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

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COMPETITION

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ANTITRUST, UCL AND PRIVACY SECTION EXECUTIVE COMMITTEE 2019-2020

CHAIR'S COLUMN

Elizabeth C. Pritzker
Pritzker Levine LLP
Oakland, CA

The Antitrust, Unfair Competition and Privacy Section is pleased to present another edition of *Competition*. The issue covers articles on important topics about antitrust enforcement, rules of analysis, economics, and trial practice. Also reprised here are discussions from our flagship program, the Golden State Institute (GSI), an annual day-long conference that takes place each fall. I want thank everyone—organizer, panelist, speaker, sponsor, author, editor and contributor—who make GSI and *Competition* the enduring successes that they are. **And note: this year's GSI will be on Thursday, November 5, 2020, at the historic Julia Morgan Ballroom in San Francisco, CA.**

As the California Lawyers Association that serves as our organizational head turns three, the Antitrust, Unfair Competition and Privacy Section continues its work. In addition to *Competition*, we have been busy editing and publishing the *California State Antitrust and Unfair Competition Law* treatise, producing our monthly newsletter, *e-Briefs*, and putting together insightful webinars, live events, CLE programs, and career development and networking opportunities for our members.

My tenure as Chair happily coincided with the Section's adoption of its first-ever Diversity and Inclusion Policy and Initiative at our annual meeting in October 2019. The goals of this Diversity Initiative are to increase the diversity of the Section's membership, the diversity in the Section's leadership and Executive Committee, and the participation and visibility of diverse lawyers–both in Section activities, specifically, and in the practice areas of antitrust, unfair competition and privacy more generally. The Diversity Initiative defines diversity to refer to race, color, ethnicity, gender, gender identity, sexual orientation, national origin, religion, age, disability, first generation professional, and veteran status. As part of our effort to ensure that diverse persons have opportunities ascend to leadership within the Section, we adopted a goal of having at least 30% of any candidate pool for leadership or governance within the Section be comprised of diverse Section members.

Consistent with these goals, the Section has succeeded in diversifying the applicant pools of its Executive Committee and its standing committees. We launched a Mentorship Program that contains a core diversity component. We incorporated a seminar on diversity and inclusion into our GSI programming. We hosted our ever-popular, and now fourth annual, *Women in Competition* Law program. And, we have plans in the works for events, seminars, and networking activities that will bring together diverse law students, lawyers, regulators, judges and others—programs that we hope will strengthen, grow, and diversify our professional practice for years to come.

All of the work of the Section is performed on a volunteer basis by a dedicated, knowledgeable and spirited group of Executive Committee representatives, standing committee members, and advisors. Each of them is, in a word, fantastic.

If you would like to join us in our work, please consider sitting on a standing committee, serving as a mentor, submitting a piece of writing for publication, becoming

an article editor, participating as a panelist, speaker or program organizer, or sponsoring an event at your organization or law firm. Or, suggest something new that you'd like to see happen (or make happen!) for Section members. I am happy to discuss your ideas and interest in getting involved in Section activities. Please email me at ecp@pritzkerlevine.com.

EDITOR'S NOTE

Qianwei Fu
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Welcome to the first issue of Volume 30 of *Competition*, our Section's official journal published biannually both in print and electronically. Last November, the Section continued its streak of success with its 29th Golden State Institute. The conference brought together experienced jurists and practitioners who shared their insights on the recent developments in competition law as well as the challenges with emerging issues and trends. In this issue, we are pleased to present eight articles reprising those discussions at the GSI. In addition, we present three articles on topics that have received recent attention from practitioners on both sides of the aisle.

The issue starts off with a comprehensive review of the law by the "three Toms" panel: 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, the Federal Trade Commission's Western Region Director. In these pages, we reproduce **Tom Papageorge**'s discussion of California substantive law and **Tom Greene**'s discussion of state and federal procedural law relating to competition issues. These notes are well worth a close reading since they contain key developments that may have been overlooked under the time demands of our busy practice.

Next, the issue includes roundtable discussions on two big-stakes antitrust trials. In *In re: Korean Ramen Antitrust Litigation*, an antitrust class action alleging a price-fixing conspiracy to fix the prices of Korean ramen noodles, the case progressed from a court stating that there was ample evidence of conspiracy to a jury rejecting price-fixing claims following a five-week trial. Trial counsel **Christopher L. Lebsock**, a partner at Hausfeld LLP, **Rachel S. Brass**, a partner at Gibson Dunn & Crutcher LLP, and **Mark Dosker**, a partner at Squire Patton Boggs LLP, discussed the trial path that ultimately led to a defense verdict. **Jill M. Manning**, a partner of Steyer Lowenthal Boodrookas Alvarez & Smith LLP, moderated the panel. The second panel focused on the takeaways from *U.S. v. Usher, et al.*, a criminal trial of three former London-based foreign currency exchange traders for alleged felony violations of the Sherman Act. A federal jury rejected the government's claim and acquitted all three individuals after a two-week trial in New York. Trial counsel **Andre Geverola**, the Director of Criminal Litigation for the Antitrust Division of the U.S. Department of Justice, **Heather S. Nyong'o**, a partner at WilmerHale, and **David Schertler**, a partner of Schertler & Onorato, dissected how the trial played out. **Niall E. Lynch**, a partner at Latham & Watkins LLP, moderated the panel.

Last year's GSI also had the good fortune to welcome the keynote address by the **Honorable Ming Chin**, Justice of the California Supreme Court. **Cheryl Lee Johnson**, Deputy Attorney General of the Office of the Attorney General's Antitrust Section in Los Angeles, and **Kathleen J. Tuttle**, Deputy-in-Charge of the Antitrust Section in the Los Angeles District Attorney's Office, co-presented the session.

The conference was also honored to host an antitrust enforcement session. The session began with a speech by **Richard A. Powers**, Deputy Assistant Attorney General at the Antitrust Division of the U.S. Department of Justice, on recent highlights and the agency's initiatives in criminal antitrust enforcement, followed by a fireside chat between **Aaron Hoag**, Chief of Technology and Financial Services at the Antitrust Division of the U.S. Department of Justice, and **Karen E. Silverman**, a partner at Latham Watkins LLP, on civil antitrust enforcement and competition issues in the technology space.

The conference concluded with the ever-popular judges' panel, drawing a full house of audience. The panel featured three distinguished Northern District of California jurists—**Judge Vince Chhabria**, **Judge Haywood Gilliam**, and **Magistrate Judge Jacqueline Corley**—who offered their insights and perspectives on managing antitrust and complex business litigation and trials. **Elizabeth Castillo**, a partner at Cotchett, Pitre & McCarthy, LLP, moderated the panel.

In addition, this issue includes three articles on timely topics of interest.

Robert E. Connolly, the former Chief of the U.S. Department of Justice Antitrust Division's Philadelphia Office, provides a comprehensive analysis of the history of the *per se* rule, its operation in criminal Sherman Act cases, and the recent challenges to the rule's application in criminal antitrust prosecution. The article argues that it is unconstitutional to apply the *per se* rule in criminal antitrust cases and predicts that the U.S. Supreme Court will eventually overturn the *per se* rule.

Jiamie Chen, the Director of Investment Initiatives at Parabellum Capital LLC, discusses the competitive barriers in antitrust private enforcement, the role of commercial litigation funding in mitigating the risks in antitrust enforcement actions, and the legal status of third-party funding in the United States.

Armando Levy and **David Sunding**, the Principals of The Brattle Group, provide an overview of the economic and marketing theory for retail pricing and its relations to the pass-through of wholesale costs, as well as its implications for class treatment in indirect purchaser antitrust litigation.

I would like to give special thanks to Robert L. Newman of Zelle LLP, for his help in bringing this issue to life. I would also like to express my gratitude to the Section's Executive Committee and Advisors. It is an absolute privilege to work beside such a talented, dedicated, and caring group of professionals.

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CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW UPDATE: SUBSTANTIVE LAW

By Thomas A. Papageorge[1]

I. INTRODUCTION

This outline provides a selection of substantive 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 Consumer Legal Remedies Act, the Unfair Competition Law and False Advertising Law, California privacy laws, as well as related developments regarding covenants not to complete and public enforcement actions.

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

A. California Antitrust Legislation Increases Scrutiny of Drug Patent Settlements[2]

On October 21, 2019, Governor Newsom signed into law AB 824 (Wood), strengthening state antitrust scrutiny of patent infringement settlements between branded and generic drug companies. The legislature passed AB 824 in response to the continuing antitrust controversy over "pay for delay" agreements and similar patent settlements that have forestalled entry into pharmaceutical markets by price-competitive generic drugs.[3]

Overview. AB 824, codified as Health & Safety Code section 13400 *et seq.*, creates a presumption for Cartwright Act antitrust claims regarding the anticompetitive effects of certain pharmaceutical patent settlement agreements. The new standard establishes a legal presumption that a drug patent settlement where a generic drug maker receives "anything of value" from the manufacturer of a branded drug has anticompetitive effects and violates the Cartwright Act and California's other competition laws, absent specified conditions and exceptions.

The California Office of Legislative Counsel summarized the new standard:

> "This bill would provide that an agreement resolving or settling, on a final or interim basis, a patent infringement claim, in connection with the sale of a pharmaceutical product, is to be presumed to have anticompetitive effects if a nonreference drug filer [i.e., generic drug

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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 author 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 14, 2019, reflecting developments as of that date.

2 AB 824 (Wood), Cal. Stats. 2019, ch. 531, § 1; *see* Health & Safety Code § 13400 *et seq.*

3 *See In re Cipro Cases I & II*, 61 Cal.4th 116 (2015) and the California Attorney General's 2019 antitrust actions in the pharmaceutical marketplace, summarized *infra*; *see also FTC v. Actavis*, 570 US 136 (2013).

maker] receives anything of value, as defined, from another company asserting patent infringement and if the nonreference drug filer agrees to limit or forego research, development, manufacturing, marketing, or sales of the nonreference drug filer's product for any period of time, as specified."

Exceptions. The new legislation provides several exceptions from this presumption of anticompetitive effects. These apply where a defendant can demonstrate: (1) the settlement value received was only for other unrelated goods or services; (2) the agreement's procompetitive benefits outweigh its anticompetitive effects; (3) the agreement allows entry of the generic product before the patent expires; or (4) the agreement is only to refrain from suing or to compensate for reasonable litigation costs.[4]

Remedies. In addition to other remedies provided by the Cartwright Act, the Unfair Practices Act and the UCL, the new law provides for civil penalties where a defendant received value from a violation of up to three times the valued received or $20 million, whichever is greater, and where a defendant did not receive such value, of up to three times the value to other parties or $20 million, whichever is greater.[5] However, if penalties are recovered under this new provision, the State may not obtain other penalties under the Cartwright Act, UPA or UCL, although other relief or damages may be recovered.[6]

Conclusion. AB 824 alters California antitrust law to reverse a key aspect of *FTC v. Actavis*, which requires federal courts to evaluate these settlement agreements under the rule of reason and imposes on plaintiffs the difficult burden of demonstrating actual or likely anticompetitive effects. California's standard now directs that the defendants in Cartwright Act cases involving such agreements must meet the burden of rebutting this anticompetitive presumption. Thus, this legislation creates yet another significant difference between California antitrust law and federal Sherman Act law.

B. California Attorney General Obtains Stipulated Judgments Against Drug Makers for Patent Settlements Allegedly Violating the Cartwright Act

California ex rel. Becerra v. Allergan PLC[7] *and similar settlements*

In mid-2019, the Antitrust Law Section of the California Attorney General's Office settled multiple antitrust actions it had brought under the Cartwright Act and Unfair Competition Law, *inter alia*, against manufacturers of branded pharmaceuticals for settlement agreements with generic drug makers that allegedly forestalled or delayed the entry of price-competitive generic drugs into the California marketplace. The stipulated judgments imposed permanent injunctions prohibiting "pay for delay" settlement conduct in the generic pharmaceuticals marketplace and together provided for the payment of an aggregated total of nearly $70 million in monetary relief. *See also* discussion of AB 824,

4 Health and Safety Code § 134002(a)(3) and (b)(1-5).

5 *Id.* § 134002(e).

6 *Id.*

7 2019 WL 3251470 (N.D. Cal. June 6, 2019).

supra. For example, in *Becerra v. Allergan PLC*, 2019 WL 3251470 (N.D. Cal. 2019), the AG's complaint alleged that defendant Allergan engaged in violations of the Sherman Act, the Cartwright Act and the Unfair Competition Law by entering an agreement that foreclosed competition from generic equivalents of the brand-name drug Lidoderm and later reduced competition between sellers of generic lidocaine patches. Without admitting liability, the defendant entered into a stipulated final judgment permanently enjoining the alleged anticompetitive conduct and providing for the payment of $760,000 in monetary relief.

C. Consumers Who Bought Apps from Apple Are "Direct Purchasers" For Antitrust Standing Purposes

Apple, Inc. v. Pepper[8]

State antitrust laws, including the California Cartwright Act, have often been in tension with federal standing rules under the principles of *Illinois Brick Co v. Illinois*[9], which bars recovery by antitrust plaintiffs of damages suffered at the hands of defendants removed from the plaintiffs in the chain of distribution. The applicability of the *Illinois Brick* "indirect purchaser" doctrine has been superseded in California and other states by virtue of explicit "*Illinois Brick* repealer" legislation.

The California legislature amended the Cartwright Act after *Illinois Brick* in order to restore standing under California law for persons injured "regardless of whether such injured person[s] dealt directly or indirectly with defendant."[10] In 1989, California's indirect purchaser provision was upheld as a valid exercise of state police powers by the Supreme Court in *California v. ARC America Corp*.[11]

In *Pepper*, the U.S. Supreme Court has again addressed the indirect purchaser doctrine and the proper application of federal and state antitrust laws to these marketplace relationships. The Court summarized federal indirect purchaser doctrine and held that consumers who bought software applications from manufacturer's electronic retail store were "direct purchasers" who could sue manufacturer for alleged monopolization (and thus would not have to rely on state indirect purchaser standing conferred by *Illinois Brick* repealer legislation).

The Court concluded: "The bright-line rule of *Illinois Brick* . . . means that indirect purchasers who are two or more steps removed from the antitrust violation in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are the 'immediate buyers from the alleged antitrust violators—may sue . . . . The iPhone owners pay the alleged overcharge directly to Apple . . . Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit."[12]

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8 139 S.Ct. 1514 (2019).

9 431 U.S. 720 (1977).

10 For a detailed history of California's indirect purchaser provision, see *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758 (2010).

11 490 U.S. 93 (1989).

12 *Pepper,* 139 S.Ct. at 1521 (2019).

D. Cartwright Act Suit Against Medical Marijuana Dispensary Was Not a SLAPP Action

Richmond Compassionate Care Collective v. 7 Stars Holistic Foundation, Inc.[13]

Plaintiff, a medical marijuana collective, sued a medical marijuana dispensary and its owner for Cartwright Act restraints of trade, alleging the defendants colluded with other dispensaries to prevent the collective from opening a new business location. The trial court denied defendants' anti-SLAPP motion. On appeal, the First Appellate District held that the Collective's Cartwright Act action against the dispensary and its principal was not a SLAPP.

The First District concluded: "The essence of [plaintiff's complaint] was the private actions the group took to restrain trade and monopolize the medical marijuana market . . . That was the gravamen, the thrust, of the cause of action. Whatever the protected activity, it was at the most incidental."[14]

E. Allegations of Wage Suppression Conspiracy Fail in Sherman Act/Cartwright Act Lawsuit

Kelsey K. v. NFL Enterprises, LLC[15]

A professional cheerleader for NFL football teams brought a putative class action against the teams for violations of the Sherman Act and California's Cartwright Act based on an alleged conspiracy to suppress wages and prevent cheerleader recruitment. The district court dismissed the action for failure to state a claim. The Ninth Circuit considered both the Sherman Act and the Cartwright Act claims in sustaining the dismissal, holding the NFL cheerleader failed to allege conspiracy sufficiently to state claims under either law for alleged wage suppression by professional football teams.

With regard to the Cartwright Act, the Ninth Circuit held: "Kelsey's claim under California's Cartwright Act fails for the same reasons because the requirements to plead a claim under California's Cartwright Act are "patterned after section 1 of the Sherman Act."[16] Accordingly, we affirm the district court's ruling that the complaint fails to plausibly allege conspiracy under the Cartwright Act."[17]

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

Competitive Disadvantage Alone Is Insufficient Pleading of Required Injury: In re Dealer Management Systems Antitrust Litigation[18]

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13 32 Cal. App. 5th 458 (1st DCA, 2019).

14 *Id.* at 470.

15 757 Fed. Appx. 524 (9th Cir.2019).

16 *Id.* at 527 (citing *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1476–77 (9th Cir.1986)).

17 *Id.*

18 360 F.Supp.3d 788 (N.D. Ill. 2019).

In a class action brought in part under California's secret rebates provision, Business and Professions Code section 17045, the plaintiffs, businesses using data from automotive software programs that allowed access under the dealers' software licenses, did not sufficiently allege injury caused by any purported discount given by the developer of the software to the plaintiffs' competitor. As a result, the plaintiffs failed to adequately state a secret rebates claim against the software developer under the Unfair Practices Act.

The federal court concluded: "Plaintiffs allege that the fee waiver given to [plaintiffs' competitor] places Plaintiffs' applications 'at a severe competitive disadvantage in the market place,' which Plaintiffs contend is sufficient to establish injury under Section 17045 of the CUPA. . . . However, a plaintiff bringing a claim under Section 17045 of the CUPA must allege an actual injury in addition to a competitive disadvantage. *Am. Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F.Supp.2d 1031, 1043 (N.D. Cal. 2001) (finding 'a tendency to destroy competition' but granting summary judgment for failure to establish 'actual injury'); *cf. Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc.*, 16 Cal. App. 4th 202, 213, 20 Cal.Rptr.2d 62 (1993) (plaintiff established actual injury by showing that 'its gross sales and profits drastically declined'). Because Plaintiffs have not done so here, Plaintiffs CUPA claim fails."[19]

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

Non-employment Covenant Not to Compete Is Not Per Se Invalid: Quidel Corporation v. Superior Court (Beckman Coulter, Inc.)[20]

Creating a potential conflict with other California courts, the Fourth Appellate District has held that a restriction on research and development in an exclusive dealing agreement between two biotech companies regarding the sale of a blood testing system was not *per se* invalid as a restraint of trade under Business and Professions Code section 16600 *et seq.*

Quidel, the maker of a laboratory blood analyzer, brought a Cartwright Act and section 16600 action against the manufacturer of a point-of-care blood analyzer, challenging a term of their agreement prohibiting the plaintiff from developing a test to detect specific blood markers until two years after the end of their exclusive dealing contract for defendant's blood testing system. The trial court entered summary adjudication invalidating the contract term as a restraint of trade under section 16600 *et seq.*

The Fourth District reversed the summary disposition regarding the validity of the contract term, holding the provision was not invalid per se under California's non-competition covenant doctrine. The court distinguished the California Supreme Court's opinion in *Edwards v. Arthur Andersen LLP*[21], which held "[n]oncompetition agreements are invalid under section 16600 in California, even if narrowly drawn, unless they fall within

19 *Id.* at 807-808.

20 39 Cal. App. 5th 530 (2019), *reh'g denied* (Sept. 13, 2019).

21 44 Cal. 4th 937 (2008).

the applicable statutory exceptions of sections 16601, 16602, or 166025."[22] The Fourth District reasoned that the prohibition in *Edwards* was limited to its factual circumstances involving employment agreements.[23]

The Fourth District concluded that "as long as a noncompetition provision does not negatively affect the public interests, is designed to protect the parties in their dealings, and does not attempt to establish a monopoly, it may be reasonable and valid."[24] Under this analysis, the in-term covenant not to compete in an exclusive dealing contract such as this one was not *per se* invalid. *Id.* Further, the existence of factual issues concerning the alleged anticompetitive effects of the agreement precluded summary judgment on the validity of the contract provision.[25]

The Fourth District opinion in *Quidel Corporation* interpreting *Edwards* as applicable only to employment contracts is arguably inconsistent with the California Supreme Court's broader and less flexible interpretation of the California prohibition on non-competition covenants, so further clarification will be needed here.

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

Blair v. Rent-A-Center, Inc.[26] (see discussion, *infra*)

VI. UNFAIR COMPETITION LAW (UCL) (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[27]

The U.S. Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, holding that the Federal Arbitration Act[28] 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.

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

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22 *Id.* at 955.

23 *Quidel Corp.*, 39 Cal. App. 5th at 540-541.

24 *Id.* at 542.

25 *Id.* at 545.

26 928 F.3d 819 (9th Cir. 2019).

27 563 U.S. 333 (2011).

28 9 U.S.C. § 1 *et seq.*

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.[29]

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.[30]

Many commentators see support within the California Supreme Court for carving out exceptions to the broad sweep of *Concepcion*.[31] 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: In *Iskanian v. CLS Transportation*,[32] the California Supreme Court held that *Concepcion* impliedly overruled *Gentry v. Superior Court*[33], and thus mandatory arbitration provisions must be enforced even when they require arbitration of wage-and-hour issues protected by California's labor laws. However, the Court further ruled that an

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29 61 Cal. 4th 899 (2015).

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

31 *See, e.g.,* R. Novotny, "*Gauging the Future of Iskanian and FAA Preemption in California*," Los Angeles Lawyer (Mar. 2015), 10.

32 59 Cal.4th 348 (2014).

33 42 Cal. 4th 443 (2007).

arbitration agreement requiring the employee to give up the right to bring representative actions under the Labor Code Private Attorney General Act of 2004[34] is against public policy and unenforceable.

By carving out PAGA representative actions from the realm of private arbitration governed by the FAA, *Iskanian* has prompted a wave of plaintiffs' lawsuits and class actions utilizing this exception in employment and wage-and-hour disputes.[35]

Public injunctive relief: In *McGill v. Citibank, N.A.*[36], 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."[37]

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."[38] 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."[39]

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[40] (see discussion, *supra*)

Iskanian v. CLS Transportation[41] (see discussion, *supra*)

2. Arbitration Clauses Rejected

McGill v. Citibank, N.A.[42] (see discussion, *supra*)

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34 Labor Code §§ 2698 *et seq.* ("PAGA").

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

36 2 Cal.5th 945 (2017).

37 *Id.* at 961 (emphasis original).

38 *Id.* at 962.

39 *Id.* at 969 (emphasis original); *see also Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir.2019).

40 61 Cal. 4th 899 (2015).

41 59 Cal. 4th 348 (2014).

42 2 Cal. 5th 945 (2017).

Baxter v. Genworth North America Corp.[43]: Plaintiff 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 law: "[t]he former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results."[44] Defendant's arbitration provision was unconscionable under this standard. Plaintiff "had no opportunity to negotiate" and no "meaningful choice in the matter" (*id.* at 723), 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.[45]

Blair v. Rent-A-Center, Inc.[46]: In a class action against a rent-to-own furniture company alleging excessive prices violating the UCL, the CLRA and state anti-usury law, the Ninth Circuit held the contract's arbitration term invalid and unenforceable since the FAA does not preempt the rule of *McGill v. Citibank*, N.A.[47] that a waiver of the right to seek public injunctive relief is unenforceable. "In sum, the *McGill* rule is a generally applicable contract defense derived from long-established California public policy. It is a 'ground[ ] . . . for the revocation of any contract' and falls within the FAA's saving clause at the first step of the preemption analysis." The plaintiff class thus had the right to a trial on the public injunction claim here.[48]

B. UCL Preemption/Bar Arising from Federal or State Regulatory Schemes

The California and federal courts continue to wrestle with the multi-faceted issue of applying the Unfair Competition Law and similar laws 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 Preemption of or Bar to UCL/FAL Action

National Institute of Family and Life Advocates v. Becerra[49] (see discussion, *infra*.)

Durnford v. Musclepharm Corp.[50]: The Ninth Circuit reviewed a UCL, FAL and CLRA challenge to the labeling practices of a nutritional supplement maker and held that the state law challenges to statements made in the FDA-mandated Nutrition Facts Panel were preempted, but challenges to claims made elsewhere were not. "The FDCA . . . preempts a misbranding theory premised on the Supplement's use of nitrogen-spiking agents to inflate the measurement of protein for the [Nutrition Facts Panel]. It does

43 16 Cal. App. 5th 713 (2017).

44 *Id.* at 721.

45 *Id.* at 737.

46 928 F.3d 819 (9th Cir. 2019).

47 2 Cal. 5th 945 (2017).

48 *Blair,* 928 F.3d at 828.

49 138 S.Ct. 2361 (2018).

50 907 F.3d 595 (9th Cir.2019).

not, however, preempt a misbranding theory premised on the label's allegedly false or misleading implication" elsewhere about the sources of the supplement's protein.[51]

2. Holdings of No Preemption of or Bar to UCL Action

Solus Industrial Innovations, LLC v. Superior Ct.[52]: 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.[53] The Court 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."[54]

This decision is important in the OSHA sphere and also as an indication 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.

Hawkins v. The Kroger Company[55]: A consumer plaintiff brought a putative class action against a bread crumb manufacturer alleging violations of the UCL, FAL and CLRA. The Ninth Circuit held the Nutritional Labeling and Education Act (NLEA) did not preempt the consumer's labeling claims. The court concluded: "The 'rounding rules' applicable to the Nutrition Facts Panel do not apply to the nutrient content claim on the face of the label. . . . Because the FDA regulations do not authorize the contested statement, Hawkins's labeling claims are not preempted."[56]

Durnford v. Musclepharm Corp.[57] (see discussion, *supra*)

CTIA v. Berkeley[58] (see discussion, *infra*)

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51 *Id.* at 605.

52 4 Cal. 5th 316 (2018), *cert. denied sub nom. Emerson Elec. Co. v. Superior Court of California, Orange Cty.*, 139 S. Ct. 376 (2018).

53 29 U.S.C. § 651 *et seq.*

54 *Solus Industrial Innovations, LLC*, 4 Cal. 5th at 347.

55 906 F.3d 763 (9th Cir. 2018).

56 *Id.* at 772.

57 907 F.3d 595 (9th Cir.2019).

58 928 F.3d 832 (9th Cir.2019).

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

National Institute of Family and Life Advocates (NIFLA) v. Becerra[59]

In an opinion with potential impact on UCL enforcement of state-required affirmative disclosures to consumers, the Supreme Court examined a state law requiring pro-life pregnancy centers to make 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 unduly burdensome compelled speech. Exempting some clinics from the disclosure requirements fit poorly with the law's objective of providing low-income women with information about state services. As a result, California's law was "underinclusive" and thus defective under the First Amendment.[60]

Some observers have suggested that a broad reading of the Supreme Court's opinion in NIFLA could jeopardize the constitutionality of other state-mandated affirmative disclosures, perhaps including Proposition 65 notices and other forms of required disclosure. But the Ninth Circuit has now identified substantial limits on the scope and applicability of the NIFLA opinion:

Interpipe Contracting, Inc. v. Becerra[61]: Here the court distinguished NIFLA, suggesting limits to its applicability: "First, National Institute expressly did not reach the issue of viewpoint discrimination. 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.'"[62]

CTIA—The Wireless Association v. Berkeley[63]:The Ninth Circuit sustained a district court's refusal to issue a preliminary injunction against a Berkeley ordinance requiring cell phone retailers to advise prospective purchasers of the dangers of carrying cell phones too close to the body. "But *NIFLA* plainly contemplates applying *Zauderer* to 'purely factual and uncontroversial disclosures *about commercial products*.' NIFLA, 138 S. Ct. at 2376 (emphasis added). Berkeley's ordinance falls squarely within this category . . . Based on the foregoing, we conclude that CTIA has little likelihood of success on its First Amendment claim that the disclosure compelled by the Berkeley ordinance is unconstitutional, and thus the ordinance meets constitutional standards under the intermediate scrutiny of *Zauderer*."[64]

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59 138 S.Ct. 2361 (2018).

60 *Id.* at 2375.

61 898 F.3d 879 (9th Cir. 2018).

62 *Interpipe Contracting, Inc.*, 898 F.3d at 902, n.17 (internal citations omitted).

63 928 F.3d 832 (9th Cir. 2019).

64 *Id.* at 848-49.

D. UCL Standing After Proposition 64

Allegations of Reliance Are Unnecessary for Private Standing in Unlawfulness or Unfair UCL Actions

In Re Effexor Antitrust Litigation[65]: In the consolidated national class action involving the antidepressant drug Effexor, the New Jersey District Court concluded that the class plaintiffs (identified as "EPPs") pleaded sufficient facts to go forward on their 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."[66] 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 unfair business practices, Defendants' motion for judgment on the pleadings with respect to this claim is denied."[67]

E. Other UCL and Related Trade Regulation Developments

Robocalling Prohibition Under Parallel Federal and California Statutes Clarified

Duguid v. Facebook, Inc.[68]: Unsolicited telemarketing calls, including those using automatic telephone dialing systems ("robocalling"), are regulated under federal law by the Telephone Consumer Protection Act of 1991[69] and the federal "Do-Not-Call" Implementation Act of 2003[70], and under California law by Business and Professions Code sections 17590-17594, entitled "Unsolicited and Unwanted Telephone Solicitations," which harmonizes California law with the federal regulations. The TCPA and California law have now been held to "[forbid] calls using an automated telephone dialing system (ATDS), commonly referred to as a robodialer."[71] The federal "Do Not Call" regulation prohibits calls of specified types to numbers registered on the federal "Do Not Call" list maintained by the Federal Trade Commission.

California's regulations addressing unsolicited telemarketing calls, including the requirements of the state's "Do Not Call" list, were amended in 2004 to coordinate the California regulatory scheme with the federal "Do-Not-Call" Implementation Act of 2003.[72] California's Business and Professions Code sections 17590-17594, entitled "Unsolicited and Unwanted Telephone Solicitations," conforms California law to the

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65 337 F.Supp.3d 435 (D.N.J. 2018).

66 *Id.* at 463 (internal citation omitted).

67 *Id.*

68 926 F.3d 1146 (9th Cir. 2019).

69 47 U.S.C. § 227 ("TCPA").

70 6 C.F.R. § 310.4 *et seq.*

71 *See Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019).

72 6 C.F.R. § 310.4 *et seq.*

federal regulations, including the definition of robodialing as addressed in *Duguid*.[73] The revised state law also adopts all California phone numbers on the federal registry as the California "do not call" list, permitting Californians to take advantage of the free federal registry and its protections, and separately prohibits specified unlawful and deceptive practices by telemarketers.[74]

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

A. California's Law Regulating Former Price Advertising Upheld Against Constitutional Challenges

People v. Superior Court (J.C. Penney, Inc.)[75]

Under a longstanding California law, codified at Business and Professions Code section 17501, it is unlawful to advertise a former price unless it was the prevailing market price within three months immediately preceding the advertisement or without adequate disclosure of when the former price did prevail.[76] California enforcement authorities have used this advertising regulation sparingly in recent years in part because of uncertainties about the scope and proper application of the statute.

However, in *J.C. Penny*, the first contemporary appellate opinion addressing section 17501, the Second Appellate District has rejected constitutional challenges to the statute, while also noting potential issues concerning the statute's scope.[77] In *J.C. Penney*, the Second District upheld the constitutionality of this prohibition on deceptive former price advertising against claims that the statute improperly infringes on free speech infringement and is void for vagueness.

The Second District overturned the trial court's grant of demurrer, holding that section 17501 regulates commercial speech but is not facially unconstitutional and is sufficiently clear to withstand vagueness challenge on these facts. "Petitioner Los Angeles City Attorney . . . alleged [defendant retailers] sold products online by means of misleading, deceptive or untrue statements regarding the former prices of those products. Real parties demurred to the claims, asserting that the statute contravenes free speech rights and is void for vagueness. . . . We conclude that real parties failed to demonstrate any constitutional defect in the statute on demurrer."[78]

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73 *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019).

74 Bus. & Prof. Code, § 17590.

75 34 Cal. App. 5th 376 (2019).

76 Bus. & Prof. Code, § 17501; *see* 30 Ops. Cal. Atty. Gen. 127 (1957).

77 *J.C. Penny,* 34 Cal. App. 5th at 399.

78 *Id.* at 384.

VIII. CALIFORNIA PRIVACY LAWS

A. California Enacts Comprehensive Consumer Privacy Law

California Consumer Privacy Act of 2018 ("CCPA")[79]

In 2018, in response to the worldwide consumer privacy movement represented by the European Union's General Data Protection Regulation (GDPR) (Regulation 2016/679; 27 April 2016) and to public demand for additional California privacy protections in the Internet Age, the state legislature passed and Governor Jerry Brown signed AB 375 (Chau), the California Consumer Privacy Act of 2018.[80] Effective January 1, 2020, the CCPA provides comprehensive codification of consumer privacy rights and establishes remedies for violations of those rights. Note: Amendments to the CCPA, including SB 1121 (Dodd) (Stats. 2018, ch. 735, § 9) and others pending in the state legislature, alter or clarify parts of the CCPA and will act to delay the effective dates of certain provisions. Numerous additional amendments are under consideration or have been proposed, so interested parties should continuously update research on the CCPA.

Legislative intent. In its statement of intent, the California legislature described the purpose of the CCPA as "giving consumers an effective way to control their personal information by ensuring the following rights[81]:

(1) The right of Californians to know what personal information is being collected about them.

(2) The right of Californians to know whether their personal information is sold or disclosed and to whom.

(3) The right of Californians to say no to the sale of personal information.

(4) The right of Californians to access their personal information.

(5) The right of Californians to equal service and price, even if they exercise their privacy rights."

Definition of personal data. The CCPA defines personal information as information that "identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[82] This includes identifiers such as a "real name, alias, postal address, unique personal identifier, online identifier Internet Protocol address, email address, account name, social security number, driver's license number, passport number, or other similar identifiers."[83]

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79 Cal. Civ. Code, § 1798.100 *et seq*., Stats. 2018, ch. 55, § 3.

80 *Id.*

81 Stats. 2018, ch. 55, § 2(i).

82 Cal. Civ. Code, § 1798.140(o)(1).

83 *Id.* § 1798.140(o)(1)(A).

The CCPA provides examples of covered "personal information," including protected classifications under federal or state law, commercial information, biometric information, Internet activity, geolocation data, audio-visual information, professional or employment information, education information, and similar information used to draw a profile about a consumer.[84]

However, the CCPA specifies that "publicly available information" is not included in this definition, which category includes, among other exceptions, information lawfully available from government records and consumer information that is "deidentified or aggregate consumer information."[85] In this regard, the CCPA definition differs from that of the GDPR, as the CCPA extends its definition to include households, while the GDPR classifies applicable personal consumer information as individual only.

Applicability. The CCPA applies to any "business," including any for-profit entity that collects consumers' personal data, does business in California, and satisfies at least one of the following thresholds: (1) has annual gross revenues in excess of $25 million; (2) possesses the personal information of 50,000 or more consumers, households, or devices; or (3) earns more than half of its annual revenue from selling consumers' personal information.[86]

Obligations of businesses. The CCPA provides a number of obligations for businesses that collect the personal information of consumers, including requirements to: (1) implement processes to obtain parental or guardian consent for minors under 13 years and the affirmative consent of minors between 13 and 16 years to data sharing for purposes[87]; (2) provide a "Right to Say No to Sale of Personal Information" and provide guidance on methods to opt out of the sale of that information via "reasonably accessible" means, such as links on business websites[88]; (3) designate methods for submitting access requests including toll-free telephone numbers[89]; (4) update privacy policies with new information, including a description of California residents' rights[90]; and (5) implement procedures to avoid requesting opt-in consent for 12 months after a California resident opts out.[91]

Private remedies and public sanctions. Private remedies and public law enforcement sanctions are provided by the CCPA. Where notified businesses fail to cure violations within 30 days, the CCPA authorizes statutory damages in private civil actions for the data breach violations of $100 and $750 per California resident and per incident, or actual damages, whichever is greater, and any other relief a court deems proper, subject

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84 *Id.* § 1798.140(o)(1)(A-K).

85 *Id.* § 1798.140(o)(2).

86 *Id.* § 1798.140(c).

87 *Id.* § 1798.120(d).

88 *Id.* § 1798.102.

89 *Id.* § 1798.130(a).

90 *Id.* § 1798.135(a)(2).

91 *Id.* § 1798.135(a)(5).

to the option of the California Attorney General's Office to supersede the private actions and prosecute civil law enforcement actions against the violations.[92]

Where notified businesses fail to cure violations within 30 days, the CCPA authorizes civil penalties recoverable in actions in the name of the People of the State of California by the Attorney General under the Unfair Competition Law of up to $2,500 per violation, and under the CCPA of up to $7,500 per violation for intentional violations.[93]

B. California Attorney General Issues Proposed CCPA Regulations

California Consumer Privacy Act Regulations [Proposed][94]

On October 11, 2019, the California Attorney General's Office released its highly anticipated proposed regulations interpreting important aspects of the California Consumer Privacy Act, as required by the Act. Designated the "California Consumer Privacy Act Regulations," these new interpretations of the CCPA, if adopted, would be codified at 20 CCR § 999.300 *et seq.* of the California Code of Regulations.

Civil Code section 1798.185 requires the Attorney General to adopt regulations addressing ten separate subject areas, including: updating the relevant categories of "personal information;" updating the definition of unique information identifiers; establishing exceptions needed to conform CCPA to federal or state law; establishing procedures for consumers to opt out of sales of personal information; adjusting the monetary thresholds for the CCPA definition of relevant "businesses;" and establishing rules and procedures for the required CCPA notices, financial incentive offerings, obtaining of the consumer's own information, and verification of consumer requests, among other topics. The AG's initial proposed regulations cover many of these required subjects, but leave others for subsequent regulations.

Of particular interest, this initial body of proposed regulations addresses the applicability of the CCPA to covered service providers (proposed § 999.314) and establishes notice obligations for passive recipients of defined types of personal information (proposed § 999.305).

IX. PUBLIC ENFORCEMENT OF UCL, FAL, AND RELATED LAWS

A. California Attorney General Obtains Stipulated Final Judgments Against Drug Makers for Patent Settlements Violating the Cartwright Act

California ex rel. Becerra v. Allergan PLC[95] **and similar settlements** (see discussion in Part II, *supra*)

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92 *Id.* § 1798.150.

93 *Id.* § 1798.155.

94 20 CCR § 999.300 *et seq.*

95 2019 WL 3251470 (N.D. Cal. June 6, 2019).

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

Abbott Laboratories, Inc. v. Superior Court (Rackauckas)[96]

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. . . .'"[97] 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]."[98]

"[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."[99]

Contingent-fee arrangements in public UCL/FAL enforcement actions. 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, *infra*).

California District Attorneys Association and Attorney General policy on prosecutorial neutrality. The ethical norms of CDAA and the Attorney General prohibit the use of outside contingent-fee counsel in three types of public enforcement

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96 24 Cal. App. 5th 1 (2018), *review granted, order requesting depublication denied*, 237 Cal. Rptr. 3d 178 (2018).

97 *Id.* at 20.

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

99 *Id.* at 20.

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 California legal and ethical principles adopted by the Supreme Court in *County of Santa Clara v. Superior Court*[100] and *People ex rel. Clancy v. Superior Court*[101]. Thus, CDAA's ethical manual provides: "[p]rosecutorial 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.[102]

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.'"[103]

These California ethical standards are distinct from federal due process principles and related issues. For example, the Ninth Circuit held in *American Bankers Management Co., Inc. v. Heryford*[104] that a contingent-fee counsel arrangement in a local prosecutor's civil case did not violate federal due process requirements. However, the court acknowledged the separate California ethical standards for such matters and refused to merge the two sets of principles: "[s]imilarly, 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 due process principles, but on 'the courts'general authority "to disqualify counsel when necessary in the furtherance of justice.'"[105]

C. First DCA Opinion Creates Split of Authority on Jury Trial Right in UCL Actions

Nationwide Biweekly Administration, Inc. v. Superior Court (People)[106]

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."[107]

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100 50 Cal. 4th 35 (2010).

101 3 Cal. 3d 740 (1985).

102 CDAA, Professionalism (2016), Ch.XI, Part IX (emphasis added, citing *County of Santa Clara v. Superior Court (Atlantic Richfield)*, 50 Cal.4th 35 (2010); *see also People ex rel. Clancy v. Superior Court,* 3 Cal.3rd 740 (1985).

103 *County of Santa Clara*, 50 Cal. 4th at 49.

104 885 F.3d 629 (9th Cir. 2018).

105 *Heryford*, 885 F.3d at 638, n. 12.

106 24 Cal. App. 5th 438 (2018), *review granted*, S250047, Sept. 19, 2018.

107 *Id.* at 470-71.

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.[108] *Nationwide Biweekly* thus creates a substantial split of authority on this important procedural issue. The California Supreme Court granted review on September 19, 2018, and will now address that split.

108 *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 Thomas Greene[1]

I. STANDING

A. Ninth Circuit Articulates Rules for Post-*Spokeo* Standing

Patel v. Facebook, Inc.[2]

This case arose from alleged violations of the Illinois Biometric Information Privacy Act (BIPA).[3] Representative plaintiffs were Illinois residents who alleged that Facebook failed to protect and properly eliminate biometric face templates as required by BIPA. Face templates are an individual set of measurements and mathematical relationships that allow identification of individuals from photographs.

The plaintiffs brought their action in California where Facebook maintains its headquarters. Facebook moved to dismiss this action on standing grounds, which motion was denied. The trial court subsequently certified a class of Facebook users located in Illinois for whom Facebook had created and stored a face template after June 7, 2011.

At issue in this appeal was whether the plaintiffs had standing to bring their action. In response to a remand from the U.S. Supreme Court in *Spokeo v. Robbins*,[4] the Ninth Circuit had already adopted a two-step approach to whether the violation of a statute confers standing. The 9th Circuit asks two questions: "(1) whether the statutory provisions at issue were established to protect [the plaintiff's] concrete interests (as opposed to purely procedural rights) and, if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.[5]

As to the first question, Circuit Judge Ikuta surveys the history of protection of privacy over time. She starts by citing with approval the seminal article co-written by the future Justice Brandeis, which reviewed the then-preceding 150 years of law on privacy.[6] She goes on to survey recent decisions on the common law roots of the right to privacy and the intertwining of these common law rights into current First and Fourth Amendment jurisprudence.[7] She notes that the judgement of the Illinois Legislature "is 'instructive

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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 the developments prepared for presentation at the Golden State Institute on November 14, 2019, reflecting developments as of that date.

2 932 F.3d 1264 (2019).

3 740 Ill. Comp. Stat. 14/1 *et seq.*

4 __ U.S. __, 136 S.Ct. 1540 (2016).

5 *Patel*, 932 F.3d at 1270-71 (*quoting Robins v. Spokeo*, 867 F.3d 1108, 1113 (9th Cir. 2017 (*Spokeo II*)).

6 D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890).

7 *Patel*, 932 F.3d at 1271-73.

and important' to our standing inquiry."[8] She quotes with approval the conclusion of the Illinois Supreme Court that "an individual can be 'aggrieved' by violation of BIPA whenever 'a private entity fails to comply" with the requirements of the law. She concludes that the provisions of the Illinois law "were established to protect an individual's 'concrete interests' in privacy, not merely procedural rights."[9]

Turning to the second question, she concludes that Facebook's failure to comply with BIPA "is the very substantive harm targeted by BIPA." Since BIPA protects that plaintiffs' concrete privacy interests and violations of the procedures in BIPA "actually harm or pose a material risk of harm to those privacy interests [citation omitted] the plaintiffs have alleged a concrete and particularized hard, sufficient to confer Article III standing."[10]

This decision is an important one and may well generate a petition for certiorari. But this analysis provides a road map to legislatures on how to write statutes that will be given effect in federal courts. It also provides a road map to both plaintiffs and defendants litigating privacy cases.

The Ninth Circuit is a leading voice in privacy protection. The results in other circuits have been mixed. For example, a D.C. trial court rebuffed a smorgasbord of potential theories of loss, concluding that only actual damages count.[11] Also in the mix is the remand by the U.S. Supreme Court back to the Ninth Circuit of a decision involving Google.[12] This SCOTUS decision appears to be less friendly to standing than the 9th Circuit's decision in *Patel*. That said, the thoughtful opinion of Circuit Judge Ikuta may carry the day.

II. ARBITRATION

A. Ninth Circuit Determines Federal Arbitration Act Does Not Preempt California Right to Seek Public Injunctions

Blair v. Rent-A-Center, Inc.[13]

In the underlying litigation, plaintiff claimed that Rent-A-Center had engaged in pricing and other conduct that violated the Karnette Rental-Purchase Act.[14] Plaintiff brought a putative class action seeking relief under the unfair Competition Law[15] and the Consumer Legal Remedies Act.[16]

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8 *Id.* at 1273.

9 *Id.* at 1274.

10 *Id.* at 1275.

11 *Attias v. CareFirst, Inc.*, 365 F. Supp. 3d 1 (D.D.C. 2019).

12 *Frank v. Gaos*, __ U.S. __, 139 S. Ct. 1041 (2019).

13 928 F.3d 819 (9th Cir. 2019).

14 Cal. Civ. Code §§ 1812.620 *et seq.*

15 Cal. Bus. & Prof. Code §§ 17200 *et seq.*

16 Cal. Civ. Code §§ 1750 *et seq.*

However, an arbitration contract precluded trial court actions, which Rent-A-Center sought to enforce. At issue in this appeal was whether the consumer could be required to forgo seeking a public injunction under the UCL or the CRLA. Such injunctions under these Acts can include prohibitions on future violations of the Acts, an accounting, individualized notice to those consumers whose rights had been violated, and restitution.

The Ninth Circuit found that California's prohibitions against claimants seeking public injunctions—the so-called *McGill* rule[17]—was not designed to limit arbitration. Rather, the rule protects consumers from waiving their rights to public injunctions in any forum. On this basis the court found that the purported waiver was precluded by state law.

Rent-A-Center has had success in the past enforcing its arbitration contracts,[18] so a petition for certiorari can be expected.

B. California Supreme Court Voids Arbitration Agreement as Unconscionable

OTO L.L.C. v. Kho[19]

Under the Federal Arbitration Act's savings clause, unconscionability is a valid ground for invalidating an arbitration agreement.[20] This appeal arises from an administrative action filed by a mechanic seeking back pay from a Toyota dealership. While this decision arises from an ordinary labor setting, it substantially clarifies California's law of unconscionability. It also provides a tutorial on drafting arbitration agreements.

Plaintiff Kho was an automobile technician working for One Toyota, the trade name for OTA L.L.C. Three years into his tenure with OTA, Kho was approached by a "porter" with the personnel department who asked him to sign some papers. Since he was in the middle of a job, he took approximately four minutes to review and sign the documents. The principal document was a dense, single-spaced arbitration agreement that mandated arbitration for most employment issues; required that arbitration be handled by a retired superior court judge; required adherence to all California rules of pleading, discovery and evidence; and provided for resolution by summary judgement or judgment on the pleadings.

The allocation of costs was not specified except by a cite to a code section that generally provides that parties must pay their own costs. This agreement replaced a simpler, less formal Berman proceeding provided by Cal. Labor Code §§ 98-98.8.[21] Several months after his employment ended, he filed a wage claim against OTA with the Labor Commissioner.

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17 *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017).

18 *Rent-A-Center West v. Jackson*, 561 U.S. 63 (2010).

19 8 Cal. 5th 111 (2019).

20 *AT&T Mobility v. Concepcion,* 593 U.S. 333, 339 (2011).

