get down to it. And, I apply a little practical principles of proportionality and trying to find ways to use random samples.

Here's one of my tricks. If you use those instructions in your document request combined with the definitions (all those capitalized words), you are automatically making it unenforceable because it's so broad and oppressive. I will say, "Look how oppressive this is." The party seeking the discovery will always try and fix it up by writing a letter saying to the effect, "All we really want is X, Y, Z," but it turns out that in their actual document request it was much more. Anyway, the point is, I hold my own hearing and I give a ruling at that hearing.

Now, the one thing that I handle differently is privilege. If there's an issue of privilege, then I require a sworn record and a full hearing because I think privilege should not be cut through quick and dirty like a lot of other things. I do that on a more formal record, but I might shorten the time for that kind of motion.

MS. MANNING: Judge Chen, what is your policy on oral argument? Do you typically hold oral argument on motions? If so, what is your style? Do you start with questions or do you allow counsel to proceed with a prepared argument?

JUDGE CHEN: Unlike a lot of districts, I think most of us hold oral argument, at least I do, and I hold the oral argument in probably 95 percent of the cases, even when I think it seems like it might be clear. I have found that often I will learn something in oral argument that I didn't pick up, either because it wasn't in the briefs, or wasn't highlighted, or it's buried in some footnote or some passage that I didn't catch. Or, as the argument evolves and you think about different strains of argument and counterargument, you know, there's kind of an iteration that wasn't thought through.

So, I've always found oral arguments to be helpful. It's also fun. I mean, doing an oral argument, it's just kind of a fun exercise. But, I think it's actually very useful.

Ideally I would like to get out a tentative ruling in advance or advance questions. Some of my better prepared colleagues do that. I just find myself not able to do that all of the time, but I do come out almost always with some initial impressions and my tentative views, and I will try to zero in on the critical questions.

MS. MANNING: Judge Beeler?

JUDGE BEELER: I think oral argument is really important. I always have them on dispositive motions. I aspire to have them on any consequential motion. I find oral argument to be extremely helpful. When I clerked in the Ninth Circuit, Judge Trott told me how important it was. I remember having that conversation with him as a clerk. It really stuck with me.

MS. MANNING: And, how about you, Judge Alsup?

JUDGE ALSUP: I think oral argument is very important. You know, many districts don't do it at all. Up in the Western District of Seattle you don't get any oral argument. The first time you see the trial judge is on the day of trial; they don't even do the pre-trial conferences.

But, we are very engaged in our district with the lawyers. I would say in more than three-fourths of the motions, I like to decide with oral argument. Some people learn better visually and in reading, but I'm one of the people who learn better listening, especially when I get to ask questions.

I will come out usually with my tentative, although I don't hand out a written tentative. Rather I will say, "Listen, here's the way I feel about this, and I want to give you a chance to talk me out of it." So I'll say, "I think we should do X, Y, and Z, and that's because of A, B, and C. Now, what am I missing in this picture?" Then you get a chance to say, "Wait, Judge, you forgot all that they just told you was completely untrue."

I also like to do it issue by issue. Instead of going through five or six issues and then letting the other side going through five, I like to say, "Okay, let's hear from each side on Issue 1," and we go back and forth. Then we'll go to Issue 2 and we'll go back and forth.

So, I find oral arguments extremely valuable. I will say as a general rule, about one third of the time it changes my mind in some substantial way. Maybe not that I'll completely reverse my tentative, but I will modify what I thought in an at least one third of the time.

MS. MANNING: Thank you, Judge Alsup.

Most complex cases ultimately end up settling before trial. What is your policy on when the parties may discuss settlement negotiations in a class action?

Judge Alsup, I understand you have a standing order that prohibits parties from discussing a settlement prior to the Court's order on class certification. Can you talk about that?

JUDGE ALSUP: Now, that's in a proposed class action suit. And, I know that I'm all alone out there. I feel this way. It is okay to discount the merits of a case when the absent class members are concerned. It's okay if you're asking for $1,000 and you discount it down to $400 based upon the merits, I think that's perfectly normal.

But, what should not be done is you discount it further from the $400 down to $150 or $200 based on the possibility that it's not suitable for class treatment in the first place. The absent class members should not bear that burden.

I think you should figure out first whether there is a class. Are certain issues suitable for class treatment? And then once we define what those are, the parties can go talk settlement. But, not before. That's the way I feel about it.

Now, there is an exception. Rule 23 calls for appointment of interim counsel as a possibility, and I have done that in certain cases where I think the defendant is going

bankrupt or there is some urgency. I will say to the parties, "You have my permission to go try to work out a settlement before class certification is decided." I will consider that as a possibility in certain circumstances.

I recognize that I'm the only judge who does this, but there's a professor who's written a good article about exactly what I said. You should not allow the absent class members' claims to be further discounted by the possibility that you're not even going to get a class. And then, for example, you might not have an adequate representative or a certain issue might not be amenable to class wide proof. And, so the absent class member is better off still having their claim.

MS. MANNING: Thank you.

Judge Chen, do you have any limitations on when parties in a proposed class action can start talking about settlement?

JUDGE CHEN: I don't. I guess we have different views on this particular question. In my view, the risk of non-certification or sustaining of the certification is one of the litigation risks, just like the merits is. And in particular, given the current situation where so many issues related to class certification are in a state of flux and that are being changed in the Ninth Circuit—for example, the issue of predominance in multi-state class cases, and the overlay of the whether claims must be arbitrated—that affect the class certification inquiry.

It does seem to me that sometimes absent class might be better off trying to settle rather than throwing the dice and getting nothing out of the case.

But, I am concerned, for the same reason articulated by Judge Alsup, that if you settle a class case too cheap and the case is so much on the edge that at some point it's questionable. And, perhaps that's why you still have to satisfy the requirements of Rule 23 even in a proposed settlement of a class case before certification. I think that's the main protection.

Of course there's a different presumption applied before you get class certified in terms of the reasonableness of the settlement. And you're in a much better position if you actually certified the class. So, there is already some recognition of that in the case law. But, I don't have a blanket rule that prohibits discussion beforehand.

MS. MANNING: And what about you, Judge Beeler?

JUDGE BEELER: I don't either. I will just say this, though: There are certain utilities that attach to a case where you have certified the class.

And, then the whole settlement analysis, just practically speaking, is just much easier to understand in the context of a case that has been litigated to at least class certification and sometimes beyond.

MS. MANNING: Let's switch gears and talk a little bit about the cases that don't settle and end up going to trial. How do you handle evidentiary issues during trial? What do you consider effective and ineffective in arguing evidentiary issues, and when do you allow briefing on those issues?

Judge Alsup, let's start with you.

JUDGE ALSUP: In the vast majority, you have to rule right there. There's a jury over there, and the lawyer says, "Objection, hearsay." Half of the time, I know it's not hearsay and I say, "Overruled, please answer." And, that takes about five seconds.

But, there are times when I am not sure, so you have to do what Judge Lowell Jensen was a genius at, which is, you know, we're running a risk management thing ourselves as the trial judge because at the end of the trial there will be perhaps 100 rulings. Now, are we going to get it right 100 times? No. We get it right maybe 90 times or 95, and so five issues may go up on appeal.

For the ones that I'm not as certain about, I may buy some time. I'll tell the lawyer, "Move on to something else, we'll talk about this at the break." I may even let counsel brief it overnight. It depends on how important the issue is, and how much the lawyer thinks he or she needs the evidence in, so it's a give-and-take thing.

I usually am able to work enough time out of the trial day or the hearings in order to give myself adequate briefing and time to consider the ramifications of it. But, nevertheless, I would say the vast majority of rulings are made very quickly, otherwise, trials would grind to a halt.

I require the lawyers to be in court at 7:30 in the morning in order to work out the evidentiary kinks of the day. The jury arrives at 7:45, and we always start by 8:00 o'clock. So, we have about 30 minutes to sort out the day's problems.

There are very few days where we need more than 30 minutes, and then we have a plan for the day, we go and bring the jury. Very few issues will require sidebars. There will be a few, but not very many.

The process above does not apply to *Daubert* motions, now, that's a separate question. I'm talking about the normal trial issues like hearsay or other objections or typical trial issues that would come up.

MS. MANNING: Because you opened the door, how do you deal with *Daubert* motions?

JUDGE ALSUP: I think there is so much abuse of experts and there is so much abuse of *Daubert* motions.

MS. MANNING: Do you mean overfilling of *Daubert* motions?

JUDGE ALSUP: Overfiling, attacking everything. One side says there's $3 billion in damages; the other side says it's zero. Really, that happens a lot. Then both sides want to attack each other with a *Daubert* motion. And, okay, we go through that process. I sometimes do it before the pre-trial conference, sometimes at the pre-trial conference, and sometimes these things even come up in the middle of the trial.

I want you to know I'm skeptical of experts and I'm skeptical of *Daubert* motions. I've just seen too much, I guess.

MS. MANNING: Judge Chen, what do you think about *Daubert* motions, and how and when do you resolve them?

JUDGE CHEN: I share Judge Alsup's view. I think they're overfiled to a certain extent. And, I can understand why, tactically, strategically, but . . .

Now we see *Daubert* motions in connection with motions to certify a class or summary judgment motions. So we're seeing them at almost every stage. And, we just have to deal with it.

I don't think we can limit it.

The Court has made it clear we have that gatekeeping function to perform, and of course you all have your advocacy role. But, just be aware that, you know, it wears us down to a certain extent.

JUDGE ALSUP: May I interrupt? You said the "gatekeeper" thing. I threw out an expert completely, and I said, "Look, it's my gatekeeper duty." And, he said, "Well, you're supposed to be a gatekeeper, Judge, but not an armed guard." That was a good one. That guy got an A. That was a good line.

MS. MANNING: Did he have to go to trial without an expert at that point?

JUDGE ALSUP: Yeah. If I throw your expert out, you don't get a substitute.

JUDGE BEELER: So what happened in the trial, what was the outcome?

JUDGE ALSUP: I got reversed on appeal, but on a different ground.

JUDGE BEELER: One of the weird things about experts, though, is the balance is really affected when an expert is lost. Experts are a means for a jury to hang its verdict on something, and that's a pretty skeptical view, but I think it true.

I know what it was like to try cases, and as a result, I don't have my pre-trial conferences well in advance of the trial. Sometimes I'll manage a couple of pre-trial conferences, but I feel very strongly about wasting the jury's time. And, most jurors come in and you see that in jury selection and how people think they don't want to be there, but then ultimately jury trials are an amazing experience for everybody. It's a great experience for everyone; we are all improved by it.

And, as a lawyer—I always said this when I taught trial advocacy—there's no excuse for not being able to get in evidence, either it's admissible or it's not. And, I don't like the jury's time being wasted.

So, Judge Spero doesn't do this, and he always says everything will sort itself out, so don't get overly involved. And, I suppose I get overly involved in admissibility of evidence a little bit early on. I don't spend oodles of time on it, but if I sense that a case is unorganized, I will make the lawyers come in and spend a day and work it out.

I don't like to see challenges for authenticity that are silly, I don't want to see custodians called unnecessarily, and I don't want the jury's time to be wasted.

A documents case should go in smoothly and easily, and if it's all cluttery, you're actually distracting from your narrative. So, not only do I think its bad strategy, I think it's bad for the jury. So, I take an active role in managing that because I know from my own experience that it's easy to try a big case that's document intensive, and it doesn't have to be a clutter of objections.

JUDGE CHEN: To that end, I require the parties to file a table of all exhibits they're going to propose to submit, and then the other side to file their objections and response so I have a little mini table of everything before trial. I do this in the pre-trial conference. I want to see a preview of all the objections.

And, sometimes there are so many, there's hundreds, I'll do kind of a bellwether thing that says, well, let's select out the groupings, see what are the critical issues here, whether it's a hearsay problem or some other issue.

JUDGE BEELER: Or saying something is a business record when it's not a business record.

JUDGE CHEN: So, I might get those out of the way. I don't want to see those for the first time in front of the jury and have to argue or take a time-out or something. So, I try as best I can to get as many of the evidentiary issues talked about beforehand and then use that as guidance in advance. I said, "Look, you've got my ruling now on these 20 or 30, you should work out the rest." And, if you're not, you see what direction I'm going to go.

JUDGE ALSUP: Let me add one thing. I think the judges on our court are pretty faithful to the rules of evidence.

And, I think there are lawyers, probably some in this room, who think, well, once I get to trial, if it was in the file, in my client's file, even if it was the "Chron," I get to put that in evidence because it's a "business record" because it's in their business files. No. We are pretty good about insisting on that the rules of evidence be honored. I think that's our view.

MS. MANNING: In antitrust litigation, the cases typically involve testimony from economists regarding collusion and damages. Do you have any tips for how lawyers can present complex economic evidence to juries?

Judge Chen?

JUDGE CHEN: Well, my comment is not necessarily particular to economic damages. We have a lot of high tech cases, and there's a lot of expertise in patent cases and other things. Part of it is the lingo and the ability of the expert to use simple vocabulary and to analogize if they can.

A good expert can make you feel like you're in a classroom. I've seen complex science, like anticancer drug therapy, explained in a way that was quite simple. I mean, it seems simple at the time. I don't know if I really understood it, but I felt like I did at the time, and I think the jury did as well.

And, I have seen other presentations, like in tutorials, where the experts are presenting but they're using such complex concepts and lingo that was totally ineffective. I got nothing out of it. And, I think that applies to all experts.

MS. MANNING: Judge Beeler?

JUDGE BEELER: I think that use of accessible language, describing things by analogy, and using plain English are all really important observations with experts.

Once I saw an antitrust trial just as a spectator, and the two experts were so alike to be as virtually indistinguishable. Age, length of hair, superior academic credentials—you really could not tell them apart. And, of course, what did the jury do? They disregarded both of them.

I have noticed one thing that jurors like: boots-on-the-ground experience, like actually going to visit the site in question. And, so I think that that's an observation I learned from my own experience about experts.

MS. MANNING: Do you have any tips, Judge Alsup?

JUDGE ALSUP: Use something that I can understand. I think animations and diagrams are great. Something that simplifies the problem without oversimplifying it. It still retains the essence of the problem and explains the essence of the problem. So, that's one way to explain technical concepts and issues to juries.

The most important thing about to say about a damages expert is that candor is important and to be realistic. I'll give you one example. In a patent case a few years ago, the plaintiff wanted $17 million, and that was a reasonable number. In fact, I was surprised that they didn't ask for more. They probably could have gone to $25 million and still been reasonable. They asked for $17.1 million, and that's exactly the number that the jury came back with because every step along the way, I thought the expert was just rock solid. So, the plaintiff won down the line on everything and down the line on all the damages. And, it was just a remarkably well tried case, in my view, without any overreaching and without any abuse by the expert.

So, I think candor is important. I don't see that very often. I often see $3 billion on one end and zero on the other side. That is the much more common thing you see these days, which is sad, really.

Can I give you one other thought?

MS. MANNING: Absolutely.

JUDGE ALSUP: I've only done it once, but I'm of the view that we should appoint under Rule 706—and make the parties pay for it—a court-appointed expert who will come in there and tell the jury like it is.

JUDGE BEELER: Assuming you can tell it like it is.

JUDGE ALSUP: Rule 706 tells you we can do that and we can make the parties pay, or apportion it any way that we feel is just.

MS. MANNING: Have you ever done that?

JUDGE ALSUP: One time I have done that. And that has not yet been reversed, but it's still in play.

JUDGE BEELER: Judge Wilken did it one time, too, but I'm not aware of anybody else doing that.

JUDGE ALSUP: She did. And, she and I are the only ones. Well, I got the idea from her, actually. She did it on a technical issue, and I'm doing it on a damages issue. Damages issue are now so complicated that it's plausible that you could use a 706 expert there. That, I commend. You know, the lawyers are not going to want that, but my colleagues, I commend that as something that might bring some sanity back to the use of experts.

JUDGE BEELER: I wonder if Judge Chen has something to say about that.

JUDGE CHEN: Well, I'll observe for a while and see how that plays out. I mean, obviously the danger, on the other hand, is the perception that we're delegating too much, we're putting too much weight on somebody and we're sort of losing the role of a judge. But, you know, that's not a crazy thought. There are intellectual property courts—I went to one in Taiwan—where they have 12 expert area examiners sitting with the judge and helping him or her understand the issues. And, yet the judge still makes the ultimate decision. And, in some ways you think, gee, that kind of makes some sense.

JUDGE BEELER: Thailand does it too. It's interesting though, because it's an adversarial process—that's our system—which I didn't fully appreciate earlier on in my legal career.

I remember seeing it towards the end of my last job where I was trying increasingly more sophisticated cases. And, I really had the time, because they move slower, to see how jurors looked at the decision maker. I had a case in front of Judge Patel, and people looked at her, you know, like she's Judge Patel! She really was an amazing judge, and it was a pleasure to try a case in front of her. But, I saw how the jury looked at her and, I hadn't noticed it earlier in my career.

JUDGE ALSUP: Well, the rule is designed to assist the jury, the finder of fact. It has to be a case that is sufficiently complex that it would be of assistance to the jury to have someone explain what the two competing sides are fighting over and what they think.

And that appointed expert is not directed by me in any way. They make their own independent professional decision.

JUDGE BEELER: Right. I just don't know if it feels like it has the imprimatur of court approval somehow and then in a way that kind of puts your thumb down in a way that's inappropriate for the adversarial process.

JUDGE ALSUP: Yes, but what that will do is it will cause the bought-and-paid-for experts to move toward the mean as opposed to extremes. Because they don't want to be too far off with what the court-appointed expert conclude. Nevertheless, I've only done it once, and I recognize these problems and I believe in the adversarial system, but this problem with experts is out of hand, in my view.

