CALIFORNIA LAWYERS ASSOCIATION

competition

Vol 31, No. 1
Spring 2021

The Journal of the Antitrust and Unfair Competition Law Section of the California Lawyers Association

CALIFORNIA
LAWYERS
ASSOCIATION

The Journal of the Antitrust and Unfair Competition Law Section of the California Lawyers Association

Vol. 31, No. 1 Spring 2021

Discussion from Golden State Institute and More

COMPETITION

The Journal of the Antitrust and Unfair Competition Law Section of the California Lawyers Association

ANTITRUST AND UNFAIR COMPETITION LAW SECTION EXECUTIVE COMMITTEE 2020-2021

CHAIR'S COLUMN

Qianwei Fu
Zelle LLP
Oakland, CA

With thanks to the authors, editors, and other contributors, the Section is pleased to present another edition of *Competition*. The articles included in this issue cover important developments in antitrust and unfair competition law as well as discussions from our flagship program, the Golden State Institute (GSI), an annual day-long conference that takes place each fall. We continued our streak of success with the GSI last fall (with over 300 registrants!), hosting the conference on a virtual platform for the first time. **Please save the date of November 18, 2021 for our 31st Annual GSI**. We hope to resume the tradition of holding the conference in person this year at the historic Julia Morgan Ballroom in San Francisco.

The year 2020 will be remembered as a time of unprecedented challenges and changes. It also presented an opportunity to test the Section's resilience. Thanks to the selfless commitment of our Executive Committee, advisors, and contributors, the Section has not merely adapted to the virtual environment in the throes of the pandemic, but thrived with creative content and programs. There are several noteworthy accomplishments. First, after five years of nurturing the privacy subcommittee, a new Privacy Law Section is born into the California Lawyers Association family. This Section's name, thus, has returned to "Antitrust and Unfair Competition Law Section." The Section's work in privacy law has paved the way for the continued success of the newly formed Privacy Law Section. We look forward to cross-section collaborations with privacy law practitioners in areas that impact both antitrust and privacy practices. Second, 2021 marks the inaugural year of the Section's Inclusion & Diversity Fellowship program. The Fellowship is one of the Section's many efforts toward fostering greater diversity in the antitrust bar. The Fellowship recipient will receive a summer internship in a government agency, a $10,000 stipend, and a year-long mentorship. Through this program, we hope to provide mentorship and career opportunities to students from underrepresented groups and disadvantaged backgrounds, and cultivate the students' interest in antitrust law. Finally, the Section has continued to provide core products and services to our valued members. Each year, the Section's ExCom works hard to deliver publications and education programs. Last year was no exception. We published two issues of *Competition*, with a focus on the digital economy. We updated our beloved treatise, a must-have reference guide on California antitrust and unfair competition law. We published monthly e-briefs and hosted many well-attended CLE programs and events.

Many thanks to our immediate past Chair Elizabeth Pritzker, for her tireless effort in leading the Section's Executive Committee through a year of challenges and her vision to expand the Section's diversity efforts. And many thanks to you, our members. Without you, there would be no reason to produce this journal. I hope, with our publications and programs, that we kept you informed, that you learned something from reading and participating, and that you consider contributing to our Section. If you would like to find out how to get involved in our work, please visit the Section's website at https://calawyers.org/section/antitrust-unfair-competition-law or email me at qfu@zelle.com. I am happy to discuss your interest in contributing to the Section's activities.

EDITOR'S NOTES

Trevor V. Stockinger
Kesselman Brantly Stockinger LLP
Manhattan Beach, CA

Welcome to the Spring issue of Volume 31 of *Competition,* our Section's official journal published biannually both in print and electronically. Last October, the Section pivoted the 30th Golden State Institute (GSI) to a virtual event due to the pandemic. We are particularly proud that, while not a single hand was shaken at the conference, it hit the record for the highest all-time attendance. As in the past, the conference brought together experienced jurists and practitioners who shared their insights on recent developments in competition law. This GSI also included several panels on diversity and inclusion, as part of the Section's continuing and growing focus on these issues. We are pleased to present five articles reprising discussions at GSI, as well as four articles on topics that have received recent attention from practitioners on both sides of the aisle.

The issue starts off with a comprehensive review and update on the state of antitrust and unfair competition law presented by Colleen E. Huschke, Deputy District Attorney in the Consumer Protection Unit of the San Diego County District Attorney's Office; Kate Patchen, Director and Associate General Counsel of Litigation at Facebook, Inc.; and Professor Shana Wallace at Indiana University's Maurer School of Law. In these pages, we reproduce **Colleen E. Huschke**'s materials on California law updates, as well as **Kate Patchen**'s and **Shana Wallace**'s materials on Federal substantive and 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 a roundtable discussion on a "big-stakes" antitrust trial. In *New York v. Deutsche Telekom AG,* California and other States challenged the merger of Sprint and T-Mobile, the third and fourth largest wireless networks in the United States. Shortly before trial, the judge ordered that he would not hear opening statements. Here, we publish those previously-unheard statements along with a discussion between **Paula Blizzard**, Supervising Deputy General Counsel of the California Attorney General's Office in the Antitrust Section and trial counsel for California, and **George Kary**, Partner at Clearly Gottlieb Steen & Hamilton LLP and trial counsel for T-Mobile U.S. and Deustche Telekom. **Laura Wilkinson**, Associated General Counsel of Global Antitrust for PayPal, moderated the panel.

The Section also had the privilege to welcome **Honorable Joshua P. Groban,** Associate Justice of the California Supreme Court, at last year's GSI. **Cheryl Lee Johnson**, a former Deputy Attorney General of the California Attorney General's Office in Los Angeles, and **Courtney A. Palko**, Partner at Baute Crochetiere Hartley & Velkei LLP, co-presented the session.

Next, the conference turned to two panels on social justice and inclusion. The first panel debated the appropriate role of antitrust law in the social justice movement and wealth distribution. Professor **Douglas Melamed** at Stanford Law School and **Sandeep Vaheesan**, Legal Director at the Open Markets Institute, shared their insights. **Mandy**

Chan, an associate at DLA Piper focusing on antitrust and competition law, moderated the panel.

In the second panel, **Harvey Anderson**, General Counsel for HP Inc., and **John Gibson,** Partner at DLA Piper, along with **D. Bruce Hoffman**, Partner at Cleary Gottlieb Steen & Hamilton LLP as moderator, conversed about the state of diversity in the antitrust bar and shared knowledge on how to make antitrust practice a more inclusive community.

The issue next presents four articles on issues of interest.

The first two articles continue the focus on diversity and inclusion. **Anthony Leon**, who worked in-house for the Louvre Museum and focuses on antitrust and compliance, provides a comprehensive overview of diversity in the legal and antitrust field. The article provides key statistics, an overview of important issues, and extensive advice on how the antitrust field might increase diversity.

Amy Brantly, Partner at Kesselman Brantly Stockinger LLP, and **Jennifer M. Oliver**, Partner at MoginRubin LLP, next discuss the interrelationship between market power and inclusion. In particular, they review the impacts of increasing consolidation in the legal field on opportunities for women practitioners in antitrust.

Dan Werner and **Garrett Glasgow**, Senior Consultant and Associate Director, respectively, at NERA Economic Consulting, write on the trends and approaches to calculating damages in false advertising and product defect class action litigation, including the pros and cons of using various methodologies.

Aminta Raffalovich, Vice President at Intensity, LLC, and **Steven Schwartz**, Managing Director at Intensity, LLC, provide an economic analysis and critique of Qualcomm's "No License, No Chips" policy and the Ninth Circuit decision in *FTC v. Qualcomm*. They consider the incremental effects of Qualcomm's standard-essential patents on Qualcomm's already-dominant position within the unique economic setting of standard-setting organizations and FRAND licensing.

I would like to express my appreciation to the Section's Executive Committee and Advisors, and particularly the Chair, Qianwei Fu, for their continued guidance and support in this endeavor.

Vol 31, No. 1 Spring 2021

The Journal of the Antitrust and Unfair Competition Law Section of the California Lawyers Association

TABLE OF CONTENTS

RECENT DEVELOPMENTS IN CALIFORNIA COMPETITION AND PRIVACY LAW

By Colleen E. Huschke[1]

I. COVID-19 INSPIRED LEGISLATION

A. California Clarifies Price Gouging Prohibitions

1. Price—Gouging–Penal Code § 396

Effective January 1, 2021, California Penal Code section 396 will now clearly apply in pandemic emergencies and to online and in person sales, in addition to traditional retail sales (both clarifications of existing law). The amended statute now also explicitly covers new sellers into the market and places a limit on the amount the seller may charge (50% above cost). Penal Code section 396 maintains the pricing restraints how much a previous seller of specified goods and services may raise their prices.

II. CALIFORNIA PRIVACY LAWS

A. California Enacts Comprehensive Consumer Privacy Law

1. California Consumer Privacy Act of 2018, Civ. Code, § 1798.100 *Et Seq*.

In 2018, in response to the worldwide consumer privacy movement represented by the European Union's General Data Protection Regulation (GDPR)[2] 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 (CCPA).[3]

Effective January 1, 2020, the CCPA provides comprehensive codification of consumer privacy rights and establishes remedies for violations of those rights.

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:

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

---

1 Colleen E. Huschke is Deputy District Attorney in the Consumer Protection Unit of the San Diego County 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.

I am grateful to Thomas Papageorge, Head of the Consumer Unit of the San Diego County District Attorney's Office, for his guidance and use of his prior update as a foundation for this year's memorandum.

2 Regulation 2016/679 (Apr. 27, 2016).

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

(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."[4]

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."[5] 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."[6]

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.[7]

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."[8] 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.[9]

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

---

4 Stats. 2018, ch. 55, § 2(i).

5 Cal. Civ. Code § 1798.140(o)(1).

6 *Id.* § 1798.140(o)(1)(A).

7 *Id.* § 1798.140(o)(1)(A-K).

8 *Id.* § 1798.140(o)(2).

9 *Id.* § 1798.140(c).

purposes;[10] (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;[11] (3) designate methods for submitting access requests including toll-free telephone numbers;[12] (4) update privacy policies with new information, including a description of California residents' rights;[13] and (5) implement procedures to avoid requesting opt-in consent for 12 months after a California resident opts out.[14]

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 to the option of the California Attorney General's Office to supersede the private actions and prosecute civil law enforcement actions against the violations.[15]

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.[16]

B. California Attorney General Issues CCPA Regulations

1. California Consumer Privacy Act Regulations, 20 CCR § 999.300 *Et Seq.*

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.

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.[17] Designated the "California Consumer

---

10 *Id.* § 1798.120(d).

11 *Id.* § 1798.102.

12 *Id.* § 1798.130(a).

13 *Id.* § 1798.135(a)(2).

14 *Id.* § 1798.135(a)(5).

15 *Id.* § 1798.150.

16 *Id.* § 1798.155.

17 *Id.* § 1798.185.

Privacy Act Regulations," these new interpretations of the CCPA are codified at 20 CCR § 999.300 *et seq.* of the California Code of Regulations. On February 10, 2020 and March 11, 2020 certain modifications were proposed and revision made.

On August 14, 2020, California's Office of Administrative Law approved the final version of the implementing regulations. Recently, on October 12, 2020 the Department of Justice proposed a third set of modifications with a public comment period open until October 28, 2020. The third set of proposed modifications to the regulations focuses on the Notice of the Right to Opt-Out of Sale of Personal Information;[18] Requests to Opt-Out;[19] Authorized Agent[20] and Notices to Consumers Under 16 Years of Age.[21]

III. CREATION OF THE CALIFORNIA DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION

A. California Consumer Financial Protection Law (CCFPL), Fin. Code § 90000 *Et Seq*.

On September 25, 2020 Governor Newsom signed AB 1864 enacting the California Consumer Financial Protection Law (CCFPL). The CCFPL shall be effective January 1, 2021. Below is an overview, not an exhaustive analysis, of the new law.

The newly enacted law renames the Department of Business Oversight (DBO), the Department of Financial Protection and Innovation (DFPI).

Legislative Intent. The purpose of the California Consumer Financial Protection Law shall be to promote consumer welfare, fair competition, and wealth creation in this state by doing all of the following:

(1) Promoting nondiscriminatory access to responsible, affordable credit on terms that reasonably reflect consumers' ability to repay.

(2) Promoting nondiscriminatory access to consumer financial products and services that are understandable and not unfair, deceptive, or abusive.

(3) Protecting consumers from discrimination and unfair, deceptive, and abusive acts and practices in connection with financial practices and services.

(4) Promoting nondiscriminatory consumer-protective innovation in consumer financial products and services.[22]

Scope. The DFPI is modeled on the federal Consumer Financial Protection Bureau (CFPB) and the CCFPL is based, in part, on the federal Dodd-Frank Act Title X. The DFPI has broad jurisdiction over the financial services industry to protect consumers from

---

18 *Id.* § 999.306.

19 *Id.* § 999.315.

20 *Id.* § 999.326.

21 *Id.* § 999.332.

22 Cal. Fin. Code § 9000(b).

"unlawful, unfair, deceptive, or abusive" acts.[23] The definition of "unfair" and "deceptive" acts is to be interpreted consistent with Business and Professions Code section 17200 and case law thereunder,[24] whereas "abusive" is to be interpreted consistent with Title X of the Dodd-Frank Act.[25] While the CCPL defines "covered person" broadly[26] there are important exemptions to coverage, including banks.[27] The CCFPL contemplates the issuance of rules regarding registration requirements for covered persons.[28] The CFCPL also contains a complaint response obligation by covered persons.[29]

In addition, the DFPI will establish a Financial Technology Innovation Office to investigate and report on markets for consumer financial products and services, to conduct outreach and educational programs for underserved communities and to implement initiatives to promote innovation.[30]

Enforcement. The DFPI has broad power to bring administrative actions, or civil actions in state or federal court.[31] The DFPI also has extensive investigatory and subpoena powers.[32] The CCPL does not limit the power or authority of the Attorney General.[33] Similarly, the enforcement authority of the district attorney or city attorney pursuant to Business and Professions Code section 17204 to bring unfair competition actions is not affected by the CCFPL and any remedies from such actions are cumulative of those set forth in the CCFPL.[34]

Remedies. The CCFPL contains a panoply of remedies, including, but not limited to, rescission, restitution, monetary relief and civil penalties.[35] The DFPI may also, "after notice and an opportunity for a hearing, suspend or revoke the license or registration of a covered person or service provider."[36]

---

23 *Id.* § 90003(a)(1).

24 *Id.* § 90009(c)(1).

25 *Id.* § 90009(c)(3).

26 *Id.* § 90005(e).

27 *Id.* § 90002.

28 *Id.* §§ 90009, 90009.5.

29 *Id.* § 90008.

30 *Id.* § 90006(d)(1)-(4).

31 *Id.* § 90006(b)(1)-(2).

32 *Id.* § 90011.

33 *Id.* § 90017.

34 *Id.* § 90017(e).

35 *Id.* § 90012(b)(1)-(8).

36 *Id.* § 90015(f).

IV. PUBLIC ENFORCEMENT OF UCL, FAL AND RELATED LAWS

A. California Supreme Court Holds Statewide Jurisdiction for District Attorneys

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).[37]

The California Supreme Court reversed.[38] The court held: "The People, as real party in interest and represented by the District Attorney, have asked this court to determine whether the District Attorney's authority to enforce California's consumer protection laws under the auspices of the unfair competition law (UCL) (Bus. & Prof. Code, § 17200 et seq.) is limited to the county's borders. We hold it is not: The UCL does not preclude a district attorney, in a properly pleaded case, from including allegations of violations occurring outside as well as within the borders of his or her county."[39]

The court first discussed the UCL, quoting at length from Business and Professions Code sections 17200 (definition of unfair competition), 17203 (trial court can award injunctive relief and issue "any orders . . . which may be necessary" including restitution), 17204 (which agencies can bring law enforcement actions for injunctive relief), 17205 (UCL remedies are cumulative to remedies provided by other statutes), 17206 (which agencies can seek civil penalties and the allocation of such penalties), and 17207 (civil penalty if a defendant violates a UCL injunction) and 17206 (civil penalties for engaging in unfair competition).

While the court noted that the legislative record does not expressly authorize district attorneys to collect extraterritorial civil penalties, "what the record does reveal is a clear trajectory toward greater and overlapping public enforcement at all levels of government."[40] The court then went on to detail the various changes to the scope of the enforcement power of law enforcement agencies to bring actions for violations of the UCL. Law enforcement civil penalties were added in 1972.[41] In 1974, city attorneys in cities with a population of more than 750,000 were given UCL law enforcement authority.[42] Further expansions–in 1991 "to all county counsel" and in 1992 "to all city attorneys with the consent of their respective district attorneys."[43] Only 2004's Proposition 64 is an exception to "this trajectory of expanding UCL enforcement" and that proposition "had

37 *Abbott Laboratories, Inc. v. Superior Court,* 24 Cal. App. 5th 1 (2018).

38 *Abbott Laboratories, Inc. v. Superior Court*, 9 Cal. 5th 642 (2020).

39 *Id.* at 648-649.

40 *Id.* at 657.

41 *Id.*

42 *Id.*

43 *Id.*

no effect on suits brought by the Attorney General, the district attorneys, or other public prosecutors."[44]

The California Supreme Court concluded "[i]n sum, the text of the UCL grants broad civil enforcement authority to district attorneys, and this broad grant of authority is consistent with the statute's purpose and history. We see no indication that in an enforcement action brought by a district attorney, the Legislature intended to limit civil penalties or restitution to the geographic boundaries of the district attorney's county."[45]

The court did, however, note the concerns of the amici curiae, the California Attorney General and the CDAA, about the breadth of the district attorney's enforcement power, but concluded: "Ultimately, the pros and cons of centralization or decentralization in the enforcement of California's consumer protection laws is a matter of policy for the Legislature to decide."[46]

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 below).

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 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*[47] and *People ex rel. Clancy v. Superior Court*.[48] Thus, CDAA's ethical manual provides: "Prosecutorial neutrality is required in those civil law enforcement actions where important constitutional concerns are implicated, *ongoing business activity is threatened,* or there is a threat of criminal liability. Private contingent fee attorneys may not appropriately represent the People in such cases."[49]

---

44 *Id.* at 658.

45 *Id.*

46 *Id.* at 663.

47 50 Cal. 4th 35 (2010).

48 3 Cal. 3d 740 (1985).

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

In this regard, the California Supreme Court has cited with approval the *ABA Standards for Criminal Justice, Prosecution Function*: "'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.'"[50]

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*[51] 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: "Similarly, the California Supreme Court's decisions in *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985), and *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (2010), were based not on federal due process principles, but on 'the courts' general authority "to disqualify counsel when necessary in the furtherance of justice.'"[52]

B. The California Supreme Court Finds No Right to a Jury Trial in UCL and FAL Actions

The First District created a split among California courts when it held defendants in UCL public enforcement actions have a right to jury trial as to liability.[53] Numerous appellate courts over the past forty years had held that UCL actions brought by the People are primarily equitable in nature and should be decided by a trial court, not a jury.[54]

The First District, however, found that "the '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."[55]

The California Supreme Court reversed.[56] "For the reasons discussed hereafter, we conclude that the causes of action established by the UCL and FAL at issue here are equitable in nature and are properly tried by the court rather than a jury. As we explain, the legislative history and underlying purpose of the statutory provisions in question demonstrate that these very broadly worded consumer protection statutes were fashioned to permit courts to utilize their traditional flexible equitable authority, tempered by judicial experience and familiarity with the treatment of analogous business

---

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

51 885 F.3d 629 (9th Cir. 2018).

52 *Santa Clara*, 50 Cal.4th at 48 (quoting *Clancy,* 50 Cal. 3d at n. 12).

53 *Nationwide Biweekly Administration, Inc. v. Superior Court*, 24 Cal. App. 5th 438 (2018).

54 *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).

55 *Nationwide Biweekly*, 24 Cal. App. 5th at 470-471.

56 *Nationwide Biweekly Administration, Inc. v. Superior Court*, 9 Cal. 5th 279 (2020).

practices in this and other jurisdictions, in evaluating whether a challenged business act or practice or advertising should properly be considered impermissible under these statutory provisions."[57]

The Court found there was no *statutory* right to a jury trial on the issue of civil penalties under either the UCL or the FAL explaining "the legislative history and legislative purpose of both statutes convincingly establish that the Legislature intended that such causes of action under these statutes would be tried by the court, exercising the traditional flexible discretion and judicial expertise of a court of equity, and not by a jury, including when civil penalties as well as injunctive relief and restitution are sought."[58]

Next, the court found that there is no California *constitutional* right to a jury trial when prosecutors seek both civil penalties and injunctive relief. When a nonseverable cause of action involves both legal and equitable aspects, courts apply the "gist of the action" test for purposes of a California constitutional right to jury trial analysis. "[I]n light of the particular nature of the civil causes of action authorized by the UCL and FAL, we conclude that the gist of a civil action under the UCL and FAL is equitable rather than legal in nature."[59] Therefore, there is no right to a jury trial in a UCL/FAL case even when the prosecution seeks civil penalties in addition to traditional equitable relief.[60]

Lastly, the court found *Tull* distinguishable. The right to a jury trial under the U.S. Constitution's Seventh Amendment only applies to federal court actions, not actions in state court. "[T]he right to jury trial in state court proceedings is governed by the provisions and judicial interpretation of each state's own constitutional jury trial provision."[61] Under *Tull*, federal courts apply a different test than California's holistic "gist" test.[62]

C. California Attorney General Obtains $344 Million Judgment Against Johnson & Johnson

The California Attorney General filed suit in 2016 against Johnson & Johnson and its surgical products unit, Ethicon, Inc., alleging unfair competition and false advertising in the sale and promotion of its pelvic mesh product.[63] On January 30, 2020, the San Diego Superior Court ordered Johnson & Johnson to pay nearly $344 million in civil penalties finding, after a nine-week bench trial, that it had, in fact, deceptively marketed its pelvic mesh device. The court found: "While J&J's marketing vividly portrayed the benefits of the company's products, J&J misstated, downplayed and omitted the risks of its pelvic

57 *Id.* at 292.

58 *Id.* at 297.

59 *Id.* at 322.

60 *Id.* at 327.

61 *Id.* at 330.

62 *Id.*

63 *People of the State of California v. Johnson & Johnson et al.*, No. 3702016-00017229-CU-MC-CTL (San Diego Supr. Ct.).

mesh products. J&J knew the grievous risks and also knew full well why they should have disclosed them."[64]

In addition to its extensive, 88-page Statement of Decision, which found both penalties and injunctive relief appropriate, the court included two detailed Appendices; a 12-page Penalty Count Appendix; and 24-page Violation Appendix. A copy of the Statement of Decision with Appendices is located on the Attorney General's website. Unsurprisingly, Johnson & Johnson filed a notice of appeal on September 17, 2020.

V. COVENANTS NOT TO COMPETE–BUSINESS AND PROFESSIONS CODE § 16600 *ET SEQ.*

A. California Supreme Court Applies Rule of Reason to Business-to-Business Non-Competes

In 2016, Ixchel entered into Collaboration Agreement with Forward to develop a new drug treatment containing DMF for the treatment of neurological diseases.[65] The agreement allowed Forward to terminate the agreement at-will upon 60-day notice.[66] At the same time, Forward was also in negotiations with Biogen to settle a patent dispute relating the DMF.[67] This settlement required Forward terminate its agreement with Ixchel, which Forward did, resulting in Ixchel losing its ability to develop this treatment with Forward. It was also unable to find another partner.[68] Ixchel filed suit in federal court against Biogen alleging, among other things, tortious interference with contractual relations.[69] The complaint was dismissed and Ixchel sought review of its tort and UCL claims by the Ninth Circuit.[70]

In order for the Ninth Circuit to correctly review the district court's dismissal, the California Supreme Court was asked to address the certified questions: 1) whether Biogen's interference in Ixchel's at-will contract with Forward must be independently wrongful; and 2) how Business and Professions Code section 16600 applies to the settlement provision requiring Forward to terminate its agreement with Ixchel.[71]

The California Supreme Court held: "tortious interference with at-will contracts requires independent wrongfulness and that a rule of reason applies to determine the validity of the settlement provision under Business and Professions Code section 16600."[72]

---

64 Statement of Decision 46, *People of the State of California v. Johnson & Johnson et al.*, No. 3702016-00017229-CU-MC-CTL (San Diego Super. Ct. Jan. 30, 2020).

65 *Ixchel Pharma, LLC v. Biogen, Inc.* 9 Cal. 5th 1130, 1138 (2020).

66 *Id.*

67 *Id.*

68 *Id.* at 1139.

69 *Id.* at 1140.

70 *Id.*

71 *Id.* at 1137.

72 *Id.*

The court first considered whether this business-to-business at-will contract was more closely aligned with interference with the performance of a contract or interference with a prospective economic relationship.[73] The court concluded that at-will contracts of the kind at issue here were similar to prospective economic relationships. "Like parties to a prospective economic relationship, parties to at-will contracts have no legal assurance of future economic relations."[74] As such, the "plaintiff must allege that the defendant engaged in an independently wrongful act."[75]

Next, the court considered whether section 16600 applies to the dispute and if so, did it form the basis of the independent wrong required to state a claim. The court quickly dispensed with the first issue. "As an initial matter, we agree with the parties that section 16600 applies to business contract."[76] Ixchel argued that the settlement agreement's requirement that Forward terminate the Collaboration Agreement was *per se* void as it violated section 16600.[77] Section 16600 states "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The court acknowledged the broad language of the statute but, reviewing the statutory history, found section 16600 "is best read not to render void per se all contractual restraints on business dealings, but rather subject such restraints to a rule of reason."[78]

After the Supreme Court issued its opinion, the Ninth Circuit, in an unpublished decision, applied the Supreme Court's guidance, finding that the district court had correctly held that for Ixchel to have stated a claim for tortious interference with an at-will contract, Biogen would have had to have committed an independently wrongful act.[79] The Ninth Circuit affirmed the district court's ruling that the termination provision in Biogen's settlement agreement with Forward was not an unreasonable restraint of trade in violation of section 16600.

VI. CARTWRIGHT ACT–BUSINESS AND PROFESSIONS CODE § 16700 *ET SEQ.*

The Second District reversed a $3.75 million judgment in favor of Flagship Theatres of Palm Desert, LLC (Flagship) in the ongoing litigation between Flagship and Cinemark USA, Inc. and its subsidiary Century Theatres, Inc. (collectively Century).[80] The case concerns an antitrust dispute arising from the licensing of motion pictures to movie theatres. Flagship alleged, and a jury agreed, that "Century had engaged in a practice known as 'circuit dealing' by entering into licensing agreements with film distributors that covered licenses to play films not just at [a theatre owned by Century], but at multiple

---

73 *Id.* at 1140–1141.

74 *Id.* at 1147.

75 *Id.*

76 *Id.* at 1150.

77 *Id.*

78 *Id.*

79 *Ixchel Pharma, LLc v. Biogen, Inc.*, 821 Fed. Appx. 897 (2020).

80 *Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 55 Cal. App. 5th 381 (2020).

other Century-owned theatres as well, and using these agreements to pressure distributors into refusing to license films to [a theatre owned by Flagship]."[81]

The court relied heavily on its analysis of federal law, including *United States v. Paramount Pictures*,[82] as well as California law, including *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*,[83] concerning circuit dealing and vertical restraints concluding a review of the case law did not support the argument that "all multi-theatre license agreements under all circumstances are per se illegal under federal (or California) antitrust law."[84] Rather, "[b]ased on the forgoing survey of relevant federal and California law and film industry developments, we conclude that the trial court correctly required Flagship to show actual net harm to competition under the rule of reason in order to prevail on its non-monopoly circuit dealing claim."[85] The court went on to find that "the connection between the rule of reason and vertical restraints in modern antitrust law–a connection that, since *Redwood* discussed it, has graduated from a trend to a fundamental tenet–is key to selecting the proper analytical framework for non-monopoly circuit-dealing claims."[86] Thus, to prove a *non-monopoly* circuit-dealing claim not only must there be evidence that there were agreements covering more than one theatre, "but that such agreements caused net harm to competition, as determined by the balancing of anti and procompetitive effects under the rule of reason."[87]

Given this analytical framework, the court proceeded to evaluate the sufficiency of the evidence presented to support the jury's findings. The court took issue with the jury instructions concerning the relevant market.[88] It ultimately found the evidence to support a finding of competitive harm in the relevant market region, as defined by either party, was insufficient to support the verdict.[89]

VII. CALIFORNIA'S AUTOMATIC RENEWAL LAW–BUSINESS AND PROFESSIONS CODE § 17600 *ET SEQ.*

A. No Private Right of Action Under California's ARL

The Sixth Appellate District has held that there is no private right of action under California's automatic renewal statutory scheme.[90] Citing *Lu v. Hawaiian Gardens Casino,*

81 *Id.* at 388-89.

82 334 U.S. 131 (1948).

83 200 Cal. App. 3d 687 (1988).

84 *Flagship Theatres*, 55 Cal. App. 5th at 403.

85 *Id.* at 410.

86 *Id.*

87 *Id.* at 413.

88 *Id.* at 424-15.

89 *Id.* at 426.

90 *Mayron v. Google LLC*, 54 Cal. App. 5th 566 (2020).

Inc.,[91] the court observed that a private party can only sue for a violation of a statute if that statute expressly allows it.[92]

Plaintiff argued that Business and Professions Code section 17604 contemplated a private right of action because, while the statute makes clear that there shall be no criminal sanctions for violations of the auto renewal law, "all available civil remedies that apply to a violation of this article may be employed."[93] The court ruled that "Plaintiff's interpretation is not unreasonable."[94] There must be "clear, understandable, unmistakable" language reflecting a legislative intent to create such a private right.[95] "A clear indication means the text cannot be reasonably susceptible of competing interpretations" and the text in this case was found to be susceptible to different interpretation.[96]

However, the court provided hope to future litigants that a claim could be stated for a violation of Business and Professions Code § 17200 if the plaintiff could meet the standing requirement for private actions by pleading actual harm was caused by the violation.[97] In doing so, the court disagreed with federal cases which found the statute's unconditional gift provision alone had conferred standing.[98] Because the plaintiff in *Mayron* had not alleged financial harm resulting from the violation of law, and had not shown how he would amend the complaint, the court found no abuse of discretion in the lower court's denial of leave to amend.[99]

VIII. ARBITRATION AND UNCONSCIONABILITY ISSUES IN CONSUMER AND EMPLOYMENT CONTRACTS AFTER *CONCEPCION*, *SANCHEZ*, *ISKANIAN* AND *MCGILL*

Arbitration after *AT&T Mobility, LLC v. Concepcion*.[100] The U.S. Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, holding that the Federal Arbitration Act[101] 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 v. CLS Transportation*[102] and elsewhere the broad preemptive effect of the FAA and has abrogated several California doctrines limiting mandatory arbitration. However, the Court has also

---

91 50 Cal. 4th 592 (2010).

92 *Id.* at 572.

93 *Id.* at 571.

94 *Id.*

95 *Id.* at 571.