21 Pleadings are limited to a complaint and answer. There is no discovery process. All relevant evidence is admitted. The hearing officer is authorized to assist the complainant with cross-examination and may explain the process to him or her. *OTA*, 8 Cal. 5th at 121-22.

The question for the California Supreme Court was whether this contract was unconscionable. The Court had previously decided that any agreement that eliminated the Berman proceeding was contrary to California law and policy so could not be imposed on employees.[22] This decision was reversed and remanded by the U.S. Supreme Court, relying on *AT&T Mobility LLC Concepcion*.[23] Upon remand, the California Supreme Court concluded that an agreement to arbitrate wage disputes (in lieu of using the Berman process) can be enforceable so long as it provides an accessible and affordable process for resolving these disputes.[24]

Unconscionability in California has a procedural element and a substantive element. "The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided."[25]

Examining the first element, procedural unconscionability, the Court noted that the "circumstances relevant to oppression include, but are not limited to, (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney."[26]

The Court criticized that environment during the signing and the lack of explanation for the "opaque" provisions of the contract. The Court strongly criticized "complex" sentences in the agreement filled with "statutory references and legal jargon." The Court concluded that the "circumstances here demonstrate significant oppression."[27]

Turning to the second element, substantive unconscionability, the Court found that the agreement did not explain how to start an arbitration; the procedure itself was "difficult for an unsophisticated, unrepresented wage claimant to navigate," and imposed potentially significant legal costs on the claimant.[28] The Court found that this element of the test was also met.

Although this decision arises from an employment dispute, the discussion of the fatal weaknesses in the agreement are relevant to anyone drafting or litigating an arbitration agreement. Standout issues include:

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22 *Sonic-Calabasas A. Inc. v. Moreno*, 51 Cal. 4th 659 (2011) ("*Sonic I*").

23 *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011).

24 *Sonic-Calabasas A. Inc. v. Moreno*, 57 Cal. 4th 1109, 1146 (2013) ("*Sonic II*").

25 *OTA*, 8 Cal. 5th at 125 (citing *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*, 55 Cal. 4th 223, 246 (2012)).

26 *Id.* at 126-127 (citing *Grand Prospect Partners L.P. v. Ross Dress for Less, Inc.* 232 Cal. App. 4th 1332, 1348 (2015)).

27 *Id.* at 127.

28 *Id.* at 129-138.

- Make clear how arbitration can be started and who pays for the process;
- Plain English is a must;
    - But if the weaker party's primary language is not English, that factor may be added to the unconscionability analysis although that issue was left open in this case.[29]
- Unexplained references to code sections or cases are not appropriate;
- The weaker party should be given time to review the agreement and that party should have the opportunity to ask questions and receive informed answers; and
- Any waivers of rights should be prominently displayed.

If your responsibilities include arbitration agreements, this is a must-read case.

C. SCOTUS Denies Certiorari for A California Decision Denying Arbitration Based on California Unconscionability Law

Ramos v. Superior Court[30]

While a denial of certiorari is not strong precedent, this is a denial worth knowing about.

Remands of California decisions denying arbitration on various grounds have become commonplace since the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion*.[31] As in *OTO*, noted above, the California response has been to assess arbitration agreements under California law for unconscionability, the argument being that these rules apply to all contracts so are not strictly speaking anti-arbitration.

In this case, a highly paid "income partner" of a national law firm asserted that her arbitration agreement was substantively and procedurally unconscionable under California law. Although the plaintiff was a very sophisticated, highly paid lawyer, the Court of Appeal agreed. Review was denied by the California Supreme Court as was certiorari was subsequently by the U.S. Supreme Court.

This leaves in place the court of appeal decision in this case as well as the California Supreme Court's decision upon which it relied, *Armendariz v. Foundation Health Psychcare Services, Inc.*[32]

Great care is required in interpreting the precedential effect of a denial of certiorari, but the conjunction of denial and seemingly good facts for the defense suggests that the California approach to arbitration may be gaining traction in the U.S. Supreme Court.

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29 *Id.* at 128 n. 8.

30 28 Cal. App. 5th 1042 (2018), *rev. denied*, 2019 Cal. LEXIS 981 (Cal., Feb. 3, 2019), *cert. denied*, *Winston & Strawn LLP v. Ramos*, 2019 U.S. LEXIS 4778, 2019 WL 4921371 (Oct. 7, 2019).

31 563 U.S. 333 (2011).

32 24 Cal. 4th 83 (2000).

If you are responsible for drafting arbitration agreements, the Court of Appeal's analysis is worth a close look. Although the plaintiff presumably understood the arbitration agreement she signed, the court nonetheless easily found that the contract was procedurally and substantively unconscionable.

III. ANTI-SLAPP MOTIONS

A. California Supreme Court Issues Three Opinions Limiting SLAPP Practice

Rand Resources, LLC v. City of Carson[33]

FilmOn.com Inc. v. DoubleVerify Inc.[34]

Wilson v. Cable News Network, Inc.[35]

California provides powerful tools to address strategic lawsuits against public participation (SLAPP).[36] The paradigm case is one in which a citizen opposes the construction of a power plant and is then subjected to expensive litigation designed to eliminate this opposition. To address situations like this, the law provides a form of immediate summary judgement that freezes all discovery. If the SLAPP motion is denied, the movant can seek immediate appeal, during which time discovery remains stayed. Anti-SLAPP motions have become a powerful tool in California courts. In 2019, the California Supreme Court has provided important, new guidance on the scope of the Act.

In *Rand Resources,* plaintiffs alleged that they had an exclusive contract with the City of Carson to negotiate with the National Football League to bring an NFL team to a new stadium to be built in that city. Instead, the city sent emails of its own to the NFL to initiate negotiations for an NFL team and a new stadium. Since a communication was involved, the trial court granted anti- SLAPP relief to the city, denying most of plaintiffs' claims.

The Supreme Court concluded otherwise, finding that while a new stadium was of public interest, the anti-SLAPP statute does not "swallow a person's every contract with government, nor does it absorb every commercial dispute that happens to touch on the public interest."[37] The Court concludes that while many of the claims of tortious interference and fraud "involved oral and written exchanges, few of those exchanges were themselves" protected speech, so those statements were not properly subject to anti-SLAPP motions to dismiss.[38]

In *FilmOn.com,* FilmOn distributed entertainment content consisting of "hundreds of television channels, premium movie channels, pay-per-view channels and over

33 6 Cal. 5th 610 (2019).

34 7 Cal. 5th 133 (2019).

35 7 Cal. 5th 871 (2019).

36 Cal. Code Civ. P. § 425.16.

37 *Rand Resources*, 6 Cal. 5th at 630.

38 *Id.*

45,000 video-on-demand titles."[39] FilmOn sued DoubleVerify over confidential reports DoubleVerify prepared for advertisers about the nature of the content on its site. The core of FilmOn's claim was that defendant had improperly tagged some of its content as either "Adult Content" or "Copyright Infringement: Streaming or File Sharing," and that these tags dissuaded advertisers from buying ads on its content.

At issue before the Supreme Court was the scope of a catch-all provision that extended anti-SLAPP protection to statements that are not public statements about a public issue. DoubleVerify argued that its tags were a form of protected speech. Based on the context of its statements, the Supreme Court concluded that DoubleVerify's statements—although about important issues—did not "contribute to the public debate."[40] Therefore, DoubleVerify's tags were not within the catch-all provision of the anti-SLAPP statute.

In *Wilson*, the issue before the Supreme Court was whether, in an employment discrimination or retaliation case, the employer's alleged motive to discriminate or retaliate eliminates any anti-SLAPP protection that might otherwise attach to the employer's practices.[41] Here, a television journalist who was black and Latino alleged that after taking a paternity leave, he was marginalized, discriminated against and fired. His employer defended that his writing had declined and that he had plagiarized content from other sources for an important story.

On the key issue, the Court opines that the defendant in a "discrimination suit must show that the complained-of adverse action, in and of itself, is an act in furtherance of its speech or petitioning rights."[42] The Court goes on to say that "[c]ases that fit that description are the exception, not the rule."

Since the defendant is a major news organization, the Court finds that remand on its anti-SLAPP motion with respect to its plagiarism claim is proper. The Court finds wanting its other anti-SLAPP claims.

Taken together, the Court clarifies the applicability of the anti-SLAPP statute in the less obvious corners of speech and petitioning. This should begin to rein in SLAPP-based claims that only tangentially affect speech rights.

B. Negative Online Reviews Merit SLAPP Protection

Salo v. Lahiji[43]

This case arises from an attorney-client relationship that went bad. The upshot of the soured relationship was a series of negative Yelp reviews about an individual lawyer and his firm. Reviews included statements that the lawyer and firm:

- Used "a law student" to "negotiate with an insurer";

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39 *FilmOn.com,* 7 Cal. 5th at 141.

40 *Id.* at 153.

41 *Wilson,* 7 Cal. 5th at 883.

42 *Id.* at 890.

43 40 Cal. App. 5th 882 (2019).

- Were "Underhanded and shady";
- Were "unprofessional and unethical";
- Used "scare tactics"; and
- Had an "awful moral compass."

The court concluded that these statements were protected activity within the meaning of the SLAPP statute.[44] This shifted the burden to defendant to show that it was likely to prevail.

IV. CLASS ACTIONS

A. SCOTUS Precludes Use of General Removal Statute or CAFA Removal Provision by Defendants Named in Counterclaim

Home Depot USA Inc. v. Jackson[45]

Lender filed a state court action against an individual consumer to recover credit card debt arising from the purchase of a home water treatment system. The consumer filed a counterclaim and third-party class action claims against the manufacturer and the retailer. The issue before the Court were whether Home Depot, a third-party to the original action, could remove the lender's state court action to federal court under either (i) the general removal statute[46] or (ii) the removal provision of the Class Action Fairness Act.[47]

Citing Scalia and Garner's book *Reading Law,* Justice Thomas concludes for the majority that neither statute applies.[48] With respect to the removal statute, he concludes that the general removal statute

> . . . does not permit removal based on counterclaims at all, as a counterclaim is irrelevant to whether the district court had "original jurisdiction" over the civil action. And because the "civil action . . . of which the district cour[t]" must have "is the action as defined by the plaintiff's complaint, "the defendant" to that action is the defendant to that complaint, not a party named in a counterclaim.[49]

The majority summarily concludes that CAFA removal is likewise unavailable, with the Court concluding that "any defendant" in CAFA refers to the defendant or defendants in the original complaint, not any defendants added in a counterclaim.[50]

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44 *Id.* at 884.

45 __ U.S. __, 139 S. Ct. 1743 (2019).

46 28 U.S.C. § 1441.

47 28 U.S.C. § 1453(b).

48 *Home Depot,* 139 S. Ct. at 1748 (citing A. Scalia and B. Garner, *Reading Law* 167 (2012)).

49 *Id.* at 1748.

50 *Id.* at 1750.

These conclusions draw a sharp dissent from Justice Alito, writing for himself, Chief Justice Roberts and Justices Gorsuch and Kavanaugh. They argue that the statutes should be understood to include counter-claim defendants based on the intent and broad policy foundations for each statute. They also criticize the majority for validating a "tactic" used by plaintiffs to avoid CAFA.

At one level, this is an odd opinion. Thomas, a leading conservative, uses textual analysis to reach a conclusion endorsed by his liberal colleagues but blasted by his usual allies. At another, this decision puts important limits on removal so it should at least be front of mind when you deal with removal issues. For plaintiffs, the dissent may be right. If this provides a roadmap for sidestepping CAFA, this may turn out to be an extremely important decision.

B. SCOTUS Denies Equitable Tolling for Appeal of Denial of Class Certification

Nutraceutical Corp. v. Lambert[51]

This appeal arose from a class action filed for alleged improprieties in the marketing of a dietary supplement. The trial court had initially certified the requested class but revisited its decision and decertified the class. Fed. R. Civ. P. 23(f) provides that the plaintiff has 14 days within which to ask for Court of Appeals, here the 9th Circuit, for permission to appeal a denial order. Plaintiff ignored this provision. Instead, he filed a motion for reconsideration. Plaintiff's motion for reconsideration and the trial court's decision on this motion occurred well after the 14-day period had run.

The issue before the Court was whether the equitable tolling doctrine applied to plaintiff's delayed filing with the Circuit Court. Writing for a unanimous court, Justice Sotomayor opined that "whether a rule precludes equitable tolling turns not on its jurisdictional character but rather whether the text of the rule leaves room for such flexibility."[52] After reviewing the text of Rule 23(f), the cross references to the rule in the Federal Rules of Appellate Procedure and various circuit cases, she concludes for a unanimous Court that "Rule 23(f) is not amenable to equitable tolling."[53]

C. *En Banc* Ninth Circuit Decision Reinvigorates National Class Actions Based on State Law

In re Hyundai and Kia Fuel Economy Litigation[54]

Readers of this decision may experience whiplash. A decision by a 3-judge panel in 2018 arguably killed multi-state, national class actions in the 9th Circuit.[55] This *en banc* decision, by contrast, reinvigorates multistate, national class actions by, among other

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51 __ U.S. __, 139 S. Ct. 710 (2019).

52 *Id.* at 714.

53 *Id.* at 715.

54 926 F.3d 539 (9th Cir. 2019).

55 *In re Hyundai and Kia Fuel Economy Litig.,* 881 F.3d 679 (9th Cir. 2018).

things, imposing on objectors (rather than settlors) the burden of showing that the law of non-forum states materially differs from the law of California.

Because there are few *en banc* 9th Circuit decisions on class actions, this is also a good reference case on recurring issues, including predominance, sufficiency of class notice, appropriate claims processing and attorney fees based on use of a lodestar.

The case arose from misstatements of fuel economy by the manufacturer of Hyundai and Kia automobiles. Higher-than-actual estimates of fuel economy were included in federal Monroney stickers as well as in national ads.[56] Over 50 cases were consolidated under the MDL process and settled.

A key premise of the *en banc* panel was that this was a settlement class, not a litigation class so manageability was less of an issue. Against this background, the 9th Circuit concluded that:

- California law imposes on objectors the burden of demonstrating that non-forum law is materially different than the law of California.[57] The 9th Circuit concluded that no objector argued that differences among the consumer protection laws of the 50 states precluded certification of a settlement class. "Consequently, neither the district court nor class counsel were obligated to address choice-of-law issues beyond those raised by the objectors."[58]

- Notice to the class was proper. Noting that Rule 23(e)(1) requires that notices of a settlement "present information about a proposed settlement neutrally, simply and understandably."[59] The notices here met this standard.

- Requiring claims forms that allowed for verification that the claimant is the current owner, former owner, or current or former lessee of a qualifying vehicle was proper, even if claims were made for only 21% of potential claimants.[60]

- Use of a lodestar to determine fees supplemented by a modest multiplier was proper, and high fees did not support the assertion that the settlement was collusive.[61]

Circuit Judge Ikuta, who wrote the opinion in the 3-judge panel decision, dissented. She was joined in whole or in part by three other Circuit Judges.[62] The dissent largely repeats the earlier 3-judge panel decision.

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56 *In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d at 560.

57 *Id.* at 561 (citing *Wash. Mut. Bank, FA v. Superior Court,* 24 Cal. 4th 906 (2001)).

58 *Id.* at 562.

59 *Id.* at 567 (citation omitted).

60 *Id.* at 568.

61 *Id.* at 570-572.

62 *Id.* at 572-582.

D. California Supreme Court Clarifies Ascertainability Standard

Noel v. Thrifty Payless, Inc.[63]

This appeal was triggered by denial of class certification for a putative class of purchasers of blow-up pools for alleged misrepresentation of the size of the product. At issue in the appeal was whether plaintiff had shown the existence of an ascertainable class.

Defendant argued that plaintiff "bore the burden of introducing evidence in connection with his certification motion that would show how members of the putative class could be identified later in the proceeding, so they could be provided notice of the pending action."[64] Defendant grounded its argument on a line of cases that required this "more demanding standard," exemplified by *Sotelo v. Medianews Group, Inc.*[65] Plaintiff argued that there were numerous ways notice could be provided, and that it had "no obligation" to provide such information at the certification stage of the litigation. Plaintiff relied on another line of California cases exemplified by *Estrada v. FedEx Ground Package System, Inc.*[66]

Chief Justice Cantil-Sakauye wrote the opinion for a unanimous court to eliminate the conflict between these two lines of cases. Noting that California's standards for ascertainability had not been particularly "pellucid," the Chief Justice returned to the court's earliest jurisprudence on class actions, citing *Daar v. Yellow Cab Co.*[67] for the proposition that "the requirement that a plaintiff show an ascertainable class does not subsume a 'necessity of identifying the individual members of such class as a prerequisite to a class suit.'" She then carefully reviews both state and federal precedent on ascertainability, citing with approval the Seventh Circuit's decision in *Mullins v. Direct Digital, LLC.*[68]

The Court concludes that a class is "ascertainable" within the meaning of California law "when it is defined 'in terms of objective characteristics and common transactional facts' that make the 'ultimate identification of class members possible when that identification becomes necessary.'"[69] No demonstration of ability to contact individual class members individually is required at the certification stage, given that "the circumstances of each case determine what forms of notice will adequately address due process concerns."[70]

This resolves the conflict among California courts on ascertainability. However, the Court leaves open the possibility that inability to contact class members may affect

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63 7 Cal. 5th 955 (2019).

64 *Id.* at 964.

65 *Id.* at 965 (citing *Medianews*, 207 Cal. App. 4th 639 (2012)).

66 154 Cal. App. 4th 1 (2007).

67 *Noel,* 7 Cal. 5th at 972 (citing *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 706 (1967)).

68 *Id.* at 976 (citing *Mullins v. Direct Digital LLC*, 795 F.3d 654 (7th Cir. 2017)).

69 *Id.* at 979 (referencing *Mullins* and quoting *Hicks v. Kaufman & Broad Corp.*, 89 Cal. App. 4th 908, 915 (2001)).

70 *Id.* at 982.

what must be shown under "*another* requirement for a proper class proceeding," notably manageability.[71]

If you handle class actions in state court, this is an important decision to review.

E. Opiates Trial Court Approves Negotiation Class

County of Summit, Ohio v. Purdue Pharma L.P. (In re Nat'l Prescription Opiate Litig.)[72]

Judge Polster of the Northern District of Ohio has over 2000 federal opioid cases before him. He has expressed his view that a settlement of these cases is "especially important as it would expedite relief to communities so they can better address the devastating national health crisis" represented by opioids.[73]

At the suggestion of counsel and the special master handling these cases, the court has certified a "negotiation class" to manage negotiations of a possible global or near-global settlement. This process has five stages:

- *Allocation and Voting:* Class members first develop a plan to allocate any lump sum settlement among the classes and a plan for voting on the reasonableness of any lump sum payment if one is achieved.
- *Class Certification:* With the allocation and voting plans in place, the plaintiffs move for certification of the negotiation class.
- *Notice and Opt-Out Period:* If the Court approves the motion, class members are given an opportunity to opt out, presumptively within 60 days.
- *Lump Sum Settlement Negotiation:* After the size of the class is determined, negotiations may begin with defendants.
- *Judicial Approval, Including Class Vote*: The last step in the process is review and approval by the trial court. As part of this process, class members can vote to accept the proposed deal.[74]

The trial judge makes a compelling argument that this is the best way to proceed with these complex cases and a path forward that is consistent with Rule 23.[75]

This is a fascinating effort to use Rule 23 to solve real problems in a creative way. This kind of solution may not make sense in your cases, but it certainly suggests what may be possible at the boundaries of Rule 23.

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71 *Id.* at 986.

72 2019 U.S. Dist. LEXIS 155118 (N.D. Oh., Sept. 11, 2019).

73 *Id.* at *60-*61.

74 *Id.* at *66-*69.

75 *Id.* at *69-*115.

V. DISCOVERY

A. SCOTUS Protects Confidential Commercial Information from Disclosure Under FOIA

Food Marketing Institute v. Argus Leader Media[76]

The Argus Leader, a South Dakota newspaper, requested data maintained by the U.S. Department of Agriculture under the Freedom of Information Act. It sought store-level details about the Supplemental Nutrition Assistance Program (a.k.a. the food stamp program). Unsatisfied with what it got from U.S.D.A., the Argus Leader sued the agency. At issue was the scope of the exemption from disclosure of "commercial or financial information obtained from a person and privileged or confidential."[77]

At trial, USDA argued that the information was commercially important, kept confidential by the stores, and that its release would give advantages to competing grocery stores. Nonetheless, relying on circuit precedent requiring a demonstration of competitive harm from release of commercial information before the exemption applied, the trial court ordered production of the detailed, store level information requested by the Leader. This was affirmed by the Eighth Circuit.[78]

Justice Gorsuch, writing for the majority, rejected this analysis. Criticizing the statutory analysis contained in the leading case supporting the competitive harm test, *Nat'l Parks and Conservation Assn. v. Morton,*[79] as "a relic from a 'bygone era of statutory construction,'" the Court rejected the substantial competitive harm test and found that the requested store-level information fell within the exception because the data was (i) normally kept confidential by the stores and (ii) the government had promised to keep the information confidential.[80]

This decision is something of a two-edged sword. On the one hand, this is very good news for businesses that provide confidential business information to the government. On the other, this will throttle what has become a cottage industry of FOIA requests for business information.

One hanging issue is whether the discussion of the government's promise that store-level information would be protected is dicta or not. If dicta, a promise from the government to protect specific kinds of submissions would not be necessary to protect otherwise confidential business information. This reading appears to be consistent with the language and history of this exemption. However, if not dicta, this language may limit the utility of this decision for companies that supply confidential information to government agencies.

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76 __ U.S. __, 139 S. Ct. 2356 (2019).

77 5 U.S.C. § 552(b)(4).

78 *Argus Leader Media v. USDA*, 889 F.3d 914, 915 (8th Cir. 2018).

79 498 F.2d 765 (D.C. Cir. 1974).

80 *Argus Leader Media v. USDA,* 139 S. Ct. at 2263.

VI. SETTLEMENT

A. Attorney's Notation of Approval as to Form and Content Does Not Foreclose Conclusion That Attorney Bound by Confidentiality Provisions of Settlement

Monster Energy Co. v. Schechter[81]

This appeal arose from the settlement of a products liability and wrongful death action arising from the death of a 14-year old girl. The settlement agreement required that the terms of the agreement be kept confidential by the parties and their attorney, Schechter. The parties signed the agreement as parties and the attorney signed the agreement under the notation "Approved as to form and content."

Subsequently, the attorney discussed the settlement with a reporter for LawyersandSettlements.com. Monster sued for breach of contract. The attorney defended, arguing that his role was limited to reviewing the agreement for form and content only. The Court of Appeal agreed with the attorney, concluding that the signature of the attorney under this heading did not bind him to the terms of the agreement.[82]

The California Supreme Court found to the contrary. The Court reviewed the terms of the settlement agreement, noting that the agreement repeatedly referenced counsel as covered by the confidentiality provisions of the settlement. Against this background, the Court opined that "an attorney's signature on document with a notation that it is approved as to form an content does not, as a matter of law, preclude a factual finding that the attorney intended to be bound by the document's terms."[83]

This seems like a just result under the circumstances. But it also cautions us all about the potential implications of signing a document as to form and content.

B. Court of Appeal Provides Tutorial on Settlements

Red & White Distribution, LLC v. Osteroid Enterprises, LLC[84]

This is explicitly a teaching case, with the appellate court noting: "We publish to remind practitioners whose clients settle a dispute involving payments over time how to incentivize prompt payment properly, and what may happen if done incorrectly."[85]

At issue in this appeal was whether a payment provided for in a settlement agreement included an unlawful liquidated damage clause. Under Cal. Civ. Code § 1671(b), parties can include a liquidated damages clause in an agreement unless it "bears no relationship to the range of actual damages that the parties could have anticipated from a breach."[86]

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81 7 Cal. 5th 781 (2019).

82 *Monster Energy Co. v. Schechter*, 26 Cal. App. 5th 54 (2018).

83 *Monster Energy*, 7 Cal. 5th *at* 794.

84 38 Cal. App. 5th 582 (2019).

85 *Id.* at 584.

86 *Id.* at 582 (citing *Ridgley v. Topa Thrift & Loan Assn.*, 17 Cal. 4th 970, 977 (1998)).

The court found that over $700,000 of a payment was an unlawful "penalty," not a valid liquidated damages amount. This extra sum was apparently included in the event of default to incent the borrower to pay its debt. The court suggests the way to do this successfully is for "the parties to stipulate that the debt is a certain number, [but] agree that it may be discharged for that number minus a specified amount. They may also agree that in the event the debtor does not timely make the agreed payments, a stipulated judgement may be entered for the full amount."[87]

This strategy avoids problems with unlawful penalties while creating a strong incentive for the debtor to promptly pay its debt.

VII. CRIMINAL LAW

A. SCOTUS Reaffirms Dual-Sovereignty Doctrine

Gamble v. United States[88]

An ordinary traffic stop triggers a torrent of scholarly analysis of the meaning of the 5th Amendment.

Mr. Gamble's car was stopped by a police officer in Mobile, Alabama because of a broken headlight. Smelling marijuana, the officer searched Gamble's car and found a loaded 9-mm handgun. Gamble had previously been convicted of second-degree robbery, so his possession of a firearm was a violation of Alabama law. After Gamble pleaded guilty to state crimes, he was prosecuted by federal authorities under federal law relying on the same facts used by state prosecutors.

Mr. Gamble asserted that the two prosecutions violated the Double Jeopardy Clause contained in the 5th Amendment. Justice Alito, writing for the majority, analyzed authorities from before and after adoption of the 5th Amendment—including a decision of the English Court of Chivalry cited by appellant—and reaffirmed the so called dual-sovereignty doctrine.

Despite pages of analysis of very old precedent, the conclusion was straightforward. The double jeopardy language in the 5th Amendment states that individual defendants are protected from being twice put in jeopardy "for the same offense."

What may be an "offense" within the meaning of the 5th Amendment is the question presented by this appeal. Based on 170 years of precedent, Justice Alito concludes for the majority that:[89]

> We have long held that a crime under one sovereign's laws is not "the same offense" as a crime under the laws of another sovereign. Under this "dual-sovereignty" doctrine, a State may prosecute a defendant under state law even if the Federal Government has prosecuted him for the same conduct under a federal statute.

87 *Id.* at 589.

88 __ U.S. __, 139 S. Ct. 1960 (2019).

89 *Id.* at 1963.

This decision got some press at the time it was issued because it meant that a presidential pardon for a federal crime will not preclude prosecutions under state law.

For us, however, this decision is more basic. It reaffirms California's ability to prosecute price fixing and other violations under its own law even if a defendant has been prosecuted for the same transactions under federal law. This analysis also supports California's authority to provide remedies to indirect purchasers of price-fixed products even if damages under federal law are limited to direct purchasers.

B. Antitrust Division Allows Consideration of Compliance Programs at Charging and Sentencing

Prior to July 2019, the Antitrust Division had eschewed consideration of corporate compliance programs at the charging stage of criminal cases. Although other components of the Justice Department considered such programs among a host of other factors at charging, the Antitrust Division provided that "credit should not be given at the charging stage for a compliance program." This language has now been eliminated.

New guidance describes nine key elements of an effective compliance program.[90] This guidance also provides analysis of how compliance programs should be assessed by Division prosecutors at both charging and sentencing. When a compliance program fails to deter conduct, prosecutors need to determine "whether the Guidelines' presumption that a compliance program is not effective and, if it does, whether the presumption can be rebutted under U.S.S.G. § 8C2(f)(3)(C)(i)-(iv)."[91]

This change was made to augment incentives for effective compliance programs.[92] However, at both charging and sentencing, the Justice Manual makes clear that compliance programs are only one of several factors to be considered by prosecutors."[93]

VIII. PATENT LAW DEVELOPMENTS

A. SCOTUS and Federal Circuit Clarify Status of Public Agencies in PTAB Proceedings

Return Mail Inc. v. United States Postal Service[94]

Regents of the University of Minnesota v. LSI Corp.[95]

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90 U.S. Department of Justice, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, July 2019, *available at* https://www.justice.gov/criminal-fraud/page/file/937501/download

91 *Id.* at 15.

92 Makan Delrahim, "Winds of Change: A New Model for Incentivizing Antitrust Compliance Programs," July 11, 2019, *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0.

93 Justice Manual, § 9-28.300.

94 __ U.S. __, 139 S. Ct. 1853 (2019).

95 926 F.3d 1327 (Fed. Cir. 2019).

In *Return Mail*, the U.S. Postal Service sought to challenge a patent for a technology to process undeliverable mail under the covered-business review process authorized by the Leahy-Smith America Invents Act of 2011.[96] Citing a presumption against including a government agency in the term "person," the Court concluded that the USPS was not a "person" within the meaning of the Act, so could not challenge the disputed patent in this process although it could defend itself in any infringement action. The opinion was written by Justice Sotomayor, who was joined by Chief Justice and Justices Thomas, Alito, Gorsuch, and Kavanaugh. A dissent was filed by Justice Breyer who was joined by Justices Ginsburg and Kagan.

In *University of Minnesota*, the university had sued alleged infringers of some of its patents in U.S. District Court. The putative infringers filed petitions for *inter partes* review before the Patent Trial and Appeal Board. The university challenged the PTAB petitions based on sovereign immunity. The Federal Circuit concluded that the defense was not applicable citing an earlier decision involving a Native American tribe.[97]

IX. NEW RULES

A. Federal Developments

The federal rules of procedure are generated by a process under which proposals from the Federal Judicial Center are forwarded to the U.S. Supreme Court, which can disapprove or modify the proposed rules. The Court, in turn, forwards newly proposed rules to the Congress, which can amend or disapprove new rules on or before December 1, 2019.[98] The rule changes described here are before Congress. Ordinarily Congress does not modify rules approved by the Supreme Court.

1. Federal Rules of Appellate Procedure

Amendments are pending for Rules 3, 5, 13, 25, 26.1, 28, 32 and 39.

Rule 3 is modified to make clear that notices of appeal may, under specified circumstances delineated in other rules, be served electronically.

Rule 5 is adjusted to eliminate a requirement for a proof of service. This is eliminated as unnecessary when service is made through the court's electronic filing system.

Rule 13, relating to appeals from the Tax Court, is adjusted to reflect electronic filing.

Rule 21, with respect to writs of mandamus and other writs, is amended to eliminate a requirement for proofs of service. This is rendered unnecessary by electronic filing.

Rule 25, relating to filing and service, is modified to lay out requirements of proof of service, if a paper "was served other than through the court's electronic filing system."

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96 15 U.S.C. §§ 100 *et seq*.

97 *Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals, Inc.*, 896 F.3d 1322 (Fed. Cir. 2018), *cert. denied*, __U.S.__, 139 S.Ct. 1547 (2019).

98 *See* https://www.uscourts.gov/rules-policies/archives/packages-submitted/us-supreme-court-rules-package-2018.

Rule 26, allowing extra time for certain kinds of service, receives clarifying amendments which are not substantive.

Rule 26.1, concerning disclosures, is expanded. Rule 26.1(a) now provides that "Nongovernmental corporations" are required to identify "any parent corporation and any publicly held corporation that owns 10% or more of its stock." This requirement also applies to nongovernmental corporations that seek "to intervene." Unless the government shows good cause, Rule 26.1(b) provides that it must file a statement that identifies "any organizational victim of the alleged criminal activity." If the organizational victim is a corporation, the additional requirements of Rule 26.1(a) apply "to the extent [such information] can be obtained through reasonable diligence."

These updated disclosure requirements are designed to help judges decide whether they must recuse themselves. This is probably the most important change in the Appellate rules and should be reviewed for all cases.

Rule 28, concerning briefs, is modified to conform with amendments to Rule 26.1.

Rule 39, concerning bills of costs, is adjusted to eliminate the requirement for a proof of service when papers are filed electronically.

2. Federal Rules of Bankruptcy

Amendments are pending for Rules 4001, 6007, 9036 and 9037.

Rule 4001, containing extensive regulation of when a bankrupt can seek credit, is modified to exclude simpler Chapter 13 bankruptcies. The rationale for this change is that the prior rule was designed to address complex post-petition financing issues particular to debtor Chapter 11 cases.

Rule 6007, concerning abandonment or disposal of property, is modified to specify the parties to be served with a motion to compel the trustee to abandon a property.

Rule 9036, relating to notice, is amended to permit both notice and service by electronic means. However, service is "not effective if the filer or sender receives notice that it did not reach the person to be served."

Rule 9037, relating to privacy protection for filings previously made in court, clarifies the rule in two major ways: (1) a motion can cover more than one document, and (2) the filer of the motion may be, but is not limited to, the filer. Amendments specify what the filer must supply the court in terms of redactions.

3. Federal Rules of Civil Procedure

Surprisingly, there are no changes proposed for the Rules of Civil Procedure, although significant changes Fed. R. Civ. P. 30(b)(6) are expected for December 2020.[99]

99 *See* https://www.uscourts.gov/rules-policies/archives/preliminary-draft/preliminary-draft-proposed-amendments-2018.

4. Federal Rules of Criminal Procedure

Rule 16.1 requires an early conference between that attorney for the government and counsel for the defendant. This conference is to take place "[n]o later that 14 days after arraignment." The rationale for this amendment is the volume and complexity of modern criminal discovery, particularly discovery of electronically stored information. After the discovery conference, new Rule 16.1(b) provides that "one or both parties may ask the court to determine or modify the time, place, manner or other aspects of disclosure to facilitate preparation for trial." This is certainly the most important change in the Rules of Criminal Procedure this year.

Rule 5(e) is amended to make clear that a petitioner may file a reply to the respondent's answer or other pleading" and that "[t]he judge must set the time to file unless the time is already set by local rule." These changes overrule a line of cases that made replies optional.

5. Federal Rules of Evidence

Perhaps the most interesting change overall is a significant modification in Rule 807, the residual exception to the hearsay rule. In its prior version, the rule provided for potential admission of a hearsay statement or document had "equivalent circumstantial" indicia of reliability as exceptions in Rules 803 and 804. This older formulation was criticized because existing exceptions have dramatically different support for their reliability. This made application of the old rule difficult and uneven. The equivalence standard is eliminated by this amendment.

The amendment authorizes admission if (1) "the statement is supported by sufficient guarantees of trustworthiness-after considering the totality of circumstances under which it was made and evidence, if any corroborating the statement;" and (2) the hearsay statement "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Although the court should consider corroborating evidence, if available, such evidence is not required for admission.

Notice to the opposing party is required. Specifically:

- Notice must be of the "substance" of the statement;
- A prior requirement that the declarant's address be disclosed has been eliminated;
- The pretrial notice must be in writing; and
- A good cause exception may allow admission of a hearsay statement even if a pretrial notice is not provided under specific circumstances.

B. State Developments

1. Court Rules

The latest amendments to the California Rules of Court can be found at: https://www.courts.ca.gov/3025.htm. There appear to be no amendments that are particularly pertinent to members of the section.

2. California Legislature

This year saw several significant legislative changes in civil practice in California. All changes become effective on January 1, 2020.

- **CCP § 340.6 and Bus. & Prof. Code § 6206:** Section 340.6 of the Code of Civil Procedure is amended to toll the time required to seek judicial review from an arbitration decision during the time a dispute over fees or costs is pending between the lawyer and client. Cal. Bus. & Prof. Code § 6206 is amended to allow commencement of arbitration upon request by a client, following commencement of an action in any court.

- **CCP § 695.215:** This legislation amends Cal. Code Civ. P. § 695.215 to provide that payment of a money judgment "does not constitute a waiver of the right to appeal, except to the extent that the payment is a product of a compromise or is coupled with an agreement not to appeal."

- **CCP § 1011:** This section is amended to provide extra time during which service is allowed. Service can be made at an attorney's office from 9:00 a.m. to 5:00 p.m. Service at a party's home is allowed from 8:00 am to 8:00 p.m.

- **CCP §§ 2030.210 and 2033.210:** These sections are amended to require provision of electronic versions of demands for discovery and responses, interrogatories and responses, requests for admissions and responses to the opposite party within three days of a request.

- **CCP §§ 2030.300, 2031.310 and 2033.290:** These sections are amended to authorize elimination of the separate statement requirement. Instead, courts may now *permit* parties to submit a "concise outline of the discovery request and each response in dispute" for motions to compel further responses for (1) demands for inspection; (2) interrogatories and (3) requests for admission. Note that Cal. Rules of Ct. 3.1345 lays out what is required if you choose not to ask a court to waive the separate statement requirement.

- **CCP § 2031.280:** Current law provides that discovery documents may be produced in the order they are kept. An amendment to Cal. Code Civ. P. § 2031.280 eliminates this option and requires production keyed to the specific request number to which the documents respond.

IN RE: KOREAN RAMEN ANTITRUST LITIGATION: A PANEL DISCUSSION WITH TRIAL COUNSEL

By Jill M. Manning[1]

This antitrust class action alleged a price-fixing conspiracy in Korea that raised the price of ramen noodles manufactured and sold in Korea. Plaintiffs, direct purchasers and indirect purchasers, alleged that the elevated prices in Korea had an impact on the prices of ramen noodles sold in the United States. Judge William H. Orrick certified the classes and denied summary judgment, stating, "there is ample, although hotly disputed, evidence of a conspiracy by the defendants to fix the price of Korean ramen in Korea that was fraudulently concealed from consumers."

After a five-week trial, a jury returned a verdict in favor of the defendants, answering only the first question on the verdict form: "Did Plaintiffs prove there was a conspiracy to fix the prices of Korean ramen noodles? No." How did the case progress from a court stating that there was ample evidence of conspiracy to a jury finding *no* conspiracy? From the reversal of fines levied by the Korean Fair Trade Commission to the exclusion of testimony from the plaintiffs' key witness, this case involved unique issues, twists and turns, and a few lighthearted moments. You will have to continue reading to find out more.

The Panelists

- **Christopher L. Lebsock** was trial counsel for the direct-purchaser plaintiffs in the *Korean Ramen* litigation. Mr. Lebsock is a partner in the San Francisco office of Hausfeld LLP and a member of the firm's antitrust and financial services group. He represents consumers and businesses in complex legal disputes in a variety of jurisdictions across the globe. He regularly consults with clients, trade associations, and law firms about competition issues and legal strategies that span international borders. Mr. Lebsock has briefed and/or argued matters in numerous courts across the United States, including in the California Courts of Appeal, the California Supreme Court, the Second, Ninth, and Eleventh Circuits, and the United States Supreme Court.

- **Rachel S. Brass** was trial counsel for defendants Ottogi Co., Ltd. and Ottogi America, Inc. in the *Korean Ramen* litigation. Ms. Brass is a partner of Gibson Dunn & Crutcher LLP's Litigation Department where her practice focuses on investigations and litigation in the antitrust, labor, and employment areas. Ms. Brass has extensive experience representing international and domestic clients in high-stakes appellate litigation in the Supreme Court, as well as Federal and State appellate courts throughout the United States. Her antitrust and competition experience includes international cartel matters, mergers and acquisitions, grand jury investigations, and other antitrust investigations by governmental entities

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in the United States and around the world, as well as litigation in trial and appellate courts.

- **Mark Dosker** was trial counsel for defendants Nongshim Co., Ltd. and Nongshim America, Inc. in the *Korean Ramen* litigation. Mr. Dosker is a partner in the San Francisco office of Squire Patton Boggs LLP. He has represented clients since 1984 in solving complex disputes in class action litigation nationwide and in international arbitration. Mr. Dosker has successfully handled a wide range of cases involving antitrust law, banking law, business practices and transactions, consumer products, insurance coverage, intellectual property, security law technology, wage and hour, and other business issues. Mr. Dosker is also an international arbitrator who has served in a variety of cases with parties from the United States, Asia, Europe, and Latin America, on three-member panels (both as Chair and Co-Arbitrator), and as sole Arbitrator and as Emergency Arbitrator.

Case Background

MS. MANNING: We're going to jump right into the case. I'm just going to give you a little bit of background on the case before we start with questions. This was an antitrust case consolidated in the Northern District of California. The direct purchaser plaintiffs and indirect purchaser plaintiffs alleged a price-fixing conspiracy in Korea that raised the price of ramen noodles manufactured and sold in Korea. Plaintiffs alleged that the elevated prices in Korea had an impact on the prices in the United States. The case originated from an investigation by the Korean Fair Trade Commission. The KFTC ruled that Korean ramen manufacturers had conspired to fix prices and succeeded in raising prices to super competitive levels from 2001 through January 2010 and imposed fines totaling 125 million.

However, the Supreme Court of Korea overturned the KFTC's ruling, finding that the pricing patterns, pointed to as evidence of the price-fixing conspiracy, were actually explained by the structure of the market and the government's price controls, and it ordered all of the fines to be repaid.

Then, we have the federal litigation. Judge Orrick certified classes of direct and indirect purchasers. He denied the defendants' motion to decertify the IPP class and denied summary judgment. In his order denying summary judgment, he stated, "there is ample, although hotly disputed, evidence of a conspiracy by the defendants to fix the price of Korean ramen in Korea that was fraudulently concealed from consumers."

The indirect and direct purchaser cases were tried together before a single jury. The two defendants were Korean-based companies Nongshim and Ottogi and their subsidiaries supplying ramen noodle to the U.S. market. Most of the witnesses in the trial were located in Korea and beyond the Court's subpoena power. After a five-week trial, a jury ruled in favor of the defense, after three hours of deliberation, finding that plaintiffs had failed to prove a conspiracy to fix the prices of ramen noodles.

So how did the case progress from a Court stating that there was ample evidence of conspiracy to a jury finding no conspiracy? Let's find out.

Chris, this was a rare trial of an antitrust class action. Knowing that antitrust cases rarely proceed to trial, how did that affect your strategy in the case?

Parties' Trial Strategies

MR. LEBSOCK: I think it affected our strategy in a few ways, but for purposes of this question, what I want to focus on is *voir dire*. Because we represented wholesalers and distributors and we were trying this case in combination with consumers, indirect purchasers, we felt that we needed to get ahead of this idea that this was a class action. We had businesses who had substantial losses, but we also had consumers in the case who, when you broke down the damages, may have suffered 10 to 15 cents of overcharge on each packet of ramen. So we made a decision that we wanted to talk about the class action process with the jury, get their reaction just right away, writing a jury questionnaire and a *voir dire*, and actually spent quite a bit of time with the jury in the *voir dire* process talking about their views of class actions, and you had the full range of opinions from the venire. You had people who were very pro class action, understood it was a mechanism that was useful in bringing justice to people with small claims, and you had folks on the jury who were very anti class action. And then you had a range of people in the middle who talked about their experience with class action, including, you know, sending in the claims, getting a check for 15 cents or a dollar.

So we explored all that with the jury right away, and I will say, on reflection, I'm not sure from my perspective that it was particularly useful to do it. You certainly put the issue front and center with the jury and then discussed it for quite a long time. It was a point of interest for everybody, but it's sort of hung in the discussion with the panel. And as I reflected back on who we struck: we struck the jurors who were anti class action, but they had other red flags, so I'm not sure that talking about it as extensively as we did was a particularly useful thing.

MS. BRASS: My client is Ottogi. We had an unusual situation representing Ottogi, which is by the time we got to trial, the lead senior associate who had been on the case from day one was still on the team, and everyone else was new. And one of the things that meant what we did for trial is really think about how we constituted the trial team. And my own bias, and I'm sure this is the best audience to say it to, is that antitrust lawyers can be a little precious about their ideas.

And so we very specifically constituted a team where we're the only antitrust lawyer, and we had one of our lead trial lawyers join the team, and the first antitrust case he had ever worked on, learned the case like a juror. And one of the heads of our Supreme Court practice joined the team to make a very aggressive record fight throughout the trial. We had a huge range of novel issues in this trial, from the duplicative recovery questions to *Hartford Fire* questions about conduct that happened exclusively outside the jurisdiction of the U.S. to other questions about things like market definition.

And in parallel, we had someone whose whole job is looking at appellate questions in a new way, not an antitrust specialist, thinking about the law and creative arguments we could press. I think one of the ones that he came up with that caught everyone off guard was a really clever argument about fraudulent concealment and diligence, and one of our arguments at the end of the trial was that none of the plaintiffs had testified to exercising

any diligence, not necessarily the kind of question that antitrust lawyers who are thinking about market definition and prices and regressions focus on, but a huge asset to us in getting a jury instruction that said, "was there evidence of diligence by the plaintiffs for the conduct outside the statute?", which was almost all of the conduct in all of the sales in the case.

The other thing we did was as that team worked up the arguments there were key arguments we did not put in trial briefs, and we did not use in depositions of the plaintiffs' experts because we wanted an element of surprise at trial, and I think that served us very well also.

MR. DOSKER: Good morning. My client was Nongshim, which is considered the market leader in Korea during the class period, more than 70 percent. You may have seen the Nongshim marked double-decker hop-on-hop-off tourist bus going around San Francisco. I will not comment on rumors that it first arrived during the selection of a jury. But as I thought about this question, the real answer to me was both because it's an antitrust case and it's one of the few that's proceeding to trial and because all of the events happened in Korea, and the question was, do they happen really the way it was alleged, and if so, do they affect the U.S. market?

My thought on this question is this. We really had to ensure that we developed plain English and clear understandable themes and advocacy that appealed to the common sense of the regular people who were going to be on the jury. That to us was crucial throughout, and it's easy as you go through hundreds and hundreds of Court filings and five years of litigation and all the precious thoughts of the antitrust specialists, it's easy to forget to go back to square one and make sure that you do that, but for us, that was hugely important, both in the runup and throughout the five-week trial.

MS. MANNING: One very unique aspect of this case, and a reason that makes it very interesting, is that direct purchasers and indirect purchasers tried their claims together before a single jury. Did that affect how the case was tried, and if so, how?

MS. BRASS: Certainly on the defense side, it did. The direct purchasers moved to bifurcate the trial, and we opposed that. Both because we thought it enhanced the possibility of duplicative recovery, and from a factual perspective, because in our view, the direct purchaser and indirect purchaser experts had testified in ways during their depositions that did not reflect complete alignment in their theoretical approach to damages. And we thought that was something we could very much exploit at trial.

Because so much of the testimony was by video or through interpretation, we knew the plaintiffs' experts would be a critical witness in summarizing and retelling the plaintiffs' story. And our goal was to make the jury incredibly skeptical of the reliability of the plaintiffs' experts by really leaning into what we saw as fundamental inconsistencies between their testimony. We also decided early on that any attack on passthrough would not be credible to a consumer jury.

So we made very little attack on the indirect purchaser expert's testimony, and instead planned from the beginning what would be for trial is to use his testimony to attack the methodology of the direct purchaser's experts. And if at the end of the day, the jury were to decide that both of those experts, and even the defendant's expert were unreliable, then

we thought we had a win. Because we thought we had the far better of the percipient witness testimony, and we thought we had the critical common sense argument.

You heard Chris say an overcharge of 15 to 16 cents a package. My client Ottogi has a product that is the most popular, and over the course of the class period to the largest direct purchaser in the class, its product rose in price a penny. And we thought the jury would really struggle to find a 15- to 16-cent overcharge in the penny increase in over a decade in the price of ramen. And if the jury did not care one bit about the wonderful testimony of our expert economist, we thought that was just fine, because the jurors understand pocketbook economics, and we are going to have a real problem with that. So it was just critical to us to have both of the experts in the courtroom at the same time so that we could pivot them against each other, and I thought that worked well for us.