JUDGE BEELER: I agree with that, too. It's just hard—you look sometimes at the experts and you just know they're hired.

JUDGE ALSUP: Bought and paid for.

JUDGE BEELER: Bought and paid for. Hired hacks is what I was going to say.

JUDGE CHEN: Sort of like the lawyers. Just kidding.

JUDGE ALSUP: Well, it's okay for the lawyers because everyone knows they are the advocates.

JUDGE BEELER: And, the jury knows it too.

JUDGE ALSUP: But, the experts pretend that they are independent and that they're giving a professional opinion.

MS. MANNING: Well, there certainly are a lot of strong opinions on the topic of experts. Let's try this one.

The antitrust bar tends to be, shall we say, quite mature and mostly male. In large MDL cases, it can be hard for younger attorneys, women, and minorities to get interesting work. What, if anything, do you do to encourage the litigation team to have a diverse group of lawyers?

Judge Chen, will you kick off this discussion?

JUDGE CHEN: I was going to defer to Judge Alsup. He's the pioneer.

JUDGE BEELER: He's the pioneer.

MS. MANNING: Seems everyone's deferring to you, Judge Alsup.

JUDGE ALSUP: I haven't done an MDL in about 10 years or so . . .

MS. MANNING: The discussion does not have to be specific to MDL cases, it can relate to any complex case.

JUDGE ALSUP: I definitely encourage young lawyers, and I say that up front. I have standing rules, but I don't order it.

When it comes to selecting lead counsel in a case where there are multiple possible lawyers, I don't like this stratified set of committees. I like to have one firm involved, although sometimes I will allow two, maybe even three, it depends. But, that's to save money for the class. So that's a different issue, it has really nothing to do with this immediate point.

But, on the initial point, I am very concerned that we are not training the next generation of practitioners and that the big firms especially are not doing that, and that we need to tell the big firms, "Please send out young people to argue your motions." I am very pleased with the results from that. And, so I think if we encourage it, it will happen. I guess that's the best I can answer on that.

MS. MANNING: Judge Chen?

JUDGE CHEN: Our court just recently had a retreat—and I can't remember now whether we incorporated it into a formal standing order or we have a model standing order that all of our colleagues are adopting—that makes it express that we encourage firms to allow younger and underrepresented attorneys to appear and argue motions. At the very least—which I think we all agree—is to allow, for instance, multiple attorneys to argue. And, it gives a chance to give a piece of an argument to a younger attorney until they get roped in by their partner.

So, I think we are all of that mind because we're all concerned about the problem of lack of diversity that we are seeing in some circles. When it comes to steering committees, I agree with what Judge Alsup said about avoiding large steering committees unless it's absolutely necessary. But, where it is necessary, I made it clear that one of the criteria when you're testing for leadership positions is how diverse your team is and what you intend to do in terms of giving opportunities to others. I think that's worked fairly well.

In the MDL I have, I've appointed a steering committee that's about 40 percent women and about 20–25 percent people of color. And, so I think that's necessary; otherwise the same people get the same experience, and pretty soon, if you're not willing to go outside that same box, you're going to end up calling the same people all over again. So, I try to break that cycle.

JUDGE BEELER: The one thing I'll add to the conversation is that you will get an argument that may be more robust if you have newer lawyers arguing it, and the judges will actually listen—you get a more receptive audience and you will have more argument than you might otherwise get.

So, not only is it the decent thing to do, not only is it the thing to do to grow the next generation of lawyer, but it's also the strategically correct thing to do. Which often is the case in life, that the right thing to do is also a good strategy.

JUDGE CHEN: And, it's really irritating to have a senior person up there and arguing, and then not knowing all the facts and having to turn to the junior lawyer who you know did all the work.

JUDGE ALSUP: Well, that is very true, but the young lawyers have not yet learned guile. Is that the right word?

JUDGE BEELER: Yes, the elegant deception of lawyering.

JUDGE ALSUP: So the senior lawyer gets up there and I ask, "Has the statute of limitations run?" And they say, "Judge, you don't have to reach that issue, here is the thing you need to consider." Or they say, "Judge, before we get to that, did you know they haven't produced those documents yet." And then I get mad because they did not answer the question.

But, if I ask that to a young lawyer, they say, "No, the statute of limitations has not run because of A and B." I hear this very clear. So, they answer the question. I like that.

JUDGE BEELER: I really do call it the elegant deception of lawyering. It's not deception if you're not saying something incorrect, but it's an avoidance technique.

MS. MANNING: Judge Beeler, I very much enjoyed reading your law review article titled "The Company I Keep." And, in that article you write, "Every hearing is an opportunity to mediate cases." Can you tell us what you mean by that?

JUDGE BEELER: Sure. The idea is lifted from someone else. [Former] Northern District of California Judge Jeremy Fogel[3] said it. He's a judge who really believes in mediation and in active case management, and sort of lived the idea of the Manual for Complex Litigation.

So, it's a little joke I tell to myself. I have all these little things I say, and one of them is, "the truth: it's important maybe 60 percent of the time." And, then sometimes I say, "The law, that's important maybe 60 percent of the time."

And, for a lot of problems, there's the business context for decision making. And, I think that if you look at cases and try to see them for what's going on in the real world, the litigated dispute is just rules being applied to a dispute, and sometimes the dispute is amenable to a different resolution altogether.

In my very first patent case, so it was years ago, there was just a slew of lawyers and clients. And, I think I asked the question, "Aren't you tired of this," and one of the clients was nodding. Because it just seemed that litigation was a bad way of solving that problem. So I just saw that early, partly because I do settlement conference as part of my practice, so I get to see that from the perspective of actual helping people resolve their disputes.

And, so I think you see in the case management process that most cases settle. 97 percent of cases don't go to trial, 80 percent of cases in our district settle without a dispositive motion. I think that is a good indication that if we can manage things toward resolution, that's good for the parties. And, I try never to lose sight of the human context of what is actually going on. I have had a couple of different situations where cases have resolved because I asked some of those questions at case management.

MS. MANNING: I think I'll ask one more question and then turn it over to the audience.

Tell us a little bit 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 ALSUP: I conduct the initial *voir dire*, and then I let the lawyers ask questions because I am sure I miss things and they can follow up. Questionnaires ahead of time are rare, but I will, in some cases, be talked into a short questionnaire. So, I won't say no or never, but I would say in the general run of cases, we don't have questionnaires. I do the initial *voir dire*, then the lawyers, and then we pick the jury.

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3 Judge Fogel currently serves as Executive Director of the Berkeley Judicial Institute, University of California, Berkeley, School of Law.

MS. MANNING: Judge Chen?

JUDGE CHEN: You know, again, we just had a retreat, and we talked about this issue of questionnaires. I think most of us feel that you actually can get a lot of information from questionnaires that you don't get in the courtroom. You would be surprised how many honest answers you get or door-opening sort of comments. In a case involving some sensitivities or some perplexities, I am favorably disposed to questionnaires, with the proviso that we can't do it in every case.

We have jury utilization statistics and we have limits and budgets. And, the problem with questionnaires is you have to bring people in, at least that's the way we're doing it, and they come in for a whole day and then you've got to then collate and collect the questionnaires and you come in another day. So, you've burned a whole day of jury time in that process.

But, in a lengthier trial, a complex trial, I think it's worth it—it yields dividends. And, particularly if it's a sensitive case that involves issues where there's a lot of pre-trial publicity or potential implicit bias, in my experience you tend to get some more honest answers in questionnaires that you can then follow up on in *voir dire* in court.

MS. MANNING: Judge Beeler?

JUDGE BEELER: I use a one-page questionnaire in every case, which is just the biographical information. And, it doesn't hurt jury selection.

When the jury is reading or watching the videos, the questionnaires come down and they are sorted in the order of call because it makes it easier. The lawyers read them, we bring in the jury, and then the jury is picked all before noon. It works out fine.

I think the jury selection goes faster because the lawyers do *voir dire*. I mean, I do the initial, and then let the lawyers do the *voir dire*, and I think it works really well.

I like the questionnaire in more complex cases for the reasons that Judge Chen describes. Because of jury utilization and partly because I think you mostly don't need it if you're doing *voir dire* yourself. And, in certain kinds of cases, it's really helpful. But, the shorter, the better, just for a whole bunch of mechanical reasons.

I do think if it is going to be a more press-worthy or sensitive case, I have the jury come in on a Friday to fill out the questionnaires and the lawyers get the weekend to review them. It doesn't work if they get them Monday night; it's just too hiccupy.

And, then also I have this theory that if a case can be tried in a week, jurors get really upset if they have to come in the following Monday. But, if they come in on a Friday and then finish the following week, that they are a lot happier.

So, that's my philosophy about questionnaires and a little bit of my philosophy of *voir dire*.

MS. MANNING: Thank you. So how about questions from the audience? I think we have time for a few. We have one over here. Mr. O'Rourke.

QUESTION BY KENNETH O'ROURKE: Good evening. Thank you.

I have a question about appeals from your rulings. And, specifically when there's an appeal from an important ruling that you have issued, do you follow it in the appellate court, look at the briefings and so forth, or is that just in the rearview mirror for 18 months or twelve months until the Ninth Circuit rules?

JUDGE ALSUP: I can think of about two cases in almost 20 years where I looked at the briefs on appeal. But, it's not because I'm not interested, it's just that we've got other cases. So, yes, occasionally. I would say rare, rarely in my case do I look at the briefs. Now, when the opinion comes in, yes, of course I look at that.

JUDGE CHEN: I think it's too excruciating. I mean, I have some colleagues who invariably will listen to every Ninth Circuit argument. They tune in and they listen. It's like you're sitting there and somebody else is arguing your case. I can't stand it. I have no control, I just wipe my brow and get to it when they come back.

JUDGE BEELER: Who has the time? Although it's an interesting thing, it hadn't even occurred to me that people might be slamming me in the briefs. Isn't that a terrible lack of self-reflection on my part?

Of course, I read the orders with interest. In one case I had, which was a really interesting environmental case that had a complex regulatory scheme, I took a lot of time with the order, and I really enjoyed the whole process of working on it. And, I was super curious because I was convinced I was right. So, in that instance, I did watch the Ninth Circuit argument, because you can watch it on the web page.

That's the only time I've done anything other than just wait for the order to come out. But, I was very interested in the topic, and I sort of poured my soul into that order. It was fun to understand. And, so, I did listen to the argument in that instance. But, I did it out of complete interest.

MS. MANNING: We have time for one more question. Ms. Chen.

QUESTIONS BY JIAMIE CHEN: Hi, my name is Jiamie Chen, from the Joseph Saveri Law Firm.

And, my question is sort of a follow-up question to a question Jill had asked you a little bit earlier. If you're at a leadership hearing and you see a variety of attorneys in the room. And, let's say that some attorneys are people of color, who are women, who maybe have been practicing for less than 20 years, and then you see some other attorneys who are extremely well respected and experienced and have, let's say, a dozen leadership appointments under their belt, and that's the one you know that has a proven track record. Are you open to giving an opportunity to someone like the former attorney, and if so, what can someone like the former attorney do or say to help you be more comfortable giving someone like that a chance?

JUDGE CHEN: Well, hopefully if it's a case where you can have a steering committee with, perhaps, five or six or seven, there is room to make the appointment. And, I think that's how inexperienced or less experienced attorneys can kind of get a foothold. You've

got to start somewhere, and if you can start and get yourself on a steering committee and then that builds on itself. And, that's how everybody starts, and that's why I think it is important.

The harder one, if there's only room for one firm, one attorney. If it's a class action, we have a fiduciary duty to the class. But, if it's just one firm or a small package, if there is a way to include others, I definitely try because I do have that in mind. But, I also understand that the first and foremost duty is to make sure that the fiduciary duty to the class is fulfilled.

So, if you're vying for that position, I would put as much in the resume about how much responsibility you've had in the cases you've tried, how much motion work or discovery you've conducted, and how much responsibility you have gotten. So you make sure you highlight all the skills that are necessary so at least somebody feels like, well, that person can run with the ball if they're given the ball.

JUDGE ALSUP: In cases where I can pick the plaintiff and the law firm, I do ask for proposals. But, I want to see who within each firm the law firm is going to put on their team and what their experience is. So, that would be the moment where that fact comes in to play.

But, what Judge Chen says is also true, which is that there is a fiduciary duty to the absent class members to make sure that the overall mix that we are putting in charge of the class can do an excellent job for the class. But, all those things should be considered and are considered. I guess that's the best I can say.

MS. MANNING: All right. Final word. Judge Beeler.

JUDGE BEELER: Well, I was just going to say one thing. It's always hard when you're not starting your career, but even mid-career, to have your audience know you well enough that they can trust you.

And, so I always thought from my own perspective, you know, how do you do that? How do you go to court and have someone say, "I want to pick you, I hear you, I trust you." You get that from engaging with the court on a regular basis. And, you can do that in your own cases, for example, by being on the court's pro bono panel and getting trial experience. You can get it by participating in the Courts, like the lawyer representatives or federal bar associations.

There are ways of getting to know your judges. I did it not because I was being particularly strategic about my own career, but because my own experience clerking was so meaningful to me. I always joke around that I was sort of like a judge groupie. You guys know that; right?

I practiced in the Northern District for 15 years, and I genuinely liked the Court, and I found reasons to try to engage with the Court. And, ultimately that really helped me, especially when I was doing more complex cases, to be seen and heard and have what I've asked for followed. So, I do think there's a way you can kind of leverage your resume by engaging with the court in that sort of way.

MS. MANNING: Thank you for that sage advice. Please join me in thanking our very distinguished panel. It was wonderful to have you here today, and I think we all will be better advocates before you having heard your words of advice and wisdom. Thank you.

[APPLAUSE]

A PRACTITIONER'S PERSPECTIVE: WHY THE SUPREME COURT SHOULD NOT OVERTURN *ILLINOIS BRICK* IN *APPLE V. PEPPER*[1]

By Steven N. Williams[2]

I. INTRODUCTION

During the course of oral argument in *Apple v. Pepper,* counsel for plaintiff was asked several times why the plaintiffs' bar did not support calls for the Supreme Court to overrule *Illinois Brick Co. v. Illinois*.[3] This article reviews the issues raised in *Pepper*, and provides this lawyer's response to the question of why *Illinois Brick* should not be disturbed.

The plaintiffs in *Pepper* purchased apps for their iPhones, iPads and other Apple devices from Apple's App Store. These apps can only be sold and purchased through Apple's App Store.[4] This model is unique to Apple. The transactions in which the plaintiffs purchase apps are solely between the plaintiffs and Apple. Apple does not mandate the prices that app developers may charge for their products when sold through the App Store. Many are free. If they are not free, their price must end in .99. iPhone users pay Apple when they buy an app from the App Store. Apple retains 30% of the purchase price paid for an app, and remits the remaining 70% to the app developer.

No one has pointed to any other sales model that operates like Apple's App Store. Apps which operate on different devices and operating systems other than Apple's iOS are widely available through Google Play, the Microsoft Store, the Amazon App Store and other places. Apple's total control over the means of distribution for both the developers who sell apps and the customers who purchase apps is unique. These features led to the characterization of the App Store as a "closed loop" during oral argument before the Supreme Court.

Plaintiffs alleged that Apple had created and exploited a monopoly over the retail aftermarket for iPhone apps and sued under the Sherman and Clayton Act for antitrust damages. After a series of motions directed at the adequacy of the complaint and amendments by the plaintiffs, the district court dismissed the fourth amended complaint

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1 United States Supreme Court docket no. 17-204. Much information about the certiorari petition, briefing, and argument in *Apple v. Pepper* are available for download at https://www.scotusblog.com/case-files/cases/apple-v-pepper/. The transcript of oral argument is available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-204_32q3.pdf. The audio of the oral argument is available at https://www.oyez.org/cases/2018/17-204. The *Pepper* case has been discussed in many forums, including the article, "*Applying Illinois Brick to E-Commerce: Who is the Direct Purchaser from an App Store?",* Sandrock, Competition, Fall 2018.

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3 431 U.S. 720 (1977) ("*Illinois Brick*").

4 The App Store is a digital distribution platform, developed and maintained by Apple Inc., for mobile apps on its iOS operating system. As of June 2016, the store featured over 2 million apps. *See* Golson, Jordan, "*Apple's App Store now has over 2 million apps*". *The Verge*. Vox Media (June 13, 2016), available at: https://www.theverge.com/2016/6/13/11922926/apple-apps-2-million-wwdc-2016.

with prejudice on the ground that the plaintiffs' claims necessarily implicated the pricing decisions of non-party app developers and thus were barred by *Illinois Brick*.