96 *Id.* at 572.

97 *Id.* at 574–77.

98 *Id.* at 572

99 *Id.* at 576–77.

100 563 U.S. 333 (2011).

101 9 U.S.C. § 1 *et seq.*

102 59 Cal. 4th 348 (2014).

demonstrated a commitment to identifying limits to *Concepcion*. As a result, the relationship between arbitration provisions and contract law principles (such as unconscionability) remains the subject of extensive litigation.

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

Aftermath of *Sanchez v. Valencia Holding Co.* [103] 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.[104]

Many commentators see support within the California Supreme Court for carving out exceptions to the broad sweep of *Concepcion*.[105] While *Concepcion* has certainly changed arbitration doctrine in California, and while challenges to protected aspects of arbitration will often fail, it appears that the California Supreme Court will continue to seek limits on the scope of the FAA and *Concepcion*. Examples include:

PAGA actions: *Iskanian v. CLS Transportation*.[106] The Supreme Court held that *Concepcion* impliedly overruled *Gentry v. Superior Court*,[107] 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 arbitration agreement requiring the employee to give up the right to bring representative actions

---

103 61 Cal.4th 899 (2015).

104 *See, e.g.*, *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017); *Carlson v. Home Team Pest Defense, Inc.,* 239 Cal. App. 4th 619 (2015).

105 *See, e.g.,* Richard W. Novotny, *Gauging the Future of Iskanian and FAA Preemption in California*, Los Angeles Lawyer, Mar. 2015, at 10.

106 59 Cal. 4th 348 (2014).

107 42 Cal. 4th 443 (2007).

under the Labor Code Private Attorney General Act of 2004[108] (PAGA) is against public policy and unenforceable.

By carving out PAGA representative actions from the realm of private arbitration governed by the FAA, the *Iskanian* opinion has prompted a wave of plaintiffs' lawsuits and class actions utilizing this exception in employment and wage-and-hour disputes.[109]

Public injunctive relief: *McGill v. Citibank, N.A.*[110] 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."[111]

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.'"[112] 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."[113]

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

Arbitration Clauses Enforced:

***Sanchez v. Valencia*.**[114] (See discussion, s*upra*.)

***Iskanian v. CLS Transportation*.**[115] (See discussion, *supra*).

***Hunter v. Kaiser Foundation Health Plan, Inc*.**[116] Plaintiff brought a class action against Kaiser and its debt collector for violations of California and federal law, including the FDCPA, UCL and the Rosenthal Act, based on the defendants' debt collection practices.[117] The District Court found the contracts' arbitration clauses enforceable, finding that federal law either preempted California law or, if not preempted, the contract satisfied

---

108 Cal. Labor Code §§ 2698 *et seq*.

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

110 2 Cal. 5th 945 (2017).

111 *Id.* at 961 (emphasis in original).

112 *Id.* at 962.

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

114 61 Cal. 4th 899 (2015).

115 59 Cal. 4th 348 (2014).

116 434 F. Supp. 3d 764 (N.D. Cal. 2020).

117 *Id.* at 767.

the requirements of California Health and Safety Code Section 1363.1.[118] The court did find, however, certain provisions within the arbitration clause relating to attorney's fees and cost splitting unconscionable, but determined that these provisions could be severed.[119]

Arbitration Clauses Rejected:

McGill v. Citibank, N.A.[120] (See discussion, *supra*).

Blair v. Rent-A-Center, Inc.[121] 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.*[122] 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."[123] The plaintiff class thus had the right to a trial on the public injunction claim here.

OTO, LLC v. Koh.[124] The First Appellate District held "waiver of the various employee-friendly wage claim provisions of the Labor Code does not make an arbitration agreement unconscionable so long as the resulting arbitration procedure is 'affordable and accessible,'" as it was here.[125] The California Supreme Court reversed this ruling.[126] The California Supreme Court found both procedural and substantive unconscionability after conducting a detailed analysis of the terms of the agreement and the circumstances of its execution.

Mejia v. DACM Inc.[127] Plaintiff brought a putative class action alleging violations of the CLRA and the UCL, among other statutes, stemming from the failure to provide required financial information relating to the sale of a motorcycle. The Fourth District found that California, not Utah, law applied to the determination of the enforceability of the arbitration clause concluding that plaintiff met his burden to show "California had a materially greater interest than Utah in the determination of the 'particular issue' involved: the enforceability of an arbitration provision which bars [him] from seeking in any form public injunctive relief."[128] The court found that *McGill* applied, notwithstanding defendant's argument that the plaintiff sought a private not public injunction. The

---

118 *Id.* at 774.

119 *Id.* at 780.

120 2 Cal. 5th 945 (2017).

121 928 F. 3d 819 (9th Cir. 2019).

122 2 Cal. 5th 945 (2017).

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

124 14 Cal. App. 5th 691 (2017).

125 *Id.* at 710.

126 *OTO, LLC v. Koh*, 8 Cal. 5th 11 (2019).

127 54 Cal. App. 5th 691 (2020).

128 *Id.* at 699-700.

defendant claimed the "arbitration provision allows [plaintiff] to pursue his claim for a public injunction in court *after arbitration of all arbitrable claims*."[129] The court found this argument for an implied exception for seeking a public injunction to be without merit and affirmed the lower court's ruling that the arbitration clause was unenforceable under *McGill*.[130]

IX. FIRST AMENDMENT PRINCIPLES AND STATE REGULATION OF COMMERCIAL FREE SPEECH

National Institute of Family and Life Advocates (NIFLA) v. Becerra.[131] 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.[132]

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.[133] 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."[134]

CTIA–The Wireless Association v. Berkeley.[135] In *CTIA*, 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

129 *Id.* at 705 (emphasis added).

130 *Id.* at 706.

131 138 S. Ct. 2361 (2018).

132 *Id.* at 2375.

133 898 F. 3d 879 (9th Cir. 2018), cert denied 139 S. Ct. 2744 (2019).

134 *Id.* at 902 n.17.

135 928 Fed. 3d 832 (9th Cir. 2019).

unconstitutional, and thus the ordinance meets constitutional standards under the intermediate scrutiny of *Zauderer."*[136]

National Association of Wheat Growers v. Becerra.[137] Proposition 65 prohibits any person in the course of doing business from knowingly and intentionally exposing anyone to the listed chemicals without a prior "clear and reasonable" warning.[138] This prohibition is supposed to take effect 12 months after the chemical has been listed as a chemical known to the state to cause cancer by California's Office of Environmental Health Hazard Assessment (OEHHA). Two specific warning labels contained in state regulations are deemed per se clear and reasonable. Glyphosate, the chemical at issue, had been classified as "probably carcinogenic" by the International Agency for Research on Cancer and placed on the state's Proposition 65 list.[139]

The National Wheat Growers Association sought a permanent injunction enjoining the California Attorney General from enforcing the Proposition 65 warning requirement of California Health and Safety Code Section 25249.6 to glyphosate.[140] The National Association of Wheat Growers argued that the warning requirement was a violation of its First Amendment right because it was unjustified compelled speech.[141]

As an initial matter, the court found the dispute ripe for disposition. "Thus, plaintiffs, who have stated they intend to give no warning based on their constitutional right against compelled speech, face a credible threat of enforcement as a result of exercising such right, regardless of the enactment of the safe harbor for glyphosate."[142]

Moving to the merits of the analysis, the court had to decide which level of First Amendment scrutiny to apply: intermediate scrutiny articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[143] or the lower standard of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.[144] The court, citing *NIFLA,* concluded that if the compelled speech was *not* purely factual and uncontroversial it would apply the intermediate standard in *Central Hudson*.[145] Plaintiff argued, and the court agreed, that the warning requirement was not purely factual and uncontroversial because various other agencies, such as the EPA and WHO, concluded that there was insufficient evidence that glyphosate was a carcinogen.[146] Acknowledging the substantial interest of the state in protecting the public from carcinogens, the court nevertheless granted the permanent injunction against enforcement of the warning label requirement, finding that "misleading

136 *Id.* at 848–849.

137 468 F. Supp.3d 1247 (2020).

138 *Id.* at 1252.

139 *Id.*

140 *Id.* at 1254.

141 *Id.* at 1256–57.

142 *Id.* at 1255.

143 447 U.S. 557 (1980).

144 471 U.S. 626 (1985).

145 *National Association of Wheat Growers*, 468 F. Supp. 3d at 1258.

146 *Id.* at 1264.

statements about glyphosate's carcinogenicity, and the state's knowledge of that purported carcinogenicity, do not directly advance that interest."[147]

The California Attorney General filed an appeal in September 2020.

X. MISCELLANEOUS

A. Robocalling Prohibition Under Parallel Federal and California Statutes Clarified

Unsolicited telemarketing calls, including those using automatic telephone dialing systems ("robocalling"), are regulated under federal law by the Telephone Consumer Protection Act of 1991 (TCPA)[148] and the federal "Do-Not-Call" Implementation Act of 2003,[149] 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."[150] 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. California's Business and Professions Code sections 17590–17594, entitled "Unsolicited and Unwanted Telephone Solicitations," conforms California law to the federal regulations, including the definition of robodialing as addressed in *Duguid*. 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.[151]

The United States Supreme Court has accepted for review the following question arising out of the *Duguid* case: "Whether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'" Resolving the question of what constitutes an ATDS for purposes of the TCPA will have a tremendous impact on both businesses and consumers. Oral argument occurred on December 8, 2020.

---

147 *Id.*

148 47 U.S.C. § 227.

149 6 C.F.R. § 310.4 *et seq.*

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

151 Cal. Bus. & Prof. Code § 17590.

RECENT DEVELOPMENTS IN FEDERAL ANTITRUST LAW

By Shana Wallace[1] *and E. Kate Patchen*[2]

I. NOTABLE ANTITRUST CASES

A. *FTC v. Qualcomm*[3]

The Ninth Circuit reversed Judge Koh's decision in the district court that Qualcomm's conduct related to its cellular standard essential patents (SEPs) and its monopolies in CDMA and premium LTE chips had violated the antitrust laws.[4] Qualcomm's SEPs are crucial to our modern day cellular existence and the manufacturers that make that existence possible. Although Qualcomm's licensing of its cellular SEPs is profitable, the Ninth Circuit explained that Qualcomm is "no one-trick pony"–which is fortunate for Qualcomm because its ability to charge supracompetitive prices on its SEPs is at least somewhat circumscribed by the fact that they are subject to licensing on fair, reasonable, and nondiscriminatory ("FRAND") terms.[5] Qualcomm could, however, arguably shore up its dominant position in chip sales (where it arguably faced at least some competition, even if mostly prospective) by charging all customers a fee for the use of any chips (whether Qualcomm's or a competitor's chips) that incorporated its SEPs, which Qualcomm dubbed a "patent royalty."[6]

A "patent royalty," the Ninth Circuit opined, "sounds in patent law, not antitrust law."[7] To the extent such facially neutral fees harm Qualcomm's customers was of no moment, explained the panel, as harms to mere "*customers*, not [Qualcomm's] competitors . . . are not 'anticompetitive' in the antitrust sense."[8] And, according to the Ninth Circuit, customers fall outside "the area of effective competition" with which antitrust is concerned.[9] The Federal Trade Commission recently filed a Petition for Rehearing En Banc.[10] The petition was denied.

---

1 Professor Shana Wallace teaches at Indiana University's Maurer School of Law. She spent over a decade in the Antitrust Division of the United States Department of Justice, representing the government in an appellate capacity, serving as an advisor to the Directors of Criminal and Civil enforcement, and investigating mergers and anticompetitive conduct. In 2016, Wallace was awarded the Attorney General's Award for Distinguished Service for her contributions to the *United States v. Apple* litigation.

2 Kate Patchen is the Director and Associate General Counsel of Litigation at Facebook, Inc. Previously, she was the Chief of the San Francisco Office for the United States Department of Justice Antitrust Division. Kate also serves as an Advisor to the Antitrust and Unfair Competition Law Section after having spent years on the Executive Committee.

3 *FTC v. Qualcomm,* 969 F.3d 974 (9th Cir. 2020).

4 *Id.* at 1005.

5 *Id.* at 983.

6 *Id.* at 985-87.

7 *Id.* at 999.

8 *Id.* at 999-1000 (emphasis in original).

9 *Id.* at 992-93.

10 Petition of the Federal Trade Comm'n for Rehearing *En Banc*, *FTC v. Qualcomm*, No. 19-16122 (9th Cir. Sept. 25, 2020) (Dkt. No. 256).

B. Supreme Court Decision on Available Remedies in FTC Enforcement Actions

A split between the Seventh and Ninth Circuits addressing available remedies in FTC enforcement actions, as well as a recent Supreme Court decision (*Liu v. SEC*, 140 S. Ct. 1936 (2020)), have thrown the federal antitrust agencies' ability to seek the equitable relief of disgorgement into doubt.

The Supreme Court granted a writ of certiori[11] to consider *FTC v. Credit Bureau Center*[12] and *FTC v. AMG Capital Management*.[13] The Seventh Circuit in *Credit Bureau Center* held that FTC Act Section 13(b)'s language authorizing the FTC to seek "a permanent injunction" does not permit a court to exercise its authority to award the further equitable relief of disgorgement.[14] The Ninth Circuit in *AMG Capital Management*, on the other hand, held that federal courts do have authority to order disgorgement.[15] After the cert petitions were filed, the Supreme Court issued a narrow ruling in the securities law context holding that federal courts only had the authority to award the equitable relief of disgorgement in SEC enforcement actions because Securities Exchange Act Section 78u(d)(5) specifically authorized the SEC to seek "equitable relief."[16] (Federal courts had ordered disgorgement numerous times in SEC actions based upon their "inherent equity power" prior to the 2005 addition of the "equitable relief" statutory language; the Supreme Court's reasoning thus implied that those courts had apparently been acting *ultra vires*.)[17]

Although the Supreme Court appeals in *Credit Bureau* and *AMG Capital Management* have yet to be decided, *Liu* was sufficient authority for the Third Circuit to agree with the Seventh Circuit's conclusion and reverse a historic district court award of $448 million in disgorgement in the antitrust case, *FTC v. AbbVie, Inc.*[18] The *AbbVie* panel reasoned that as "Section 13(b) does not explicitly empower district courts to order disgorgement," and the statutory language is only forward looking, a backward-looking remedy like disgorgement is out-of-bounds.[19] If these tea leaves are accurate for the FTC, then the DOJ Antitrust Division's ability to seek disgorgement will likely fare no better. Admittedly, the Division

---

11 *See Fed. Trade Comm'n v, Credit Bureau Ctr., LLC*, Case No. 19-825, 2020 WL 3865251 (U.S. S. Ct. July 9, 2020); *AMG Capital Mgmt. v. Fed. Trade Comm'n*, Case No. 19-508, 2020 WL 3865250 (U.S. S. Ct. July 9, 2020).

12 937 F.3d 764 (7th Cir. 2019).

13 910 F.3d 417 (9th Cir. 2018).

14 937 F.3d at 767.

15 910 F.3d 417.

16 *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020).

17 *Id.* at 1952 (Thomas, J., dissenting).

18 976 F.3d 327 (3rd Cir. 2020).

19 *Id.* at 376.

has only rarely sought such a remedy. But when it has, the Division has appealed to the reasoning in SEC cases and to federal courts' "inherent equitable powers."[20]

C. T-Mobile/Sprint Merger

Federal and certain state regulators took different approaches to their challenge of T-Mobile's merger with Sprint: the Attorneys General for New York, California, Connecticut, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Oregon, Pennsylvania, and Virginia moved under Section 7 of the Clayton Act to enjoin the merger altogether,[21] whereas the US Department of Justice ultimately petitioned for a final judgment that would allow the merger to proceed on the condition that the newly-merged T-Mobile would divest to DISH Network Corp. Sprint's prepaid wireless business and certain spectrum licenses.[22] The Southern District of New York denied the states' Clayton Act challenge,[23] and the District of Columbia granted the US DOJ's request for a final judgment.[24]

D. Seventh Circuit Reinstates *Aspen Skiing* Refusal-to-Deal and Tying Claims

In *Viamedia, Inc. v. Comcast Corp.*,[25] the Seventh Circuit reversed the district court judgments in favor of Comcast, which had dismissed Viamedia's Section 2 refusal-to-deal claim and granted summary judgment on Viamedia's tying claim.[26] The dispute stemmed from access to regional "interconnects" that had previously been jointly owned and operated by regional cable companies and which were crucial to cable companies' ability to appeal to regional and national advertisers.[27] The court outlined the industry history: (i) that Comcast had fought for decades against the entry of cable competition in the form of overbuilders and wireline telephone companies; (ii) that Comcast had simultaneously embarked on a buying spree of hundreds of local cable companies–swearing to antitrust enforcers and the FCC that it had no intention of interfering with its cable competitors' access to the cooperative interconnects; and (iii) that once Comcast had become the country's dominant cable provider, it promptly cut off access to the interconnects, claiming them as a source of its own competitive dominance.[28] The only way that Comcast would permit its cable competitors (e.g., RCN, WOW!) to access the

---

20 *U.S. v. Keyspan Corp.*, 763 F.Supp.2d 633, 638-39 & n.4 (S.D.N.Y. 2011) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also* Antitrust Division U.S. Dep't of Justice, Merger Remedies Manual 4 n. 11 (2020), *available at* https://www.justice.gov/atr/page/file/1312416/download ("In appropriate circumstances, the Division may consider seeking disgorgement in consummated merger challenges instead of or in addition to unwinding the transaction.").

21 *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 187 (S.D.N.Y. 2020).

22 *United States v. Deutsche Telekom AG*, No. 19-cv-2232, 2020 WL 1873555, at *2-3 (D.D.C. April 14, 2020).

23 439 F. Supp. 3d 179, 249 (S.D.N.Y. 2020).

24 No. 19-cv-2232-TJK, 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020).

25 951 F.3d 429 (7th Cir. 2020).

26 *Id.* at 485.

27 *Id.* at 434-35.

28 *Id.* at 436-46.

cooperative interconnects and the make-or-break ad revenue streams that flowed through them, was if Comcast's cable competitors would fire their ad representative, Viamedia, and turn over their entire inventory of national, regional, and–totally unnecessary for the interconnects–local advertising inventory to Comcast.[29] Comcast, with one swoop, thus made itself privy to the financial inner workings of its competitors, including ensuring advance notice of their promotions and ad revenue streams, and left local advertisers with no competition for the placement of local cable ads.[30]

Per the Seventh Circuit, Comcast's course of conduct, and its refusal to allow Viamedia access to the Interconnects on behalf of Comcast's cable competitors, fit squarely within the framework of *Aspen Skiing*.[31] The Supreme Court had expressly declined in recent years to overrule *Aspen Skiing*, instead deeming it to stand at the outer boundary of sanctionable conduct under Section 2.[32] The Seventh Circuit explained that unless by "outer boundary" the Court meant "limited to ski slopes," there was no meaningful way to distinguish Comcast's conduct—particularly at the motion to dismiss stage.[33] As to the tying claim, Viamedia had offered up substantial factual evidence that Comcast had indeed conditioned its competitors' (and the competitors' ad representative's) access to the interconnects on the competitors' agreement to turn all of their advertising inventory and a portion of that revenue over to Comcast.[34] It was therefore inappropriate at the summary judgment stage for the district court to weigh Comcast's unsubstantiated claims of efficiencies and procompetitive benefits flowing from such conduct against Viamedia's evidence, and grant summary judgment for Comcast.[35] Judge Brennan dissented, opining that he would have reversed the district court on the refusal-to-deal claim, but affirmed summary judgment on the tying claim.[36] Comcast has filed its petition for writ of certiorari with the Supreme Court.[37]

E. Novelis/Aleris Merger

The Department of Justice Antitrust Division used its authority under the Administrative Dispute Resolution Act of 1996[38] for the first time to elect binding arbitration to resolve a merger challenge filed in the Northern District of Ohio to block Novelis Inc.'s proposed $2.6 billion acquisition of Aleris Corporation.[39] The arbitration was limited to the sole issue of product market definition. The parties stipulated at the outset that if the DOJ won on product market definition, the parties would have to

---

29 *Id.* at 444-46.

30 *Id.* at 446-449.

31 *Id.* at 454.

32 *Id.* at 458.

33 *Id.* at 458-60.

34 *Id.* at 466-74.

35 *Id.* at 474.

36 *Id.* at 487-502.

37 Petition for Writ of Certiorari, *Comcast Corporation, et al. v. Viamedia, Inc.*, Case No. 20-319 (U.S. S. Ct. Sept. 4, 2020).

38 5 U.S.C. § 571 *et seq.*

39 *United States v. Novelis Inc. and Aleris Corp.*, Case No. 1:19-cv-02033-CAB (N.D. Ohio).

divest certain facilities, and if the parties won on product market definition, the Division would dismiss the complaint. The Division ultimately prevailed. As a result, and under the arbitration agreement, the merging parties had committed to the divestiture that was the result of the arbitration.

II. OTHER NOTABLE FEDERAL CASES

A. Discovery and Class Action Plaintiffs: *In re Williams-Sonoma, Inc.*, 947 F.3d 535 (9th Cir. 2020)

In *In re Williams Sonoma, Inc.*,[40] the Ninth Circuit held that litigants cannot use "discovery to find a client to be the named plaintiff before a class action."[41]

Plaintiffs' counsel had filed against Williams Sonoma a putative class action under California law in which a Kentucky resident served as the named plaintiff.[42] After a pre-certification ruling that Kentucky law applied to the named plaintiff's claims, the district court granted a motion to compel discovery for the "sole purpose" of finding a new lead plaintiff from California.[43] Williams Sonoma petitioned for a writ of mandamus to the Ninth Circuit to vacate the order.[44]

Recognizing that a writ of mandamus is a "drastic and extraordinary" remedy, the Ninth Circuit issued the writ principally on the ground that it was "clear error" for the district court to have found that "seeking discovery of the name of a class member (here an unknown person, who could sue Williams-Sonoma)" was "relevant to any party's claim or defense" under Federal Rule of Civil Procedure 26(b)(1).[45] The Court briefly touched on the remaining four factors germane to issuing writs of mandamus: the first two factors favored Williams Sonoma because it had no other adequate means of relief and would incur damage not correctable on appeal, while the remaining two factors counseled against issuing the writ because the error was not "oft-repeated," and was not a "novel issue."[46]

B. Article III Standing and the Award of Damages in Class Actions

In *Ramirez v. TransUnion LLC*,[47] the Court held as a matter of first impression in the Ninth Circuit that "every member of a class action certified under Rule 23 must demonstrate Article III standing at the final stage of a money damages suit when class members are to be awarded individual money damages."[48]

---

40 947 F.3d 535 (9th Cir. 2020).

41 *Id.* at 540.

42 *Id.* at 537.

43 *Id.* at 537-38.

44 *Id.* at 538.

45 *Id.* at 538-540.

46 *Id.* at 540.

47 951 F.3d 1008 (2020).

48 *Id.* at 1017.

Defendant TransUnion appealed a jury verdict in favor of a class of consumers who accused TransUnion of willfully violating the Fair Credit Reporting Act ("FCRA") in connection with its inaccurate labeling of thousands of Americans as potential terrorists, drug dealers, and threats to national security.[49] TransUnion argued, inter alia, that (a) every class member must have Article III standing; and (b) no class member apart from the lead plaintiff had Article III standing.[50] The Court agreed with TransUnion that, specifically for the "final judgement stage" in a suit for monetary damages,[51] each class member must have Article III standing.[52] However, the Court found that each plaintiff had standing because the practices that lead to TransUnion's inaccurate reporting "exposed all class members to a material risk of harm."[53]

III. FEDERAL POLICY UPDATE

A. Agencies' Joint Antitrust Statement Regarding COVID-19

On March 24, 2020, the Department of Justice, Antitrust Division and the Federal Trade Commission issued a joint statement setting out certain guidelines for businesses to follow during the COVID-19 pandemic.[54] The Agencies' statement listed a number of collaborative activities designed to improve the health and safety response to the pandemic that would not violate the antitrust laws, including: firm collaboration on research and development; sharing technical know-how; joint development of suggested standards for patient management developed to assist providers in clinical decision making; most joint purchasing arrangements among healthcare providers; and joint private lobbying addressed to the use of federal emergency authority. The Agencies also said they would account for "exigent circumstances" in evaluating efforts to address the spread of COVID-19 and would allow, for example, health care facilities to work together in providing resources and services to vulnerable communities or businesses temporarily combining production, distribution, or service networks to facilitate production and distribution of COVID-19-related supplies. The FTC further published guidance on how businesses could seek expedited advisory opinions from the FTC on proposed conduct.

The DOJ has issued three Covid-related Business Review Letters:

---

49 *Id.* at 1016-17.

50 *Id.* at 1022-23.

51 The Court distinguished this ruling from constitutional standing requirements in class actions that request only injunctive relief, as well as class actions at the certification or other, earlier, stages of the case. *Id.* at 1023, n.6.

52 *Id.* at 1023-24.

53 *Id.* at 1029-30.

54 *Joint Antitrust Statement Regarding COVID-19* (Mar. 24, 2020), *available at* https://www.ftc.gov/system/files/documents/public_statements/1569593/statement_on_coronavirus_ftc-doj-3-24-20.pdf.

- On April 4, the DOJ announced that it would not challenge an arrangement among a group of medical supplies distributors to collaborate in providing personal protective equipment.[55]

- On May 15, the DOJ announced that it would not challenge collaborative efforts between the National Pork Producers Council and the U.S. Department of Agriculture to respond to a pork supply shortage.[56]

- On July 23, the DOJ announced that it would not challenge a proposed collaboration among pharmaceutical companies to share information about developing antibody treatment for COVID-19.[57]

However, the Agencies have also warned that they would not hesitate to seek to hold accountable individuals or businesses who tried to use the pandemic as an opportunity to subvert competition or otherwise violate the antitrust laws, and signaled their willingness to prosecute rulebreakers. The agencies have emphasized that they will enforce the antitrust laws against such conduct, and they have specifically called out employer collusion on salaries or other employment terms that could disadvantage frontline workers, such as doctors, nurses, first responders, and grocery store and pharmacy employees.

B. DOJ Antitrust Statement Regarding CIDs and Depositions

On September 10, 2020, the DOJ announced that all Civil Investigative Demand forms moving forward will state that information provided by a recipient may be used in other civil, criminal, administrative, or regulatory cases, and that individuals may refuse to produce documents or answer questions under the Fifth Amendment.[58] DOJ attorneys taking depositions will also ask deponents at the outset of depositions to confirm that the deponent understands the ways in which the information they provide can be used by DOJ.

C. Vertical Merger Guidelines

On June 30, 2020, the FTC and DOJ released their long-awaited update of the Vertical Merger Guidelines.[59] The Guidelines were last updated 1984. The Guidelines

---

55 *Department of Justice Issues Business Review Letter to Medical Supplies Distributors Supporting Project Airbridge Under Expedited Procedure for COVID-19 Pandemic Response* (Apr. 4, 2020), *available at* https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting (last updated Apr. 21, 2020).

56 *Department of Justice Supports National Pork Producers Council's Ability to Combat Meat Shortage*, (May 15, 2020), *available at* https://www.justice.gov/opa/pr/department-justice-supports-national-pork-producers-council-s-ability-combat-meat-shortage (last updated June 4, 2020).

57 *Department of Justice Issues Business Review Letter to Monoclonal Antibody Manufacturers to Expedite and Increase the Production of Covid-19 Mab Treatments*, (July 23, 2020), https://www.justice.gov/opa/pr/department-justice-issues-business-review-letter-monoclonal-antibody-manufacturers-expedite.

58 *Antitrust Division Announces Updates To Civil Investigative Demand Forms And Deposition Process* (Sep. 10, 2020, *available at* https://www.justice.gov/opa/pr/antitrust-division-announces-updates-civil-investigative-demand-forms-and-deposition-process.

59 The guidelines are available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

outline the types of competitive harm that can result from vertical transactions and provide guidelines for how the agencies will evaluate them.

D. Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) Reauthorized

On October 1, a continuing resolution that contains the Antitrust Criminal Penalty Enhancement and Reform Permanent Extension Act was signed into law.[60] The Act reauthorizes the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) and repeals its sunset provision. ACPERA releases a leniency recipient from the treble damages and joint-and-several liability that would otherwise apply in private civil claims related to its self-reported cartel conduct.

E. FTC: Merger Filing Rulemaking

FTC issued a Notice of Proposed Rulemaking and an Advance Notice of Public Rulemaking relating to the Hart-Scott-Rodino Antitrust Improvements Act.[61]

The FTC has proposed two changes to the premerger notification rules: (1) requiring merger filers to disclose additional information about their associates and to aggregate acquisitions in the same issuer across those entities; and (2) introducing a rule that would exempt the acquisition of 10 percent or less of an issuer's voting securities unless the acquiring person already has a competitively significant relationship with the issuer.

The Advance Notice seeks to gather information on seven topics that will help determine the path for future amendments to the HSR rules and interpretations of those rules. Some of the topics include: the calculation of the size of transactions; real estate investment trusts; non-corporate entities; acquisitions of small amounts of voting securities; and influence outside the scope of voting securities.

---

60 H.R. 7076, 116th Congress (2020), *available at* https://www.congress.gov/bill/116th-congress/house-bill/7036/text; S. 3377, 116th Congress (2020), *available at* https://www.congress.gov/bill/116th-congress/senate-bill/3377/text.

61 *FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking, Fed. Trade Comm'n* (Sept. 21, 2020), *available at* https://www.ftc.gov/news-events/press-releases/2020/09/ftc-doj-seek-comments-proposed-amendments-hsr-rules-advanced.

A CONVERSATION WITH CALIFORNIA SUPREME COURT JUSTICE JOSHUA P. GROBAN

By Cheryl Lee Johnson and Courtney A. Palko[1]

For the seventh consecutive year, we have been privileged to have a Justice of the California Supreme Court address our members. We welcomed Joshua P. Groban at the 2020 Golden State Institute. He shared with us his major life influences, his path to the California Supreme Court, his judicial philosophy, and his sports allegiances. The panel was presented in a question-and-answer format. What follows is an edited transcript of the conversation.

MS. COURTNEY PALKO:

It is our great honor to have with us today California Supreme Court Justice Joshua Groban, the most recent appointee to the Court. Justice Groban has had a remarkable career dedicated to legal excellence and public service. A southern California native, he was raised in Del Mar, California, where he attended public schools. His parents both led lives in public service; his father is a physician and professor at UC San Diego and VA hospitals and his mother is a retired social worker and former member of the Del Mar City Council.

Justice Groban received a BA with honors and distinction from Stanford in modern thought and literature, and then received his JD cum laude from Harvard Law School. Following law school, Justice Groban clerked for the Honorable William C. Conner of the Southern District of New York. He then spent six years in private practice in New York at Paul Weiss, where he was lead counsel on the firm's largest pro bono case at the time.