MR. DOSKER: Yeah, the small addition I would make to that is at the end of the cross-examination of the indirect purchaser plaintiffs' expert, Rachel did a lovely job. I should have taken a transcript and excerpted it here, but she did a lovely job of basically showing, well, so the chances that the direct purchaser plaintiffs' conclusions are right is like one in 68 million, based on your math. Because they had different conclusions, not 180 degrees, but lots of millions of dollars and lots of other subordinate points, and so our presentation at some level was they can't both be right. You can't believe either one of them.

MR. LEBSOCK: Well, it's a disputed fact, Rachel, as to whatever your client's product went up by one penny during the class period. But setting that aside, it is true that what Rachel said. I think it had an impact. I don't know what would have happened at the end of the day. I mean, our view of Dr. Cox's testimony, I know he's here, but was that his model was fundamentally flawed, and it was too simplistic. It didn't really account for the realities of this marketplace. But setting that aside, one thing I do agree with is that the defendants did play the card of comparing the experts' analysis.

And I can say that I begged those indirect purchasers to just follow our lead on this. You know, surprisingly, they didn't do it. But at the end of the day what happened here is, the indirects had a much larger overcharge at the direct level. And then they did a passthrough analysis from that. And during trial, they abandoned their overcharge methodology and the direct purchaser level, and then accepted what our expert had done, but of course, the damage had been done at that point because their expert had rendered opinions, and so Rachel and Mark and others were able to successfully point out to the jury that you get two experts on the plaintiffs' side with maybe $50 million difference in their overcharge analysis. At the end of the day, did that matter? We will never know because the jury only answered the first question and answered that no.

MS. MANNING: This was a long, five-week trial. Mark, what strategies do you employ to keep a jury's attention during such a long trial?

MR. DOSKER: Well, to set the table, I would note that not only was it a long trial, five weeks, started just before Thanksgiving. Everybody wants to be in trial at that time. The vast majority of the fact witnesses of things that really mattered were by deposition and were taken in Korea several years earlier, and with interpretation. And even the majority of the live witnesses who did come over, likewise, testified in Korean through

interpretation. So how did we keep their attention? For starters, it's like making a movie or a stage production. You got to choose what are you going to do by video, what are you going to do by live. You have to pick dynamic video clips. You have to overcome the fact that you have depos of people speaking in another language and interpretation. So that means while you're hearing English from the interpreter, the witness is sipping his water or looking away. His lips aren't moving because it's the interpreter off stage whose words are being heard by us in the courtroom. So there is that disconnect to begin with. You know, he's looking at his watch, scratching his head, whatever.

You've got to select carefully what you're going to do by video, what you're going to do live. On video, get some dynamic clips. We liked some of the testimony of some of the lower level people who described the quasi torture and interrogation tactics that the KFTC used to squeeze statements out of them, which a number of us said that's not true. They tried to protest. They tried to print their name instead of signing their name as a symbol of—this is your statement, Mr. Investigator, that's not my statement. And these are very low-level people being, in their view, being crushed by a really serious investigative government agency. Some of those are dynamic.

Always stay on theme. Time your examinations to the theme in plain English and appeal to common sense. And also, I think to help make a long trial bearable, use our whole team. Don't just have one or two people doing examinations. Have the junior-most people. Have the middle-level people. Have everybody do a couple of witnesses. Because then the jury gets to hear different people and different styles and different mannerisms and different generational approaches. That was great.

MS. BRASS: We all—everyone—had associates, young associates, handle witnesses in front of the jury, and every time one of those young people got up, the jury sat up straight, because they were so excited to get to see them do something. It helped everybody.

MR. DOSKER: Right. And, you know, have some of the junior colleagues move to the front of the table. Have some of the senior colleagues pull back during certain witnesses. It all helps. And, finally, I do give big credit to Judge Orrick in addition to running an efficient schedule with an 8:00 a.m. start time, a 1:00 p.m. finish, so people had their afternoons free. In addition to doing that, having appropriate breaks. He watched like a hawk, and if people's eyelids in the jury box began to droop, he would stop the proceedings and ask everyone to stand up just to have a stretch break, not a regularly scheduled break, but stretch your arms and your back and your legs and wake up. And those were the things that, as I thought of this question, I think helped the jury stay quite focused and quite vigilant throughout the trial.

MR. LEBSOCK: I don't have much to add on this, other than to say I think, what was it, six weeks I think we tried the case, and it was at 8:00 a.m. to 1:00 p.m., and I guess a couple things I noticed when we started mid-November and we finished right before Christmas time. The jury was paying attention definitely up to Thanksgiving. And then we took a week's break, and I got to tell you, they came back and there was a definite change in the energy level of those jurors, unfortunately. When you combine that with the fact that we probably could have gotten an extra 50 percent in if we had gone 8:00 a.m. to 4:00 p.m. I felt like it would have been better if we had just had full days, push that jury through. Because after a certain period of time, and especially after that break,

and then you're heading into the holidays, I just didn't think that the jury really wanted to be there, you know, the last few weeks of the trial.

Turning Point During Trial

MS. MANNING: There were a lot of interesting things that happened during the case, but was there a turning point that occurred during the trial, and if so, what was it and when did it occur?

MR. LEBSOCK: To me the big turning point in this case came right before trial, and that is that there was a company called Samyang that also manufactured ramen there. They were the amnesty applicant in Korea. And they came to us early, and we settled with them. And they were going to bring a couple of witnesses. One of the witnesses that we really liked in this case was the president of the company. Her name was Mrs. Kim, and it's sort of an unusual story in that it was her husband's dad's company. She was a very, very sharp lady, and was the president of the company, really running operations. Unfortunately, she was indicted in Korea, and then we got a little delay in the case, six or eight months. And by the time we were ready to go, she was convicted, like within a couple of days of us going to trial.

MS. BRASS: What was she convicted of, Chris?

MR. LEBSOCK: Embezzlement.

MS. BRASS: How much did she embezzle, Chris?

MR. LEBSOCK: I don't know.

MS. BRASS: $80 million. Very clever woman.

MR. LEBSOCK: So the problem with this is, you've got a witness who is going to be impeached, and the judge in all of his wisdom, just excluded her testimony. She was the key link to the origins of the conspiracy and could put the conspiracy at the executive level, and without her, we were left with witnesses who were lower-level people who could talk about information exchange, and we also had her junior, who was a nice enough fellow, but he didn't have her charisma. And, I mean, she seemed like a very honest person. I got to tell you. But, you know, the replacement was far inferior to her testimony. So we entered this case with a handicap, which is that we lost the origin story as to how this thing got started. That it was at a high level. It was the executives that got together and meet, and what we had was lower-level people talking about information exchange, and that was an unfortunate situation for us.

MR. DOSKER: If I may, I would say two things. First, on the four corners of the question, was there a turning point during the trial, if so, what and when, I don't see that as the turning point. I see it, from my perspective, as more of a long inexorable march to a clear conclusion. And with great respect, no disrespect to our colleagues on the plaintiffs' bar, certainly not Chris, you know, there is a case selection here. This leniency applicant took their leniency application to the KFTC and it was rejected as inadequate. It didn't have any story about any specific agreement involved, and so they went back and they did a new leniency application. And only then did this witness say, "Oh, yeah, I remember

double hearsay from a dead man." That was her story, and she was a very smart person, but she's there in that company, not just because she's smart, because it's her family and their money bailed that company out of bankruptcy. And when the dawn raids happened, if they hadn't come up with a story that would stick and last, they would have gone back into bankruptcy.

And more to the point as we learn later, being a leniency applicant, if your application is accepted, which in Korea, investigations of you stop. And the more dawn raids that were happening and the more agents were crawling over those ports, they're going to find her embezzlement. Soon they did. They didn't find her for about ten years, but they found her eventually.

So I viewed no particular turning point in the trial, because in my view, even if she had come to trial and even though the revealing of her embezzlement didn't occur until a couple years after we deposed her, we would have had a field day on cross with her. So I don't think her presence or absence changed the course of trial, but I think it was an interesting basis on which to build a big case.

MS. BRASS: And I'm sort of in the middle. I'm very sympathetic to Chris. That made the trial much harder for the plaintiffs. As Mark said, we were pretty confident in our case regardless, but that helped, and I thought it helped in two ways. One, it just took another live person out of the room. I know Chris thinks right after Thanksgiving is when jurors lost interest, but that's when the defense started putting on its case, and we saw that a little differently. And one of the big reasons is all of sudden there were live witnesses every day in the courtroom. And I thought the jury was really interested in them and paid close attention to their testimony, and when they were hearing not assembled together deposition testimony, but direct examination that told more of a narrative, I think that also was a critical turning point in the slow march Mark describes.

Using Experts in A Jury Trial

MS. MANNING: Rachel, how do you choose and prepare experts differently in a jury trial versus a bench trial?

MS. BRASS: We have experts on roughly three different topics in the trial. We had the economist that we've already talked a little bit about. We had experts on Korean corporate governance and a construct that may or may not exist in Korea. That was due to the fact, called a chaebol, which are certain types of family-owned businesses. And we also, on the defense side, had an expert on alter ego liability. On the defense side, we focused first and foremost, of course, on sound analysis, but really on juror appeal. And when I say that, I mean are they likable people? They are going to be on the bench for a long time. Can they teach? When they teach, can they show what they are saying, not just tell what they are saying? That meant pointing to a lot of specific places in the record, knowing the record incredibly thoroughly.

We spent, in particular, my colleague Joanne Klondock, who I know is somewhere here in the audience, spent a good part of the year working on demonstrative exhibits for the jury on economic issues, both for cross-examination and for direct. And making sure as we picked them that they could turn very complicated economic concepts into kitchen table analogies. Because we knew in a case about food, if you got it to the kitchen table,

that would support our narrative of the story, and that's really what we worked on on the defense side throughout the process. I mean, we had all of the fights on Daubert motions about the ins and outs of the economic analysis.

And I do really want to emphasize the likability point. It was so important to us that all of the experts were the same people, whether I was examining them or Chris was examining them. Because we thought that really mattered to the jury. And I would say that in my view, the expert's ability to do that in the trial was not consistent across the experts.

MR. DOSKER: Persuasively explain complex topics in plain English. To me, that's it, from start to finish. And if they can be likable while they do it, all to the better. But persuasively explain complex topics in plain English. And we'll get to it later, to the makeup of this jury, but that ability was key in my view.

MS. BRASS: I know Chris mentioned Dr. Cox, who is here, and so I couldn't say otherwise, but he was incredibly likable on the stand. When Chris made a hit, and it was correct, he admitted it, and was like, yeah, that is correct. Admitting your faults, being humble. I think modesty in the experts went a long way with the composition of the jury that we had, and that just was not consistent.

MS. MANNING: Since you opened the door for the jury question, why don't we move on to that one. Rachel, describe the makeup of the jury and how that helped or hurt your case. I think we know it helped.

MS. BRASS: Well, we won. So in that way, it helped. Mark had said this. I completely agree. They were exceptionally diverse. We had four people on the jury with graduate degrees, including two with Ph.D's. We also had someone who worked full time at Panda Express. We had someone who had driven for UPS. We had someone who worked at Amazon. We had the head of land use for Marin County. He was juror number one. And we were confident from the point of jury selection, he would be the chair of the jury. He was. And we looked for people in *voir dire*. We did love Chris' questions about the class because they helped us eliminate people, but what we looked for more than anything else was who looked like they were listening during *voir dire*. Because if you didn't listen during a five- to six-week trial, where most of the witnesses were testifying in Korean, we were in real trouble. And I think we got a jury that listened very hard.

MR. DOSKER: Except for the male-female balance, which was a little heavier on one than the other, it was incredibly diverse. Different generations, and quite senior people, some quite junior people. One young person, couldn't quite tell if she was listening a lot or not, for sure. At one point when someone, might have been the judge, was struggling with how to pronounce the name of some particular flavor of ramen, she just shot up and called it out. Like a kid in class, I know the answer. And she did. The jurors behaved that way with each other in ways that were visible to us, and what I took from that, in very different life experiences, in different cultures, ethnicities. I think it helped a lot, because collectively, they understood, I'm convinced, what individually some of them might missed, had missed. And isn't that the very goal of a jury to collectively as the eyes and ears of the community to collectively understand and discern the truths of it. I think

they fulfilled that role beautifully, and I'm convinced it was their diversity, in all respects, that helped them do that.

MR. LEBSOCK: I guess not to repeat, there was one prospective juror that was very familiar with regression modeling. Did it every day as part of his job. And I really liked that guy. I wanted him to be on the jury because one of the concerns that we always have is how to communicate well what these experts are doing when they come up with their overcharges. And I mentioned earlier, we thought that Dr. Cox, who, by the way, was a very nice witness on the stand. He was excellent. But he had a very simplistic model that was measuring what happened before the conspiracies started and then trying to extend that for eight years into the conspiracy period in a market that was rapidly changing, and what it did is it essentially preordained a no overcharge result. And I really wanted that guy on the jury so that we could explain that to somebody who would know exactly what we were talking about and be able to communicate that in a jury room, but the folks to my right struck him.

MS. BRASS: We did all for not for that reason. We thought he would also be troubled by the fact that there were six conspiracy periods within the regression. Because if you just used one, you wouldn't get an overcharge. We thought that was significant, but for other reasons, we struck him.

MR. DOSKER: It had to do with clarity, in my view. Our strike panelists had to do clarity of communication between the expert and the jury. I didn't want to have cross-currents or no-ways or whatever, which I'm hearing perhaps is exactly what Chris was hoping for, but yeah, you know, nice guy, but we were very happy to see him go.

Presenting Evidence to A Jury

MS. MANNING: In the case, plaintiffs relied on both direct and expert evidence to approve a conspiracy, and in his order denying summary judgment, Judge Orrick stated there is ample, although hotly disputed, evidence of a conspiracy by the defendants to fix the price of Korean ramen in Korea. Chris, why do you think the jury reached a different conclusion?

MR. LEBSOCK: Well, Mrs. Kim wasn't there. And, you know, Mark referenced it a little bit earlier, but there was a proceeding and an investigatory proceeding by the KFTC that proceeded this. We disagree about how heavy-handed these investigators were, but the net result of it was that there were these witness statements by a number of witnesses, especially the Samyang folks, who clearly had their lawyers help write these things. So there was some very compelling facts in them, but then they would be summed up with legal words, and, you know, things like the word "conspiracy," and people don't talk like that when they are giving a narrative of what happened. So while there was plenty of evidence to deny summary judgment, the way that that played out actually was difficult for us. We actually tried to deemphasize it a little bit because we were very concerned about the efforts on the defense side to show that these witnesses were basically bullied into testifying in the way that they did.

So I think those are two big reasons. I think the third one is that we had some former Samyang employees that we had to get hate testimony from, and that took a long time, but we were not allowed to examine those witnesses. Korean lawyers had to do that in a

courtroom in Korea, and the lawyers that were involved in doing that examination are not sophisticated antitrust lawyers. They are not even really particularly familiar with cross-examining people because there is no discovery process in Korea like there is in the United States, and the testimony was a mess. So there was plenty that the defense liked and plenty that we liked, but at the end of the day when you're a plaintiff and you have a burden of proof, I'm not sure that that testimony was, at the end of the day, that convincing.

MS. BRASS: Yeah, I mean, there were little things, I think, along the way that where the evidence in front of Judge Orrick was not the same as it was in front of the jury. The most expensive part of this litigation might have been the translation of the documents and the thousands of hours spent on translation disputes. So the translated version of certain things that were in the summary judgment record is not what was in front of the jury during trial. You know, often was the elimination of more inflammatory language in an agreed upon translation dispute resolution process, but I think that helped us quite a bit. I think the although hotly disputed part of this is important, because that's the way summary judgment—you just don't have witnesses placing information into context in the same way that you do in trial. And I think live witnesses putting things into context really helped the defendants.

MR. DOSKER: For many people who came up in American culture, ramen is a convenient quick snack thing that the teenagers might like separately. In Korea, ramen is what saved South Korea from mass starvation after the war. It's a national dish, a national icon, and if you mess with the price of ramen without government approval in advance, there is hell to pay, and there was on the one instance that happened here.

So part of the translation was not just between the two languages, it was between the two cultures. And explaining and helping the jury understand that even when the cost of raw ingredients go up, so you've just got to raise your prices because the wheat, the palm oil, the seafood, everything has gone up. You have to go and informally get government approval in advance, and the one time that my client, who was the market leader, did not do that was in the 2008 financial crisis when commodity prices went through the roof. They didn't feel they had time. There was a new administration in the Korean Blue House. They didn't know who to go to exactly, and so in our view, when we tried to lay it out for the jury, this whole investigation, everything that came was a political payback for not going first to get permission for the price increase.

That kind of translation, that kind of cultural translation, is something that doesn't happen in summary judgment. You can't really do that. So that's, I think, what I would add on to that point.

Impact of Foreign Tribunal's Decision

MS. MANNING: Mark, how did evidence of the Korean Supreme Court's decision and overturned in the KFTC's conspiracy findings and fines affect the outcome of the case?

MR. DOSKER: Not much. And here's why I think that is the right answer. I think it basically put the two sides back on a level playing field. Like, okay, the KFTC found against us, but the Korean Supreme Court overturned that, and the other thing was that Judge Orrick was scrupulous in not letting anybody say much about that. There was a jury

instruction that had been set. You could refer to the jury instruction, but if you strayed past that, you know, heaven help you.

So I don't think they really cared so much for that, and no waiver here, and the trial is over, so there's no appeal, but I'll just note—but, of course, you wouldn't notice—but I would just note that in the mock jury sessions, at one point, when we, you know, raised the Korean Supreme Court, our clients watched through the one-way mirror, two-way mirror while one of the mock panelists said, "oh, Korean Supreme Court, everybody knows they're corrupt." And, wow, what are you going to do with that, right? So I think it just leveled the playing field and it got everybody back to square one, and, okay, let's not obsess over the procedural history of what happened in the Korean court system.

MS. MANNING: I'm guessing Chris might have a different opinion on that.

MR. LEBSOCK: That's ridiculous. To have the court tell the jury that there was this investigation in Korea, that there was a fine imposed, the defendants were allowed to try this case in terms of telling the jury how heavy-handed those investigators were, and then to have the judge say, you know, and that was reversed, what those guys found was wrong. It was devastating, and it was raised many, many times.

Now, it's true that Judge Orrick would remind the jury each time it was raised that they shouldn't use that in their deliberations, but when you hear the fact that that fine was reversed, I think it has an effect.

MS. BRASS: We thought the plaintiffs made a choice here. They chose to use the KFTC witness statements as evidence. And they choose to make a huge deal about what my client did in response to certain questions from the KFTC investigators, you know, accusing us of a massive forgery. I had a witness on the stand for two days. Bonnie cross-examined him for more than two hours about one document he supposedly forged. And what the plaintiffs were proposing is tell the jury you were accused of rape, but don't tell them you were acquitted.

And not surprisingly, Judge Orrick did not think that decision would withstand appeal and gave an instruction and didn't allow us to argue any more broadly about what the KFTC or the Korean Supreme Court had found. But the idea that so much of the evidence at trial should be documents created solely by the KFTC or for the KFTC investigation, but one should not be able to find out that you were not punished as a result of that investigation is outrageous.

MR. LEBSOCK: For a little context, when the KFTC conducted its raids in early June of 2008, we saw email communications between these employees of these companies, up to the end of May 2008. And what ended up happening in our view is that the raids happened. The investigators went to the wrong department when they raided, and so that gave the defendants 30 days before the investigators caught on to what was going on, to delete documents, and in our view, the two defendants that remained did a very thorough document dump and modifying documents. That's what Rachel was talking about. And we were going to show that to the jury that the reason the KFTC was relevant in this case is because the fraud was on the KFTC. Although there was zero evidence that the KFTC ever caught on to what had happened to them as a result of this document dump and this alteration of these documents.

MR. DOSKER: One of the subsidiary issues which Chris now brings up that we had to explain to people is, again, on a cross-cultural translation, the amount of storage capacity in people's systems at that time. Twelve to fifteen years ago in South Korea compared to American companies. It was tiny and nothing. There was no dump. Stuff just had to be deleted or you couldn't use your email account. You couldn't use your e-mail account if you had too many emails in your inbox, so you just deleted stuff

MS. BRASS: I do think it helped us in terms of composition of the jury that we had a lot people who worked in businesses and people who worked in technology. And so, we reminded the jury of things, for example, that most of this case happened before, for example, the iPhone was invented. We have a perception of what electronic communication looks like based on being lawyers in the world we live in, but very few people, when this lawsuit was filed in 2014/2015 had their emails from 2001 as a business? And the business people understood record retention policies. They understood 45- or 30-day auto delete functions. And we had an expert come in, whose opinion was uncontested, a judge from Korea who had practiced and specialized in KFTC proceedings and had worked with the KFTC, who said there is no document retention obligation in Korea, even when you're subject to a KFTC investigation. And I think that testimony as well as personal experience of people on the jury–and we found this in jury research–they did not care about this ablation issue, which we knew was going to be a huge part of the jury presentation.

Impact of Using Interpreters on Live Witnesses

MS. MANNING: Most of the witnesses in the case were located in Korea and beyond the subpoena power of the Court. Mark, did this lack of live witnesses have an impact on the case, and the witnesses who did testify live used an interpreter? Describe how that affected the direct and cross-examinations.

MR. DOSKER: It made it slow. Imagine the back-and-forth and the rhythm that you can establish as the examiner or not. Because everything has to be twice, first in English into Korean and from Korean back to English. So it made it slow. Having your pacing and your timing be in a way to be persuasive to the listener was quite different. So that did affect it.

And you had to also, I think, use an opportunity. We used this, and I think it was successful. Because as the market leader, my client was the one, who in Korean practice, was expected to go in and talk to the government in advance to get approval for any price increases. And that's a long dull process. The witness from our company who gave that testimony was someone who, as Chris and Rachel recall, you ask him a question and he will answer for like 30 pages without taking a breath. All about the government officials he met, who he talked with, and what they did to get through this process.

And so, we used a live witness, to tee up a particularly long and potentially dry video clip or set of video clips. Use that person's lieutenant to come in live and talk in a relatively short examination about what he and his boss did and then watch the more senior person testifying at great length. So we used that. It affected the examinations in that way.

And I would also say more so than, you know, almost any other trials I've seen over the decades, the importance of practice sessions. Now, obviously, we couldn't practice

with the same interpreter who came in the courtroom, but we had others, and I have colleagues who speak Korean, and the number of practice sessions even for a scripted set of questions and answers that's only going to be seven to ten pages on paper, not that long. Because this is, again, a different–a different culture, and I think that the cultural aspect of the difference and how it affected what we did, I think was really pervasive throughout the trial.

MS. BRASS: And the only thing I will add to that is beyond the ordinary slowness, there are significant ways that English and Korean just do not match well onto each other, and that made translation even more difficult and more cumbersome. We ultimately agreed on a translator for trial who was excellent, but it was just remarkably slow, and because we were all on the clock, it wasn't like, well, it took 50 percent longer. It took 70 or 80 percent longer. And it really meant you had to scale back the size and scope of your case because of how slow the translation was.

MR. LEBSOCK: Yeah, we had an excellent translator that we all agreed on. He was translating before you even finished your sentence. That's how good he was. And that helped, but I think, from my perspective, how did this affect the trial? It might not surprise you that the defendants did bring their witnesses who did a terrible job in Korea. They left them there, and one of the things that we wanted was to argue missing witness. That if the defendants didn't have the courage to bring these people over and have them sit in front of a jury, that we, or the judge, would alert the jury to this fact, and defendants brought a motion on that point, and actually, they prevailed. I think that was wrong.

MS. BRASS: The motion was limited to former employees or people otherwise outside the defendant's control. So I sort of think it was right.

MR. LEBSOCK: No, Yon Han Ng [phonetic spelling] who had to be the worst witness in the world but I was not allowed to say that Mr. Dosker wouldn't bring that fellow to trial so that I could cross-examine him.

MR. DOSKER: That young junior and nervous gentleman has a human right not to be dragged across the Pacific Ocean. He's not a manager or anything close to it. And I know you think your case is important, Chris, but he has a human right to stay at home with his spouse and his young child.

MR. LEBSOCK: That's right. And that's what he did.

Anecdotes During Trial

MS. MANNING: We only have a few minutes left. If you'd like, could you describe a funny moment that occurred during the trial?

MS. BRASS: I'm going to start with one that wasn't funny, but it was utterly shocking to me, and I think it underscores a lot of the things that we've been talking about. We had a witness in the Ottogi case who was the head of finance for a company called Ottogi Ramen, which was not one of the defendants. It is the factory that makes the ramen. And he handled all procurement and finance for all the ingredients that went into the ramen and testified about that. He was not deposed. He's a gentleman in his 60's. We knew he was going to be—we liked to joke with him when we got ready that he was our secret

weapon, because he was very nervous about testifying and he had not been deposed. So he had no experience with this. And he comes into the courtroom, and he bows to the judge, and then he turns a perfect turn and bows to the jury. And then turns another perfect turn and bows to Chris. None of which I knew was coming. And I'm putting him on, and then walks up to the witness stand. And if you have ever wanted a witness to capture the jury's attention before their surprise secret weapon testimony, as well as leave their own counsel's jaw sort of hanging over as they tried to regain their composure at the podium, Mr. Yu did an excellent job of that.

MS. MANNING: Chris, why don't we give you the final word, a funny moment.

MR. LEBSOCK: Jill told me she was going to ask this question. I think my perspective is colored on the fact that we lost the case. So I had to go down to Stephanie Cho's office, who is one of my associates who worked with me, and I said, "Stephanie, what was funny?" She's very perceptive. In the Ottogi opening, they have a little doll. A roly-poly doll. I think is how that is translated into English, and so they had this doll that they brought up. Everybody had ramen. We had it all scattered everywhere. But they brought this doll up, and Rachel's partner says to the jury, "now, we're like this doll. You know, you punch us, you pop right back up." And he's shaking it around, and it's jingling, and I remember sitting there going, that is the most ridiculous thing. But we end the case; the goes back to deliberate, and within a few minutes, they ask one question, and the question is, can we have the doll.

MS. BRASS: We did send them all a doll after the deliberation was over and a box of ramen.

MR. LEBSOCK: So, and that's when I knew we were cooked. That's my funny moment.

MS. MANNING: And on that note, please join me in thanking our panelists.

THE ROAD TO ACQUITTAL: TAKEAWAYS FROM *U.S. V. USHER, ET AL.*

By Niall E. Lynch[1]

By the time the U.S. Department of Justice took three former London-based foreign currency exchange traders to trial for felony violation of the Sherman Act, the agency had already gathered billions of dollars in fines from banks for the manipulation of foreign currency exchange rates. The case against the three traders is *US v. Usher, et al.*, Crim. No.1:17-cr-00019.

Under the Indictment, from at least as early as December 2007 and continuing at least through January 2013, the defendants and their co-conspirators participated in a combination and conspiracy to suppress and eliminate competition for the purchase and sale of EUR/USD in the United States and elsewhere by fixing the price of, and rigging bids and offers for, EUR/USD in the FX spot market.

Richard Usher, former Head of G11 FX Trading-UK at an affiliate of Royal Bank of Scotland plc, as well as former Managing Director at an affiliate of JPMorgan Chase & Co., Rohan Ramchandani, former Managing Director and head of G10 FX spot trading at an affiliate of Citicorp, and Christopher Ashton, former Head of Spot FX at an affiliate of Barclays PLC, were alleged to have conspired to manipulate the FX market by "coordinating their bidding, offering, and trading" at "certain times."[2]

However, a federal jury in New York rejected the government's claim and acquitted all three of the individuals. The panel discussed this significant criminal antitrust trial, each side's case-in-chief, key issues of the trial, and takeaways.

The Panelists

- **Andre Geverola** is the Director of Criminal Litigation for the Antitrust Division of the U.S. Department of Justice. As Director of Criminal Litigation, Mr. Geverola supervises all criminal litigation and trial matters across the Antitrust Division's five criminal sections. Mr. Geverola has worked at the Antitrust Division since 2007, where he worked as a trial attorney and as Assistant Chief in the Chicago office. In these roles, Mr. Geverola led numerous investigations and prosecutions of companies and individuals in a variety of industries. Before joining the Antitrust Division, Mr. Geverola worked in private practice at an international law firm where he represented companies and individuals in government investigations and litigation.

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1 Niall E. Lynch is a partner of Latham & Watkins LLP and a member of the firm's Global Antitrust & Competition and White-Collar Defense & Investigations Practices. He has represented multinationals and their managers in criminal and civil price-fixing investigations by the U.S. Department of Justice and Federal Trade Commission, as well as follow-on civil litigation arising from such investigations.

2 Indictment in *US v. Usher, et al.*, No.1:17-cr-00019, at 4, *available at* https://www.justice.gov/atr/case-document/file/931751/download.

- **Heather S. Nyong'o** was trial counsel for defendant Rohan Ramchandani. Ms. Nyong'o leads WilmerHale's California Cartel Enforcement Practice. She is an experienced litigator and first chair trial lawyer. Her more than 17 years in the white collar and antitrust space includes a tenure in the Antitrust Division of the U.S. Department of Justice. She has led noted complex cases and also represents individuals and corporations in non-public grand jury investigations. Ms. Nyong'o brings her experience and insight to government investigations including those that result in criminal or civil litigation. She fully serves her clients across every phase of an investigation and litigation, including through trial.

- **David Schertler** was trial counsel for defendant Christopher Ashton. Mr. Schertler is widely recognized as one of the top white-collar defense attorneys in the Washington, D.C. area and nationwide. He founded Schertler & Onorato in 1996 and has built the firm's reputation as a premiere litigation boutique through his broad experience with criminal and civil investigations in trial matters. Mr. Schertler began his legal career as a trial attorney in the Antitrust Division of the U.S. Department of Justice. He became an Assistant U.S. Attorney for the District of Columbia in 1984 and also served as Chief of the Homicide Section of the U.S. Attorney's Office from 1992 to 1996.

Case Overview

MR. LYNCH: This was a criminal trial. It had to do with whether or not three executives from traders of foreign currency from London were going to actually spend time in jail in the United States. So the stakes were really quite high, and the case was fascinating.

Let me first talk to you a little bit about what we'll cover today. I'll do a quick overview of the case, give a little bit of background. Then I'm going to turn it over to Andre to give the government's theory of the case and how they presented it, the evidence they presented, and issues at hand. And then I will have Heather and Dave talk about the defense case, because the defense case was quite interesting, had a lot of different issues that I think are pretty noteworthy. And then we'll talk more broadly about key issues of the trial. And finally, what worked, what didn't work, why the result was the way it was, and was there surprises or lessons learned. And if we have time, we can even open it up to questions.

Let's start with a quick overview. The three individual defendants were all former foreign exchange traders, and for those of you who don't know this market, foreign currency trading is the trading of paired currencies. They were involved in the euro-dollar trade, so they would buy and sell euros and dollars. This was an incredibly large market. Some were upwards of $4 trillion of commerce a day. I think by some measure this was the largest criminal cartel case ever investigated and prosecuted.

The first defendant was Christopher Ashton. The next was Rohan Ramchandani, and then the third was Richard Usher. They had little nicknames, and as you'll hear, a lot of the evidence in the case was based on what were called "chat rooms." These were text messages that went back and forth every day for years between every trader and other

traders in the market. And as you'll see, there was very colorful chats and lots of body language and nicknames. And I'm going to let Heather and Dave explain those. The three defendants were all British citizens living in the UK. They voluntarily came to the United States to face charges. They could have stayed in the UK. They could have fought extradition and probably successfully, because the UK authorities had investigated this very same conduct and chose not to prosecute. So they willingly came to the United States to face these charges, even though they faced the threat that they could spend many years in jail.

Who tried the case? The prosecution team was all staffed out of New York field office of the U.S. Department of Justice, Jeff Martino, Carrie Syme, Bryan Bughman, and David Chu. We hoped to have David here today, but he's actually in trial on the second FX trial that's currently going on in New York. And that trial was delayed a little bit, so he couldn't make it today. Andre has agreed to cover for both of them. We thank Andre for doing that. On the defense side, Usher was represented by Michael Kendall and Mark Gidley of White & Case. Ramchandani was represented by Heather and Anjan Sahni. We have other members of the trial team here today as well from WilmerHale: Thomas Mueller, Chris Johnstone, and Dan Crump. We're thrilled to have them. Finally, Ashton was represented by David Schertler and his associate Lisa Manning.

What was the charge? This was a one count indictment. It was filed in January 2017 in literally the last days of the Obama administration. It alleged a *per se* violation of the Sherman Act, and the allegation was that between the period of 2007 through 2013, the defendants worked as currency traders for separate banking companies in London and participated in a conspiracy to suppress and eliminate competition for the purpose and sale of euros and dollars in the United States and elsewhere. There were three defendants and one cooperator in the interbank chat room, sometimes referred to as, quote/unquote, the cartel, which was obviously helpful to the government and widely cited. But there is a back story to that, which Heather and Dave will explain. Each was the desk head of a euro-dollar FX trading at a major international bank. Rohan was at Citibank; Usher at JP Morgan and Ashton at Barclays. One other member of this cartel chat room was Matthew Gardiner of UBS, based in Zurich. UBS was amnesty applicant. Gardiner cooperated with the government, and he was fully immunized. He played a very central and significant role in the case, and Andre will discuss that. And these were some of the major banks in the euro-dollar trading market.

Before the trial, all the banks plead out and paid $14 billion in fines and civil damages to the U.S. DOJ, the CFTC, and other regulatory agencies. The trial was a three-week jury trial in the Southern District of New York before Judge Richard M. Berman. The government called nine witnesses, including two experts. The defense called two witnesses, including one expert. And the jury deliberated three hours before reaching not guilty verdicts.

It was the first case that actually went to trial. None of the banks chose to fight this case in court. And as I said before, there's a second FX trial against I think one individual maybe more, going on right now in the Southern District, but not in front of Judge Berman. It's in front of another judge. With that as background, I will hand it over to Andre to describe the government's theory of the case, how they tried to prove their case, and what evidence they used.

MR. GEVEROLA: Thanks, Niall. As Niall explained, this case arose from our fairly extensive investigation into foreign exchange trading, and it resulted not just in this trial, we have one going on now in New York on different currency pairs. It was actually also related, but a separate trial involving front running that was handled by the fraud section. So this was a large investigation involving many, many parties.

For this particular case, the theory was that when traders agree on their trading strategies and their trading execution, that is a violation of the Sherman Act. What does that mean? Let me give you a couple of examples. One, if a trader agrees to withhold bids from the market for a period of time so as not to bid price up or down against another trader, our theory was that's a form of bid suppression. So one trader says, hey, I want to stay out of the market. You do the trades that you need to make. And I'm not going to bid price against you. So that's one flavor. Another flavor is, there is something in the foreign exchange world called "the fix," which is essentially when they set a benchmark foreign exchange price. And the way that that benchmark is set is through a sampling of actual transactions in the limited period of time during the day that I think it's the same time every day. So part of the case theory was leading up to the fix when this benchmark rate would be set. The traders would coordinate their trading, for example, they would agree to both buy or both sell in an attempt to drive price lower or higher in advance of the fix, which would advantage whatever trading positions they were holding. These were two main flavors of conduct that were presented at trial as violations of the Sherman Act.

In terms of how we presented the case, the main witness for this trial was the one cooperator that Niall mentioned. There were only four members of the cartel chat. I'm sure Heather will tell you all the other names that this chat room had. And, that's actually a point, an interesting aside, which is to all of us, cartel is a self-explanatory thing, because we're antitrust lawyers. But to a jury off the street, I bet you if you walked up to somebody and said, "What do you think when you're thinking cartel?" They're not going to say antitrust, right? So it's not as self-explanatory as you might think.

So the case depended in large part on the one cooperating witness, and the other three individuals in the chat were the defendants. He received non-prosecution protection, which obviously played a big role at the trial. In addition to that, to attempt to corroborate him, we did call other witnesses. For example, we called a counterparty, from this area, from CalPERS. He was the head of equities trading at CalPERS and testified about how CalPERS relied on the big banks to execute certain foreign exchange trades and how it depended on those banks to compete for that business and offer favorable pricing on those trades.

We also called two experts. One really just to kind of set the stage and educate the jury on what this market is, what the different terms mean. He didn't testify as to any of the actual facts at issue, and he was an expert in foreign exchange markets. Our second expert was not an expert in foreign exchange trading, but in data processing. When we are talking about billions of dollars' worth of trades over x number of years, there is a voluminous amount of data across multiple banks, across the trading platforms. So we hired somebody to process that data and distill it in a way that would be useful. He testified about certain trades made by the defendants around the same time that they were

conducting certain chats that were featured at trial to corroborate, here's what was said and here's what happened.

In addition to those witnesses, we had just some kind of more jurisdictional and interstate commerce witnesses from the banks. We also called our FBI agent, the case agent, to bring in some evidence, but I think the core evidence we presented really was the corroborator and the records expert who could kind of corroborate what happened after these communications.

As I mentioned, this was a case based on chats, so some of you working on financial markets cases probably are familiar with Bloomberg chats, which are essentially kind of a running chat room, which I think banks have largely done away with now, at least on an intercompany level. But back then, the use was pretty prevalent. And people from different banks could join and form private chats where they communicate with each other during the course of the day. That was how these defendants and our cooperative communicated day-to-day.

The next set of evidence was the trading records that I've already discussed, and next were recorded phone calls. Some of them were during the conduct and some of them postdated the conduct. I think when the investigation started happening in the financial industry there were a couple phone calls involving a couple of the defendants. And, finally, we talked about the cooperator. He obviously had met with the government before testifying and he testified on the Grand Jury. So he had a lot of prior statements by the time he showed up at trial.

This is just an example of what a Bloomberg chat looks like. And if you can read it, trader jargon is almost incomprehensible. There's a lot of shorthand. There's a lot of terminology. And it really is tough to understand unless you're in that market or you can have somebody who can explain it to you. So we tried to distill certain portions that we thought were fairly self-explanatory. In the next slide, I will show you kind of the excerpts we used in the opening. These three slides were taken from the chats and discussed in the opening. Because we thought for a layperson jury, this is something that's a little bit easier to grasp than a lot of the trader jargon, and supported the government's theory in the case. I'm sure we'll talk more about those chats in a bit.

In terms of the trading records, here are some of the exhibits we presented, which showed how the volumes in which these defendants traded. There are also other trading records showing the timing of the trades leading up to the fix. And, finally, this is a quote from Mr. Schertler's client, Chris Ashton, when compliance had begun looking into this conduct. And it was an oral tape that was played very effectively in closing argument. It's quite chilling when you hear the defendant's own voice worrying about getting caught and what's going to happen.

And, finally, to bring it all together, it was really the cooperator who could explain the chats, what they meant, and how they interacted with each other, and, he was active—in fact, he was one of the founding members of the chat. Mr. Schertler's client had joined a little bit later. One thing he testified about, which I'm sure we'll discus further is, you know, is that at the time he was engaged in the conduct he did not know it was wrong. And it was only through self-examination, after working with the government, that he

realized that he really shouldn't have done this. But, ultimately, that was his testimony, and I think the defense can certainly use that. They can explain much better than I can how they used that testimony.

MR. LYNCH: Heather and Dave, faced with this mountain of evidence of chats of trading of cooperators, what was your approach and what did the defense do?

Defense Case-in-Chief

MS. NYONG'O: This is just a summary of the defense case. We did put on a defense. We, throughout our defense, put in a total of about 30 chats. One of the main themes we put forward is that the government is just showing you snippets. This is a prosecution by sound byte, one team, one dream, the cartel. They are not showing you a lot more. It's essentially a virtual wiretap on this supposed conspiracy of five years. Everything these men did and said was recorded in this chat room, and in our view, which we explained to the jury, there was zero evidence of an agreement to fix prices or do anything of the sort. It was unfortunate that our clients did refer to the chat room as "the cartel," but also that the thing they were supposedly fixing was actually called "the fix." So I was spreading very early on about the price-fixing jury instruction about the constant reference to fix, fixing the price, and that is literally what they were doing with the fix. So that was a little bit difficult to overcome, among many other things.

So we put on only two witnesses in our case, but actually Matt Gardiner, the cooperating witness, was a powerful witness for the defense. One thing about Matt's testimony was that we had 302s of meetings. So to be honest with you, when we received those 302s, I was doing backflips. I mean, I wish I could literally do backflips, but virtually doing backflips down the hall because I was overjoyed with what those 302s said. In our view, 90 percent of the 302s was exculpatory and exactly what my client had been telling me for the past five years before indictment. So Matt Gardiner's testimony was extremely consistent. He was consistent with his Grand Jury testimony, consistent with what he said to the DOJ. And so, a lot of what he said at trial was very beneficial to the defense. At one point when I was cross-examining him, the judge actually pulled me aside to the side bar and told me I was leading the witness too much. And I said, "Your Honor, this is cross-examination." And he said, "well, it seems unfair because he keeps agreeing with you." So that's to give you a sense of how important Matt Gardiner was to the defense's case.

We also called our own witnesses in the defense, and that included Michael Melvin who is a professor at the University of San Diego or UCSD. He was sort of an industry expert. He actually worked for many years at Blackrock in foreign exchange and wrote a handbook on foreign exchange. Incredibly gifted witness. Never had testified before. He was not a testifier but did an incredible job. He's a very credible witness, and it was helpful that he actually worked for one of his supposed victims of this foreign exchange conspiracy and was able to describe exactly how sophisticated clients were in this industry and how they understood exactly what the traders were doing, and that traders' job was to talk to each other through chat rooms in order to exchange information, in order to do their jobs.

The other witness that we called was Niall's client, Carly Hosler. She was a trader in foreign exchange. One of the only female traders I've ever seen in the entire foreign exchange market, which is to kind of segue a little bit, the jury started out was ten women

and two men and moved to nine women and three men. But we had a very heavily, obviously, female jury. And these chats, we had to deal with a lot. These chats had a lot of unsavory language in them, misogynistic language, lots of talk about money. Carly was a woman in this industry, and she had to contend with that, and so she was able to testify really in the shoes of our defendants. She could talk about how she used chat rooms, and how important chat rooms were to her job. And also to talk about how a lot of this is bravado and stupid asinine behavior by bankers.

So that's how we called our case, and I'm going to hand it over to Dave in a moment. But I will just talk a little bit about how we started to lay the groundwork for the jury in our opening statements. This is actually a slide that I used in opening, and the idea was to just kind of show the jury the government fundamentally misunderstood how this market worked. The foreign exchange market is not like a market where you can look on the exchange and see what the price of euro-dollars are. Instead it's just called an over-the-counter market, and traders had a very difficult job of not only trading hundreds of millions of dollars a day, sometimes billions of dollars a day that they were responsible for trading, but they had no place to just to find out how much they were needed to exchange euros to dollars for it.

This is an example of a trader desk. The traders would have these screens, sometimes six, sometimes eight to ten screens. And on each screen, they would then assess different parts of information in order to determine what the market was looking like. So they would go to electronic platforms like EBS. The government tried to indicate that EBS was the entire market here. They tried to show through the expert that these traders controlled all of EBS or some significant portion of the market at certain periods of time of EBS. But EBS was not the only place that foreign currency was traded. It also was traded on Reuters. It was traded on Currenex. And as their own witness, Dr. DeRosa testified at trial, you could go down around the corner of the courthouse and trader A and trader B could just be standing there and make a trade, FX right there on the street.

So there is lots of places that you can engage in this trading, and one of those places were through chat rooms. Chat rooms were set up by the banks through Bloomberg and Reuters. They had terminals that the banks purchased so that the banks could facilitate communication between members, participants in the market, in order to exchange information and oftentimes transact.

So Bloomberg and Reuters would actually have these things called "trader nights" where they would ask all of the traders from the different banks to come down to a pub and meet each other. Because in order to really make use of these chats rooms, they had have some level of mutual trust with each other. They were not competitors. They were the counterparties. That was how we explained it to the jury. If you tell the counterparty you're open to risk position, meaning this is what I have to sell for my client, there's a danger that another company could could get ahead of you, go out into the market, and erode the price and actually hurt you and hurt your customer in pricing. So you needed to be able to feel comfortable with the person you were going to share this information with for the purpose of transacting and would not front run you. And you only need to be a front run once to stop that communication with that particular trader.

So they developed these relationships with each other, and then they would oftentimes call up each other on chat and start discussing market color and so on in order to understand whether the other person has a position and whether they could transact with one another. It was much more efficient to transact in a chat room as opposed to on EBS. I forgot to mention they would also have these squawk boxes, these voice boxes where they could call up brokers and actually trade over the phone or get information over the phone. It was much more efficient to trade in chat rooms as opposed to on EBS. Because on EBS, there was algorithmic traders and a bunch of people who were on there, and once they see a position, they start running and eating away at the price. Whereas if you're in a chat room, you can just match off. That's what they were doing. You've got this, I've got this. Without any harm to anyone, we're just going to trade off each other's currency on the other side. And then the customer gets the very best price, most efficient price. So we also presented this in our opening to explain what exactly the purpose of these chat rooms were, which was to share information, get market color. Customers wanted the most information about the market. They would expect you to be talking to their counterparts to get that information. They would use the chat room to match off and transact with one another, and they would spend a lot of their time just socializing and joking around, because they became quite good friends.

Now, I'll turn it over to Dave to talk about our themes, and then we can look at some of the evidence that we put in.

MR. SCHERTLER: I'll just build a little bit on what Heather has told you. First, it was a trickily tried case. I thought the government attorneys did a fabulous job. We were working with three sets of defense attorneys. It was a great joint defense team, and I think the critical success to any defense here is making sure that you've got good lawyers with all three teams and lawyers that are working together. But my thing in any trial—and I've done some antitrust work, but I've tried a lot of other cases as well—is you've got to keep it simple. You've got to develop—we tried to call it a mantra or a theme—and then you just hit that theme over and over and over again. This has got to be a simple theme for the jurors, who in this case were unsophisticated. We kept all the financial people off the jury who can kind of grasp and understand.

We are dealing with a couple of things in this case. Number one, there were no real factual disputes, right? You've got chats. We weren't disputing what our guys said in the chat rooms, and the trades are the trades. Whatever they traded, and who traded what, who traded off with one another. That's all well-established. So we were not in a position to really dispute the facts. This is one of those cases where it kind of goes to intent and what's in their mind.

The second thing that—I think this inured to the benefit of the defense, but Heather and Andre both did a fabulous job of describing this business or industry that these four guys were in trading euros for dollars. I'll confess now. That I still don't understand what they were doing. I don't think the jury understood what they were doing. And I thought that was good for us. Look, this wasn't the classic antitrust case. In the classic antitrust case, I'm always thinking back to Matt Damon in *The Informant*, that Mark Whitacre and *ADM*, when he got everybody into those hotel rooms and they sat down and said, okay, this is the price we're going to charge and these are the customers that you're going to take. Okay, that we can all understand. This was really complicated, and I think it was actually

a big hurdle for the government to be able to explain to the jury just how this kind of fit within our classic conception of what an antitrust violation is, what collusion is. So I think the complexity of their business gave us a heads-up, but again, you know, trying to keep it simple, give the jury some kind of theme that they can hang their hats on when they go back there and say, well, what's really going on here.

So we take the undisputed evidence, and this is our theme: it's not a crime for four competitors to get into a chat room and talk to one another. That's basic antitrust law. We've got a good jury instruction on that. You know what, it's not a crime for competitors to get together and share information with each other about what's going on in their businesses. We got a great instruction from Judge Berman. It's not a crime for competitors to get together and trade off with one another. I'll buy your euros. I will take your dollars. In fact, that's a good thing. That could promote competition.