II. BACKGROUND

A. Antitrust Principles

These antitrust principles frame the analysis of *Pepper* and *Illinois Brick*:

> Antitrust laws are essential to the well-being of our country, and the well-being of consumers.
>
> > The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[5]
>
> Private enforcement of antitrust laws is an essential element of the antitrust laws.
>
> > When Congress enacted the Clayton Act in 1914, it "extend[ed] the remedy under Section 7 of the Sherman Act" to persons injured by virtue of any antitrust violation. H.R. Rep. No. 627, 63d Cong., 2d Sess., 14 (1914). The initial House debates concerning provisions relating to private damage actions reveal that these actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb); see, *e.g., id.,* at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414-9417, 9466-9467, 9487-9495. The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw

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5 *Northern Pacific Railway v. United States,* 356 U.S. 1, 4-5 (1958). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 486 n. 10 (1977) (Sherman Act was conceived "'primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers" (quoting 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George)); *United States v. Aluminum Co. of America,* 148 F.2d 416, 428 (2 Cir. 1945) ("In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."); *see also* Tim Wu, *Be Afraid of Economic 'Bigness.' Be Very Afraid,* The New York Times, November 10, 2018, available at https://www.nytimes.com/2018/11/10/opinion/sunday/fascism-economy-monopoly.html ("antitrust law had more than an economic goal,[ ] it was meant fundamentally as a kind of constitutional safeguard, a check against the political dangers of unaccountable private power").

treble-damages suits as an important means of enforcing the law. *Id.,* at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd).[6]

State antitrust laws existed before federal antitrust laws, have provided a parallel enforcement system, and have developed meaningful differences from federal law.[7]

From the beginning, judicial interpretation provided important interpretations of the antitrust laws. The Sherman Act was written in extraordinarily broad terms which required judicial construction.[8] Milestone judicial interpretations have addressed issues of standing and antitrust injury. These include *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[9] and *Illinois Brick*, as well as *Associated General Contractors v. Cal. State Council of Carpenters*.[10]

Hanover Shoe held that an antitrust defendant could not assert as a defense that the plaintiff passed on overcharges to its customers. *Illinois Brick* held that because *Hanover Shoe* prevented a defendant from asserting a "pass on" defense, a plaintiff who did not purchase directly from a defendant could not sue that defendant for damages under federal law. *AGC* established a multi-part test to evaluate antitrust standing.

Since *Illinois Brick,* 34 states and the District of Columbia have provided remedies to victims of antitrust violations who did not deal directly with a defendant, either through statutory changes or through judicial interpretation. These states are typically referred to as "Repealer" states. The substantive laws of these states developed in parallel to federal law but have not been identical. By way of example, in contrast to *Hanover Shoe,* the California Supreme Court, in *Clayworth, supra,* refused to permit a pass on defense to a claim under the Cartwright Act, the California state antitrust law, unless necessary to avoid duplicative damages because multiple levels in the same chain of distribution were present in the same action.[11] *ARC America* held that these state laws were not preempted even if they imposed penalties on antitrust violators that were cumulative of remedies provided to direct purchasers under federal law.

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6 *Brunswick Corp, supra*; *see also Hawaii v. Standard Oil Co.,* 405 U.S. 251, 262 (1972) ("[B]y offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'")

7 *See California v. ARC America Corp.,* 490 U.S. 93, 101 n. 4 (1989) ("*Arc America*") (noting that "it is plain that" regulation of monopolies and unfair business practices "is an area traditionally regulated by the States", and that "[a]t the time of enactment of the Sherman Act, 21 States had already adopted their own antitrust laws."); *Clayworth v. Pfizer,* 49 Cal.4th 758, 770-775 (2010) ("*Clayworth*") (describing early history of Cartwright Act and related state laws); *see also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 691 F.2d 1335 (9th Cir. 1982) (federal law generally does not permit "umbrella" damages in antitrust cases); *County of San Mateo v. CSL Ltd.,* 2014 U.S. Dist. LEXIS 116342 (N.D. Cal. Aug. 20, 2014) (umbrella damages permissible in action under California's Cartwright Act).

8 *See, e.g., Standard Oil Co. v. United States,* 221 U.S. 1 (1910); *American Tobacco Co. v. United States,* 221 U.S. 106 (1911).

9 392 U.S. 481 (1968) ("*Hanover Shoe*").

10 459 U.S. 519 (1983) ("*AGC*").

11 49 Cal.4th at 787.

The Class Action Fairness Act of 2005[12] ("CAFA") was the product of "tort reformers" seeking to curb what they called class action lawsuit abuse. At the signing ceremony for CAFA, President Bush referenced a newspaper editorial referring to "the class action system as an extortion racket"[13] and stated that he hoped CAFA would begin to remedy that situation.

Nothing about the signing remarks for CAFA indicate that any proponent of CAFA was thinking of antitrust cases. As a (perhaps unintended) consequence of CAFA, antitrust actions on behalf of all plaintiffs, whether asserting claims under federal law or under state law, are now typically presided over by a single federal judge appointed by the Judicial Panel on Multidistrict Litigation ("JPML"). Frequently this includes (1) class claims under federal law by direct purchasers, (2) class claims under state law by indirect purchasers, (3) individual "direct actions" by non-class plaintiffs, and (4) actions by state attorneys general. Cases like these are often coordinated with parallel federal criminal or civil actions.

Centralization of these actions before a single federal judge has mitigated costs of discovery by eliminating duplication, led to consistency in rulings, and provided predictability to all parties. While the task of managing such complex litigation may seem daunting, in this author's experience, federal judges have shown great skill in managing such actions successfully. Since 2006, common procedures have been established and implemented to manage private civil antitrust litigation throughout the United States. Among the mechanisms used by courts and litigants are the early appointment of lead and liaison counsel for various plaintiff and defense groups, protective orders, protocols on the production and use of electronically stored information, protocols governing expert discovery, protocols governing the taking and coordination of depositions, protocols providing for the coordination of discovery among actions, and orders governing the conduct of trials involving multiple levels of claimants.[14]

B. *Pepper v. Apple—the District Court Proceedings*

The *Pepper* plaintiffs sued Apple for damages under federal antitrust law, alleging that:

1. Apple had monopolized and attempted to monopolize the market for iPhone apps;

2. the apps were manufactured by app developers and were only sold through Apple's App Store;

3. for every third-party app sold through the App Store, Apple received 30% of the revenue and the developer received the remaining 70%;

4. payment was made directly to the App Store;

5. Apple prohibited developers from selling iPhone apps through any means other than the App Store; and

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12 Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

13 The signing statement for CAFA can be found here: https://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050218-11.html.

14 *See, e.g., In re Korean Ramen Antitrust Litigation,* No. 3:13-cv-04115 (N.D. Cal. Feb. 2, 2018) (order Following January 26, 2018 Pretrial Conference).

6. if an iPhone user purchases and installs an app on an iPhone from a source other than the App Store, Apple will void the warranty for that iPhone.

The district court dismissed plaintiffs' complaint with prejudice after the fourth amended complaint, ruling that plaintiffs' damage claim necessarily required an inquiry into the pricing decisions of non-party app developers, and therefore was barred by *Illinois Brick*.[15]

C. The Ninth Circuit's Opinion

The Ninth Circuit held that the indirect-purchaser rule of *Illinois Brick* did not bar antitrust claims against Apple by plaintiffs who purchased apps made by app developers from Apple's App Store.[16] In its analysis, the Ninth Circuit described the key issue and precedents as follows:

> The transactions in *Hanover Shoe* and *Illinois Brick* have the same structure. In both cases, a monopolizing or price-fixing manufacturer sold or leased a product to an intermediate manufacturer at a supracompetitive price. The intermediate manufacturer (in *Illinois Brick*, two intermediate manufacturers) then used that product to create another product, which was ultimately sold to the consumer. The details in [*Kansas v. Utilicorp United, Inc.,* 497 U.S. 199 (1990)] are different but the basic structure is the same. In *Utilicorp,* a monopolizing producer sold a product to a distributor at an allegedly supracompetitive price. The distributor then sold the product to a consumer. In all three cases, the consumer was an indirect purchaser from the manufacturer or producer who sold or leased the product to the intermediary. The consumer was a direct purchaser from the intermediate manufacturer (*Hanover Shoe* and *Illinois Brick*) or from the distributor (*Utilicorp*).

846 F.3d at 322. The consumer did not have standing to sue the intermediary, wether the intermediate manufacturer or the distributor. With the question framed that way, the Ninth Circuit simplified the question at issue because it did not turn on any inquiry about non-parties' pricing decisions:

> The question before us is whether Plaintiffs purchased their iPhone apps directly from the app developers, or directly from Apple. Stated otherwise, the question is whether Apple is a manufacturer or producer or whether it is a distributor. Under *Hanover Shoe, Illinois Brick,* and *Utilicorp,* if Apple is a manufacturer or producer from whom Plaintiffs purchased indirectly, Plaintiffs do not have standing. But if Apple is a distributor from whom Plaintiffs purchased directly, Plaintiffs do have standing.

Id.

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15 *In re Apple iPhone Antitrust Litig.,* 2013 U.S. Dist. LEXIS 169836, * 21-22 (N.D. Cal. Dec. 2, 2013).

16 *Pepper v. Apple*, 846 F.3d 313 (9th Cir. 2017).

The Ninth Circuit's analysis of this question turned on its application of *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson,* 523 F.3d 1116 (9th Cir. 2008). In that case, the plaintiffs alleged that Johnson & Johnson was a monopolist, but they had not purchased from Johnson & Johnson. Instead, they purchased through a distributor which had purchased from Johnson & Johnson. The court held that plaintiff was an indirect purchaser from Johnson & Johnson, and a direct purchaser from the distributor. As a result, it could not bring a damage claim against Johnson & Johnson. The key logical step in the Ninth Circuit's analysis in *Delaware Valley,* which it extended in *Pepper,* is:

> Applying the "straightforward," "bright line" rule of *Illinois Brick*, we held in *Delaware Valley* that [plaintiff] was an indirect purchaser from J & J, the manufacturer, and a direct purchaser from [ ] the distributor. That [plaintiff] and J & J had a contract setting the wholesale price of the products, and that the price plaintiff paid [the distributor] was "set, in part, by an agreement negotiated . . . on behalf of [plaintiff]" with J & J were not determinative. The determinative fact was that [the distributor] sold the products directly to [plaintiff]. Because [plaintiff] bought directly from [ ] the distributor, it lacked standing to sue J & J, the manufacturer. The necessary corollary of *Delaware Valley* is that [plaintiff] would have had standing to sue [ ] the distributor.

846 F.3d at 323.

By analyzing the issue this way, the Ninth Circuit was able to conclude that the Plaintiffs could assert their federal damage claim against Apple because Apple was a distributor. *Id*. at 324. The logic of this analysis may be strained, though the conclusion is right. In *Delaware Valley,* the distributor was not alleged to have done anything wrong. As such, the "corollary" that the plaintiff would have standing to sue the distributor provides an illusory benefit because there was no claim against the distributor to be made.

While the application of this framework to Apple in the *Pepper* case based upon its self-professed role as a distributor results in finding standing for the plaintiffs, a simpler way to get to that result would be to look at the identity of the alleged antitrust violator and violation, and the relationship of those two things to the plaintiffs. In *Pepper,* the violator was Apple and Apple had a direct relationship with the plaintiffs. This analysis, like the "distributor" analysis, avoids the need to look at non-party pricing decisions or the existence of "antecedent transactions"[17] such as those identified by the district court when it dismissed the plaintiffs' claims against Apple.

III. *PEPPER* AT THE SUPREME COURT

Apple petitioned for certiorari on August 2, 2017. On October 10, 2017, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. On May 8, 2018, the United States Department of Justice filed an amicus brief. It was not

17 *See Campos v. Ticketmaster Corp.,* 140 F.3d 1166, 1169 (8th Cir. 1988) ("*Campos")* (rejecting ticket buyers' antitrust claim against Ticketmaster because it turned on whether "an antecedent transaction between the monopolist and another, independent purchaser" had resulted in the independent purchaser absorbing or passing on all or part of the monopoly overcharge). *Campos* was relied upon by Apple in *Pepper.*

surprising that this amicus brief supported Apple's position; the following part of the brief, however, caught the attention of many:

> That regime of parallel federal and state antitrust litigation has proved to be complex and inefficient. See *AMC Report* 269-272.[18] *Inter alia,* suits by direct and indirect purchasers seeking to recover the same overcharge create a risk of inconsistent results or duplicative awards. *Id.* at 271-272. In addition, some commentators have concluded, based on the courts' experience with state-law indirect purchaser claims, that the evidentiary complexities associated with pass-on analysis are not as great as this Court believed them to be when it decided *Hanover Shoe* and *Illinois Brick*. See, *e.g., id.* at 277; 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346k, at 219-227 (4th ed. 2014). The parties have litigated this case within the framework established by *Hanover Shoe* and *Illinois Brick*, however, and have not asked this Court to revisit those decisions.[19]

While nothing in the case or in Apple's petition for certiorari challenged the *Illinois Brick* precedent—indeed, Apple relied upon it for its defense—the U.S. appeared to be injecting the issue into the Court's review based on a twenty-year old study, despite the fact that none of the parties had asked the Court to consider the viability of *Illinois Brick* and *Hanover Shoe*. The citation to the findings of the AMC were an anachronism. The AMC report was completed just before CAFA became effective. The conclusions of the AMC report were questionable when issued, and CAFA rendered them nugatory.

The AMC report proposed revisions to the antitrust laws which included the elimination of *Illinois Brick*. Among the bases for this recommendation were the assertions that the regime of parallel federal and state antitrust claims had proved to be "complex and inefficient" and that there was a risk of inconsistent or duplicative awards. Because CAFA led to the centralization of most civil antitrust claims before a single federal judge, the concerns about complexity, inefficiency, and inconsistent results have fallen by the wayside. And the assertion of "duplicative awards" is an illusion. Scholars have repeatedly shown that there has been no reported instance in which an antitrust violator has been subject to duplicative damages,[20] and advocates for this argument have never rebutted those showings. Further, it is almost certain that there is underdeterrence in antitrust because many violations are never discovered and, due to statutes of limitations, even

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18 This is a reference to the Antitrust Modernization Comm'n ("AMC"), Report and Recommendations (2007), available at http://ovinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

19 Brief of the United States as Amicus Curiae, *Apple, Inc. v. Pepper*, No. 17-204, pp. 12-13. https://www.supremecourt.gov/DocketPDF/17/17-204/46060/20180508135603183_17-204%20Apple%20v.%20Pepper%20%20-%20AC%20Pet.pdf.

20 *See, e.g.,* O'Connor & Lande, *Not Treble Damages: Cartel Recoveries are Mostly Less than Single Damages,* 100 Iowa L. Rev. 1997 (2015). As a consequence, monetary sanctions paid by cartelists are typically only 9 to 21% of what they should be to provide optimal deterrence of antitrust violations. O'Connor and Lande, *Cartels as Rational Business Strategy*: *Crime Pays*, 34 Cardozo L. Rev. 437 (2012).

when such violations are discovered violators are frequently subject to less than the total damages that they might otherwise be subject to due to time bars.[21]

The Court granted the petition for certiorari, with the question presented being:

> Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victim of the alleged offense.

This question accepted in its entirety Apple's theory of the case. The question is not consistent with the actual claim presented by plaintiffs. Under no interpretation could Apple—which created, owns, and controls everything about the App Store—be deemed merely "anyone who delivers goods", as if it were an innocent bystander to the transactions. Nor, as set forth above, do the plaintiffs' claims require an analysis of "damages based on prices set by third parties." Finally, while the App developers may or may not be "immediate victim[s]" of Apple's conduct, they are not necessarily immediate victims of the alleged offense asserted by the plaintiffs.

On October 1, 2008, Texas, Iowa, and 29 other states filed an amici curiae brief in support of respondents.[22] This brief argued for affirmance on a different ground. The attorneys general argued that *Illinois Brick* should be overruled.[23]

Apple's arguments in response to the claims in *Pepper* substituted one of many policy reasons supporting the *Illinois Brick* decision for the holding itself. This was clearly shown by Apple's oral argument before the Supreme Court, which began with the proposition that the Ninth Circuit should be reversed because plaintiffs' damages theory "is rooted in a 30 percent commission that Apple charges app developers and which allegedly causes those developers to increase app prices to consumers," and that therefore *Illinois Brick* bars the plaintiffs' claims because "the developers' pricing decisions are necessarily in the causal chain that links the commission to any consumer damages." [24] This focus on pricing decisions by non-parties or antecedent transactions as in *Campos* case fails to account for the critical issue of who the wrongdoer is and what the wrongful conduct was.

The bright-line rule of *Illinois Brick* is that only those who deal directly with an antitrust violator may bring a damage claim under federal law. In *Pepper*, only Apple was alleged to have violated the antitrust laws. Early in the argument, Justice Breyer focused on this point when he said:

> If Joe Smith buys from Bill, who bought from the monopolist, then we have something indirect. But, if Joe Smith bought from the monopolist, it is direct. That's a simple theory.

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21 *See, e.g.,* Lande, *Class Warfare: Why Antitrust Class Actions are Essential for Compensation and Deterrence,* Antitrust, Vol. 30, No. 2, Spring 2016.

22 Brief for Texas, Iowa, and 29 Other States as Amici Curiae in Support of Respondents, No. 17-204, https://www.supremecourt.gov/DocketPDF/17/17-204/65335/20181001143715665_17-204%20Amici%20Brief.pdf.

23 *Id.* at 2 ("This brief solely urges the Court to overrule *Illinois Brick*.").

24 Transcript of argument at 3:11-15.

> Now I can't find in reason or in case law or in anything I've learned in antitrust anything that would conflict with that.[25]

Justice Kagan also focused on this point, noting that *Illinois Brick* involved a vertical supply chain as distinguished from a monopoly.