MS. CHERYL JOHNSON:

Justice Groban then moved to Los Angeles where he practiced at Munger, Tolles & Olson for five years. There he specialized in complex litigation with a focus on antitrust, intellectual property, and internal investigations. His career took a turn, some would say a semi-seismic turn, when he took a leave of absence from Munger Tolles to serve as legal counsel to Jerry Brown's campaign for California governor in 2010. After Brown's election, Justice Groban served as a senior advisor in his administration, overseeing state judicial appointments and advising the governor on litigation and policy. In this role, he screened and interviewed more than a thousand candidates for judicial office. He oversaw the appointment of over 600 state judges, or approximately one out of every three judges in the state.

In 2018, Governor Brown appointed Justice Groban to the California Supreme Court to fill the seat vacated by retiring Justice Werdegar. He was sworn into office in January 2019. Justice Groban and his wife, Deborah, have two young children and he claims the Southland as his home.

---

1 Cheryl Lee Johnson is a former Deputy Attorney General of the Office of the California Attorney General's Antitrust Section in Los Angeles, and a former Chair of the California Lawyers Association Antitrust and Unfair Competition Law Section. Courtney A. Palko is a Partner at Baute Crochetiere Hartley & Velkei LLP, and Vice-Chair of the California Antitrust & UCL Treatise published by this Section.

So, with that briefest of background, we're going to turn to our questions for Justice Groban. Courtney, can you start?

MS. COURTNEY PALKO:

Thank you for joining us today, Justice Groban. Let's jump right in and talk about your early career. What influenced you to decide to pursue a career in law, and was this a career path that your parents approved or encouraged?

JUSTICE JOSHUA GROBAN:

Thank you, Courtney, and first, let me say thanks so much for having me; I'm delighted to be with you all. I wish we could be in person but maybe next year. And as somebody who practiced in this field in a prior life, I'm particularly delighted to be here.

I think I knew I wanted to be a lawyer from a pretty early age. I'm not quite sure how I got that in my head other than the robust discussions that would break out at the dinner table. We were a family that ate dinner together every night and for a good chunk of my childhood, the three homes of my grandparents, my own family and my aunt and uncle and cousins were all in walking distance of one another. So at the dinner table, there was a lot of discussion amongst physician, social worker, lawyer, and political science professor, and the discussions were robust and I think that put me on my way, so to speak.

MS. COURTNEY PALKO:

That's interesting. You practiced in private law for over a decade. Why did you choose private practice and what part of it did you enjoy the most?

JUSTICE JOSHUA GROBAN:

I wish I could say it was part of some grand strategy about the trajectory of my career but in retrospect, I was 25, 26 years old and most of my colleagues were going off to private practice and I thought I would do the same. Part of what motivated me was I had taken a one-year clerkship in New York, and the year whizzed by and I wanted to stay. And several of my friends from law school were thriving at Paul Weiss and I joined them, much to my delight. But I confess, it was not part of any grand scheme.

MS. COURTNEY PALKO:

Given that you enjoyed some aspects of private practice and had some friends there with you, what prompted you to leave to join Jerry Brown's campaign? And Governor Brown is generally known for running a lean team; what was life like for you on the campaign trail?

JUSTICE JOSHUA GROBAN:

Yes, lean is right. Once again, it would probably be more correct and proper of me to describe my career as some great, grand plan but, again, a good deal of serendipity is involved. I was happily litigating at Munger Tolles and knew that one of my colleagues was friendly with the Browns; I popped in his office one day and said I'd be delighted to have an introduction and give them a little bit of pro bono assistance on what was then a

very early 2010 gubernatorial campaign. What I did not appreciate, and as your question suggests, is I thought I would be joining a massive campaign team and just working on the outskirts. What I didn't appreciate is that when I joined the "team", the team was Anne Brown [Jerry Brown's] wife, two interns, and a dog. As a consequence, the number of things I was being asked to do increased, increased, increased and increased, and ultimately, the firm allowed me to take a leave of absence to serve as general counsel to the campaign. And as they say, one thing led to another and here I am many years later.

MS. CHERYL JOHNSON:

So, you were nominated by Governor Brown to replace Justice Werdegar. Did you ever aspire to be a judge before your work with Governor Brown?

JUSTICE JOSHUA GROBAN:

You keep giving me opportunities to say that my career has been carefully plotted out and, in candor, I keep having to say otherwise. I suppose on some level, for every lawyer, the thought crosses his or her mind. But it was not something that was at the forefront of my mind by any stretch of the imagination. And indeed, as I was conducting, as you said, over 1,000 interviews for judicial appointments for Governor Brown, I was always surprised there was an occasional candidate who would say to me, "I knew since law school that my goal was to be a judge." That always surprised me, in part because the thought really was never forefront in my own mind. But I was interested in the law, I had appeared plenty in court, and I had a sense of what a good judge looked like and what a not-so-good judge looked like. And so, when there was an opportunity to help with judicial appointments, I jumped at that. And then over the course of eight years of thinking every day about what it is like to be a judge, and what it is like to be a good judge, then of course, the thought percolated in my mind, but again, it was a process, not a grand strategy.

MS. CHERYL JOHNSON:

Since you've had such a large imprint on our state judiciary, we would like to discuss your approach to judicial appointments. The California judiciary is twice the size of the federal judiciary. I think that is a statistic that many of us don't really appreciate; no nation has as many judges as California has and you were responsible for the appointment of almost one-third of the judges during your service with Brown. I know you said you identified what you thought were good and bad judges; can you tell us what traits you thought made for a good and bad judge, and how you sought to change the ways that judges were identified, approved, and assigned from what previous governors had done?

JUSTICE JOSHUA GROBAN:

Yes, a couple of things. I think Governor Brown's vision was really to find excellent lawyers who would make excellent judges but to do that wherever he might find them. And by that, I mean I think there was a notion in prior administrations of a certain [judicial] prototype of a trial lawyer, often a prosecutor, or if they were in civil practice, a particular kind of commercial litigator, and not so much of those who were public defenders or family law lawyers or people doing arbitration or academics. I think the approach that Governor Brown took was that we want really accomplished lawyers at

the top of their field wherever we might find them. He was less concerned, for example, about whether they had primarily a family law practice. If you call the presiding judge of a superior court, particularly a larger one like Los Angeles and San Francisco, and said, "How would you like a new judge who is a certified family law specialist, who is beloved in the field, who has been doing this for 30 years, has incredible judgment, is very smart, but hasn't done—pick one, civil or criminal," they are delighted to have a person like that. They've got to field all the assignments and they just want good people, full stop. And so, I think that is the approach that Governor Brown took, and I think it put our judiciary in better stead in terms of the kinds of traits and characteristics important for doing the job.

It is a view that evolved for me over time, but of some of the characteristics we looked at, temperament was always of incredible import. I quickly learned nobody's ego went down once we put a robe on them. If there was a sense of narcissism or a haughty demeanor, that that was not going to improve on the bench and was always a red flag. Also, pure candlepower, pure smarts, was incredibly important; it is an easier job to do if you can get up to speed quickly, no doubt.

The other things we cared about was a level of decisiveness. That was always interesting because people tend to view judging as the need to be decisive, full stop. I tended to learn that that is not the whole story; that really what was happening was you needed people who actually could be very open, good listeners, and willing to hear all points of view, and then be decisive, as all of you know in practice. Nobody wants a judge who has made up her mind before you have walked in the door and just describes that as being decisive.

Empathy is an incredibly important trait, emotional IQ, particularly at the trial court level. These are such difficult assignments, such emotional assignments; the ability in a family court or dependency court, particularly heavily pro per dockets, to understand emotions, to understand how nervous people are, to understand how terrifying it is for people to walk into a courtroom, even on a traffic infraction, those were some of the things we cared about. And I'm sure others can add to the list but those were the primary things we were thinking about.

MS. COURTNEY PALKO:

That's interesting. And now that you're on the bench, has your view of what makes a good judge changed at all?

JUSTICE JOSHUA GROBAN:

Probably when I started, I would have ranked just sort of pure intellectual firepower as first on the list. Now having done it for a while—and this is particularly true of the trial courts but I think is also true at the appellate level—I think pure smarts is now down to about third or fourth on the list. Some of the other traits I described, the ability to both listen and be decisive, emotional IQ, pure work ethic, general temperament, are also important. And again, since this is a group of participants who are in courtrooms all the time, having a judge who is really smart but doesn't have any of those other characteristics is not—by and large, a judge that any of us really wants to appear in front of. And I knew that on some level, but have come to appreciate that more. That said, smart sure helps; it

beats the alternative. It matters, too, but it matters in conjunction with these other things we're talking about.

MS. COURTNEY PALKO:

Do you have any advice for those in our audience who aspire to a judicial appointment on how to increase their chances of actually securing an appointment?

JUSTICE JOSHUA GROBAN:

Yeah, that's a good question, Courtney, and one that would come up a lot in my old job and people would often ask me. I have less of a sense of Governor Newsom's administration, but I think it is true of them as well, some of those old tropes that we described–you need to be a prosecutor, you need to have had this kind of trial experience, or that civil defense work is better than civil plaintiffs' work–I think some of that is out the window now for the better. And as a consequence, some of the necessary strategizing that I think used to necessarily occur in order to get to the right kind of profile or the right kind of resume is no longer necessary. That's great because the upshot of it is, as I described earlier, we were looking, and I think the current administration is looking, for people who excel in whatever field they have chosen.

And it became incredibly apparent that that was the way to get there when we actually got on the phone and started making phone calls on people's references. It's like hiring, in many ways, for any other position at your law firm or elsewhere; you wanted to hear from opposing counsel, from colleagues, from co-counsel, "This is an incredible lawyer, full stop." And so, my advice is just excel in whatever you're doing so that when we make those phone calls, everybody who you come in contact with is saying, "This is an incredible lawyer." So, do your best at the work that's on your plate and worry less about this kind of strategy or the kind of career trajectory to get you there.

MS. COURTNEY PALKO:

The California Supreme Court relies on a unique mix of career and term law clerks. Can you talk about your hiring process and what qualities you look for in selecting your law clerks and chamber staff?

JUSTICE JOSHUA GROBAN:

At the core, I would say I want people to challenge me a little bit. The goal up here, as it is in any level of the judiciary, is rule number one is try and get it right. So, as my clerks hear like a mantra from me almost every day, I want to be pushed, I want you to ask questions, I want you to disagree, and I try to pick people who would do that. My civil experience was largely defense-oriented. One of my lawyers came from a civil plaintiffs' background. My experience was more civil than criminal. Several of my lawyers have criminal experience, but again, two different backgrounds; one comes from the attorney general's office, one came from a criminal defense background, one came from the court of appeal, and was a permanent clerk on the Second District. And so, what I hoped to create, and I think I have, is that whether we're discussing a case or discussing an issue, we're going to get robust discussion, different points of views from people with different backgrounds and different perspectives, who won't just say, "Yes,

Judge—whatever you say, Judge" because that is a recipe for getting it wrong and so that has been my goal throughout.

MS. CHERYL JOHNSON:

So, we'd like to pivot to the environment that you found on the California Supreme Court. You're the newest member of the Curt. How have you been adjusting to your role on the bench and how does your role as the newest member impact your opinions or the role that you play on the Court?

JUSTICE JOSHUA GROBAN:

Like any new work place, it's all about your colleagues. And so, I was able to join with six of the brightest, most impressive, and kindest colleagues on the Court that one could ever dream of. And then beyond that, the staff at the Court, the institutional knowledge, the dedication, the experience, and the resources have absolutely blown me away. And so, at every turn, every day, every week, I am benefiting from that infrastructure, so to speak.

As the newest member of the Court, in many ways, I'm lucky. As is known, when we speak–when we conference, either after an argument or a petition conference–we speak in order of seniority, though the Chief Justice speaks last. But that means that by the time it is my moment to offer an opinion, a bunch of very smart, very seasoned, very thoughtful, and very kind colleagues have spoken before me. And so as the newest member, I've learned that part of my job is to listen good and well and that puts me in good stead because often when it's my time to speak, I'm able to simply say, "What she said" [laughter]. And so that is how I have navigated that role here.

MS. CHERYL JOHNSON:

The California Supreme Court has a reputation for being very collegial and from all appearances, does not appear to be ideologically divided. The vast majority of the decisions are unanimous. Do you feel pressure to agree with other justices' opinions?

JUSTICE JOSHUA GROBAN:

No. The reality is the only pressure that comes is from myself; that is to say every justice reaches a moment in a close case, particularly when they have their doubts, when we must ask ourselves, "Do I feel strongly enough that I want to dissent or would I rather try to shape the majority through input and through that process rather than writing separately?" But that is a pressure upon the overarching paradigm of the work and the work product that we are spitting out. The collegiality and the relationships do not create any fear or difficulty with writing separately either in concurrence or dissent and we all do that plenty. And in some ways, it may be counterintuitive but at least for me, the collegiality of the Court actually makes it easier to write separately. I am able to very directly say to the author, "It's a really strong majority, made every point you could possibly make; I just read the statute differently." And that is actually easier than a combative or more difficult atmosphere so it has been a joy, quite frankly, in that regard.

MS. CHERYL JOHNSON:

So, you were appointed to California's highest court with no previous experience on the bench and a majority of the members of the current Court had no previous experience as a judge. How would you address any concern about the lack of judicial experience?

JUSTICE JOSHUA GROBAN:

It's a good question and, as I recall saying, I think at my confirmation hearing when I was appointed, it's not a court that was wanting for judicial experience. At the time I was appointed, I think we tallied something like there was 90 years of collective court experience amongst several of the members and I am enriched by that and the process that I described. Every day, I'm able to—if we're talking about an arraignment, hear from one of my colleagues, here is what happens on an arraignment calendar, if we are talking about a dependency case, I am able to hear from one of my colleagues, here is what happens in this kind of dependency case and the kinds of things you are looking at. I look and I listen good and hard to that kind of experience and benefit from it every day. But the reality is the kinds of cases we're hearing, we're not just resolving hearsay objections on the fly; they are largely highly academic, highly research–intensive questions of pure law; that's what we do up here. We are not fact finders and so, that is a very different posture.

MS. COURTNEY PALKO:

I'd like to shift gears and talk about judicial operations and guidance you might have for practitioners. What do you look for when considering whether to accept a case and what can a petitioner do to improve the prospects of the California Supreme Court granting a petition for review?

JUSTICE JOSHUA GROBAN:

The primary guidance I can give is that there is a tendency, particularly for lawyers who have been working on the case for a while and particularly for lawyers who were involved in the case at the trial level, to scream in their petition that the lower court got it wrong, the lower court got it wrong, they got it wrong. And if you look at our rules, error correction is not one of the bases for granting a petition for review; we are not a court of error correction. We get thousands of petitions every year and grant a very small fraction of them. So, the question that we debate when deciding whether to grant a petition that are reflected in our rules is, essentially, why are you so special; not to correct an error. And what that typically redounds to either is a clear conflict in the courts below–several courts of appeal have said X, several other courts of appeal have said the opposite of X–as a paradigmatic case where we would accept the petition. And the other is a case where there may not be a true split but it's an issue of statewide import that is either pressing or likely to occur and simply needs a clear decision from our Court. And those are the boxes you are trying to get in, typically, when you're petitioning to our Court. But merely saying "we disagree with the trial judge" is not a successful route to getting a petition granted in our Court.

MS. COURTNEY PALKO:

And how important are amicus briefs to your decision–making process at both the petition and the merits stage?

JUSTICE JOSHUA GROBAN:

They are important and it's a good question because it picks up on my last comment. Amicus, particularly, people practicing in the field or representing companies or industries in the field, are able to express to us why this issue is important, why it's troublesome, why clarity is necessary, why the decision below is causing mischief, and they are able to give that real world feel. We don't need amicus to simply rehash the legal issues that presumably, if done right, was done in the primary petition. But the ability to say this is a family law case, we are certified family law specialists, and let us tell you what happens on the ground and why this issue is so important. That kind of input is incredibly helpful.

MS. COURTNEY PALKO:

And in your view, what makes a persuasive and effective merits brief? Are there any approaches or styles that you find particularly helpful or unhelpful?

JUSTICE JOSHUA GROBAN:

What I tend to find in the most helpful merits briefs is they have decided to prioritize the issues, they've triangulated around the issues that are most important, and tried to focus the Court's attention on those issues. There is a certain tendency when you come to our Court for some practitioners, they do the try-everything-approach; we are going to make 10 arguments and maybe one will work. And what that tends to do is just dilute all 10 arguments. The briefs that can really focus us on the winning arguments rather than trying a buckshot approach to success tend to be the ones that are most effective and most appreciated. Otherwise, I think you end up diluting the arguments.

MS. CHERYL JOHNSON:

In terms of oral arguments, can you share with us what you feel is the style or styles that are most effective and those that are kind of off-putting or maybe even counterproductive?

JUSTICE JOSHUA GROBAN:

Yes, the answer is the same for both; two sides of the same coin. My number one tip for oral argument, as incredibly obvious as it sounds, is answer the question that has been put to you. And the reality is this is a case where seven justices and our staffs have been struggling with issues, debating them, writing about them, exchanging memos for many, many months. When we get to oral argument, we are not asking questions for performance, we're not asking questions for the benefit of our other colleagues, we're not asking questions to show how smart we are. We are asking questions because we've actually been struggling with that very question and we would very much like to know the answer. And this isn't politics so dodging a hard question doesn't get you anywhere and it's abundantly obvious. Or even if it's not a dodge, lawyers are sometimes so focused on what they want to talk about and where they want to go that they are unable to pivot and say, "Alright, well, if the Court cares about X, even though I was more focused on

Y, I better talk about X." A colleague or I will ask a question and, much to my shock, the practitioner will just say, "Well, I'm going to address that later, your Honor." No, you're going to address it right now–[laughter]–if you want to be an effective advocate. And so, again, as trivial as it might sound, the best lawyers give good and direct answers to the very questions we ask and the people who don't have that kind of success endeavor to evade or circle back or nip around the edges of the questions we are asking. Just because it's a hard question doesn't mean you should not answer it; it means we are struggling with it and if you can give us a satisfactory answer to a hard question, your client is in much better stead.

MS. CHERYL JOHNSON:

I think every justice we've interviewed has had the same answer: Answer the question [laughter].

JUSTICE JOSHUA GROBAN:

Right.

MS. CHERYL JOHNSON:

Don't try and avoid it. Well, we talked a bit about politics—you have a background in both litigation and politics. How do you divorce the law from the political realities that you face as a justice on the state's highest court?

JUSTICE JOSHUA GROBAN:

It's a real joy. I know this may sound glib but it hasn't been hard at all. It's nice just to think about the briefs and the arguments and decide on that basis. Politics is a lot of noise, a lot of other factors that one has to consider, and to be able to take away all that noise and simply focus on the merits of the argument is a joy. I was able to trade in a lot of distractions, a lot of competing interests, a lot of issues of appearance and reporting and instead, just focus on the merits. And so, that has been a trade I have been quite pleased to make and it has been surprisingly not so challenging; it really, really hasn't.

MS. CHERYL JOHNSON:

Interesting. So, is there a particular decision that you have issued in your time on the bench so far that you have found most interesting or that you are the proudest of?

JUSTICE JOSHUA GROBAN:

There are a few. The one that comes to mind is sort of a funny, slightly esoteric question but it's a case called *Robinson* that came to us as a certified question on the Ninth Circuit. The reason I am proud of it, but what also makes it esoteric, is because the way our state courts process and handle state habeas cases have a major impact on the way the federal courts handle the habeas case, particularly with respect to tolling in order to ensure that the filing is timely. And so, it was sort of a sui generis, certified question from the Ninth Circuit. The question was essentially—and I'm oversimplifying here a little bit; not by much—can you tell us how state habeas processes work? And that's a funny opinion—that's an interesting opinion to write; it's not the usual opinion that we work on. And so, being able to describe these ornate procedures for the benefit of not only the state courts

but principally for federal court practitioners, was a unique and interesting posture to find ourselves in.; I rather enjoyed it and it was a question that I think was plaguing the federal courts for some time, ergo the certified question, and so to the extent our edification actually makes it easier for petitioners, practitioners, and judges in the federal court to do that difficult and important work, it's also a source of some pride, although the decision is new so that remains to be seen, I guess.

MS. COURTNEY PALKO:

Justice Groban, I'd like to return to a topic that we were discussing previously. As a member of Governor Brown's administration, you were widely heralded for your role in diversifying the California judiciary, both demographically and in terms of professional background. Can you talk a little bit more about why you have been so dedicated to this cause?

JUSTICE JOSHUA GROBAN:

Yes, thanks for asking, Courtney. Much of it is that I'm so proud—like all of you, of our judicial system and our judiciary. And it speaks volumes about the integrity of our processes, the fairness of our systems, the rights to due process; though we have an imperfect system, we have the best one going that I know of. And when you walk into a courtroom that so clearly does not reflect the demographics of the community it serves, that invariably, for lawyers, for the general public, and for others, is going to raise questions about the fairness of our process.

It's a simple proposition; our courts should look like the communities they serve. And when you think about all of the difficult and often terrifying positions that people find themselves in in courtrooms, particularly without the aid of counsel, but even some with counsel and equally terrified—everything from unlawful detainer, to criminal cases, to family cases, to juvenile dependency cases—these are terrifying places to be for many and the integrity of the system is paramount. And when those people walk into courtrooms and don't see anyone that looks like their communities, it's invariably going to cause distrust in the system.

I also think having bench officers who have rich and diverse life experiences makes the system better and that's true not simply based upon race, ethnicity, gender, sexual orientation, but also as you heard from me, practice background; people who have done plaintiffs' work instead of defense work or criminal defense work instead of prosecution. All of those backgrounds and experiences make an imprint on us as bench officers and it matters to have that kind of diversity. And I think it makes the system better in the long run.

MS. COURTNEY PALKO:

Yeah, I agree. Speaking of Jerry Brown, can you tell us what he's up to now?

JUSTICE JOSHUA GROBAN:

He's always busy. He's on the ranch in Williams. I think he has been preparing for these apocalyptic times since the seminary in the '60s and so he's ready. He's constantly reading, he's incredibly engaged in board work, he's particularly focused on two kinds of, what he calls, existential threats of our time, and this is what I mean by he's been preparing for the apocalypse his whole life. He's totally focused on nuclear nonproliferation issues and on climate change and is constantly reading and talking. He just published a piece a few weeks ago, I think, on related issues. He serves on several boards, the Bulletin of Atomic Scientists, Nuclear Threat Initiative, and others, and he is as engaged as they come. So, he's plenty busy and I think we are all better for it because he's doing important and good work.

MS. COURTNEY PALKO:

Thank you. And now let's pivot and discuss your family and how you maintain a healthy work-life balance. What activities do you enjoy to take a break from the Court?

JUSTICE JOSHUA GROBAN:

Like all of you, the answer changes; it's now through sort of a pandemic lens that we have to answer these questions. But when we are able, when we're not in complete shelter-in-place mode or when we're not having to stay indoors because of forest fires, it has been all about the outdoors. So, lots of time at the beach, lots of hikes, lots of quick little getaways to the mountains; that has been our escape, particularly during the pandemic. And the beach, in particular, has been a haven and a solace this summer for my kids and myself, so that has been the primary endeavor.

MS. COURTNEY PALKO:

Speaking of your family, you have a wife and two young children. Is there anything you'd like to share with us about them?

JUSTICE JOSHUA GROBAN:

Yes, I'm always delighted to have the opportunity to brag about them so thank you, Courtney. My wife is a TV writer in Los Angeles and always busy and working on interesting projects. Many of her projects tend to have a historic, a real-life historical bend–true crime, period pieces, and other work about the art world–so I'm always learning as she's writing. I have an eight-year-old and a five-year-old. The eight-year-old boy is a sports fanatic and will be delighted to either play sports with anyone or just talk about the Dodgers with anyone nearby. And the five-year-old girl is also a delight and loves her dolls and her paints and swimming whenever she gets the opportunity, so thank you for giving me the chance to brag about them.

MS. COURTNEY PALKO:

Yeah, thank you for sharing that. Would you like to see your children follow you into the legal profession?

JUSTICE JOSHUA GROBAN:

Every lawyer on this call may have to ask themselves this same question. The short answer is I want them to do whatever makes them happy. For me, part of the inquiry and the career searching is there are plenty of happy lawyers but there are also plenty of unhappy ones. As you know, I spent a lot of time constantly talking to lawyers throughout my career, trying to identify where the happiest ones tended to reside and where that happiness quotient coincided with my own interests.

For me, the overlap became lawyers working in the public interest, working in the public sector, and so that is where I landed. But though I have described a long course of serendipity, it wasn't totally serendipitous. I was always struck, even in talking to the most senior lawyers in my law firm, that their most wistful, happy stories still seemed to be from 30 years ago when they were working in government or when they were with the US Attorney's Office and that always struck me. And so, the short answer is I would be delighted if my kids went into law but as long as they found the happy lawyer path, as opposed to the not-so-happy lawyer path. And as all of you know, that is tricky to navigate.

MS. CHERYL JOHNSON:

So, I want to get to the question that I think everybody is waiting for. You have the same name as singer Josh Groban and he congratulated you on Twitter for your appointment to the Supreme Court. Now, rumor has it that the two of you are distantly related and/or that you may have some hidden musical talents. Can you address those rumors?

JUSTICE JOSHUA GROBAN:

Yes. Like most rumors, they are partially true, but with some problems. The problem is I have no musical talent whatsoever, so you can put that off to the side immediately. The true part is I think we are related. Were my father here, he would happily trace for you the lineage, but we are second or third cousins, as I recall. And it's a small world; it turns out he lives in Los Angeles not that far from me, so there's a decade or more of history of mixed-up dry-cleaning and prescriptions at the pharmacy.

MS. CHERYL JOHNSON:

You've lived on the east coast and you've lived in a lot of different cities in California. Where do your sports loyalties lie? We know your son likes the Dodgers; what are your teams?

JUSTICE JOSHUA GROBAN:

Though it does not lead to familial bliss, I grew up in San Diego and remain a tried-and-true San Diego Padres fan and I'm, similarly, a Chargers fan. I still call them the San Diego Chargers, though they moved, so the Padres and Dodgers are vying for first place at this moment and just finished a three-game series and it led to some spirited sports-watching in the house this week, which redounded to my son's benefit because the Dodgers took two out of three.

MS. CHERYL JOHNSON:

Well, thank you so much, Justice Groban. I want to extend our sincerest gratitude for you sharing your time with us and allowing us to divert you from solving the state's most vexing legal problems. If we weren't virtual, there would be a room of people applauding you. Since we are virtual, I think we're just going to end this with Courtney and I joining the silent audience applauding you. Thank you so much.

JUSTICE JOSHUA GROBAN:

Thank you.

MS. COURTNEY PALKO:

Thank you.

BIG ANTITRUST TRIAL: *NEW YORK v. DEUTSCHE TELEKOM AG* (S.D.N.Y.)

By Laura Wilkinson[1]

In the New York v. Deutsche Telekom AG *case, California and other states challenged the merger of Sprint and T-Mobile, the third and fourth largest wireless networks in the United States. They did so even after the United States Department of Justice approved the merger on the condition that Sprint sell some of its assets to DISH Network. Just before trial, the trial court ordered that it would not hear opening statements. On this panel, California's lead counsel and T-Mobile's lead counsel give abbreviated versions of the opening statements that were prepared, as well as discuss the trial.*

PANELISTS

Paula Blizzard is currently a Supervising Deputy General Counsel of the California Attorney General's Office in the Antitrust Section, where she was California's lead counsel in *New York v. Deutsche Telekom AG*. She recently spent two years at the Federal Communication Commission as Deputy Bureau Chief of the Enforcement Bureau, bringing enforcement actions against telecom carriers as well as working on Net Neutrality. From 2000 to 2004, she was at the U.S. Department of Justice Antitrust Division, working on *US v. Microsoft* and *US v. Oracle* (Peoplesoft merger). As a partner at Keker, Van Nest & Peters from 2004–2014, she tried all manner of cases, including many patent and antitrust cases. Notable antitrust matters included pharmaceutical pay-for-delay FTC investigations, *In Re Tricor Antitrust Litigation*, *In Re TFT-LCD (Flat Panel) Antitrust Litigation*, *In re High-Tech Employee Antitrust Litigation*, *San Jose v. MLB*, *In re Auto Parts Antitrust Litigation*, and *NY v. Intel*.

George Kary is a Partner at Clearly Gottlieb Steen & Hamilton LLP, where he represented T-Mobile U.S. and Deustche Telekom in *New York v. Deutsche Telekom AG*. *Chambers and Partners* has ranked Kary in its top tier of global antitrust lawyers every year for the last decade and *Benchmark Litigation* named him Antitrust Lawyer of the Year for three consecutive years (2016–2018). Before joining the firm in 1998, Kary served as Deputy Director of the Federal Trade Commission's Bureau of Competition, where he oversaw merger transactions, including as lead trial counsel for the FTC in its successful challenge of the Staples/Office Depot merger. He received the Brandeis Award, awarded to the FTC's outstanding litigator.

MS. LAURA WILKINSON:

Good afternoon, everyone, and thank you, Elizabeth, for the welcome. Welcome, everyone, to the big stakes antitrust trial panel. This year, we will focus on the state attorney general's challenge of the merger of Sprint and T-Mobile. My name is Laura

1 Laura Wilkinson is Associated General Counsel of Global Antitrust for PayPal. Before that she was a partner at Weil, Gotshal & Manges LLP, and Clifford Chance. She also served as Deputy Assistant Director of the FTC's Bureau on Competition. She has extensive experience concerning mergers and acquisitions, and counseling on antitrust compliance. She sits on the Board of Trustees of Cornell University and the Board of Directors of the non-profit Legal Momentum.

Wilkinson; I'm a senior director and associate general counsel at PayPal, responsible for antitrust. I have the privilege of moderating today's panel.

Our esteemed panelists are Paula Blizzard and George Kary. Ms. Paula Blizzard is a supervising deputy general counsel in the Antitrust Section of the California Attorney General's Office. She was the lead California attorney for the Sprint/T-Mobile trial. Prior to joining the attorney general's office, Paula was deputy chief for enforcement at the Federal Communications Commission. She was also a partner at Keker, Van Nest & Peters, and previously, a trial attorney at the U.S. Department of Justice Antitrust Division.

And Mr. George Cary is a partner at the Washington D.C. office of Cleary Gottlieb. He has decades of experience in sophisticated antitrust trials, including a significant track record on securing approval from multi-billion-dollar deals. George was the lead trial counsel for T-Mobile and Deutsche Telekom in the Sprint/T-Mobile litigation. His other recent megadeals where he was global lead counsel include DOW Chemical in its merger with DuPont, 21st Century Fox in its acquisition by the Walt Disney Company, Glaxo Smith Klein in its multibillion-dollar transaction with Novartis. Before joining Cleary, George was a deputy director of the Federal Trade Commission Bureau of Competition, responsible for mergers. And before that, he had a long career in private practice.