So what's the crime here? The crime here under the language of our antitrust laws is really, did they actually reach an agreement to coordinate their trades in a way to affect prices, and we said—the mantra was, no, they didn't do that. They exchanged information and talked to one another. They traded off with one another, but there was never any agreement that they were going to coordinate their trades in a way that would help them by affecting prices. We argued they shared all this information, they were in a chat room, they knew what each other were doing. But they did their own independent trading in their own interest for their own banks, and it wasn't coordinated.

That was the mantra that we pressed. In opening, you saw why they chatted, and then with the cross-examination, especially of the cooperating witness, Matt Gardiner, and then in closings again, we beat that theme over and over again. And my opinion is that ultimately that resonated with the jury. We really can't see the solid evidence of an agreement where these guys all got together and said, okay, we're going to trade in a way that's going to benefit all of us. And there were a few chats that we were able to highlight in closing statement.

My guy, Chris Ashton, he's in this five-year conspiracy for seven months. So I'm thinking, well, okay, that's not that bad. I've got the low guy on the totem pole. That's something else that hurt us a little bit later. There's a chat on January 6th of 2012. All the guys are in the chat room and they're all talking about what they're doing in trading. Now, this particular day is a risky day, so the other guys in the chat room, Matt, Rohan, and Mr. Gardiner, Scott, all say, you know what, it's a risky day, I'm not going to get involved, Chris Ashton—my client—I'm going to trade my stuff to you. You go ahead and do what you're going to do. I'm selling to you. I'm backing out.

Now, the government's theory is they are coordinating. They're backing out, and they're giving Chris Ashton all this market power to trade and hopefully make a profit. Now, they back out. He makes his trade. It's a disaster. He loses all kinds of money, and they started laughing at him in the chat room and saying what numpty (means an idiot). What numpty, what idiot, would do this trading? We came to the jury. We said, look, there's no coordination here. They are taking advantage of him, selling to him, and he's going to take all the risk. He's going to do his own independent trade thinking he may make a profit. And he loses. He's the numpty. So there you go. No evidence

of an agreement to coordinate their trades to try to increase the price. They're doing this independently.

And one final thing I will say in the defense before we get to some questions is, Carly Hosler, who Niall represented, was brought to the stand in the defense case. She was one of the two defense witnesses. We had another an expert who I think did a nice job. Carly was the last witness in the case. Carly had this wonderful English accent. She was a trader like our guys. And this was Heather's idea. It was, we called them "industry practice witness." So she was going to testify about what the practice in the industry was.

Now, I have to confess that in pretrial motions and motions in limine, when the government's trying to keep her out, I'm thinking, oh, this is going to be a hard climb with Judge Berman. I don't think he's going to let her in. He let her in. He let her testify. She gets up, and she did just what Heather said. She was a surrogate for the defendants. If Carly testifies, our guys don't have to testify because she's going to say, I was doing exactly what they were doing. We all did the same thing. Nobody thought it was wrong. It was part of the industry practice. Everybody did it. And that's what she did, and she's testified to very effectively.

I think this is brilliant orchestration by a terrific trial lawyer, Heather, but she was brought on the stand because she had worked for Rohan Ramchandani, who was Heather's client. Rohan was her boss, and so we get through all the what did you do in trading, and did you do what these guys did? Yes, I did. And did anybody think that was wrong? We never thought it was wrong. Everybody did it. Our bosses knew about it. And so we got all that in, but at the end, Heather asked some questions about, well, you know my client Rohan Ramchandani. She says, yes, I do. And can you tell us a little bit about Rohan Ramchandani? Apparently, they had this great working relationship. Rohan was her boss. She starts to describe the situation where she got pregnant, and it was a difficult pregnancy, and Rohan was the boss who was just terrific to her, who looked out for her, who made her feel wanted, who helped her through what was a difficult time for her, personally and professionally. She starts to cry as she's describing her relationship with this terrific boss, defendant Rohan Ramchandani, and I'm looking over at the 10 of the 12 jurors are women, and half of them are crying as well. It was at that moment I thought, okay, I think we've won this case.

MR. LYNCH: Well, you also indicated that there was no government objections, because it did veer a little bit off of industry standards, so no harm, no foul.

MR. SCHERTLER: But it was brilliant with the tears flowing from the witness and from the jury. Heather stopped the cross-examination. There was really not an effective cross-examination, and that's how we ended the case because there was no government rebuttal case. So really moving.

And just another quick side story. Now, keep in mind, you're calling this witness, and, you know, at the time we didn't know whether Carly Hosler would be brilliant and save the case for us, which she did, or whether this could be a disaster, whether there's going to be a government cross-examination at the very end of the case that's going to sink our case. And we had a lot of tough joint defense meetings late at night, you know, discussing,

do we do this or do we not. And at the end, it was a bit of a risk, but we took the risk as you do in all trials, and I think it won the case for us.

MS. NYONG'O: I did not orchestrate anything, FYI, just the facts. I was just going to show a couple of pieces of evidence real quick. Everyone in this room knows the elements of the Sherman Act *per se* violation, but we focused on this. When we were orchestrating our defense case, we really focused on just doing our best to disprove each and every element of the offense, that there was an existence of a price-fixing conspiracy, that the defendant knowingly joined that conspiracy. And because this was a foreign conspiracy case, the government had to show that there was a direct substantial and reasonably foreseeable effect on U.S. commerce.

So just as a couple of examples of the testimony that we received that we thought completely disproved the government's case, I felt was worthy. Rule 29, quite frankly, was first on the existence of a conspiracy. The question was asked of Matt Gardiner, the cooperating witness, would you agree that the person receiving open-risk exposure information, that was your position, benefited because that trader could offer his customers a better execution, a better price, if he did not need to go into the electronic trading platforms, and Matt Gardiner said yes. So the cooperating witness just conceded that the chat room gave customers a better pricing.

Another example is from Carly Hosler's testimony where she was saying liquidity, which is access to essentially supply in the market. That's everything to the trader. It's sound a bit naff, but it's like the oxygen for a trader. You need it to be able to buy and sell. The more liquidity you have, the better you can execute, the better prices you can show your customers. It brings in more business. It's everything. So she was hitting on themes throughout her testimony. And thank you, Niall, for preparing her so well, of saying that these were just marketplaces for us to transact and would have more access to the ability to get better prices for our customers and more people that we can trust in order to trade with.

Another, on the second element of the defense—knowingly joining the conspiracy—I asked Matt Gardiner, in the government's opening statement, they said over and over again, that these guys cheated the market and cheated their customers. They were cheaters, cheaters, cheaters. So my client told me I needed to ask this question of Matt Gardiner, which I did and felt very confident that he would answer in this way. I asked, you know, you didn't think you were cheating any customers, including U.S. customers, right? And he said, again, I didn't think I was cheating anyone. The judge was not satisfied with that answer, so he followed up and said, Mr. Gardiner, but you didn't think you might have been cheating them then, but now you know you were cheating customers, don't you? And he said, I don't think I was cheating anybody back then, and I don't think I was cheating anybody now. I was ready to stand up and ask for Rule 29.

The next one on the second element is a question to Matt Gardiner that I asked him, you weren't trying to suggest to Rohan to do something that wasn't allowed, right? This is on the knowingly element. He said, no. You weren't suggesting to Rohan that you would enter into some agreement to fix prices, were you? And he says, well, at that time I wouldn't have thought about that.

So this all goes to the many of our themes about the cooperating witness which is that Matt Gardiner didn't form the understanding that he had somehow entered into a price fixing agreement until years later and after dozens of meetings with the government.

MR. LYNCH: We've been hammering on the government for quite a while. So let's put Andre on the spot. So, Andre, we have this defense team, good faith defense, everyone does it, it's not a problem. That's not a legal defense. That's more of an emotional one. You also have this attacking of the immunized witness with Matt Gardiner. How did you confront that, how did you deal with that at trial, and if you were to do it again, how would you handle it today?

Commentary and Takeaways

MR. GEVEROLA: Sure. With regards to Matt Gardiner's immunized status, I mean, it is what it is. He was the only one of the four chat room participants to testify for the government. So it's not as if you can bring in additional individuals to corroborate him. All you can do is try your best to corroborate him with the documents. With regards to the good faith defense, we did try to exclude that evidence pretrial because despite what that slide says, willfulness is not an element of an antitrust violation. It's knowingly entering into the agreement. There is no knowledge of wrongdoing or willfulness requirement. So we tried to keep that evidence out. I think largely the judge, for the most part, let it in. So I think that opened the door to a lot of things the defense did at trial.

The Carly Hosler testimony, for example, without kind of a good faith defense, it would not be irrelevant what another market participant happened to be thinking as she was doing what she was doing while the defendants were over here in a chat room. So the ruling on this good faith issue really opened the door to that. And, as Dave mentioned, kind of opened the door to other testimony from Ms. Hosler, including miscarriages that happened while she was at work. I still remember the ending of her testimony, which is probably paraphrasing a little bit. The close of her direct was, oh, and isn't it a shame that the defendant's first child was born last week and he missed it because he's here at this trial.

MR. LYNCH: It was true.

MR. GEVEROLA: I'm sure that was spontaneous.

MR. LYNCH: Well, I would say the last part of her testimony was the result of a poorly chosen question by the government, which is they tried to I think impeach her by saying, isn't it true you were fired by Citbank, and she said yes, and then Heather got up and said, can you please explain the circumstances surrounding that. And she said, yes, I was wrongfully terminated. I took Citibank to court in London for a wrongful termination suit, and I won, and that ended the trial.

MS. NYONG'O: And I would say that after the government's cross-examination, the judge told Ms. Hosler that she could leave the stand and that her testimony was completed, and this was, you know, with this hanging out here, were you fired from Citibank? Yes. And I kind of saw the jurors' faces fall. And he said, you're excused. And I said, Your Honor, I have redirect. And he said, no, you don't. And I said, yes, I do. And I grabbed the microphone, and I said, what happened after that? And then she just took it away.

MR. GEVEROLA: I mean, she was a significant witness for reasons largely outside the elements of the offense, but that's how it goes with a jury trial. And in terms of things we could have done differently, for one, it would be great to have more witnesses that were part of the conspiracy. That just was not the facts here. It would be great to have cooperatives who pled guilty to the offense, but it was not the facts here. So I don't think the issues that lead to the result were really issues at trial. Today, it was just really the underlying facts, and this was a tough case from the beginning. We knew that, with the benefit of hindsight, there are probably things you can do on the market that you can always think about after you get an adverse result. I think we could have called more counter-party witnesses just to demonstrate what effects this conduct really had on the market, and as you've heard, it's a very esoteric market. So it's hard to figure out, well, if they did what they did, who was really hurt by it. So that's something we thought about, and, you know, again, Judge Berman ruled against us pretrial on the good faith issue. I do believe as the trial went on, he started to doubt his pretrial ruling when he saw the way the case was headed, in terms of what door was opened and where that was going. And I think we perhaps should have renewed that motion to exclude that evidence, certainly before Ms. Hosler testified, because I do think, and just kind of observing the trial, he started to realize, wait, I thought I was making a narrow ruling, but it was really opening the door to all sorts of things.

MR. SCHERTLER: I do have a question for Andre that I think the judge asked, and I don't know that he ever got an answer. But Judge Berman, an esteemed judge, made a lot of interesting evidentiary rulings in the case. Stuff that I was thinking would never come in was coming in. Stuff I think that should have come in was staying out. But one of the rulings he made is that if we did this thing with calling a witness to talk about industry practice, and basically to say, everything, we were all doing it, and it was all okay. Nobody thought it was a crime. So Judge Berman's *quid pro quo* for that evidence being admitted by the defense is, well, then I'll let the government introduce the evidence of the bank pleas. So all those pleas with all these damning statements of facts of what our guys were doing was going to come in. He had basically given the government the green light. You can introduce that. We thought that was a wrong decision. We thought it was against the tremendous weight of the law about bringing in hearsay statements from somebody else that would be incriminating our guys, violates our Sixth Amendment confrontation right, but the government did not choose to bring in the bank pleas.

And we're sitting there in a charging conference. So all the evidence is in and now we're discussing what the jury instructions are going to be. And it's just the lawyers and the judge. Judge Berman looked at Jeff Martino, and he said, why didn't you introduce those bank pleas. And I forget what Jeff's answer was, but I think we all thought you didn't introduce them because that would be a tremendous risk of being overturned on appeal because this could be considered a violation of their constitutional rights to confront witnesses against them. I don't know if you can answer the question, though, but it's still something I think about.

MR. GEVEROLA: I can't comment on our kind of internal thinking with regard to that decision, but the judge allowed it to happen. We thought about it, and we ultimately decided not to introduce that evidence, and I think this goes with what I was mentioning earlier, which was as the case went along, I do think the judge began to have doubts about his earlier pretrial decisions, letting in the good faith type of evidence, and maybe was

trying to find a way to remedy that, those past decisions. And ultimately for this particular issue, he decided not to do that.

MR. LYNCH: Let me put the defense on the spot then. You had three defendants who were all well-dressed, no prior criminal histories. They looked like upstanding businessmen. You didn't put them on the stand. What was your thinking on that?

MR. SCHERTLER: Just my general thinking on whether you put a client on the stand or not. It's always a game time call, right? You get them ready to testify, and what you do is you evaluate how did we do in cross-examining the government's witnesses. Did we make enough of our case where we can argue it to a jury without having to put our guys on the stand to explain? And I think once we got to the government's case in chief, I felt that way. I felt we've got enough argument that we created with cross-examination of their cooperator, Matt Gardiner, and all the other things that we brought in, that we don't need to call these guys. I can go and I can make a closing argument based on what I've got now, so why take the risk of putting my client on the stand.

It's always a big risk of putting your client on the stand, especially on the government's side, they had some people who would be good cross-examiners, but in addition to that, we had a good expert witness. I think the judge didn't like him, but the jury liked him. And I think he was able to explain what our guys were doing in an innocent way. And then secondly, once Carly testified, she was really like a defendant testifying. She did exactly what these guys did, and she explained what she did and why she did it. It was really a no-brainer at the end of the case. There was no need to call any of our clients and take that risk.

MS. NYONG'O: I'll tell you, my client really, really wanted to testify, but we kind of struck a deal if I'm able to get these guys to agree to put Carly on the stand, you stand down, because Carly is going to hit this out of the park for you. And he agreed.

MR. LYNCH: Any final thoughts, Andre, you first?

MR. GEVEROLA: Sure. We were disappointed with the result, but obviously, we respect the jury's decision. But the result of one case doesn't deter us from being aggressive in other cases. As we've talked about, there's another FX case going on as we speak. There's also a case going on down the street where the defendant is the former CEO of Bumblebee. Both antitrust cases. So both of those trials are going to be hard fought. Like any trial, there's going to be a risk of acquittal, but in light of the jury verdict in the *Usher* case, we did not shy away from continuing to pursue those cases. And we're not going to shy away from continuing to pursue cases in the future. That's the risk. Comes with the territory. And finally, I think our prosecutor should be commended for being willing to bring and try the tough cases. The easy thing in FX would have been to walk away with the billion-dollar fines and not pursue who we viewed were the responsible individuals. As prosecutors, our job doesn't just stop at fines. And that's a long history we've had in the antitrust division, pursuing the responsible individuals, and that comes with a risk of acquittals, and since we're in San Francisco, historically, what I can think of is that we've had a lot of successful investigations here, whether it's the real estate cases, the *LCD* cases, the *DRAM* cases, going back even further. We had tough trials in those cases. We won some. We won a good number, but we did not win them all. We've lost cases in those

highly successful investigations too. So the fact that you got an acquittal, you lost a trial, does not mean you as a prosecutor did not do a good job. And I'm sure the prosecutors involved in those cases continue to believe to this day that they made the right decisions. That's the job of a prosecutor, and it's a tough job, and the folks who do it day in and day out I think should be commended, no matter the result.

MR. LYNCH: And I think with that we'll end our program. That's a really well-stated position with the Department of Justice, a good way to end this trial. Thank you.

KEYNOTE ADDRESS: A CONVERSATION WITH JUSTICE MING W. CHIN

By Cheryl Lee Johnson and Kathleen J. Tuttle[1]

For the sixth year in a row it has been our good fortune to have a justice of the California Supreme Court as our keynote speaker. At last year's GSI we welcomed The Honorable Ming Chin who shared with the audience his upbringing, career path, professional experience, and judicial philosophy. The panel is presented in a question and answer format. Two former chairs of our Antitrust Section, Cheryl Lee Johnson and Kathleen J. Tuttle, posed the questions after a brief introduction. What follows is an edited transcript of the conversation.

MS. JOHNSON: It's a great honor to have with us today California Supreme Court Justice Ming Chin. He is now the longest serving justice on the court. Justice Chin has come a long way from his family's potato farm in Klamath Falls, Oregon, where he was born the youngest of eight children. As a child, Justice Chin worked seven days a week on the farm, and by the time he was 14, he could operate every piece of equipment on the farm—the hay bailers, the tractors, the combines. His parents both immigrated to the U.S. from China at a period of time in which the Chinese Exclusion Act was in effect. They bought 80 acres of farmland in 1936, and through hard work, expanded the farm to over 800 acres. It's still in his family. The parents did not have a formal education, but they always emphasized the value of education, and of course hard work and rotation of crops, right?

JUSTICE CHIN: Of course.

MS. JOHNSON: And optimism. When he was 14, Justice Chin gave up the immeasurable chores of hay bailing and followed the 16-year-old brother Tom to Bellarmine College Prep in San Jose. From there, he went on to receive both his BA and JD from the University of San Francisco. Following graduation from USF in 1967, Justice Chin was commissioned as a captain in the U.S. Army, where he served in Vietnam. He received a Bronze Star as well as the Army Commendation Medal for his outstanding service.

Justice Chin began his legal career in 1970 as the first Asian American to serve as a deputy district attorney for Alameda County. In 1973, he joined Aiken, Kramer & Cummings where he became the partner in charge of the litigation department, specializing in commercial and employment litigation.

In 1988, Governor George Deukmejian appointed him to the Alameda County Superior Court, and two years later, elevated him to the First District Court of Appeal. In 1966, a milestone year, Governor Pete Wilson nominated Justice Chin to the California Supreme Court to fill the seat of retiring Judge Arabian.

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1 Cheryl Lee Johnson is the Deputy Attorney General of the Office of the Attorney General's Antitrust Section in Los Angeles. Kathleen J. Tuttle is the Deputy-in-Charge of the Antitrust Section in the Los Angeles District Attorney's Office. Both panelists are former Chairs of the California State Bar Antitrust, UCL & Privacy Section.

At the time of his nomination, Justice Chin received wide acclaim including from Justice Carol Corrigan, then his colleague, on the First District Court of Appeal. She praised him as exceptionally talented, breathtakingly bright, and indefatigably hard working. Along the way, Justice Chin became the first Asian American president of the Alameda County Bar Association, and among his other—many other public service roles, he's a member of the Judicial Counsel of California and on the board of trustees of USF, and he's also served as an adjunct professor at USF law school.

Justice Chin and his wife Carol, a pharmacist, have two children who are both lawyers. His son Jason Chin was recently appointed by Governor Brown to the Superior Court of Alameda County, and his daughter Jennifer Chin is senior legal counsel to the University of California Regents.

With that brief introduction, I'm going to turn it over to Kathleen to start the conversation.

MS. TUTTLE: Thank you, Cheryl. We, first, Justice Chin, would like to talk some about your background. Despite all the talk these days about immigration, and there is a lot of talk, few realize that the Chinese were discriminated against for decades by the Federal Chinese Exclusion Act of 1882. It barred immigration of Chinese laborers and banned those already here from being naturalized.

Your parents immigrated to the United States from China while the Act was in effect. Your mother was held for six weeks on Angel Island, which I understand happened frequently when there was a glitch or more on their paperwork, more questions needed answering, and so forth.

How did all of this affect your parents' view of the United States?

JUSTICE CHIN: Well, that's a dark serious opening question.

MS. TUTTLE: And it's going to go down from there.

JUSTICE CHIN: It was not a good experience. My mother did not talk about it in detail because it was so traumatic for her. She was 24 years old, arrived in a foreign country, didn't speak the language, and she was incarcerated. She said it was like a jail. One night she went to the ladies' room, and one of the other inmates had hung herself. This is pretty traumatic for a 24-year-old girl, but she was never bitter. She was always optimistic in spite of the discrimination that they were exposed to.

They also made a lot of good friends. Our family home was burned when I was four. I lost my brother in that fire. And the only reason I'm telling you this is because the kindness of our neighbors was what got us through that experience. Our neighbors were away on their honeymoon at the time. They came back. They gave us the keys to their house where we stayed until we got back on our feet. So growing up in that rural community had its pluses and minuses. There were a lot more pluses.

MS. TUTTLE: Thank you. Along the same lines, your parents raised you in Klamath Falls, Oregon. Many of us may not think of Klamath Falls or Oregon or as

being particularly diverse. And you've partially spoken about this, but give us a sense for what it was like growing up there.

JUSTICE CHIN: We were the only Chinese family in the community, but we made many, many good friends. For the longest time, I thought I was Irish. I played McNamara in McNamara's Band on St. Patrick's Day, so I fit right in. My parents sent us, the three youngest—I'm youngest of eight. The three youngest of us were sent to a private Catholic grammar school, boarding school, in Klamath Falls. It was run by the sisters of St. Francis. This was an incredible education for three young children from an immigrant family because the sisters took us under their wings and really gave us a classical education. In the broadest sense of the word, we were taking art and music. I mean, this was in Klamath Falls. You would not think that a place like this would exist, but it did, and it gave us a terrific start on the educational process.

MS. JOHNSON: Well, it's been a long journey from your Oregon potato farm. What inspired you to leave potatoes, not that there is anything wrong with potatoes, but to pursue a career in law?

JUSTICE CHIN: It was, as I said, with the sisters of St. Francis. By the time I got to junior high school, the sisters had quite enough of the Chin family. They stopped boarding. So the only judge in town was a friend of my father's. And Judge David Vandenberg called my father and said, "Why don't you have Ming come and stay with us for the last two years of junior high school." So I did that. And the judge took me under his wing. He took me down to court. I was able to watch jury trials. He gave me the gun in a murder case. I said, "I don't think I want my fingerprints on that." He gave me Blackstone to read when I was 12. It's kind of amazing I became a lawyer. But he really was a terrific mentor and he taught me everything that a good lawyer and a good judge ought to be, and that was really my inspiration in applying for law school.

When I applied to law school, I called the judge and I said, "Would you write me a letter of recommendation?" He did, and I still have a picture of him in my chambers, and behind that picture in the frame is the letter that the judge wrote for me. When I was appointed to the Supreme Court, his oldest daughter Mary came down from Klamath Falls to San Francisco for the confirmation hearing. She brought me her father's gavel which sits in my chambers.

MS. JOHNSON: And what prompted you to start your legal career at the Alameda County District Attorney's Office?

JUSTICE CHIN: Well, that's kind of an interesting story because it relates to the family farm. You remember, I worked seven days a week from sun up to sun down. I didn't know people had weekends. I called the D.A.'s office when I was a second-year law student in Alameda County. The D.A. himself answered the phone Saturday at 9:00. I told him what I wanted, and he said that anyone that calls the D.A.'s office at 9:00 on a Saturday morning I want working for me. So that's how I got in the Alameda County D.A.'s Office, but there is another story to it because I had to go off to the Army, spend a year in Vietnam. I got a letter from the D.A., Frank Coakley. He said, "Ming, when you finish your tour of duty in Vietnam, you have a job here in the Alameda County District

Attorney's Office." What a relief that was because it's a little hard to interview from a foxhole. But when I got back from Vietnam, Frank Coakley had retired, just my luck.

Fortunately, Lowell Jensen was appointed to replace him, and I knew Lowell when I clerked in the office. I told Lowell what Frank Coakley promised. And he said, "Of course, we will honor the commitment."

I've always been grateful to Lowell for that. He has been a terrific mentor all through my legal career, and I have been most grateful, but that's how I started in the Alameda County D.A.'s Office.

MS. JOHNSON: And were there any particular people or factors that led to your appointment to the California Supreme Court and what advice would you give to the many in this room who probably want to get on the California Supreme Court?

JUSTICE CHIN: Don't do it. It's been a terrific career. I suppose I could just start by telling you the story about how I got the call. I was in Los Angeles for a meeting of the appellate advisory committee of the judicial council. Justice Marvin Baxter was the chair of the committee. As soon as I walked in the room, Justice Miriam Vogel, now retired from the Second District and is now with Cheryl's law firm, MoFo, now in Los Angeles. Miriam says, "Ming, come and sit next to me. I have some hot gossip for you." I'm always up for gossip.

I sit down, and Miriam says I bet you the governor will call you within two weeks appointing you to the Supreme Court. I laughed. I said, "Miriam, first of all, I don't expect to hear from the governor at all, and number two, it certainly won't be within two weeks because it took him eight months the last time." I was under consideration for appointment to the court.

Marv calls the meeting to order. Someone from the hotel comes in with a silver tray with a note on it. It was the governor. I called the governor, and he said, "Ming, I told you three years ago that if I had a second seat on the court I would appoint you. I now have it. If you're still interested, I'd be happy to appoint you to the court."

I just saw Pete Wilson last Friday at dinner, and I thanked him for giving me this incredible opportunity.

Back to the meeting in Los Angeles, I called Miriam Vogel after the press conference announcing the appointment, and I said, "Miriam, I know you won the bet, but I don't remember how much we bet." Miriam said, "Ming, you owe me $10,000." She's still waiting.

I then called Marv Baxter to tell him I'm sorry I didn't make it back to the meeting. And he said, "Ming, did you get the call I think you got?" I said, "You know I can't tell you that." He said, "You just did."

MS. TUTTLE: We can see that you've been on the court, well, a few years now. And so it's interesting to ask you this question. Four of your current colleagues on the court are younger, and you said I could say 30 plus years your junior, and with no judicial experience, how does that affect court dynamics?

JUSTICE CHIN: Well, let me tell you this story. There is a picture hanging outside of my chambers. It is the court as it was constituted in 1964. That was the year Phil Gibson retired as chief. Roger Traynor was appointed to replace him. Stanley Mosk was appointed to replace Roger Traynor. 1964. That was the year I started law school. When I arrived at the court in 1996, Stanley Mosk, fortunately for me, was still on the court. I was 30 years his junior. What goes around, comes around.

MS. TUTTLE: That's great. The U.S. Supreme Court has been the focus of attention, to say the least, with two fairly recent appointments. How do its views, the court's views on personal and civil liberties impact the California judiciary—us here in California?

JUSTICE CHIN: Well, I don't want to get into a long discussion about what is happening or not happening in Washington. I am happy to be here in California. I think it becomes dangerous when judges get involved in political conversations. I am the most boring dinner partner you can ask for. People will ask me questions about this, that, or the other thing, how I feel about that. And I have no opinions that I'm going to express to them over cocktails or over dinner.

It is so important for judges—well, I'll give you an example. At the last judges' college, I talked to all of the new judges, and one of the questions was, "Justin Chin, how do we handle what is happening in Washington, D.C.?"

I said, "I recommend that you keep politics out of your courtrooms and keep politics out of your opinions." I have tried to do that over the last number of years where I have written on various subjects, including the subjects that you are most interested in. Each time I write on those subjects, I cannot hear the din of the conversations that are happening throughout the country and throughout the state, because I have to look at the facts and the law that is right in front of me and nothing else.

It is so important that judges do that, if we are to maintain an independent and impartial bench. I think Justice Kennedy said it best. The integrity of our opinions depends upon the public having confidence that we are neutral.

One example I want to give to you is a recent example. I went to the swearing in of our newest justice, Josh Groban. When Josh was sworn in, Jerry Brown got up to speak, and he said a lot of—this was his fourth appointment to the court. And keep in mind, I was the fourth appointment of Governor Wilson to the court. Govern Brown said, "many people are talking that now I have appointed the fourth justice to the court, and that this is going to be the Brown court." Are you kidding me? He said these four people don't agree with each other, much less with me. I was so relieved to hear that because I certainly felt that way during all the years I sat with many of my fellow appointees from the Wilson administration.

We did not look at these cases based upon who appointed us. We never do. I hope we never will. The interesting part about all of this is that Justice Groban was the appointment secretary for Governor Brown when my son was appointed to the Alameda County Superior Court. So he is my new favorite justice, or favorite new justice.

MS. JOHNSON: We are going to pivot a little bit to litigating before the California Supreme Court. Now, last year the court received over 4,000 petitions for review and

issued about 90 decisions. What do you look for in a petition for review and what advice do you have for lawyers who write these petitions? Is there a consensus on the court about what cases you should take on, or do you-all bring your own personal views to this decision as to what comes up?

JUSTICE CHIN: Well, we definitely have differences of opinion about which cases should be granted, and there are vigorous conversations. We meet every Wednesday to decide what cases to take, and you are absolutely right, we take a very small number of the petitions that we get. But the criteria is really very simple. Is it an important issue? And if it's an issue of statewide importance, and even though there is not a conflicting opinion about that issue, we will take it.

There are many examples. The same-sex marriage issue, we took up, even though there was only one opinion from the First District Division Three. The criteria generally speaking is whether or not there is a conflict. So if it is not an issue of statewide importance, but it is an important issue and there are differences of opinion among the courts of appeal, we will usually grant it. I know that many people think that we don't grant and review in enough cases. And I'm sure you filed a petition recently. You are definitely of that opinion.

And you're certainly entitled to it, but I—for the life of me, haven't had—I shouldn't say this because then I'm going to get bombarded with all sorts of your opinions about why we missed something, but I don't think that we are not granting review in your civil cases because we're overburdened with death penalty cases or criminal cases. There is really a balance of the number of cases that we—I mean, just throughout the 22 years I've been on the court, it's been pretty balanced about what cases we are working on.

As far as what your petitions for review want to look like, keep in mind, I'm in my chambers. I have 150 to 300 of these to read. How much attention do you think I'm going to give to your petition if it's long, rambling, unfocused. So how to write them? Compact, to the point, don't exaggerate, cite exactly to the record where we can find what you're talking about.

Just point us in the right direction. Don't make us wade through a swamp of material to find whether or not this is an issue that is worthy of review. I have to read a lot of material. Make it material that I want to pick up. That I want to read every word that you've written. Because you're competing with 150 others. Sometimes if it's a double conference, 300 others.

Now, I don't want to give you the impression that we're overwhelmed by the paperwork you file with us. We'll wade through it. We'll get through it, but you will make it easier for us to find the needle in the haystack if you point us in the right direction, and don't add a lot of extraneous material. Does that answer your question?

MS. JOHNSON: That does. What role does amicus briefs play in your decision-making, both at the petition stage and the merits stage, and do you have any advice as to what kind of amicus briefs you find particularly helpful?

JUSTICE CHIN: I can talk about it generally. The state and trust section filed an amicus brief on a trust and estate matter. It was quite helpful. And it was helpful because it gave a broader context, not just the context of the litigants involved in that particular

litigation, but how does it affect the entire field of trust and estates? That vantage point is invaluable. We can probably figure it out for ourselves, but it helps, and I think amicus briefs filed with that in mind are really helpful. I think we probably have more amicus briefs than any other court. And I'm always grateful for them.

I'll tell you one secret. Sometimes we will get a petition for review that we can tell is not particularly well-prepared, and we will look for amicus organizations to help file in those cases.

I'll tell you just one story about the mural in the courtroom here in San Francisco. I was on the art committee with Former Chief George's wife, Barbara George, to select all the art for the building, and one of the pieces that we selected was the mural in the courtroom. It was my opinion that it should not just be a beautiful work of art, but it should be calming. Why? Because we want attorneys to appear before the California Supreme Court to be calm, relaxed, give us your best work. Because we need all the help we can get to solve these difficult problems, and your assistance is invaluable. I've asked hundreds of attorneys whether or not the mural works. They all said no.

MS. TUTTLE: In terms of oral argument, can you tell us what you find to be most effective for you and what things you view as counterproductive and totally unhelpful?

JUSTICE CHIN: I'll start with the counterproductive. Josh Groban said, "When Ming closes his binder, that means we're finished." If I've closed my binder, that doesn't mean you're finished, but maybe you should make it shorter. We hear from many, many outstanding attorneys. I really appreciate good advocacy. What is it?

It's an individual who stands up in front of the court, knows the record backwards and forwards, knows that case better than anyone else in the courtroom, and answers our questions directly and succinctly. You'd be surprised how many people don't fit that description. The ones that do are a real treat for the court. Oral argument is not an opportunity for you to give up, get up, and show us your Cicero or MacArthur or Churchill. You are there to carry on a conversation with seven people who are interested in your case, who have particular problems with certain aspects of it, and are asking you questions that either they are interested in or they know that their colleagues are troubled by. So don't ever say, "That is a really good question, Your Honor. I'll get back to that in a minute." Answer the question. Even if you have to think about the answer while you're giving it. Because we need your best observations about what we're trying to get at.

Think of oral argument as a conversation with seven people. And you are really there not to moderate the conversation, but to help us advance what is being talked about. Sometimes you will ask a very simple, seemingly friendly, question, and counsel will be defensive. Why? This is a softball. Hit it.

The oral argument proceedings that we have widely vary, unfortunately. I would think that by the time you get to arguing at the California Supreme Court everyone is doing their best. I wish that were the case. I hope that all of you, when you come to our court, are in the first description that I gave, not the last one that, where people are really not familiar with the record, not familiar with the law, not familiar with the—all of the cases that are on point in this litigation, and I mean it when I say, you have worked on that case for sometimes years by the time you get to us. You know that case better than anyone

else in the courtroom. We hear your case, and then we hear five more cases after that. We come back the next day and hear six more cases. We come back the third day and hear six more cases. Don't be nervous standing in front of the court. You know more about it, give us the benefit of all of the work you've put in on that case that means so much to you.

MS. TUTTLE: Upon your confirmation, Governor Wilson referred to you a judicial conservator. Do you consider yourself to be that, and what does the label mean to you, and do you feel your views have changed over time?

JUSTICE CHIN: I'm not a big fan of labels. I am not sure that whether I'm conservative or not, but I can tell you that I believe in judicial restraint. I think that judges should stay in their own lane and not be legislating, not be forming public policy where that should be in the hands of the legislators and the governor when he decides to sign that piece of legislation.

We each have our own duties and responsibilities. We should ensure that we are not intruding on the legislative function. The legislators in formulating this legislation have committee meeting after committee meeting with experts on all different areas coming in and giving them their best opinions about what ought to be done in that particular case. We don't have that benefit. We have attorneys who have briefed this particular issue. We have law that applies to that particular issue, and we should stick to interpreting the statute as it is written, not as we would like it to have been written.

We have been fortunate to have pretty open-ended conversations with our legislators. We recently had one in Sacramento, and we told them, when you write this legislation, the clearer you can make it, the better it will be for all of us. One of the legislators said that is easy to say, but sometimes we have Joe's vote or Emily's votes or Barbara's vote, and they need this language in the statute. So it's kind of like a sausage being made, not pretty, but that's what they end up sometimes, and we appreciate that, but that just makes our job that much more difficult when the statutes are not clearly written.

MS. TUTTLE: Interestingly, you are the only sitting justice to have served in the military. Did that influence your judicial philosophy, and maybe even more intriguing, I don't know, is did your service in Vietnam influence you?

JUSTICE CHIN: My services in the military gave me immense respect for all branches of the military, and I'll just give you one example. I was activated as a unit in the First Brigade of the Fifth Division. We moved 5,000 men from Fort Carson Colorado to Quang Tri, Vietnam, 5,000 men, 2,000 vehicles. We were operational within a week. If we were traveling on vacation, we would still be looking for our toothbrush.

The logistical management of that move was incredible. We replaced the third Marine division in Quang Tri, which is 37 miles south of the DMZ. I gained such immense respect for my colleagues in the Army. My boss was a man by the name of Richard Barrett. He was a major. He was in what they called the Foreign Area Specialists Program. He went to the Monterey Language Institute, spoke fluent Arabic, wrote fluent Arabic. He showed me some of the letters he was writing to people in the Middle East. They looked like works of art. This was an incredible officer in the United States Army. He really tried to get me to stay in the Army and join the Foreign Area Specialists Program.

I thought seriously about it, but eventually decided to come home and start practicing law. I think it turned out okay.

MS. TUTTLE: I would say so. You have a reputation for being a very hard worker, a very hard worker, authoring more majority opinions in your first decade on the court than any of your colleagues. Tell us about your opinion writing process.

JUSTICE CHIN: I don't keep track of those statistics. I think all of my colleagues are dedicated, hard working. I've had the privilege of serving with three incredible chief justices. Malcolm Lucas, Ron George, and Tani Gorre Cantil-Sakauye. I have also had the privilege of serving with some nine associate justices, all incredible people, all hard working, dedicated. The—having the honor of working with all of these people over these many years has been the honor of a lifetime. And it's so incredible because they cover the gamut on the political spectrum, and yet, we are all good friends.

I like the story about the friendship between Justice Scalia and Justice Ruth Bader Ginsburg. Polar opposites on politics, but dear friends, and I loved Justice Ginsburg's introduction to Justice Scalia's last book that was a collection of his speeches, organized by his sons, but Justice Ginsburg said that many people are surprised that Justice Scalia and I are such good friends. I don't know why people are surprised that very good people have opinions that you can disagree with.

I feel the same way on the California Supreme Court. Our most recent appointees were appointed by Jerry Brown. How could I not agree with them, he appointed my son. But I'll just give you an example. I had a barbecue at my house for all of the justices and their children. I invited my children and my grandchildren because all of them are about the same age. So when I told Goodwin Liu what we were doing, he said, "a playdate."

I'll give you one example of what happened during this barbecue in our backyard. We have a paddle boat, and all the kids got to take the paddle boat out to the lagoon. We had a jumpy house in the garage, so all the kids got to bounce up and down in the jumpy house. So I'm out in the back, and, you know, Justice Cuéllar is married to Judge Lucy Koh. Well, Lucy is looking right at me, and she says, "Ming, stop that." I said, "What was I doing?" She was talking to her son who was right behind me, and his name is Ming. That's really his Korean name, and when I got a thank you note from Lucy and Tino and their two children, Ming wrote from Ming 2 to Ming 1. Thank you for a terrific day.

I guess the answer to your question, we're having a good time. We get along well. We are good friends. Of course, we disagree, but we try never to be disagreeable.

MS. JOHNSON: The legal profession has changed a lot since when you first started.

JUSTICE CHIN: Everything has changed a lot.

MS. JOHNSON: Did you encounter discrimination or barriers as a result of being an Asian American when you first started, and how did you deal with that?

JUSTICE CHIN: Well, I'll just give you one example. We used to drive back and forth from Klamath Falls, and back then it was a two-lane road, so you couldn't drive the distance in one day. So we would stop at a place along the way for accommodations. We'd

drive up to motels with vacancy signs blazing in the window, no cars in parking lot. My father would go in to get a room, and he would be told there is no room for us in the inn. That happened on a regular basis.

One time we were driving in town in Klamath Falls, and I looked at the houses, and I told my dad, "Wouldn't it be nice to live here?" And my father said, "Oh no, they don't let Chinese live here." Of course my question was why, and my father said, "Maybe someday you can do something about it." I guess that day has arrived.

MS. JOHNSON: Now, you've broken a lot of barriers. You were the first Asian American prosecutor in Alameda County. Later, the first Asian American president of the Alameda County Bar Association. What is your advice to young Asian Americans as to how they can leave their own mark on the wall?

JUSTICE CHIN: Well, I'll tell you a brief story first. When I was appointed to the Supreme Court, my son Judge Jason gave me a plaque, and I think it's from Emerson. And it says, "Do not follow where the path may lead. Go instead where there is no path and leave a trail." My son wrote a note with that and said, "Dad, you've lived your life like this, and I've always admired it." I don't know whether I've done that or not, but don't be afraid to leave a trail. Even if you're in unfamiliar territory.

I remember the first time I stood up to try a jury case in Alameda County. I was petrified. Standing up in front of a group of people that I didn't know was unnerving.

The second case got a little bit easier. The 50th case was a lot easier, and then being 15 years in private practice handling any number of different kinds of civil cases, from securities to commodities to contract cases to water cases to employment cases to construction cases. It was just a mind-boggling array of problems that had to be worked on. I just jumped in to every one of them, learned as much as I could about every subject matter and was fairly successful at private practice.

Never be afraid of learning something new. It will be broadening. It will open your mind to issues that you'd never thought of before. I remember when I was appointed to the trial court, Mike Balachi was the PTA, and Mike came to me and said, "Ming, what area of the law do you know least about?" So I went down the list. I tried every kind of criminal case imaginable in the D.A.'s office. I went down the list of civil cases. I even served in juvenile court. I said, "Mike, the only area that I have no familiarity with that I've never practiced is family law." He said, "Ming, guess what court you're going to?"

So I was assigned to family law, went to the 40-hour family law class that the committee on judicial education arm provides. It was the best continuing education class I had ever been to.

After I'd been to family law for a while, Don King came to me. Justice Don King retired from the First District Court of Appeal and said, "Ming, I've been teaching family law at USF for so many years, I'm exhausted. Would you take it over?" I said, "Don, you want me to teach family law?" He said yes. So I did it.

One thing that happens when you offer to teach a course, everyone who has ever written a case book sends it to you. I started reading them. Do you remember the Dead

Poets Society? Robin Williams gets up on the table and says tear out the first 50 pages of your books because it's nonsense. Well, that's kind of the way I felt about these case books. I hope there aren't any family law professors here. But I pulled together my own case book.

I mean, I taught family law for a few years. The first semester was really tough because I was putting together the case book. I was about two weeks ahead of the class. I don't recommend you do that, but I was really happy with the final product because I used it every semester after that one I taught, family law, but don't be afraid to learn new things. It is incredible, it's challenging, and it's immensely rewarding.

MS. JOHNSON: Speaking of family, you have two children, and both of them are lawyers. Any idea what prompted them to become lawyers?

JUSTICE CHIN: It wasn't me. But I suppose they saw I never sold this thing. I answered their questions, and I answered them frankly. I did not sugarcoat it, but I think they knew that I loved being a lawyer. I loved the law. I loved the challenges of the law. I love what the law can do for people, and businesses, on both sides. I think that they saw, even though I didn't give sermons about it, and I didn't pressure either one of them into becoming lawyers. As a matter of fact, when Jennifer finished at Stanford, she's told me she wanted to go to law school. I said I recommend you take a year off and do whatever you want.

When Jason graduated from UC San Diego, he wanted to go to law school. I said take a year off and do whatever you want. They both went to work for law firms, and remarkably enough, they both had good experiences, but I wanted to make sure this is something they wanted, not something that I wanted. So I did not talk either one of them into doing this. When Jason was several years in the D.A.'s office, he was in the middle of a murder trial. So I called him and I said how's it going. He said fine. I said, "Do you like it?" He said, "Dad, I love it." That's what you want to hear from your children, especially when they're following in your footsteps. I couldn't be more proud of my family and the families that they are raising.

MS. JOHNSON: So a couple of quick questions to conclude, what do you like to do to take a break from the law?

JUSTICE CHIN: I started playing golf at age 65. I don't recommend this. But my son came to me a long time ago, and I taught him to play tennis when he was a kid. He was a great tennis player. By the way, our daughter is an incredible gymnast. So they were both athletes, but Jason wanted me to play golf, and I said, "That's an old man's game. I'll play golf when I can't play tennis anymore." And he said, "It would be too late."

So he's resurrected the Alameda County D.A. golf tournament. He said, "Dad, you've got to play." I said, "I don't play golf." He said, "That's all right. No one else does either." Anyway, we all went out and we had a great time, but I said if I'm going to do this, I want to at least be passable, so I started playing it seriously at age 65. I am enjoying it immensely. If my knee holds out, I will continue to play it, but it is immensely challenging, and I enjoy it.

MS. JOHNSON: So you play tennis with Justice Liu. Who's the better player?

JUSTICE CHIN: You remember, he's 30 years younger. We usually play doubles and usually we're on the same team, but we have a lot of fun.

MS. JOHNSON: Great. We know you're a Warrior's fan, and what is your preference between the Raiders and the 49ers?

JUSTICE CHIN: The Raiders are leaving again? Are you kidding me? I was mad the last time they left. I mean, I was in the Alameda County D.A.'s Office. I used to go to the Raiders games all the time. When they went to L.A., I'm not interested. When they came back, not so interested. When they are leaving again, not interested at all. 49ers, incredible game. Sorry we lost. I could not believe he made the first three field goals and missed the one that we really needed, but the Warriors and the 49ers, I think they have more injured players than healthy. So both teams are suffering on the injury list, but they'll come out of it, and they'll be better. We have such a wealth of professional sports teams here in the Bay Area that we couldn't be happier.

MS. JOHNSON: One last question. Who is the funniest justice on the court?

JUSTICE CHIN: We're not really very funny. Oh okay, I have it. Justice Corrigan. Do you remember, she was at a gathering like this, and her chair fell off the back of the podium, so she went head over heels. She gets up to the microphone, fortunately she wasn't injured. It was a group of attorneys. She said, "are there any good attorneys in the house?"

MS. JOHNSON: I think we're out of time, unfortunately, but we're very, very thankful and sincerely appreciate Justice Chin taking time from his very busy schedule and sharing your experiences and advice for us. So I'd like everybody to give him a round of applause.

[APPLAUSE]

CRIMINAL ANTITRUST ENFORCEMENT: RECENT HIGHLIGHTS, POLICY INITIATIVES, AND WHAT'S TO COME

By Richard A. Powers[1]

Good afternoon. Thank you, Peter, for the kind introduction. It's great to be back in San Francisco, and I appreciate the invitation to speak at the 29th Annual Golden State Institute. The timing of your event allows me to reflect on the many accomplishments of our outstanding prosecutors and to detail the Antitrust Division's criminal enforcement priorities going forward.

My remarks today will focus on three topics: first, a recap of recent case-related developments; second, two significant policy announcements and their implications; and third, I will close with a few thoughts on our goals and plans for the future.

Before I get into those topics, however, I want to spend a few minutes talking about the state of our program. As many of you know, we've been navigating a period of change and transition at the Division. Over the last few years, we've had a number of significant, highly successful investigations wind down. As that has happened, we have shifted our limited resources to new investigations and new initiatives.

We've also introduced and implemented a number of policy and practice changes. Some of the changes attracted headlines—such as last summer's compliance announcement and the recent launch of the Procurement Collusion Strike Force. Other changes were behind the scenes and involved the details of our day-to-day practice. Additionally, we've promoted talented and experienced prosecutors to key leadership roles at the Division.

We aren't just seeing changes with our leadership; we are growing our trial attorney ranks. We've hired twelve new trial attorneys across three offices in the last few months and are wrapping up a round of lateral hiring in our San Francisco Office. We've also brought in two experienced litigators from other components of the Department of Justice.

For the first time, we've added a Senior Litigation Counsel, Carol Sipperly, who is one of the Department's most seasoned litigators, with experience prosecuting everything from corporate crime to mafia bosses.

William Sloan also joined the Division as counsel to the Assistant Attorney General. Billy exceled as an Assistant United States Attorney in two different districts and brings significant trial experience to our ranks. As I will discuss later, he has also spearheaded the launch of the Procurement Collusion Strike Force and will serve as its first director.