> JUSTICE KAGAN: . . . the questions that are being put to you by my colleagues are really, what was *Illinois Brick* about? Was it about a vertical supply chain or, instead, was it about a pass-through theory?
>
> Now, in the facts of *Illinois Brick*, and, indeed, in the facts of all the *Illinois Brick* cases that we've discussed, you had both. So you didn't have to separate the two.
>
> And now, here, you don't have both, because this is not a vertical supply chain, but there still is a pass-through mechanism. So then the question is, does *Illinois Brick* apply to that or not?
>
> And I think what Justice Breyer was suggesting to you, that as long as it's not that vertical supply chain where the person is not buying from the monopolist itself, here the person is transacting with the monopolist itself, that that's what separates this case from Illinois Brick and makes it entirely different, notwithstanding that there's some kind of pass-through mechanism involved.[26]

Justice Alito raised the policy reasons underlying *Illinois Brick*, and was the first of the justices to raise a question about its continued validity:

> JUSTICE ALITO: Mr. Wall, could I ask you about what troubles me about your position, and—and it is this: *Illinois Brick* was not about economic theory. It was about the court's—the court's—the basis for the decision was not economic theory, as I read the case. It's the court's calculation of what makes for an effective and efficient litigation scheme.
>
> And maybe your answer to this question is that the validity of *Illinois Brick* is not before us. But I really wonder whether, in light of what has happened since then, the court's evaluation stands up.[27]

Justice Alito's comments are particularly noteworthy for recognizing that *Illinois Brick* was about much more than economic theory or the calculation of damages in a particular case. Like many interpretations of the antitrust laws, it had many underpinnings all of which tied back to the Court's determination of what would permit an effective and efficient private enforcement system. In *Hanover Shoe*, it was the decision to limit federal damage claims to direct purchasers. This was deemed most likely to benefit private enforcement. The bright-line rule of *Illinois Brick* was a corollary to that rule and again was intended to provide for the continuing vibrancy of private enforcement under federal law.

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25 Transcript of argument at 8:22-9:5.

26 Transcript of argument at 13:5-14:2.

27 Transcript of argument at 14:25-15:13.

The development of Repealer law among the states not only is consistent with the states' long history of economic regulation, *see ARC America, supra,* but it is also consistent with the ideals of federalism. And importantly to the resolution of *Pepper*, Justice Alito's comments demonstrate that the focus on a non-parties' pricing decisions was not the core of *Illinois Brick,* but just one part of the rationales that supported that decision.

IV. CONCLUSION

A. The Resolution of *Pepper*

It is likely that *Pepper* will be decided before this article is published. Nonetheless, my opinion is that a majority of the Court will affirm the Ninth Circuit on different grounds, ruling that *Illinois Brick* is a bright-line rule, that plaintiffs dealt directly with Apple and therefore are direct purchasers, and that considerations of how damage claims might be proven are not a basis on which to find that the claims are barred by *Illinois Brick*.

B. The Benefits of *Illinois Brick*

" . . . [Y]ou still haven't explained to me why the plaintiffs' bar isn't asking to overturn *Illinois Brick* when 31 states are. . . ."[28]

The answer is because (1) the present system works, and (2) disrupting parts of the private enforcement system without a thoughtful, comprehensive approach would cause chaos and disruption in the civil justice system, in violation of Federal Rule of Civil Procedure 1, and would discourage private enforcement in violation of the goals of the drafters of federal and state antitrust laws.

The combination of *Hanover Shoe, Illinois Brick, ARC America,* CAFA and the MDL process have resulted in a regime that mitigates costs, avoids duplicative discovery and inconsistent legal rulings, and centralizes cases involving all claimants before a single federal judge. Federal district court judges and counsel for parties have fashioned a system within this construct that provides consistency and predictability, all in satisfaction of Rule 1. Though not by design, this system has tended to eliminate every issue of concern raised by the AMC report, whether real or imagined.

Further, the need for private antitrust enforcement has not lessened. It has become more critical than ever. Many believe that the automotive parts antitrust conspiracy, which lasted from at least 2001 through 2011, was the largest antitrust conspiracy ever uncovered. The Hon. Marianne Battani of the Eastern District of Michigan presided over an enormously complex case with great skill and efficiency, and a group of accomplished lawyers representing direct purchasers, multiple levels of indirect purchasers, opt out plaintiffs, state attorney generals and defendants have brought that case close to its conclusion. The more recent Generic Drugs antitrust litigation now pending before the Hon. Cynthia M. Rufe in the Eastern District of Pennsylvania may prove to be even larger than the automotive parts case. The point is that antitrust conduct is not abating; rather, it is continuing and its impact is felt throughout our economy and usually with consumers.

28 Comment of Justice Neil Gorsuch, transcript of argument in *Apple v. Pepper,* at 48:17-20.

Overruling *Illinois Brick* without consideration of the other substantive legal principles that are part of federal antitrust law—most particularly, those set forth in *Hanover Shoe, AGC,* and *ARC America*—would render the private enforcement system confusing and illogical, at least until enough private litigation had proceeded at district court level to establish new rules and procedures. No one has identified any need for this, and the disruption to private enforcement that would follow if *Illinois Brick* were overruled would be profound. At each step of litigation, district courts would be faced with new and unsettled questions about who in any group of plaintiffs is permitted to assert claims, how classes would be certified, and whether antitrust damages need be allocated amongst different claimant groups. Because district courts did this after CAFA, and created a system that works, there is no need to create chaos in the private enforcement system by overruling *Illinois Brick*.

Our present system of private antitrust enforcement is the most effective, efficient, and predictable system that we have had and should be maintained. Overruling *Illinois Brick* would impair the effectiveness of private civil antitrust enforcement, a cornerstone of our nation's antitrust and economic policy.

WHERE DO WE GO FROM HERE: ARTICLE III STANDING AND CY PRES-ONLY SETTLEMENTS IN PRIVACY CLASS ACTIONS IN THE WAKE OF *FRANK V. GAOS*

By Bethany Caracuzzo[1]

I. INTRODUCTION

This term, the Supreme Court heard argument in *Frank v. Gaos*.[2] The case involves an objector appeal to a class settlement reached in multi-district litigation against Google, in which plaintiffs allege the internet search engine violated users' privacy by collecting and disclosing their internet search terms to owners of third-party websites. The lead objector and petitioner, Theodore Frank, founder of the Competitive Institute's Center for Class Action Fairness (CCAF), and a frequent opponent of class action settlements, obtained certiorari to a challenge of the settlement, which took the form of an "all cy pres[3] settlement" providing for $5.3 million in charitable contributions to several non-profits, including the law schools of lead plaintiff's counsel, in lieu of any monetary or other compensation to an estimated 129 million unnamed class members.[4]

As everyone braced for what the high court had in store for cy pres settlements,[5] a funny thing happened. At oral argument on October 31, 2018, the justices devoted much of their questioning[6] to the issue of whether plaintiffs had suffered an "injury-in-fact" sufficient to confer Article III standing as required by the Supreme Court's 2016 ruling in *Spokeo, Inc. v. Robins*.[7] Justices Gorsuch and Kavanaugh, who joined the Court after *Spokeo* was decided, were active in the hearing debate on this issue.[8] Indeed, the standing question, which had not been formally briefed previously, was of such significance that the Supreme Court ordered the parties to provide post-argument supplemental briefing directed solely to that issue.[9] That briefing concluded in late December 2018.

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2 *In re Google Referrer Header Privacy Litigation*, No. 17-961 ("*Frank v. Gaos*").

3 In modern litigation, the term "cy près" refers to the act of designating unclaimed class funds to public interest organizations whose work furthers the interests of the class. The history and usage of cy pres remedies in class action jurisprudence is discussed, briefly, in Section II.B. of this article.

4 *In re. Google Referrer Header Privacy Litigation ("Gaos")*, 87 F.Supp.3d, 1122, 1129-1130 (N.D. Cal. Mar. 31, 2015).

5 Chief Justice Roberts foreshadowed his of cy pres-only settlements in his statement from the bench when the Supreme Court denied certiorari in *Marek v. Lane*. At that time, Chief Roberts specifically was interested in examining "how to . . . assess fairness [of *cy pres*] as a general matter," how to choose entities to receive the *cy pres* award, whether new entities could be formed as part of the relief, how to delineate responsibility between the judge and parties in forming the *cy pres* remedy, and "how closely the goals of any enlisted organization must correspond to the interests of the class." *Marek v. Lane*, 134 S.Ct. 8, 9 (2013).

6 Transcript of Oral Argument, *Frank v. Gaos*, No. 17-961 (Oct. 31, 2018).

7 __U.S. __, 136 S. Ct. 1540 (2016) ("*Spokeo*").

8 Transcript of Oral Argument, *supra*, note 5.

9 *See* Orders in Pending Cases, *Frank v. Gaos*, No. 17-961 (Nov. 6, 2018).

Given the question presented on appeal, the Supreme Court's decision in *Frank v. Gaos* had the potential to significantly impact privacy class actions in two ways. It could have prohibited, or placed further restrictions on, class action settlements that provide only cy pres relief. Also, with two new justices on the Court, the decision could have altered the Article III standing requirements articulated in *Spokeo*. Instead, the Court punted on both issues: it vacated the judgment issued by the Ninth Circuit, remanded in a per curiam decision issued March 20, 2019, and directed that the Ninth Circuit or the District Court undertake a *Spokeo* analysis in the first instance.[10]

Although the Supreme Court did not reach the merits of the issues presented, the history of briefing and arguments before the Court provide an important glimpse of the justices' views on Article III standing in the privacy context, and the continued viability of cy pres only settlements in class action cases generally. This article summarizes the parties' briefing and argument on these core questions, as well as the justices' questions on these issues. The article concludes with this author's view of some of the important takeaways from the proceedings.

II. BACKGROUND

A. Pre-Settlement Briefing in the District Court

This case arises from class action claims that Google violated users' privacy by disclosing their Internet search terms to owners of third-party websites.

In October 2010, plaintiff Paloma Gaos filed a class action lawsuit against Google in the U.S. District Court for the Northern District of California. The claimed privacy violations involve browser architecture. When a user submits search terms to Google, it returns a list of websites on a "search results page." When a user then visits a website on the list by clicking on the provided link, that website is privy to the search terms the user originally submitted to Google, as part of the referrer header information collected by Google in the search process.[11] Those search terms, plaintiffs contend, can reveal users' highly sensitive or personally identifying information such as real names, street addresses, confidential medical information, racial or ethnic origins, political or religious beliefs or sexuality, and can also disclose a user's IP address, pinpointing the user's exact computer.[12] Plaintiff complained that this application of the search protocol, coupled with Google's "Web History" service, which tracks and stores account holders' browsing activity on Google's servers, was contrary to representations in Google's Terms of Service, and violated users' privacy and other state and federal laws.[13] Plaintiff also alleged that, with the use of "reidentification" or "deanonymizing of data" processes, a

10 *Frank v. Gaos*, No. 17-961, 586 U.S. __ (March 20, 2019)(slip op.).

11 The "referrer header" mechanism is not unique to Google. All major web browsers (including Internet Explorer, Firefox, Chrome, and Safari) by default reports the URL of the last webpage that the user viewed before clicking on the link to the current page as part of "referrer header" information. *See In re Zynga Privacy Litig.*, 750 F.3d 1098, 1102 (9th Cir. 2014) (explaining how "referrer headers" operate).

12 Complaint at ¶¶ 2-4, *Gaos*, No. 5:10-cv-04809-EJD, (Oct. 25, 2010), ECF No. 1.

13 *In re. Google Referrer Header Privacy Litigation ("Gaos"),* 2014 WL 1266091 (N.D. Cal. Mar. 26, 2014), at *1; Complaint at ¶¶ 18-23, *supra* note 11.

third party may be able to reverse-engineer information divulged in the referrer header to learn the user's identity.[14]

The district court granted Google's first motion to dismiss with leave to amend because Plaintiff Gaos had failed to allege an "injury in fact" sufficient to establish Article III standing.[15] Gaos amended her complaint, and Google again challenged her standing under Article III on the same grounds.[16] The district court agreed with Google as to plaintiff's six common law claims and dismissed them with leave to amend.[17] As to her first cause of action for violation of the federal Stored Communications Act (the "SCA")[18], the district court denied the motion, stating "[t]he injury required by Article III [] can exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" The court found that the SCA "creates a right to be free from the unlawful disclosure of communications as prohibited by the statute" and that Ms. Gaos had "alleged a concrete and particularized injury in fact as a result of the alleged violation of her rights under the SCA."[19] Plaintiff amended a second time, also adding Anthony Italiano as another representative plaintiff.

A third motion to dismiss again challenging plaintiffs' Article III standing, was filed, briefed, and taken under submission without oral argument. While it was pending, the Supreme Court denied as improvidently granted ("DIG") the appeal in *First Financial Corp. v. Edwards*[20], which questioned whether a statutory violation could support standing. When *Edwards* was DIG'd, Google withdrew its standing challenge to the SCA cause of action in *Gaos*, the parties stipulated to the filing of an amended consolidated class action complaint ("CCAC")[21], the third motion to dismiss was terminated as moot, and the standing issue was never addressed.[22] The CACC asserts causes of action for violation of the SCA, as well as common law claims of breach of contract, breach of the covenant of good faith and fair dealing, breach of contract implied in law, unjust enrichment (in the alternative), and declaratory judgment and corresponding injunctive relief, on behalf of an admittedly colossal class of "[a]ll persons in the United States who submitted a search query to Google at any time between October 25, 2006 and the date of notice to the class of certification."[23]

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14 Complaint at ¶¶ 2-4, 31-33, *supra* note 11.

15 Order Granting Motion to Dismiss, *Gaos*, No. 5:10-cv-04809-EJD, (Apr. 7, 2011), ECF No. 24.

16 First Amended Complaint, *Gaos*, No. 5:10-cv-04809-EJD, (May 2, 2011), ECF No. 26; Motion to Dismiss First Amended Complaint, (May 16, 2011), ECF No. 29.

17 Order Granting-in-part and Denying-In Part Motion to Dismiss, *Gaos*, No. 5:10-cv-04809-EJD, (March 9, 2012), ECF No. 38

18 18 U.S.C.A. § 2702.

19 Order on Motion to Dismiss, *supra* note 16, at 5. It should be noted that the district court's analysis pre-dates the Supreme Court's 2016 decision in *Spokeo*.

20 567 U.S. 756 (June 28, 2012); *see also Frank v. Gaos*, slip op. at 3, 5, *supra* note 9.

21 Consolidated Class Action Complaint ("CACC"), *Gaos*, No. 5:10-cv-04809-EJD, (April 26, 2013), ECF No. 50. The CACC also added in named plaintiff Gabriel Priyev, who had originally filed suit in the Northern District of Illinois.

22 Order as Modified by the Court Granting Stipulation of Class Actions, *Gaos*, 5:10-cv-04809-EJD, (Apr. 30, 2013), ECF No. 51; *see also Frank v. Gaos*, slip op. at 3, 5, *supra* note 9.

23 CACC at ¶ 119, *supra* note 19.

B. The Proposed Cy Pres Only Settlement

The parties then proceeded to mediation and reached a settlement, which they submitted to the district court for preliminary approval in July 2013. The settlement did not require Google to stop providing users' search information via the referrer header to third parties, but instead mandated that Google provide updated information in the FAQ portion of Google's Website informing users what it was doing, and providing users an opportunity to opt out.[24] As settlement consideration, the settlement provided that Google would pay a total of $8.5 million in exchange for a release of the claims of the approximately 129 million people who used Google Search in the United States between October 25, 2006 and April 25, 2014 (the date the class was given notice of the settlement).[25] Of the $8.5 million to be paid by Google, $2.125 million was to be allocated to attorneys' fees and costs; $15,000 in incentive awards to be paid, in total, to the three named plaintiffs; and approximately $1 million in costs to administer the settlement.[26] The settlement proposed that the remaining $5.3 million be distributed entirely to six cy pres recipients, each of which would receive between 15 and 21 percent of the net cy pres money.[27]

The doctrine of cy pres has a long, historical background, with legal concepts surrounding cy pres potentially dating back to the Roman Empire,[28] which is far beyond the scope of this article. The term is derived from the Norman French phrase, "*cy pres comme possible*," or "as near as possible."[29] In the U.S., state courts for some time have utilized cy pres to enforce charitable trusts where it is impossible or impractical to honor the original gift but there is a desire to preserve the general charitable intention of the testator.[30]

Federal courts use the cy pres doctrine as a remedy in the class action context in two ways.

First, cy pres can be used to distribute unclaimed or non-distributable portions of a class action settlement to the "next best" class of beneficiaries.[31] This is preferable to having unclaimed class action settlement funds simply revert back to the defendants—thwarting the deterrent impact of civil litigation on defendants' activities—or having funds escheat to the state.

Second, cy pres may be included as part of the settlement consideration itself, as was proposed in *Gaos*, by directing that a portion of the settlement money go to designated charities. This latter form of cy pres has been held by the Ninth Circuit to be

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24 2014 WL 1266091 at *5.

25 Motion for Settlement (Preliminary Approval), *Gaos*, No. 5:10-cv-04809, (July 19, 2013), ECF Nos. 52, 55, 57.

26 *Gaos*, 2014 WL 1266091 (N.D. Cal. Mar. 26, 2014), at *4-*5; *see also In re. Google Referrer Header Privacy Litigation* ("*Gaos*") 869 F.3d 737, 741 (9th Cir. 2017).

27 *Gaos*, 869 F.3d 727, 740 (9th Cir. 2017).

28 Edith L. Fisch, *The Cy Pres Doctrine in the United States* § 1.00, at 1 (1950).

29 *Gaos*, 869 F.3d 373, 741 (9th Cir. 2017).

30 Fisch, *supra* note 27, § 5.00 at 128.

31 *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (internal citation omitted).