CASE BACKGROUND

I will briefly begin by setting the stage for today's presentation. In April 2018, T-Mobile and Sprint announced a plan to merge in a transaction that would combine the third and fourth largest wireless networks in the U.S. The Department of Justice Antitrust Division and several state attorney generals investigated the merger. A year later in July 2019, DOJ and some state attorneys general agreed to approve the merger on the condition that Sprint sell certain assets to DISH Network. Notwithstanding the settlement reached by the DOJ in some states, a coalition of other state attorneys general decided to continue challenging the merger in federal court in the Southern District of New York.

The highly publicized trial took place in December of 2019 before a Judge Victor Marrero. On the eve of trial, the judge decided to forgo the opening arguments. Today, Paula and George are going to present abridged versions of the opening arguments they had prepared for trial so we will get to see and hear what these veteran trial lawyers had planned to present. After their presentations, we'll get to talk with both of them about the trial and some key takeaways from the court decision.

Please note the disclaimer: Ms. Blizzard and Mr. Cary are here in their personal capacities and not on behalf of the attorney general or any clients. Their opening statements that they will present today are abbreviated versions of what would have been presented at trial. They have been shortened and modified to serve the purposes of this panel. Similarly, my comments will be in my personal capacity and are not those of PayPal.

A few logistics before we begin. If you have any questions for the panelists, please type into the chat as we go along and that will be monitored. Also, both George and Paula will be using PowerPoint presentations so for better viewing, we suggest that you switch to full screen mode. There's an option to do that on your screen; it's either on the bottom right or top right of your screen. Please use that to enable full screen mode and you'll still see the speakers in a thumbnail at the top.

With that background, we're ready to hear the opening arguments and we will begin with counsel for the plaintiff's, the state's attorney generals, Paula Blizzard. Go ahead, Paula.

PLAINTIFFS' ABBREVIATED OPENING STATEMENT

MS. PAULA BLIZZARD:

Good afternoon, your Honor. Thank you for the privilege of letting us present this opening statement this morning. Like any real trial, the first question we ask is is the tech working? So I'm hoping everyone can see my slides. Laura, please let me know if you can't.

MS. LAURA WILKINSON:

Yes, we can.

MS. PAULA BLIZZARD:

Great, thank you. All right. Good afternoon, your Honor. My name is Paula Blizzard. I'm a supervising deputy attorney general in the great and mighty state of California. And we're here on behalf of the States, representing over 100 million consumers in the United States to explain to you why we brought this case and why we believe the evidence will show that the proposed merger of T-Mobile and Sprint should be blocked.

So we're going to begin with a couple of things that, to be honest, your Honor, I think you already know, I think the audience already knows, and the most basic of those is that cell phones are integral to everyone's life these days. I was surprised to learn when we started this case that there are more cell phone lines in use in the United States than there are people. There are more than 300 million cell phone lines today in use in the United States and we use them for everything. We use them to do banking, our kids use them to do their homework, we use them to communicate, text messages, social networking; we use them to check on healthcare. So cell phones are integral and so this merger will affect literally the lives of almost every American.

And for many Americans, let me also add that for some of them, this is their only connection to the internet. So many of us are fortunate to have computers in offices and broadband connections, but many are not and many rely only on their phones to access the internet, to Google, to get their news, to do their homework; things that we take for granted. And so for some, particularly consumers that are used to lower-cost plans, the cell phone and pricing the cell phone plan are crucial to their lives.

So what is the situation in the United States right now? Well, we have four competitors: Verizon, AT&T, T-Mobile, and Sprint. And these are the only four competitors that have cell networks and you can think of them as having, and being the landlords. They own the buildings, they own the networks, they own the actual capacity that is used in this country; only these four. Everybody else you've ever heard is offering service, maybe you've heard of the Tracfone, they are all just tenants; they're tenants in the networks, with the landlords being these four. So the only people who have networks are Verizon, AT&T, T-Mobile and Sprint and they control the key infrastructure. And the proposal here is straightforward; that T-Mobile and Sprint will combine and we'll have three.

So the question for your Honor is what's going to happen when we have those three? And we can learn what will happen in any number of ways, one of which is what does history tell us, what is the history of antitrust in economics, theory that's been around for a hundred years; what does that tell us about a merger that will have three large, equal-sized players at the end? What will happen to prices and integration? We could also look at what has happened in this particular network; what have these companies been doing? Competing vigorously, which I think we can all attest, because we've all seen the commercials and the pop-ups on our screens and the ads inside of buses and everywhere that these four competitors compete vigorously.

Now what has happened is the prices have gone down; competition has led to lower prices. This is some data from the Federal Communications Commission, which shows the prices have gone down from 2011, where average subscriber price was $46 a month to $38 a month in 2017. And we also know that even as prices have fallen, the service has increased. So you now have plans where you get much more data, you get much higher speeds; in fact, get a much better product for a lower price. And that is an American success story; that, in fact, is competition—competition means lower prices and more innovation.

Now what's another way that these companies compete and another thing, that again, I think everybody knows, including yourself, your Honor, already know, which is that cell phone coverage is intensely local. Local - what do I mean by that? Well, here's a press release. It talks—it's from Sprint and it talks about Sprint tops the charts in Boston for fastest download speeds and most improved network. So each of these companies goes out of their way in specific global markets to increase their network and we all know that cell coverage varies by geography. You might have great coverage in your hometown; you travel to another part of the country and your network isn't so good. This is because the Federal Communications Commission gives out the spectrum, the core technology that underlies a network, in small geographic regions. And each of the carriers then builds in their regions and so, the coverage varies. And they market differently in different areas, just like this press release is showing that Sprint tops the charts in Boston. Now, I'm certain that the defendants are going to come and say, "Well, that's only one price, we have a national price." Well, that's all well and good but is it the same price for products that are varying across the country and those are really different products because you're paying a certain price with certain capacity in Boston whereas if you were on the Sprint network and you went to, I don't know, San Diego–I'll pick a place–you might get much less coverage. You may have the same price but you're not getting the same product. And so, again, keep in mind cell coverage is local.

Now the other thing to pay attention to is what do T-Mobile's executives–in particular, the executives and their Deutsche Telekom majority shareholders–say about this network proposal, say about this proposed merger, before they filed them? So I can tell you that every state when they propose a merger, when they—by the time they get to the regulators, they will say it will increase competition and it will lower prices and we will never, ever stop competing and this is going to be great for American consumers and all those—I've never heard an executive say that. Which is why when you look at the case law and you see that the focus is on what were the statements by the executives before the merger; before it was in the regulatory process to get approval? And here we have a document from Deutsche Telekom that just lays it out. What they are focusing on is what they call the Rule of 3, which is that they can get the network down to

three competitors. If they can get the market to be only three, then we can reduce price competition. And you'll see this in multiple documents, again and again, that when they were talking about before they proposed the merger is getting down to the Rule of 3 to reduce the price point.

Now let me give you a brief overview of what I'm going to do in this opening statement. I'm going to talk about the evidence linked to the presumption. So because we have been looking at mergers for over a hundred years, because we have all this experience, the law and economics have made or created a presumption about what mergers will be anticompetitive. I'm next going to talk about anticompetitive effects. And finally, I'll talk about the defenses being offered by the defendants. Sprint is somehow a weakened competitor that may leave the market; that the merger will be an issue. In other words, they will build a very efficient network. And finally, the proposed fixes from the FCC and U.S. DOJ that they believe will remedy, what they think they agree with us on, are some fundamental problems with the merger.

So let's talk about first about this presumption; why is there a presumption? And we said, your Honor, we've been down this road before and time and again, if a merger has certain characteristics, the law presumes that it is anticompetitive because those mergers have been found to be anticompetitive over and over again. And there are two main criteria that are used. One is from a binding U.S. Supreme Court case called United States vs. Philadelphia National Bank. And that case holds that concentrations over 30 percent in merged companies together will hold over 30 percent of the market, that those are presumed illegal and the market share here, your Honor, will in fact exceed 30 percent of the proposed merger.

The other thing that gets talked about are these HHIs. Well, what is HHI? It's the Herfindahl–Hirschman Index and I actually wrote that on a sticky right here, because I always forget what it stands for. So the HHI's are another way of measuring concentration and they have slightly different levels. These are both in the U.S. DOJ merger guidelines, as well as case law. And they say if these levels are 2,500 or greater or if the increase has been more—and it increases by more than 200, then it's presumptively unlawful. And the evidence here will again show that this merger satisfies those criteria.

So here's a preview of what you'll see from our expert, Professor Shapiro, our expert; showing that the HHI's are in fact above 2,500, if they increase by more than 200 and the concentration is at 3000. Now, this is for a national market but the other thing I wanted to point out is the local market. So I put up a chart here again and this is from Professor Shapiro's expert reports and he will testify to these. It looks at a number of these local markets–this chart only shows California and New York–but we pulled all of the states' markets and they shared the combine share, the market share, of the combined states, they show the increase in HHI, which is over 200, and they also show the HHI with merger, the total number at the end. And all of those were above–if I'm reading it correctly–each one on this page is above 3,400. But I wanted to highlight a few things to again, come back to this idea that while you can have a national market, you could also have local markets, and the law does allow you to have multiple markets; let me be clear on that.

If you look at what is highlighted near the top, California 5, San Luis Obispo, it's only at 21 percent combined share there and a number of them are much lower than that. In

contrast, if you look at California 7, Imperial, which is highlighted in pink, you can see that Sprint and T-Mobile, if allowed in that local market, they'd have a 63 percent share and the numbers are simply off the charts. The increase in HHI is 200 for a total of 4,600. And in fact, California 7, Imperial County, is the most concentrated market in the entire United States, or it will be, if you allow this merger to go.

Now what are the effects? Even if the market is presumed to be anticompetitive, which legally the evidence will show, we also can show that there will be coordinated effects unilaterally. Coordinated effects are defined in numerous places, but also in Horizontal Merger Guidelines. It's, "Conduct by multiple firms that is profitable for each of them only as a result of accommodating reactions of the others." So what does that mean? That means when you go from four to three firms and you only have three large firms, each of those firms, when thinking about pricing, relation, where do you stand in markets, for instance, will take into account the reactions of the other two, okay? And what they will do is accommodate; they will signal. They will say, "Oh, it's my turn now and then you'll get a turn later." And they will, in short, pull their punches; they will pull their punches and they will not be as aggressive as they might otherwise have been about price or innovation.

Now let me be clear, this is not price fixing, this is not an exclusive agreement, this is not even particular to these firms that I'm talking about. This is not a characteristic of the rise in AT&T or a characteristic of only cell phone companies.

What 100 years of economics tells us is in certain types of markets that are concentrated, when you get above the presumptive level, it is natural, it is normal, it is in some ways standard business practice, good business and each of those large competitors will say, "You know, we'd all be a little bit better off if we didn't compete quite so hard." That's coordinated effects. Now, is it true of every industry? No. There were some key factors that were called out again by U.S. DOJ case law that you look at to see is this a market where coordinated effect occur? One of the most important is transparency of pricing. Can you see what the prices are? Can each of the competitors see the other prices? And you know that they can because we see them too; we're consumers. We see them on the sides of buses, on television, on cable programs, on YouTube advertisements, email ads, social media; pricing is very transparent. Everybody knows what's the current offer from AT&T and Verizon and T-Mobile.

Second is can they signal their competitors? Well, your Honor, we're blessed in this case that we're going to see some emails that would specifically say, "Here is our signal to our competitors. Here is our signal which says," in this quote, "our turn to discount the item." So they can signal, they admit they signal, they do signal, and it's right in the email.

And one of the most important factors is do you have a small number of competitors that are roughly equal in size and the answer is yes. If the merger goes through, these are the approximate market shares that we will see. They're approximately equal, they will all look at each other and realize, hmm, that if they can back off a little bit, that we'll all make more money. Consumers aren't better off; corporate profit increases.

Now, unilateral effects; what are unilateral effects? Unilateral effects look at what happens when one competitor leaves the market. So this just looks at what happens if strength goes away and I'm going to illustrate this with a little example.

So here's an example for a price for a monthly plan: Verizon & AT&T at $40, T-Mobile and Sprint each at $35. And this is roughly comparable; generally, Verizon and AT&T tend to have higher prices, T-Mobile and Sprint tend to have lower prices and a lower segment of the market. So what if T-Mobile is considering raising its prices to $38? So it thinks about this and says, well, I'm still under Verizon and AT&T; that'd be great. I can still say I've got a lower price. But Sprint's at $35 so Sprint undercut my prices so Sprint's lower price would discipline T-Mobile.

Unilateral effect says what if we take away Sprint? Same example. Now you've got T-Mobile saying, well, I can raise my price to $38, I'm still under Verizon and AT&T, but Sprint's not here so I don't need to worry about that. So I, T-Mobile, unilateral effect here will be to raise the price. Still might be lower but that $35 plan is gone and for a lot of Americans who need their cell phone plans and need lower cost plans, $35 plan just isn't available anymore. So I am certain you will hear the defendants say, "Oh, we will never raise prices on the consumer, never, never, never, never. Our consumer would leave us if we did that." Well, the question to ask yourself, your Honor, is where do you go? If Sprint is gone and there are no other networks, everybody else is trapped, these will be the only networks that exist.

Now let's go on to defenses. This is what the defendants, I believe, are likely to argue, but we'll hear that in a minute from Mr. Cary. First, they're going to argue that Sprint is a weakened competitor. Well, your Honor, Sprint has 42 million subscribers. And for those 42 million subscribers, Sprint is just fine. It works for them. It offers them a network price they can afford. It may not be perfect, it may not make their shareholders as much money as they want, it may not make the executives as much money as they want, but it works for the 42 million people. And Sprint is on record, under oath, for a California agency just a few months ago saying, flat out, Sprint is not going to leave the market; they're not going to go bankrupt. They may not make as much in profits as their executives want, but that doesn't give them a free pass on a merger that otherwise violates the antitrust law.

Now, defendants are also going to talk a lot about efficiencies and, in fact, I think that will probably be the majority of what they talk about. So what does that mean, efficiencies? Well, let's take the case we have here, specifically, your network, right? You're designing a cell network. We've got spectrum, you share the airways, you've got cell towers, you've got backbone; you've got all the pieces that make a computer network. And if you went to an engineer and you said, well, you can have a certain percent of the resources, the spectrum tower, or you could have more; I could combine those two companies and you could get twice as much spectrum, twice as many cell towers, and more backbone, you could get more resources. So what would the engineer say? Well, the engineer would say, and I kind of expect him to say in this case, that he can build a more efficient network with more engineering resources. Okay. But this isn't an engineering class; we're not here to look at what is the most efficient network. Monopolies can be very efficient if they so choose because they control the whole market. What we're here to talk about is competition: Competition and prices to consumers and benefits that are passed on to consumers. This is not an engineering question about what is the most efficient network. So you don't have to take my word for that, however, because you can look at the US Department of Justice for that. The U.S. Department of Justice agrees with us completely that any efficiencies generated by this merger are unlikely to be sufficient to offset anticompetitive effects on American consumers, okay? This is the United States

Department of Justice's complaint. They agree that the efficiencies are not sufficient; they do not offset the bad effects on consumers. And this is why the U.S. Department of Justice required in order for them to settle it had to be four competitors because they agree with us that if the market is only three, it's not going to be good for consumers. We'll talk a little bit more about the DOJ fix and DISH in just a moment.

So who else agrees with us? Sprint. Sprint, in this courtroom in the Seventh District of New York in April of 2019, believed in fact that it had good position, it had good spectrum resources, it had a good approach and what it was going to do was leap-frog its competitors, specifically AT&T. So in April of 2019, under oath, this is from the declaration from a Sprint executive, they believe that not only were they not going to go out of business, that they had a unique opportunity based on spectrum.

And finally, just a few words on 5G. Is this merger about 5G? Can we not get 5G if we don't have this merger? No, that makes no sense whatsoever because 5G is already here. T-Mobile rolled out 5G a few weeks ago; Sprint also rolled out 5G. So now let me move on to fixes, primarily, the DOJ fix and adding DISH.

So today, Sprint, as a network, as having operated network, as tower and spectrum, it has cell phones that it sells to consumers, that operate on its network; it's an established player. What is DISH? Well, DISH is a satellite television company. DISH doesn't have any towers, it doesn't sell any mobile phones to consumers, it doesn't use its spectrum–it uses it a little bit. I'm here to tell you how they have a great deal of spectrum; they don't use it. So Dish's spectrum, has it been under obligation to build it out? When it gets the spectrum, it's required to build it and if you know anything about the FCC, that is the law. You can't get a very valuable resource like spectrum to sit on it like DISH.

What is DISH's history? DISH has a long history of simply not meeting its commitments. It tells the FCC, it tells the government regulator it's going to do one thing and it doesn't do it and there's a series of deadlines that it missed for specific spectrum deadlines. It misses them, it extends them; they find some way of not building out its spectrum. So that is the history of the company that is supposed to come in and discipline the four.

So who else might agree with us about DISH? Well, you know who agrees with us? T-Mobile agrees with us. This is a letter that T-Mobile submitted to the FCC, a public letter, and T-Mobile says, quote, "DISH has a track record of price increases for its services, speculative warehousing of spectrum, and failing to meet FCC-imposed deadlines to construct the facilities. Indeed, DISH stands out for its efforts to game the regulatory system." This is what T-Mobile thinks about DISH.

Now this is obviously before it entered into the U.S. DOJ settlement; this is before T-Mobile agreed to be DISH's landlord because how does that settlement work? DISH is going to have to ride on and use T-Mobile's network until it builds its own. And that is going to take years, so for years, DISH is going to be the tenant on T-Mobile's network and what T-Mobile thinks of DISH is that they're gaming. So if any of you have ever had a lease or been a renter, the renter knows if your landlord can't stand you, you're going to have a problem.

So what does Deutsche Telekom thing? Are they worried? "Wow, there's this U.S. DOJ remedy, we're going to have a fourth competitor; this is a big deal, it's a concern." Yeah, no. No. They're "happy to consider the game," they're referring here to DISH, "happy consider the game that DISH can play but it's economically illiterate to argue they actually build it," in the email. "Economically illiterate." And their view was quite simply that in end, that DISH might build something lawyers can use but not something that consumers can use.

So your Honor, we have four competitors; those four competitors have done a great job in offering lower pricing, more innovation, competing heartily against each other to bring a better product to the American consumer. What you're faced with now is T-Mobile and Sprint merging together, the Rule of 3 coming into play for Deutsche Telekom, pricing going up, a hundred years of economics telling you that this type of market is susceptible to coordinated effects, stepping back, pulling their punches, not competing as heavily; it's unilateral effects that if Sprint goes away, T-Mobile will not have anyone to discipline them in its place.

And the only real argument is the U.S. DOJ remedy that says, no, no, DISH won't enter. DISH is not going to enter any time in that—anytime soon because they don't have a network and that will take years to build; there will not be any debate about that, which is why DISH will simply be a tenant on the T-Mobile network for many, many years to come. And I continue, your Honor, that that is not sufficient enough hope that this network will come into existence to risk the 300 million cell phone lines, 300 million subscribers, that are in the United States today for something as vital as a cell phone. Thank you, your Honor.

MS. LAURA WILKINSON:

Thank you. Now, we will hear from the defendants, George Cary, representing T-Mobile.

DEFENDANTS' ABBREVIATED OPENING STATEMENT

MR. GEORGE CARY:

Thank you, your Honor. Your Honor, you've heard from Ms. Blizzard about presumptions in the law, about Herfindahl-Hirschman Indexes, coordinated interaction, unilateral effects; all of these antitrust buzzwords, which really go to nothing else than setting up a whole series of theoretical considerations that might lead you to a bottom-line conclusion about the transaction.

But antitrust law is not about theory, it's not about formulas, it's not about hypotheticals; it's about real world facts and those real world facts go to one fundamental question: Is the world a better place with the merger or without it? Are consumers better off with the merger or without it? Is competition invigorated by the merger or reduced by the merger? And we're going to go to the bottom line here. Given that our time is running extremely short, I won't be able to respond to everything Ms. Blizzard has said but we're going to get to the bottom line; we're going to show you, your Honor, that consumers are much better off if this deal happens than if it doesn't happen and that is what your Honor has to determine at the end of the day: Are you going to punish consumers by blocking

the deal or are you going to help consumers by approving the deal? That's the fundamental question here. And we're going to show that consumers are better off through a variety of real world, concrete facts.

First, this merger will generate much more capacity at much lower costs. It's fundamental, your Honor, that if you get more supply at lower cost, prices go down. It's supply and demand; we all know this. Not only will costs go down but the quality of the product developed will go up so you're going to get a lower price, much more supply, and more and better coverage and faster speeds if you allow this deal to go through than if you don't. If this deal is blocked, DISH, who is sitting on the sidelines with tons, basketballs of unused spectrum, which is the scarce commodity here, will continue to sit on the sidelines because other ingredients that they need, which they will get from T-Mobile and Sprint, the vestitures in this deal, they don't have. So as a result of the deal, DISH will enter with all of this additional spectrum, increasing supply even more and bringing another low-cost producer into the marketplace. So what this deal is really about is actually increasing competition, not decreasing competition. And we're not going to ask you to take our word for this; we're going to spell it out in great detail with concrete facts through our witnesses. Bottom line, prices will go down, quality will go up.

So this chart shows you what happens to the capacity of these networks if you put them together. The pink bar is T-Mobile's capacity, the yellow bar is Sprint's capacity, the black bar is the combined capacity of the new network, and as you will see, as the network becomes integrated, as these two networks are put together and we go to 21, 22, 23, and 24, the combined network is going to have much more capacity than the sums of the parts. That is a critical fact here. The combination creates much more capacity from the same scarce resources; resources you can't just go out and buy in the marketplace. In fact, by 2024, the combined network will have two times the capacity of the stand-alone networks, even assuming that they continue to grow at the rate that they otherwise would be able to grow at. That's a huge increase in supply in the market. Increasing supply means lower prices at a lower cost.

So how much of a lower cost? Here's a table and we will give you the backup for this in great detail and again, we'll explain how it comes about. Again, this is not "trust me," this is "verify with your own eyes," Judge. We will show you what T-Mobile's costs will be without the merger based upon the capital investment plan of the company. We will show you what Sprint's costs will be without the merger and then we'll show you how this combination, by creating this massive new capacity, instantaneously, without huge expenditures, without huge investments, is going to reduce the cost per unit to 1/17th what the other standalone networks could generate. Reducing marginal costs that much is going to price—drive prices down because every additional unit sold will generate much more profit, which incentivizes the companies to drop price to win subscribers to sell those units. You can't sell more units by raising price; you sell more units by dropping price and bringing more consumers in. And with this cost structure, the companies are powerfully incented to do that.

Not only will the costs go way down, the quality will go way up. So this chart is showing you the speed that people will get under the new T-Mobile, relative to the standalones. In this particular picture, we have it at various speeds. This one is for 200 megabytes per second download speeds. Sprint will serve zero customers at those speeds

because of the limitations on their network and we'll talk about exactly where those limitations come in. T-Mobile will be able to serve 46 million subscribers at those speeds by 2024 without the merger. Combined, by putting together these complimentary resources, 280 million Americans, the very people Ms. Blizzard was speaking about who rely on their phones as their access to the internet, will receive these blistering speeds that are faster than Wi-Fi speeds; that's not possible without the deal. So the people that are most dependent on their wireless connection to access the internet are the ones who are going to benefit the most here. Without this deal, hundreds of millions of consumers will not be able to get these speeds.

How does that happen? It happens because each company solves the other company's problems. There's a reason T-Mobile is smaller than Verizon and AT&T. There's a reason that Sprint is 1/3 the size of Verizon and AT&T. It's because they lack that which they need in order to compete. What does T-Mobile lack? Well, T-Mobile has great coverage. They have the kind of spectrum that covers the country but they are limited in capacity so they can't serve more consumers. And in fact, when you crowd more consumers onto a network that's limited in capacity, those consumers get a much worse experience.

It's like a two-lane road where you have a line of cars, people are turning left, they're blocking traffic, people are turning right, waiting for pedestrians, blocking traffic; you can't go very fast, traffic is slowed down. You move to an eight–lane freeway with the same number of cars, now everybody can move very quickly so T-Mobile lacks capacity. That means their service will deteriorate, which means they have to ration that capacity by raising prices.

What does Sprint have? Well, Sprint's got tons of capacity. Why? Number one, because they have the type of spectrum that is good for capacity, unlike T-Mobile. And number two, because nobody really wants to use Sprint; there are very few customers on Sprint because of the lack of coverage. So when you're driving from San Francisco to Lake Tahoe, on Sprint you're going to lose your signal repeatedly. People will not choose that and, therefore, they have a lot of capacity that is available and not being used. Put the networks together and what do you get? You get a network with lots of capacity and great coverage. That's what consumers want and, by the way, you get it at a much lower cost. That is a huge benefit.

So I've talked to you a little bit about spectrum. Let me just say quickly, because we are running out of time, there are different kinds of spectrum. There's low–band spectrum, which covers great distances; many, many miles. It's very good for coverage. Think of being in your apartment and hearing the baseline on your neighbor's stereo that's cranked up real loud. You can't hear the music but you can hear that base; that is the low frequency signal and, boy, does it travel.

Mid-band spectrum, on the other hand, has got lots of capacity. There's not very much capacity on low-band spectrum; lots more on mid-band spectrum. But it doesn't travel very far so it's not very good for coverage. And then you have millimeterWave, which doesn't go anywhere at all; you have to have a line of sight but it has huge capacity. The best network is one that combines these things. That's what Verizon's got, that's what AT&T has got, and that's what T-Mobile and Sprint, new T-Mobile, will have with this deal and will not have without the deal.

So you put them together and what do you get? This is a picture of T-Mobile's spectrum today as the engineers see it and our engineering expert will explain exactly what this is. You see the big white space in the mid-band range next to T-Mobile. Look at Sprint and at the low–band down at the bottom; big white space. That white space is lack of capacity for T-Mobile, lack of coverage with Sprint. Put them together, now you've got a network. Does this increase competition? You better believe it. This is now something that can go head-to-head with AT&T and Verizon and compete with terrific quality but also at such lower prices that they can win subscribers by lowering prices. You don't have to compromise quality to get low prices anymore with this deal.

I'm going to skip over low-band. Ms. Blizzard said—I'm sorry, 5G—Ms. Blizzard said 5G is going to be out there. Well, you know, yeah, it's going to be out there; the question is is there going to be a lot of it for everybody or a little bit for those who can afford to pay premium price like Verizon was charging for 5G? T-Mobile's not going to charge extra for 5G, unlike Verizon, if this deal happens because they'll have all this 5G capacity that they otherwise won't have. That is a huge cost savings to American consumers and, again, closes the digital divide by making that capacity available to everybody, not just a select few. Twice the 5G spectrum with the deal.

Our engineering expert will explain to your Honor exactly how this happens. And this a formula that tells you what the capacity of the network is. You will not hear the states dispute this formula; this is from standard engineering techs. Everybody agrees with this. Capacity is the number of cell sites times the amount of spectrum times the efficiency. If you can increase any one of these, you get more capacity form the same inputs. By combining these networks, you increase all of these: 11,000 new cell sites, 190-megahertz new spectrum, more 5G means more efficiency. So pre-deal, you've got limitations on capacity. With the deal, you get this huge stadium with much reduced costs and the incentives are going to be powerful to fill up that stadium by charging lower prices and attracting customers from AT&T and Verizon. Lower prices, higher quality, good for consumers.

How does it happen? Our engineering expert will explain this but it's really straightforward. We'll show you the math because it sounds like magic when you just hear it but I'll show you the math, we'll walk through the math, and hopefully, that will give you a very intuitive sense of what's happening here.

So you have cells and on those cells you have spectrum, the blue signals there. Each phone that you see here is representative of a unit of capacity, so let's see it's 100 phones or 1,000 phones or whatever. The spectrum is of a particular frequency; it's like channel four in San Francisco, channel four in L.A.; you can't have them interfere with each other. You can show different programs on using that same spectrum in the two cities; local news in L.A., local news in San Francisco.

If you add a tower in San Luis Obispo and you turn down the power so they don't interfere, now you can show a third program, local news in San Luis Obispo. Cell phones work the same way. By splitting cells, you add capacity using the same spectrum. What does this deal do? This deal does 11,000; 11,000 cell splits.

So here's the math again: Right now, you've got T-Mobile, two phones, you've got Sprint, two phones. You combine these networks, put all of the Sprint, Spectrum on T-Mobile towers, all of the T–Mobile spectrum on Sprint towers, now you end up with eight phones using exactly the same spectrum. And again, very importantly, spectrum is the limiting resource here; there's not very much of it. People need it for TV, radio, military defense, etcetera; it's a scarce resource. You double the capacity by combining these networks. So pre-merger, two plus two; post-merger, capacity is now eight. More capacity, same resources; that cuts in half the cost of running the network. That's what's happening here, your Honor.

That's not the only efficiency. Another efficiency is using the right tool for the right job. So we talked about the different characteristics of the spectrum. So today, T-Mobile has to use its—excuse me, Sprint has to use its mid–band spectrum to cover the broadest area because it doesn't have low-band spectrum. T-Mobile has low–band spectrum that it wasted, in some sense, because it needs to use it to supply the phones close to the tower where it's characteristics of propagation are not really necessary. Put these two together and now you can use the right tool for the right job and that, too, adds to the capacity of the network.

And then finally, networks are built for certain capacity. My screen seems to be stuck, okay, there we go. Networks are built for certain capacity but every network sees a situation where unexpected demand puts a strain on the network, which reduces quality. Those are the dark red peaks that you see but that happens at different times with different customer bases. So Sprint's peak usage is at different times from T-Mobile's. You put the two networks together and the valleys in Sprint's network accommodate the peaks in T-Mobile's and now you can accommodate more traffic without making huge incremental expenses. That means costs go down, lower costs, more supply means lower prices, increased competition.

Now, Ms. Blizzard says efficiencies don't matter, they don't count, this is not engineering; this is about competition. Well, that's not what their expert says. Their expert says a full analysis takes into account efficiencies; yes, it does. That's what their expert says and that's because efficiencies can make it for more competitive, right? Answer: Correct. It creates an ability and incentive to compete more aggressively if you realize efficiencies through a merger, correct? Yes, that's correct. Merger-specific efficiencies, particularly ones that lower marginal costs, would generally affect those to cause the firm to be more competitive, more aggressive, everything else equal. So all that we've discussed is not—again, is concrete and their own expert admits that it's necessary to look at that to determine the effects of the deal.

So what do we have here? Twenty–three billion dollars in marginal cost efficiencies, $80 billion in quality improvements, dialing the speed and the lack of downtime, etcetera, from the network synergies, combined $102 billion compared to Dr. Shapiro's estimate that all of the things that Ms. Blizzard talked about might lead to $18 billion in potential consumer injury, which he speculates might occur. But, as you will see, he will not be able to tell you that these are likely to occur; he'll just tell you they might occur.