With new leadership and new trial attorneys in place, we've taken the time to look at our program and our mission, which is to promote economic competition by deterring, detecting, and prosecuting criminal violations of the antitrust laws. In fulfilling that mission, we are grounded first and foremost by our commitment to professionalism and

1 Richard A. Powers serves as the Deputy Assistant Attorney General at the Antitrust Division of the U.S. Department of Justice. Remarks as delivered at the 29th Annual Antitrust, UCL and Privacy Section Golden State Institute on November 14, 2019.

the high ethical standards expected of federal prosecutors. I often emphasize that we are process driven. We will do things the right way, for the right reasons: we will run efficient, organized investigations, and make sound prosecutorial decisions based upon the Principles of Federal Prosecution.

As many of you know, our investigations are lengthy, wide-ranging, and complex. Greed can infect any market, and our duty to deter, detect, and prosecute those who cheat consumers and corrupt the competitive free market spans the U.S. economy.

We investigate and prosecute antitrust crimes knowing that our work will be dissected and challenged at every point. Sometimes, in these high-stakes cases, the defense opts to challenge the integrity of our investigation as a negotiation or litigation tactic, rather than contest the facts or the law. But our job as prosecutors is to put professionalism, ethics, and mission first, and I couldn't be prouder of how our prosecutors handle themselves each day to embody what the late-Attorney General and Justice Robert H. Jackson called the "spirit of fair play and decency that should animate the federal prosecutor."

In addition to questions that go toward fair play and decency, some have questioned our zeal, particularly when it comes to labor market investigations. In October 2016, the Division reminded the business community that naked agreements among employers to limit competition for employees are *per se* violations of the Sherman Act that can be prosecuted criminally.

The Division has a number of active criminal investigations into naked no-poach and wage-fixing agreements that began or continued after October 2016. The investigation and prosecution of employers who collude with other employers to cheat their employees and distort the labor markets remains one of the Division's highest priorities and an area to which we are devoting substantial resources.

That said, the time and effort required to investigate and build criminal cases is substantial. We will follow the evidence wherever it leads us, including to the C-suite of major corporations, but doing so takes time. These cases, like all of our work, are built and charged based upon the Principles of Federal Prosecution. While we appreciate the public discourse around this topic, sound prosecutions are rooted in our philosophy of professionalism, ethics, and fulling our mission guided by the Principles of Federal Prosecution. And this is an area where I can promise you that we will not compromise.

That brings me to my first topic, recent case-related developments. Back in March, Assistant Attorney General Delrahim told the bar and business community to stay tuned because our prosecutors were hard at work and there was more to come. Since then, we've announced the first charges in six new investigations, and made progress in many other longstanding investigations, which cut across the economy and include several priority areas.

One of the defining themes of our recent enforcement efforts is individual accountability. As we speak, prosecutors from our San Francisco Office are in trial against the former CEO of Bumble Bee Foods who was indicted for fixing prices of packaged seafood. On the east coast, prosecutors from our New York office are in the third week of trial against a former currency trader accused of conspiring to fix prices and rig bids for

foreign currencies. And hours ago, a former vice president at a broker-dealer pled guilty for his involvement in a bid-rigging conspiracy involving complex financial instruments.

This focus on individual accountability is a consistent theme through all stages of our investigations and litigation. On average, the Division charges around three individuals for each corporate co-conspirator.

For example, our investigation into price fixing among freight forwarding competitors has resulted in one corporate and three individual guilty pleas. This conspiracy inflated prices by as much as 20 percent and victimized vulnerable consumers sending gifts and household goods to loved ones in Central America. In June 2018, the FBI arrested two freight forwarding executives in Miami.

At a contested detention hearing that followed the arrests, the court agreed with prosecutors from our Washington Criminal I Section and ordered the freight-forwarding company's CEO detained pending trial. He spent more than five months in jail before agreeing to plead guilty. This summer, another executive and the CEO were sentenced to 15- and 18-month terms in prison.

Other investigations illustrate the Division's commitment to safeguarding taxpayer dollars and holding responsible those who victimize the government.

Division prosecutors from our Washington Criminal II Section worked with the U.S. Attorney's Office for the Eastern District of Michigan to prosecute a fraud scheme that affected federally funded demolition contracts in Detroit. This fall, a former city official and executive charged in the investigation each received 1-year prison sentences.

In another investigation involving government victims, two executives have pled guilty in our Chicago Office's investigation into bid rigging at GSA's online auctions for surplus equipment.

Beyond government victims, recent cases have also involved particularly vulnerable victims, including hospitals and charities. One executive and one company have pled guilty in our Chicago Office's investigation into bid rigging and price fixing among commercial flooring contractors. The conspiracy spanned the better part of a decade and victimized schools, hospitals, and charities in the greater Chicago area.

Our New York Office has secured guilty pleas from three executives involved in a $45 million bid-rigging and fraud scheme that inflated bids for commercial insulation contracts by at least 10 percent to New England-area victims, including hospitals and universities.

The insulation investigation is also one where the Division and its partners found criminal conspirators using new tactics and techniques to further their illegal activity. To conceal their misconduct, the conspirators used burner phones to perpetrate the bid-rigging and fraud schemes.

Our recent results also include charges involving other sectors that impact the domestic and global economies, and affect the pocketbooks of every-day Americans. The healthcare industry is at the top of the list of critical markets for many Americans, particularly the elderly.

As part of the Division's ongoing investigation into this vital industry, Heritage Pharmaceuticals was charged for its role in a criminal antitrust conspiracy to raise and fix the prices of a diabetes drug. Heritage entered into a deferred prosecution agreement to resolve the charge, pursuant to which Heritage admitted liability, agreed to pay a criminal penalty and cooperate in the Division's ongoing investigation. Previously, Heritage's former CEO and president also pled guilty to antitrust charges. I can also report that we expect to make additional announcements about this investigation into the generic pharmaceuticals industry.

Division prosecutors have also kept pace with collusion involving online markets. Earlier, I mentioned our work rooting out collusion at online auctions for surplus government equipment.

The Division has also worked to prosecute executives and their companies who conspired to fix prices of customized promotional products sold online. To date, 11 defendants have been charged in the investigation, and five individuals and four companies have pled guilty. Each executive was sentenced to prison and the corporate guilty pleas have resulted in nearly $10 million in criminal fines.

Like the insulation investigation, this is another example of the Division and its law enforcement partners adapting to new methods of collusion. In the promotional products conspiracy, the defendants and their co-conspirators used social media platforms and encrypted messaging applications to reach and implement their illegal agreement.

The Division also remains committed to rooting out misconduct involving electronics and the financial markets.

From liquid crystal displays and DRAM to electrolytic capacitors, the Division has a noteworthy history prosecuting international conspiracies involving electronic components. Most recently, NHK Spring Co., a Japanese manufacturer of suspension assemblies used in hard disk drives, pled guilty and was sentenced to pay a $28.5 million fine for its role in a global conspiracy to fix prices.

Like the electronic-components industry, the Division continues to prosecute anti-competitive conduct in the financial sector. I previously mentioned that, just a few hours ago, an executive pled guilty to conspiring to rig bids for financial instruments. This is the fourth guilty plea in the investigation into collusion among broker-dealers to submit rigged bids to borrow pre-release American Depository Receipts (ADRs).

This investigation is a reminder that neither the financial sector nor complex financial instruments are beyond the reach of the antitrust laws. And the results speak for themselves: to date, the Division's munibonds, foreign exchange, LIBOR, and pre-release ADRs investigations have resulted in over forty convictions and substantial corporate criminal fines and penalties.

Of course, when we prosecute hard cases involving complex markets, we do not always prevail at trial, as happened a year ago in a foreign exchange market case. But we remain unwavering in our willingness to prosecute criminal antitrust conduct wherever we uncover it in order to pursue a just result.

We are proud of our charging decisions and our record of corporate and individual convictions in all of these important markets. But our work isn't done. Whether competitors conspire to harm consumers making online purchases or buying life-improving drugs on main street, whether their anticompetitive conduct distorts our grocery bills or financial markets, the Antitrust Division will vigorously prosecute both corporations and their culpable executives.

Whatever the market, we also stand ready to litigate to ensure that those who scheme and conspire to fix prices, rig bids, and allocate our markets are brought to justice.

The most recent example of our litigation efforts occurred right down the street. Like many of the other examples I've discussed today, it involved a conspiracy to fix prices in a critical market affecting the pocketbooks of American consumers: canned tuna.

More than a year ago, in October 2018, StarKist Co. agreed to plead guilty to conspiring to fix prices of canned tuna. For nearly a year thereafter, Division prosecutors litigated a dispute over StarKist's ability to pay a statutory maximum, $100 million fine. In September, the district court sided with Division prosecutors and found that StarKist had not proven its financial circumstances justified a lower fine, and ordered it to pay a $100 million criminal fine.

An even lengthier litigated dispute was also resolved in the Division's favor earlier this year. In 2016, a grand jury in Utah charged an heir location services provider and its co-owner with conspiring to allocate the heir location market.

In June 2017, the district court ruled that the conspiracy alleged in the indictment would be tried under the rule of reason and granted a motion to dismiss the indictment as time-barred. The Tenth Circuit reversed the district court's dismissal on statute of limitations grounds, and encouraged the district court to reconsider its rule of reason order. This February, the district court granted the Division's motion to reconsider and found the *per se* rule applied. In July, both defendants pled guilty.

These cases stand out as examples of the tenacity and resilience of our prosecutors. Our San Francisco team fought to bring StarKist to justice for its role in a price-fixing conspiracy that affected hundreds of millions of dollars worth of canned tuna and inflated Americans' grocery bills. Likewise, the efforts of our Chicago-based heir location team highlight the Division's resolve and willingness to litigate to ensure that the antitrust laws are properly applied.

When it comes to litigation, whether before the trial court or on appeal, we take a long-range view. Prosecuting complex crimes in complex markets is hard work. Sometimes we are not able to convince all twelve jurors; some judges may not like our cases. But whether in the face of success or setback, we stand ready to aggressively litigate tough cases to protect American consumers because that is our duty as prosecutors.

The past few months have seen no shortage of policy changes and first-of-their-kind initiatives. Behind these changes and new initiatives are a few key themes. As I mentioned earlier, the Division's mission is to promote economic competition by deterring, detecting, and prosecuting criminal violations of the antitrust laws. While we remain steadfast in our dedication to prosecuting antitrust crimes, recent policy initiatives announced by Assistant

Attorney General Delrahim focus on the importance of deterrence and—through new incentives, initiatives, and relationships—augmenting our detection capabilities.

I'll start with the Procurement Collusion Strike Force (PCSF), which the Department announced last week. The PCSF is an interagency partnership among the Antitrust Division, 13 U.S. Attorneys' Offices, the Federal Bureau of Investigation, and four federal Offices of Inspector General to deter, detect, investigate, and prosecute antitrust and related crimes that affect government procurement, grant, and program funding.

The Strike Force's mission starts with deterrence. The Strike Force will harness the combined expertise and capacity of its members to conduct targeted outreach to procurement officials and government contractors about antitrust risks in the procurement process. Further, the PCSF will facilitate collaboration among its members and the law enforcement community in developing and using data analytics to detect potential antitrust crimes.

The Strike Force not only will leverage the existing resources and personnel of its partner agencies, but it also has secured additional funding to support outreach and efforts to jointly investigate and prosecute procurement-related crimes. Although the Division has significant experience partnering with law enforcement to investigate procurement collusion, this initiative will strengthen and expand the scope of our partnerships to cover outreach, investigation, and prosecution.

While the initiative is new, the Division's commitment to protecting taxpayer dollars from collusion and safeguarding the integrity of the public procurement process is not. Collusion affecting public procurement victimizes our federal programs and American taxpayers. As Assistant Attorney General Delrahim explained when we launched the Strike Force, last year the United States spent upwards of $600 billion in taxpayer dollars on federal contracts and grants. As a result, reducing procurement collusion would not only ensure the integrity of the procurement process but could save taxpayers billions of dollars per year.

The Division's well-established policies concerning the prosecution of antitrust crimes will remain unchanged. For instance, the Division's Leniency Policy applies in the context of procurement-related antitrust crimes just as it does in the context of other antitrust violations.

In addition to the PCSF, let me touch upon another initiative, which similarly promotes the twin goals of deterring and detecting antitrust crimes.

In July, Assistant Attorney General Delrahim announced another new policy. The Antitrust Division, for the first time, will consider and allow for crediting corporate compliance programs at the charging stage in criminal investigations. Now, when appropriate under the Justice Manual's Principles and our Corporate Leniency Policy, corporate charges may be resolved by a deferred prosecution agreement (DPA) rather than a guilty plea and criminal conviction. To promote transparency, we also made public a guidance document that outlines our approach to evaluating antitrust compliance programs.

The goal of the policy change is to incentivize corporate compliance and good corporate citizenship. Corporate compliance efforts are the first line of defense to

antitrust crimes, and part of our effort to both deter and detect violations. Ideally, robust antitrust compliance programs deter wrongdoing altogether, preventing the harm from anticompetitive conduct before it occurs.

When misconduct does occur, prompt detection minimizes the harm and gives companies the opportunity to win the race for leniency. Companies that lose the race for leniency now have the opportunity to earn a DPA and avoid a criminal conviction if they have an otherwise effective compliance program and are committed to a culture of a compliance, as demonstrated by their swift actions and response to misconduct.

In either case, companies that become aware of antitrust violations and self-report not only further our efforts at detecting misconduct and holding those responsible accountable, but they also put themselves in the best position to mitigate the damage.

Effective compliance starts with educating employees. Whether it's communicating HR-specific risks to corporate officials with authority to set wages, or instructing employees about document destruction or obstruction of justice, compliance starts with education that's integrated into the company's business and accessible to its employees. Educated employees can avoid antitrust misconduct altogether and can also detect and flag potential violations.

When employees detect and flag potential violations, it goes without saying that the company's response is critical. Deciding to do nothing or sweep misconduct under the corporate rug can be a costly mistake that deprives the company of the benefits of leniency and severely undermines any subsequent claims for compliance credit. The Division is committed to rooting out misconduct and ensuring that time provides no antidote to antitrust ills for those who sit on their hands after becoming aware of wrongdoing.

Moving forward, our commitment to our work remains the same. The Division ended the fiscal year with over 100 grand jury investigations. A number of those investigations are nearing a tipping point. So, while the markets and the corporations and individuals involved may differ, we remain committed to individual accountability, safeguarding critical markets, and rooting out collusion affecting government victims.

Similarly, we will steadfastly maintain our focus on litigation. As soon as the two ongoing trials end, we'll be preparing for two more involving bid rigging at foreclosure auctions and a fraud scheme to divert funds intended to rebuild and repair an Army facility.

I have no doubt that our compliance policy changes and the PCSF launch will further our efforts to deter and detect antitrust crimes. Our compliance policy incentivizes companies to invest in compliance and act as the first line of defense to anticompetitive conduct. Working with our partners in the district-oriented Strike Force promises to supercharge our deterrence and detection efforts in several ways, including expanding our outreach efforts and using data analytics to detect wrongdoing. In fact, since the announcement last week, the response from our law enforcement partners and the procurement community has been overwhelming. We have already received a significant number of requests for outreach presentations to federal, state, and local groups.

The PCSF will also further our detection efforts by maintaining a public website with a new citizen complaint reporting form. Perhaps most importantly, the PCSF expands and

solidifies the relationship between the Division and our U.S. Attorneys' Office, FBI, and Inspector General law enforcement partners.

As I mentioned at the beginning of my remarks, we are finishing our transition into an era of new leadership, working on new matters, and implementing new policies and initiatives. We are excited about where our program is and where we are headed. More importantly, we will continue to be a professional, process driven organization, focused on conducting diligent and efficient investigations, and dedicated to the principles that guide us as federal prosecutors.

Thank you again for the opportunity to be here and speak with you all today.

FIRESIDE CHAT WITH U.S. DOJ ANTITRUST DIVISION CHIEF OF TECHNOLOGY & FINANCIAL SERVICES SECTION AARON HOAG

By Karen E. Silverman[1]

The 29th Annual Golden State Institute was honored to host a fireside chat with Aaron Hoag, the U.S. Department of Justice Division Chief of the Technology and Financial Services Section, on civil antitrust enforcement and competition issues in the technology space.

MS. SILVERMAN: Thank you very much. Aaron and I worked together for a number of years on bar-related stuff and on casework, so it's my very great pleasure to have the opportunity to talk to you today.

Aaron started the antitrust division in 1997 in the mergers task force. He was briefly in the front office and then moved over to, I will also call it "net tech," but it's the technology and financial services section in 2003 and then rose to lead that section in 2016, and for any of you who have worked with Aaron wouldn't be surprised to witness his rise to leadership in that area.

Over the time that Aaron has been working in the department, the prominence of technology and technology-related questions has only accelerated, and Aaron's worked with it. So we're going to have a conversation about that. We are at a moment where antitrust and technology is probably, for the first time in my long career, an interesting social subject. We get asked at every cocktail party that we go to sort of what's going on. So we're going to talk about what's going on.

And before we talk about whether the antitrust rules and laws and enforcement practices are up to the task of technology, which they are, but I would like to ask you to address, is technology different from other industries in ways that are important to antitrust enforcement? How is technology different?

MR. HOAG: Well, first of all, let me just say thank you for having me here. It's a wonderful time to be back in San Francisco. Thank you, Peter, for having me. We worked together very closely on a trial that we did out here in San Francisco. I see some of my colleagues from our San Francisco office here today too, which is wonderful. We worked with them very closely looking at technology matters.

I also have to add my standard caveat since I'm at a career manager level that these are my own personal views today, so views, my own opinions don't necessarily affect all the policies and practices of the Department of Justice.

But let me turn to your question, which is kind of a great one and great stage-setting question. I personally tend not to think of technology cases as being in some kind of fundamentally different form of antitrust law than the rest of the antitrust law we practice, but

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1 Karen E. Silverman is a partner of Latham Watkins LLP. She advises on emerging legal and governance issues arising from the business applications of AI and related technologies, as well as the antitrust regulatory aspects of strategic M&A transactions.

I do think that there are some characteristics that we see in the technology markets that can sometimes come up in non-technology markets, but maybe are a little more frequent there.

We see certainly as a very popular topic in antitrust circumstance the presence of direct and indirect network effects and sort of the relevance that that can have for the analysis in the antitrust front. There is a lot of focus on two-sided markets, multi-sided markets and platforms, and while you can obviously see those kinds of markets elsewhere in the industry, they are very prominent in the tech space. They do have an effect on the analysis. You see the kinds of entry barriers you see in tech are certainly different in a way than they are in other markets. You don't talk about entry barriers in terms of how much did it cost to build this plan that makes this product and how many do you need to build and when you have the economies of scale. Because you're not asking yourself, is it timely and likely sufficient that someone could take this plant to make this many widgets or steel or paper or whatever. You're asking if someone can invent it, create this product, and get it out there in this marketplace.

So the kinds of questions and the way you approach those can be quite different. I also think when you see some characteristics, the level of dynamism in these markets can vary and vary widely in the tech markets. They have a reputation for being very technology innovative, and there are always new developments and new products and new things coming out into the marketplace, which can result in a lot of change, but in some markets you see maybe that even when there is a lot of innovation, you don't necessarily see different players in the market share as well. Those are a few of the factors I think what makes it a bit different.

MS. SILVERMAN: What about the one we always say too, is the speed at which technology changes. That can lead us into the next question. Obviously, I would like us to anchor a little bit of where Aaron sees the ongoing debate about how the antitrust laws really map on to from an enforcement perspective, technology markets and the standard by which we typically evaluate competitiveness and largely transactions, but also conduct. So we can talk about the consumer welfare standard, but also just the pace at which technology happens, how does that impact your thinking and what kinds of standard you use?

MR. HOAG: I think it has a significant impact when you're looking at any particular transaction, right? Because if you're looking at a particular deal, and you hear the arguments coming from both directions. Both that antitrust law is too slow, therefore, can't keep up with the pace of innovation, or that innovation is so fast—you used to hear this argument maybe a lot more than you do today, that there's so much innovation, things are taken so quickly, there's not even a need for antitrust enforcement. That's perhaps today's debate as it was back 20 years ago when I was in law school and people were just using Microsoft and the like.

MS. SILVERMAN: Right. Let's talk about the consumer welfare standard and how you're thinking about the sort of core principles, prime objectives of antitrust enforcement and how that maps onto tech questions.

MR. HOAG: Yeah, I think it continues to map very well. I mean it is a very lively topic of debate. You see folks pushing out there, pushing for saying the time for the

consumer welfare standard has ended and that we should all move on to something new and better and greater things. But I see it as being actually quite adaptable and applying quite well to these technology cases.

Obviously, you can certainly apply consumer welfare. When you're looking at a traditional market, you're talking about an increase in price and how it outweighs output, and all those things work perfectly fine, but I think equally well it works when you start talking about markets where there is maybe a zero-price product or markets where the important aspects of competition are actually product differentiation or are quality or we could see markets that could be privacy in becoming obviously much more important, both in the competitive spirit and antitrust.

And so I continue to be optimistic about our ability to capture all the different forms of competition within consumer law standards. I don't think consumer welfare–I mean, it has kind of a reputation of being only about price. Everything is obsessed with maximizing the price and only capturing competitive harm when it happens in terms of price.

But I don't think that's the case. I think we see plenty of markets in technology, plenty of cases that we've worked on where innovation is more important than price and where innovation is more important in the element of product differentiation, and yet we still are able to apply all the adjusted forms, the sniff test, and other types of analysis that are I think sort of fundamentally the same and fundamentally rest on the same antitrust competition principles.

MS. SILVERMAN: And the role of—of sort of the traditional economics tools that we use to—I mean, we've all used prices and proxy for competitiveness and consumer welfare for years, but mostly because we can measure it, right? Are you starting to see new tools coming in to aid in a broader scope of welfare analysis?

MR. HOAG: I wouldn't know if I could go as far as say "tools." It's hard to come up with an economic model that's around quality and variation, especially if you start talking about conduct cases. Maybe in a merger you can still look at diversion. You can still measure these things, and price can still be a proxy in such a way. But I think what you do see is a lot of creative and flexible thinking from our economists.

We have such a wonderful group of Ph.D. economists at the antitrust division that are embedded in every single team in every single case. They're on top of all the latest literature and the ways of approaches and the ways of thinking about different types of competition and how you might prove or disprove in a particular case and what the particular facts are, would be necessary for that. So I think we see kind of an increased focus on that in most recent matters.

MS. SILVERMAN: It strikes me that documents, which are always important than becoming that much more important, where you're trying to assess other dimensions.

MR. HOAG: I think that's completely right, because there's such a qualitative element to a lot of these antitrust cases. You're trying to look at a particular course of conduct and find out is that conduct fundamentally restraining competition, promoting competition—especially if you're looking at a conduct case, we always say that intent is an element in antitrust law and there is no doubt that that is true.

And there are plenty of cases where you can sort of make your antitrust proof without any evidence of intent, but it's not hard to say it's probable though. I think you see that in documents time and time again, whether it be a merger case or a conduct case where you see companies that are sort of honest in their assessments of the pros and cons in a particular course of action. That I think you can see that directly having an impact on—if that appears to be consistent with the kind of evidence you find in the rest of the industry. Those documents can carry a lot of persuasive weight, and I think would be very relevant.

MS. SILVERMAN: But the one question—as you were listing down the other sort of dimensions of welfare, you mentioned privacy sort of in a parenthetical way.

MR. HOAG: Yeah.

MS. SILVERMAN: Can you tell us a little bit about how, if at all, you're looking at data policy and privacy sort of policy discussions, of how you're interacting with those, if at all, over the course of antitrust enforcement? At least in a lot of our work, we see these as not necessarily competing disciplines or tensions, but they are evolving and emerging in parallel and not always in conversation. And so I would love to get your thoughts on that.

MR. HOAG: As I think about both data and privacy, they kind of cut across all different areas that we look at in antitrust, and what I think of them as—antitrust is not about imposing a prescriptive view of what the privacy law should be in the United States. It's about, obviously, taking scene of the benefits of competition so that competition can determine, to the best that it's able, that the consumers get the kind of privacy protections that they are sort of—I don't want to say entitled to, but entitled to in the commercial sense, not maybe in the moral prescriptive sense.

And so when we think about privacy, you look at it as kind of an aspect of that non-price competition that people can benefit from. Data is kind of a different one. It's been important in antitrust for quite a while. I think some of the cases when we first started doing a lot with data, where data was the actual service that was being provided, many of those are kind of the simplest form of cases. People or a company, they license a particular kind of financial data and they're merging with another company that licenses a similar kind of financial data, and so you do your kind of traditional analysis of the overlap between those two and how substitutable they are for each other, and doesn't really dramatically change the nature of the antitrust enforcement. But I think where we've seen a lot more recently is where data is a critical input to providing some other kind of service. And I think that can fundamentally affect the antitrust analysis, not sort of the nature of the antitrust analysis, but when applied to a particular set of facts, I think can lead to some very interesting results.

I think back in my time in the division, ten years ago or so, we were looking at all agreements that related to the Yahoo search engine.

So at one point—you may have been involved with this, certainly some of your partners were—Yahoo had an agreement with Google where Google was going to take over to some degree, at much debate, while the Yahoo search—

MS. SILVERMAN: We're not going to relitigate anything.

MR. HOAG: I promise. I think there what you saw that it was clear that data was an absolutely essential input into operating a search engine, which I think is obvious to everyone, and that a loss of data or a diminution of data or a reduction in the amount of searches that Yahoo was handling raised some real serious questions for the division about how viable Yahoo would be going forward in the future. So you saw from that perspective, you can see where the importance of data and importance of data at scale was a critical factor in figuring out whether a merger agreement, a commercial agreement, was going to be procompetitive or anticompetitive.

But apparently when you looked at the outburst, you looked at–after that, we all fell apart, and I'm not revealing anything dramatic here. This was public at the time. We were prepared to sue to block that transaction.

Then Yahoo did a parallel kind of deal where they did it with Microsoft, right? There you have an operator who was, probably at the time, suboptimal in terms of scale, and their ability to obtain additional data from Yahoo, as I think we concluded and has been said publicly, sort of provided the potential for some real benefits to competition by giving them additional data, additional scale, and may have been more able to become a more effective competitor to Google.

So you can see those coming into play in particular transactions in different ways, but I think kind of on board with the fundamental antitrust principles.

MS. SILVERMAN: I guess even as recently, I think it might have been yesterday, when assistant attorney general Bill, who was testifying on the distinction between data usage and the value of that in a transaction that's distinguished from sort of consumer data, which really more is the province of data policy as data policy is sort of more is classically thought of. Are you guys exploring those distinctions in the context of primarily transactions or conduct? How does it come out?

MR. HOAG: I think it could be relevant to any particular case. It's very hard to say—to make general, broad statements about how data fits in, as you know, because what it really does is it comes up in a particular case, in particular a conduct or a particular merger you're looking at. So you can definitely see, as the assistant attorney general was commenting yesterday, there are certain kinds of data that seem more replicable or more easily accessible to others.

It's a little harder to imagine in the abstract why those would be likely to be entry barriers where there's other more specific kinds of data that tied for a particular use of platform. You can see how they might get companies more durable competitive advantages.

Now, obviously, you don't have to test that in any particular market, in any particular case, to see what is the real impact that data is having here. So it's easy to make—everyone makes the general assertions about, we see people that come in. They need all this data or you need this much data, but I think what's important is sort of putting real concrete aspects to it and really figuring out what's the quality of the data, like how much do you really need? Can you actually quantify what the gap between the data you have and the data that might be at the next level if you weren't denied access to this particular service or something like that? You could actually either quantitatively or qualitatively describe what difference that would make in terms of the firm's ability to meet. I think those are

the kinds of details that are necessary to make that really fit into a Folsom antitrust analysis in a particular matter.

MS. SILVERMAN: Without going down the rabbit hole completely, non-horizontal mergers and killer acquisitions and sort of the non-traditional, forward-looking merger enforcement work that you guys are doing. I think in tech, in particular, a lot of the traditional efficiencies, defenses and arguments that we would raise or we're beginning to suspect don't have as much life in them as they may have historically.

Can you expand a little bit on sort of what's your starting place when you think about these acquisitions and what you're looking for by way of—sort of looking for where the competitive interactions are in non-horizonal transactions?

MR. HOAG: I think the best way to think of it is, if you have a non-horizontal transaction, you're almost invariably looking for, is there some form of market power that's already preexisting that's going to be reinforced in some way? So I think of that as the fundamental. I suppose one can come up with a stylized set of facts where you don't have market power on either side in the vertical transaction and somehow get there at the end, but to me, that's probably the rare case.

MS. SILVERMAN: It's a different panel.

MR. HOAG: Yeah, that's probably a different panel. I think it's more likely that the kind of cases we would be concerned about that would cause us to look more closely are cases where you have a firm that has either market power or monopoly power. Could be either one is engaged in a transaction that, yes, it may be complementary in a certain way, but is there a discrete or logical chain of events that leads you to think that that actually could result in reinforcing that market power, not just by innovating and making a good product, but by actually withholding access from only people, for example, to the firm that is being bought? So it could be hard when those companies are nascent and are at the beginning stages.

Vertical cases are hard enough when you have well-established firms on both sides, as we certainly saw in one of our trials recently at the department. But I think in the nascent ones, you want to look for just real preexisting dominance or monopoly power and a real likely path for it to be reinforced by the merger; something that's not overly speculative.

And even then, I think under Section 7, I think you have kind of a hard road. The law is very tight on potential competition or on nascent competition. In vertical cases, there's probably no real law there, but to me, that isn't something you want to look at very closely and we wouldn't be interested in reviewing.

MS. SILVERMAN: But one of the conversations we've had in other contexts is whether there is meaningful daylight between your classic Section 7 standards and your incipient Section 2 type case, right? Where is your interest or shift from causally related to the merger to maybe more focused on merging market power? And I don't know if you—are you guys thinking about those as divergent from a legal standard perspective these days or is that still—

MR. HOAG: At the minimum, complementary, but I think you could definitely imagine a case where you've come to a different outcome, or a case you're convinced should have been a different outcome, which is maybe or less the same thing. I think on the Section 7 talk side, you've always got to get over the probabilistic threshold, and where it's not precisely defined whether it's 30 percent or 50 percent or whatever, but still at some level you have to show more likely than not or very likely that there's going to be a direct reduction of competition as a result of the merger.

If you look at the Section 2 case, my colleague, or acting chief economist Jeff Wilder gave a really interesting speech on this topic recently, and talked about how in the Section 2 case, if you start with monopoly power, then I think as we saw when you look back at the Microsoft case, for example, looking at particular kinds of conduct, you could extend that line of analysis, thinking towards acquisitions, and if there's still going to require a coherent story, a coherent reason to think that this transaction is one that's actually going to reinforce the monopoly position rather than just enable them to expand into a new area or engage in activities or growth. They are inquiring in a way they wouldn't otherwise.

But I think there is some potential there, and I think I could definitely imagine a scenario where you end up with actually different answers. And it's unproven, of course, but I think when you think about it from a theoretical point of view, it seems to capture a lot of what the concern about transactions is, which is really related to the enforcement of the existing monopoly power, more than necessary is the removal of this particular competitive entity from the marketplace because it's so small.

MS. SILVERMAN: Still, I want to live long enough to see the first causation case—which hopefully.

MR. HOAG: Hopefully.

MS. SILVERMAN: One more question before I ask you what we can do for you or what you need to see and how you interact with the bar in ways that are useful—well, more useful than not. We've talked about sort of this other way to look at consumer welfare through the broader reach. Is it useful at all to also ask the other question, which is are there categories of conduct, interest, concern that just plainly are outside the purview of the antitrust? Because one of the things as we wander through the world balance that there is this tendency to try to answer all questions in the context of whether the antitrust laws could reach this, fix this, address this, make it worse, make it better. What should sit outside of antitrust and not in this room?

MR. HOAG: I think I tend to take a very broad view of what sits inside antitrust, which is probably not too surprising. But maybe the only limitation that I really apply to it is that it really needs to be competition-related. And that it has to be actually related to a theory that involves a direct loss of competition in some form or another.

So I think antitrust is fully capable, so we were talking a little bit about earlier, taking into account all types of non-price elements, of quality, of variety of products, of innovation, of privacy, of idea. I think those issues are all perfectly able to be tackled to some degree or another within antitrust, but there is always a temptation to see antitrust work reasonably well to see if you can solve all the world's problems through antitrust.

And as an antitrust lawyer, I tend not to think that's the case. That doesn't mean there are the competition problems that can't be addressed through antitrust, but I leave it to those much higher in the food chain to what extent we need prescriptive policy to address the gap between antitrust and our vision of the world from a more prescriptive point of view.

MS. SILVERMAN: Which is important to be thinking about. All right. So things that keep you up, and we'll leave time for some Q and A, so be thinking about your questions. But the things that sort of keep you up, most concern these days, and things from the division's perspective under the private bar's perspective, what is going right, what could go better?

MR. HOAG: I'd start to say half-jokingly like what could go better. It's always better if everyone returned our calls when we called them for our investigation. I really strongly encourage people to do that. That could be quite helpful. It does surprise me how often we're doing some merger investigation and we get the list of the top customers. We call 30 people, and 20 of them don't call us back sometimes. And it's really hard to figure out to determine quickly whether you have a transaction that—in trying to determine whether it's likely to be anticompetitive or not, if you can't get the responses. Even if the response is, oh, we don't care about this at all because there's 14 other competitors, that's a perfectly fine 30-second response, even if you don't want to sit down for an interview.

But I will say more seriously that we are always interested in hearing from people in the bar and from the companies in Silicon Valley and elsewhere about their markets. We invite people to come in and give us presentations and I'll extend an open invitation for people that come in and think they have things we should know about as we're looking at these markets. We are more than happy to hear a variety of views, whether you have a specific set of complaints about a particular company or whether you just want to come in and tell us about trends that you see across the industry. We're actually pretty open. So we are always, both in our office in D.C. and for folks here, working with our colleagues in San Francisco, always happy to do that and happy to benefit from the knowledge that's out there in the industry as a whole. So we welcome that.

MS. SILVERMAN: Great. With that, we have time for a couple of questions before we yield.

MR. ALIOTO: Enjoy it very much. My name is Joe Alioto, and what I would be interested in is your view as to whether or not any of the mega mergers have resulted in an undue concentration of economic power in most of the industries in the United States.

MR. HOAG: Well, this is where we get to the boring part of the presentation where I say that I unfortunately can't comment on specific matters, sort of—

MR. ALIOTO: You personally; forget the DOJ.

MR. HOAG: Fair effort.

MS. SILVERMAN: Other questions?

MR. HOAG: The only thing I will say is obviously, there's been no reticence about the fact that both us and the FTC are taking a very broad look at all these technology markets. So to the extent that someone has a concern or a complaint of a particular transaction in the past has resulted in either an undue concentration today or then resulted in conduct resulting from that, that might violate the antitrust laws. We're very open to hearing that, and we're doing a lot of activity in these markets right now.

MS. SILVERMAN: So, interestingly, Aaron worked on the Microsoft case and decree. Do you want to talk briefly about—I mean, that sort of is now a historical starting place for how a lot of the market power analysis sees, and you have some thoughts of what the real takeaways are from that . . .

MR. HOAG: So I worked on the case after the trial was over and when the case had already gone up to the court of appeals and come back down and settled, and we were left with the remedy. There was a lot of debate and argument of whether the remedy was adequate, but I worked for, gosh, eight years or so on the actual enforcement of the decree, and I think what it leads me to—maybe a couple of quick conclusions.

One was the belief that these kinds of antitrust remedies, even though ultimately we obviously weren't granted structural relief in that case, I think it did have a major impact on the way the industry developed. I mean, you can look back, I saw Bill Gates say last week that he thought that the antitrust investigation case is the reason why we aren't all using Windows phones.

MS. SILVERMAN: Cost in the phone market.

MR. HOAG: Yeah, of course, what he meant was that we were distracting them unfairly and persecuting them. But I maybe take a little different view of it which is, if you look at the fundamental restraints that were put in place in that decree, I think that they prevented a lot of nefarious conduct that very well might have taken place. I don't know if the industry would have developed the same way in web browsers and sort of the overarching use of the Internet in a generally neutral and open manner. If it had been the case, that Microsoft could have tied it all back in and continued to make it part of Internet Explorer in their own unique domain.

Also sort of led me to believe that you need to think very carefully about what some of these remedies look like. Because there are certainly some parts of it that were much more complicated and I think therefore were less effective, sort of overall, there were parts of the remedy that were both a challenge to implement, but also I think because of the challenge, almost never really had the effect that one might have hoped, certainly not as much as the direct conduct prohibitions that actually, I think, guided Microsoft's conduct. I'd like to think at least a little bit opens up that industry, some competition.

MS. SILVERMAN: Other questions, comments, before we let Aaron go home? Thank you, guys, very, very much.

[APPLAUSE]

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

By Elizabeth Tran Castillo[1]

In 2019, the Golden State Institute continued the tradition of hosting a panel of judges with backgrounds and experiences of managing antitrust and complex business litigation and trials. Three distinguished Northern District of California jurists—**Judge Vince Chhabria**, **Judge Haywood Gilliam**, and **Magistrate Judge Jacqueline Corley**—offered their insights and perspectives on these issues in a panel discussion moderated by **Elizabeth Castillo**.

Panelists

- **Judge Haywood S. Gilliam, Jr.** serves as a United States District Judge for the Northern District of California. Judge Gilliam received his commission in December 2014. He graduated *magna cum laude* from Yale College in 1991 and received his J.D. from Stanford Law School in 1994. After law school, Judge Gilliam clerked for the Honorable Thelton E. Henderson, then the Chief Judge for the Northern District of California. Judge Gilliam was in private practice from 1995 to 1998 and worked at the U.S. Attorney's San Francisco Office from 1999 to 2006, ultimately serving as Chief of the Securities Fraud Section. Before his appointment, Judge Gilliam's law practice focused on white collar criminal and regulatory matters and internal investigations.

- **Judge Vince Chhabria** serves as a United States District Judge for the Northern District of California. Judge Chhabria was nominated by Barack Obama on July 25, 2013 and confirmed by the Senate on March 5, 2014. Before taking the bench, he was chief of appellate litigation for the San Francisco City Attorney's Office, as well as a deputy on the Government Litigation Team for that office. Prior to joining the San Francisco City Attorney's Office, he worked in the San Francisco office of Covington & Burling, where he focused primarily on criminal defense litigation. He served as a law clerk to Supreme Court Justice Stephen Breyer during the 2001-2002 term. Before that, he clerked for James R. Browning on the Ninth Circuit and Charles Breyer on the Northern District of California.

- **Magistrate Judge Jacqueline Scott Corley** has been on the federal bench since 2011 and has presided over nearly every type of civil action at all stages of the proceedings, from motions to dismiss through jury trial. She has also served as a settlement judge in hundreds of cases. She currently serves as the Northern District's Alternative Dispute Resolution Magistrate Judge, in charge of coordinating the alternative dispute resolution program with the Court. Just prior to taking the bench, Judge Corley was a partner at Kerr & Wagstaffe, LLP. From 1998 through 2009 Judge Corley served as a career law clerk to the Honorable Charles R. Breyer. She also served on the Northern District of California

1 Elizabeth Tran Castillo is a partner of Cotchett, Pitre & McCarthy, LLP. Her practice focuses on antitrust class actions against international cartels. Ms. Castillo has represented clients in both federal and state courts and at all stages of litigation, including discovery, trial, and appeals.

Alternative Dispute Resolution mediation and early neutral evaluation panels from 2006 through her appointment. Judge Corley received her undergraduate degree from U.C. Berkeley, and her J.D. from Harvard Law School, *magna cum laude*, where she was an editor and Articles Chair of the Harvard Law Review.

I. MANAGING COMPLEX CASES

MS. CASTILLO: Good afternoon, everyone. My name is Elizabeth Castillo, and I have the honor of moderating this distinguished panel of federal judges from the Northern District of California, all of whom have a wealth of wisdom regarding complex case management and best trial practices.

Welcome, judges, and thank you for being with us here today. Let's jump right into managing complex cases. Let's first begin with your experience in complex cases and your practices and procedures for presiding over them. We'll start with Judge Chhabria.

JUDGE CHHABRIA: I don't know if I can describe one road map for managing complex cases. I mean, they are complex, and they are usually unique, right? So my approach is that I try not to have a set approach. I try to think about every case based on the facts and law and the nature of the case what is the best way to manage and schedule the case in a way that's going to be least costly for the parties and move the case along as quickly as possible, but I honestly have some kind of default approaches to class actions that I assume we'll talk about later, but for the most part, I don't have one set approach. I really try to go into each case with an open mind as to how to manage it and schedule things.

JUDGE CORLEY: So my experience as a magistrate judge is going to be a bit different where I have some complex cases on consent. Just having to get consent from everyone makes it less likely, so I deal with the more for discovery and for settlement. And I guess I would say my philosophy with complex cases is we tend to have pretty experienced counsel. So my philosophy is to sort of go with counsel, really rely on counsel, give them the time and ability to come up with proposals for me for discovery, encourage them. Maybe require them to come up with a really thorough discovery plan, but then not mess with it, right? Say, okay, you agreed to it, accept it.

The same thing with settlement is really spend a lot of time on the phone figuring out what is our best way to proceed, and then what I really think with complex cases is often what the best thing a judge can do is give parties deadlines. And so I'm happy to do that, and as much as possible, where there's a deadline for the discovery, a deadline to come up with a stipulation, a deadline to do this. And I've found with complex cases that's what actually keeps them moving the most.

JUDGE GILLIAM: I do in each case that comes in as a new civil case have, as Judge Chhabria was saying, some defaults that are the standards, especially in terms of the schedule. So generally, if it's a relatively straightforward case, I often look to have a schedule that could have the case resolved within about a year. Sometimes for more complex cases, it could take 18 months or longer, but like Judge Chhabria, that is a starting point, and my practice in the complex cases especially is that I do rely very heavily on the parties' counsel to meet and confer, really think about the case before that first case management conference. And come up with a set of proposals that we then can discuss for moving the case along in a way that's timely and efficient.

One of the immediate bad signs in a case management conference statement is when I get two dueling schedules that are dramatically different because, obviously, the parties know the case much better than I do at that point. You're deeply immersed in it, and I urge counsel to really think together about what makes sense. And then we talk about it. I don't impose the default unthinkingly. If there is something about the particular case that counsel different approach, I'm going to consider that. Sometimes I experiment in terms sequencing, if the parties are making a joint proposal and they present well-thought thorough reasons for trying it, I will consider that. But really, I think the fundamental expectation coming in is that I do ask a lot of counsel in terms of really deeply thinking about the case, figuring out where the real disputes are, as opposed to just disputing everything and throwing it to me to resolve. And I like to set up a relationship where we can work in a way that's collaborative, understanding it's adversarial, but to the extent we can figure out what makes sense in the parties' view for the case, I think that ends up working better than the alternative where I just end up imposing something because the parties can't come to a mutual proposal.

JUDGE CHHABRIA: And I wonder, Jackie, you and I have talked about this over the years, I wonder if I may differ a little bit from you on one point that you make, which is I think I might be less inclined to defer to counsel if they agree on an approach. I think I tend to ask, well, why are you proposing it this way. Is it just because that's how it's always done. You know, have we really thought about whether that might not be the right way to manage cases. I mean, it might make more sense to not make waves with the parties if they agree how to move the case forward, but I do find myself at times saying, no, I think we should do it this way and tell me why my idea is bad. And if they can't explain to me why my idea is bad, I might impose my own way of doing it on both sides.

MS. CASTILLO: At the initial the CMC, do you like to set a case schedule early on that runs through trial or leading up to trial, or how far do you like to set the schedule at the initial CMC?

JUDGE CHHABRIA: I set the case through trial except in class actions. With class actions I will set it either through summary judgment or through class certification, and then we will sort of regroup after that. And there's often a big discussion about whether to do summary judgment as to the named plaintiffs first or do class certifications first, but other than those cases, I set the case for trial right away.

JUDGE CORLEY: I do the same thing, through trial. I think it's helpful particularly as someone who does a lot of settlements, right? It's always just more productive at a settlement conference when you can say to the litigants, look, if we don't settle, this is what we know we have coming because we have the data, and what I find difficult is when I am referred cases where there is no schedule, not from these two sitting next to me. But anyway, but I do set it all the way through, and with class actions, it depends. If the parties request only through class certification, then I'll do that, but sometimes I don't, and then I'll do it all the way through just to keep it—again, keep the case moving.

JUDGE CHHABRIA: My practice is similar. For non-class cases, I will generally set the trial schedule shortly after that Rule 26 conference. For class cases, I do set those through class certifications because the outcome of that motion can really dictate the

path of the case and how long the trial would take and all those types of things. So that's the default.

I will say that I do sometimes, if the parties show up at the first conference and say we've been discussing a resolution, we think that if we have a finite period of time to talk about it, we may be able to work the case out. And so, and again, this is another place where counsel's credibility is critical, as we have to have that discussion, and I have to make an assessment of how serious the discussions are and how likely they are to be productive and assess whether counsel is committed to giving it a good faith go. But if they are, and I'm persuaded of that, then I have had instances where I've said let's take 30 days or 60 days or however long, come back for a case management conference, see what you are able to do in the interim and then proceed from there.

It's so hard to tell, though, when they really want to take a serious crack at settling it versus they just haven't done their discovery and they are asking for a continuance of the trial date, and the reason they give is to try to settle, but it's really just because they haven't done their stuff yet.

JUDGE GILLIAM: It's true. In the instances when I have done that have usually been at the very beginning of the case where I have to assess credibility, and if there is a good faith chance for the case to resolve before the whole machine gets spun up, then I will give the chance to do that if I'm convinced that it's a realistic good faith effort.

MS. CASTILLO: I would like to go back to what Judge Chhabria mentioned, which in class actions, what should come first, class certification or summary judgment, what is your take on that?

JUDGE CHHABRIA: It's the eternal question. I have actually, and especially when I started on the bench, I tried as an experiment in a couple of cases to set summary judgment first to see if there just would be a resolution as to the named plaintiffs claim that would then mean that that person couldn't be class representative and that would be feedback for the parties. I haven't found that I've disposed of a case that way yet. It's just tends to work out that there ends up being an issue of fact that precludes summary judgment, and then we're on to the class questioning in any event. So I thought when I started that there was more of a prospect for an early dispositive data point for the parties that would be something that could be done before the class certification phase, but it just hasn't worked out that way.

JUDGE CORLEY: I've had to work where the counsel was in agreement. Because, of course, you have to have the defendant willing to take the risk. That should the defendant win, it's not binding on the absent class members, given the case has never been certified.

JUDGE CHHABRIA: And should the plaintiff win, it brings class certification; if the plaintiff then wins class certification, they have won the case.

JUDGE CORLEY: Right. But then you have to also have a plaintiff. But where I've had it done is because the defendant was willing to do that and the plaintiff wanted to do that because the defendant said we really think there is a problem with these representatives and their claims, and the plaintiff's counsel, to her credit, didn't want to spend all the time

and money litigating class certificates which was just actually going to go away. So they agreed and we did it, and the case did resolve then after summary judgment.

So, again, it goes to I think when the parties agree, when counsel agrees, judges should really look at that, in the absence of some data that says they don't know what they are doing, really agree to it. So that's what I do. But I would never impose it. I would never impose it without the agreement of both sides because they know their case more than I do.