"fundamentally fair" and satisfying the requirements of Rule 23(e) where plaintiffs have shown that it is infeasible to provide monetary payments to absent class members and there is a sufficient nexus between the chosen charitable organization(s) and the harm that the plaintiffs suffered.[32]

C. The District Court Approved the Cy Pres-Only Settlement

The *Gaos* settlement came before the district court for preliminary settlement approval on August 27, 2013. The court granted preliminary approval on March 26, 2014.[33]

Addressing the proposed cy pres remedy, the court noted in its preliminary approval order that it was "mindful of the Ninth Circuit's recent direction" in *Lane v. Facebook* that a pure "cy pres [settlement] distribution must be the 'next best' remedy to direct payments to the class either because proof of individual claims would be burdensome or distribution of damages too costly."[34] "In this case," the court held, "a settlement providing for cy pres payments rather than direct payments to class members is the 'next best' remedy for both reasons identified in *Lane*. "Since the amount of potential class members exceeds one hundred million individuals, requiring proofs of claim from this many people would impose a significant burden to distribute, review and then verify. Similarly, the cost of sending out what would likely be very small payments to millions of class members would exceed the total monetary benefit obtained by the class."[35]

The district court further held that plaintiffs "have demonstrated how distributing settlement funds to the proposed cy pres recipients accounts for the nature of this suit, meets the objectives of the SCA claim, and furthers the interests of class members."[36] And, while the court found "the proposed cy pres recipients certainly have the capabilities to carry out Plaintiffs' goals,"[37] at the preliminary approval hearing, the court asked class counsel to provide more detail in the final approval briefing on the cy pres recipient selection process and the recipients' proposals for their intended use of the funds.[38]

There were five objections to the settlement and proposed fee award, but only Mr. Frank appeared at the hearing. In both his filings and at the final approval hearing, Frank argued strenuously against the use of a cy pres settlement remedy. He asserted that distribution of a settlement fund to injured consumers was feasible in *Gaos*, given that only a small portion of class members realistically apply for such funds and they would typically be distributed pro rata, or, the Objectors contended, in the alternative, funds could be distributed via

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32 *Id.* at 821. The Supreme Court denied certiorari in *Lane* but, even so, Chief Justice Roberts took the unusual step of issuing a statement from the bench, stating that when a more suitable case presents itself, the Court should consider "when, if ever, [cy pres] relief should be considered" and should "clarify the limits on the use of such remedies." *Marek v. Lane*, 134 S.Ct. 8, 9 (2013).

33 2014 WL 1266091 (N.D. Cal. Mar. 26, 2014); *see also* Transcript of Aug. 27, 2013 Hearing, *Gaos*, No. 5:10-cv-04809, ECF No. 57.

34 *Id.* at *6 (N.D. Cal., 2014)

35 *Id.*

36 *Id.* (footnote omitted).

37 *Id.*

38 Transcript of Aug. 27, 2013 Hearing, *supra* note 31, at 6:20-8:15; 11:5-17; 40:11-41:6; 45:15-24; 47:3-8; 48:12-19.

a "sampling lottery method"[39]—that is, Objectors proposed, the court could randomly select class members to receive settlement payments, which would allow selected lottery "winners" to receive a greater distribution than if the entire class were to be paid pro rata.[40] In objecting to the payment of attorneys' fees, Frank argued that the attorneys for the class should not benefit by getting a fee when consumers receive nothing. Finally, Frank asserted, the attorneys had disqualifying conflicts of interest, because the proposed cy pres recipients were alma mater institutions of the counsel involved and because many entities had also previously received charitable donations from defendant Google.[41]

Almost a year to-the-day of the hearing on preliminary approval, on August 29, 2014, the district court heard arguments on final approval. At the hearing, the court and counsel discussed the process by which the cy pres recipients were selected, with plaintiffs' counsel representing that 40 potential recipients were narrowed down to six.[42] The court noted its disappointment that, despite counsel's representations at the hearing on the motion for preliminary approval that plaintiffs would be "setting the bar higher" in terms of the identification and selection of the cy pres recipients, it appeared "that the usual suspects [recipients] are still usual."[43] The court also expressed that the lack of transparency in the cy pres selection process, which plaintiffs' counsel claimed was non-disclosable because it was subject to the mediation privilege, "raised a red flag", caused the court concern, and "doesn't pass the smell test."[44] The court ended the hearing reiterating its concerns, indicating that its initial thought was to not approve settlement and to issue an order informing the parties "what I think needs fixing."[45]

Despite its noted concerns, and without requesting further submissions from the parties, the district court granted final settlement approval on March 31, 2015.[46] The court held that "a class action settlement does not need to embody the best possible result to be approved," and that the proposed cy pres-only remedy "is the 'next best' result here."[47] The district court also approved the requested attorney fee award of $2.125 million, which was equal to 25% of the settlement fund.[48] Incentive awards in the amount of $5,000 to

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39 Objection by Frank and Holyoak (August 8, 2014) at 14, *Gaos,* No. 5:10-cv-04809-ELD, ECF No. 70, citing to Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 Geo.Wash. L.Rev. 1065 (2011).

40 Lavie, *supra* note 39, at 1070-1071 (Lavie provides an example of distributing funds to only 5% of a settlement class, thereby decreasing administrative costs by 95% and leaving more money that can be paid to the winning beneficiaries).

41 Transcript of Aug. 29, 2014 Hearing, *Gaos*, No. 5:10-cv-04809; ECF No. 82, at 5-13; Objection by Frank and Holyoak, *supra* note 38.

42 Transcript of Aug. 29, 2014 Hearing, *supra* note 41, at 18:2- 26:17.

43 *Id.* at 23:7-8.

44 *Id.* at 26:23-27:17; 31:14-32:6; 47:17-48:2; 64:25-65:7.

45 *Id.* at 64:22-65:6.

46 *Gaos*, 87 F.Supp.3d 1122 (N.D. Cal. Mar. 31, 2015).

47 87 F.Supp.3d at 1132, 1133; *see also* nt. 1 of the opinion, where the district court again referred to the final list of cy pres recipients as being the "usual suspects," despite plaintiffs' counsel's prior promise to the court to "raise the bar" by treating the cy pres allocation selection like a grant application process.

48 *Id.* at 1135-36.

each of the three named plaintiffs (for a total of $15,000 as requested) also were approved.[49] Final Judgment was entered on April 2, 2015.

D. The Ninth Circuit Affirmed

Two of the original five objectors, Mr. Frank and Melissa Ann Holyoak, appealed to the Ninth Circuit, raising the same arguments they had made to the district court. The *Spokeo* decision came down after briefing, but before the Ninth Circuit issued its decision; but because Google had withdrawn its standing challenge to the SCA, standing was not discussed. The Ninth Circuit affirmed the approval of the settlement, finding that: (1) a cy pres-only settlement was appropriate, (2) the choice of cy pres recipients ("the crux of th[e] appeal")[50] was within the discretion of the district court in approving the settlement, and (3) the lower court did not abuse its discretion in awarding class counsel their attorneys' fees.[51] Reviewing the cy pres remedy for abuse of discretion, the Ninth Circuit found that, while cy pres-only settlements are considered the exception and not the rule, they are appropriate when the settlement fund is "non-distributable" because the proof of individual claims would be burdensome or distribution of damages costly."[52] Looking to its 2012 decision in *Lane v. Facebook, Inc.*[53], another privacy class action in which a cy pres-only settlement had been approved because direct monetary payments would have been infeasible because each class member's individual recovery would have been *de minimis*, the Ninth Circuit found the "gap between the fund and a miniscule award [to class members] is even more dramatic here," resulting in a "paltry 4 cents in recovery," not including the cost of notice and mailing: "a *de minimis* amount if ever there was one."[54]

The Ninth Circuit rejected the Objectors' proposed lottery system and noted that its review of the settlement was predicated not on whether there are other possible alternatives, but whether it was "fair, adequate, and free from collusion."[55] Google's earlier donations to some of the cy pres recipients were held not to undermine the selection process or impugn the settlement, "without something more, such as fraud or collusion" which "is missing here."[56] The court disagreed that the link between some recipients and class counsel's alma maters raised questions about whether the selections were merit-based, noting that the selected institutions are large law schools who "graduate thousands of students each year", and finding that the district court appropriately considered the claim of potential conflicts: counsel swore they had no ongoing affiliations with the research centers at their alma maters that were to receive the funds, and the recipients were all

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49 *Id.* at 1137.

50 869 F.3d 743 (9th Cir. Aug. 22, 2017). The panel consisted of circuit judges J. Clifford Wallace, M. Margaret McKeown, and Jay S. Bybee. The opinion was by Judge McKeown, with a partial concurrence and partial dissent by Judge Wallace.

51 *Id.* at 737 (9th Cir. Aug. 22, 2017).

52 *Id.* at 741-742.

53 696 F.3d 811, 819 (9th Cir. 2012).

54 869 F.3d at 742.

55 *Id.* at 742.

56 *Id.* at 745-46.

well-recognized research centers focusing on the Internet and data privacy.[57] Lastly, the Ninth Circuit affirmed the attorneys' fees award, dismissing out of hand the Objectors' view that the fees should have been calculated lower because it was a cy pres-only settlement.[58] Objectors' petitions for panel rehearing and for rehearing en banc were denied.[59]

III. PETITION FOR CERTIORARI AND PRE-HEARING BRIEFING

A. Standing Was Raised for the First Time After the Grant of Certiorari

Certiorari was granted April 30, 2018 on the Objectors' limited question of, "whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members comports with the requirement that a settlement binding class members must be 'fair, reasonable, and adequate.'"[60] The Objectors put the availability of pure cy pres settlement relief in the class action context squarely at issue. Objectors argued that the cy pres settlement, itself, is not fair or reasonable as required by Rule 23 because it provides no direct compensation to the class, and that the Ninth Circuit, in its affirmance of the settlement, created a perverse incentive for class counsel to not compensate the class while compensating themselves.[61]

No party or amici explicitly raised plaintiffs' alleged lack of Article III standing before the Ninth Circuit or in briefing to the Supreme Court prior to its grant of certiorari. Google, while not challenging standing, nevertheless flagged the issue in its opposition to the petition for certiorari by citing to *Spokeo* and noting that the plaintiffs' "lack of injury" was a reason for supporting the settlement.[62] While suggesting that plaintiffs' "hypertechnical claims and lack of injury" made the case "unusually well-suited to a cy pres remedy," Google emphasized in its opposition to certiorari that it was not, in fact, arguing that plaintiffs' lacked Article III standing.[63]

The United States government appeared to pick up the mantle on the standing issue in its friend of the court brief. Supporting neither party, the Solicitor General, as amicus,

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57 *Id.* at 746-47. Attorneys for the class attended Chicago-Kent College of the Law, Stanford, and Harvard, which were designated to receive 16%, 16% and 15% of the cy pres fund, respectively. *Id.* at 749.

58 *Id.* at 747-48. Circuit Judge Wallace concurred in part, and dissented in part. While he agreed that a cy pres-only settlement was appropriate and did not think the fee award was an abuse of discretion, he was concerned about the preexisting relationships between class counsel and some cy pres recipients, and dubious that the district court had conducted a "careful review" of the relationships given the "terse . . . boilerplate . . . one-line" declarations counsel submitted. *Id.* at 750. Judge Wallace recommended vacating and remanding with instructions to hold an evidentiary hearing, examine class counsel under oath on the record, and to determine whether "prior affiliation[s] played *any role* in the selection [of the] beneficiaries. *Id.*, at 748 (emphasis in original).

59 Oct. 5, 2017 Order, USCA Case No. 15-15858.

60 Petitioners' Brief for Writ of Certiorari, *Frank v. Gaos*, No. 17-961 (July 9, 2018).

61 *Id.* at 40, 49.

62 Brief of Respondent Google, Inc. in Opposition to Petition for Writ of Certiorari at 2-3, 22, *Frank v. Gaos*, No. 17-961 (March 9, 2018).

63 *Id.* at 3.

argued that there is "considerable doubt whether the Court has Article III jurisdiction"[64] and urged the Court to remand the case to enable the lower court to address the standing issue in the first instance. The government questioned whether plaintiffs had alleged an injury in fact that is both "concrete" and "particularized" as required by *Spokeo*, given that the district court had determined that the common law claims, asserted only by plaintiff Gaos at the time, did not allege injury sufficient for Article III standing, and that the SCA claim survived, in the district court's view, because it arose from a statute, "even without additional injury."[65]

The procedural timing of *Gaos* creates confusion regarding its compliance with *Spokeo*. *Spokeo* was decided in May of 2016, a year *after* the district court's March 2015 grant of final approval of the settlement in *Gaos*, while the Ninth Circuit decision was pending. Article III standing requires that a plaintiff has (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 a favorable judicial decision.[66] As articulated in *Spokeo*, to establish an injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized."[67] Concrete and particularized are separate factors, the Supreme Court emphasized, and, while "concrete" does not always mean "tangible," *Spokeo* held that a plaintiff does not automatically satisfy the injury-in-fact requirement simply by virtue of a defendant's statutory violation that provides plaintiff with authority to sue.[68]

Citing *Spokeo*, the government questioned whether the *Gaos* plaintiffs had identified any injury-in-fact as a result of Google's use of referrer headers, noting that neither the district court nor the Ninth Circuit had addressed whether such allegations amount to a "concrete" injury.[69] The government urged that the Court vacate and remand to address Article III standing, but that, should the Court reach the issue and favorably decide the standing question on the merits, it should nonetheless still remand the case to allow the lower courts to engage in a "more rigorous scrutiny" of the cy pres relief in the settlement, of which the government was quite critical.[70]

In response to the newly-raised standing argument, Class Respondents urged on Reply that the existence of a previously unaddressed jurisdictional issue warranted dismissing the

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64 Brief for the United States as Amicus Curiae Supporting Neither Party at 10-11, *Frank v. Gaos*, No. 17-961 (July 16, 2018)("although no party raised a jurisdictional objection in the court of appeals or at the certiorari stage, this Court has an obligation to satisfy itself of its own jurisdiction even though the parties are prepared to concede it.") The government later pressed the Court to remand, not to more fully address standing and scrutinize the cy pres relief, but instead with direction to dismiss. *See also* Supplemental Brief for the United States as Amicus Curiae, *infra* note 133.

65 *Id.* at 13.

66 *Spokeo*, 136 S.Ct. 1547.

67 *Id.* at 1548.

68 *Id.* at 1549.

69 Brief for the United States, *supra* note 64, at 14-15. Unlike the District Court, the Ninth Circuit had the benefit of *Spokeo* before it issued its affirmance. No party raised the issue in its appellate briefing, however.

70 *Id.* at 11, 14-15.

writ as improvidently granted—i.e., that the Court should not have accepted the case—rather than remand.[71]

Google, for its part, initially avoided weighing in on the standing question. It responded that, while under the current law, post-*Spokeo*, plaintiffs' standing is "doubtful at best," at the time it entered into the settlement, *Spokeo* had not yet been decided. Google further stated its "obligation to support the settlement constrain[ed] [its] ability to discuss this matter further."[72]

Clearly highlighting a desire that the Court squarely address the cy pres issue, and likely hoping to avoid a per curium DIG order as Class Respondents had urged, Petitioners (the objectors), on Reply, argued *in support* of plaintiffs' standing. Petitioners asserted that Article III jurisdiction exists because, as *Spokeo* holds, plaintiffs' injuries need not be "tangible" to be "concrete" so long as the alleged intangible harm is "closely related to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[73] Petitioners referred to common law tort protections of private disclosures of personal matters for support of intangible, yet concrete, injuries that support standing here under *Spokeo*.[74]

B. The Amici Were Divided on Cy Pres Settlements

Twenty-six amici, including the United States Government, weighed in, with eleven challenging cy pres-only settlements. Of those eleven: four opined that cy pres-only settlements are never acceptable[75]; three, including the government, called for close scrutiny of such settlements and that such approval only be granted in "rare" circumstances[76]; one argued that cy pres-only settlements should be available only where substantive law

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71 Brief for Class Respondents at 54-55, *Frank v. Gaos*, No. 17-961 (Aug. 29, 2018).

72 Brief for Respondent Google LLC at 46, *Frank v. Gaos*, No. 17-961 (Aug. 29, 2018).

73 Reply Brief for Petitioners at 25-26, *Frank v. Gaos*, No. 17-961 (September 28, 2018), citing to *Spokeo*, 126 S. Ct. at 1549-50.

74 *Id.*

75 Brief of the Cato Institute and American's for Prosperity as Amici Curiae in Support of Petitioners at 3, 6, 8-19, *Frank v. Gaos*, No. 17-961 (July 12, 2018) (collectively referred to as "Cato Institute"); Brief of Amicus Curiae Lawyers for Civil Justice in Support of Petitioners at 14-15, 18, *Frank v. Gaos*, No. 17-961 (July 13, 2018); Brief of the Center for Individual Rights as Amicus Curiae in Support of Petitioners at 1, *Frank v. Gaos*, No. 17-961 (July 16, 2018); Brief of the Attorneys General of Arizona, Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Indiana, Louisiana, Michigan, Missouri, Nevada, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, and Wyoming as Amici Curiae in Support of Petitioners at 3, 13, *Frank v. Gaos*, No. 17-961 (July 16, 2018).

76 Brief of Amicus Curiae Electronic Privacy Information Center (EPIC) in Support of Petitioner at 5 (July 16, 2018)(criticizing that the selection of cy pres recipients here fails to provide funding for consumer privacy organizations and also insulates Google from related claims calling for close judicial oversight of all cy pres-only awards); Brief of the United States Chamber of Commerce as Amicus Curiae in Support of Neither Party at 15-16, (July 16, 2018) (calling for close scrutiny of such settlements and for courts to "enforce the requirements of Rule 23 at the front end—and thus [] relieve the pressure for opportunistic cy pres settlements at the back end."); Brief of the United States Government Supporting Neither Party, *supra* note 64, at 15-16.

expressly provides for it[77]; and one sought to outlaw cy pres-only settlements to the extent they confer no direct benefit to the class.[78] Five of the eleven, including the government, objected specifically to the use of cy pres in this instance because it provided no direct benefit to the class, provided no meaningful business practice change, and the parties did not appropriately select the cy pres award recipients, including by providing funds to advocacy groups whose causes or views class members may disagree with or who are "allied with" defendant Google.[79]

State Attorneys General came out on both sides of the cy pres question. The Attorneys General of nineteen states criticized the Ninth Circuit for what they deemed as its "blessing" of the "free use" of cy pres. These state Attorneys General called for the Court to completely "bar cy pres-only deals" as "*per se* invalid under Rule 23(b)(3)" asserting that such deals "release class claims, yet block consumers from receiving any direct benefit." [80]

Thirteen other state Attorneys General, including California, Hawaii, Oregon, and Washington, took the opposite position. These state Attorneys General supported the use of cy pres-only settlements in general, and further lent their support to the specific use of cy pres as a class remedy in this case.[81]

In total, fourteen amici briefs were filed in support of cy pres settlements, with thirteen of those underscoring the importance of cy pres as a class remedy in general, and five arguing that the cy pres distribution was appropriate in this case.