Bottom-line, net benefit to consumers from this deal, $85 billion. If this deal is blocked, consumers are worse off by $85 billion. Very quickly, again, capacity up, cost

down, prices down, good for consumers. We are not, as Ms. Blizzard suggested, arguing that Sprint is a flailing company or a failing company; we are arguing that their market share is declining because they are not competitive. They're not competitive because they don't have good coverage. They can't get good coverage because there is no low-band spectrum available to them. So if the question is is Sprint alone a better competitive situation than combined, the answer's no. We talked about DISH. DISH has spectrum; it has more low-band spectrum than Sprint. It has as much mid-band spectrum as Verizon. That spectrum has been sitting on the sidelines waiting for towers, waiting for customers, waiting for retail. Guess what they're getting through this divestiture? They're getting towers, they're getting customers, they're getting retail. So they will now have the tools to allow them to compete and they will have every incentive to do that because this spectrum they're sitting on is worth about $20 billion and they're going to forfeit it if they don't deploy it. So they will add to the marketplace.

In conclusion, with the merger, more capacity. Without the merger, less, strained with rationed higher prices. With the merger, lower costs. Without the merger, higher costs and higher prices. With the merger, faster speed, better coverage. Without the merger, none of that. And then finally, with the merger, a brand new competitor bringing an additional huge amount of spectrum into the market that's been sitting on the sidelines, adding to supply, adding a fourth player. This is good for consumers, your Honor. Stopping this merger will stop progress, slow 5G, hurt consumers, and raise their prices. Thank you.

MS. LAURA WILKINSON:

Thank you. Thank you, both, for excellent presentations and since we have the benefit of having the judge's opinion in this matter now, in the few minutes that we have, let me ask one question. You each presented a lot of evidence, alluded to your economic experts, and during the trial, you presented a lot of economic evidence and the judge's opinion seemed to rely quite a bit on the testimony of the merging company's officials. What do you say is the role of economic evidence versus testimony in antitrust litigation going forward? Either one of you?

MR. GEORGE CARY:

Well, I'll kick it off because I have very strong views about this. I think that the judge did exactly the right thing here, obviously, and the reason for that is the following. As we pointed out in the slide that we put up of Professor Shapiro's testimony, the key here was getting the judge to understand that efficiencies are not this foreign concept; we're not introducing something that's not part of the holistic analysis. Professor Shapiro was our best witness on that point. Obviously, Professor Katz, our own expert, made the same point; you have to consider efficiencies. Once the judge understood that, then the question is are there or are there not efficiencies? And the technical experts were the ones that answered that question and they did it, again, through textbook network engineering and physics of history. So the role of an expert is to help the judge understand the significance of the fact evidence; that's the role. And we believe that Professor Shapiro and Professor Katz did exactly that. The judge applied the methodology that both endorsed and he did that by looking at the factual evidence and applying the lens that Professor Shapiro and Professor Katz both agreed was the right lens.

MS. LAURA WILKINSON:

So, Paula, do you want to add to that or maybe also talk about whether you think not having opening arguments impacted the trial?

MS. PAULA BLIZZARD:

Sure. Um, so let me just say that on the economics question, and speaking only for myself, obviously not for the AD's office, I think if you look writ large at the role economics more or less over 100 years, we as antitrust lawyers are relying on it too much. And it's usually used by defendants to argue their case. I think, perhaps, going forward a little less reliance on economics would be helpful.

And then turning to the opening statements, so first of all, I did go over on my time; the judge probably would have cut me off and so, George, I owe you another opening statement sometime when you can do it full length. And in addition, I want to correct something from the beginning which is this wasn't my opening statement; this was Glenn Pomerantz's opening statement. So the states hired Munger, Tolles & Olson and we could not have done it without them; they did phenomenal job assisting us, working with us, and most of this opening was Glenn would have done it; I'm sure he would have done it better. But being a client, I usurped him and am doing it for this presentation.

I do think that it hurt us significantly not to have an opening. As the government, you don't have your own executives, you don't have your own network. You have experts and then you have the witnesses, perhaps even third parties. But essentially, cross–examining people from the start and if you don't have an opening, it's very hard to frame the case and get momentum and I speak of that generally, not specific to this case. The role of plaintiffs, if you told them you don't get an opening and you have to start on cross, they would say, wow, that's hard. I think we might have changed the order of the witnesses; we would have started, perhaps, with one of your experts with the narrative on the outset; it's always something a trial lawyer considers. But it was perfectly within the judge's rights to cancel the openings, it happens, and it did. And certainly, as all of you know, credit to George and his team.

MS. LAURA WILKINSON:

Thank you. Thank you, both, for excellent presentations. We are at time so we need to end this program because there's more programming as part of this presentation today, so thank you both for joining panel and enjoy the rest of your day. Thank you.

MS. PAULA BLIZZARD:

Thank you. Thank you, Laura. Thank you, George.

PERSPECTIVES ON THE ROLE OF ANTITRUST LAW IN SOCIAL JUSTICE

By Mandy Chan[1]

The proper role of antitrust law within the context of social and economic justice reform has been debated since the inception of the Sherman Act and related laws. In this discussion, two leading experts, Professor Douglas Melamed and Sandeep Vaheesan, debate the proper role of antitrust in wealth distribution, discuss antitrust's historical and political context, and comment on its future role as part of the modern social justice movement.

PANELISTS

Professor A. Douglas Melamed teaches at Stanford Law School. He was the Herman Phleger Visiting Professor in 2014, and appointed as a Professor of the Practice of Law in 2015. From 2009 to 2014, Professor Melamed served as Senior Vice President and General Counsel for Intel Corporation. Prior to joining Intel, he was a partner at WilmerHale's Washington, D.C. office and chaired the Antitrust and Competition Practice Group. From 1996 to 2001, Professor Melamed served in the U.S. Department of Justice as Acting Assistant Attorney General in charge of the Antitrust Division and, before that, as Principal Deputy Assistant Attorney General. Professor Melamed has received numerous professional awards and honors. He has been the Distinguished Visitor from Practice and an adjunct professor at the Georgetown University Law Center, and he has authored numerous articles on antitrust, and on law and economics. He is a member of the boards of directors of the Nasdaq exchanges and the American Law Institute and a Contributing Editor of the *Antitrust Law Journal*.

Sandeep Vaheesan is legal director at the Open Markets Institute. He previously served as regulations counsel at the Consumer Financial Protection Bureau, where he helped develop and draft the first comprehensive federal rule on payday, vehicle title, and high-cost installment loans. He has published articles and essays on a variety of topics in antitrust law, including the relationship between antitrust and workers, and the political content of antitrust. His writing has appeared in the Berkeley Business Law Journal, Harvard Law & Policy Review, Nebraska Law Review, University of Pennsylvania Journal of Business Law, and Yale Law Journal Forum. He received a B.A. from the University of Maryland, and a J.D. and M.A. from Duke University.

MS. MANDY CHAN:

Hi, everyone, and welcome. Thank you for joining us for this antitrust and social justice session. Today, we're going to discuss an incredibly important topic of whether the current antitrust laws have contributed to wealth inequality and whether they should be changed to encompass social welfare concerns.

---

1 Mandy Chan is an associate at DLA Piper focusing on antitrust and competition law. She serves as the Co-Chair of the US Chapter of Iris, DLA Piper's LGBTQ Resource Group; Vice Chair of the San Francisco Chapter of the Leadership Alliance for Women (LAW), DLA Piper's Women's Resource Group; and Co-Chair of the San Francisco Diversity and Inclusion Committee. Mandy is the Antitrust and Unfair Competition Law Section's Liaison with the California Young Lawyers Association.

To kick off our discussion, I'd like to invite Sandeep to state the case for antitrust reform. What public interest issues do we see that arise from or are attributable to current antitrust law and policy?

MR. SANDEEP VAHEESAN:

So at present, antitrust law contributes to economic and political inequality, as well as racial injustice. So to set the table, it's worth remembering that the law constructs and shapes markets through things like property, contract, rules on nuisance, consumer protection, or securities. These are all essential and, indeed, prerequisites for a well-functioning market. There's no such thing as a free market or unregulated markets; really the debates that we have over law and policy are over different configurations of rules, not some mythical free market versus a regulated market.

Given that the law constructs the marketplace, it unavoidably decides who is powerful and powerless in the economy: Executives and shareholders or workers, small firms, and consumers? To offer a concrete example, I'll briefly discuss patents in pharmaceuticals. At present, patenting and pharmaceuticals has a relatively loose set of criteria and patents granted by the PTO are strictly enforced. The present patent regime favors the interests of branded pharmaceuticals at the expense of generic rivals, patients, and payers.

In light of all this, antitrust, like all law, decides who has power in the economy. So, for instance, if an antitrust enforcer vigorously prosecutes wage fixing and no poach agreements among employers, they shift power in labor markets toward workers and away from employers because workers have more effective exit opportunities and can enjoy more competition for their services. If, however, they tolerate wage fixing and other horizontal collusion among employers, they are giving the bargaining advantage in labor markets to employers. So antitrust law unavoidably distributes power one way or the other.

So what does this have to do with inequality and racial injustice specifically? Of course, there's nothing facially discriminatory about the antitrust laws; they're facially neutral. But like so many laws and practices in American society, antitrust law is racially discriminatory in impact. At present, antitrust law gives broad freedom to corporate executives and financiers, a group that is overwhelmingly white, to control and plan economic activity through mergers and contracts and deprives independent workers and small firms of the right to challenge the domination through concerted action.

So I'll quickly offer four case studies to support this point I made and they all involve workers and independent business people who are disproportionately or mostly people of color. So first, the NCAA. The NCAA, to put it simply, is a large wage suppression cartel. Division One colleges and universities come together to cap the compensation pay to college basketball, football players, at tuition, room and board, and a modest stipend. So despite generating billions of dollars for the NCAA, players only get to enjoy a small share of these rewards. Coaches and administrators, in contrast, make millions of dollars a year while players barely subsist. The courts have, in large measure, upheld the system either on amateurism grounds or on the grounds that this system caters to viewers tastes.

My second case study concerns a more obscure example, Peruvian guestworkers who work as shepherds in the Rocky Mountains. They're some of the most exploited workers in the economy, until recently making subminimum wages and working in some of the

harshest conditions on earth. In a class action lawsuit, they alleged that the ranchers, operating through rancher associations, collusively suppressed their wages and agreed not to pay shepherds more than the relevant minimum wage. Despite the strong facts in the complaint and the allegation of a per se violation of the Sherman Act, the district court, as well as the Tenth Circuit, tossed this complaint on rather specious grounds and tortured readings of the facts.

The third example involves fast food franchising. At present, franchisers tightly control franchisees through contract, dictating what they sell at what price, their hours of operation, the layout of their store, just to name some examples. Franchisees, however, bear the risk of loss if their franchise doesn't succeed. So in many ways, franchisees at present, who are akin to middle managers, don't have the stability of salary and benefits that we have traditionally associated with that position. And this control through contract is thanks to a series of antitrust decisions like *GTE Sylvania* and *State Oil vs. Khan*. And Commissioner Rohit Chopra of the FTC has talked at length about the exploitative control through contract that defines the franchising world.

And last but not least, I'll talk about gig workers; these are Uber drivers, delivery workers for Instacart and other modern platforms. So while the antitrust agencies have not targeted the predatory pricing and many acquisitions of Uber and Lyft, they have targeted the attempts to organize among Uber and Lyft drivers. So because they're misclassified as independent contractors, they do not have the right to organize and engage in union activity, unlike workers who are in the traditional employment relationships. And the DOJ and FTC have gone on the record to say that organizing by Uber and Lyft drivers would be a per se violation of the Sherman Act and made clear that their organizing is illegal under present antitrust law.

But I want to end on an optimistic note. I think the system can be changed to advance equality—economic, political, and racial. So I'll quickly sketch out what a different system might look like. As a preliminary matter, we should abandon the rule of reason and instead opt for a series of per se rules and presumptions. The rule of reason invites subjectiveness, decision-making, and is hopelessly discretionary as the Trump administration has illustrated in a number of investigations and enforcement actions.

So we can have a rules-based system that actually transfers power downward. For instance, a strict prohibition on wage fixing that's actually enforced and not merely existing on paper. Number two, restrictions are complete prohibitions on control through contract that allows independent business people to actually exercise autonomy and discretion. And third, protecting the right of all workers, irrespective of employment classification to organize and build power. And same with small firms when they're confronting more powerful counterparties. Think of franchisees collectively bargaining against McDonald's or Burger King.

So in dispersing power, this alternative rules-based system would distribute power away from mostly white, economic royalists to the multi-racial majority of workers and other producers in American society. I don't want to argue that antitrust is some sort of cure all for inequality and racial injustice, but I believe it can play an important role in addressing all these social, economic, and political issues.

MS. MANDY CHAN:

Thanks, Sandeep. Professor Melamed, any thoughts on what Sandeep has said about making the case for antitrust reform?

MR. DOUG MELAMED:

Well, I think those were interesting perspectives, certainly. Reflecting on a lot of Sandeep's work over the years and a much broader, sort of populist–I mean, I think just as a descriptive term, sort of sentiment that we see, of course, in many dimensions in our political and public life. But I disagree with the particular suggestion, at least conceptually, that antitrust law ought to be changed in order to address issues of social justice, as Sandeep defined.

Let me state at the outset though, I agree with the notion that we're living in something of a gilded age and that there is excessive inequality of wealth and income and economic and political power and I think that the political system ought to address that issue. The question, of course, is whether antitrust is a suitable or desirable solution.

Lots of laws, all laws, I think as Sandeep probably implied, affect markets and equality. And even laws that are facially very neutral, given other aspects of society–the legacy of racial discrimination, income and wealth disparities and so forth–have in any particular application implications that might be in effect upward redistribution or regressive. Property law, certainly, is of that type. Patent law, as Sandeep mentioned. Both of those, I think, it's clear, provide enormous benefits to society. And yet, they have that effect because some laws provide opportunities for those with resources to flourish and less so those without resources.

Now, we have a lot of laws that are intended to address problems of inequality and social justice quite directly. Labor laws, there's a specific exemption from the antitrust laws for certain kinds of union organizations, collective activity by employees, civil rights laws, tax laws, restrictions on lobbying, campaign contributions, the list can go on and on. Antitrust is not one and it never has been. The statutory language in antitrust is concerned with conduct, it speaks in very neutral language; it does not speak of the identity of the actor or of the victim. It's not hostile to the have-nots in society; it's neutral. It protects labor and racial minorities from bad conduct that creates market power and justice. It protects any other group from bad conduct that creates market power.

Antitrust law is about economic welfare; that's a somewhat different objective from a redistributional goal. It's a very simple conception: It proscribes welfare reducing conduct, called anticompetitive conduct, that reduces competition and increases market power; conduct that, to be more precise, reduces the ability of rivals or potential rivals to discipline one another in the marketplace through competition. Applied correctly, it can enhance economic welfare, protect anyone who would be harmed by anticompetitive conduct resulting in market power.

Now, there is clearly room for improvement in antitrust law and we're going to talk about that for much of this hour as we want to talk about. But prudent improvements to antitrust law would retain, it seems to me, a singular focus on economic welfare–sometimes called the Consumer Welfare Standard–and would not modify or adjust that

focus in order to take into account the kind of distribution or social justice concerns that Sandeep has in mind, however laudatory those objections might be and however prudently they might be addressed by other bodies of law.

Here's why: Any new objectives to antitrust law would matter only if it would result in a different outcome in an individual case. Only if, in other words, a decision that would enhance economic welfare were to be abandoned in favor of a different decision to achieve some other objective. Now, we can argue about whether antitrust is optimally designed to achieve economic welfare, as I said, I think it can be improved. But when one says, well, we have to change it for social justice reasons, he's saying even if that entails a loss of economic welfare, so that's a big cost.

And how would you implement that change? It could have categorical rules, for example; workers can get together and enter into what would otherwise be regarded as a cartel, a price-fixing cartel, in order to strengthen their hand in bargaining with others, but that kind of a rule would result in arbitrary lines. We'd have to decide what is a worker? Is an owner of an individual shop, a sole proprietor, a worker? Or is it only someone who works at the direction of another person? And if we're talking about working at the direction, where do we draw the line between independent contractors and employees? So there'd be a lot of arbitrary line drawing.

Then you have the question of transacting around and a lot of lawyers would figure out ways to get around these kinds of arbitrary lines, we have litigation regarding the formalities. And then the question is what do we achieve? Creating bargaining power for workers will reduce economic welfare except when the employer has equal market power. So what would you do? Would you put an element into the test that would say we have to litigate whether the employer has market power, as well as the workers do? This could be incredibly complex and incredibly costly from a welfare point of view.

Moreover, if we have complex goals that are stated more aspirationally, antitrust law should be focused to protect the little guy, then we have, inevitably, arbitrary law because there's no algorithm; there's no way to decide. How do you decide an antitrust case when economic welfare points at one direction and equality of well-being points in another direction? There is no algorithm. What does that mean? It means we have arbitrary decisions, a loss to legitimacy for antitrust law, and more than that, an opportunity for capture because if decisions are not made in accordance with clear principles, it is much easier for the decisionmaker to say, "Oh, I made a judgment about who should win this case." And when you have discretionary judgments, you have the opportunity for capture. And who wins in a world in which law is subject to capture? It's the powerful, not the powerless.

So while we can talk about various suggestions, changing the rule of reason, I agree there should be some changes. I don't happen to agree with the particular changes that Sandeep mentioned; we can talk about. But conceptually, it seems to me antitrust is about economic welfare. Let's use it for that purpose to maximize economic welfare and let's have other laws carefully designed in order to achieve social justice goals. That's it.

MR. SANDEEP VAHEESAN:

So I'll offer a couple of responses to Doug's rebuttal. So he mentions that consumer welfare is the objective of antitrust and that's certainly what the Supreme Court has said, that's what the agencies have said since the early 1980's. But that's really based on some false history by Robert Bork. Robert Bork claimed that he reviewed the legislative history of the Sherman Act and found that consumer welfare is what Congress sought to promote. But historians have actually reviewed the legislative histories of not only the Sherman Act, but also the Clayton and FTC Acts, and said that Robert Bork's legislative history's made up out of whole cloth. Congress had much more different and ambitious goals in enacting the antitrust laws. It sought, among other things, to disperse power in American society and ensure that the trusts and monopolists that ruled American life in the late 19th century couldn't turn a nominally democratic society into a truly oligarchic one. So I dispute the idea that antitrust is about consumer welfare. If we seriously believe that congress is our national legislature and national policymaker, its judgments and intentions should prevail over the views of a conservative legal scholar, so that's one point.

Second point, is antitrust law disperses or concentrates power one way or the other; it's not possible for it to be neutral. Since the early 1980's, we've lived in a system where the agencies and the courts have said we'll generally be tolerant of mergers, we'll generally be tolerant of vertical restraints, but on the other hand, we'll be categorically hostile to horizontal coordination; not just by large firms but also by independent contractors and small firms. So antitrust has really served to concentrate power at the very top. It hasn't stood apart from economic and political trends over the last 40 to 45 years.

Third, even if you accept consumer welfare as the only objective of antitrust law, the present system is not working particularly well. You know, take the example of mergers. There's been a wealth of research over the past five, 10 years - John Croke, an economist, but many others–that have found that mergers frequently lead to higher prices, higher price cost margins, and I can even offer you a line from Herbert Hovenkamp and Carl Shapiro; people who typically don't agree with my perspective. They said the empirical evidence shows a positive relationship between seller concentration and prices or price cost margins.

And on the flip side, research has shown that mergers rarely create productive efficiencies. A NYU business scholar by the name of Melissa Shilling actually reviewed the merger literature, conducted case studies of her own, and concluded that the only consistent winner in M&A activity appeared to be the investment bankers who arranged these deals. So even if we care about consumer welfare and nothing else, the current system is not working and I point you to a number of sectors–hospitals, telecommunications–where merger policy has contributed to higher prices, higher price cost margins.

Third—I should say, fourth, the present system is actually not very transparent; it's actually quite opaque and subjective. There are a couple of good articles in ProPublica in 2016 and 2017, that document the intense lobbying that goes on to get mergers and acquisitions through, in which economists present often farfetched theories on how a merger will lead to productive efficiencies and benefit consumers and the public is really not clued in on what's happening. A relatively narrow clique of lawyers and economists

make the relevant decisions. So if we're talking about transparency and rule of law, the current system is not satisfying those requirements.

And last but not least, I think Doug was responding to a little bit of a strawman when he said that my alternative system requires hopeless subjectivity and the comparison of apples to oranges. I actually think the current system's deficient for that reason because it requires antitrust enforcers and courts to weigh short-term price increases against dynamic benefits over time, against changes to equality. The current system requires these complicated cost-benefit judgments. The system I'm calling for would actually be much simpler, much more transparent, much more objective, and easier not just for businesses to understand and follow, but for the public to understand. And since we're talking about public law, I think the public understanding aspect of it cannot be downplayed or ignored.

MR. DOUG MELAMED:

Let me just respond, if I can, to a couple of the points. First, about legislative history. I have not studied it in great detail but do think it's probably correct that Robert Bork's interpretation and some very influential articles in the 1960's is incorrect and that Congress did not have a specific focus on what he called consumer welfare, but actually I think meant to be total welfare.

On the other hand, I think the contrary view that was summarized briefly by Sandeep that Congress had intentions to serve these various distribution and social justice objectives, confuses means and ends. It is true that there are, in the legislative history of the Sherman Act and the Clayton Act, as there are in many laws, statements by congressmen who point to the desirable byproducts, the desirable consequences of this body of law, and with respect to the Sherman Act, they talk about a guarding against big corporations and protecting small corporations and all that.

But that's not what the law said. That may have been a byproduct of the law that they intended but the law that they intended was quite specific. If you look at the Sherman Act and the Clayton Act, they're very general and they're very narrow in the following sense: They talk about anticompetitive conduct, not about being too big or too powerful. They talk about unreasonable restraints, about monopolizing, and about merging in a way that may tend to injure competition. So the focus has always been on desirable conduct, not on redistribution, although it is thought that enforcing laws prohibiting that kind of conduct would have some redistributional benefits.

My understanding of legislative history is, it really says that Congress intended to codify the preexisting common law of unfair competition. And courts have been clear for decades that antitrust is ultimately a common law kind of subject, that takes its meaning in an evolving common law way through adjudication. And I think that's the proper way to figure antitrust, not to find some snippets from congressional hearings and congressional testimony about the consequences of a sound antitrust law that some of us supported and envisioned, so that's one thing.

The second point is going to be more brief. It is not true, as I think Sandeep's phrasing may have suggested, though I'm not sure he meant this, that antitrust has helped the powerful at the expense of the powerless. It is probably true that antitrust has been underenforced with respect to certain kinds of anticompetitive conduct and with respect

to certain kinds of mergers. But it hasn't affirmatively aided large companies; it simply hasn't been quite as aggressive as Sandeep and I, at least, think it ought to have been. Similarly, it hasn't singled out workers for harsh condemnation of collusion; it went after Apple, which made a similar argument that it was orchestrating a cartel of book publishers in order to erode Amazon's monopoly and the court correctly said we don't allow antitrust vigilantism here. You've entered into an anticompetitive cartel.

So I think the conversation should really focus, as Sandeep ended up, on the question of how can antitrust be improved better to serve the objective that has evolved through this common law process in the courts, the objective of promoting economic welfare?

MR. SANDEEP VAHEESAN:

So, I'll start with the issue of statutory texts. So all the principle antitrust statutes are quite open-ended, so the Sherman Act speaks in terms of restraints of trade, the Clayton Act speaks in terms of mergers that may tend to substantially lessen competition. The FTC Act, section five, at least, speaks in terms of unfair methods of competition. So interpretation is unavoidable; the text is not nearly specific enough for agencies and courts to say, you know, X merger is illegal or Y monopoly is illegal. Interpretation is inescapable here and that means we have to rely on interpretative aids and I think legislative history is traditionally one of those important interpretative aids and it's certainly a more defensible interpretative aid then, let's say, Robert Borks' legislative history.

Second, on the issue that the Congress delegated decision–making power to the Supreme Court and the courts, I think that's actually incorrect. So one quick response is the law professor, Sanjukta Paul, has written a great article called "Reconsidering Judicial Supremacy in Antitrust" that really goes into the detail of the legislative debates and concludes that Congress did not intend to delegate broad policymaking power to the courts.

And secondly, and in some ways an even more powerful fact, is in the *Standard Oil* Decision in 1911, the Supreme Court announced the rule of reason and said, we nine justices will have the power to interpret the Sherman Act going forward. And what did Congress do in response to that? Congress did not acquiesce. In fact, it enacted two new antitrust laws to reign in the power of the courts and ensure that its vision of dispersing power in the economy would be advanced. First, the Clayton Act prohibited very specific practices, mergers, as well as exclusive dealing, tying in interlocking directorates, and second, Congress set up the Federal Trade Commission to serve as the national competition policymaker, identifying new and emerging competition issues and developing policies and rules in response to that.

So I think the idea of the common law thesis has certainly been adopted by the Supreme Court, you know, you probably have a majority, if not a unanimous court agreeing with that assessment, but I think as a historical and legal matter, it's incorrect, even if it is correct, as a descriptive matter of where the courts stand right now.

And two other quick points. So, Doug said that antitrust has not affirmatively hurt the powerless but I think it has. You know, millions of workers in today's economy are classified or misclassified as independent contractors. Uber drivers are probably among the best-known examples right now; these are workers often making less than minimum

wage. And thanks to antitrust law and official policy statements of the DOJ and FTC, they cannot organize against Uber and Lyft, you know, two entities that have unlimited amounts of venture capital that have been allowed to burn through billions of dollars in an effort to dominate local cab markets around the world, been allowed to buy out rivals, been allowed to break municipal cab regulations, as well as federal labor law. So against these behemoths, antitrust has come in and said Uber and Lyft, we will leave you alone, but drivers, you better not organize. If you do, you can expect an investigation and possibly enforcement actions even though you're powerless actors by any definition. This isn't really Apple going up against Amazon; this is a group of precarious workers often making poverty level wages who cannot avail themselves of the labor exemption of antitrust law.

MR. DOUG MELAMED:

A couple—just a couple of brief thoughts. On the legislative history, I'm glad you reminded me that the Supreme Court, the contemporaneous Supreme Court of the 1890's and early 1900's, didn't understand the antitrust laws the way you're saying they should have been understood. Now, maybe that was a rogue court but I have a suspicion it's a little presumptuous for us to think we have a better understanding of the legislative history 130 years ago than the contemporaneous courts did.

But more substantively, let's look at the Uber, Lyft story that you mentioned. First of all, they haven't had any difficulty attracting workers so you have to wonder whether they are really reducing or rather enhancing the options and alternatives available to the people who want to be drivers for Uber and Lyft. But even leaving that aside, it is not the antitrust laws that determine whether they are employees or independent contractors; that's a matter of labor law and state law. So the antitrust laws can't be blamed if there was a mistake in interpretation and I have no idea whether there was or there was not. I'm going to take as a given the fact that they're independent contractors, not employees. And if they're independent contractors, then the question becomes should the antitrust laws have an exception that it doesn't presently have for cartel behavior by people deemed to be independent contractors?

Well, where do you draw the line? What about doctors that get together and form, in effect, price fixing cartels to raise prices, charge to patients and to insurers all around, you know, their service areas; they do this all the time, although they're being increasingly—antitrust laws are being enforced against them with increasing seriousness. And some of these doctors are making six and seven figure incomes and trying to make even more. Should they be entitled to the exception for workers to bargain collectively? Or do we have to say only poor workers or black workers or unskilled workers? And how are we going to write a law that is fair, that treats people equally, that is a sound policy and that is an antitrust law based on economic welfare, rather than a redistribution law? And I'm not opposing redistribution laws; it's just that I think they should be passed by an appropriate legal body and with a careful consideration of the interests they are intending to serve rather than asking the question of, how do you compromise interests that ought to be shared by the antitrust laws?

MR. SANDEEP VAHEESAN:

Yeah, so on the first point about the early judicial interpretation of the antitrust laws, so this was in 1890's—the 1890's, the early 1900's, so this was the time of the Lochner court; a court that was pretty infamous for adopting anti-worker positions and issuing anti-worker rulings, using the antitrust laws at the time to restrict organizing firms and industries and advancing the prerogatives and privileges of big businesses. So yeah, I don't trust their judgments on the legislative histories. It's not really a question of whether they were engaging in good faith analysis or not; they had a particular ideology that was, you know, quite different from a progressive one as defined today and even the progressive one that animated the passage of the antitrust laws.

It's worth remembering that the antitrust laws were passed at the behest of farmers, workers, and other small producers in the economy. This law didn't come out of anywhere; it was the product of the Knights of Labor, the Grange, the Farmer's Alliance; so this was a product of small pea populism, you know, embodied by people like William Jennings Bryan. Congress was responding to that pressure; it wasn't trying to promote, quote end quote, "competition indiscriminately," it was trying to promote a fair, balanced and small "d" democratic economy. So I don't really defer to the Lochner court's judgment here; I don't think it's entitled to any special deference.

On the issue of workers for Uber and Lyft, it's not really surprising that these platforms attract millions of workers. I mean, we've been living in a period of chronic persistent unemployment and underemployment where millions of people can't get a steady, rewarding paycheck so when given the choice of not paying their bills or working for Uber, most people understandably work for Uber, so I don't think we should really take it as an assessment of Uber and Lyft's overall attractiveness as employers, rather an assessment of the rather bleak macroeconomic picture here; you know, issues that transcend antitrust law.

So on the issue of line drawing, you know, Doug brought up the example of doctors who collectively bargain, you know, they're not very sympathetic professionals. As Doug mentioned, they're often making six or even seven figures. But in many cases, they are actually collectively bargaining against Aetna and Cigna and not necessarily against the public, so I think it's a little bit more complicated than Doug suggested; they're not collectively bargaining against you and I as patients but against insurers. And insurance markets in the United States are generally quite concentrated.

But you know, putting that aside, where do you draw the line? I think that's a legislative judgment; that's a judgment that Congress should make. It should not be made on a case-by-case decision. You know, of course, DOJ and FTC will exercise prosecutorial discretion and, you know, I think it's more important for them to use their resources to protect the vulnerable, rather than the powerful.

But in terms of black letter law, that's a judgment that should be made by Congress and Congress really did make these judgments in the past. The Clayton Act speaks very broadly in terms of protecting workers; it has the language of laborers not being a commodity or article of commerce. Similarly, the Norris–LaGuardia Act and National Labor Relations Act has announced broad rights to organized. So Congress has made these

judgments in the past; it's just the courts have often ignored those judgments or rewritten those judgments over time. So I'm not calling for case–by-case decision-making by the DOJ and FTC; I think that's simply unworkable. I'm calling for Congress to reassert its authority and say that this is a matter of national importance. Congress responds to the people; the Supreme Court does not. Congress should be deciding these important questions and I think the recent House antitrust subcommittee report on the big tech companies is an encouraging sign that Congress is ready to take up the mantle again and reclaim authority from the Supreme Court that has largely operated unchecked since the mid-1970's and hold that, you know, we, the national legislature, are going to make competition rules.