JUDGE CHHABRIA: And when you say "impose," you mean you would never say we're doing summary judgment as to the named plaintiffs before class certifications.

JUDGE CORLEY: I will never do it over defendant's objection. I don't think that's fair to do that to them, but I would think about it if the plaintiff objected, as long as I was confident that an objection wasn't based simply on, oh, we want to force an early sentence because of the cost of class certification. But I think that's rare because class certification is costly on both sides. And plaintiff does not want to engage in that costly if they are not there either, but if they agree, I would definitely do it.

JUDGE CHHABRIA: I will not do summary judgment first if the defense objects because I actually think it's under the case law you can't force the defense to do that, but I also say to the defense, if you want to do summary judgment first, then we're doing cross-motions for summary judgment, not if the plaintiff wants to file a cross-motion for summary judgment. It's not just you who gets to file a motion for summary judgment to try to knock the plaintiff out. The plaintiff can try to win as well, if they think they can. So I think that every case is different and you really do have to take a good look at each case and think about what makes the most sense, but generally speaking, I am a pretty big fan of doing cross-motions for summary judgment first and have found—I think I probably have dealt with a lot fewer class certification motions because I do it that way, and, of course, it's not about me and that's not why I like it. I like it because I do think that it increases the chances of the parties getting a resolution without spending all that money on class certification.

I do find that a good number of plaintiffs object to this. I think some of them object reflexively because it's not the way they usually do it. I do think that a number plaintiffs object because it prevents them from driving up the settlement value of the case. And they want to sort of do discovery on who's a member of the class and get that expert discovery going on class certification in an effort to drive up the settlement value. So I think for those reasons it often is a good idea. I've often found it to be a good idea to do summary judgment first. And I feel like a couple of times it didn't work out, but for the most part, it has worked out quite well.

JUDGE CORLEY: And it doesn't have to resolve the whole case. So you can do the partial summary judgments and class certifications on a claim-by-claim basis. It can be very useful for the parties to figure out what are the claims that are going to go forward, so that class certification isn't wasted on those claims that wouldn't go forward, in any event.

So I, for example, would be curious what your practice is, and we'll put in a plug, I don't think any of my magistrate colleagues, we have no rules on the number of summary judgment motions that you can bring. It's not that we want ten, but we might speak up.

But because I do think litigation can be managed more efficiently if sometimes you have judges decide early on summary judgment motions, but parties are going to be reluctant to bring that if you're telling them that's your one and only, from either side.

JUDGE CHHABRIA: And I agree with that. I'm not a fan of the one summary judgment rule. I'm also not a fan of the rule that says you have to go seek permission or like kneel before the judge to sort of get their blessing on filing a summary judgment motion. On that one let the parties litigate their case.

JUDGE GILLIAM: And I do have the single summary judgment motion as the default, but again, as with everything, if there is good cause shown for filing one after that, then I will always consider that, but I actually do want the parties thinking about moving for summary judgment to give some serious thought as to whether it's a sensible approach at that time. So I do want there to be at least some sort of hanging over.

JUDGE CHHABRIA: Do you have that process that a number of judges have where you have to write a letter to the judge or you have to have a kind of conference with the judge to talk about whether you should be filing a summary judgment motion before they do it?

JUDGE GILLIAM: I don't. I can see the appeal, but I haven't implemented that.

MS. CASTILLO: What can attorneys do to effectively coordinate multiparty litigation in your court? Judge Corley?

JUDGE CORLEY: Get along.

JUDGE CHHABRIA: Exactly. Talk.

JUDGE CORLEY: Actually, I love when I see this, when they get together and they come up with a really thorough discovery plan, including, okay, each side is going to get, say, 150 hours. I love the hours of deposition as opposed to numbers because it avoids the fights as to who is going to be how long. I think it makes a lot more sense, right? Your 30(b)(6) may take 30 hours, and somebody else may take two, when they've talked about, as you do in antitrust cases, you have depositions that require translation. So they bake that into their hours and those kinds of things. They've agreed to search terms, or they've really just sat and really spent the time to go through all of it, which I think in the long run will save their clients money because it's going to avoid all of those unnecessary fights.

And I know that there is a lot of give and take that goes in that and there is a lot of compromising on each side that goes out. And I think, what I like about that is I think that's in their client's best interest as well as opposed to some judges, for me, sort of deciding arbitrarily because I will never understand your case as well as you do. So that's what I think is super helpful.

JUDGE GILLIAM: I just think in so much of what I will say today comes down to three words: meet and confer. I always appreciate it when the parties have this sort of relationship that they can narrow disputes. I understand that not every dispute can be eliminated. I entirely get that. That's my job is to resolve the disputes. But what I expect the parties to do is to be in constant communication, figure out what really can't be

resolved, and then that can be elevated, but one of the things that always set my radar off is if I get an administration motion for something. We asked for this, and the other side said they won't do it. And it's not uncommon then for us to look at that as a contested matter and then get a statement a couple days later saying never mind, we agree to that.

So those are the kinds of things that I like to have the parties work out. If there is something that really can't be agreed upon, I'm always here to resolve it, but I think especially on a multiparty case having that mindset that the goal is to work out whatever can be worked out without the intervention of the court, and then however many that is, that's fine. I'm not saying don't bring things to me if they can't be resolved, but I think the more parties there are, the more, from my seat, I appreciate seeing parties who have really thought things through and figured out how to efficiently work together.

JUDGE CHHABRIA: I agree with all of that. As for multiparty cases, I'm not really sure that I've had a multiparty case in my five plus years that has presented special management problems as compared to your typical complex case that is just between two parties. So I think those things become more of these things that Judges Gilliam and Corley are talking about become all the more important when you have the multiparty cases, but I haven't had any special problems with that.

MS. CASTILLO: Judge Corley touched on discovery, so I want to transition to that and ask you what is your philosophy on how to effectively manage discovery and how do you balance the desire for efficiency with the need to get an adequate record for summary judgment, cross-adjudication, et cetera?

JUDGE CHHABRIA: First of all, my default in most cases is to keep the discovery dispute myself. There's an exception for patent cases.

JUDGE CORLEY: Thank you.

JUDGE CHHABRIA: You're welcome. But I think most other cases and certainly the two MDLs that I have, and most other cases, I will initially keep discovery myself. Just on the theory that it's better for one judge to be managing the case than two. In most instances I have the procedure, like I said, that I think most of us have where you submit a joint five-page discovery letter, and that's what tees up your discovery dispute.

I find that most of the discovery disputes can be resolved simply by reading that letter and maybe the discovery requests that they are fighting about and the objections, and you have to stay on top of it. You can't just let the discovery letter sit in your inbox. But as long as you stay on top of things, I think that's the most efficient way to resolve most discovery disputes. Then for the ones where that doesn't work, I will either refer to a magistrate judge or have a hearing myself or force them to both come and lock them in a room and make them talk until they figure it out.

But I have not found that discovery issues have really slowed down my cases very much, for the most part. I think there are some exceptions, at least from my perspective. I haven't seen discovery battles and discovery problems be a big issue in the speedy adjudication of cases.

JUDGE CORLEY: A practice I started a couple years ago in my own cases and also cases referred to me for discovery, is I allow counsel to contact my courtroom deputy and set up an informal telephone call with me and the parties when a discovery dispute is brewing, I don't know in advance what the dispute is, and we get on the phone, and I say how can I help. And one side will describe what the issue is, and the other side. And I just give them my off-the-cuff instinctual reaction, and when I tell them I'm not going to rule. I'm not going to say anything binding because that wouldn't be fair. Because you haven't had an opportunity to present it to me. But I'm just going to give you my instinctual reaction.

I would say 95 percent of the time that staves off the discovery disputes. Maybe because a lawyer can now go back to the client and say, now, the judge said she's likely to order this so why bother spending the time on this. And maybe sometimes they will just say, offhand, it will just be like, when are you going to produce that document? Oh, and then miraculously, they find that they have a date that counsel couldn't get out of them for however long. So I've done that practice, and I found it's interesting.

I actually think in my more complex cases, my most sophisticated lawyers are using that process the most, which I find really quite interesting, even in some MDLs where I'm assisting with the discovery as well. And I think that is because a lot of disputes are not worth, frankly, the big full-blown letter all the time, and the delay, right? You just need an answer, and the judge giving you her reaction can just help you and help the lawyers move on, and so I found that to be very expensive.

JUDGE CHHABRIA: Sorry to interrupt. I bet you're right that a lot of it is particularly on the defense side that they can go back and talk to their client about it. That they can say, look, I'm having a hard time getting a date from you for this 30(b)(6) or I'm having a hard time pulling these documents out of you because you think they are embarrassing and you don't want to disclose them. But I'm telling you, the judge had a very strong reaction the other way, and the judge has the power to sanction us. We have to pay the other side's fees if we don't turn it over. I bet that is a big driver behind it.

JUDGE CORLEY: The danger is that sometimes that can be a crutch. It takes a lot of time, my time as well, to do that. But if I started to feel like that's being abused, then I will just quit and I will say, okay, they have to come in person, and that's the other thing—I will give you all my secrets.

The other thing is when a case is referred to me for discovery, so I've never seen the parties before. It's usually with the dispute, but that first dispute I will have them come in, so I can get to see if they are getting along, sort of set the ground rules. I talk about my informal procedure, and I will mostly continue to have in-person hearings. But when it occasionally happens, I start getting letters, joint disputes letters every week, then I just start issuing really pithy orders and they never get to come in, because I don't want them to have the satisfaction of coming to see the judge and being able to talk about what the other side thinks. So if you start to see those orders coming from me, you know I've gotten tired of you.

But that's just my thing about managing, and that seems to work. I have this case now, actually it's your case, Judge Gilliam's, where I literally have a call with him every

week. Because they just needed it, right? Or one side in particular, and they just needed it. And so I'm having a call every week. When something is referred to a magistrate judge for discovery, our goal and our obligation is to not delay the case, and really facilitate, consistent with Rule 1 in those discovery disputes, not getting out of control and not delaying the case. And so sometimes what that means is having calls with the parties every week, so I'll do that as well.

And the other thing I would say my philosophy is with the dispute is when you come in, I'll say what do you want. And don't read me your document request, right? I don't care what that says. I just want to know in plain English what is it that you want, and for the defense, why won't you give it to them. And usually when the one side says in plain English what they want, the other side will say, oh yeah, I can get that for you.

And so that's what I'm going to say. Don't tell me about your meet and confers and all that. I mean, I'll let them say a little bit and I'll say stop. Just describe what you want, which is sometimes what we will do is we'll say when I really feel like they haven't had that discussion is I'll say come in, I'll give them that lecture, and then I will send them up to the attorney lounge, and I will say when you're ready to put something on the record, tell Ms. Means, I'm here all day, or when you reach impasse. Then we'll come in.

And I actually did that last week, and they came back and they said everything is now resolved. We don't need to put anything on the record. And I'd say most of the time, 90 percent of disputes get resolved that way as well. I only do that when I have the sense that they haven't really met and conferred. I don't want to waste your time. So anyway, those are some of the tricks of the trade.

JUDGE GILLIAM: I'm pretty sure I know which case you're talking about. I do, in the ordinary course, refer my discovery matters to a magistrate judge. The one point that I would make on this topic is the parties have to walk a line. There is a balance. On the one hand, as I've said, I want with discovery, as with all things, for the parties to take the time and tee up the dispute, figure out whether it can be worked out, and if it can't, raise the issue. So there is some amount of time that that takes to go through that process.

On the other hand, something that I see very commonly and don't take too well is the idea that the schedule that we've set, that we discussed at the initial case management conference, needs to be extended by six months because we are having all these discovery problems, and this is happening, and that's happening. And what I tell the parties is I'm relying on you to figure that out early within the confines of the schedule that we've set. Now, sometimes, it just can't be done and things blow up and there are unique circumstances, and I understand all that. But really, the expectation is that once we've got the schedule, that process of figuring out how to get the discovery exchanged and how to resolve any disputes that come up with the magistrate judge that's assigned to the case has to happen in a way that respects the schedule. And so I'm surprised how often I see the reflexive request that says, well, we just can't do it, judge, so we need many more months to work out these discovery problems.

JUDGE CHHABRIA: And I think that's a really good point, and I think most of the time when somebody comes to you at the end of the discovery process with that kind of story, what you learn is that they kind of twiddle their thumbs for the first half of the

discovery period, right? And usually what I say is, no, we're going to trial. You've had your chance, and, you know, let's do it like the old days. We won't know every single minute fact before we go to trial. Let's just go to trial.

JUDGE GILLIAM: Do you write those Rule 16 orders, or do you just do it on the record, denying the request for the continuance?

JUDGE CHHABRIA: I think it's usually just on the record.

JUDGE CORLEY: One thing you should know is unlike settlement, when a case is referred to me for settlement, we don't discuss the case, right? But if it's referred to me for discovery, I am discussing the case with them because I'm part of the team that's managing the case. So you should know that. That we are all working together on that, and I'm communicating with them about it.

JUDGE CHHABRIA: You would not believe how unreasonable this lawyer is being, Vince. I mean, I've heard that from you before, right?

JUDGE CORLEY: Or Judge Chhabria, the schedule is ridiculous. You don't know what you're doing.

JUDGE GILLIAM: See, I never get that call.

JUDGE CHHABRIA: I get that call a lot.

II. USING EXPERTS AND SCIENTIFIC EVIDENCE IN COMPLEX LITIGATION

MS. CASTILLO: Let's move on to experts and scientific evidence. It seems like the use of experts is increasing more and more every day. The expert reports are getting longer in every case. What's your perspective on the use of scientific evidence in complex cases and what are effective and ineffective uses of scientific evidence?

JUDGE CHHABRIA: Maybe I sound a little bit like a broken record, but I don't think there is an answer you can give to that question that fits all cases. I think it really depends on the case.

There are some cases, and the biggest confrontation I've had with scientific evidence is in the *Monsanto* MDL about RoundUp and whether RoundUp causes cancer. And the scientific evidence in that case was going to make or break the case. So you just have no choice but to put a ton of time into that and make it a major priority. And you might have a science day where they come educate you on the principles of the science before they get into the expert testimony, and then you have to read those long expert records, and you have to have *Daubert* hearings. And I think in the *Daubert* hearings, the judge has to be very active in questioning the witnesses. Can't just leave it to the lawyers.

I think the expert is a little more likely to be a little more forthright when the judge is asking him questions than when the lawyers are asking him questions on direct or cross-examination. And it's a really challenging part of the job, especially for somebody like me who went to UC Santa Cruz and took one science class called "Physics for Poets." You know, there is an attempt to bring scientific evidence in.

This happens in civil cases and in some civil cases, it's really just a little bit of a side show because it's cast in the veneer of the science. There is a concern that a jury might place greater weight on it. I think that's particularly true in criminal cases. And I think judges need to be very careful about when to let that in. And not just, is it something that's going to be helpful to the jury, but is it something under Rule 403, is it something that's really necessary that really needs to be part of the case or will it be unduly prejudicial to one side or the other. But I think there's no one-size-fits-all approach to scientific evidence or expert testimony in general.

JUDGE GILLIAM: I haven't had the massive sort of *Daubert* proceeding that Judge Chhabria had in the RoundUp case. I think what is challenging in dealing with scientific evidence and proffered expert evidence overall is that I think *Daubert* motions are ubiquitous in my cases, and it's very hard to find a dividing line between true *Daubert* material, real junk science, something that is just not reliable enough to put before the jury.

And argument is about weight, and I find that those get blurred together in a way that is a challenge to sift out. As Judge Chhabria is saying, it's a huge investment of our resources because really we've got to dive into the reports and try to make that tough determination. And I think that my impression is that a *Daubert* motion is essentially thrown out there in most cases just to see what happens. Maybe the judge will buy it, but oftentimes, it seems to me that really the matters that are being raised are ones that are weight issues or they're for cross-examination, or there are disagreements about the substance of the opinion. But I have not very often had a circumstance where I've found that the methodology or the underlying science was such that exclusion was more of a given.

The *Daubert* motion that I granted that immediately comes to mind is about an expert coming to testify about legal conclusions. That one was pretty easy. But when you're talking about science and even social science and economics and those types of issues, figuring out how to strike that balance between true *Daubert* and weight-type issues is a real challenge and takes a lot of resources, from a chamber's perspective.

JUDGE CHHABRIA: Your comments triggered a couple thoughts in my mind. One is that I think oftentimes people will file *Daubert* motions in connection with summary judgment motions almost as a way to further argue the summary judgment, and I'm starting to wonder if I should adopt a rule that says there can be no *Daubert* motion alongside the summary judgment motion. You have to argue it altogether in a summary judgment brief. That's kind of a small point, but the bigger point is that your comment about the blurry line between admissible and inadmissible, the problem with the law in this area is that for every statement of principle that you find in favor of admissibility, you can find an opposite one, the converse in favor of excluding it.

For example, you say, well, the credibility issue is for the jury, right? You're not supposed to exclude it, an expert witness, because they have credibility issues. But then you also have statements in the law that say if the expert's analysis is outcome-oriented, it should be excluded. Well, if the expert's analysis is outcome-oriented, it's a credibility problem, right? And so, for every statement that you find in support of admissibility, you can find a statement of principle on the other side in support of inclusion, and there really is no clear line.

And the only other comment I'll make about that, which I made kind of loudly in the *Monsanto* case, is that the Ninth Circuit case law is very forgiving of sketchy expert opinions. And so it's almost like in some of the Ninth Circuit cases you read, if this person is qualified, if this person has the qualifications, you just have to let them go before the jury. I mean, it's not quite that bad, but it's close.

And so, having now sort of studied the law of all the circuits in connection with this *Monsanto* case, I believe that there is a significant difference in the law of the different circuits on *Daubert* that can, in some cases, make a difference.

MS. CASTILLO: In antitrust cases, there is usually testimony from experts regarding collusion and damages. Do you have any tips for how lawyers can present this really complex economic evidence to juries or to you to make it more digestible and understandable?

JUDGE CHHABRIA: No.

JUDGE CORLEY: I was going to say settlement before you get to the jury.

JUDGE GILLIAM: When you just realize, the expert witnesses are like any other witness in that the jury is trying desperately to figure out who is telling them the truth, right? Who is shooting straight. Are they well-equipped to know who that is when you've got these complicated economic concepts? Probably not. But I think experts who are good teachers and are committed from the beginning, both counsel and the experts, to the idea that what matters here is making sure that either the judge at that stage or the jury understand. Like, you don't get points for showing off how complicated it is. You want credit because I've mastered this really complicated thing.

I think lawyers fall into that too, where the presentation is an opportunity to show off the last four years of work in the mastery of this really complicated thing. And you just have to realize that that's not the goal at that stage. And so, believe me, I've got some cases coming up for trial where I'm very eagerly looking forward to seeing how on earth the experts and the lawyers can explain those to a jury. That may have a truck driver, and have somebody who works in retail, and have the physician. It makes me remember how hard being a lawyer really is.

JUDGE CHHABRIA: One big problem in this area. This isn't specific to damage models or anything like that, damages models, but judges are increasingly imposing time limits on civil trials, I think understandably so, because we are really concerned about the amount of time that eight members or ten members of the community are spending on this case, and we really want the lawyers to be efficient.

On the other hand, I think what judges have to remember is that in a *Daubert* hearing you get to read the expert reports before the expert testifies. If there are studies or literature that the expert is relying on, you get to read that literature, and then you get to listen to the expert testify, and you get to ask the expert all kinds of questions if you're not clear on something. And you compare that to a jury trial, where the jury does not get the expert report, does not get the studies that the expert is relying on.

Maybe you call out a snippet of a study during the expert's testimony and put it on the board for the jury, but the jury doesn't get to go back and read the studies and put it into context. And the jury is just hearing the very abbreviated version of what the expert is presenting, and I think that's a real problem. I don't know the answer. I don't know how to deal with that. I think that creates a real problem in terms of the juries being able to understand what the expert is presenting. I think the juries are capable of it.

I mean, certainly, my experience with juries is that they are smart. They're super conscientious. They really put in the effort and they want to understand. They are capable of it, but are we really giving them the time to understand? And if we're not giving them the time, is the solution to give them the amount of time that they really need to understand, or is that problematic because then it turns a six-week trial into a six-month trial? I don't know the answer.

III. EFFECTIVE TRIAL MANAGEMENT AND ADVOCACY

MS. CASTILLO: What have you found particularly effective at trial? It can be anything. What have you seen that you liked that resonated with you that you thought, this is really good?

JUDGE GILLIAM: There are a couple of things. One process thing and one practice point kind of thing. My practice in trials is I really like to front-load issues as much as possible. So if we've got a category of documents that's being offered, and there is a hearsay issue that I need to sort out, it is so much better to do that at the pretrial conference. Or I actually have a process where during trial if there are issues that come up for the next day, I have the parties see if they can work it out.

If they can't, they each get to file a short brief by 10:00 a.m. And then we come in at 8:00 a.m. or earlier, if we need to, to work it out so that the jury doesn't sit around while we work through this, so we don't have a bunch of side bars that are clunking up the trial. So I really appreciate it, and I build this into my processes. But I think when lawyers can go with that and not fight it, I think the trial ends up progressing in a way that goes smoother for everybody, where we can have fewer on-the-fly issues, fewer disruptions. That's something I really like to do in terms of a process, from a process standpoint.

From just an in-court standpoint, one of the things—and I was trying to think as I was preparing for this, how to characterize it—and the best word I can come up with is "awareness."

I had a bench trial with some really good lawyers. And just this little thing jumped out, which was the lawyer was in the middle of examination, and you can see the court reporter getting more and more frantic because he started talking too fast, and she was showing distress on her face because he was going too fast. And he said on the record, "I see from madam reporter I'm going too fast. Let me slow down, Your Honor."

And just being attuned to what's happening in the courtroom, not face down in the outline, not missing the response because you're on to the next question, just getting to the point where you have that level of—just the ability to step back and be aware of what's happening in the courtroom, something that was just a nice moment that stood out in that trial.

JUDGE CORLEY: I would say using technology smoothly and competently is really effective. I know I've seen our jury starting to be a little younger. We have a lot of millennials, right? They are used to that. Instagram or whatever, like they need, they want to see things. In a lot of the cases I've tried, we have video in every case. But using it competently, right? Because so much of I think what a jury trial is, is the jury trying to figure out which lawyer can I trust, who do they think is telling them the right thing. And if your machine or whatever is not working and you're constantly stopping and having to ask your colleague to do something, you just don't look competent.

So I think learning to smoothly use that technology is super important and really that you should be practicing that. You probably all do, but you should be practicing that as much as you're practicing your closing and what you're saying is how you're doing it. That transition so that it's all smooth so that you come across as super competent so that they will trust you when you say my client is right, rule in my favor.

JUDGE CHHABRIA: You know, I feel like the best lawyers, one of the things that trial lawyers, one of the things that distinguishes them is preparation. Just knowing where everything is on the deposition of the witness you're cross-examining, the technology stuff that you were just talking about, but knowing the record cold. I had one patent case where the plaintiff's expert was testifying that the patent is invalid, and on the second to the last page of his deposition from six years ago, he had testified that the patent was valid. Or vice versa. I can't remember which one it was. But just like the lawyers being really well-prepared, those are the ones that usually win the case.

I'm not sure if it's totally responsive to your question, Elizabeth, but my big pet peeve with respect to trials relates to jury instructions. My experience with juries is that they take instructions very, very seriously. They read through them very carefully. They talk with each other about the jury instructions and what they are being instructed to find. And words matter.

And yet I find 95 percent of the time with the lawyers they don't take the jury instructions seriously. And it's like an afterthought. I remember one time I had a trial in private practice. The partner I worked for was like, you deal with jury instructions. I don't even want to see them. You argue them. You put them together. I understand it because you're focusing on your opening statement, your closing argument, getting ready to cross the witnesses, all that kind of stuff. But you are making a big mistake by not really poring through those jury instructions. And you're making a mistake by unthinkingly submitting the pattern instruction without thinking about whether your case is a little bit different and requires a tweak to the pattern instruction to allow the jury to understand precisely how they need to apply that principle of law to the facts of your case.

And so that's my biggest advice for trials.

JUDGE CORLEY: And I feel like, to say this to this group, I think it's malpractice to do a closing argument and not refer to the instructions and have the verdict form out there and fill it out for the jury. But you would be surprised the number of trials where I see that the lawyers don't do that. I mean, that verdict form has got to be up there, and you show them exactly what they should do, and go through those instructions and talk about the evidence in connection with the instructions because that is what they are going to do

when they get back there. So you should be using that closing as the opportunity to tell them exactly what they should do and tether the evidence to those instructions and then tether it to the questions on the verdict form. Particularly in these complex cases, you're going to have long special verdict forms.

IV. PERSONAL STORIES AND EXPERIENCES

MS. CASTILLO: Now, I have some individual questions. Judge Gilliam, you practiced antitrust law before you became a judge. What was it like practicing antitrust law versus now presiding over these antitrust cases?

JUDGE GILLIAM: So most of my work in private practice was criminal antitrust, so it's nice to not have to answer to the Department of Justice anymore.

The other thing, having this job has made me realize that we truly are the last generalist in the system. When you have a big case in private practice, you're spending all your time thinking about that case and working on mostly that case for potentially a long time. And in my current job, you have to understand that the hearing before your hearing was a criminal sentencing in a felony possession case, and a hearing after yours is a 1983 excessive force case.

We just have to do much more multitasking in terms of the bandwidth. And so it certainly highlights to me, though—we obviously we work hard, we read the papers, we prepare. But to the point Judge Corley was making earlier, it's always going to be the case that you'll know your case much, much better than we do. And the one obvious ramification of that, it is critical for your credibility not to ever shade anything.

Because if we have to do the drill-down, the one thing that I never like to hear but happens distressingly often is just the two sides saying the facts are diametrically opposite in terms of what someone did or what was said or what the representation was. The fact that you have that in-depth knowledge that we don't is a big responsibility.

Because if I get to the point where I have to resolve one of those disputes, credibility can be damaged, not just in this case, but in every case that I ever have with you. But that's part of it, just realizing that in my current job, we're really constantly shifting from one thing to another, and there are very, very different types of cases that make up an average day.

MS. CASTILLO: Judge Corley, your path to the bench was nontraditional. Can you tell us a little bit about that and give career advice to those who have nontraditional career paths?

JUDGE CORLEY: Yeah, sure. So I was about a year from partnership with the Coblentz firm when I had my second child and my first wasn't even two yet, and I was working with Judge Breyer. He got nominated, and so I left practice, and I joined him as his career law clerk because I had clerked right out of law school, and I was working with him in private practice at the time. And I told him, okay, I will stay for about four years and I will be back. And I ended up staying for eleven and a half years, and it was a great job, and one reason it was so great is that Judge Breyer trusted me and he gave me the flexibility.

And when I first started, I would come in three days a week, and so I would have two days at home. And I still kept half my docket, as Judge Chhabria will tell you.

JUDGE CHHABRIA: But I was like, who is this person, she never comes to work. I mean, I was young then. There were two misconceptions I had about you. One was this person is lazy. She's only coming to work three days a week. She's really smart. Maybe she can handle it. Fine. And the other thing was like, you had these small kids, and I would see your car, and it was just filled with junk. And I'm like, God, is my court clerk a hoarder or something. What is wrong with this person, and, you know, but I was very young. And, of course, I got older, and I had kids. My car became filled with junk, and I realized that Jackie was simply a hyper-efficient, brilliant person who could do all of the work, only coming in three days.

JUDGE CORLEY: Well, the truth is, I worked at night. I worked when my kids napped. I made sure they power napped, right? So that I could get my work done, but I did it, and I'm so grateful to Judge Breyer. It was such a benefit to me, and I would like to think, maybe Judge Chhabria would say I taught him everything he knows, is that I did a good job and that I fulfilled my obligation, but I still had this nontraditional way of doing it. And then when I left clerking, I decided to go out there, and I'll tell you—some may have involved a case that actually did it—to me was the Celebrex Baxtra MDL. And I was working so hard as a law clerk, I'm like, those lawyers are out there making all this money, I quit. And I went to private practice, but I was really concerned that I would have a hard time finding work.

And it didn't work out that way, and obviously, I'm so blessed and so fortunate the way it turned out. But the advice I always give to newer lawyers is just make that decision that you need to do on your personal life, and hopefully everything else will follow. And if it didn't work out, right, if I couldn't do it, and maybe if I had still—I wouldn't say "stuck." If I still was clerking as the career clerk for Judge Breyer, I would do it all the same way again because at the time it was the right time for my family.

And I know you don't hear that very much. I do ultimately think in the end we're human beings, right? And that's the most important thing. And so that's the advice I always give, is I do think you need to make those decisions. And I've been so fortunate that I've been able to have just the best career, but also I have the best family, and I would always choose family first.

MS. CASTILLO: Judge Chhabria, you clerked for Judge Breyer and then Justice Breyer.

JUDGE CHHABRIA: Why is it always about Judge Breyer, even when he's not here? Events are always about Judge Breyer. Anyway, sorry, go ahead.

MS. CASTILLO: Were their styles more similar or different? What were your experiences like?

JUDGE CHHABRIA: Very different. I mean, they sound similar. You might hear one talking down the hall and you don't know which one it is almost, that sort of baritone enthusiastic expression. But so in that way, they are very similar. I mean, Charles Breyer is the perfect District Court Judge, and Stephen Breyer is the perfect Supreme Court Judge.

I remember one thing Judge Breyer always said is, yeah, they sent me to Harvard college because they needed me to get more serious about my studies and stop goofing around, and they sent Stephen to Stanford because they wanted him to get out more and interact with people. Stephen Breyer is very much the absent-minded professor, and Judge Breyer is very sort of focused on what is in front of him.

But the similarity is more important than the differences, and similarity is they come from a family of public servants. Their grandfather was a member of the San Francisco Board of Supervisors. Their father was a giant in San Francisco. He was the general counsel for the San Francisco Unified School District for many, many years. People often refer to him as having run the school district during that time, and the biggest way they've probably rubbed off on me is they are true public servants.

I mean, they care so deeply about serving their community and serving their court, and there are lots of ways I don't try to emulate Judge Breyer because it would be a waste of time. But in terms of the commitment they have to the community and wanting to do their job in a way that makes a contribution to the community, they are both very similar and real role models.

MS. CASTILLO: Okay. Last question of the afternoon. Oftentimes in these complex cases there's big teams on both sides of the V. If you're a young associate, and there's a lot of young associates here this evening, what advice would you give them to make themselves stand out, get substantive work and be indispensable?

JUDGE CHHABRIA: Go work for the government. I mean, seriously, if you're a young lawyer and you want to get good experience under your belt and have real responsibility and, again, make a contribution, you're way better off going to work for the government than you are in private practice.

JUDGE CORLEY: That's a cynical answer. So ask, right, ask. So almost all the judges I think now in the Northern District have rules to encourage to give opportunities to less experienced lawyers, so tell the partner, ask to do it. So in my court, for example, what I say is I have no rule. I don't care how many lawyers want to argue a single issue, that's fine, so that the partner and the client is comfortable. If the associate is giving away the store, they can stand up and take it back. So for associates, just ask. Lots of times they don't know if you want to, and so you have to ask to do that, and then start with the little things. Come say, you know, that discovery dispute and then come super overprepared, right? So spend way more time, don't put it down on your billing so they don't know, but just do it at first so they can come to you with that outstanding job and they'll give more to you.

JUDGE CHHABRIA: I think Jackie sees that part is really important about letting the partner or the more senior lawyer come clean up. I think that's critical for the clients, right? If clients are not assured that that can happen, they are not going to want the young lawyer to argue even if the senior lawyer wants them to argue. So that's a really good point.

The other bit of advice I was going to give, and I'm sorry I had forgotten to mention this, I think that you can get away from your talking points. When you do get the opportunity to go up there and argue, I did this when I was a young lawyer, I sort of had my talking points, and regardless of what judge's question was, I tried to shoehorn one

of my talking points into the answer, right? But the sooner you can get away from that and the sooner you can just be having a natural conversation with the judge, without any talking points in front of you, and just knowing your case cold and really listening to what the judge is asking you and responding directly to their question, that's a way to make yourself really stand out as a young lawyer, because 95 percent of the young lawyers don't do that.

JUDGE GILLIAM: Yeah, just a couple of points to follow up on those. One is I agree with Judge Corley; you have to ask. I always tell young lawyers no one is going to create the career that you want for you. You've got to figure out what is important to you and what you're looking for no matter what you're doing, and then make it known that you would like to do a deposition this year, you would like to have a chance to do an argument.

Pro bono is a huge opportunity in that way, and it's good on multiple dimensions. It's a good way to get experience and actually have the direct responsibility for a client relationship and a real person's legal problem in a way that you may not get in all the cases working on a big team. And it's just an important foundation for yourself in terms of service.

The other thing I always encourage young lawyers to do is start thinking early on, what would I do if this were my case, right? I think it's easy to sort of get your head down and you're reviewing documents or you're writing discovery requests. Even though you're doing whatever you've got, your tasks, that's great. You have to excel at your task. But think about the bigger picture and show curiosity about the bigger picture. Have a good idea—always be thinking, if I were running this case, what types of things would I be thinking about right now.

As we all know, a partner may or may not have the same point of view as to that. But I think in terms of distinguishing yourself as a young lawyer, the kind of person who is obviously thinking about the case or the strategy or the bigger picture and offering thoughts about that, is someone who becomes really valuable as a partner. Because you see that this is someone who is not just punching a clock. This is someone who is really thinking about how can we do the best job representing our client.

MS. CASTILLO: Thank you, Judges, for your time and your wisdom. Let's give the judges a round of applause.

[APPLAUSE]

IN THE CLASH BETWEEN THE VENERABLE *PER SE* RULE AND THE CONSTITUTION, THE CONSTITUTION SHALL PREVAIL (IN TIME)

By Robert E. Connolly[1]

"A long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom. But, the tumult soon subsides. Time makes more converts than reason." Thomas Paine: COMMON SENSE (1776).

I. INTRODUCTION

A challenge to the *per se* rule stalled recently when the Supreme Court denied certiorari in a petition to find the *per se* rule unconstitutional in criminal antitrust cases.[2] The appeal pitted one of the longest standing principles in antitrust law, the *per se* rule, against the constitutional rights of a criminal defendant to have a jury find the defendant guilty of every element of the offense beyond a reasonable doubt. The *per se* rule has long dictated that certain agreements (price fixing, bid rigging, and market allocation) are presumed to be an illegal restraint of trade and, even in a criminal case, the jury cannot consider whether the alleged agreement was reasonable.[3] More recent Supreme Court decisions interpreting the 5th and 6th amendment,[4] however, hold that conclusive presumptions deprive the defendant of his right to have the jury find every element of an offense beyond a reasonable doubt.[5] The *per se* rule is one of those principles that has so long been accepted, the mind balks at thinking it wrong. But a constitutional protection trumps the storied history of the *per se* rule and one day, but not just yet, the *per se* rule will fall.

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2 *Sanchez et al. v. United States,* No. 19-288, __ U.S. __, 2020 WL 129558 (Jan. 13, 2020) (denying cert. petition).

3 Under the *per se* rule there is "a conclusive presumption that the restraint is unreasonable." *Arizona v. Maricopa Cty. Med. Soc'y.*, 457 U.S. 332, 344 (1982); *see also N. Pac Ry. Co. v United States*, 356 U.S. 1, 5 (1958) (price fixing is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it] ha[s] caused or the business excuse for [its] use.").

4 The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . . nor be deprived of life liberty, or property without due process of law. . . ." The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

5 The Supreme Court has repeatedly held that any jury instruction in a criminal case that takes an element away from jurors by directing them to rely on an "irrebuttable or conclusive presumption" is unconstitutional. *Francis v. Franklin*, 471 U.S. 307, 317 (1985); *see also, e.g.*, *Carella v. California*, 491 U.S. 263, 265-66 (1989) (*per curiam*); *Sandstrom v. Montana*, 442 U.S. 510, 517 (1979); *Morissette v. United States*, 342 U.S. 246, 274-75 (1952).

II. PREVIEW OF ARGUMENT

The first problem with the *per se* rule is that it cannot be found in Section One of the Sherman Act. Section One condemns agreements in "restraint of trade." From a textualist point of view, the very same words cannot create the *per se* rule and the rule of reason. The Supreme Court has created, and later reversed, most *per se* violations while the operative language of the Sherman Act, "restraint of trade," has not changed.[6] The *per se* rule against horizontal price fixing is the last *per se* rule standing. The Antitrust Division argues that the *per se* rule is not an evidentiary presumption but an interpretation of the statute: "it is as if the Sherman Act reads price fixing and bid rigging are illegal."[7] But, it doesn't. Textualism will prevail over the "it is as if the Sherman Act read" rule of statutory construction.

The second problem with the *per se* rule is that it clashes with constitutional protections enjoyed by a defendant in a criminal case. The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt.[8] Under the *per se* rule, however, once the *court* makes the factual determination that the *per se* rule applies, the jury is instructed that the government has proven a restraint of trade beyond a reasonable doubt because price fixing is *per se* illegal.

This article further explains that elimination of the *per se* rule is not the end of criminal antitrust prosecutions for price fixing and bid rigging ("the supreme evil of antitrust"). The mantra of the Antitrust Division with respect to enforcement of its criminal enforcement program is, "price-fixing is flat out fraud . . . nothing more than theft by well-dressed thieves."[9] The most difficult part of criminal antitrust prosecutions is almost always proving the existence of the agreement and that the particular defendant joined the conspiracy. When a conspiracy involves holding meetings with phony agendas, using code words, shredding documents, and lying to customers about the reasons behind price increases, few defendants are going to admit they joined the conspiracy. It will be rare for a cartel member to argue that their secret agreement was actually procompetitive.

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6 Compare this view of the court's role with that of Justice Gorsuch's who wrote in one of his last opinions while on the Tenth Circuit Court of Appeals about the court's job: "[I]t is (or should be) emphatically to apply, not rewrite, the law enacted by the people's representatives." *A.M. ex rel. FM v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016).

7 In *United States v. Brighton Building & Maintenance Co.,* 598 F.2d 1101, 1106 (7th Cir. 1979) (As the government put in its brief, "Since the per se rule defines types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'"). The Antitrust Division has repeated this position in numerous later appellate briefs discussed herein.

8 *Alleyne v. United States*, 570 U.S. 99, 104 (2013); *United States v. Gaudin*, 515 U.S. 506, 510 (1995), *In re Winship*, 397 U.S. 358 (1970).

9 Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't. of Justice, *The Antitrust Division's International Anti-Cartel Enforcement Program,* Remarks to ABA Antitrust Section Spring Meeting (Apr. 6, 2000), available at http://www.justice.gov/atr/public/speeches/4498.htm; *see also* Robert E. Connolly, *Per Se "Plus:" A Proposal to Revise the Per se Rule in Criminal Antitrust Cases,* 29 ANTITRUST 105 (Spring 2015).

In limited criminal cases proving, beyond a reasonable doubt, that an agreement restrained trade may be difficult for the prosecution, but with a maximum 10-year jail sentence, the *per se* rule cannot be justified because it makes the government's case easier to prove.

III. RECENT CHALLENGES TO THE *PER SE* RULE

The nutshell argument for why the *per se* rule is unconstitutional in criminal cases is as follows. There are three elements to a Section One Sherman Act offense: 1) an agreement; 2) in restraint of trade; and 3) that affects interstate or foreign trade or commerce. The statutory text is identical for all Section One cases: an agreement "in restraint of trade . . . . is declared to be illegal." But, in a criminal price fixing case, the jury is instructed by the court that the agreement [if proven] is a restraint of trade and the jury's function is only to find whether the defendant knowingly joined the agreement. The criminal defendant does not get to offer evidence and ask the jury to decide whether the agreement was "in restraint of trade." Ironically, one would expect that the defendant would have more leeway, not less, in a criminal case to prove he did not violate the Sherman Act. The *per se* rule, however, forecloses any argument that the agreement was not a restraint of trade.

In the most recent Supreme Court Sherman Act case, *Ohio v. American Express Co.*[10] the Court explained the basis for the *per se* rule: "A small group of restraints are unreasonable *per se* because 'they always or almost always tend to restrict competition and decrease output.'"[11] This is perhaps reasonable streamlining/efficiency in a civil case,[12] but in a criminal case, the government does not get to prove the defendants are almost always guilty; the prosecution needs to prove that this defendant's agreement was, in fact, a restraint of trade. Below is a "quick look" at recent and ongoing challenges to the *per se* rule.

A. *Sanchez, et al. v. United States*[13]

In a recent opinion, the Ninth Circuit found the *per se* rule applied to auction bid rigging.[14] *United States v. Joyce*[15] was an appeal by an individual who conspired to rig bids at real estate foreclosure auctions. The *Joyce* court explained, "If a business arrangement is a type conclusively presumed to be unreasonable, the government is relieved of any obligation to prove the unreasonableness of the specific scheme at issue and any business justification for the defendant's conduct is neither relevant nor admissible."[16] In a similar

10 138 S. Ct. 2274 (2018).

11 *Id.* at 2283.

12 The *per se* rule would survive in civil cases, even if it is found unconstitutional in a criminal case, because the constitutional right against conclusive presumptions does not necessarily apply in civil cases if they "bear a sufficiently close nexus with [the] underlying policy objectives." *Weinberger v. Safi*, 422 U.S. 749, 772 (1975).

13 No. 19-288, On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit (Docketed Sept. 4, 2019).

14 *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018).

15 *Id.*

16 *Id.* at 676-677.

auction collusion appeal that followed shortly thereafter, *United States v. Sanchez*,[17] the Ninth Circuit again found the *per se* rule constitutional.[18] At oral argument in *Sanchez*, however, one Ninth Circuit panel judge was sympathetic to the defendants' position and noted: "I think if it's going to get straightened out [whether the *per se* rule is constitutional] it's going to have to require an *en banc* panel of this court or more likely the Supreme Court itself."[19]

The *Sanchez* defendants appealed to the Supreme Court.[20] In their opening brief, petitioners stated: "The question presented is whether the operation of the *per se* rule in criminal antitrust cases violates the constitutional prohibition—grounded in the Fifth and Sixth Amendments—against instructing juries that certain facts, presumptively, establish an element of a crime."[21] The Fifth and Sixth Amendment require that the jury be the fact-finder in a criminal case of every essential element of the crime. Because the jury was not allowed to decide whether the agreement was a restraint of trade, the defense was barred from proffering procompetitive evidence. Two amicus briefs were filed in support of the Supreme Court taking the case; one by National Association of Criminal Defense Lawyers,[22] and another by the Due Process Institute.[23]

The United States urged the Supreme Court not to take the case, arguing that "the *per se* rule is an interpretation of the Sherman Act, not an evidentiary presumption, and that it can be constitutionally applied in a criminal antitrust protection."[24] The government's brief recounts the history of major Supreme Court *per se* rule cases and concludes:

> As those decisions illustrate, the *per se* rule is an interpretation of the Sherman Act; it provides that certain anticompetitive conduct falls "within the purview of Section One as a matter of law because it categorically constitutes an unreasonable restraint of trade." *Standard Oil*, 221 U.S. at 65; *see id.* at 59-60 (interpreting the "language of" Section One in light of the common law).[25]

The Supreme Court denied certiorari on January 13, 2020, ending this challenge to the *per se* rule.[26]

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17 *United States v. Sanchez*, No. 17-10519, 760 Fed. Appx. 533 (9th Cir. 2019) (not-for-publication memorandum).

18 *Id.* at 535. ("The district court therefore did not err in instructing the jury under the per se rule.").

19 Joshua Sisco, *In Foreclosure Auction Appeal, Court Questions Applicability of Per Se Standard, (Behind Pay Firewall)* (MLex Jan. 16, 2019).

20 *Sanchez v. United States*, Petition for a Writ of Certiorari (filed Aug. 30, 2019).

21 *Id.* at i.

22 *Sanchez v. United States*, Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioners (filed Oct. 24, 2019).

23 *Sanchez v. United States*, Brief for Amicus Curiae Due Process Institute in Support of Petitioners (filed Oct. 24, 2019).

24 *Sanchez v. United States*, Brief for the United States in Opposition (filed Nov. 25, 2019), at 6.

25 *Id.* at 9-10.

26 *Sanchez et al. v. United States,* No. 19-288, __ U.S. __, 2020 WL 129558 (Jan. 13, 2020) (denying cert. petition).

B. *Heir Locators*

In another recent criminal antitrust case, commonly known as *Heir Locators,*[27] Utah federal district court Judge Sam initially ruled that an indictment alleging a customer allocation scheme would be tried as a rule of reason case.[28] The Antitrust Division appealed this ruling and, at the strong urging of the Tenth Circuit,[29] the district court reversed his position. Upon reconsideration the "court finds that the agreement in question, known as the 'Guidelines,' is a horizontal customer allocation agreement and thus subject to the *Per Se* approach."[30] The defendants subsequently pled guilty.[31] The government requested a sentence of 21 months for the individual defendant. The judge declined jail time and sentenced him to one-year probation.[32]

The judge's wrestling with whether the *per se* rule would apply in *Heir Locators* is a clear example of how the court is the fact-finder in a *per se* case. In reversing himself, Judge Sam noted: "There certainly may have been other additional reasons for entering into the agreement, as laid out by Defendants; but as laid out in *Kemp* [the Tenth Circuit decision], if the *Per Se* approach applies, there is no need to weigh the benefits that could come from such an agreement."[33] Judge Sam noted the implications of the *per se* rule for the defendant: "This [the *per se* rule] provides an evidentiary shortcut through the Rule of Reason's minutiae; in such cases, the *Per Se* approach is justified based on efficiency. *Arizona v. Maricopa Cty. Med. Soc'y.*, 457 U.S. 332, 344 (1982)."[34]

A court's decision regarding whether the facts call for application of the *per se* rule is often the determining factor of who wins in an antitrust case.[35] District courts around the

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27 *United States v. Kemp Associates, Inc. and Daniel Mannix,* No. 2:16-cr-403-DS (D. Utah). The indictment was returned on August 17, 2016, *available at* https://www.justice.gov/atr/file/887761/download.

28 *United States v. Kemp & Assocs., Inc.*, No. 2:16-cr-403-DS, 2017 WL 3720695, at *1 (D. Utah Aug. 28, 2017), *rev'd and remanded*, 907 F.3d 1264 (10th Cir. 2018).

29 *United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264, 1278 (10th Cir. 2018).

30 *United States v. Kemp & Assocs., Inc. and Daniel Mannix*, No. 2:16-cr-403-DS, 2019 WL 763796, at *2 (D. Utah Feb. 21, 2019).

31 *Heir Location Service Company and Co-Owner Plead Guilty to Antitrust Charge for Long Running Agreement Not to Compete*, United States Department of Justice Press Release (July 10, 2019), *available at* https://www.justice.gov/opa/pr/heir-location-services-company-and-co-owner-plead-guilty-antitrust-charge-long-running.

32 Matthew Perlman, *No Prison Time for Heir Locator In Market Splitting Case,* Law360 (Jan. 28, 2020), *available at* https://www.law360.com/competition/articles/1238265/no-prison-time-for-heir-locator-in-market-splitting-case.

33 *Kemp & Assocs.,* 2019 WL 763796, at *3.

34 *Id.* at *2.