The twenty-six amici offered varying reasons for their support, and just a few examples are included here.

The American Bar Association (ABA), while taking no position on the precise question before the Court, discussed the importance of cy pres awards in funding legal services to low-income and indigent litigants to provide them with access to the judicial system and alerted the Court to the potential impact on state statutes and rules providing for cy pres awards. The ABA urged the Court to not make any broad pronouncements about the constitutionality of cy pres remedies in class action settlements.[82]

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77 Brief of the Manhattan Institute for Policy Research as Amicus Curiae Supporting Petitioners at 21, *Frank v. Gaos*, No. 17-961 (July 16, 2018).

78 Brief of the New Jersey Civil Justice Institute as Amicus Curiae in Support of Petitioners at 9, *Frank v. Gaos*, No. 17-961 (July 16, 2018) ("NJCJI") (because unnamed class plaintiffs will not receive a direct benefit under the settlement, the class device is not superior and Rule 23 has not been met).

79 Brief of Amici Curiae Center for Constitutional Jurisprudence and Atlantic Legal Foundation in Support of Petitioners, *Frank v. Gaos*, No. 17-961 (July 13, 2018) (collectively referred to as "CCJ"); Brief of EPIC, *supra* note 76; Brief of NJCJI, *supra* note 77; Brief of Amici Curiae David Lowrey, et al., in Support of Petitioners at 12-13, *Frank v. Gaos*, No. 17-961.

80 Brief of the Attorneys General of Arizona, *et al.*, *supra* note 75, at 3, 13; *see also* Brief of the Center for Individual Rights, *supra* note 75, at 1, which also criticized what it called the Ninth Circuit's "practice" of approving cy pres-only settlements.

81 Brief for the States of Oregon, California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New York, North Carolina, Vermont and Washington as Amici Curiae in Support of Respondents at 16, *Frank v. Gaos*, No. 17-961 (Sep. 3, 2018).

82 Brief of the American Bar Association as Amicus Curiae in Support of Neither Party at 4, 6, 9, *Frank v. Gaos*, No. 17-961 (July 16, 2018).

The Center for Workplace Compliance (CWC), an employer association focused on workplace compliance requirements, stressed that parties to a class action are broadly free to structure a class settlement as they wish, provided that it is "fair, reasonable, and adequate." CWC noted the availability of cy pres relief as an important tool for dispute resolution, especially in cases against large employers.[83]

Professor William B. Rubenstein, a long-standing class action academic, mirrored some of the other arguments in support of Class Respondents. He joined Respondents in pressing the Court for a DIG order; alternatively, he suggested the Court issue a very narrow ruling focused on the exceptional nature of the case.[84] Professor Rubenstein's amicus brief is notable for its examination of eighteen cy pres only settlements that had been granted final approved by federal courts across the country.[85]

The Civil Justice Research Institute ("CJRI"), a think tank chaired by Erwin Chemerinsky, Dean of Berkeley Law School and Founding Dean of the UC Irvine School of Law, was the only amicus to suggest that the Court provide guiding principles for courts to apply in evaluating whether to approve the distribution of cy pres. While CJRI opined that the rules as they currently exist are sufficient if courts diligently review cy pres proposals, it suggested that, should the Court intend to provide further direction, the questions Chief Justice Roberts raised when the Supreme Court denied certiorari in *Marek v. Lane*[86] may provide guidance. Specifically, CJRI proposed the Court consider the following factors in determining the propriety of cy pres only relief in class settlements: (1) what the lawsuit is about and the interests of the absent class members; (2) when it is alleged that a statute is violated, the objectives of the statute; (3) the loss suffered by the class members; and (4) the geographic breadth of the class.[87] In addition, CJRI urged, defendants should not, as a rule, select cy pres recipients and if the defendant has given money to the recipient in the past, the award should be "looked at closely by the reviewing court," and the Court should not have any role in the initial selection of cy pres recipients; that is the role of the class representative and class counsel.[88]

"Professional recording and performing artists" David Lowrey, Raymond J. Pepperrell[89], Blake Morgan, and Guy Forsyth, added an interesting amicus perspective. Rather than raise a wholesale challenge to all cy pres settlement distributions, the four amici argued that the cy pres award in this case, and in other similar cases against Google and Facebook, harm rather than benefit class members, because some of the chosen cy

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83 Brief Amicus Curiae of the Center for Workplace Compliance in Support of Respondents at 10-11, 20, *Frank v. Gaos*, No. 17-961 (Sep. 3, 2018).

84 Brief of Professor William B. Rubenstein as Amicus Curiae in Support of Respondents at 6-7, 16, *Frank v. Gaos*, No. 17-961 (Sep. 3, 2018). Professor Rubenstein is the Bruce Bromley Professor of Law at Harvard Law School and the sole author, for the past decade, of *Newberg on Class Actions*.

85 *Id.* at Appendix 1a, citing to 18 cases dating back to 1995.

86 *Marek v. Lane*, 134 S.Ct. 8, 9 (2013).

87 Brief of the Civil Justice Research Initiative as *Amicus Curiae* in Support of Respondents at 26-32, *Frank v. Gaos*, No. 17-961 (Sep. 3, 2018).

88 *Id.* at 28.

89 As just one example of their professional and creative works, Mr. Pepperell is the song-writer and guitarist for the American punk band, Dead Kennedys.

pres recipients have lobbied with or supported Google against the copyright interests of class members who are in the artist community (the specific recipient(s) alleged to have supported Google in this way are not identified in the recording artists' brief, however).[90]

Only four amici, including the government, both opposed the *Gaos* cy pres-only settlement and addressed the standing issue. The Center for Constitutional Jurisprudence ("CCJ"), the public interest law arm of the Claremont Institute, and Atlantic Legal Foundation challenged plaintiffs' standing based not on the "concrete" injury factor discussed in *Spokeo*, but on the third factor required for Article III standing: i.e. that the plaintiff must show that a favorable ruling by the court will actually redress the injury. Since Google was not required to stop engaging in the conduct at issue, and plaintiffs did not receive any monetary recovery, the district court's ruling and Ninth Circuit's affirmance, they argued, did not redress the injury alleged in the litigation, and therefore plaintiffs lacked standing.[91]

Former Professor Roy A. Katriel, the only amici who did not address cy pres at all, took the standing question in an entirely different direction. Mr. Katriel, in his friend of the court brief, changed the question presented to: "Whether a class member who voluntarily joins a Rule 23(b)(3) class action settlement has Article III standing to appeal a district court's approval of the settlement."[92] He posited that *the Petitioners* (objectors) lacked standing to appeal a judgment "entered under a settlement they voluntarily joined" by not opting out. He urged that the writ of certiorari be dismissed and the judgment of the Ninth Circuit also be vacated for lack of jurisdiction.[93]

IV. SUPREME COURT ANALYSIS

Oral argument was held on October 31, 2018. The argument and questions from the bench focused largely on three topics: (1) whether a cy pres-only settlement of a class action is generally appropriate; (2) whether the cy pres relief approved in *Gaos* was a "fair", "adequate", and "reasonable" class remedy in that instance; and (3) whether plaintiffs had pleaded injury sufficient to satisfy Article III standing.

A. Questions Regarding Cy Pres as a Remedy Generally

Right out of the gate, Justices Ginsburg and Sotomayor questioned why it was unfair and unreasonable for the Court to endorse a cy pres-only class settlement. They asked whether, at minimum, it is not within the individual district court's discretion to make that decision, unless and until Congress looks at the issue and decides differently.[94]

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90 Brief of Amici Curiae David Lowrey, at al, *supra* note 79, at 3, 6.

91 Brief of CCJ, *supra* note 78, 4-6; *see also* Brief of Amicus Curiae Lawyers for Civil Justice in Support of Petitioners at 6, 15-16, *Frank v. Gaos*, No. 17-961 (July 13, 2018).

92 Brief of Former Professor Roy. A. Katriel as Amicus Curiae in Support of Neither party, at i, *Frank v. Gaos*, No. 170961 (filed July 13, 2018). Mr. Katriel is a former adjunct professor at American University's Washington College of the Law and an attorney practicing class action litigation.

93 *Id.*

94 Transcript of Oral Argument, *supra* note 5, at 2-9, 12.

Justice Breyer then posited whether a higher scrutiny standard should be crafted to apply to cy pres-only settlements: "[W]hile we wouldn't say never, what's happening in reality is the lawyers are getting paid and they're making sometimes quite a lot of money for really transferring money from defendant to people who have nothing to do with it . . ."[95]

Justice Alito's comments reflected a high degree of skepticism for cy pres-only class settlements: "And at the end of the day, what happens?" he asked. "The attorneys get money, and a lot of it. The class members get no money whatsoever. And money is given to organizations that they may or may not like or may not ever do anything that is of even an indirect benefit to them. So how can such a system be regarded as a sensible system?"[96]

Justice Roberts' comments at hearing offered little insight in to his thoughts on cy pres-only settlements as a general rule. He did, however, express that, if a cy pres-only settlement provides any relief to class members, it is appropriate to award attorneys' fees to class counsel, regardless of the fact that no money was paid to class members.[97] Echoing the suggestion of Petitioners, Justice Kavanaugh wondered whether a lottery system that would put settlement money into the hands of at least some class members, as Objector Frank had argued, wasn't a better system, calling it "strange" that the award money would instead end up in the hands of "people who weren't injured at all."[98]

B. Questions Regarding Cy Pres as the Proposed Remedy in *Gaos*

Many of the justices expressed serious doubts about the propriety of the selected cy pres recipients in the *Gaos* settlement. Chief Justice Roberts thought it "fishy" that cy pres money was to be paid to an organization that Google contributed to in the past,[99] noting the likely existence of other organizations to which Google hadn't donated.[100] Justice Kavanaugh was similarly skeptical and, referring back to the district court's order, noted what he considered favoritism in the alma mater institutions of counsel as the chosen cy pres recipients.[101]

C. Questions Regarding Article III Standing

Justices Gorsuch and Kagan were eager to get to the jurisdiction issue.[102] Indeed, many of the justices appeared to struggle with both the question of whether plaintiffs were

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95 *Id.* at 46-47.

96 *Id.* at 63.

97 *Id.* at 26 ("I think you either decide the cy pres award provides relief or it doesn't provide relief . . .if it does provide relief, then I don't know why the fee would be cut back just because it's not money.")

98 *Id.* at 48-52, 58-59.

99 Again, the Chief Justice's skepticism was foreshadowed in his statement from the bench when the Supreme Court denied certiorari in *Lane*. *See supra*, note 5, *Marek v. Lane*, 134 S.Ct. at 9.

100 Transcript of Oral Argument, *supra* note 5, at 56.

101 *Id.* at 55.

102 *Id.* at 15.

actually harmed and what to do about it if they hadn't suffered a sufficiently concrete, if intangible, harm.[103]

Justices Gorsuch and Breyer seemed particularly dubious about whether plaintiff Italiano, the named plaintiff the justices focused on, was actually injured—a merits question—and whether the data revealed about him in the referrer headers related to his divorce was merely just public information.[104] Justice Breyer appeared to be very focused on *Spokeo*: he criticized the district court for not trying to find a harm beyond the violation of a statute, which is what "*Spokeo* says is wrong"; Justice Breyer, perhaps foreshadowing his opinion, admitted he a "hard time distinguishing this from *Spokeo*."[105]

Justice Kavanaugh, on the other hand, seemed to say that *Spokeo*'s mandates had been satisfied. "Isn't that an injury, disclosure of what you searched?" he asked. ". . . I don't think anyone would want the disclosure of everything they searched for disclosed to other people. That seems a harm."[106] Justice Kavanaugh also asked whether determining if any person's identity can be revealed through reverse-engineering their searches, *e.g.* the "reidentification" theory, was a merits question.[107] He further intimated that the issue of whether this was an injury or not sufficient for standing would be a better question for the Rules Committee in Congress, and not an issue the Supreme Court should decide.[108] When the justices returned to the issue of whether plaintiffs suffered a harm later in the hearing with questions by Justices Sotomayor, Kagan, Alito, and Chief Justice Roberts about how the referrer header process works, Justice Kavanaugh again posited whether analyzing what process took place for plaintiff Italiano is a merits question, noting "you don't have a mini-trial on whether the harm, sufficient for standing, is proved."[109]

There also appeared to be varying opinions on what action to take on the standing question. Justice Gorsuch debated whether the case shouldn't be remanded to direct the court to make the decision whether there is "actually" standing, as opposed to the mere "allegation" of standing, because "here we're entering a final judgment."[110] Justice Ginsburg seemed to agree that remand would be appropriate.[111] Justice Alito, the author of the *Spokeo* majority opinion, suggested the Supreme Court could decide the standing issue as a matter of law.[112]

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103 *See infra* note 108.

104 *Id.* at 18-21, *see also* 30-21.

105 *Id.* at 19.

106 *Id.* at 30-31.

107 *Id.* at 32.

108 *Id.* at 35. Justice Kavanaugh does not elucidate in what ways he feels the Rules Committee could provide guidance other than to possibly "address it." *Id.*

109 *Id.* at 44-45.

110 *Id.* at 18.

111 *Id.* at 34.

112 *Id.* at 27.

D. POST-HEARING BRIEFING ON "STANDING"

With the standing issue taking on a more prominent role at hearing, a week after oral argument, the Court ordered the parties and the government to submit supplemental briefing addressing "whether any named plaintiff has standing such that the federal courts have Article III jurisdiction over this dispute."[113] The supplemental and reply supplemental briefing added significantly more case law, and verbiage, to the standing argument. For brevity, only the highlights and new arguments are summarized here.

1. Petitioners (Objectors) Argued the Complaint Satisfied Both the *Spokeo* Majority and Concurring Opinions.

Petitioners (objectors), obviously wanting the Court to get to the cy pres question, argued in their supplemental briefs that there was no reason for the Court to get to the standing issue. Where standing is not factually controverted in the lower courts, Petitioners argued, there is no need to demand evidence of beyond what is alleged in the complaint, construing the complaint in favor of the complaining party.[114] If an objector makes a plausible factual challenge to a class representatives' standing, or a court suspects collusion by the parties to create jurisdiction, only then would some evidentiary showing and factual finding be required, Petitioners asserted.[115]

Objectors then argued that plaintiffs' allegations of intangible harm satisfy the *Spokeo* "concrete injury" factors. First, they argued, plaintiffs' harm has a close relationship to an injury to privacy that has historically been regarded as providing a basis for a lawsuit in English or American Courts.[116] Numerous American cases protect the confidentiality of private letters and Internet search queries, and search terms themselves reflect users' communications of intimate thoughts and sentiments, and can reveal the identity of the searcher, Petitioners argued.[117] Objectors argued that the second *Spokeo* factor, Congress's judgment in identifying and elevating intangible harms results in an analysis of whether the statute at issue creates a procedural or substantive right, was also met because the SCA creates a substantive and not merely procedural right.[118] Petitioners likened this case to *Eichenberger v. ESPN, Inc.*, where the Ninth Circuit distinguished the merely "*procedural* obligations that *sometimes* protect individual interests" of the Fair Credit Reporting Act at issue in *Spokeo*, from the Video Privacy Protection Act ("VPPA") at issue in *Eichenberger v. ESPN, Inc.*, which identifies a "*substantive* right to privacy that a user suffers *any time* information is disclosed without consent."[119] Here, Petitioners argued, in passing the Electronic Communications Privacy Act ("ECPA")[120], of which the SCA is a part,

113 *See* Orders in Pending Cases, *supra* note 8.

114 Supplemental Brief for Petitioners at 4, *Frank v. Gaos*, No. 17-961 (November 29, 2018), citing to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), *Warth v. Seldin*, 422 U.S. 490 501 (1975), and *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1208-12 (11th Cir. 2018).

115 *Id.* at 4-5.

116 *Id.* at 7, citing *Spokeo*, 136 S.Ct. at 1549.

117 *Id.* at 9-10 (citations omitted).

118 *Id.* at 11-12.

119 876 F.3d 979, 983-84 (9th Cir. 2017) (emphasis in original).

120 18 U.S.C. § 2510, et seq.

Congress sought to ensure privacy protections for electronic communications comparable to those already in existence for physical records.[121]

Lastly, Petitioners argued, plaintiffs' alleged harm also satisfies Justice Thomas' *Spokeo* concurrence requirements. Plaintiffs' claims under the SCA and under the common law, Petitioners argued, seek to vindicate a private right, and, therefore, need not demonstrate additional injury beyond infringement of that right.[122]

2. To Show That *Spokeo* Has Been Satisfied, the Class Respondents (Plaintiffs) Directed the Court to Precedent Protecting Private Communications and to Google's Privacy Policy Protections.