Last but not least, this goes back to an earlier point that Doug mentioned about competition and he said antitrust protects competition. But competition is not a self–defining term. And when we're talking about competition antitrust debates, we're really trying to figure out what are the types of competition we should encourage and what are the types of competition we should discourage? I happen to think companies should succeed and be rewarded for succeeding for making better products, offering fair prices, treating their workers well. I, however, don't think companies should compete and succeed by exclusionary contracts, predatory pricing, deceptive advertising. So when we talk about competition, we really need to scrutinize what we mean by competition; what are the forms of competition we want the law to encourage and what are the forms of competition we want the law to restrict or prohibit?

MR. DOUG MELAMED:

So, yes, Congress has spoken; Congress passed law–a law creating an exemption from the antitrust laws for employees when they organized into unions. It didn't create a broader exemption than that. The courts did; the courts created an implied exemption; implied exemption in some circumstances that go beyond what Congress did. But Congress, when it thought specifically about whether to exempt workers from the antitrust laws past the narrow exemption based on union activity. Now we may want to revisit that but the question is, do we revisit in the antitrust context or in the labor law context or in some new proworker context?

Here's the problem from the antitrust context: If you imagine a bunch of workers getting together to bargain collectively–let's say all the gig drivers, Lyft and Uber in California are forming a collective bargaining organization–they're going to have market power. If they have market power, they're going to exercise that power to raise price and restrict output; that's what monopolies do. That's going to reduce economic welfare except maybe, in a very specific circumstance with a counterparty, Lyft and Uber and Grubhub and who knows who else, themselves exercise an equal amount of market power, but chances are they don't because you can see already, I've already listed three and there are probably many, many more who were competing for these gig workers. So you wound up having—wind up having disproportionate power on the worker side and that reduces economic welfare for everybody. Not the workers; everybody else.

Now I'm not saying there's no legitimate role for workers to be able to bargain collectively but it's a very complicated question and it requires understanding of who these workers are, why are doctors to be treated differently–by the way, my daughter's

a doctor; I have some conflicting interest here, or one of my daughters is–and how do you take into account the power of the counterparty because if the counterparty doesn't have market power, all we're talking about is old fashioned cartel behavior in which the people get together to create market power at the expense of everybody else. This is a very complicated problem and it's not one, I think, that can be dealt with by simply talking about let's pass a law that gives workers an exemption without taking into account a much broader set of economic considerations that are necessary in order for antitrust to continue to promote and protect economic welfare for all of us.

MR. SANDEEP VAHEESAN:

Yes, on the issue of independent contractors versus employees, the Clayton Act makes no such distinction; it simply talks in terms of the labor of a human being. The independent employee distinction is a subsequent judicial loss that emerged in the 1940's and the '50s, so Congress actually spoke extremely broadly in the law; it's the courts that read that language narrowly. So I think that's one issue here. You know, judicial reinterpretation and disregard for congressional–not only congressional intent but in some cases, the plain text of the law–has been a chronic problem in antitrust jurisprudence.

Second, on the issue of economic welfare, so even assuming that this, you know, neoclassical concept is the only appropriate goal of antitrust, I see some deep tensions here because we live in an economy dominated by monopolies and oligopolies - like most markets have three, four, or five players–and there seems to be very little concern about the loss of economic welfare in these concentrated markets. Instead, a frequent response you see is, well, welfare is not actually being sacrificed by these concentrated market structures; these firms are just being rewarded for their superior productivity. They're just more productive as enterprises than their rivals. And you know, that's often presented as an assertion; it's not actually documented through facts that, you know, Uber and Lyft are more productive than traditional cab companies. And I think it might be a useful example to elaborate on because there's been a lot of analysis about Uber and Lyft. You know, the general perception and one that's been advanced by the companies themselves, as well as the antitrust community, is these are disruptive new entrants, they are simply better at providing cab service than, you know, Yellow Cab or your traditional independent cab operator.

But a transportation scholar by the name of Hubert Horan has actually dug into Uber and Lyft's books and evaluated their business operations and he concluded that these companies aren't actually more efficient at offering ride hailing service; that's not where their advantage is. He said, actually, on those grounds, traditional cab companies are more efficient at maintaining cab fleets and employing drivers. He said their advantages are really two-fold.

First, as a matter of corporate policy, they've chosen to ignore municipal cab regulations that traditional cab operators have to comply with, so there's a competitive advantage. If I don't have to—if I'm in competition with Doug and I choose to ignore certain laws, I'm going to have a cost advantage over Doug and probably beat him in the marketplace. Second, they also have unlimited, seemingly unlimited, financial support from venture capital, which often takes the form of people like Jeff Bezos, Blackrock,

Softbank, and the Kingdom of Saudi Arabia, so they have the privilege of losing billions of dollars every year that, you know, your small independent cab operator doesn't have.

So when we talk about economic welfare and superior productive efficiency, I think it's really worth digging into the details instead of assuming that just because Uber or Walmart offers lower prices than their rivals that they are somehow more productively efficient, you know, productively efficient meaning, they take the same number of inputs and produce more outputs than their rivals do.

So in light of that, I think we really have to think about, you know, fixating on the loss of economic welfare from small players like Uber and Lyft drivers coordinating, and step back and ask, are we actually promoting and protecting consumer welfare by giving Uber and Lyft and a number of other venture capital backed firms carte blanche to dominate entire markets?

MR. DOUG MELAMED:

Well, just two quick comments. The notion that most markets are dominated by four or five firms is ridiculous; it's ridiculous. I mean, there are some markets—there is some over, there is some—apparent increase in concentration using large aggregates and, yes, I see [inaudible] commerce department they did and so forth, but the idea that most markets are dominated—I mean, just walk down the street. How many gas stations, how many restaurants, how many hair salons, how many gymnasiums, on and on and on? Okay, so we're talking about a much narrower problem, I think, than the one that Sandeep has in mind.

And second, look, I'm not going to sit here and defend Uber and Lyft but the idea that the taxi companies were efficient when they didn't have the kinds of apps and ordering service and other things that the consumers have flocked to I think is a little bit ridiculous. Clearly, innovators shake up markets and they create enormous amounts of wealth and we need to have an economic system that creates incentives for them to do that, while at the same time, guarding against anticompetitive conduct that reduces welfare.

MR. SANDEEP VAHEESAN:

Yes, to quickly respond, you know, the Uber and Lyft issue, you know, the innovation wasn't the app; the app is fairly trivial. The innovation was large-scale lawbreaking, whether it is municipal cab regulations or federal labor and employment laws. I think it's worth keeping those things in mind instead of focusing narrowly on the app and saying that the app is what led to the rise of Uber and Lyft. Traditional cab companies have offered apps, too, but so long as they choose to comply with the relevant law, they cannot compete with Uber and Lyft on a cost basis.

On the issue of concentration, yes, I agree, restaurants are sort of an exception. There are still small, family-owned restaurants that do quite well in the economy; we'll see whether that's true after Covid. But in a number of other markets, concentration really is the norm, so I'll just focus on one: Healthcare. Healthcare accounts for about one out of six dollars of GDP in the United States and local hospital markets across the country are highly concentrated. Insurance markets are highly concentrated. Pharmaceutical markets are highly concentrated. So even if you ignore the rest of the economy and

say that concentration is not really a problem, it is a huge problem in what is the most important and largest sector of the economy. And part of the reason it's so concentrated is because federal antitrust enforcers and the courts have failed to preserve unconcentrated, competitive markets and have allowed rollups in hospital market after hospital market, same story in insurance and pharmaceuticals.

MR. DOUG MELAMED:

Hospital mergers have been clearly an area of failure in antitrust enforcement; I don't dispute that.

MS. MANDY CHAN:

So, you know, I have a question for both Professor Melamed and Sandeep. What are your thoughts on the composition of the antitrust community and do you think that that composition has had any impact on policymaking or the application of the antitrust laws?

MR. DOUG MELAMED:

I'm not sure that—

MR. SANDEEP VAHEESAN:

I think so. I mean, if you look at antitrust debates, they are—let's, you know, on racial, occupational, and educational grounds, not very diverse. You're talking about a relatively small group of lawyers and economists who are disproportionately white and male, who often spend time representing large corporations, so there is a composition problem in the antitrust community. These are laws that affect all of us. It shouldn't be left to a relatively small elite that brings a, you know, corporate-oriented perspective to these issues to be deciding all of the relevant policy questions.

You know, if we moved over to labor law, we'd find it deeply concerning if labor law was interpreted and applied entirely by management side lawyers. You know, that's one complaint against the Trump administration and Secretary of Labor, it's that NLRB have been people who spent their careers representing management against unions. But unfortunately, when you move over to antitrust, there's no similar concern, whether in democratic or republican administrations, have just accepted that most of the relevant staffers in leadership will come from corporate defense bar and industry and that really has to change and I think there are other models, encouragingly.

So I worked at the CFPB for about three years and policy debates there were very, very different. You know, lawyers and economists played an important role; we had our place but we also engaged with the public, we engaged with faith leaders, we engaged with champions of racial justice, we engaged with consumer advocates. We just talked with a much broader range of stakeholders than the DOJ and FTC typically do. And I think that model should be ported over to antitrust. There's no reason that issues of public import should be decided exclusively by this relatively narrow, nondiverse clique of lawyers and economists.

MR. DOUG MELAMED:

Well, the agencies, in my experience, certainly consider the input from a variety of sources–plaintiffs and customers and public interest organizations, as well as the kinds of lawyers that Sandeep had in mind.

I do think there are two things that are related though. One, antitrust, the way it's taught and the way it's practiced in the agencies–not so much in private litigation but in the agencies–is very heavily influenced by economics. And economics, unfortunately, has tended to skew very male. The economics profession is taking account now of the problem of male skew among economists and some of the consequences of that. I think that may explain a little bit of the gender disparity, but I think it's declining over time as I perceive it, including a very talented associate on this panel. But I think there clearly is some issue there, whether that affects outcomes in the way that we're talking about today, is not clear, but I think there really is an unfortunate demographic skew in the antitrust community, generally—plaintiff side, as well as defense side.

That relates to a larger problem, which is that antitrust has become increasingly technocratic and increasingly complicated, so much so that I've come to think when I look at some recent Supreme Court—not just the Supreme Court—recent decisions like *American Express*, *Qualcomm* and others, that judges just don't have a clue; it's just becoming too complex for them. So I do think there's a serious question of whether antitrust doctrine, antitrust law, needs to be revised a bit, perhaps in ways that make it a little bit less technocratic, a little more accessible to generalist courts. And to the extent that a byproduct of that might be some amelioration of the demographic attributes that are implicit in the last exchange.

MR. SANDEEP VAHEESAN:

So, I'll offer a quick thought on the economics of antitrust; I'm glad Doug brought it up. So it is true, antitrust has become increasingly dominated by economic concepts and sort of economistic discourse. You know, putting aside whether that's actually consistent with, you know, legislative intent and plain text of the law, economics in antitrust has been very theoretical, very deductive, not particularly empirical, so if you read Supreme Court decisions, you know a lot of agency policy documents, they tend to work from, quote end quote, "simplifying assumptions to understand the world." So if you read the 2010 Horizonal Merger Guidelines, it has a piece in there saying that mergers generally produce more efficient firms and can benefit consumers. And you know, that's an assertion that actually doesn't have much empirical basis behind it; it's taken on almost a quasi-religious status and people just repeat it and don't really ask—don't often ask, like, is this actually true; what's the basis for it? There's actually a lot of evidence showing the opposite; that mergers often make firms less efficient, not more efficient.

So to the extent that we need economics in the field, the economics should be much more empirical; it should be about economists and statisticians and accountants actually going out there and studying firms and studying markets. And you know, I'm obviously biased when I say this but I think the CFPB presented a good model. We had a team of economists that would actually go out and study consumer financial products and understand how were consumers using them, how did they understand the terms when

they took out a loan, did they actually have any understanding of, you know, arbitration clauses in their credit card agreement? So we need a much more empirical antitrust economics and one less dependent on simple and often simplistic theory.

MR. DOUG MELAMED:

Antitrust law as applied, in my experience, in court and in the agencies, is very empirical and that's one of the problems, in a way, a lot of arcane econometric work is done and so forth. You can't do it on a general level because it's not regulation; it's case–by-case enforced by 51 government agencies and every private party that's been injured by a violation and by generalist courts around the country. You do it on a case-by-case basis. The problem is that a lot of judges don't really understand that and so they default to the simpleminded notions that they had picked up when they were in law school or went to a sort of a law and economics bootcamp for judges or whatever, so there is a problem, I think, with the way the judges, many judges, deal with antitrust issues, but it's not that the practitioners of antitrust are insufficiently empirical.

MR. SANDEEP VAHEESAN:

Yeah, I guess what Doug said lends support to my earlier point about Congress reasserting its authority in this area. If the judges are just hopelessly indoctrinated by these law and economics seminars, and there's a lot of evidence that they are, we can't count on them to get things right so we need someone else to step up and I think that is, in part, Congress. I think the FTC could be doing a lot more here; the FTC has the authority to propose and finalize competition rules; it's not a power it has used much in the past 40 or 50 years but there are tools that the FTC has to sort of reclaim power and put its real expertise to use and prevent judges with, let's say, imperfect learning from making all the relevant decisions.

MR. DOUG MELAMED:

You have more confidence in Congress' ability to fine tune economic policy than I do.

MR. SANDEEP VAHEESAN:

I have more faith in Congress than I do in the judges who appear to lack both expertise and democratic accountability so it's really a relative question here.

MS. MANDY CHAN:

Well, thank you so much, Professor Melamed and Sandeep. With our sort of last couple of minutes here, do you have any parting thoughts or suggestions for where our audience can look up further about these issues and learn further about these issues?

MR. SANDEEP VAHEESAN:

I'll offer a couple of thoughts. I think the recent House antitrust subcommittee report is definitely worth reading. It really looked under the hood of the big four tech companies and showed the methods and acquisitions that they've used to acquire dominance in a number of markets; I think that's a highly worthwhile document to read.

And maybe a little bit unexpectedly, I think the complaint of the DOJ and 11 states filed against Google last week is a fine piece of legal and analytical work and should be read by all antitrust lawyers and practitioners.

MR. DOUG MELAMED:

I think the Google complaint is a good legal document but I disagree with Sandeep about the House report and I think that illustrates my concern about Congress. Yes, they gather a lot of good and interesting information; that was a valuable service. But it was not—it was a political document; it was not an economic analysis, legal analysis, or policy analysis. It didn't look for other possible explanations of ambiguous information. It was very tendentious, used manipulative language, and didn't consider contrary policy arguments when it proposed recommendations. So it was just a political document that had really very little analytical value, I think.

MR. SANDEEP VAHEESAN:

I would just say these are all political documents; it's just whether we're honest about the political content and status or not. There is no apolitical intent in antitrust.

MR. DOUG MELAMED:

And you could also be serious about the analysis that's required to do good lawmaking.

MR. SANDEEP VAHEESAN:

Absolutely. And I think the report embodied that. And I certainly believe that analysis should be careful and rigorous and it's often been missing in antitrust so I don't dismiss or discount the value of careful thinking, careful fact gathering, at all; I think it's vitally important.

MS. MANDY CHAN:

Well again, thank you so much for your time and your thoughts today; incredibly interesting.

A CONVERSATION ABOUT DIVERSITY, RACISM AND EQUALITY IN THE LEGAL PROFESSION

By D. Bruce Hoffman[1]

A goal of the Antitrust and Unfair Competition Law Section is to increase diversity and inclusion in the antitrust bar. This esteemed panel of antitrust experts from in-house, private, and government practice discusses the state of diversity in the field. It also discusses models for increasing diversity in organizations, like the Rooney Rule used by the NFL and the Mansfield Rule increasingly used by legal departments. The panelists share strategies that can be employed at an individual level, for example, engaging in intentional allyship and sponsorship of diverse lawyers. In the end, the panelists agree that speaking up as an individual to support inclusion and foster belonging is key. Remember the power of one.

PANELISTS

Harvey Anderson is General Counsel for HP Inc. Harvey has over 25 years of experience in public policy, regulatory compliance, corporate/commercial transactions and IP litigation. Most recently he served as the Chief Legal Officer of AVG Technologies, and prior to that he spent six years as the Chief Legal Officer of Mozilla. Throughout his career, Harvey has focused on public affairs issues, most notably launching the "Do Not Track" privacy initiative, organizing the SOPA internet protest movement, and serving on the FCC's Open Internet Advisory Committee. Harvey has a J.D. from the University of San Francisco School of Law and a B.S. in Civil Engineering from Marquette University.

John Gibson is a Partner at DLA Piper where he specializes in antitrust, commercial, healthcare, and technology litigation. He was previously a partner and member of the management board of Crowell & Moring LLP. Gibson has won numerous accolades, including being named the 2019 Attorney of the Year by the Thurgood Marshall Bar Association. He also served on the executive committee and board of directors of the Constitutional Rights Foundation. Gibson has a J.D. from University of Michigan Law School and a B.A. from Harvard University.

MR. BRUCE HOFFMAN:

Welcome, everybody, and good afternoon. It's the third day of the 30th Annual Golden State Institute on Antitrust, UCL and Privacy; a great conference. And this panel is a conversation about diversity, racism, and equality in the legal profession. My name's Bruce Hoffman; I'm a partner at Cleary Gottlieb and the former director of the United States Federal Trade Commission. I'm going to, to a large extent, just serve as a moderator for today's conversation.

I'm really pleased and excited to have with me virtually today Harvey Anderson, who's the general counsel of HP, Inc., and John Gibson, who's an antitrust and litigation

1 D. Bruce Hoffman is a Partner at Cleary Gottlieb Steen & Hamilton LLP focusing on antitrust enforcement, including merger clearance and conduct investigations, and antitrust litigation. He is a former Director of the Federal Trade Commission's Bureau of Competition, heading the FTC's antitrust enforcement, as well as a former Deputy Director of the Bureau of Competition and Associate Director of Regional Litigation for the FTC.

partner with DLA and that firm's Los Angeles office and a very prominent antitrust litigator, ranked in Best Lawyers in America and an all-around star and I think we're going to have a really good conversation.

I think we're going to get started by doing a little bit of level-setting or background to try to get a picture, or paint the picture, of where the legal profession and to whatever extent it's ascertainable, the antitrust practice within it, stand on diversity, racism, and equality; all the metrics of inclusion. And with that, let me turn it over to Harvey to talk a little bit about where things stand from the perspective of companies; of corporate clients, corporate entities, and legal departments.

MR. HARVEY ANDERSON:

Yes, Sir. Thank you and thanks for the chance to talk about this today. I think there are two dimensions that I think about. There's the, first, the quantitative dimension and the qualitative dimension. On the quantitative side, at least from the tech sector and I'm from the tech sector and I worked in the valley for most of my career, I think on the D&I side, it's not that great. Just generally speaking, to net it out, you know, the industry's been criticized quite a bit, whether it's, you know, law or engineering or any part of the tech sector as a whole. And specifically, in the legal sector, it's not particularly better. And then from the number's perspective, I mean, if we looked overall across the industry, you see minorities represent about 19 percent of lawyers, black–that's across the U.S.–African Americans about four percent, I think five percent for Latinx and another 4.7 percent or so for Asian Pacific Islanders. And so that's sort of the general context and then I think it just gets—goes down from there.

And then, more importantly, it's not just a number so to speak, who's doing what and where are they on the leadership side? So on the inhouse side, you see, I think about 11 percent of general counsels are minorities and 26 percent are women, so that's still not that great when you think about it and I can almost count the folks that are GC's in the valley that I know that are African American.

But I think the more important number is not a number; it's the qualitative perspective of it. And there's this notion–I don't think we have a good metric for that. We measure engagement scores in our companies but it's this notion of–we call it a sense of belonging and to the extent that that's much higher, you retain more people, it's a more inclusive environment, and I don't think we've done as an industry really well at sort of measuring what that belonging looks like. But that's where a lot of our focus is today, so I'll stop there and let you guys share a bit.

MR. BRUCE HOFFMAN:

Well, John, is the picture any different, better, worse, in the law firm world?

MR. JOHN GIBSON:

Thanks, Bruce. The quick answer is I think it's similar. So first of all, I'm just really grateful to be exchanging ideas here with you and Harvey today. And also, to be talking with and directly, virtually, members of our Golden State Antitrust Bar.

In terms of big law, we're still looking at–despite very sincere and longstanding programs and intentions–you know, we're still looking at an entrenched system in most of big law where the in-group kind of sponsors and promotes other members of the in-group and that's human nature, in many ways, and so the out-group kind of stays out and the in-group stays in. As an example, at the end of last year, at least, there were–from the Am Law 200 law firms–only 4.4 percent of the non-partner lawyers in those firms were African American. Only two percent of the partners in Am Law 200 firms were African American; two percent compared to over 13 percent in the U.S. population at large, so there's a lot of work to be done. Dramatic underrepresentation, particularly as you escalate the ranks from associate to counsel to partner in big law, so we've got a pipeline problem and we've got a retention and promotion and opportunity problem.

But that's the bad news. The good news is that allyship is alive and well in various pockets and I think what we've got to do is bring that to the mainstream. And here we are in a moment where, unlike really any other in recent memory, we have a lot of people coming together and saying we want to do this. And so I think if we take the current moment and take the allyship that exists in pockets and bring it mainstream, we can make a huge amount of progress here.

MR. BRUCE HOFFMAN:

Harvey and John, one of the things that I've noticed over time–and I'm thinking here about both government enforcement and the government antitrust space and the antitrust bar–is that, you know, Harvey, you said things are, if anything, worse in the valley in certain ways than they are in the population at large. And John, you made the point about how as you go up in the ranks of seniority, you start from an already underrepresented–significant underrepresentation to a really dramatic underrepresentation, as the situation gets worse. And it seemed to me that that's true in antitrust.

You know, antitrust has a reputation, I think, as being one of the less diverse practice areas in the bar. There's been statistics–I know the New York Bar gathered some statistics on that in New York a few years ago. A lot of this is difficult to track because it's a little hard to pin down who's in the antitrust bar, necessarily, since a lot of folks who are antitrust lawyers also litigate other things. But I do know that if you compare, for example, the number of women lawyers, which is about 38 percent overall, to the number of lawyers who are female in the antitrust section, the ABA antitrust section, that's only 27 percent, so that's significant underrepresentation. And anecdotally, the numbers look even worse when you're looking at black or other racial or ethnic or national origin and minorities. Any sense, first of all, whether in your experience that's true and, if so, any ideas why or is there anything about antitrust in particular that's an issue?

MR. JOHN GIBSON:

Well, I'll start. Pretty soon I was going to turn it back to you, Bruce, since given your experience with the Bureau of Competition, but you know, I think that because it is so specialized, I think that, for example, I didn't take the antitrust class in law school and kind of stumbled upon antitrust practice as a litigator 10 years in practice and got very deeply into it, obviously. But I think that we're—it's not, you know, widely known and solicited as an expertise and practice area where there are a significant amount of attorneys of color.

So I think that's one issue when folks are being recruited out of law school and recruited into law schools and, in fact, recruited into law firms and other places, I think there's often not a lot of discussion about antitrust as being a hot area for you as an attorney of color.

MR. BRUCE HOFFMAN:

That makes a lot of sense. In fact, I think we're going to talk in a little bit about some specific experiences with the FTC with HP and otherwise. But before turning to that, just to pick up on the point you just made, John, about people not being aware of or not feeling like whatever opportunity there is in antitrust is for them, thinking more broadly about the profession and about the issues we talked about at the beginning with increasing diversity in the profession, increasing equality, what are the high levels? Are we talking about increasing the pipeline at the intake level and getting more people in? Or are we talking about improving opportunities throughout or as, John, to get to your point or, Harvey, yours about who are the GC's, who are the partners, are we talking about addressing those issues or is it all of the above?

MR. HARVEY ANDERSON:

I'll take a shot; I think it's all of the above. I don't think you can just focus on the pipeline but not address retention and belonging because it won't matter. And we have data that suggests that minorities tend to tap out earlier; it happens in the legal profession, in law firms, than other folks, other cohorts of employees. So there's something that's going on once you're there anyway so you've got to do both.

And then I think the–so it's the pipeline environment once you're there and I think there's something about leadership at the top, too. Organizations that really make inclusive environments and D&I priority, it just makes it a–it just changes everything. So it's not a side on thing; it's just a core principle of how we operate and I mean sort of little "d" diversity. Like, we want diverse thought from–you know, we want different experiences, different backgrounds, different geographies, different parts of the world. You know, truly embracing diversity.

MR. JOHN GIBSON:

Yeah, I think that's right, Bruce. I'll just add, from my perspective, I think opportunity drives in a lot of ways belonging and the pipeline and promotion because if you see the opportunity ahead of you in terms of maybe people who were a few years ahead of you who are similar to you and you see they're getting opportunities, you're encouraged and, you know, you want to work hard and because you see at the end of the—all your hard work, comes the opportunity that you really got into this business for, so I think that's very important as well.

MR. BRUCE HOFFMAN:

Those are great points and we're going to come back, I think, and spend some more time talking about each piece; like how do you address the pipeline, how do you address the opportunities at the end, how do you address retention and the outcomes.

Maybe we should go to our little case studies. So I think, John, you were going to put some slides up. We have a PowerPoint that I think is in the materials; we're not going to walk through. I'm sure everybody will be relieved to know we are not going to walk through slide–by-slide but we're going to pick up on a couple of the slides to talk about them. And we thought we might start with the FTC and–yeah, that's a great picture of the FTC headquarters building in DC, but I do want to actually give a shout out, since this is the Golden State Conference, to the FTC San Francisco Office, which is a fantastic office with great lawyers and who do really great work, including last year litigating one of the most important anticompetitive conduct cases that the FTC had. So for anybody out there in the Golden State, if you want to do antitrust and you want to work for the government, think about the FTC San Francisco Office; that's my PSA recruiting announcement for the FTC San Francisco.

But on that note, now let's skip to the next slide, I think. Yeah, so let me just give a very quick background on the Bureau of Competition and I suspect that many people who are at this conference are familiar with it, but the FTC has two main enforcement arms; one is the Bureau of Consumer Protection, which actually, I think, more people know about; that's the folks who do telemarketing issues and consumer fraud and all those kinds of things.

But the Bureau of Competition does antitrust with the FTC; that's the organization that I ran for the last few years. And we have the–I put the mission statement from the Bureau up here. What I wanted to focus on though was some internal points about the Bureau having to do with diversity and, particularly, with the points that Harvey and John were making about how does diversity play through the organization into the top.

So the Bureau of Competition in 2020 had about 528 FTE, roughly 300 of whom were lawyers, and those groups are–they're organized into groups of, between usually 20 or 30 staff lawyers, with a small number of managers. It's a very flat organization without a lot of positions that are considered ranked, I suppose is the way you put it, or the leadership positions in the agency.

John, let's skip–let's go to the next slide. Maybe skip that one; I want to actually kind of maybe go to the last slide. Right, so the FTC has long worked hard and made a real emphasis of diversity and inclusion and I think that's been true, particularly from the top, if you look at the current chairman, Joe Simons, he's made this a big focus. That is true for acting chair, Ohlhausen, and for Chairman Ramirez, and Chairman Leibowitz, under President Obama. It's long been a focus of the agency. And in general, I think the FTC's done pretty well with diversity and some of the prior slides have some statistics on that to support that point. But nevertheless, one of the things that you could notice about the FTC is if you looked at it in 2017, that diversity kind of fell off at the top and here I'm not talking about the political appointees but I'm talking about the career staff management, the career leadership in the staff.

So 2017, out of 27 managers in what I think of in sort of the litigating groups, the enforcement groups within the Bureau, there were only six female and zero diverse by ethnicity, by LGBTQ status, you know, any–or any measure, you had an incredibly non–diverse leadership group. And you know, I think that's improved a lot. I don't know exactly what the current numbers are but by roughly the time that I left the agency, out of

that group, it was slightly larger because a new litigation group had been established but the percentage that were female had risen to 43 percent and there were 13 percent–which is only four people; we're talking about a small organization–who were otherwise diverse.

There were also some issues that we looked at that had to do with hiring and recruiting. How do you find, how do you get, people into the pipeline? How do you make people realize that working at the FTC is a good move so you can help your career and, particularly, how does the agency get out of its comfort zone, which is producing perhaps not as diverse a group as could be and within the staff and in a position to be promoted? And the agency did a number of things to try to address those issues. I put down here–and we can talk about them later more specifically if anybody wants to–but I think overall, the bottom line of this is it's early to tell whether this is really going to help but there were a number of things where the sense and the leadership of the agency was there were actually small structural changes that could be made in the way that we were recruiting, the way we were hiring, the way we were promoting that could potentially have some beneficial outcomes and time will tell whether that worked.

So that's my short vignette about diversity with the FTC and with that, John, I don't know if you want to exit this? Or I know you had a case study that you wanted to talk about; I'm not sure if you wanted to go back to the slides for that?

MR. JOHN GIBSON:

Sure, I'll–since we're in the slides, why don't I take that. I do want to swing it back to Harvey as quickly as we can. But I wanted to talk about the Rooney Rule in the NFL and how during the first 10 years of that, anyway, why it was so successful and, you know, you might be thinking what application does that have to a legal profession and the antitrust bar? And I think what the relevance is is that the NFL was able to take an entrenched system that was unconsciously biased and was keeping the out-group out and figure out how to change things by casting a wider net and by leveraging off of intentional allyship through first, really winning the hearts and minds of the NFL equity holders and general managers.

So quickly, what is the Rooney Rule, for folks who don't know? Basically, it was a rule that required, still requires, NFL teams to interview minority candidates for head coaching and general manager positions when those vacancies need to be filled. It's named after Dan Rooney who, at the time back in 2003, was the equity holder of the Pittsburgh Steelers. And what happened, essentially, is that in 2002, specifically on Martin Luther King weekend 2002, two of the three head coaches, black head coaches in the NFL, were fired. And those two coaches had–one of them had a winning record at the time; the other one had just finished his first losing season in 10 years. And Johnnie Cochran and another civil rights lawyer, Cyrus Mehri, along with an economist, got to work and put together a study. And what they found is that the so-called group, African Americans and other coaches of color, actually outperformed the in group in terms of win-loss record, which is key in the NFL and playoff appearances and wins, but they actually got inferior opportunities.

So this group got together with Rooney and other folks in the NFL to put together this fair competition proposal. And the proposal was really just interview at least one

person of color as you look at filling positions. So a couple of really interesting things happened. As you can see here, we marked with a vertical line where the Rooney Rule was instituted; there's a dramatic increase for at least about 10 years in the number of head coaches and general managers of color as a result of this, but it really came from a number of events that won over the hearts and minds of folks making the decision. And one was, a few years later, two black coaches met in the Superbowl and for all the world to see, so those are the two teams vying for the championship.

Another thing that happened is that Rooney himself was faced with a situation where, you know, in the 1970's, the Steelers were the team in football and won multiple Superbowls, were the team to beat, but by 2006, they'd fallen on hard times and they were not the same team. So the coach was retiring and that coach, importantly, was championing his protégé, who was another straight, white, male, who was a head coach of a college team. And Rooney said, you know what? It's my rule; I'm going to interview at least one black candidate, which he did, and that was a very young coach in his early thirties named Mike Tomlin. And there was just something about this guy Tomlin, the way he talked about offensive and defensive schemes, the way–his approach to relationships with the players, and Rooney said, you know what? This is a first for our team and our franchise; I'm going to do it. I'm going to hire this young black guy who has never been a head coach and has only been a defensive coordinator for half a second, which–and it's unprecedented but I'm going to give it a shot because we're losing. And a year later, this guy, Mike Tomlin, becomes the youngest head coach in NFL history to win a Superbowl. And the story continues.