35 In *Rockford v. Mallinckrodt*, 360 F. Supp 3d 730 (N.D. Ill. 2019), the Court ruled that it needed more factual information before deciding whether the rule of reason or *per se* rule would apply. *Id.* at 754 (citing *CSR Ltd. v. Fed. Ins. Co.*, 40 F. Supp. 2d 559, 564 (D.N.J. 1998) ("At this early [motion to dismiss] stage of the proceeding, the court does not find it necessary to determine which mode of analysis [*per se* or rule of reason] it will ultimately employ in evaluating the defendants' activities."); 2 Areeda & Hovenkamp, Antitrust law ¶ 305(e) (4th ed. 2019) ("Often, however, the decision about which rule is to be employed will await facts that are developed only in discovery.").

country are currently grappling with whether the *per se* rule applies in various "no-poach" cases where employers have agreed to not hire each other's employees.[36]

C. Current *Per Se* Challenges: *United States v. Aiyer*[37] and *United States v. Lischewski*[38]

On November 20, 2019, a jury found Akshay Aiyer guilty of knowingly joining a conspiracy to fix prices and rig bids in the foreign exchange market for Central and Eastern European, Middle Eastern, and African ("CEEMEA") currencies.[39] In a post-trial motion defending the use of the *per se* rule, the government wrote: "The *per se* rule 'treat[s] categories of restraints as necessarily illegal' and thereby 'eliminates the need to study the reasonableness of and individual restraint in light of the real market forces at work.' *Leegin Creative Leather Prods., Inc. v. PSKS.,* 551 U.S. 877 877 (2007)."[40] The defendant will likely appeal the application of the *per se* rule at his criminal trial to the Supreme Court.

On December 3, 2019, a California federal jury found Bumble Bee Foods LLC's former CEO Christopher Lischewski guilty of price-fixing on allegations that he conspired with executives at rivals StarKist and Chicken of the Sea to illegally raise the price of canned tuna.[41] The defendant challenged the *per se* rule in a pretrial motion and it will certainly be part of his appeal.[42] These cases demonstrate that defendants in criminal antitrust cases will likely continue to raise the argument, until the Supreme Court addresses the issue, that use of the *per se* rule in a criminal case is unconstitutional.

IV. CHANGING LANDSCAPE: FROM MISDEMEANOR TO FELONY, RED NOTICES, EXTRADITION, AND A TEN-YEAR MAXIMUM SENTENCE

The *per se* rule came into use when all cases—criminal or civil—seemed like civil cases because the Sherman Act was a misdemeanor and penalties were almost always a modest financial slap on the wrist. In *United States v. Socony Vacuum Oil Co.,*[43] for example, individuals were convicted but the "harshest" sentence meted out to any individual

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36 *See, e.g., Butler v. Jimmy John's Franchise, LLC et al.,* No. 3:18-cv-00133 (S.D. Ill. 2018).

37 *United States v. Aiyer,* No. 1:18-cr-00333-JGK (S.D.N.Y.).

38 *United States v. Lischewski,* No 3:18-cr-00203-EMC (N.D. Cal.).

39 Jeffrey May, *Jury Convicts Former Currency Trader in Ongoing FX Probe*, Antitrust Law Daily (Nov. 21, 2019), *available at* https://lrus.wolterskluwer.com/news/antitrust-law-daily/jury-convicts-former-currency-trader-in-ongoing-fx-probe/99766/.

40 *United States. v. Aiyer*, No. 1:18-cr-00333-JGK (S.D.N.Y.), Memorandum of Law in Support of the United States' Opposition to Defendant's Motion for a Judgment of Acquittal or, in the Alternative, for the Declaration of A Mistrial or A New Trial, ECF No. 204, filed Jan. 27, 2020, at 4.

41 Joel Rosenblatt and Eliza Ronals-Hannon, *Ex-Bumble Bee CEO Is Latest Catch in Tuna Price-Fixing Hunt,* Bloomberg (Dec. 3, 2019), *available at* https://www.bloomberg.com/news/articles/2019-12-03/ex-bumble-bee-ceo-lischewski-found-guilty-in-price-fixing-trial.

42 *United States v. Lischewski,* No 3:18-cr-00203 (N.D. Cal), Motion to Dismiss Or, in the Alternative, For An Order that the Rule of Reason Applies, ECF no. 11, filed May 16, 2019.

43 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

defendant was $1,000.[44] The consequences to convicted criminal defendants in Sherman Act cases, however, have since increased dramatically. Short jail sentences became a realistic possibility when the Sherman Act became a felony in 1974 with a three-year maximum prison sentence. Today, the maximum term of imprisonment is 10 years.[45] The Antitrust Division has actually sought 10-year prison sentences for two convicted defendants.[46] Additionally, the Sherman Act is applied extraterritorially. Foreign defendants have lost jobs, been placed on Red Notices, seized by Interpol, and experienced prison conditions in multiple countries while being extradited to face trial and/or prison in the United States:

> Romano Pisciotti spent 669 days in custody. This included two hours in a police station in Lugano, Switzerland; 10 months in a jail in Frankfurt, Germany fighting extradition [on a Sherman Act indictment]; and eight months in a U.S. federal prison in Folkston, Georgia, in a room with around 40 mainly Mexican inmates and a single corner toilet. [47]

The Antitrust Division continues to exercise its ability to extradite criminal Sherman Act defendants. In January 2020, a former air cargo executive was extradited from Italy on an indictment returned in 2010.[48]

Corporate criminal fines have also skyrocketed. In one recent financial crimes cartel prosecution, fines of over $3 billion were imposed collectively against the corporate defendants.[49] The *per se* rule developed at a time when the Sherman Act penalties were a nuisance and a defendants' Fifth and Sixth Amendment right to have a jury decide every fact necessary for conviction was undeveloped. Times have changed. The greatly increased penalties for convicted Sherman Act criminal defendants will continue to keep the *per se* rule a subject of defendants' motions and appeals.

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44 *See* Daniel A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, Antitrust Stories 107 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

45 The maximum jail sentence was increased to 10-years in the Antitrust Criminal Penalty Act Enhancement and Reform Act of 2004, commonly referred to as ACPERA.

46 The Antitrust Division argued at sentencing that two AU Optronics executives, H.B. Chen and Hui Hsiung, had guidelines ranges of 121 to 151 months. Since this exceeded the Sherman Act 10-year maximum, the Division argued for a sentence of 10-years in jail. *See* United States' Sentencing Memorandum at 3-35, *United States v. AU Optronics Corp.,* No. 3:09-0110 (Sept. 20, 2012), *available at* http://www.justice.gov/atr/cases/f286900/286934_1.pdf. The court imposed sentences of three years (Chen) and two years (Hsiung).

47 Lewis Crofts and Leah Nylen, *Mlex Interview with Romano Pisciotti*, MLex (Dec. 9, 2015), *available at* https://mlexmarketinsight.com/insights-center/reports/interview-with-Romano-Pisciotti; *see also,* Gianni De Stefano, *Meet the First Extradited Businessman on Cartel Charges*, 8 J.E.C.L. & Pract. 5 (2017), *available at* https://academic.oup.com/jeclap/article/8/5/281/3074470.

48 *See Former Air Cargo Executive Extradited from Italy for Price-Fixing,* United States Department of Justice Press Release (Jan. 13, 2020), *available at* https://www.justice.gov/opa/pr/former-air-cargo-executive-extradited-italy-price-fixing.

49 *See BNP Paribas USA, Inc. Pleads Guilty to Antitrust Conspiracy*, United States Department of Justice Press Release (Jan. 26, 2018), *available at* https://www.justice.gov/opa/pr/bnp-paribas-usa-inc-pleads-guilty-antitrust-conspiracy.

V. HOW THE *PER SE* RULE WAS CREATED

Section One of the Sherman Act states, "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." [50] The Supreme Court has said: "the problem presented by the language of Section One of the Sherman Act is that it cannot mean what it says."[51] But the Sherman Act can mean exactly what it says if the text is given its natural meaning. A procompetitive (or neutral) agreement does not restrain trade. To restrain is "to limit" or "to hold back."[52] If an agreement is pro-competitive, it expands trade; if neither pro nor anticompetitive, it does not restrain trade in the most commonly understood usage of the words, either today or back in 1890. The "trade" the Sherman Act was concerned with was clearly not trade such as a contract between Standard Oil Company and a customer buying a barrel of oil. That contract "restrains" trade only when given a very literal meaning—that the customer is not free to buy that barrel from another vendor. Today, we would say that such contracts generally are procompetitive or at worst neutral—*i.e.* they allow and expand trade. There is no indication in the legislative history, nor common sense, that the Sherman Act intended to literally outlaw *every* commercial contract. Congress *was* concerned with the agreements/trusts that made Standard Oil the equivalent of a modern day cartel. The great trusts of the day motivated passage of the Sherman Act: the Sugar Trust, Oil Trust, and Banking Trust, *etc.*[53] did restrain trade. It is clear that Congress used the term "trade" in the way current antitrust cases use "market." It is a rule of statutory construction not to give words an implausible interpretation.[54] The Supreme Court should have found that Congress did not intend that "all" contracts were restraints of trade given that Congress, including Senator Sherman himself, likely had entered into contracts that literally "restrained trade."

Unfortunately, in 1897 the Supreme Court ruled that virtually any commercial contract restrained trade.[55] Of course in one sense it did; the purpose of a contract is to restrain, or limit the parties to the terms of the contract. In the famous *Standard Oil*[56] case of 1911, the Supreme Court dealt with this seemingly absurd result by "amending" the Sherman Act and introducing the "rule of reason," declaring that only unreasonable

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50 15 U.S.C § 1.

51 *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679, 687 (1978).

52 Merriam Webster Dictionary (definition of restraint: "1a: an act of restraining: the state of being restrained; b(1): a means of restraining: a restraining force or influence; b(2): a device that restricts movement"), *available at* https://www.merriam-webster.com/dictionary/restraint.

53 "In 1882 S. C. T. Dodd, an attorney for John Rockefeller's Standard Oil Co., created a trust to facilitate a tight combination of oil refiners that could dictate price and supply while also avoiding state-level taxes and corporate regulations. The use of trusts for industrial consolidation multiplied throughout the 1880s, and in response, several states and the federal government passed antitrust laws to regulate business competition, focusing on coordination among firms and business tactics used to monopolize industries." Laura Phillips Sawyer, *U.S. Antitrust Law and Policy in Historical Perspective,* Harvard Business School Working Paper, 19-110 (2019), *available at* https://www.hbs.edu/faculty/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf.

54 *See Advocate Health Care Network, et al v. Stapleton,* 137 S. Ct. 1652, 1660 (2017) ("Congress, we feel sure, would not have intended all National Guardsmen to get a benefit that is otherwise reserved for disabled veterans.").

55 *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897).

56 *Standard Oil v. United States*, 221 U.S. 1 (1911).

restraints of trade are illegal. In a dissent, Justice Harlan objected that the Court, rather than Congress, amended the legislation. Justice Harlan wrote that the Court "has now done what it then said it could not constitutionally do. It has, by mere interpretation, modified the act of Congress."[57] Adding "unreasonable" to the Sherman Act was, however, "harmless error" since the modification was redundant and only gave the words of the Sherman Act their natural and intended meaning. The real mischief was the Supreme Court's belief that it was required to amend the Sherman Act because a literal interpretation was non-sensical. The rule of reason was soon followed in 1927 by the establishment of the *per se* rule in *United States v. Trenton Potteries Co.*[58] Over its history, the Supreme Court has created, and later repealed, *per se* rules for vertical price fixing, maximum resale price maintenance, vertical non-price restraints, boycotts and tying. There was no legislative basis for doing this. The operative text of the statute, "restraint of trade," has not changed. The inquiry under the Sherman Act Section One must always be whether an agreement (if one is proved) constitutes a restraint of trade because that is what the statute prohibits. The Supreme Court was wrong in *United States v. Socony-Vacuum Oil Co.*,[59] when it held that any horizontal agreement that tampers with price is *per se* illegal: "[w]hatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness."[60] The question under the Sherman Act is always whether the agreement restrained trade. In fact, in *Broadcast Music, Inc. v. CBS, Inc.*[61] the Supreme Court held that blanket license issued by American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) did not necessarily constitute price fixing—in other words, the *per se* rule did not apply to these agreements. As Justice Brandies correctly observed nearly a century ago, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[62] I would add that this is the only test that can be read from the words "restraint of trade."

A look at the checkered history of *per se* rules undermines the position of the Antitrust Division that "since the *per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions."[63] If so, they are substantive laws improperly created by the Supreme Court. The Sherman Act cannot read "as if the act said [resale price maintenance] [maximum resale price fixing][etc.] were illegal," and later, with no change in the language, not read that way anymore. The Supreme Court has found many types of agreements to be *per se* violations, only later to reverse itself:

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57 *Id.* at 99. (J. Harlan dissenting). For more detail and color, see William Kolaksy, *Chief Justice Edward Douglass White And the Birth of the Rule of Reason,* 24 Antitrust 77 (summer 2010). On the bench, Harlan was even harsher. Those present in the courtroom reported that Harlan "[h]aving refreshed himself with whiskey . . . denounced his colleagues from the bench in improvised language that is said to have made them blush." *Id.*

58 273 U.S. 392, 398 (1927).

59 *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

60 *Id.* at 224.

61 *Broadcast Music, Inc. v CBS, Inc.*, 441 U.S. 1 (1979).

62 *Bd. of Trade of City of Chicago v. United States,* 246 U.S. 231, 238 (1918).

63 *United States v. Brighton Building & Maintenance Co.,* 598 F.2d 1101, 1104 (7th Cir. 1979).

Restraint	***Per Se* Born**	***Per Se* Deceased**
Vertical Minimum Price Fixing	1911[64]	2007[65]
Vertical Non-Price Restraints	1967[66]	1977[67]
Vertical Maximum Price-fixing Agreements	1968[68]	1997[69]
Group Boycotts	1959[70]	1985[71] (life support)
Tying	1947[72]	1992[73] (life support)

The Supreme Court has been creating and dismantling *per se* rules as evidentiary short cuts, i.e., presumptions, in accordance with what it believed to be the sound economic principles of the day. The operative text of the statute, "restraint of trade" has not changed between *Dr. Miles* and *Leegin*.

The Antitrust Division also acts as a fact-finder of what constitutes a *per se* violation. The Antitrust Division helpfully publishes guidelines setting forth what types of Sherman Act violations it will [currently] prosecute civilly and what types it reserves for criminal *per se* treatment.[74] The standard has changed over time. Recall that the Antitrust Division at one time charged a corporate defendant criminally for vertical price restraints.[75] The corporate defendant was precluded from defending itself by arguing that the agreement did not restrain trade because, at the time, the Supreme Court had ruled that vertical price restraints were *per se* violations. Had the question been put to a jury "did the agreement restrain trade?", perhaps the blanket condemnation of resale price maintenance and other, now extinct, *per se* rules, would have met an earlier demise.

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64 *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911).

65 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

66 *United States* v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967).

67 *Continental T.V., Inc., v. GTE Sylvania Inc.*, 433 U. S. 36 (1977).

68 *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968).

69 *State Oil Co., v. Khan*, 522 U.S. 3 (1997).

70 *Klor's Inc. v. Broadway-Hale Stores., Inc.,* 359 U.S. 207 (1959).

71 *Northwest Wholesale Stationers, Inc. v. Pacific Statioanery & Printing Co.* 472 U.S. 284 (1985).

72 *International Salt. Co. Inc v. United States*, 332 U.S. 392 (1947).

73 *Eastman Kodak Co. v. Image Tech. Serv. Inc.* 504 U.S. 451 (1992).

74 United States Department of Justice, Antitrust Division Manual (5th ed. 2012), *available at* https://www.justice.gov/atr/file/761166/download.

75 The Department of Justice brought its only felony prosecution of vertical price-fixing in the 1980 case of *United States v. Cuisinarts, Inc.*, No. H80-559, 1981-1 Trade Cas. (CCH) ¶ 63,979 (D. Conn. Mar. 27, 1981); *see In* re *Grand Jury Investigation of Cuisinarts, Inc.*, 516 F. Supp. 1008, 1010–11 (D. Conn.) (recounting the proceedings in the criminal case, which resulted in a *nolo contendere* plea and a $250,000 fine), *aff'd*, 665 F.2d 24 (2d Cir. 1981). A companion civil case was also brought that was resolved by consent decree.

VI. HOW THE *PER SE* RULE WORKS IN CRIMINAL ANTITRUST CASES

Before proceeding to demonstrate why the *per se* rule is unconstitutional in a criminal case, it is worthwhile to see what the jury is instructed if a judge finds the *per se* rule applies. In the *Sanchez* real estate foreclosure auction prosecution, this was part of the *per se* instruction given to the jury:[76]

> The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are conclusively presumed to be illegal, without inquiry about the precise harm they have caused or the business excuse for their use. Included in this category of unlawful agreements are agreements to rig bids.
>
> Therefore, if you find that the government has met its burden with respect to each of the elements of the charged offense, you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it.[77]

This is a typical jury instruction in a criminal antitrust prosecution.

Likewise, the ABA's *Model Jury Instructions in Criminal Antitrust Cases for Per Se Violations of the Antitrust Laws* reads:

> The Sherman Act makes unlawful certain agreements that, because of their harmful effect on competition and lack of any redeeming virtue, are conclusively presumed to be an unreasonable restraint on trade and are always illegal, without inquiry about the precise harm they have caused or the business excuse for their use. Included in this category of unlawful agreements are agreements to [fix prices,] [rig bids,] [allocate customers, and] [allocate territories].[78]

As Judge Robert Bork has written: "Behavior is illegal *per se* when the plaintiff need prove only that it occurred in order to win his case, there being no other elements to the offense and no allowable defense."[79]

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76 *See U.S. v. Sanchez, et. al.*, No. 17:10519, Brief of the United States, ECF No. 37, at 25, n. 4 (filed Aug. 27, 2018).

77 The balance of the *Sanchez per se* jury charge reads: "It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was, in fact, a conspiracy as charged in the indictment, it was illegal." *Id.*

78 *Model Jury Instructions in Criminal Antitrust Cases* (ABA 2009), Ch. 3, Sec. F.

79 Robert H. Bork, The Antitrust Paradox 18 (1978).

VII. A TEXTUALIST APPROACH TO INVALIDATING THE *PER SE* RULE IN CRIMINAL ANTITRUST CASES

While Justice Neil Gorsuch is known as a "textualist;" he is not the only "textualist" on the Supreme Court. Every judge starts with the text of the statute.[80] Justice Elena Kagan has said that the Supreme Court is by-and-large a textualist court, having adopted much of the late Justice Antonin Scalia's judicial reasoning.[81] The problem with the *per se* rule from a textualist point of view is that the *per se* rule is simply not in the statute. Section One of the Sherman Act declares illegal "[e]very contract . . . or conspiracy in restraint of trade."[82] The very same words in the text cannot be read to create two different standards for liability: the *per se* rule and rule of reason.

In *United States v. Brighton Building & Maintenance Co.*,[83] the Seventh Circuit quoted favorably the position of the Antitrust Division set forth in its appellate brief: "Since the *per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. *It is as if the Sherman Act read*: 'An agreement among competitors to rig bids is illegal.'"[84] (emphasis added). The Antitrust Division has repeated "it is as if the Sherman Act read" in one of its most recent filing on a *per se* challenge.[85] To buy this argument, however, one must accept that, at one time, "it was as if the Sherman Act read resale price maintenance is illegal." And then, without any change in the statute, it no longer read that way and the Supreme Court overruled *Dr. Miles*. The fact is that the Sherman Act simply says, and has always simply said, agreements in "restraint of trade" are illegal. *Per se* rules have been a judicial creation. The Antitrust Division has conceded this in the past, explaining "the argument that the *per se* rule is an unconstitutional evidentiary presumption 'asks us in effect to overrule the *Supreme Court's decisions establishing the per se rule*.'" (emphasis added). The Supreme Court agrees that it created *per se* rules. In *Topco v. United States*,[86] the Supreme Court stated:

> The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against

80 *See* Ryan Lovelace, *Elena Kagan: The Supreme Court Is More Like A Textualist Court*, Washington Examiner, (Oct. 16, 2017), *available at* https://www.washingtonexaminer.com/elena-kagan-the-supreme-court-is-a-textualist-court-that-reasons-more-like-scalia-than-breyer.

81 Justice Elena Kagan, in a recent lecture at Harvard Law School, said that thanks to Justice Scalia, "we are all textualists now." *See* Jonathan R. Siegel, SCOTUS blog (Nov. 14, 2017), *available at* https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/.

82 15 U.S.C. § 1.

83 598 F.2d 1101 (7th Cir. 1979).

84 *Id.* at 1114. *See also United States v. Koppers Co.,* 652 F. 2d 290, 294 (2d Cir. 1981) ("In cases involving behavior such as bid rigging, which has been classified by courts as a *per* se violation, the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'").

85 *U.S. v. Sanchez, et. al.*, No. 17:10519, Answering Brief of the United States, ECF No. 37, at 23 (filed Aug. 27, 2018).

86 405 U.S. 596 (1972).

> promotion of competition in another sector is one important reason we have formulated per se rules.[87]

Ironically, in *Topco,* the Supreme Court applied the *per se* rule to find an intrabrand territorial allocation scheme to be illegal *per se*, a decision many commentators believe wrongly condemned a procompetitive agreement.

A recent Supreme Court case illustrates that, good intentions aside, the Supreme Court simply cannot add words to the Sherman Act to create substantive rules. The recent 9-0 opinion in *Digital Realty Trust Inc. v. Somers*[88] involved the statutory construction of SEC whistleblower legislation requiring a whistleblower to report conduct to the SEC in order to be eligible for an award. The whistleblower and the government both argued that to give effect to the legislation, the statute should be interpreted to include rewarding a whistleblower who reported illegal conduct internally within his or her company, but not to the SEC. The Supreme Court did not deny that Somers and the Solicitor General made sound policy arguments but stated: "We next address these concerns and explain why they do not lead us to depart from the statutory text."[89] Similarly, in *Morrison v. National Australia Bank Ltd.*,[90] Justice Scalia wrote for the majority that "[i]t is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve. . . ."[91]

The Antitrust Division highlights the fact that the Supreme Court has created two different legal standards—based on one the very same words "restraint of trade." A recent government brief in a *per se* challenge states:

> The Supreme Court, however, has explained that Section 1 "prohibit[s] only unreasonable restraints of trade" and that a restraint is unreasonable if it violates either of two substantive rules of law—the rule of reason or the *per se* rule. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988).[92]

The Sherman Act does not set forth two substantive rules of law; the Supreme Court formulated them for the various reasons expressed in the Supreme Court *per se* jurisprudence.

The Supreme Court and Department of Justice have justified *per se* rules, likening them to rules against speeding:

> The *per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding. While some "violations of such rules actually cause no harm,"

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87 *Id.* at 609-610.

88 138 S. Ct. 767 (2017).

89 *Id.* at 779.

90 561 U.S. 247 (2010).

91 *Id.* at 270.

92 *U.S. v. Sanchez, et. al.*, No. 17:10519, Answering Brief of the United States, ECF No. 37, at 19 (filed Aug. 27, 2018).

> the rules are "justified by the State's interest in protecting human life and property." [The rules] are "supported . . . by the observation that every speeder and every stunt pilot poses some threat to the community" and that a "bad driver going slowly may be more dangerous than a good driver going quickly, but a good driver who obeys the law is safer still."[93]

This is a legitimate argument for Congress to make price fixing *per se* illegal, but the text of the statute simply cannot be read to mean there is a "rule of reason" speed limit for certain drivers/cars and a *per se* rule for others. A 70-mile-per-hour speed limit can mean just one thing: "did the driver exceed the limit?" In a Sherman Act Section One case, the inquiry, based on the text of the statute, can only be "did the agreement restrain trade?" In a criminal case, the jury should be the fact-finder on that critical element of the offense.

VIII. THE SIXTH AMENDMENT APPROACH TO OVERTURNING THE *PER SE* RULE[94]

A look at the rationale behind the *per se* rule demonstrates why it is inappropriate in a criminal antitrust case:

> This principle of *per se* unreasonableness not only makes the type of restraints that are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[95]

Put another way, an individual is facing up to 10 years in prison for an alleged Sherman Act violation, but the fact-finder is not going make "an effort to determine at large whether a particular restraint has been unreasonable . . . [because a *per se* rule] avoids the necessity for an incredibly complicated and prolonged economic investigation. . . ." You can be sure the defendant would like to take the time to determine if the agreement he is charged with was actually a restraint of trade.

Another rationale of the *per se* rule is:

> The anti-competitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are *so unlikely to prove significant in any particular case* that we adhere to the rule of law that is justified in is general application.[96]

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93 *Sanchez v. U.S.,* Brief for the United States Opposing Grant of Certiorari, at 10 (*citing FTC v. SCTLA*, 493 U.S. 411, 433-434 (1990)).

94 The first time I had a "Holy Smokes" moment thinking that the *per se* rule might be unconstitutional was when I read Charles D. Weller's *The End of Criminal Antitrust Per Se Conclusive Presumptions*, 58 Antitrust Bulletin 665-91 (2013). Mr. Weller deserves much credit for raising these issues.

95 *Northern Pac. Ry. v. United States,* 356 U.S. 1, 5 (1958).

96 *Arizona v. Maricopa Cty. Med. Soc.,* 457 U.S. 332, 351 (1982) (emphasis added).

In other words, Mr. Defendant, it is so unlikely that your agreement did not restrain trade that we are just going to skip over that element of the criminal statute. It is true that, in hard-core horizontal price fixing or bid rigging, it is highly unlikely that the defendant will be able to prove, or even try to prove, that the alleged agreement did not restrain trade. Criminal antitrust cases will still predominantly be defended by "there was no agreement" or "I was not a party to the agreement." But if a defendant is charged with an agreement in restraint of trade, the Constitution at least allows the defense the right to argue—*to the jury*—that the agreement did not restrain trade.

In *Sanchez*, a real estate foreclosure auction collusion case, the defendants wanted to argue that, given the extraordinary control [i.e., market power] the banks had over the process and the unfair practices the banks employed to the bidders' disadvantage, coordination was the only way the defendants would have participated in the process:

> In short, petitioners sought to show at trial that, given the extraordinary barriers outsiders confronted in California's foreclosure auction system, they had to coordinate bids in order to participate at all. They sought to show that their coordination efforts, while ostensibly anticompetitive, were actually procompetitive. Petitioners' defense, moreover, was not based on mere supposition. Their expert witnesses offered empirical analyses showing that, after the government raided petitioners' businesses and ended the supposed conspiracy, auction prices actually went down.[97]

In *Heir Locators*, the defendants argued that they "negotiated a complicated agreement that governed a very limited subset of estates and used profit sharing to incentivize efficiency (pooling resources and avoid duplication)."[98] The defendants also noted the uniqueness of the heir locator industry, factors that were adopted by Judge Sam when he initially found the rule of reason would apply to the case.[99]

In *Ohio v. American Express Co.*[100] the Court explained the *per se* rule: "A small group of restraints are unreasonable *per se* because they always or almost always tend to restrict competition and decrease output." [101] By contrast, the rule of reason is a "fact-specific assessment" used "to assess the restraint's actual effect on competition."[102] The Sixth Amendment requires that the jury must make this "fact-specific assessment." In a criminal case, the finding of elements of the offense must always be "assign[ed] solely to the jury."[103]

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97 *Sanchez v. U.S.,* Petition for Writ of Certiorari, Petitioners Opening Brief, at 6.

98 Brief for Kemp & Assocs., Inc. and Daniel J. Mannix in the Tenth Circuit Court of Appeals, No. 17-4148, Document: 01019940078 (filed Feb. 2, 2018), at 43.

99 The Kemp & Assocs. appellate brief more fully describes the defendants' arguments about why the *per se* rule should not apply and possible procompetitive effects of the agreement and Judge Sam's agreements with these observations. *Id.* at 39-48.

100 138 S. Ct. 2274 (2018).

101 *Id.* at 2283-84.

102 *Id.* at 2284.

103 442 U.S. 510, 523 (1979).

The belief that the *per se* rule in a criminal antitrust case is unconstitutional is supported by the Supreme Court's line of Sixth Amendment cases starting with *Apprendi v. New Jersey,*[104] where the defendant was given an enhanced sentence based on a fact found by the sentencing judge, not the jury. The Supreme Court found this to be unconstitutional under the Sixth Amendment right to a jury trial, stating that: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury and proved beyond a reasonable doubt."[105] Likewise in *United States v. Booker,*[106] the Supreme Court ruled that the

Sixth Amendment right to jury trial requires that a defendant's sentence exceeding the statutory maximum be based only on facts either admitted by the defendant or proved beyond a reasonable doubt by the jury. For example, when the Antitrust Division seeks a corporate fine above the Sherman Act statutory maximum of $100 million, the defendant either has to agree to certain "twice the gain or twice the loss" facts in the plea agreement or the government must charge and prove them *to a jury.* It would be odd, in the sense that it would be unconstitutional, if the government does not have to prove to the jury that the defendant *in fact restrained trade* but does have to prove to the *amount of loss* from the alleged restraint.

The treatment of the "materiality" element of a perjury/false statement trial provides an analogous situation. Historically, in a criminal trial for false statement/perjury, the court decided one element of the offense—whether the alleged a false statement was material. But in *United States v. Gaudin*,[107] the Supreme Court held that materiality is an element of the offense, so it must be determined by the jury. Under the Sixth Amendment, a criminal conviction must "rest upon a jury determination that the defendant is guilty of every element of the crime" in question, beyond a reasonable doubt.[108] But, under the *per se* rule, once the Court declares the restraint unreasonable, the jury is left only to find whether the restraint existed.

The *Sanchez* petitioners discuss *Carella v. California*,[109] another example of the Supreme Court's heightened attention to a defendant's Sixth Amendment rights. *Carella* involved a state law that required juries to be instructed that "intent to commit theft by fraud is presumed from failure to return rented property within 20 days of demand.[110] The Supreme Court found that such a "conclusive presumption" violated the Fifth and Sixth Amendment because it "removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption."[111] The Court did not consider whether individuals who keep a rented item for more than 20 days always do, in fact,

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104 530 U.S. 466 (2000).

105 *Id.* at 490.

106 543 U.S. 220 (2005).

107 *U.S. v. Gaudin*, 515 U.S. 506, 510 (1995).

108 *Id.*

109 491 U.S. 263 (1989) (*per curiam*).

110 *Id.* at 265 (internal quotation marks omitted).

111 *Id.* at 266.

intend to steal it.[112] The mere withdrawal of the intent issue from the jury itself violated the Constitution.

Textualism and constitutional concerns can create unusual allies on the Supreme Court. To quote one commentator, "progressive" Supreme Court Justice Sonia Sotomayor and "textualist" Justice Neil Gorsuch "are on a mission to restore criminal defendants' constitutional rights."[113] The two justices teamed up to champion Sixth Amendment safeguards against notoriously flawed forensic analysis. They also attacked policing for profit, endorsing Eighth Amendment protections against civil forfeiture. The two joined forces, once again, to stick up for the right to a trial by jury when the government seeks to impose crippling fines in the form of criminal restitution.[114] The textualist argument is that the Sherman Act prohibits "restraints of trade;" the constitutional argument is that this element must be found by a jury beyond a reasonable doubt in order to convict. The two propositions will attract enough Justices to overturn the *per se* rule in criminal cases.

IX. STARE DECISIS WILL NOT SAVE THE *PER SE* RULE

In *Leegin Creative Leather Products Inc. v. PSKS Inc.*[115] the Supreme Court overturned its nearly 100-year *per se* rule against resale price maintenance. The opinion states that "[s]tare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act."[116] In overturning many other long-standing antitrust precedents, the Supreme Court has noted: "[j]ust as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraints of trade' evolve to meet the dynamics of present economic conditions."[117] It is not just economic conditions that have changed. The 10-year maximum jail sentence for an antitrust violation, the severe extradition and immigration consequences and corporate fines in the billions for a criminal antitrust conviction should result in a closer look at the constitutional rights of criminal antitrust defendants. This is not your misdemeanor Sherman Act anymore. In a concurrence in *Sessions v. Dimaya*,[118] Justice Gorsuch noted the dramatic increased penalties in civil litigation warranted a stricter approach to vagueness than before when civil penalties were relatively minor.[119] The dramatic increase in Sherman Act penalties—and actual sentences imposed—will continue to focus attention on the Sixth Amendment right to a jury. A last, but important, point on stare decisis:

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112 *Id.* at 265-66.

113 Joseph Mark Stern, *Sotomayor and Gorsuch Resume Their Fight for the Future of the Sixth Amendment*, Slate (Jan. 7, 2019), *available at* https://slate.com/news-and-politics/2019/01/sotomayor-gorsuch-supreme-court-dissent-criminal-restitution.html; *see also* Mark Joseph Stern, *Neil Gorsuch and Sonia Sotomayor Have Started Teaming Up to Protect Criminal Defendants,* Slate (Nov. 19, 2018), *available at* https://slate.com/news-and-politics/2018/11/neil-gorsuch-sonia-sotomayor-sixth-amendment-dissent.html.

114 Joseph Mark Stern, *Sotomayor and Gorsuch Resume Their Fight for the Future of the Sixth Amendment*, Slate (Jan. 7, 2019).

115 551 U.S. 877 (2007).

116 *Id.* at 899.

117 *Id.*

118 138 S. Ct. 1204 (2018).

119 *Id.* at 1229.

"[t]he force of *stare decisis* is at its nadir in cases concerning procedural rules that implicate fundamental constitutional protections."[120]

X. HOW TO FIX THE *PER SE* PROBLEM IN SHERMAN ACT CRIMINAL CASES

A finding that the *per se* rule is unconstitutional will not mean the end to the criminal prosecution of price fixing and bid rigging cartels. The Sherman Act as a criminal statute can be fixed in several ways.

1. Congress Can Amend the Statute

As noted, the Antitrust Division continues to argue that "it is as if the Sherman Act read. . . ." While the Sherman Act does not read that way now, Congress can amend the Sherman Act so that it actually does say that price fixing and bid rigging are illegal *per se*. Justice Gorsuch wrote in his dissent in *Perry v. Merit Systems Protection Board*:[121] "If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation."[122] While this seems a simple fix, since it involves Congress, it is prudent to offer alternatives.

2. Proceed In Criminal Cases Without the *Per Se* Rule

Another approach to cure the unconstitutionality of the *per se* rule for the Supreme Court to overrules this last *per se* rule standing and allow the jury to decide whether the agreement charged in an indictment was a restraint of trade.[123] This does not mean that every price-fixing/bid rigging trial is going to be an unwieldly foray into market share, elasticity of prices and economic theory. Typically, it is the "last man standing" defendant who goes to trial because it is too late to secure immunity or a 5K downward departure[124] for cooperation, and without one, the sentencing guidelines can be draconian. Trial may be this defendant's best "bad" option. Even at trial, only those defendants facing a mountain of evidence tying them to a price-fixing or bid-rigging conspiracy are going to defend by arguing, "Yes, I fixed prices [or rigged bids], but it was procompetitive—and not a restraint of trade!" The secrecy of price fixing and bid rigging (code names, encrypted messages, falsified travel reports, etc.) will make it hard to argue in the alternative that "I wasn't a member of the conspiracy, but if you find that I was, I assure you it was not a restraint of trade." Former Antitrust Division Assistant Attorney General

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120 *Alleyne v. U.S.*, 570 U.S. at 114 n.5.

121 137 S. Ct 1975 (2017) (J. Gorsuch dissenting).

122 *Id.* at 1990 (J. Gorsuch dissenting).

123 One purpose of the *per se* rule, however, was to give notice, a "bright line" of what conduct under the vague Sherman Act was considered criminal. *Northern Pac. Ry. v. U.S.,* 356 U.S. 1, 5 (1958). Without a *per se* rule it could be argued that the Sherman Act, as a criminal statute, is unconstitutionally vague. As Justice Scalia has written, "One can hardly imagine a prescription more vague than the Sherman Act's prohibition of contracts, combinations, or conspiracies in restraint of trade." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1183 (1989); *see also* Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness* (May 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2968933. The Supreme Court, however, has upheld the Sherman act against a vagueness challenge. *U.S. v. Nash*, 229 U.S. 373, 376-77 (1913).

124 United States Sentencing Guidelines § 5K1.1 (also known as a "5K" motion).

Bill Baer stated that "price-fixing, bid rigging and market allocation agreements among companies that hold themselves out to the public as competitors are inherently deceptive and defraud consumers who expect the benefit of competition."[125] The "restraint of trade" is in the secrecy or deception—customers believe there is competition when in fact there is collusion.[126] As long as the Antitrust Division sticks to these kinds of conspiracies to indict criminally, proving that the agreement restrained trade will be harder, of course, without the *per se* rule, but less daunting a challenge as may first appear.

The elimination of the *per se* rule would not open the door to "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved. . . ." The Federal Rules of Evidence on relevance give the judge sufficient latitude to keep the trial manageable and prevent a defendant from bogging down a trial with a complex revisit of the history of an industry. Not every case calls for a full market analysis: "What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.[127] Federal Rule of Evidence 401[128] provides the court the ability to exclude irrelevant evidence and Federal Rule of Evidence 403[129] allows the exclusion of even relevant evidence on the grounds that it is cumulative, confusing or a waste of time. For example, in *Trenton Potteries Co*, the court held that a price-fixing agreement among competitors is an unreasonable restraint "without the necessity of minute inquiry whether a particular price is reasonable or unreasonable. . . ."[130] This would still be a correct statement of law even if the *per se* rule were abolished because the reasonableness of the price is not relevant to whether trade was restrained.

It is undeniable that going from a presumption that an agreement restrained trade to having to prove it will be more difficult for criminal antitrust prosecutors. But with a potential 10-year jail sentence, the goal should not be to lighten the prosecutors' burden. To paraphrase "Justice Spiderman," "With great jail sentences come greater constitutional protections."

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125 Letter from Peter J. Kadzik, Principal Deputy Assistant Attorney General, U.S. Department of Justice, to Senator Patrick Leahy Attaching Responses of William Baer, Assistant Attorney General, Antitrust U.S. Department of Justice to Questions for the Record Arising from the Nov. 14, 2013 Hearing of the U.S. Senate Committee on the Judiciary Regarding Cartel Prosecution: Stopping Price Fixers and Protecting Consumers (Jan. 24, 2014), at 3, *available at* http://www.judiciary.senate.gov/imo/media/doc/111413QFRs-Baer.pdf.

126 Even before the Sherman Act, in *McMullen v. Hoffman*, 174 U.S. 639 (1899) the Supreme Court refused to enforce a contract when one conspirator sued for his portion of the profits from a successful collusive bidding scheme. The Court explained that the agreement "tend[ed] to induce the belief that there really is competition . . . although the truth is there is no such competition." *Id.* at 646.

127 *California Dental Assn. v. FTC,* 526 U.S. 756, 781 (1999).

128 Fed. R. Evid. 401 ("Test for Relevant Evidence. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

129 Fed. R. Evid. 403 ("Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

130 *Trenton Potteries* Co., 273 U.S. at 397.

3. The *Per Se* "Plus" Fix

I've offered a third solution: *"Per Se "Plus:" A Proposal to Revise the Per se Rule in Criminal Antitrust Cases.*[131] The Antitrust Division can add fraud counts to criminal indictments (as it already sometimes does). The Division prosecutes cartels criminally where "agreements are generally secret, and businesses and consumers are defrauded and misled because the conspirators continue to hold themselves out as competitors."[132] As a former Antitrust Division Criminal Deputy Assistant Attorney General has stated when lobbying for 10-year maximum prison sentences, "the [criminal] cases that we are charging and prosecuting are unmistakable fraud."[133] If the prosecutor thinks she cannot prove an element of fraud, or convince a jury that the defendant engaged in a restraint of trade, perhaps a civil complaint, not a criminal indictment, is in order.

XI. CONCLUSION

As a former Antitrust Division prosecutor, when I started researching this issue, I did not expect to reach the conclusion that my former "best friend," the *per se* rule, was unconstitutional. However, I can relate to something Justice Gorsuch wrote when he was on the Tenth Circuit Court of Appeals: "Indeed, a judge [researcher] who likes every result he reaches is very likely a bad judge [researcher], reaching for results he prefers rather than those the law compels."[134] New questions are being raised about the constitutionality of the *per se* rule that cannot be satisfactorily answered because a fresh look exposes its flaws. Cartels remain "the supreme evil of antitrust,"[135] but the *per se* rule is not a constitutionally permitted way to fight them. The Supreme Court will eventually overturn the *per se* rule.

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131 Robert E. Connolly, *"Per Se "Plus:" A Proposal to Revise the Per se Rule in Criminal Antitrust Cases 29* Antitrust 105 (Spring 2015).

132 James M. Griffin, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Competition in the Pharmaceutical Marketplace: Antitrust Implications of Patent Settlements*, Statement Before the U.S. Senate Committee on the Judiciary (May 24, 2001), *available at* http://www.justice.gov/atr/public/testimony/8327.htm.

133 Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Transcript of Testimony Before the United States Sentencing Commission Concerning Proposed 2005 Amendments to Section 2R1.1* (April 12, 2005), at 3, *available at* https://www.justice.gov/atr/proposed-2005-amendments-section-2r11-0.

134 *A.M. ex rel. FM v. Holmes,* 830 F.3d 1123, 1170 (10th Cir. 2016) (J. Gorsuch dissenting).

135 *Verizon Communications v. Law Offices of Curtis v. Trinko*, 540 U.S. 398, 408 (2004).

PROMOTING COMPETITION IN COMPETITION LAW: THE ROLE OF THIRD-PARTY FUNDING IN OVERCOMING COMPETITIVE BARRIERS IN PRIVATE ANTITRUST ENFORCEMENT PRACTICE

By Jiamie Chen[1]

I. INTRODUCTION

Among the most fundamental antitrust concerns are barriers to entry in concentrated markets. Yet antitrust practice itself—specifically big-ticket private enforcement—remains a concentrated market subject to longstanding competitive barriers within the greater legal industry. Private enforcement contingency practice inherently involves high risks and high rewards. Recent developments have driven contingency risks even higher, requiring greater investments at early stages of litigation while creating more ways for plaintiffs to lose. No one can meaningfully compete—or continue competing—in the private enforcement market without effectively managing the financial risks of the practice.

But the private enforcement world is changing. The targeted conduct itself is evolving, from proverbial smoke-filled rooms to computer algorithms[2] and two-sided e-commerce platforms.[3] New thought leaders like Lena Kahn[4] and Dina Srinivasan[5] are shifting the conversation on how traditional antitrust principles apply to today's economic and commercial realities. In addition, key precedents in antitrust collective actions are developing abroad, particularly in the United Kingdom.[6]

These factors create room for new players and new ways to compete in the private enforcement market. One development in particular—the rise of third-party commercial litigation funding in the United States—can help competitors overcome the risk management barriers in this practice market. Commercial funding provides non-recourse capital to law firms and operates like an investment. By contrast, a traditional recourse loan must be repaid with interest regardless of litigation outcome. Moreover, it makes truly institutional-scale capital available to the legal market and can help level the playing field

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2 Ariel Ezrachi and Maurice Stucke, *From Smoke-Filled Rooms to Computer Algorithms—The Evolution of Collusion* (May 14, 2015), *available at* https://clsbluesky.law.columbia.edu/2015/05/14/from-smoke-filled-rooms-to-computer-algorithms-the-evolution-of-collusion/.

3 *See, e.g., Ohio v. American Express Co.*, 585 U.S. ___, 138 S. Ct. 2274 (2018); *see also* Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. Davis L. Rev. 133-2014 (2017).

4 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

5 Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 Berkeley Bus. L.J. 39, 88 (2019).

6 *See, e.g.*, Richard Crump, *US Firms Eye Early Knockout In Rival UK Forex Class Actions* (Feb. 13, 2020), *available at* https://www.law360.com/articles/1243710/us-firms-eye-early-knockout-in-rival-uk-forex-class-actions.

with well-resourced corporate defendants. Of course, there is no substitute for requisite experience.[7] But third-party commercial litigation funding can and should play a key role in promoting competition in competition law.

II. COMPETITIVE BARRIERS IN PRIVATE ENFORCEMENT

A. Appetite for the Practice

Private antitrust enforcement occupies a niche that draws certain practitioners—and the draw is as powerful as it is well-founded. As one Harvard Business School professor quipped, "[t]he phrase 'doing well by doing good' has been used, at my last unscientific count, roughly 38 trillion times."[8] Yet it aptly applies to the (successful) practice of private antitrust enforcement.

The Supreme Court itself has emphasized the critical role of "private attorneys general" in antitrust enforcement.[9] The Court most recently reiterated this view in the seminal *Apple v. Pepper* case, stating that, in the private enforcement action at issue, "[t]he plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law." [10] To put a finer point on it, "unlike public enforcers, private enforcers can obtain significant damages," which "serves as a crucial source of deterrence for illegal anticompetitive conduct and the major avenue for compensating victims for harms suffered at the hands of cartelists and dominant firms."[11] Private enforcement of antitrust law is needed perhaps now more than ever.[12]

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7 Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 75 (2019) ("Repeat players add value in large part by leveraging their experience and access to capital to level the playing field against defendants, who will almost always be repeat players, as will their teams of BigLaw attorneys.").

8 Michael Norton, *Finally, Proof That You Can 'Do Well By Doing Good'* (May 18, 2013), *available at* https://www.huffpost.com/entry/proof-that-you-can-do-well-by-doing-good_b_3298306.

9 *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972) ("By 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.") (internal quotation marks omitted); *see also Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 494 (1968) (rejecting the pass-through defense in private antitrust cases because "[t]reble damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."); *Cal. v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) ("Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.").

10 *Apple Inc. v. Pepper*, 587 U.S. ___, 139 S. Ct. 1514 (2019).

11 American Antitrust Institute, *The Vital Role of Private Antitrust Enforcement in the U.S.* (May 14, 2019) (citing Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1 (2013) and Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. 315).

12 *See* Joseph E. Stiglitz, *Market Concentration Is Threatening the U.S. Economy* (Mar. 12, 2019), *available at* https://www8.gsb.columbia.edu/articles/chazen-global-insights/market-concentration-threatening-us-economy; *Capitalism is Becoming Less Competitive* (Oct. 10, 2018), The Economist, *available at* https://www.economist.com/open-future/2018/10/10/capitalism-is-becoming-less-competitive.

Of course, fulfilment from such laudable work alone won't keep the lights on (or put the kids through college). Successful practitioners in this sector should have no trouble doing either. For example, a recent empirical study conducted by University of San Francisco School of Law and Huntington National Bank found that, between 2013 and 2018, antitrust class actions resulted in over $19 billion in recoveries, and that the plaintiffs' attorneys obtained fee awards amounting to 20%–40% of the total recovery.[13] Lex Machina found that, between 2009 and 2018, courts awarded over $34 billion in antitrust damages, excluding fees, costs, and prejudgment interest.[14] Antitrust class actions likely make up the vast majority of those damages.[15]

It comes as no surprise that private antitrust enforcement is big business. For example, as multidistrict litigations (MDLs) have rapidly taken over national civil dockets, rising from 16% in 2002 to 39% in 2015 of federal courts' entire civil case load,[16] private antitrust actions constitute a significant portion of all MDLs. In fact, of the 190 currently pending MDLs, 48 are antitrust matters, second only to products liability, which accounts for 66 MDLs.[17]

Yet this billion-dollar market is dominated by a small number of repeat players—firms that show up, and, critically, are appointed to leadership positions again and again in high-stakes nationwide collective actions.[18] Antitrust matters[19] in particular demonstrate the prevalence of this "repeat player" pattern in MDLs, which has drawn empirical study as well as heated commentary from scholars.[20]

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13 Huntington National Bank & Univ. of San Francisco School of Law, *2018 Antitrust Report: Class Action Filings in Federal Court* (May 2019) [hereinafter 2018 Report], *available at* http://ssrn.com/abstract=3386424.