The Class Respondents, like Petitioners, asserted in their supplemental briefing that under a long, established history of U.S. common law, the unauthorized disclosure of private communications inflicts an actionable injury, thereby satisfying the first *Spokeo* factor.[123] Additionally, the Class Respondents reminded the Court that, here, there was an express promise by Google in its Terms of Service to not disclose users' searches.[124] Whether some search terms communicated to Google would not result in embarrassment is not the issue, they argued. The unauthorized interception and disclosure of a communication's contents "would still violate the writer's right to control her communications, no matter how pedestrian the content."[125]

The Class Respondents argued the second *Spokeo* factor also is met in this context by Congress's enactment of the SCA itself, which prohibits electronic communication service providers from "knowingly divulging" the "contents of a communication" they carry or store, except to "intended recipient(s)" or with "lawful consent," authorizes relief without actual damages, and authorizes any "subscriber or other person aggrieved by a violation" to sue.[126] The complaint, in providing example searches that plaintiff Italiano undertook related to his divorce, revealing both his intent to divorce and that he was looking for a forensic accountant to advise him, is sufficient to show that plaintiffs' searches created "sufficient risk of real harm" as contemplated by *Spokeo*, Class Respondents argued. The reidentification, (reverse-engineering) threat, too, is real, Class Respondents urged, noting that Google itself cites such privacy risks when refusing to turn over even anonymized search terms in response to government subpoenas.[127] Lastly, they argued, the named plaintiffs also have standing to assert the four other breach-of-contract and quasi-contract causes of action because their allegations satisfy traditional pleading requirements for

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121 Supplemental Brief for Petitioners at 11-13, *Frank v. Gaos*, No. 17-961 (Nov. 29, 2018).

122 *Id.* at 17, citing to *Spokeo*, 126 S.Ct. at 1551-1552.

123 Class Respondents' Reply to Supplemental Briefs on Article III Standing at 2-12, *Frank v. Gaos*, No. 17-961 (Dec. 21, 2018).

124 Class Respondents' Supplemental Brief on Article III Standing at 12, *Frank v. Gaos*, No. 17-961 (Nov. 30, 2018).

125 *Id.* at 14.

126 *Id.* at 15-16, quoting 18 U.S.C. § 2702(a),(b),(c) and § 2707.

127 *Id.* at 18.

those claims.[128] Class Respondents urged the Court to find standing had been sufficiently pleaded, rather than dismissing or remanding.[129]

3. Google Challenged the Plausibility of Plaintiffs' Theories of Harm.

Prior to the hearing, Google, noting its obligation to support the settlement, did not challenge plaintiffs' harm or resulting Article III standing.[130] In its supplemental briefing, however, Google reversed course. In a bit of surprise, Google turned on plaintiffs and the settlement the parties had negotiated, stating in its post-argument brief that "[n]one of the three named plaintiffs has Article III standing" as required by *Spokeo*.[131] Google challenged the complaint's allegation of actual harm as conclusory and failing to satisfy *Iqbal* and *Twombly*, arguing that Class Respondents' alleged reidentification theory is not plausible because plaintiffs have not alleged that someone can or has linked their searches to their identity; plaintiffs merely speculatively allege, Google argues, that reidentification is a possibility.[132] Much of Google's supplemental briefing focused on the merits, and specifically, the "science" of the reidentification theory and whether it can be proven to show an articulable harm.[133] Google argued that search terms embedded in a URL are "nothing like the contents of a private letter" or any of the other examples of communications deemed private by historical case law cited by both Petitioners and Class Respondents.[134] Lastly, even assuming the complaint's allegations were found to be sufficient, Google now contended it should be entitled to an evidentiary hearing to disprove the Class Respondents' standing allegations.[135] Google concluded its supplemental brief by asking the Court to vacate the Ninth Circuit judgment and to remand with direction to dismiss for lack of Article III standing.[136]

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128 *Id.* at 19-22.

129 *Id.* at 23.

130 Brief for Respondent Google LLC, *supra* note 72, at 46.

131 Supplemental Brief for Respondent Google LLC at 1, 7-8, *Frank v. Gaos*, No. 17-961 (November 30, 2018).

132 *Id.* at 10-11 (citing to *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)), 13-14.

133 *Id.* at 13. Google contended that a web server could piece together information from multiple searches to identify a user only if a plaintiff conducted different searches and each time clicked on the same site and that the operator of that site kept track of each of those queries. Google also argued that an adversary (not Google) would then need to take five affirmative steps, detailed in their brief, to be able to reverse-engineer to locate a user, which Google opined is unlikely. Google added that none of this "chain of possibilities" is alleged in plaintiffs' complaint. *Id.* at 14-15.

134 *Id.* at 20.

135 *Id.* at 24.

136 *Id.* at 26. Google advances that, if the Court somehow finds the complaint's allegations of harm to be "sufficient," Google would still be entitled to an evidentiary hearing to test the competency of plaintiffs' allegations before Article III standing could be fully determined. *Id.* at 24-25.

4. The United States Government Also Factually Challenged Plaintiffs' Harm.

Noting that the Court in *Spokeo* "explained that the 'risk of real harm' can in some circumstances 'satisfy the requirement of concreteness'" and that "plaintiffs asserting certain statutory violations can establish a concrete injury without alleging '*any* additional harm'", the Solicitor General reiterated in its supplemental brief that plaintiffs, here, had not satisfied *Spokeo* because they continued to rely solely on the allegation of a statutory SCA violation.[137] Like Google, the Solicitor General delved into the facts, arguing that the disclosure of search queries does not provide any identifying information about the user, are not considered contents of a "communication"[138] that would identify plaintiffs, and that any injuries resulting from someone learning that plaintiffs conducted the searches would not be regarded as "highly offensive to a reasonable person,"[139] don't involve the "publicity" of private information, and do not concern plaintiffs' private life.[140] Also, like Google, the government argued in its post-argument brief that the "science of reidentification" is too speculative to create Article III standing.[141] The Solicitor General, like Google, asked the Court to vacate the judgment below and remand with directions to dismiss for lack of jurisdiction.[142]

V. THE COURT'S PER CURIAM ORDER

In another surprise turn, despite having the benefit of supplemental briefing, the Supreme Court in the end punted on both issues. In an unsigned per curiam order, the high court held that a review of the supplemental briefing it had ordered "raise a wide variety of legal and factual issues not addressed in the merits briefing before us or at oral argument. We 'are a court of review, not of first view.'"[143] Vacating the Ninth Circuit's judgment and remanding, the Court held that "[r]esolution of the standing question should take place in the District Court or the Ninth Circuit in the first instance."[144] The Court expressly resolved to give no hints on how it would have resolved the standing issue had

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137 Supplemental Brief for the United States as Amicus Curiae Supporting Neither Party at 10-11, *Frank v. Gaos*, No. 17-961 (November 30, 2008).

138 *Id.* at 1107-1108; *see also In re Zynga Privacy Litigation*, 750 F.3d 1098 (9th Cir. 2014). The Ninth Circuit in *Zynga* affirmed the Northern District of California's dismissal for failure to state a claim of allegations that Facebook Inc. and Zynga violated the Wiretap Act and SCA by transmitting, via the referrer header, a user's Facebook ID and address of the Facebook webpage the user was viewing before clicking on and launching a Zynga game. The Ninth Circuit determined that information transmitted in a referrer header does not constitute "contents of any communication" under the SCA.

139 The government argues that plaintiffs' complaint only alleges that a web operator could merely determine from the referrer header data that "*someone*" conducted the searches they allege, which is "far less offensive than the injuries that give rise to suits for public disclosure of private facts at common law. Supplemental Brief for the United States at 17, *supra* note 136 (emphasis in original).

140 *Id.* at 12-18.

141 *Id.* at 20-22.

142 *Id.* at 22.

143 *Frank v. Gaos*, slip op. at 6, *supra* note 9 (citation omitted).

144 *Id.*

it reached it: "[n]othing in our opinion should be interpreted as expressing a view on any particular resolution of the standing question."[145]

Justice Thomas (despite asking no questions at oral argument) dissented, indicating he would reach the merits and reverse the order approving the cy pres settlement—the core issue on which certiorari was originally granted. Justice Thomas opined that Article III standing had been met by plaintiffs, in accordance with *Spokeo*, "[b]y alleging the violation of 'private dut[ies] owed personally' to them 'as individuals.'"[146] Justice Thomas stated he would reverse, however, as to the cy pres-only settlement because, in his view, the settlement failed to satisfy several elements of Fed. R. Civ. P. 23, asserting: (1) the interests of the class were not adequately represented because the named plaintiffs were willing to settle without obtaining any relief for the class, (2) the lack of any benefit for the class rendered the settlement unfair and unreasonable; and (3) it is questionable whether a class action is superior when it "serves only as a vehicle through which to extinguish absent class members' claims without providing them any relief."[147] "Whatever role cy pres may permissibly play in disposing of unclaimed or undistributable class funds," Justice Thomas concluded, "cy pres payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorneys' fees)."[148]

VI. KEY TAKEWAYS AND FUTURE CONSIDERATIONS

Given the Court's side-stepping of both the Article III standing and cy pres issues, what are practitioners to absorb from *Frank v. Gaos*? Here are some takeaways:

Article III standing has relevance beyond the pleading stage. Orders for class certification, even for settlement purposes, may need the support of an evidentiary record on Article III justiciability to survive appellate review.

While the decision in *Gaos* did not prohibit cy pres-only awards altogether, it can be anticipated that cy pres-only settlements will be subjected to stricter scrutiny in the courts. In recent years, in a number of cases, the conservative majority on the Supreme Court has expressed hostility to class action suits. The justices' colloquy with counsel during oral argument in *Gaos* reveals that the hostility remains. Justice Thomas, we now know, believes cy pres is not a proper remedy in class action suits, at least in so far as the settlement requires a release of absent class member claims.

Similarly, Chief Justice Roberts, in his statement from the bench when the Court denied certiorari in *Lane*, expressed his frustration at the lack of judicial guideposts in this area. Among the subjects Justice Roberts hoped the Supreme Court would examine "when a . . . suitable cases presents itself" is "how to . . . assess fairness [of cy pres] as a general matter," how to choose entities to receive the cy pres award, whether new entities could be formed as part of the relief, how to delineate responsibility between the judge and parties in forming the cy pres remedy, and "how closely the goals of any

145 *Id.*

146 *Id.*, slip op., dissent at 1, *supra* note 9 (citation omitted).

147 *Id.,* at 2-3.

148 *Id.*, at 2.

enlisted organization must correspond to the interests of the class."[149] Justice Roberts' stated concern at oral argument in *Gaos*—that it seemed "fishy" that cy pres money was set aside for organizations to which Google had donated, despite the likely existence of other organizations that had not previously received such support[150]—suggests a desire by the Chief Justice that federal courts have rules in place to guide them when evaluating the fairness or adequacy of cy pres class action settlements. While *Gaos* did not end up being the vehicle by which the Supreme Court set forth new cy pres guideposts, a future class case providing only cy pres relief may afford the conservative justices the opportunity to limit cy pres-only settlements.

Cy pres has an established and important history in class action litigation.[151] A finding by a future Supreme Court that cy pres-only settlements can never be certified would be a windfall for defendants and, in this author's view, undermine the historical and chief function of class action lawsuits to enforce the law and deter wrong-doing. Conversely, perhaps *Gaos*' cautionary tale will provide an impetus both to settling defendants, to offer a monetary award, and, to settling plaintiffs and fund administrators, to propose creative means for distribution even where the settling class is large, if all parties want to get their settlement approved.

Class action practitioners should be guided by the developed record that *Gaos* provides. At a minimum, litigators representing plaintiffs and defendants in class actions in which they believe cy pres may be an appropriate class remedy should ensure that there is an articulated basis for Article III jurisdiction at the time of class certification and settlement approval. If cy pres is the only practical settlement vehicle, practitioners also should take care to select as proposed cy pres settlement recipients organizations that are independent of any participant in the litigation and who possess nonprofit goals that have a close nexus to the claims at issue in the case and aren't the "usual suspects" that the District Court identified.

149 *See supra*, note 5, *Marek v. Lane*, 134 S.Ct. at 9.

150 Transcript of Oral Argument, *supra*, note 5, at 56.

151 *See supra* notes 27, 29, and 84.

THE INTERPLAY OF THE EUROPEAN UNION'S GENERAL DATA PROTECTION REGULATION AND U.S. E-DISCOVERY—ONE YEAR LATER, THE VIEW REMAINS THE SAME

By Lesley E. Weaver and Anne K. Davis[1]

I. INTRODUCTION

The European Union's General Data Protection Regulation[2] took effect on May 25, 2018, resulting in significant attention from legal analysts in the lead-up to its effective date. Articles discussing the GDPR's scope, impact, potential penalties, extraterritorial application, and challenges for U.S. companies with GDPR compliance obligations abound, but little attention, comparatively, has been paid to the impact of the GDPR on U.S. e-discovery. Some have speculated that the GDPR would pose an obstacle to discovery in U.S. courts because of the new substantive rights granted to individuals to control personal data and because of stiff new potential penalties for GDPR violations. Nearly one year after the GDPR's effective date, what has the GDPR meant for litigants seeking e-discovery in the U.S. courts from entities with European operations? A recent order by a magistrate judge in the Northern District of California suggests that the GDPR has not significantly altered the U.S. discovery landscape.[3] Nonetheless, attorneys and litigants in U.S. courts who have electronic and other information that falls within the GDPR's protections need to undertake careful planning to preserve and produce discoverable information in a manner that complies with both the EU privacy regulations and broad U.S. discovery principles.

This article hopes to provide practical assistance. It provides a brief overview of the GDPR, the legal bases for complying with the GDPR in connection with U.S. e-discovery requests, and the legal landscape with respect to U.S. courts' deference to non-U.S. privacy regimes. It also proposes steps that can minimize the likelihood that unexpected GDPR-related discovery disputes will arise, avoiding court intervention.

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2 Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation ("GDPR")).

3 *Finjan Inc. v. Zscaler Inc.*, No. 17-cv-6946, 2019 WL 618554 (N.D. Cal. Feb. 14, 2019).

II. BRIEF GDPR OVERVIEW

The GDPR is the EU's unified privacy protection regime, designed to harmonize privacy protections for residents within the EU and the larger European Economic Area.[4] The GDPR centers on the rights of individuals by adding transparency requirements and requiring "data minimization." (GDPR Art. 5(1)(c)). The GDPR protects individual privacy by limiting the collection, storage, processing, use and transfer of "personal data," and by imposing obligations and potential liability on data controllers[5] and data processors,[6] alike. (GDPR Arts. 4, 24, 28, 82).

Significant for litigants in the U.S. seeking discovery from EU entities, the GDPR applies to processing of personal data and to personal data transfers made by organizations operating within the EU/EEA and outside the EU/EEA that employ or offer goods or services to individuals resident in the EU/EEA.[7] The GDPR grants EU/EEA residents new substantive rights to control electronic data containing their "personal data." While the general principles protecting individual privacy have not changed from the EU's prior privacy regime (under the 1995 Data Protection Directive)[8] the GDPR newly codifies individual rights to control personal data, includes a variety of enforcement mechanisms, and provides for new and significant penalties—up to € 20 million (about $22.8 million) or 4% of annual global revenue, whichever is higher—for failure to comply with the GDPR. (GDPR, Art. 49, 83(5)). This means that litigants with GDPR compliance obligations may face conflicting requirements when responding to U.S. e-discovery requests, raising the specter of potential sanctions for violating the GDPR, or for failing to comply with U.S. discovery requirements. Litigants seeking discovery from EU/EEA entities may face delays in obtaining discovery to which they are entitled, and all parties may incur additional costs should it be necessary to involve the U.S. courts in mediating GDPR-compliance-driven discovery disputes.

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4 The European Economic Area ("EEA") includes non-EU member states Iceland, Liechtenstein, and Norway. Entities that are not physically located in the EU/EEA, but have employees in the EU/EEA, provide goods and/or services to EU residents and transfer personal data outside the EU, or maintain electronic records of EU/EEA employers on servers outside the EU/EEA, are all subject to the GDPR. *See* Guide to the General Data Protection Regulation (GDPR), Information Commissioner's Office ("ICO Guide"), International Transfers, https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-transfers/ (last visited Mar. 26, 2019). Thus, U.S. employers, companies, educational institutions, and similar organizations that employ EU/EEA residents, sell products or services to persons residing in the EU, or have EU/EEA residents as students in their school programs or as members of their organizations are all subject to the GDPR.

5 A "Data Controller" is a person or entity which "determines the purposes and means of the processing of personal data." GDPR Art. 4(7).

6 A "Data Processor" is a person or entity which processes personal data on behalf of the Data Controller. *Id.* Art. 4(8).

7 ICO Guide.

8 Directive 95/46/EC of the European Parliament, Official Journal L 281, Nov. 23, 1995, P. 0031–0050 ("1995 Directive"). Unlike the 1995 Directive, which required implementing legislation by EU member states, the GDPR is a regulation, and is directly enforceable.

III. PERSONAL DATA UNDER THE GDPR

The GDPR defines personal data as "any information relating to an identified or identifiable natural person." (GDPR, Art. 4(1)). The GDPR restricts the processing of personal data to circumstances where a Data Controller can provide a lawful basis for processing. The scope of information defined as personal data is significantly broader than the types of information typically afforded protection by U.S. courts ("Personally Identifiable Information," or "PII"), such as tax-identification numbers, social security numbers, or individually identifying information combined with health records or financial account numbers.[9] While PII as it is defined in the U.S. falls within the scope of the personal data protected by the GDPR, under the GDPR, *any* information sufficient to identify an individual "directly or indirectly" is protected.[10] *Id.* This means information incidentally present in electronically stored information ("ESI") relevant to a legal dispute, such as email signature blocks, employee address books, or some types of metadata, falls within the types of personal information protected by the GDPR. Because such information is frequently integrated into ESI, rather than stored separately such that it can be easily culled or produced in protected form, complying with the GDPR can require additional and expensive measures such as redaction or anonymization. And while redacting personal data may comply with the GDPR, it may also conflict with U.S. discovery requirements.