But I think some important points about this, the benefits of the Rooney Rule are not only to folks of color but also straight white males. So for example, John Harbaugh was a coach who had never been a head coach, never had been a defensive coordinator. He was a defensive back coach and those folks typically were never considered for head coaching jobs in the NFL and he was hired, really kind of as part of the Rooney Rule and quickly, thereafter, won a Superbowl, proving that he was at least qualified for the job.

And the final point I'd like to make is in connection with the Rooney Rule, a group put together this ready list of potential candidates who had never been head coaches but they seem to have the qualities that if you cast a wider net could be successful candidates. So I think that it's really up to–and this model became the precursor for diversity efforts that we're using in the legal profession, as well, in the Mansfield Rule.

So just getting to the end, I think one point about how you win over hearts and minds is it's just generally not going to work if you impose a system on folks. We're going to do this and this is the change we're going to make. But if you can really talk about it, like they did in the NFL, and so everyone comes to the realization that, "Hey, how is this going to affect me? I'm a straight, white, older man. How is this going to affect me and my family if we institute this rule?" And what people over time realized is that what's going to happen is we're going to cast a wider net, it's going to be to my advantage and we're going to have a wider pool of qualified folks who have the ability to see the fruits of their labor and their excellence.

So with those open conversations in the NFL, the rule worked for the first 10 years and really made dramatic change. I think we can use something similar in the legal

profession but we first have to have this robust conversation about what does this mean for me? If I'm going to be a true ally, what does it mean for me and my family if my proteges are getting promoted and advanced and have greater opportunities?

MR. BRUCE HOFFMAN:

That's great. Thank; thanks, John. So I know, Harvey, when we think about the point that John just made, how do we integrate this, the Rooney Rule and particularly what happened there in the legal profession, I know that HP's been at the cutting edge of a lot of this and that's saying that obviously you spend a lot of time thinking about and speaking about it. What can you tell us about the HP experience and your thoughts on this?

MR. HARVEY ANDERSON:

Yeah, sure. I think there are two key things to talk about. The first is using our influence and our dollars to affect the legal profession as a whole. And Kim Rivera, our CLO, launched a diversity holdback program a couple of years ago; about three years ago. And essentially said, in broad terms, that if you're going to do work for HP, we want to see diversity in the team of people that work for us, and relatively low thresholds, by the way, and if you can't meet those thresholds, there'll be a 10 percent holdback in the billings and those are the terms to do our work. And there's lots of exclusions, actually. If you're a small firm, you're under a certain level, you know, it doesn't apply; so it really just applies to bigger, larger firms that have a chance to actually comply.

And the point of that was to bring more diverse, younger attorneys into the workflow so that they get exposed to this work, they get to get the experience to move themselves up the ranks. And also, I think there's a pragmatic part of it, too; we do believe that diverse teams deliver better results. We want the broadest possible perspective, so that was one piece.

And when we first launched it, we had about 43 percent compliance; that was three years ago. Today, I think we're over 99 percent compliance with that holdback program. And then, so the next question is how do you evolve that, how can others adopt that? I think there were a number of proposals out there that different companies use; this one was considered a little bit more of the stick than the carrot. I think they—we tried the carrot for a long time, it didn't really do a lot, so we moved to that approach, but that's one piece. I do think that over time, those thresholds will probably start to go up. I mean, if you can't meet the thresholds now, it's—I mean, they're easy to meet. They're welcome with open arms thresholds.

The second piece we've done internally is an extension of the Rooney Rule and thanks for that history behind that, John, and the emotional and psychological parts of it, too. I think understanding that is important. There's an organization called the Diversity Lab, which I bet a bunch of the folks on this call are a part of; their firms or organizations are a part of. But the Diversity Lab has a program called the Mansfield Rule, which essentially is an evolution of the Rooney Rule and it says that when you make significant hires or placements on your team or you allocate significant bodies of work, half of your pool that you consider be diverse. And I think you have—there are some places for exceptions but that has been—we just adopted that this year in our team, across DLA, and it's really interesting and it doesn't—so it doesn't mandate the outcome; it just talks

about the pool of people. And it's not one person; I think there's a bunch of signs out there that says having a pool of candidates with one minority in it actually isn't the best way to approach it. You need to see—it does a disservice to that candidate. But if you really embrace it, it changes the way you recruit, it changes where you go. If you're really trying to build a pool of people, it creates a different behavior. And we recently did a senior hire on our team, you know, and we reached out to, you know, a whole bunch of different bars that we wouldn't normally reach out to. It required a lot of intentionality, it required using our networks, and the pipeline of folks we had was really robust; it was fantastic. I mean, just a fantastic pipeline of candidates from all different kinds of experiences from different parts of the world. So I was really pleased with that.

And I'll say, you know, we're not Mansfield certified yet; we have to do some data pieces behind it. But the second part of it is the thinking about senior assignments. So instead of giving that senior plum, that hard, strategic project that you know X can do–like, I know Bruce can do it so I ask Bruce to do it–well, suppose I say, "Hmm, who else could do that? Bruce did it the last three times; how do I disrupt or interrupt the pattern and take a chance, you know, it's not even a chance necessarily, but who else can do it?" And just start to change our thinking and our behavior so that folks have those experiences that advance their professional careers. Because most of our advance now, at least I'd say in the legal field, is not a straight vertical up; it's a lateral, experiential expansion that makes you good and creates other opportunities. So at least, that's how most of my growth has been but that's been our experience.

And I think the third part is working on actually creating an inclusive environment and that means a couple things for me. One, practicing what inclusive behaviors look like. How do we talk to each other? How do we engage in meetings? Do I cut you off every time you speak, Bruce? Is there someone that's quiet in the back that never talks? How do I bring them into the conversation? Do I amplify comments, particularly around gender and color? Do I say that's not a–you know, say I don't agree? There's way to say you don't agree that some are more inviting and inclusive than others. You know, like I found myself saying the other day, "Well, I don't disagree." Well, what the heck do I mean by that? I don't disagree. Does that mean I agree? But why didn't I say agree with that? That's a great idea. So I had to actually change–catch myself and then restate it in the moment but it's okay if you create a safe place to do that in your environment; it's not a bad thing to acknowledge that you did it. And one of the exercises that we do when we have our team meetings, we'll play what I call the inclusion game and we identify a list of inclusive tactics and responses and comments and you get a point and there's a prize at the end of that meeting. Let's say you're having an offsite or a leadership team meeting. So throughout the course of that meeting, people that are saying more engaging and inclusive comments get a point and when you say that, you know, "Hey John, that's a silly idea," and minus one. So then at the end, there's a prize. But what that does is it creates a safe place for us to practice these behaviors that can spill out because there's a lot that we can do on a day-to-day basis; it's not just through the pipeline stuff. Those opportunities happen less often, when you think about it, and particularly if there's pressures, economically, in terms of hiring and if you're not growing as fast. But how do you create the environment that feels inclusive and drives that sense of belonging? So I think there's more to do there.

And I think the final piece is recognizing that there are—there are microaggressions that live in our culture, that live in our institutions. And people experience those so being

honest and transparent about those, calling them out–and John started with allyship–allyship is really important. And there was an example, I heard someone make a comment about and said, "This woman wouldn't want that job because she has a family." Well, wow; that's a lot of assumption built into that baseline gender and family status. And I had to call it out in a team meeting and it turns out, there's nothing behind it; it was benign, it was—there had been discussion about it and the candidate really did not want that opportunity when given that choice. But even when you hear those things, you have to be an ally and speak up, so we all have to be allies to model the behavior in the environment that we want, which is something each of us can do.

MR. BRUCE HOFFMAN:

So, John, to pick up on a couple of things that Harvey said. You know, he talked about inclusion in the environment, about the microaggression issue, about how to interrupt the patterns and then the opportunity both in terms of building the pipeline, but then also at the top, do you—I mean, you're a very successful litigator and antitrust lawyer, big law partner, the pinnacle of the procession. What's your view on those issues in terms of the law firm environment? Are law firms good at this? Bad at this? Doing better? Doing worse? You know, what—in light of your experience, what would you think?

MR. JOHN GIBSON:

Well, a really good question, Bruce. I think law firms are trying and I think that, you know, law firms are profit-making businesses and they follow what clients want, so that's why I think it's so important–and I love the way Harvey put it–interrupting the pattern and, you know, that's just exactly what the diversity holdback program that HP instituted is doing. It's interrupting the pattern at big law firms by forcing conversations. So you get this, you know, edict from–or suggestion from a client—

MR. BRUCE HOFFMAN:

Edict. We'll go with edict [laughter].

MR. JOHN GIBSON:

[Laughter] It's not an edict; you don't have to follow it. You don't have to do it if you don't want to; you just won't get the business, right? Which is brilliant and so, law firms start with, okay, so we've got, you know, one or two longtime relationship partners at the firm for HP who kind of had funneled or done all the work for years. Now what, right? How do we get—so HP, one of the things it calls for is to have lawyers who are supervising the matters be diverse and also relationship partners with the client at the law firm to be diverse, more diverse, and so, you know, as a practical matter, you may have one person, one longtime partner, who is saying, "Listen, I get origination credit for this client and I make a lot of money or a large part of my competition every year is based on the origination dollars that come in from HP. How is this going to affect me and my family if we diversify, you know, who's the relationship partner?" And so, I think it starts these great discussions and what I'm seeing come out of it, in part, is you know, law firms, whether it's law firm management or the head of the group that primarily does the work for a client, saying, "Listen, powerful partner, we're depending on you to do just exactly what Harvey said, which is mentor and sponsor some lawyers who have not been in the

flow of HP work but can do it and, you know, to introduce them to the client, to help get them ready, to do just what a sponsor does for a protégé across differences."

That's the big difference, I think here, is that most of these systems we see in place, where the in-group stays in and the out-group stays out, are based on human nature. We deal with who we're comfortable with, we mentor and sponsor whom we're comfortable with, and maybe someone who reminds us of ourselves or our son or daughter or family member. And so what we're saying—so what I think, you know, some of the things that HP is doing and other clients are doing is forcing these great conversations where relationship partners and powerful partners at law firms start to say, "Wait a minute, I can make a difference, right? I can still do well for me and my family financially, but I can make a difference now and down the road for somebody else and change what we're seeing in terms of the lack of diversity in the legal profession and some of the issues we're having in our society. I can do that as an individual." So I think that's very powerful and I am seeing those conversations happen and we're going to see what happens from here.

MR. BRUCE HOFFMAN:

Now, you highlighted a point that I think really touches a lot on some of the programs that Harvey talked about. One of the things about law firms is not—at most law firms, there's not a ton of internal structure, right? Unlike in a company where you might have a progression of steps that are well-defined from this position to that position to that position. In law firms, it's a lot more amorphous and the channels through which people advance and all those things are not easy to identify.

From your perspective, the thing about the law firm–and looking at statistics, like Harvey mentioned, that retention is poor for minorities in law firms–and that's absolutely true and, you know, we've seen it; we've been looking hard at this at Cleary this year and one of the things we see is that we lose our minority associates earlier than we lose other associates, right? There's a noticeable, significant difference and that's something that we're thinking a lot about how do you address? But in the law firm context, where you don't have these clearly defined paths to progression, where if you go in as a–when I started out as a junior associate, I had absolutely no family knowledge, no one in my family was a lawyer; I knew nothing, I had no idea how you advanced at a law firm and I'm a, you know, white guy, so it's going to be inherently easier for me by all relevant statistics. I can only imagine what it is if you're not a white guy and you come in with a similar background to mine and you obviously have no idea how you progress.

How at the law firm do you address this issue of the lack of clarity, I guess in the progression process, the advancement process? And then, Harvey, from the client standpoint, how can you help law firms navigate that; figuring out ways to address this problem where there's not–it's hard to define and to identify the problem because there isn't this clear progression?

MR. HARVEY ANDERSON:

Well, just one assumption I just want to correct. I think in the corporate world, it's not so clear, either.

MR. BRUCE HOFFMAN:

Fair enough.

MR. HARVEY ANDERSON:

At all. And so, I don't always think it's clear–it's funny, in the legal world, it's seems clearer. You can go from one level to another to another, then there's a partnership, either equity and nonequity partnership. It looks cleaner but it's probably equally opaque in both worlds.

MR. BRUCE HOFFMAN:

Right.

MR. HARVEY ANDERSON:

So no magic bullets from us but really good question. John, what do you think?

MR. JOHN GIBSON:

Sure, that is a great question and back to your point, Harvey, of creating a safe place for communication, I think early on when a lawyer comes in a law firm, there ought to be some discussions where you have quote "successful partners" who can talk about the different paths that they took. And you know, some of those paths may not apply directly to a minority lawyer, but that's part of the communication and conversation we've got to have to figure out how do we–okay, one, how do we create different paths that are going to be successful and not rely on the so-called, you know, good old boy network, but also, you know, how do we leverage off of the so-called good old boy network in a way that it's going to reach out across differences and be helpful to folks other than good old boys, right?

And so, just as a very quick example, I, you know, there might be a senior partner whose habit is to, you know, who comes in early and goes to coffee, you know, at her or his favorite coffeeshop. And so, one path to success for an associate might be, be there outside that partner's office when he or she goes to coffee every morning at 7:30, or at least some of the mornings, to talk about what's happening in, you know, antitrust practice, what's going on in that partner's day, what are the big client matters that that person's working on, and pretty soon, if you're accompanying that partner to coffee multiple times during the week, you're going to be brought in as part of the in crowd.

MR. BRUCE HOFFMAN:

Right.

MR. JOHN GIBSON:

And so, I think learning from, you know, past prologues, so learning for history, and learning different partners paths to success and having a conversation so partners can be thinking, "Wait a minute, I've been picking people who look like me and think like me.

Here's this person who wants to be involved in my practice. I'm going to reach out to that person and bring them in and help them succeed."

MR. BRUCE HOFFMAN:

Right.

MR. HARVEY ANDERSON:

You know, John, I heard you say all that to say "mentorship,"–MR. JOHN GIBSON:

Yes.

MR. HARVEY ANDERSON:—whether it was intentional or unintentional.

MR. BRUCE HOFFMAN:

Right.

MR. HARVEY ANDERSON:

Right? That's what that sounds like to me and to the extent that there is mentorship of folks of all new talent, by the way, you create a better outcome. Like, all of our new folks, we try to assign mentors to all the new people that join our teams, irrespective of, you know, where they stand or not in their diversity stance. So because you do need that to help people understand how to grow their careers, what are their kinds of experiences and opportunities? And looking back at it, you know, as a young associate, I didn't even know what questions to ask, to be honest with you. And if someone happened to mentor you and you were lucky–they took you along, maybe they would ask you the right question or they would–if you happen to land in the right partner gravitational sphere, your work looked very different, right, then if you were in the, quote, "bad partner sphere" with the, you know, the bad work and there's no place to go and it wasn't like the hot clients. So mentorship and being intentional about that as we bring people in. And as I think about it, and even in our environment, we've done really well with mentoring with people–I think, pretty well–pulling mentors that are even outside of our legal team. So there are other senior leaders in our organization who said I'd like to mentor this person over here; I'd like to be their mentor. When I joined, I had a mentor. So it–and then your leaders, too, being really intentional about their experiences that you give to your younger talent so that they get these stretch assignments. You know, they have a chance to–they have the opportunity to excel and if they excel, that is fantastic; you get to see it. If they don't, then they need to be in a different place, perhaps.

MR. BRUCE HOFFMAN:

So on that point about mentorship, you know, one thing that I wonder about is there's mentorship where you're talking about teaching people the technical skills of the trade–how to write, how to be, you know, how to research, how to think, how to identify problems–I think that's fine but I wonder if–it sounds to me like what a lot of both of you are talking about is more than that; where it's really taking an interest in somebody's development, writ large. Like what ought they be doing to solve the puzzle? They should know the right questions to ask to figure out how to advance.

And then that makes me think a little bit, you know, Harvey, you had talked about connection, you know, connectedness, those kinds of issues, and from your perspective, both of you, I don't know if you had this kind of relationship with anybody as you were progressing, but would it matter, would it help if you felt–if you were a young lawyer, you're a minority, you know, African American, Latinx, whatever, coming into a firm, if somebody more senior than you is actually taking an interest in you as a person in your career, is that–did you have that experience? Was that helpful? Is that something we should be including in mentorship more broadly?

Because we do see, when we lose minority associates, and this is not just Cleary, this is generally across the profession, one of the things you frequently see is they say, "I never felt like I belonged." You know, "I never felt like I was included in things." And I think this kind of aspect of saying, you know, how do you do things? You know, how do you grow as a lawyer, maybe is a way to help with that?

MR. HARVEY ANDERSON:

That's exactly what we started with; this notion of belonging. And yes, the mentorship means exactly that. Not career training and here's how you take depos and, I mean, that's–you're going to have to do that work, but it's that other piece. And I think back, there were a couple of mentors that I had–actually, one of the ones said the most powerful things to me was an antitrust attorney, Dan Wall, and I love him for this. Dan, when I was a summer associate, said, "Hey, you should compare yourself by your own internal standards. Don't measure yourself by our standards; measure by your own standards. That will be good enough." And what it did was it made me feel like I belonged. It's like–it said, oh, okay, you're on steady ground. You're–this part is true. And that's just one small comment, he probably doesn't even remember that he said that to me, but it was pretty meaningful and it made you feel connected, it made you feel like you belong, just as much as anyone else. You know, not better, not worse; you know, one among many. And so, your point about creating that sense of belonging in someone–and I don't know how much of an interest he took in me, personally; he might have been giving that advice to everyone. But I happened to hear it one day so, you know, for that I am grateful.

MR. JOHN GIBSON:

I think that's right. And I would draw a distinction between what we call mentorship and what we call sponsorship. So, a mentorship is offering your advice and being helpful. I think sponsorship is another level up, which can include, you know, which is a really holistic investment in the protégé. And it includes the sponsor using her or his contacts and influence for the benefit of the protégé, so it'd be things like introducing the protégé to a client and basically saying this is our next great lawyer in this area of the law that I'd like you to get to know. That's big, right? And that creates a sense of belonging when you know that you're being endorsed like that. I think it includes things like if you're working on a brief or that you're going to send to a client, let's say, in draft form, having the sponsor really rigorously go through that and, you know, the brief may be bleeding red or bleeding track changes but then the protégé gets to see that and gets to clean it up and address those comments and then the protégé gets to send it to the client and the client says, "Wow, nice brief," right? And the sponsor says to the protégé, "You know, you're younger; I was at your stage 15, 20 years ago and you're going to get better, you're going

to use this experience to become a better writer." But now, your relationship with the client has elevated because you handed out–you gave them this great work product; keep it up. Things like that, I think, are things that a sponsor does who is fully invested in, as you say Harvey, the life and the career of the protégé and I think that's very impactful.

MR. BRUCE HOFFMAN:

What would you say, for both of you, what's the biggest obstacle today to not having more sponsorship relationships between established successful lawyers, whether they're in house or in government perhaps or at law firms and diverse lawyers or other barriers? I mean, it seems to me there must be because of the statistics that we see but what do you think they are if they exist?

MR. HARVEY ANDERSON:

You know, I think the notion that John brought up about, first, the distinction between mentorship and sponsorship is huge. I think people sponsor others but not many of us do it intentionally and therein lies the problem. It's an art, it's done, but it's not always done with intentionality so when you say what's the obstacle, my sense is that the obstacle is that we don't know that that's a muscle to use and when to use it.

Now, there are people that we like that work on our teams that we want to promote and advance because we see them doing great work. We are being sponsors for them. They might not even know that. And there are people that we don't know that are doing great work that don't know to ask to be a–that don't know that they need a sponsor, so to speak; that they don't need–that they need that kind of–or set of sponsors. So I think even shedding light on this mechanism and behavior, because it's a bit of a dark art in some ways, is an obstacle because it's not talked about.

MR. JOHN GIBSON:

Yeah, if I can add to that, Bruce, I think that's exactly right and further, the folks who are going to be the most powerful and impactful sponsors, you know, both in law practice and in house, are really busy, you know? So of course, you'd like to ask Harvey to take on 20 proteges, right? But he's running a Fortune 50 legal department, right? There's a lot to do. For the kind of the most powerful law firm partners, they're out trying cases and attending to client's needs 24/7; it's very difficult. But usually, my experience has been, when you approach folks who maybe are not reaching out for proteges across differences, a lot of times when you bring it to their attention and say, "Hey, look, we've got two people who are really doing well and have a lot of potential who really need some help," and they say, "Great, I'd love to help them. I didn't think about it. I mean, I don't have–you know, I'm billing 14 hours a day, right, and so I didn't really think about it and these other folks were waiting outside my office to go to coffee with me, right, or approach me."

And so, I think one of two things. One is bring it to the attention of the people who would be, you know, very impactful sponsors and asking them to intentionally reach out across differences. But it's also educating diverse lawyers in the profession that you need to—hey, listen, if you want Harvey to sponsor you, one thing you could do is get in touch with him and say, "Hey, listen, I've been following your life and career; it's amazing what you've done. And I want to be like you. How do I–what are some of the things I can do,

you know, in today's world to carve a path that's similar to yours? Can I take you to lunch? Can I take you to coffee? Can we spend 10 minutes together where I can learn about your life in a way that improves mine and expands my knowledge base?"

MR. BRUCE HOFFMAN:

That's a great point; I'm going to come back to that in a second. But let me just say I think we have a little bit under 10 minutes left; like five to seven minutes. So if anybody has questions out there, please fire them in. I know you can put them in the chat; I think that's the best way because I'm, frankly, not sure from this particular view how we can get people up on the screen. But I know that there are–the folks that are on the line who are running this for Golden State can get your questions in here if you have them, so please feel free.

John, to come back to the point that you just made, one of the things that that underscores for me is that people have to feel like they can ask for what they want. I mean, first they have to know what they can ask for, which is a hard thing sometimes, but also, people have to ask and they really don't have to, but it certainly is helpful. One of the things that I've noticed is some lawyers who might have seemed progressed rapidly aren't shy about asking for things. They ask for good work. An example I use often is I know a young lawyer who–we were starting a large antitrust litigation back when I was in private practice the last time, before I was in the government, and he came into one of the partner's offices who was running litigation and said, "I want to do depositions in this case, so you know, I think there are going to be a lot and I don't want to just always be carrying somebody's briefcase; I want the chance to actually go and take depositions." And the answer was, "Okay, you know, it looks like we're going to have a lot so I'm sure we can find you some that you can do where you could first chair a deposition." But had that person not asked, that might not have ever happened. And I think, you know, at least it seems to me that one thing is to encourage people or make them feel safe enough to ask, you know, that they have the ability to ask for what they want and that that actually matters; it's a meaningful thing to progress. Whether it's in terms of somebody helping you or whether it's in terms of the kind of work you want to do.

MR. JOHN GIBSON:

I think that's right, Bruce, and you know, I think it's important to educate lawyers when they're first coming in to the profession that that is important; that that's kind of, you know, the way the legal profession works. And that they own, to a great extent, responsibility for succeeding; you know, for getting into these systems where powerful folks will be willing to sponsor them and help them as they were helped.

MR. HARVEY ANDERSON:

You know, I wonder if all of the folks that are coming in in this cohort that we're talking about all have the same emotional and psychological security to even ask that? I think that there's another–I agree with what both of you said but I also think there's another element of–there's an element of fear; they don't know that that's how it's done. They don't know that the worst–that "no" is not the worst answer, you know?

MR. JOHN GIBSON:

Right.

MR. HARVEY ANDERSON:

And there's no downside to it. So there's something else going on here, too, I think, because you'll see different folks just have different profiles and they may be more quiet about things, they don't know–they just don't know how it works and don't even know to do that, even though they want it. But they think it's–it will violate a rule or it's out of turn or it's culturally not the right thing to do.

MR. BRUCE HOFFMAN:

So we actually have two questions, one of which I think may pertain a little bit to that last point, Harvey. So the question that may bear on that is can you share how to be a better ally? I think that may be for any of the three of us; maybe for me a little bit, as well, in particular. But the other question was even with the Rooney Rule, black coaches and general managers seem grossly underrepresented relative to players. Any comments on that? You want to–maybe we should take that one first. John, do you have any thoughts on that or Harvey?

MR. JOHN GIBSON:

Yeah, so I mean, that's right and I think the maximum of reach was maybe 15 percent, you know, black coaches and general managers in the league, compared to something like, you know, 70 percent players; players of color. But I think the point is that there was a change that was made and it was going in the right direction and, you know, really the point is that each person can make a difference, each equity holder can make a difference. And a very recent example, talking about a different sport, basketball, is when the Los Angeles Clippers were looking to fill their head coaching position recently, you may have read virtually all of the candidates that Steve Ballmer, the equity holder, interviewed were African Americans. He interviewed pretty much every high-level, qualified, African American candidate for that position and I think maybe one straight white male and something like eight or nine men. And he didn't say anything to the press, he didn't say this is what I'm doing, but his actions spoke volumes. And, you know, what he was basically saying was, here I've got an opportunity in this moment to find–and folks who know Steve Ballmer know that he's very competitive and he's all about winning a crown, winning a championship, so he's going to find the best, most capable coach he can and that's what he did. But he did it in a way where he loaded equality and diversity. And so I think that's what–that's a real benefit that came out of the Rooney Rule, where folks are changing their way of thinking and making loud statements through their actions to other owners and other CEO's.

MR. BRUCE HOFFMAN:

You know, look, one of the things I think that example really underscores, and also the genesis of the Rooney Rule, is look, talent is not distributed particularly to any group, right? I mean, talent is spread equally across the human population. And so, if you are not—if your diversity doesn't represent society, then you are by definition harming

yourself or, by definition, you're less good than you could otherwise be. I mean, there's no other conclusion you can reach. And I think when people realize that, then they think this is a—that's what, I think, really starts to bring home what a problem this is; that basically, we're wasting talent. We are underperforming, you know, as a society, as a profession, by definition. Just by the math, it's simple but often it's not thought about that way.

I'll try to take a quick stab at the better ally question and then turn it over to all of you for your thoughts and I think that will probably end our panel here. But I mean, look, I don't know–I'm not sure I know how to be a better ally. What I would say is there's a—John Cusack in Gross Pointe Blank, one of my favorite movies, there's a scene where he's asked something like, "How's your life?" Or, "How's life going?" And he said, "In progress." And I think that's the best I could say here. I think when I think about being an ally, what I try to think about is really intentionality, right? Just actually trying to think about it; trying to break patterns and think about who are people that helped me, what did they do for me, who can I help that way? You know, who can I–who might be quiet? For example, Harvey, use your point, you know, who's not talking? Who can I reach out to? Who can I try to give space to speak? But I really think just keeping this top of mind is the first thing, right? Everything else–the way I think about it, everything else comes after that. The first thing is actually thinking about; actually paying attention to it. But with that, I'll stop talking, turn it over to you all, and I think that's probably the end of our time.

MR. HARVEY ANDERSON:

I think to be a better ally, just speak up when you see behaviors that would offend you; just speak up. You'd be surprised; you'd be surprised.

MR. JOHN GIBSON:

And I would just close by saying that remember the power of one. You may be the one person who's going to make a difference that day or that week or that year in some person's life or in many person's lives. And so, make an intentional choice to support allyship, to be an ally, and to be that change that the world needs, that the profession needs, by making a change in yourself. I'm going to make that change and I hope you will, too.

MR. BRUCE HOFFMAN:

All right, well, thank you all very much and I'm not sure how we technically end but I think they'll turn us off. I appreciate it and I hope everyone in the audience learned things from this. I certainly learned a lot so thank you, all.

MR. HARVEY ANDERSON:

Thanks, folks. Bye–bye.

MR. JOHN GIBSON:

Thank you.

DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION: A MISSED OPPORTUNITY FOR THE ANTITRUST PRACTICE

By Anthony Leon[1]

I. INTRODUCTION

Discussions about the importance of diversity in the workplace have flourished over the past few decades. In an inherently and historically diverse American society, various professions remain overwhelmingly held by white men. The legal profession has not been spared from this critique. On average, 83.5% of the people working in legal occupations in 2020 self-identified as white.[2] While not surprising, this assessment is stark: it is evidence that the legal jobs market in the United States remains largely non-diverse and unequal.

Yet, diversity could triumph in the legal profession. The law and its enforcement are at the core of our democracy. It is a singular profession where one gets to reflect on past decisions to guide decisions in the present. It is also a profession where one can elect to work on the subjects they most care about. Lawyers' interpretation of the law contributes to design and shape society. It is an essential political instrument that can be utilized to reach specific goals. Traditionally used to enhance consumer welfare, antitrust law enforcement may be targeted to have a more significant social impact. For instance, practitioners can focus on combatting anticompetitive conduct having adverse effects on people of color. All in all, people from diverse backgrounds and experience, often motivated with a desire to change society, help others, and make a difference, should have every reason to join the legal profession—and why not practice antitrust law.

It would be unfair not to recognize certain organizations have made efforts to promote diversity in the workplace. Law firms in the United States, for which it is considered critical for their business and a priority,[3] have strived to implement measures for the recruitment, training, retention, and advancement of diverse talent. Diversity is also crucial to reinforce trust in the legal profession. As a complicated and continually evolving subject, diversity requires consequent resources and continuous attention.

However, the past year and the multiple challenges people of color have faced forced employers to reconsider their diversity programs. The global pandemic has considerably transformed the work environment. Remote working isolates employees in their homes, creating a new obstacle for inclusion. Moreover, with disproportionate effects on people

---

1 Anthony Leon is an attorney, currently working in-house in San Francisco, CA. After receiving his initial legal education in France, Anthony joined the legal department of the Louvre Museum in Paris, France. Anthony then obtained an LL.M. from the University of California, Hastings College of the Law, and passed both the New York and California bar exams. Anthony's practice includes compliance, antitrust, business and corporate law.

2 *Labor Force Statistics from the Current Population Survey: Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity*, U.S. Dep't of Labor, Bureau of Lab. Statistics, https://www.bls.gov/cps/cpsaat11.htm (last modified January 22, 2021).

3 Deborah L. Rhode and Lucy Buford Ricca, *Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel*, 83 Fordham L. Rev. 2483, 2486 (2015).

of color, the pandemic has emphasized inequalities between communities.[4] If this were not enough, the deaths of Breonna Taylor, George Floyd, Jacob Blake, and too many other people of color, the non-condemnation of White supremacists at the highest office in the country,[5] or the public attack on democracy in cities and states where voters of color are predominant[6] have led to social and racial unrest throughout the country. The too-long-delayed-but-necessary conversation about structural and systemic racism in society must be addressed. All employers, including in the legal profession, ought to engage in this discussion. Inconsequential commitments to diverse principles and values are no longer sufficient. People are calling for action towards social justice and equality.