14 Lex Machina, *Antitrust Litigation Report* (April 2019), *available at* https://lexmachina.com/antitrust-litigationreport/.

15 For example, in 2018, class action recoveries accounted for nearly $3.6 billion, or approximately 85%, of the $4.3 billion in total antitrust damages awarded.

16 Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 72 (2017) (citing Duke Law Center for Judicial Studies, *MDL Standards and Best Practices* (2014), *available at* https://law.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf). Note that the MDL percentage in 2015 increases to 45% after removing prisoner and social security cases. *Id*.

17 https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-January-15-2020.pdf

18 *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 74 (2017); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass- Multidistrict Litigation*, 64 EMORY L.J. 329, 355–73 (2014); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 Cornell L. Rev. 1445, 1458–63 (2017).

19 For example, the Lex Machina Antitrust Litigation Report analyzed over 9,000 antitrust cases and identified the most active plaintiff firms in antitrust litigation nationwide, including and excluding MDL cases. Lex Machina Antitrust Litigation Report at 17-18. Likewise, the 2018 Report empirically analyzed antitrust class actions from 2013 to 2018 and identified the top plaintiffs' lead counsel by complaints filed, number of settlements, and aggregate settlement amount. 2018 Report at 25–27. The significant overlap between these lists leaves no mystery as to who the top antitrust repeat players are.

20 *See* note 18, *supra*; *see also* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 75 (2019), for the opposing view.

The small number of readily-identifiable repeat players shows that appetite for the practice, even when coupled with skill, does not suffice to create robust competition in this market.[21] That is because no one can meaningfully compete—much less thrive—in the private antitrust enforcement market without effectively managing the significant financial risks of the practice.

B. Risks of the Practice

In contingency and hybrid-contingency representations, legal risk translates to economic risk. Scholars (especially Professor Herbert M. Kritzer) have studied contingency representations in fields like personal injury and worker's compensation at length.[22] However, "[t]here is relatively little literature on the nature of contingent representation in more complex areas of law such as antitrust."[23]

As discussed below, in addition to readily observable patterns, other, perhaps less obvious, factors also manifest as further risks unique to antitrust contingency practice, especially with certain recent developments in the field.

1. No More Cheap Losses for Antitrust Plaintiffs

Traditionally, plaintiffs must prevail at up to six stages—at pleadings, class certification, *Daubert*, summary judgment, trial, and appeal—to win a case. Defendants need only win once. Savvy plaintiffs' firms have historically succeeded within this construct by apportioning risk such that, if they lose, they do so as inexpensively as possible.

However, recent trends are making it increasingly difficult to "lose cheap," even early in a case. Instead, firms now must make increasingly substantial upfront investments[24] in their contingency antitrust cases, while having to fight (and win) ever more dispositive battles before even reaching the merits.

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21 *See* notes 18-20, *supra*.

22 *See, e.g.*, Herbert M. Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (2004); *see also* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 Wash. U. L.Q. 739 (2002); Stephen Daniels & Joanne Martin, *"It's Darwinism—Survival of the Fittest:" How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients*, 21 Law & Pol'y 377 (1999); Jerry Van Hoy, *Markets and Contingency: How Client Markets Influence the Work of Plaintiffs' Personal Injury Lawyers*, 6 Int'l J. Legal Prof. 345 (1999); Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 Tex. L. Rev. 1781 (2002); Steven Garber, Michael D. Greenberg, Hillary Rhodes, Xiaohui Zhuo & John L. Adams, *Do Noneconomic Damages Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?*, 6 J. Empirical Legal Stud. 637 (2009); Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers: Dealing with the Possible but Not Certain*, 60 DePaul L. Rev. 337 (2011).

23 David L. Schwartz, *The Rise of Contingency Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 338 (2013). Notably, many of Professor Schwartz's observations about why "patent cases are more risky to the [contingency] lawyer" than other areas of law also apply to antitrust litigation, such as "unique issues," "the breadth of documentary and electronic discovery," costly expert witness fees, and duration. *See id.*

24 Further, these increased investments, often made through traditional recourse lines of credit, present not only unconditional debts that must be repaid, often with personal guarantees from the firm's owners, but also significant opportunity costs commensurate with the firm's resources and capacity.

To begin with, the costs of filing a viable antitrust complaint have entered a race-to-the-top. To meet the heightened antitrust pleading standards[25] resulting from *Twombly*,[26] *Iqbal*,[27] and, in the Ninth Circuit, *Kendall*,[28] as well as to position themselves for leadership,[29] plaintiffs' attorneys now also routinely retain economics and/or industry experts to produce substantial original content for their complaints.[30] The more case-specific investigation and analyses a firm performs, the more factual allegations it can put forth in its complaint to survive motions to dismiss.[31] In addition, the earlier a firm begins and the more resources it spends on its investigation, the stronger its leadership bid becomes.[32] In a system with these incentives and pressures, a plaintiffs' firm, especially one seeking leadership, is hard-pressed to limit its investment and corresponding risk, even if it loses at the pleading stage.[33]

Several steps, and several years, later, if the plaintiffs prevailed at the pleadings stage and mustered resources to conduct discovery, they now must fight—and win—class certification and *Daubert* battles, before even reaching the merits. And recent

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25 *See generally* Joshua Stokes and Jordan Ludwig, *Pleading An Antitrust Conspiracy in A Post-Twombly World*, 24 Competition 120 (The California Lawyers Ass'n 2015) (providing a circuit-by-circuit survey of how courts evaluate antitrust pleadings in the wake of *Twombly*).

26 *Bell Atlantic Corp. v. Twombly*, 550 US 544 (2007).

27 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

28 *Kendall v. Visa USA, Inc.*, 518 F.3d 1042 (9th Cir. 2008).

29 See Manual for Complex Litigation § 10.22 (4th ed. 2004) (hereinafter "MCL 4th") for a general discussion of counsel leadership organization, duties, and considerations in complex litigation; see also David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders* (forthcoming 2020), Lewis & Clark L. Rev., *available at* http://dx.doi.org/doi:10.7282/t3-vz3v-h745, for an empirical study and analysis of leadership orders in MDLs that were pending as of June 18, 2019. The study also found that leadership was contested in less than 38% of the sampled MDLs.

30 For example, MCL 4th advises judges appointing lead counsel in complex litigations to consider, inter alia, "the attorneys' resources, commitment, and qualifications to accomplish the assigned tasks." MCL 4th (2004) § 10.224. Indeed, competing firms at antitrust leadership appointment hearings often cite their access to resources, how early they began their case investigation, how much time and resources they have spent on their investigation, the unique factual allegations in their complaints resulting from their investigations, and the extent of investment they made or plan to make in the case in support of their leadership bids. *See also In re Dairy Farmers of Am. Cheese Antitrust Litig.*, 2013 U.S. Dist. LEXIS 162798, at *16 (N.D. Ill. Nov. 15, 2013) (denying counsel's application for appointment as co-lead counsel where counsel "has fallen far short of demonstrating that she has sufficient resources to carry this complex, antitrust class action forward in the demanding role of co-lead counsel.").

31 Further, some federal courts have raised antitrust pleading standards even higher in class actions by migrating a full Rule 23 analysis to the pleadings stage to strike class allegations from the complaint *See In re: Railway Indus. Employee. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464 (W.D. Pa. 2019).

32 *See* note 30, *supra*.

33 This is especially true in cases with relatively novel or indirect theories of anticompetitive harm or application of traditional principles to modern economy. *See*, *e.g.*, *In Re: Humira (Adalimumab) Antitrust Litigation*, No. 1:19-cv-01873 (N.D. Ill. filed Mar. 18, 2019); *In re: Aluminum Warehousing Antitrust Litigation*, No. 1:13-md-02481 (S.D.N.Y. filed Dec. 16, 2013); *In re Apple iPhone Antitrust Litigation*, No. 4:11-cv-06714 (N.D. Cal. filed Dec. 29, 2011); *Reveal Chat Holdco LLC et al. v. Facebook, Inc.*, No. 3:20-cv-00363 (N.D. Cal. filed Jan. 16, 2020).

developments have made this supposedly preliminary stage increasingly difficult and costly for antitrust plaintiffs.

First, merits inquiries have increasingly seeped into the certification analysis, such that plaintiffs arguably must prove their case at certification.[34] The Supreme Court blessed this trend by providing for merits assessment at the certification stage as to commonality in *Dukes* and extending it to the critical predominance requirement in *Comcast*.[35]

In addition, antitrust plaintiffs now must overcome the additional hurdle of *Daubert* challenges at class certification before reaching merits. Even before *Dukes* and *Comcast*, from 2000–2009 alone, expert challenges increased over 340%,[36]and a plaintiff expert in private antitrust cases is four times more likely to be excluded than a defendant's expert.[37] With *Daubert* challenges at certification becoming even more widespread after *Dukes* and *Comcast*, the majority of appellate courts facing the unsettled issue of whether class certification expert evidence must meet the full *Daubert* standard have answered in the affirmative.[38] This means that the risks and costs of litigating a full *Daubert* challenge, which traditionally occurred if and after plaintiffs won certification, now must be borne

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34 There can be no serious debate that certifying a class has become increasingly difficult. *See, e.g.*, Joseph A. Seiner, *The Issue Class,* 56 B.C. L. Rev. 121, 129 (2015) (discussing how scholars argue that the Supreme Court's decision in *Dukes* undercuts plaintiffs' ability to bring class actions); Libby Jelinek, *The Applicability of the Federal Rules of Evidence at Class Certification,* 65 UCLA L. Rev. 280, 294 (2018) (arguing that *Dukes* marked a departure from previous class certification standards, resulting in a heightened evidentiary burden for plaintiffs at the class certification stage). *See also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008) (allowing certification only if the plaintiffs establish Rule 23's requirements by a preponderance of the evidence); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 269 (5th Cir. 2007) (applying the preponderance of the evidence standard); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (holding that a court may certify a class only after it "resolves factual disputes relevant to each Rule 23 requirement"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) ("Before deciding whether to allow a case to proceed as a class action, therefore, a judge should make whatever factual and legal inquiries are necessary under Rule 23.").

35 *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast v. Behrend*, 569 U.S. 27 (2013); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 2019 WL 3850581 (D.C. Cir. Aug. 16, 2019) (affirming district court's denial of class certification on remand where appeals court, based on the *Comcast* opinion, previously vacated and remanded district court's prior grant of certification).

36 PricewaterhouseCoopers, Daubert Challenges to Financial Experts: A Ten-Year Study of Trends and Outcomes 2002-2009 (2010).

37 Christine Bartholomew, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 Cardozo L. Rev. 2147, 2150 (2014) (citing James Langenfeld & Christopher Alexander, *Daubert and Other Gatekeeping Challenges of Antitrust Experts*, Antitrust, Summer 2011, at 21, 22; D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 Alb. L. Rev. 99, 108–10 (2000)).

38 The Third, Fifth, Seventh, and arguably Second Circuits require that class certification expert evidence be admissible under *Daubert*. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 129 (2d Cir. 2013); *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187 (3d Cir. 2015); *Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005); *Messner v. Northshore Univ. HealthSys.*, 669 F.3d 802, 812 (7th Cir. 2012). The Eighth and Ninth Circuits employ a less stringent standard. *In re Zurn Pex Plumbing Prods. Liability Litig.*, 644 F.3d 604, 613–14 (8th Cir. 2011) (holding that class certification rulings are "inherently preliminary" and thus admissibility under *Daubert* is not necessary); *Sali v. Corona Regional Med. Ctr.*, 909 F.3d 996, 1006 (9th Cir. 2018) (holding that "a district court should evaluate admissibility under the standard set forth in *Daubert* . . . [b] admissibility must not be dispositive [and] the Daubert inquiry should go to the weight that evidence is given at the class certification stage").

during, or before, certification.[39] This also means that, in some cases, plaintiffs now must bear the costs of litigating—and must win—full *Daubert* challenges twice: at certification and again at summary judgment. Litigating certification and *Daubert* has thus become more expensive, more time-consuming, and riskier.

2. Longevity Risk of Antitrust Enforcement Cases

For comparison, antitrust cases take more than twice as long to litigate[40] as patent infringement cases, which themselves are known to take a "relatively long period of time to resolve."[41] In antitrust class actions from 2013-2018 where the court granted final approval of a settlement, the median time between filing of the complaint to the final approval order was 5 years, with some cases taking over 12 years.[42] Indeed, it takes over two years, on average, just to have an antitrust class action dismissed on the pleadings.[43] The silver lining is that the plurality of defendant wins—nearly half—occurred in the pleadings stage, making them (relatively) cheap losses for plaintiffs' attorneys.[44]

Certain longevity is inherent in antitrust cases, especially those involving class actions, as "an antitrust class action is arguably the most complex action to prosecute,"[45] often involving review of millions of documents, taking many dozens of depositions, and extensive law and motion practice.[46] Antitrust cases also involve more unpredictable forces that may cause delay. For example, parallel government enforcement actions, while often significantly bolstering the merits of a follow-on private action, also could lead to delays, as judges are reluctant to deny enforcement agencies' stay requests.[47] In addition, antitrust class actions run the risk of objectors who can delay, or even derail, disbursement of settlement funds to class members and fee awards.[48]

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39 *See generally* Bartholomew, Christine, *Death by Daubert: The Continued Attack on Private Antitrust*, 35 Cardozo L. Rev. 2147 (2014).

40 2018 Report, at 8.

41 David L. Schwartz, *The Rise of Contingency Fee Representation in Patent Litigation*, 64 Ala. L. Rev. 335, 348 (2013) (citing Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 Wash. U. L. Rev. 237, 299 (2006)).

42 2018 Report, at 8.

43 *Id.* at 9.

44 *Id.*

45 *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (quoting *In re Motorsports Merchandise Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000)).

46 *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 154-55 (D.N.J. 2013) (noting that "Class Counsel have reviewed millions of documents, taken hundreds of depositions, participated in dozens of meetings with defense counsel, briefed several motions, prosecuted appeals, and finally, participated in complex multi-party mediation proceedings.").

47 See *Southeast Ready Mix, LLC et al. v. Argos North America Corp. et al.*, No. 1:17-cv-02792 (N.D. Ga. filed July 24, 2017), for an example of the government requesting and the court granting multiple stays of discovery in the private enforcement action due to the government's ongoing criminal investigation.

48 For examples of settlement and attorney's fees delays and complications involving objectors, *see In Re: Optical Disk Drive Products Antitrust Litig.*, 3:10-md-02143 (N.D. Cal. filed April 7, 2010); *In Re: Lithium Ion Batteries Antitrust Litig.*, 4:13-md-02420 (N.D. Cal filed Feb. 6, 2013); *In re Foreign Exchange Benchmark Rates Antitrust Litig.*, 1:13-cv-07789 (S.D.N.Y. filed Nov. 1, 2013).

III. FINANCING THE RISKS OF ANTITRUST ENFORCEMENT ACTIONS

High-dollar private antitrust enforcement, in short, requires risk capital that is effectively prohibitive for all but the best-resourced firms. Experienced and capable attorneys may hesitate to commit significant (often borrowed) capital upfront with both increasingly challenging obstacles[49] and at least several years[50] standing between them and any potential payout—understandably so. Perhaps no other area of plaintiffs' litigation presents higher risks and higher potential rewards.

Third-party litigation funding is a potent new tool which plaintiffs' attorneys can use to manage the inherent risk in affirmative competition cases. Essentially, third-party funding allows attorneys (or claimants) bearing risk in a case—through advancing some or all fees and/or costs—to share that risk with the funder on a non-recourse basis. The funder effectively becomes a passive investor, either in one particular case or across a portfolio of several cases, with a particular law firm or claimant. Non-recourse funding means that, unlike traditional lines of credit, if the funded case loses, the funder bears the loss of the investment capital. And the terms of each funding arrangement are bespoke—negotiated and tailored to best fit the particular case or portfolio at issue.

While some version of third-party litigation funding has been around for decades, commercial funding picked up momentum[51] around the time that Credit Suisse, the market originator in the U.S.,[52] founded a litigation risk strategies unit in 2006, which it spun off in 2012.[53] In less than ten years, litigation finance has grown in the United States from "approximately 25 to 30 commercial cases a year"[54] to a multi-billion-dollar-per-year investment practice. In the 12-month period ending June 30, 2019, commercial funders deployed approximately $2.3 billion in litigation funding in the U.S.[55] The bulk

49 *See* Section II.B.1, *supra*.

50 *See* Section II.B.2, *supra*.

51 *See* Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571 (2010).

52 For discussions of litigation finance in Australia and the United Kingdom, where it is established and widely accepted, see Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third Party Litigation Funding*, 19 Cardozo J. Int'l & Comp. L. 343 (2011), and *A Brief History of Litigation Finance: The Cases of Australia and the United Kingdom*, *available at* https://thepractice.law.harvard.edu/article/a-brief-history-of-litigation-finance/.

53 Jennifer Smith, *Credit Suisse Parts with Litigation Finance Group* (Jan. 9, 2012), *available at* https://blogs.wsj.com/law/2012/01/09/credit-suisse-parts-with-litigation-finance-group/.

54 *The Rise of Third Party Litigation Funding* (Jan. 21, 2011), *available at* https://www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding.

55 *Litigation Finance Buyer's Guide*, *available at* https://advantage.westfleetadvisors.com/litigation-finance-buyers-guide.

of those funds likely landed in litigations featuring "a mismatch of resources between the plaintiff and a more deep-pocketed corporate defendant."[56]

Used prudently, third-party funding can help "clos[e] the existing funding gap"[57] for plaintiffs' attorneys in costly litigations and provide "access to capital to level the playing field against defendants . . . [and] their teams of BigLaw attorneys."[58]

A. Commercial Funding Basics

Attorneys have traditionally self-funded through recourse debt obligations. Using a loan or line of credit, attorneys borrow funds that must be repaid, regardless of litigation outcome. The repayment obligation is often secured by the firm's assets as well as the personal guarantee of the firm's owner(s).[59] Third-party litigation funders, by contrast, provide capital on a non-recourse basis—meaning capital is only repaid from actual case proceeds. The funder bears the risk of deployed capital. Thus, commercial funding operates more like investments than loans.

In general, the commercial litigation funding market[60] focuses on big-ticket business disputes. In the antitrust realm, funders commonly finance direct or opt-out Section 1 claims, Section 1 and Section 2 competitor cases, or portfolios of cartel class actions.[61] Recipients of the funding include law firms who may seek to manage their contingency risk, scale their practice, and/or stabilize or supplement their operating capital. Funding recipients also include claimants, who may seek to finance their legal fees or out-of-pocket costs, and/or to monetize their claims.

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56 Cristina Violante, *What Your Colleagues Think of Litigation Finance* (Dec. 11, 2017), *available at* https://www.law360.com/articles/989204. The survey found that antitrust was one of the top three areas of litigation where third-party funding is used, behind intellectual property and commercial litigation, and that 86% of attorneys who have used third-party litigation funding reported a positive opinion of it.

57 Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273, 1281 (2012).

58 Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. 73, 78 (2019).

59 Attorneys theoretically can fund a contingency portfolio of antitrust cases entirely through law firm equity, but such arrangements are beyond the means of all but a handful of well-resourced firms and are likely not a prudent strategy event for those firms.

60 Commercial funding is distinguishable from consumer litigation funding, which generally is used for claims sounding in personal injury, medical malpractice, wrongful death, mass torts, and so forth.

61 Due to ethical considerations, funding for class actions usually only occurs in a portfolio arrangement rather than on a single-case basis.

Of course, all funding transactions must be structured with an eye toward applicable ethics considerations[62] and potential future discoverability,[63] which all reputable funders routinely address. The most common types of arrangements, or funding products, through which commercial funders provide capital are described below. The particular terms of funding arrangements are bespoke, which allows firms pursuing complex cases to tailor the terms to their needs and the specific risk profile of their practices.[64]

1. Single-Case Financing

A prototypical financing arrangement involves the funder providing capital to cover attorney's fees, out-of-pocket costs, or both, within an agreed litigation budget, for a specific case, on a non-recourse basis. The funder bears the risk of deployed investment capital. If the case results in a recovery, the funder recovers its deployed capital, plus a return, from the actual recovery.

2. Portfolio Financing

Portfolio financing can involve more complex terms but also offers more ways to customize the arrangement to best suit the needs of the parties. Here, the funder provides capital across a specified set of cases. For plaintiffs receiving funding, this can include a portfolio of all direct actions. For law firms, the portfolio may range from an agreed case group up to the firm's entire contingency practice. The funder may also provide funds for the firm's operating capital, rather than for the litigation budget of a specific case, and the returns on that investment can be payable from the recovery in a certain portfolio (or all) of the firm's cases. Because portfolio financing involves more than one case, the per-case transaction costs (time, due diligence, negotiation, and so forth) of portfolio financing tend to be lower than in single-case financing. Portfolio financing also typically offers better economic terms for the law firm because the portfolio nature decreases the risks somewhat for the funder.

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62 For a summary of the debate surrounding the ethics issues relating to third-party litigation finance, see Stephanie Spangler and Dai Wai *Chin Feman, An Overview of the Debate Over Litigation Finance Disclosure* (May 6, 2019), *available at* https://www.law360.com/articles/1155496/an-overview-of-the-debate-over-litigation-finance-disclosure; Danielle Cutrona, *Answers To Key Legal Finance Ethics Questions* (July 16, 2019), *available at* https://www.law360.com/articles/1178103/answers-to-key-legal-finance-ethics-questions.

For further discussion and analysis of the concerns that have been raised in relation to the growth of litigation funding, see generally Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DePaul L. Rev. 499 (2014), and Michele M. DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 Fordham L. Rev. 2791 (2012).

63 Note that Northern District of California Local Rule 3-15 requires the disclosure of "any persons [with] (i) financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." N.D. Cal. Civ. L. R. 3-15(a)(1). The Northern District has found that identification of a litigation funder as "a person with financial interest" in the case suffices to comply with Local Rule 3-15. *MLC Intellectual Property, LLC v. Micron Technology, Inc.*, No. 14-cv-03657-SI, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

64 Funding arrangement also can be made early in a case, as risks and expenses in antitrust matters become increasingly front-loaded, or at a later stage, when firms (or claims) may reach the limits of their resources.

3. Claim Monetization

When a commercial funder monetizes a claim, it provides a non-recourse advance against the plaintiff's ultimate recovery. Claim monetization has been common in post-settlement, post-judgment, and appeal settings to offset collection risk. It is now increasingly used both generally and at earlier stages in litigation to provide access to inherent value in otherwise illiquid legal claims.

B. How Commercial Funding Helps Mitigate Antitrust Litigation Risks

Leading commercial funders each generally have hundreds of millions of dollars—if not more—of assets under management.[65] Thus litigation funding, for the first time, makes institutional-scale capital available to the legal market on a non-recourse basis. Funders can play a key role in helping to manage the risks and promoting competition in high-stakes private antitrust enforcement practice.

1. Enter and Expand

For firms that have more limited resources, are new to private antitrust enforcement, or otherwise have risk-averse cultures, non-recourse funding can enable them to enter and compete in the private enforcement market.

For firms already in the market, litigation funding can allow them to expand and scale their practice on a non-recourse basis. With funding, a firm can increase the number and quality of their attorneys and staff, dedicate more resources to cases, and ultimately achieve better results—all while the funder bears the risk of the investment capital. By expanding their risk capacity, firms also can pursue more promising enforcement cases—which, in antitrust, still inherently involve significant longevity and legal challenges.[66]

2. Stronger Complaints and Leadership Bids

With litigation funding, a firm can retain investigators, economists, and/or industry specialists to conduct more robust and thorough case investigations and craft stronger complaints. Ample investigation also would allow the firm to form a better preliminary prosecution plan. A firm can demonstrate superior understanding of and commitment to a case through a fulsome investigation and complaint as well as a well-considered plan to prosecute the case. This, coupled with access to ample resources to pursue the prosecution, allows firms to better position themselves for a leadership bid.[67] Stronger complaints also

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65 *Litigation Finance Buyer's Guide*, *available at* https://advantage.westfleetadvisors.com/litigation-finance-buyers-guide.

66 *See* Section II.B, *supra*.

67 It could also give them the freedom to partner with less firms (or perhaps not partner with any other firms) to spread the risk and raise the resources necessary to pursue a given case, and to comply with many judges' preference for "lean" leadership structure, even in complex cases. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 2018 U.S. Dist. LEXIS 140137, at *76 (N.D. Cal. Aug. 17, 2018) (noting that counsel's fee application "stood in tension with the Court's rejection of an eight-firm leadership team and appointment of a leaner team consisting of four law firms").

better withstand pleadings challenges and can help streamline the increasingly difficult, lengthy, and costly preliminary stages of antitrust litigation.[68]

3. See It Through

Litigation funding further allows both firms and litigants to pursue their cases through the (many) intervening hurdles all the way through resolution. Plaintiffs and firms can access third-party funding generally at any stage of litigation. Likewise, funding arrangements can be re-negotiated and updated throughout a litigation to address relevant developments. Thus, access to the litigation funding resource pool could help antitrust plaintiffs level the playing field with well-funded corporate defendants throughout the duration of a litigation, especially as the barriers to maintaining private enforcement actions keep escalating.[69]

IV. CONCLUSION

For more than a decade, the pendulum swung against antitrust plaintiffs, particularly in class actions. Private antitrust enforcement, inherently a high-risk/high-reward practice, now faces greater challenges at earlier stages of litigation. Private enforcement is needed now, arguably more than ever. Attorneys competing, or seeking to compete, in the private enforcement market must effectively manage the growing risks of the practice. With the risk management potential available through third- party commercial litigation financing, private antitrust enforcement actions may find ways to thrive and prosper in the current legal climate.

68 *See* Section II.B, *supra*.

69 *See* Section II.B, *supra*; Cristina Violante, *What Your Colleagues Think of Litigation Finance* (Dec. 11, 2017), *available at* https://www.law360.com/articles/989204.

AN ECONOMIC TREATMENT OF PASS THROUGH IN INDIRECT PURCHASER ANTITRUST LITIGATION

By Armando Levy and David Sunding[1]

In order to be certified as a class action, indirect purchasers in *Illinois Brick* repealer states carry the burden of showing antitrust impact through common proof on a classwide basis. In this article, we describe the most recent results in the economics and marketing literature regarding retail pass through.

I. INTRODUCTION

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), established a doctrine that only direct purchasers of product and services suffering from antitrust injury have standing to sue under federal antitrust law.[2] However, indirect purchaser plaintiffs have been able to establish standing under state laws in the so-called *Illinois Brick* "repealer" states since *California v. ARC America Corp.*, 490 U.S. 93 (1989). In *ARC America*, the Supreme Court held that *Illinois Brick* interpreted only federal antitrust law and states could allow indirect purchasers to seek damages under state law.[3] Many states and the District of Columbia reaffirmed an indirect purchaser's right to recover damages by passing *Illinois Brick* repealer statutes that expressly allow for indirect purchaser actions.[4]

For these cases, in addition to proving an overcharge to the direct purchasers, it is necessary to calculate a "pass-through" rate of the overcharges from direct purchasers to the indirect purchasers (end users). The pass-through rate is the percentage of wholesale price changes that appear in the retail price. Depending on the product and market, the product may pass through several hands before finally arriving to the end-user indirect purchasers. Hence, a pass-through analysis necessitates examination of the institutional details of the supply chain and the market structure at each of its levels. In fact, it is this additional burden (among others) that is cited among the justifications for the *Illinois Brick* doctrine.[5]

Pass-through analyses form an essential part of work an economist expert would perform in an indirect purchaser antitrust litigation matter. Although indirect purchaser antitrust litigation is not exclusively brought as a class action, class actions form the great

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2 The recent Supreme Court ruling on *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1519 (2019), has expanded the definition of what constitutes a "direct purchaser," but the doctrine remains in place. See Kobayashi and Wright (2019), *What's Next in* Apple Inc. v. Pepper*? The Indirect-Purchaser Rule and the Economics of Pass-Through*, 2018-2019 Cato Sup. Ct. Rev. 249, for a discussion.

3 *California v. ARC America Corp.*, 490 U.S. 93 (1989).

4 Nearly thirty states authorize indirect purchasers to recover damages under state antitrust laws through legislations or judicial decisions. Five states limit their repealer laws to claims asserted by their attorneys general on behalf of indirect purchasers.

5 Richard A. Posner and William M. Landes, *Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602 (1979).

majority of indirect purchaser cases. Several recent decisions on class certification for purported classes of indirect purchasers have turned on the failure of the plaintiffs' experts to establish pass through for all or virtually all class members.[6]

As we discuss below, economic theory is generally inclined to view positive pass-through rates as consistent with the behavior of profit-maximizing firms. The rate itself may vary greatly depending on the structure of wholesale and retail markets, but the *fact* of pass through (that is, whether or not it is positive) is a standard feature of most conventional microeconomic models. However, the literature on marketing and merchandising focuses on tactics meant to drive cross-product sales for multi-product retailers such as grocery and "big box" retail stores. These tactics include so called "loss-leader" sales, "focal" pricing or "pricing on the Nines," "everyday low pricing," and "high/low pricing." These tactics serve the strategy of maximizing store profits, but depending on how the tactics are implemented, they may suspend pass through for a period of time for certain products. Hence, empirical investigations based on statistical models of the relationship between retail and wholesale prices are often carried out on the relevant product markets to determine if this is the case.

This article describes the economic and marketing theory for retailer pricing and its relation to the pass-through of wholesale costs. The next section lays out the standard for class certification, while the following section discusses the economic and marketing theories of pass-through. The final section concludes.

II. CLASS CERTIFICATION REQUIREMENTS

In order to certify a class, the plaintiffs must meet the requirements Rule 23 of the Federal Rules of Civil Procedure. Specifically, plaintiffs must satisfy each aspect of Rule 23(a), which reads:

> *a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:*
>
> *(1) the class is so numerous that joinder of all members is impracticable;*
>
> *(2) there are questions of law or fact common to the class;*
>
> *(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and*
>
> *(4) the representative parties will fairly and adequately protect the interests of the class.*

The plaintiffs must also show that the class action fits within at least one of the three types of class actions described in Rule 23(b). For damages actions, the plaintiffs' proposed state-law damages classes must satisfy Rule 23(b)(3)'s predominance and manageability requirements. Rule 23(b)(3) reads:

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6 *See In re Processed Egg Prod. Antitrust Litig.*, 312 F.R.D. 124 (E.D. Pa. 2015); *In re Optical Disk Drive Antitrust Litig.*, 303 F.R.D. 311 (N.D. Cal. 2014); *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2018 WL 1156797 (N.D. Cal. Mar. 5, 2018).

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

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

In the context of an antitrust claim brought by members of a purported indirect purchaser class, the plaintiffs bear the burden of showing that all or nearly all members of the class suffered antitrust injury. Hence the *fact* of pass through is necessary to establish the antitrust standing of purported class members whereas the size of pass through is relevant to the size of damages to indirect purchasers.

With the new more rigorous environment for the class certification process, courts often require a more rigorous showing of damages methodology at the class certification stage. Indirect purchasers do not buy directly from the defendants. Depending on the product at issue, there may be more than one path by which the products travel from the defendant producers to the retailers who sell to the members of the class. At the class certification stage, an economist will examine the details of the supply chain to determine if wholesale cost changes are passed through to retail prices and whether or not the determination requires individualized inquiries. In our discussion below, we focus on retail pass-through, where finished products are sold by retailers.[7]

III. THE ECONOMIC FUNDAMENTALS OF PASS THROUGH

As a matter of economic principle, retailers must recover their short-run variable costs when they price their products for the market. Hence, in deciding the retail price, a retailer must cover the wholesale cost of the goods from their supplier and the costs of stocking and tracking the inventory before it is sold to customers. On top of the short-run variable costs of the good in question, the retailer must also cover a portion of their fixed costs (such as rent) and allow for (accounting) profit. The pass-through rate can be related to the markups that retailers use. The ratio of retail price to the retailer's variable cost is the markup ratio.[8] The markup ratio minus one gives the proportion by which the retail price exceeds variable cost. For example, if a retailer pays $1 for a product wholesale and then sells it for $1.50, the markup ratio is 150 percent and the markup is 50 percent. The pass-through rate is the proportion of a wholesale cost increase that the retailer passes on

7 Hence we set aside the problem of a manufacturer passing through a single component cost increase to a final good that has many components.

8 In practice, there are many markups that appear in GAAP financials, but we are defining the markup from an economist's perspective.

to its customers. Because a retailer knows what the wholesale price of the good is and has a less precise sense of the per-unit stocking and inventory costs, retailers may adopt a simple constant markup over wholesale cost as a pricing rule.[9] With a constant markup, the pass-through rate and the markup ratio coincide with each other.

In a perfectly competitive market, firms price at marginal cost and when marginal costs increase, the cost increases are passed through to the consumer 1:1 or at a 100 percent pass-through rate.[10] The grocery retail business is known to be highly competitive and to be characterized by thin profit margins.[11] Hence, from a purely theoretical perspective, a 100 percent pass-through rate is a reasonable starting point for grocery retail. The general retail business is also known to be competitive.

When a market is characterized by imperfect competition where retailers have some market power and face downward sloping demand, the pass-through rate may be different from 100 percent.[12] As a general matter, the pass-through rate will be determined by the relative elasticities of supply and demand for the firm.[13]

For purposes of establishing that a wholesale overcharge resulted in class-wide impact, it is necessary that the pass-through rate is greater than zero. If the rate is greater than zero, any overcharge in wholesale prices will impact indirect purchasers. This is the key hurdle for class certification. From the point of view of economic theory, although different market structures imply different rates of pass through, a positive rate of pass through is a general finding. However, in the marketing literature there is a more of a tactical treatment of retail pricing. We discuss some of this literature below.

IV. RETAILER PRICING TACTICS THAT MAY IMPACT PASS THROUGH

Economic fundamentals dictate that in the long run retail prices for retail goods must cover their variable costs. However, retailers may diverge from a static markup rule to try to increase store traffic, promote particular brands in a retail category, or to signal low prices to customers generally. For instance, a grocery store may periodically put milk on

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9 "In the retail trades, a conventional pricing rule is to seek some standard percentage margin—for example 40%—of price less cost over price. Knowing the wholesale price W of an item, one finds the retail price by calculating W/(1-.4). The 40% margin must cover all selling and overhead expenses." Frederic M. Scherer and David R. Ross, Industrial Market Structure and Economic Performance 262 (3d Ed., Houghton Mifflin 1990).

10 Pierpaolo Benigno and Ester Faia, *Globalization, Pass-Through and Inflation Dynamic* (Mar. 2010), *available at* http://www.nber.org/papers/w15842 (last accessed Feb. 14, 2020); Frank Verboven and Theon van Dijk, *Cartel Damages Claims and the Passing-On Defense*, 57 J. Indus. Econ. 457 (Sept. 2009); Gregory J. Werden, Luke M. Froeb, and Steven Tschantz, *The Effects of Merger Efficiencies on Consumers of Differentiated Products*, 1 European Comp. J., 245-264 (Oct. 2005).

11 *See* CNBC, *What's Behind the Rush into the Low-Margin Grocery Business* (June 6, 2013), *available at* https://www.cnbc.com/id/100794988; Porte Brown Grocery & Food Service Quarterly Industry Report (March 2018).

12 For example, in a simple symmetric Cournot environment with n firms, the pass-through rate would be n/(n+1) x 100%. *See* Jean Tirole, The Theory of Industrial Organization, Ch. 5 (MIT Press 1988).

13 E. Glen Weyl and Michael Fabinger, *Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition*, 121 J. Political Econ. 528 (2013).

sale (even at a loss) to draw customers into their stores and make up their losses on sales of other products such as tissue paper or bread. Exactly how this sale is implemented may be important to whether or not there is pass-through during those sales. We discuss the most common retail pricing strategies that appear in the literature below.

V. LOSS-LEADER STRATEGIES

In certain instances, retailers may lower the retail price of a selected item to near (or even below) cost to entice customers into the store to increase traffic in the hopes that they will buy more profitable items along with the featured loss-leader product.[14] This pricing strategy is usually combined with advertising such as weekly store "flyers" that are included with local newspapers.[15]

In order to prevent a "bait and switch" problem with retailers quickly running out of stock of advertised items, in 1971 the FTC implemented the "Unavailability Rule" for retail food stores. The rule "prohibits retail food stores from advertising prices for food, grocery products, or other merchandise unless the stores have the advertised product in stock and readily available at or below the advertised price."[16] Hence sales of loss leaders cannot be *de minimis* and thus escape relevance as the exception to "all or nearly all" class members. It is common for retailers to use loss-leader strategies on perishable goods which cannot be stocked up at home or bulky items that take up space to store. Indeed, a number of academic papers that study the loss-leader strategy suggest that the most popular products chosen are soft drinks, paper towels, eggs, and milk.[17]

Although named a "loss-leader," loss leaders are usually not sold at a price below their purchase cost. This is because the reduced price episodes are often executed in conjunction with the producers who reimburse the retailers for the sale through a short-term deep trade promotional discounts.[18] Hence, wholesale price and retail price move together even during the period of deep discount.

Figure 1 below shows wholesale and retail prices for a grocery store from the Dominick's chain that runs loss leaders on their orange juice product. The figure is taken from Dutta, Bergen and Levy (2002).[19] As can be seen in the figure, retail prices drop

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14 *See* James D. Hess and Eitan Gerstner, *Loss Leader Pricing and Rain Check Policy*, 6 Marketing Science 358 (1987); Rajiv Lal and Carmen Matutes, *Retail Pricing and Advertising Strategies*, 67 J. Bus. 345 (1994).

15 J. Barry Mason and Morris L. Mayer, Modern Retailing Theory and Practice (5th ed. BPI/Irwin 1990).

16 Federal Register Vol. 79, No. 227 (November 25, 2014), *available at* https://www.govinfo.gov/content/pkg/FR-2014-11-25/pdf/2014-27881.pdf. The rule was amended in 1989 to provide an exception for disclosures that "supplies are limited" and four defenses: (1) stock is kept to "reasonably meet demand," (2) the issuance of "rain checks," (3) offer comparable products at comparable prices, or (4) offer compensation equal to the advertised value.

17 Rockney G. Walters and Scott B. MacKenzie, S.B., *A Structural Equations Analysis of the Impact of Price Promotions on Store Performance*, 25 J. Mktg. Research 51 (1988).

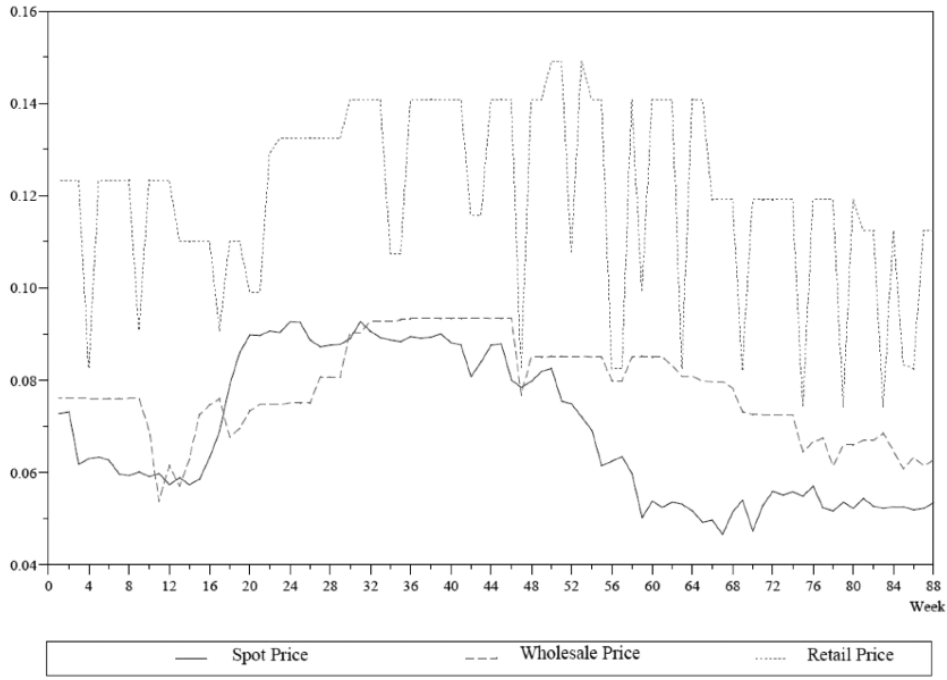
18 Robert C. Blattberg and Scott A. Neslin, S.A., Sales Promotion: Concepts, Methods and Strategies (Prentice Hall 1990).

19 Shantanu Dutta, Mark Bergen and Daniel Levy, *Price Flexibility in Channels of Distribution: Evidence from Scanner Data*, 26 J. Dynamics and Control 1845 (2002).

near wholesale prices periodically. Some of the sales are unsupported by wholesale price discounts (such as week 4) and other sales (such as week 47) coincide with temporary drops in the wholesale price. Generally, wholesale prices were higher in the middle period (weeks 32-46) and lower at the beginning and end. "Regular" retail prices followed this same pattern. Prices began near 12.5 cents per ounce, climbed to 14 cents per ounce and then declined to under 12 cents per ounce albeit with periodic sales throughout. Similarly, sale prices were also low at the beginning (weeks 4 and 9) and end (weeks 75, 79 and 83) and higher in the middle (weeks 34 and 42). Hence the level of loss leader sales price appears related to the level of wholesale prices. However, as is apparent from Figure 1, wholesale and retail prices do not move in lockstep (note the highest retail prices occur when wholesale prices had started to decline).

Statistical models can be fit to the data to estimate the systematic relationship between wholesale and "regular" retail price and "sale" retail prices. Often product-specific (SKU level) price scanner data is available directly from retailers or from third-party marketing firms such as Nielsen or IRI. When this is the case, empirical estimates can be made of the relationship between wholesale and retail prices using regression analyses.

Figure 1: Retail and Wholesale Price of Orange Juice



Source: Shantanu Dutta, Mark Bergen and Daniel Levy, Price Flexibility in Channels of Distribution: Evidence from Scanner Data, 26 Journal of Dynamics and Control 1845, Fig. 1b (2002).

VI. PRICE POINTS

A common tactic employed in retail pricing, and commonly as part of a loss-leader strategy, is to target a particular retail price point (such as $.99) that seems inexpensive or is likely to be remembered by consumers. The use of price points has the effect of discretizing or imposing a grid of prices that are chosen by retailers and wholesalers. As we discuss below, price points are part of the execution of a "high/low" or an "Every Day Low Pricing" strategy. However, a strategy to stick to a particular price point in spite of wholesale cost changes is the unicorn of "no pass through." The foremost example of this tactic is the Costco hot dog. Costco has famously maintained a $1.50 price point for a hotdog and soft drink at their snack bar since the 1980s.[20] Costco has also maintained the price of its rotisserie chicken at $4.99 since 2009.[21]

VII. EVERY DAY LOW PRICING AND HI/LO PRICING STRATEGIES

Two approaches to retail pricing that have emerged are the use of Every Day Low Pricing (EDLP) or a high/low pricing strategy. In the former model, retailers set and maintain a constant lower margin on a product in order to build trust with the customer and negate the need to comparison shop between retail stores.[22] For example, Walmart is known to employ an EDLP approach to pricing its products. This strategy is more prevalent with big box club-style stores such as Walmart, Costco and Trader Joe's.

By contrast to EDLP, the "high/low" strategy is popular among chain grocery stores. Under this strategy, retailers frequently put items on aggressive promotion for a short period of time in order to attract customers and then return to the standard price (*e.g.*, *see* Figure 1 above). In this approach consumers may be thought to infrequently update their sense for the price level at a store and so a sale price may cause customers to establish the habit of frequenting a particular store. The Dominick's grocery store chain used this strategy with many products during the 1990s. In practice, the high/low strategy is closely related to the loss leader approach described above but may involve less severe discounting.

VIII. SOME RECENT LITERATURE OF PASS-THROUGH ANALYSIS

A couple of papers demonstrate two approaches to estimating retail pass through in the academic literature. The first paper uses what is called a reduced form model to estimate the general relationship between wholesale and retail prices. This paper calculates markup ratios of manufacturers and retailers using scanner data from the same Dominick's Finer Food chain as used by Dutta, *et al.* (2002) above. Dominick's carried national branded and private label products. The retailer's markup ratio for national branded canned tuna products was estimated to be 1.15 on average, while the markup ratio on private label

20 *See* https://www.cnn.com/2018/10/04/business/costco-food-court-prices/index.html.

21 *See* https://www.cnn.com/2019/10/13/business/costco-rotisserie-chicken-facts/index.html.

22 See Stephen J. Hoch, Xavier Drèze and Mary E. Purk, *EDLP, Hi-Lo, and Margin Arithmetic*, 58 J. Mktg. 16 (1994), for a discussion.

tuna products was a bit higher at 1.22.[23] Other grocery products showed somewhat higher markups.

The second paper by V. Midrigan fits a structural model of retailer behavior to scanner data from the same retail chain (Dominick's).[24] This paper differentiates between the analyses of low-frequency changes in "regular" prices versus the high-frequency price changes from sales promotions. The paper describes a structural model of retail pricing using the Dominick's retail data that incorporates equilibrium with frequent discounting from a regular price in the presence of small costs to changing prices. This paper finds the retailer's optimal price is a constant markup over unit costs, with a markup ratio of 1.5.[25] This would imply a pass-through rate of 150 percent.

IX. CONCLUSION

In summary, whether or not an indirect purchaser class is suitable for class treatment will depend on the facts of the particular case and whether or not all or virtually all class members had wholesale cost changes passed on to retail prices. Economic theory is supportive of pass through but tends to be more abstract then the more granular studies in marketing which may imply periods of no pass through. Examples also exist in plain sight. Costco hot dogs are an extreme form of focal pricing which show zero retail pass through for decades. In practice for a particular case, statistical models can be employed to estimate whether positive pass through uniformly exists using detailed wholesale and retail sales data.

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23 Robert B. Barsky, Mark Bergen, Shantanu Dutta and Daniel Levy, *What Can the Price Gap between Branded and Private-Label Products Tell Us about Markups?*, Scanner Data and Price Indexes, Chp. 7, 165-228 (Feenstra and Shapiro eds., U. Chi. Press 2003).

24 Virgiliu Midrigan, *Menu Costs, Multiproduct Firms, and Aggregate Fluctuations*, 79 Econometrica 1139 (2011).

25 The markup ratio is given by the ratio $\gamma/(\gamma-1)$, with γ taken as the elasticity of demand for grocery products as given by reference to Nevo (1997), Barsky, et al. (2003) and Chevalier, et al. (2003). *See* Aviv Nevo, *Demand for Ready-to-Eat Cereal and Its Implications for Price Competition, Merger Analysis and Valuation of New Brands*, Ph.D. Dissertation (Harv. U. 1997); Robert B. Barsky, et al., *What Can the Price Gap between Branded and Private-Label Products Tell Us about Markups?* Scanner Data and Price Indexes, Chp. 7, 165-228 (Feenstra and Shapiro eds., U. Chi. Press 2003); Judith A. Chevalier, *Why Don't Prices Rise During Periods of Peak Demand? Evidence from Scanner Data*, 93 Am. Econ. Rev. 15 (2003).

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