IV. PROTECTION OF PERSONAL DATA IS A FUNDAMENTAL RIGHT IN THE EU

In the EU, protection of personal data is a fundamental right.[11] The GDPR includes provisions to ensure that individuals can effectively protect their personal data, such as the right to be informed, the right of access to their personal data, the right to demand correction, the right to demand deletion (in circumstances where the data is no longer necessary for the original purpose for which it was collected and there is no overriding legitimate interest), and the right to object to the collection, processing, storage, or transfer of their personal data at the behest of the Data Controller. (GDPR, Arts. 14, 15, 16, 17, 21, and 49). The GDPR also includes a notice requirement for individuals whose personal data is to be "processed" beyond the initial use for which it was collected, which notice must be

9 *See*, *e.g.*, Fed. R. Civ. P. 5.2 (providing for the redaction in court filings of identifiers such as social security number, tax-payer identification number, date of birth, financial account numbers, and information pertaining to the identification of a minor person).

10 The GDPR also provides protection for certain "special categories of data," including personal data revealing racial or ethnic origin, protected viewpoints, trade union membership, genetic and biometric data, and data concerning health, sex life, or sexual orientation. GDPR Art. 9. The processing of Art. 9 data is strictly prohibited, subject to limited exceptions such as express consent. *Id.* Art. 9.2. Article 9 data is outside the scope of this article.

11 *Amicus* Brief at 1; *see also*, Charter of Fundamental Rights of The European Union, Art. 8(1), 2012 O.J. (C 326/02) (stating that all people have "the right to the protection of personal data concerning him or her.").

detailed and easily understood, using plain and clear language.[12] (GDPR Arts. 5, 13, 14). Among other circumstances, processing in response to a discovery request from litigation in a U.S. court triggers the notice requirement. (GDPR Art. 6). Practitioners should be mindful that under the GDPR, processing includes all aspects of handling personal data—from collection to destruction—including the technical processes associated with e-discovery and the act of document review. Individuals also have the right to lodge complaints with a "Data Protection Authority" ("DPA"). (GDPR Art. 77).

V. THE U.S. DISCOVERY REGIME

Discovery under the U.S. Federal Rules of Civil Procedure is considerably broader than in the EU and EEA—indeed, it is "the most expansive of any common law country."[13] Under F.R.C.P. Rule 26, U.S. litigants may obtain discovery regarding any non-privileged matter relevant to a party's claims or defenses, subject to case-specific proportionality considerations and protections for sensitive business information such as trade secrets, or PII. In contrast, in many EU/EEA countries, discovery, if allowed at all, is limited to documents admissible at trial or to documents narrowly and specifically described.

Under U.S. discovery rules, when an EU/EEA entity is on notice of legal claims, it is obliged to take steps to preserve all relevant documents, including ESI. Where a U.S. litigant brings a civil suit against an entity with locations or employees in one or more EU/EEA member states, seeks ESI in discovery that is in the possession of a litigant's EU/EEA office or parent company, or seeks ESI that concerns EU/EEA-resident employees, the processing of that information falls under the GDPR's protections, to the extent that it includes personal data. Under the GDPR, preservation of ESI is an act of processing data.

Typically, an entity facing U.S. discovery will send out a hold notice to employees, notifying them of their preservation obligations. Under the GDPR, the individual recipients of such a hold notice have the right to inspect the ESI subject to preservation. If the ESI contains their personal data, individuals have the right to object to the preservation of their personal data, and to seek to prevent its collection, processing or production, subject to a balancing of their individual interests against the legitimate interests of the entity. U.S. discovery obligations may put the entity in the position of having to choose between violating its U.S. discovery obligations and violating the GDPR.

The European Commission has made it clear that U.S. discovery requests must qualify as lawful under the GDPR independent of any U.S. court order. In the context of U.S. discovery, there is little guidance from the EU courts as to balancing the interests of entities in developing or defending legal claims or other "legitimate interests" with the rights of the individual. How the EC and enforcing agencies will balance the interests of

12 The GDPR defines Data Processing as: "[a]ny operation or set of operations performed upon personal data or sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction." GDPR Art. 4.

13 Sedona Conference, The Sedona Conference Practical In-House Approaches for Cross Border Discovery & Data Protection (2016)

entities in abiding by U.S. discovery orders against the fundamental rights of individuals remains to be seen.[14]

VI. LAWFUL BASES FOR PROCESSING AND TRANSFERRING DATA FOR U.S. DISCOVERY UNDER THE GDPR

The GDPR framework for lawful processing of personal data requires, among other things, that personal data be processed for a specific purpose and in a transparent manner. If, as is frequently the case when personal data is processed in response to a U.S. discovery request, additional processing of personal data is to take place for a reason different than the reason for the original collection of that personal data, there must be an independent legal basis for the processing.[15] (GDPR Art. 6(1)). Once an entity has established the lawful basis for *processing* personal data in connection with U.S. litigation, the lawful basis to transfer personal data for discovery purposes must be established.

Transfers of data to the U.S. for purposes of U.S. discovery are, under the GDPR, transfers to a Third Country. The GDPR permits Data Controllers to effect personal data transfers to Third Countries subject to certain compliance conditions. (GDPR Arts. 44, 45). Because the United States is not among the nations found to provide adequate protection for personal data, transfers to the U.S. may only take place when appropriate safeguards and limitations can be demonstrated. Absent that, under the GDPR, data cannot be transferred.[16]

As relevant to U.S. discovery requests, the likely legal bases for processing and transferring personal data are set forth in GDPR Article 49, and include (a) processing and transfer with the express consent of the data subject; (b) processing and transfer in connection with the establishment, exercise, or defense of legal claims; and, as a "last resort," (c) processing and transfer where there is a compelling legitimate interest, which interest is not "overridden by the interests or rights and freedoms of the data subject."[17] (GDPR, Arts. 6(1)(c), 6(3), 49(1), 49(1)(a) and 49(1)(e)).

Litigants that wish to rely on the consent of the individual must be able to show that consent was voluntary, unambiguous, obtained after a notice that conveyed the request for consent in clear and plain language, specific for the particular data processing and transfer,

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14 *See* Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, at 14-15, *United States v. Microsoft Corp.*, No. 17-2 (S. Ct. Dec. 13, 2017) ("EC Brief") ("Article 48 makes clear that a foreign court order does not, as such, make a transfer lawful under the GDPR . . . GDPR thus makes "mutual legal assistance treaties," or "MLATs," the preferred option for transfers . . . a transfer to a third country thus could proceed only if it qualified under Article 49 [derogations for specific situations].) The *Microsoft* case involved the Stored Communications Act and overseas data transfer, which dispute was mooted by superseding law.

15 *See*, ICO Guide, Lawful basis for processing; *see also* Article 29 Data Protection Working Party, Working Document 1/2009 on pre-trial discovery for cross border civil litigation, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp158_en.pdf.

16 Transfers outside of the EU/EEA are referred to as "Third Country Data Transfers." GDPR Art. 44. A "Cross Border" transfer occurs when data is transferred within the EU/EEA. *Id.* Art. 4.

17 European Data Protection Board, Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/6779, Sections 2.1, 2.5, and 2.8 ("Derogations Guidelines"). https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22018-derogations-article-49-under-regulation_en.

demonstrated through a clear statement or affirmative action, and the consent must be revocable. (GDPR Arts. 4(11), 7, 49(1)(a)). Consent must be obtained from each individual with personal data subject to processing, which may not be practical for U.S. discovery. Because employee-employer relationships may be seen as coercive, it may be difficult for employers to demonstrate that consent was voluntarily given without fear of retaliation. In circumstances where the reasons for processing and transfer cannot be fully disclosed, consent cannot be obtained. Additionally, the revocable nature of the consent may make it difficult for a producing party to comply with the GDPR throughout the lifecycle of U.S. litigation. As such, it may be difficult to obtain consent in a manner and scope sufficient to provide a lawful basis for processing in U.S. litigation.

Under Article 49(1)(e), data transfers are permissible where they are "necessary for the establishment, exercise, or defense of legal claims." Because the Derogations Guidelines specifically mention data transfers for the purpose of formal pre-trial discovery in civil litigation as falling within this derogation, it provides the most likely legal basis for processing and transfer to the U.S. in connection with e-discovery. This derogation cannot be used where legal proceedings are a mere possibility, but can be used by a Data Controller to institute proceedings in a Third Country.[18] To comply with GDPR, there must be a close connection between the personal data and the legal proceeding *and* the transfer must be necessary for the "establishment, exercise or defense" of the legal claim.

Where a data transfer cannot be based on safeguards such as binding corporate rules, participation in the Privacy Shield Program, or other derogations, Article 49(1) § 2 provides that personal data can be transferred if it is "necessary for the purposes of compelling legitimate interests." (GDPR Arts. 45, 46, 49). The Derogations Guidelines note that this derogation is meant as a "last resort," dependent on the Data Controller's ability to demonstrate both that there were no other possible bases to support the data transfer, and that there is a compelling and legitimate interest at stake for the Data Controller. Because this derogation can only be used in a non-repetitive manner and can only involve a "limited number of data subjects," and so may not be appropriate for complex U.S. e-discovery requests.[19]

VII. CONFLICTS BETWEEN EU PRIVACY LAW AND U.S. DISCOVERY ARE NOTHING NEW

Although the GDPR's stiff new penalty provisions heighten the stakes for EU/EEA entities facing U.S. discovery requests, conflicts between the U.S. discovery regime and European law are nothing new. U.S. courts historically have prioritized U.S. legal interests over conflicting foreign law. Following the comity analysis set forth by the U.S. Supreme Court in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, 482 U.S. 522 (1987), courts weigh the interests of the litigants, the hardship for the producing party, the interests of the United States in enforcing its discovery regime, the interests of the foreign sovereign under applicable law, and the likelihood of enforcement

18 Derogations Guidelines, Section 2.5.

19 *Id.*, Section 1.

action against a producing party under the foreign law at issue.[20] U.S. courts have afforded limited deference to foreign privacy regimes, typically compelling production in compliance with the U.S. discovery regime.[21] Given the GDPR's codification of new individual rights and the new potentially stiff penalties associated with non-compliance, some commentators have suggested that the balancing of the interests by U.S. courts must shift with respect to the protections U.S. courts afford entities subject to the GDPR.

Finjan Inc. v. Zscaler Inc., No. 17-cv-6946, 2019 WL 618554 (N.D. Cal. Feb. 14, 2019), is one of the first U.S. decisions to test that theory in the context of the GDPR. The *Finjan* court concluded that the GDPR "does not preclude the Court from ordering Defendant to produce the requested e-mails in an unredacted form, subject to the existing protective order."[22] As with decisions pre-dating the GDPR's effective date, the *Finjan* court affirmed that a concrete showing of hardship, or at least a showing of actual likelihood of a GDPR-related enforcement action, is necessary to support a claim of undue burden to shield documents from production.[23]

In *Finjan*, the defendant asserted that it could not produce e-mails of a U.K. citizen employee without violating the GDPR, claiming that personal data contained within the ESI captured by the plaintiff's search terms would result in the production of personal data irrelevant to the litigation.[24] Because any irrelevant personal data would need to be redacted or anonymized to comply with the GDPR, and the costs associated with GDPR compliance would pose an undue burden, defendant also proposed cost sharing for anonymization and redaction, if plaintiff was unwilling to narrow its request or forgo production in favor of U.S. sources. The plaintiff opposed defendant's requests, asserting that an "Attorney's Eyes Only" production would satisfy the GDPR, and that other measures would impede its review.[25]

The *Finjan* court applied the *Aérospatiale* test applicable in the Ninth Circuit to consider (1) the importance of the documents or other information requested to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; (5) the extent to which noncompliance would undermine important interests of the United

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20 *See, e.g., Aérospatiale*, 482 U.S. at 544, n.29 (rejecting a French blocking statute that called for criminal penalties for production of certain documents, setting forth a comity analysis, and holding that foreign statutes do not deprive American courts of the power to order production of documents, even where the production might violate the statute.), citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204-206 (1958).

21 *See, e.g., St. Jude Med. S.C. v. Janssen-Counotte*, 104 F. Supp.3d 1150, 1162 (D. Or. 2015) (German Data Privacy Act held not to be an impediment to U.S. discovery; U.S. has substantial interest in vindicating rights of U.S. citizens); *Pershing Pacific West, LLC v. Marinemax, Inc.*, 2013 WL 941617, at *8-9 (S.D. Cal. Mar. 11, 2013) (U.S. interests in vindicating rights of its citizens held to outweigh provisions of German Data Privacy Act). *See also*, Sant, Geoffrey (2019) "Courts Increasingly Demand That Businesses Break the Law," *Akron Law Review*: Vol. 52: Iss. 1, Article 4 (reviewing recent cases applying the *Aérospatiale* test, finding that courts typically order production).

22 *Finjan*, at *3, citing cases ("the burden of showing that the law bars production is not satisfied where there is no evidence of the extent to which the government enforces its laws.").

23 *Id.*

24 *Id.* at *1.

25 *Id.*

States; (6) the extent and the nature of the hardship that inconsistent enforcement would impose upon the person; and (7) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state.[26] Concluding that first three factors weighed in favor or production, because the documents at issue were directly relevant to the litigation, the requests was sufficiently tailored, and the defendant's status as a U.S. company, the Court turned to the defendant's assertions regarding alternative means of accessing the information at issue, and the Court's task of balancing national interests, and weighing the burden posed by the requests.[27]

Here, the *Finjan* court made clear that entities seeking protection from U.S. courts under the GDPR must provide more than bare assertions regarding the GDPR's applicability and any burden that would result. For example, the defendant in *Finjan* asserted that the production at issue would be duplicative of other ESI present in its U.S. operations, but failed to show that this assertion was based on its review of the ESI at issue.[28] Similarly, while the defendant claimed that the GDPR barred the production of personal data contained within the ESI, it failed to show on what bases production was purportedly barred, and failed to make any showing regarding the extent to which the U.K. enforced the GDPR. In the absence of any showing regarding the U.K. interest in preventing production, the strong American interest in protecting its patents weighed strongly in favor of production. Given all these factors, and considering the presence of an existing and effective protective order for the matter, the Court found no grounds to deny the plaintiff's request for production, in unredacted form.[29]

VIII. U.S. DISCOVERY PRACTICE IMPLICATIONS

Following *Finjan*, where litigants seek narrowly-tailored discovery of non-duplicative documents directly relevant to the subject matter of the litigation from an entity subject to the jurisdiction of U.S. courts, and have entered into a protective order limiting access to documents containing personal information, the GDPR appears to present no barrier to the production of unredacted documents.[30] If EU/EEA entities that respond to U.S. discovery requests face enforcement actions and fines, U.S. courts' hardship analysis may change. In the absence of enforcement actions in the EU/EEA, the legal landscape for U.S. litigants seeking discovery from EU/EEA litigants in U.S. courts appears largely unchanged by the GDPR, from the perspective of court intervention.

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26 *Id.* at *1. *See also*, Sant, 128-130 (discussing circuit split on the factors considered in conducting a comity balancing test following *Aérospatiale*, noting that in the Ninth Circuit, courts apply a seven-factor balancing test, *citing Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992)).

27 *Finjan*, at *2.

28 *Id.*

29 *Id.* Other courts, pre-GDPR, have reached similar conclusions. *See, e.g., Royal Park Investments SA/NV v. HSBS Bank USA N.*A., 2018 WL 745994, at *2 (S.D.N.Y. Feb. 6, 2018) (holding that plaintiff improperly withheld document custodial information and redacted individual names and email addresses in deference to Belgian Data Privacy Act; comity analysis found to weigh in favor of compelling bank to produce documents in unredacted form, with custodial information restored).

30 *Id.* at *1.

Practitioners representing EU/EEA clients should evaluate the risks associated with U.S. e-discovery as soon as practicable after discovery is reasonably anticipated—before transferring any data to the U.S—including a source-by-source evaluation of the amount and type of personal data covered by the GDPR that may be subject to processing for review and transfer. Where possible, U.S. data sources should be identified and prioritized. The Sedona Conference recommends measures including consideration of the Hague Evidence Convention and letters rogatory for the taking of evidence to justify data transfer, incorporating the Standard Contractual Clauses set forth by the EU Commission in agreements relating to data processing and transfer, developing a processing plan that considers protection of personal data (including data minimization, redaction or anonymization), and—where feasible—conducting in-country data processing and review. At all stages, practitioners should ensure careful documentation of all steps taken to protect the privacy of individuals.[31]

Litigants can take steps to avoid the need for court intervention by raising issues pertaining to GDPR-compliance early in litigation, including meeting and conferring regarding data sources, retention, and scope.[32] Litigants should also consider safeguards such as protective orders[33] incorporating agreements regarding the handling of personal data in litigation and specifically addressing documents and information (such as metadata) subject to the GDPR, a phased discovery schedule that allows time to implement GDPR-compliant ESI processing, selecting vendors that are experienced in facilitating GDPR compliant Third Country data-transfers, and should think ahead to the treatment of personal data during motion practice and at trial, particularly given the common law presumption of public access to judicial documents.[34]

31 Sedona Conference, The Sedona Conference International Principles on Discovery, Disclosure & Data Protection in Civil Litigation (Transitional Edition) (2017)

32 *Id.*

33 *Id.* at 33 (Model U.S. Federal Court Order Addressing Cross-Border ESI Discovery)

34 *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (discussing the right of public access to judicial records).

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