This article is my contribution to shaping a more diverse and inclusive legal profession. It is also my opinion on the importance of diversity. As a White queer man born and raised in France who recently immigrated to California, witnessing the changes in American society led me to challenge my own culture and beliefs. I grew up in a country where it is inappropriate to speak in public about race because it immediately refers to biological racism.[7] As such, these communities are not legally recognized in France.[8] In my country, the legislature is deliberately silent on race or ethnicity under the pretense that—as written in our Constitution—the people should be "one and indivisible."[9] But this same legislature adopts laws neutral in appearance, making it illegal for a person to cover all their face but their eyes in a public forum, intentionally designed to adversely prohibit women from wearing a burqa.[10] My past experience is in opposition to the one I am living in the

---

4 *See* Pinar Karaca-Mandic, Archelle Georgiou, & Soumya Sen, *Assessment of COVID-19 Hospitalizations by Race/Ethnicity in 12 States*, JAMA Internal Med. 131, 134 (2021) (the research found "disproportionately high COVID-19 hospitalizations for the Black population" and "higher odds of hospitalization in non-Hispanic Black individuals compared with non-Hispanic White individuals"); *see also* Elise Gould & Valerie Wilson, *Black workers face two of the most lethal preexisting conditions for coronavirus—racism and economic inequality*, Econ. Policy Inst. (June 1, 2020), https://www.epi.org/publication/black-workers-covid/ (racial and economic inequality leave workers of color with few good options for protecting both their health and economic well-being).

5 *See* Kathleen Ronayne & Michael Kunzelman, *Trump to far-right extremists: 'Stand back and stand by'*, AP News (Sept. 30, 2020), https://apnews.com/article/election-2020-joe-biden-race-and-ethnicity-donald-trump-chris-wallace-0b32339da25fbc9e8b7c7c7066a1db0f (President Trump refused to publicly condemn white supremacist groups and their role in violence during 2020 social unrests, and called Proud Boys, a far-right extremist group, to "stand back and stand by").

6 *See* Juana Summers, *Trump Push To Invalidate Votes In Heavily Black Cities Alarms Civil Rights Groups*, NPR (Nov. 24, 2020), https://www.npr.org/2020/11/24/938187233/trump-push-to-invalidate-votes-in-heavily-black-cities-alarms-civil-rights-group (Trump claims on voter fraud principally targeted Detroit, Philadelphia and Atlanta, cities historically with a higher number of Black voters).

7 *See* Erik Bleich, *Race Policy in France*, Brookings Inst. (May 1, 2001), http://brook.gs/2bVQ6tx.

8 *See* Norimitsu Onishi, *A Racial Awakening in France, Where Race Is a Taboo Topic,* The N.Y. Times (July 14, 2020), https://www.nytimes.com/2020/07/14/world/europe/france-racism-universalism.html (In France, race is a taboo topic in a society where the overwhelming majority aspires to a colorblind universalism).

9 1958 Const. 1 (Fr.) ("France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion.").

10 Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (1) [Law 2010-1192 of October 11, 2010 on the Act prohibiting concealment of the face in public space], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 24, 2020, (Fr.) ("Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage." ["No one is allowed, in a public space, to wear an outfit meant to conceal their face."]).

United States, where race, origin, sexual identity, sexual orientation, or other differences are fundamental parts of who individuals are. Besides being more exposed to diversity, I learned to listen to people's experiences and continue to work on my blind spots and biases. Despite self-identifying as a member of the LGBTQIA+ community, I am conscious of my inherited privileges.

In Part I, I strive to explain what diversity is and why it matters to foster it in the workplace. I develop my belief that diversity is a concept because it may have multiple meanings. This leads me to summarize the benefits diversity can provide to an organization when nurtured simultaneously with an inclusive culture. In Part II, using available statistics about diverse representation in the legal profession and the antitrust practice, I assess the state of diversity before reminding of persistent non-inclusive behaviors. In Part III, I express my belief that the antitrust practice should champion diversity for two reasons. One is that antitrust law can be a tool to combat social injustices and inequalities; the other is that its practice has everything susceptible to attract diverse talent. Finally, in Part IV, I offer a series of recommendations to ameliorate diversity and inclusion in the legal profession, from changing law firms' practices to a proposed revision by State Bars of the attorneys' code of conduct.

II. THE CONCEPT AND THE IMPORTANCE OF DIVERSITY IN A WORKPLACE

A. Defining Diversity as a Word and a Concept

Before discussing why diversity matters in a workspace, it is essential to discuss the word's meaning, and further if it can be considered a concept. In the American English dictionary, diversity is defined as the "condition of having or being composed of differing elements,"[11] though when applied to a group of people, it is preferably defined as "the inclusion of people of different races, cultures, etc."[12] In both cases, diversity refers to the existence of differences, regardless of which kind, within a broader ensemble—such as a group of people or items. Thus, assuming this ensemble is the people in a workplace, diversity consists of recognizing that differences between the persons in a workplace exist.

This short but broad definition remains insufficient to consider diversity as a concept. Most often based on experiences, a concept is an assembly of mental representations developed from thoughts and beliefs about a particular subject. Said differently, if a subject can be mentally represented in various ways, it may very well be considered as a concept.

Diversity is a subject that has been interpreted in various ways over the past few decades. Several factors may influence someone's definition, including time, culture, history, policies, experience, or beliefs.

Time has influenced how people understand diversity. If two persons of different generations were to discuss the meaning of diversity, the chances are that their interpretation will significantly differ. For example, Dr. Roosevelt Thomas, Jr. published

11 *Diversity*, Merriam-Webster, https://www.merriam-webster.com/dictionary/diversity (last visited Feb. 25, 2021).

12 *Id.*

in 1996 his reflection on diversity, which he defined broadly as "any mixture of items characterized by differences and similarities."[13] While his definition can find some relevance today, the context in which it was written can not. At the end of the twentieth century, developments on diversity focused on acknowledging differences and similarities between White people and Black people, men and women, straights and gays. Thinking of diversity today as only affecting these communities would be unseemly.

Other than time, a nation may define diversity based on its culture, history, norms, beliefs, or policies. For instance, there is a distinction between a European approach to diversity and the North American one. Public policies and history in Europe—especially World War II—greatly influenced people's perception of diversity. In Western Europe, people often refuse to categorize individuals in communities while acknowledging that differences exist. In France, public policies identifying groups of individuals on the basis of race, origin, or religion are unconstitutional.[14] Despite differences between individuals, the French people are one and indivisible. This governmental approach is said to be "race-blind."[15] An excellent illustration of this approach is the 1978 act on information technology, data files, and civil liberties, which includes a prohibition on "the collection and processing of personal data that reveal, directly or indirectly, the racial and ethnic origins, the political, philosophical, religious opinions or trade union affiliation of persons, or which concern their health or sexual life."[16] France is not the only country in Europe hostile to collecting these sensitive data sets. In 2017, the Justice and Consumers' department of the European Commission recognized, in a report on "Data collection in the field of ethnicity," the existence of contestations and debates within the Member States regarding the usefulness of racial and ethnic data collection.[17] Indeed, a few anti-racist European non-governmental organizations have long been opposed to collecting this data, which they argue fosters racism.[18] Thus, this diversity approach gives no room to communities and tends to unite individuals as one people, all equal in front of the same law, regardless of any differences.

This diversity approach appears at odds with the North American one, where individual differences are recognized and considered a fundamental part of who people are. Contrary to France, United States agencies such as the Census Bureau or the Department of Labor's Bureau of Labor Statistics (BLS) regularly collect data and conduct statistics

---

13 R. Roosevelt Thomas Jr, Redefining Diversity 5 (1996).

14 *See* Conseil constitutionnel [CC] [Constitutional Court] decision No. 2007-557DC, Nov. 15, 2007, Rec. 29 (Fr.) (The Constitutional Council recognized that collect and process data necessary for carrying out studies regarding the diversity of origin of peoples, discrimination and integration may be done in an objective manner, but infringes Article 1 of the Constitution of France).

15 *See* Bleich, *supra* note 7.

16 Loi 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés [Law 78-17 of January 6, 1978 on information technology, data files and civil liberties] Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 1, 2020, (Fr.).

17 Lilla Farkas, *Analysis and comparative review of equality data collection in the European Union: Data collection in the field of ethnicity,* Publ'n Office of the European Union (2017), https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=45791.

18 *Id.* at 7.

on race, ethnicity, gender, age, and disability.[19] Furthermore, some private organizations are also allowed to conduct similar surveys. Here as well, history, culture, and public policies can explain this approach. Historically recognized as a racially diverse region, individual differences were acknowledged early on and used to shape public policy. After the colonization, individuals were generally categorized as either Native Americans, European Americans, or African Americans. Although the motivation was far from celebrating people's differences, it certainly has developed and fostered over time feelings of belonging to these communities. In the early days of the United States, differences between individuals were naturally used to create legal distinctions on an objective basis of physical characteristics, social circle, and assumed ancestry. For example, during the very first census in the United States in 1790, individuals were categorized either as "free white" male or female, "all other free persons," or "slaves."[20] Racial segregation also contributed to creating legal separations between ethnic communities. But diversity's meaning and its use progressively changed during the twentieth century. The change was partially prompted by the development of modern aspirations such as employment equity, equal opportunity, or affirmative actions. Individuals' differences are increasingly getting the acknowledgment and protection they deserve instead of justifying legal separations. The country's multicultural diversity becomes valued if not encouraged. Despite not being explicitly written in the United States Constitution, attainment of diversity within a group of people was even recognized in 1978 as a legitimate interest. In *Regents of the University of California v. Bakke,* Justice Lewis F. Powell, Jr. declared that aiming to reinforce diversity among students in an institution of higher education was "clearly a constitutionally permissible goal."[21]

Through this evolution, public policy contributed to raising awareness of communities' existence. People's differences are now recognized, protected, and valued by reason of a series of enacted laws. While not directly promoting diversity, these laws aimed to fight discrimination against underrepresented communities. To name a few examples: the Equal Pay Act of 1963 prohibiting wage discrimination between men and women raised awareness of gender differences;[22] Title VII of the Civil Rights Act of 1964 making it illegal for public or private organizations to discriminate on the basis of race, color, religion, sex and national origin raised awareness of each of these traits;[23] the Age Discrimination in Employment Act of 1967 prohibiting discrimination against

---

19 *See Labor Force Statistics from the Current Population Survey*: *Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity*, *supra* note 2 ; *see also U.S. Bureau of Labor Statistics Information Guide*, U.S. Dep't of Labor, Bureau of Lab. Statistics, at 18, 21, and 29, https://www.bls.gov/bls/bureau-of-labor-statistics-information-guide.pdf; *see also* Annual Business Survey, U.S. Census Bureau, https://www.census.gov/programs-surveys/abs/about.html (The Annual Business survey includes for example "employment by sex, ethnicity, race and veteran status") (last visited March 8, 2021).

20 *See 1790 Overview*, U.S. Census Bureau https://www.census.gov/history/www/through_the_decades/overview/1790.html (last visited Feb. 25, 2021).

21 *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) ("The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.").

22 Equal Pay Act of 1963 § 6(d), 29 U.S.C. 206 (2016).

23 Title VII of the Civil Rights Act of 1964 § 702, 42 U.S.C. 2000e-1 (1991).

employees and applicants being 40 years old or over raised awareness of age differences;[24] the Pregnancy Discrimination Act of 1978 prohibiting discrimination against job applicants or employees on the basis of pregnancy, childbirth or related conditions, raised awareness both of gender and pregnancy;[25] the American with Disabilities Act (ADA) of 1990 prohibiting discriminations from employers on the basis of disability,[26] and requiring job accommodations for individuals with a disability, raised awareness of disabilities;[27] the Civil Rights Act of 1991 making considerable changes on procedural and substantive federal law on discrimination cases reinforced the need to protect specific classes;[28] the Genetic Information Nondiscrimination Act of 2008 prohibiting forms of genetic discriminations;[29] or the ADA Amendment Act of 2008 broadening the definition and protection of disability.[30] More recently, legislators began requiring affirmative actions towards diversity. For example, following the adoption in 2018 of a law requiring at least one woman in corporations' board of directors when headquartered in California,[31] California legislators recently extended other diversity requirements in corporations' board of directors.[32] On September 30, 2020, Governor Gavin Newsom signed into law a bill whose purpose is to impose "affirmative action plans to address past discrimination and patterns of discrimination."[33] To do so, the bill starts by providing the very first legal definition of an "underrepresented community" as a group of "individuals who self-identif[y] as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identif[y] as gay, lesbian, bisexual, or transgender."[34] Under the new requirements, public corporations headquartered in California will now be required to include a certain number of underrepresented communities in their board of directors. The attempt to legally define "underrepresented community" should most of all be commended.

While not exhaustive, these differences and evolutions in the interpretation of diversity show that a single definition of diversity is unlikely to encompass all its possible meanings. People's experiences, shaping their beliefs and thoughts, leads them to have their own mental representation of diversity. As a result, diversity may be considered a concept. In modern American society, diversity goes beyond acknowledging individuals' differences: it recognizes each soul is unique. People's differences and self-identifications should be valued, regardless of what they are. Race, ethnicity, gender, age, sexual orientation, disability, beliefs, political opinions, or religions are the most notable differences when

24 Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C. 623 (2015).

25 Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (1982)).

26 American with Disabilities Act (ADA) of 1990 § 202(a), 42 U.S.C. 12112(a) (2009).

27 *Id.* § 202(b)(5).

28 Civil Rights Act of 1991, Pub. L. No. 102-166 (codified at 42 U.S.C. § 1981) (1992)).

29 Genetic Information Nondiscrimination Act of 2008 § 202, 42 U.S.C. § 2000ff-1.

30 ADA Amendment Act of 2008, Pub. L. No. 110–325 (codified at 42 U.S.C. 12101) (2008)).

31 Cal. Corp. Code. § 301.3 (2021).

32 Cal. Corp. Code. § 301.4 (2021).

33 *See* Cal. Corp. Code. §§ 301.3, 301.4, 2115.6 (2021).

34 *See* Cal. Corp. Code. § 301.4(e)(1) (2021).

speaking of diversity. However, every single element that can make a person who they are should be valued, including their clothing, hairstyle, makeup, hobbies, experience, character, or language.

Diversity as a modern concept in American society may therefore be the recognition, acceptance, and respect of every individual's uniqueness and differences. However, respecting others' differences is also respecting their interpretation of diversity. People should engage in conversations to better address diversity in a social setting.

Yet, diversity must be nurtured simultaneously with inclusion. Rejecting assimilation, an inclusive culture calls for affirmative actions to ensure everyone feels included. People should not have to deny a fundamental part of themselves so that other people feel more comfortable in their presence. Respect and acceptance of someone's uniqueness are only achieved when they feel safe to be their authentic self in society. Speaking about diversity alone is not enough, workplaces must promote both diversity and inclusion.

B. The Importance and Benefits of Diversity in the Workplace

Various benefits have been recognized in promoting diversity and inclusion within an organization. William Bowen, a former president of Princeton University, described the benefits of having a diverse student body. His words were published in a footnote of Justice Powell's *Bakke* opinion. He wrote: "[a] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talent, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves."[35]

Diversity and inclusion in the workplace benefits society and individuals. It is said that, on average, Americans will spend a third of their life working, equivalent to approximately 90,000 hours. Spending that amount of time at work can substantially impact someone's life. Promoting diversity and inclusion at work is likely to teach workers social values they can replicate outside the workplace. An organization's action is likely to ripple through society.

On the business side, a few studies have established that diversity and inclusion in an organization have significant impacts on several aspects such as its reputation, its responsibility, its teams, or even its finances.[36] According to a global report conducted by the International Labour Organization (ILO), the promotion of diversity and inclusion

35 *Bakke*, 438 U.S. at 312 n.48 (citing William Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)).

36 *See Why Diversity and Inclusion Matter: Quick Take*, Catalyst (June 24, 2020), https://www.catalyst.org/research/why-diversity-and-inclusion-matter/.

increases an organization's chance to improve its reputation by 57.8%.[37] In fact, fostering diversity and inclusion improves the reputation of the organization, of its products, or its services. As for the products or services, the use of diverse advertisements was proven in a recent study to increase consumers' intent to buy.[38] With regard to the workplace, the reputation associated with an inclusive culture generally leads to greater chances of hiring and retaining talent, ultimately benefitting the whole organization. People often look for role models in their organization, and they must believe that they have an equal opportunity to grow their skills and find networking opportunities. In this regard, the presence of diverse persons at leadership levels was proven to both reduce diverse talent's turnover[39] and increase innovation.[40] Gender-diverse management and leadership have also been linked to better results in corporate responsibility, such as a diminution of lawsuit exposure, more outstanding compliance management, and a diminution of risk exposures.[41] Diverse teams often bring a different perspective, reflection, approach, or point of view to a project. They contribute to the richness of a work environment. Here, the ILO found that promoting diversity and inclusion in an organization led to a 59.1% increase in creativity and innovation.[42] It increases employees' performance by raising problem-solving and decision-making abilities.[43] Finally, research shows promoting diversity and inclusion has a positive effect on finances. It increases an organization's revenues, its sales performance, and its returns on investment.[44]

As business organizations, law firms promoting diversity and inclusion should see all the benefits mentioned above. In this view, it is in their interest to hire and retain diverse

---

37 *See The business case for change: Country snapshots*, Int'l Labour Org., Women in Bus. and Mgmt. (May 22, 2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_702188.pdf.

38 *See* Shelley Zalis, *Inclusive ads are affecting consumer behavior, according to new research*, Think with Google (Nov. 2019), https://www.thinkwithgoogle.com/future-of-marketing/management-and-culture/diversity-and-inclusion/thought-leadership-marketing-diversity-inclusion/ ("64% of the people surveyed said they took some sort of action after seeing an ad that they consider to be diverse or inclusive").

39 *See* Cara C. Maurer and Israr Qureshi, *Not Just Good for Her: A Temporal Analysis of the Dynamic Relationship Between Representation of Women and Collective Employee Turnover*, Org. Studies (2019). *See also* Elissa L. Perry and Aitong Li, *Diversity Climate in Organizations*, Oxford Rsch. Encyclopedia of Bus. and Mgmt. (2020).

40 *See* Rocío Lorenzo, Nicole Voigt, Karin Schetelig, Annika Zawadzki, Isabell M. Welpe, and Prisca Brosi, *The Mix That Matters: Innovation Through Diversity*, The Boston Consulting Grp. (Apr. 26, 2017), https://www.bcg.com/en-us/publications/2017/people-organization-leadership-talent-innovation-through-diversity-mix-that-matters.

41 *See* Binay K. Adhikari, Anup Agrawal, and James Malm, *Do Women Managers Keep Firms Out of Trouble? Evidence from Corporate Litigation and Policies*, 67 J. of Acct. and Econ. 202, 202-225 (2019). *See also* Young Zik Shin, Jeung-Yoon Chang, Keyeongmin Jeon, and Hyunpyo Kim, *Female Directors on the Board and Investment Efficiency: Evidence from Korea*, 19 Asian Bus. & Mgmt. 438, 438-479 (2019).

42 *See The business case for change: Country snapshots*, *supra* note 37.

43 *See* Astrid C. Homan, *Dealing with Diversity in Workgroups: Preventing Problems and Promoting Potential*, 13 Soc. and Personality Psychology Compass 1, 1-9 (2019). *See also* Dnika J. Travis, Emily Shaffer, and Jennifer Thorpe-Moscon, *Report: Getting Real About Inclusive Leadership*, Catalyst (Nov. 21, 2019), https://www.catalyst.org/research/inclusive-leadership-report/.

44 *See Why Diversity and Inclusion Matter: Quick Take*, *supra* note 36.

talent, promote an inclusive culture and value diverse opinions. More than just benefitting the workplace, law firms' commitment to a diverse and inclusive culture helps increasing respect towards the legal profession. It also makes the profession more visible to diverse crowds prospecting to practice law. There are also specific benefits in terms of law firms' business development. Most prospective clients primarily hire firms based on their best chances of success. However, prospective clients may be sensitive to the firm's culture. If two equally competent firms compete for a prospective client's business, the prospective client may ultimately decide to retain the services of the firm having an inclusive culture.

This is particularly important if counsel represent a clearly diverse class's interests or face a jury. The judiciary is increasingly sensitive to the importance of diverse representation. In a recent order, Judge James Donato in the Northern District of California consolidated cases into a class but denied the interim counsel request due to concerns about lack of diversity.[45] The proposed lead counsel team was solely composed of experienced men. Without doubting their competence, Judge Donato held that "leadership roles should be made available to newer and less experienced lawyers, and the attorneys running this litigation should reflect the diversity of the proposed national class."[46]

In sum, promoting diversity and inclusion in a firm will most likely increase its competitiveness rather than hurting it. It is now relevant to study the state of diversity in the legal profession, and specifically the antitrust practice.

III. THE STATE OF DIVERSITY IN THE LEGAL PROFESSION AND THE ANTITRUST PRACTICE

A. The Apparent Non-Diverse Legal Profession

1. Statistics in the Legal Profession

In 2015, Deborah L. Rhode, Professor of Law at Stanford Law School and authority in legal ethics, asserted in an article published in the Washington Post that "law is one of the least racially diverse professions in the nation."[47] According to the US Bureau of Labor Statistics' (BLS) 2020 Labor Force Statistics from the current population survey, 83.5% of the people surveyed working in legal occupations is White.[48] This is the highest percentage within the pool of professionals and related occupations, followed by the education and entertainment sectors—both sectors having 82% of the people surveyed self-identifying as White—and far above healthcare professions—with 75.6% of the people surveyed self-identifying as White. It is apparent that even five years after Professor Rhode's affirmation,

45 *In re Robinhood Outage Ligitation*, No. 20-CV-01626-JD, 2020 WL 7330596 (N.D. Cal. July 14, 2020).

46 *Id.* at *2.

47 Deborah L. Rhode, *Law is the least diverse profession in the nation. And lawyers aren't doing enough to change that*, The Wash. Post (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/.

48 *Labor Force Statistics from the Current Population Survey*: *Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity*, *supra* note 2.

the legal profession remains the least diverse profession in the country. This lack of diversity becomes even more noticeable when looking at statistics by practice.

Private practice statistics usually show significant disparities in communities' representation. In February 2021, the National Association for Law Placement (NALP) published its 2020 report on diversity in US law firms.[49] NALP's statistics are based on a pool of nearly 101,000 partners, associates, and lawyers from 883 offices of various sizes. Among the 101,000 surveyed lawyers, 37.14% self-identified as women, 17.95% as people of color, 9.32% as women of color, 0.88% as having a disability, and 3.31% as being LGBTQIA+.[50]

The report also provides details about diverse representation at different levels in law firms. At the associate level, on average, almost one of every two associates self-identify as women, while only one of every four associates self-identify as being a person of color. Specifically, among 43,398 associates, 47.45% self-identified as women, 26.48% as people of color, 15.17% as women of color, 0.99% as having a disability, and 4.66% as being LGBTQIA+.[51] The disparities are increased at the partner level. Statistics show that there are almost two times fewer members of underrepresented groups in the pool of partners surveyed. Among 42,438 partners, 25.05% self-identified as women, 10.23% as people of color, 3.79% as women of color, 0.69% as having a disability, and 2.19% as being LGBTQIA+.[52] At the counsel and non-traditional track levels, diverse representation is generally higher than at the partner level. Among 11,293 counsels, 36.81% self-identified as women, 11.72% as people of color, 5.80% as women of color. Among 3,823 non-traditional track attorneys, 55.35% self-identified as women, 25.14% as people of color, 14.65% as women of color.[53] In this pool of counsel and non-traditional track attorneys combined, 1.17% self-identified as having a disability, and 2.57% self-identified as LGBTQIA+.[54] Finally, at the summer associates' level, 53.62% self-identified as women, 36.48% as people of color, 22.12% as women of color, and 7.68% as being LGBTQIA+.[55] Additional statistics are provided through the report, specifically in terms of race. At the associate level, 12.12% self-identify as Asian (7.18% women), 5.10% as Black or African American (3.04% women), and 5.64% as Latinx (2.99% women). At the partner level, 4.08% self-identify as Asian (1.62% women), 2.10% as Black or African American (0.80% women), and 2.80% as Latinx (0.90% women).[56]

Overall, these statistics reveal senior leadership in law firms remain significantly less diverse than the cohort of junior lawyers. Even at the lower levels, progress must occur. Despite yearly progress in most communities, law firms ought to maintain their efforts

---

49 *2020 Report on Diversity in U.S. Law Firms*, Nat'l Ass'n for Law Placement (NALP) (Feb. 2021), https://www.nalp.org/reportondiversity.

50 *Id.* at 19 (Table 6), 26 (Table 9), 30 (Tables 11 and 12).

51 *Id.* at 19 (Table 6), 28 (Table 10), 30 (Tables 11 and 12).

52 *Id.* at 19 (Table 6), 26 (Table 9), 30 (Tables 11 and 12).

53 *Id.* at 21 (Table 7).

54 *Id.* at 30 (Tables 11 and 12).

55 *Id.* at 23 (Table 8), 30 (Table 12).

56 *Id.* at 17 (Table 2).

to increase underrepresented communities' presence at each level, particularly at the leadership level.

NALP's efforts to increase the visibility of non-binary lawyers in law firms can nonetheless be commended. For the first time in 2020, NALP inaugurated statistics on lawyers self-identifying as non-binaries—9 associates and 8 summer associates in total. For future statistics, NALP should go further and collect data by sexual orientation, identity, sexuality, and other genders, instead of grouping them all under the conglomerate LGBTQIA+.[57]

Representation in the rest of the legal profession can also be studied. In the judiciary, few statistics are available. At the top, among the nine United States Supreme Court Justices, three are women—one of whom identifies as Latina—and one is a Black man. Women and people of color remain underrepresented. Diversity in State Supreme Courts was studied in a 2020 report published by the Brennan Center.[58] Among the State Supreme Court Justices, 55% self-identify as White men, 29% as White women, 8% as men of color, and 7% as women of color.[59] The report shows that twenty-three states have an all-White bench,[60] while six states have a percentage of people of color higher than the percentage of their representation in the state population.[61] California is one of those six states: with 71% people of color on the bench versus 63% of the State's population self-identify as people of color. More generally, the 2020 BLS's statistics present statistics on judges, magistrates, or other judicial workers: 53.9% self-identify as women, 74.4% as White, 16% as Black, 5.7% as Asian, and 6.2% as Hispanic.[62] On the federal side, among all the Article III sitting judges, 80.1% self-identify as White, 27.6% as women, and 6.9% as women of color.[63]

In the public sector and government, we must first note that there are only 10 women attorneys general and 10 attorneys general of color in the fifty states and the District of Columbia.[64] Beyond this, data remains unfortunately much more limited. The few available numbers relate to the whole public organization instead of the individuals employed in a legal profession. Using the NALP directory, it is possible to find out that of the 15,836 attorneys employed in 2020 at nine public entities, 43% self-identify as White

---

57 *See* Bendita Cynthia Malakia, *Being a B: Perspectives on Being a Bisexual Lawyer*, Inst. for Inclusion in the Legal Profession (2019-2020), https://theiilp.wildapricot.org/resources/Documents/IILP_2019_FINAL_web.pdf (As a bisexual, the author regrets the lack of consideration to identities within the conglomerate LGBTQIA+).

58 Alicia Bannon & Janna Adelstein, *State Supreme Court Diversity–February 2020 Update*, Brennan Ctr. for Justice (Feb. 20, 2020), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Labor Force Statistics from the Current Population Survey*: *Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity*, *supra* note 2.

63 Biographical Directory of Article III Federal Judges, 1789-present, Fed. Judicial Ctr., https://www.fjc.gov/history/judges/search/advanced-search (Search limited to sitting judges only and for any federal court).

64 *Find My AG*, Nat'l Ass'n of Attorneys Gen., https://www.naag.org/find-my-ag (last visited Mar. 1, 2021).

men, 33% as white women, 7.70% as men of color, 10.22% as women of color, and 0.10% as LGBTQIA+.[65] However, these numbers only represent a small sample.

2. Persistent Issues in the Legal Profession

Studying the state of diversity and inclusion within the legal profession is not only about statistics. While it shows that entry in the profession remains low for diverse talent that is only one side of the problem. Another essential side of the problem is culture. Specifically, one must study whether each individual currently in the profession feels valued, accepted, respected, and that they have an equal opportunity to grow, regardless of their differences. If they doubt that any of these elements apply to them, there is a great chance that the organization is not fully committed to enforcing an inclusive culture. In this regard, diverse talent often reports that a few persistent issues within the legal professions contribute to them not feeling like they belong.

At the top of the concerns is the persistent lack of diverse leadership, as the statistics have previously confirmed. In the words of Deborah L. Rhode and Lucy Buford Ricca, "within the American legal profession, diversity is widely embraced in principle but seldom realized in practice. [Underrepresented communities] are grossly underrepresented at the top and overrepresented at the bottom."[66] An insufficiently diverse leadership makes diverse talent feel they do not belong—diversity breeds diversity. It also makes them assume that they are less likely to grow and access these positions. These feelings are intensified when leadership does not know how to manage a diverse workforce. The ABA's Commission on Women in the Profession released in 2020 is a national study focused on women of color pursuing legal careers.[67] In the pool of women of color surveyed, only 19% believed supervising attorneys were trained on managing a diverse workforce, and 23% believed that supervising attorneys were held accountable for developing and advancing diverse attorneys.[68]

Pay gaps are another persistent issue that affects the legal profession. 2020 BLS's statistics showed that, on average, men lawyers earn $2,324 per week while women lawyers earn $1,665 for the same amount of time. The gap is larger when speaking of the legal occupations in general, where men earn on average $2,275 per week while women

65 *NALP Directory of Legal Employers*, Nat'l Ass'n for Law Placement (NALP), *available at* https://www.nalpdirectory.com (Results compiled by searching employers being "government" and "public interest")(last visited March 2, 2021)

66 Deborah L. Rhode & Lucy Buford Ricca, *Diversity In The Legal Profession: Perspectives From Managing Partners And General Counsel*, 83 Fordham L. Rev. 2483, 2483 (2015).

67 Destiny Peery, Paulette Brown, and Eileen Letts, *Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color*, Am. Bar Ass'n Comm'n on Women in the Profession (2020), https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf.

68 *Id.* at ix. The legal occupations categorized by BLS are: lawyers; judicial law clerks; judges, magistrates, and other judicial workers; paralegals and legal assistances; title examiners, abstractors and searchers; and legal support workers (all other).

earn $1,252 for the same amount of time.[69] The BLS does not provide similar statistics for other underrepresented communities in the legal profession.

Diverse talent are often disappointed with the distribution of client assignments within a law firm. They frequently declare they are not sufficiently assigned with cases likely to require more billable hours, resulting in more generous rewards, or significantly growing their legal skills.[70] Fewer assignments reduce their visibility and ultimately their chance to be promoted.

Bias and stereotypes affect diverse talent. Too often, women of color are assumed not to be the lawyer in the room and continue to be confused for custodial, administrative, or courtroom staff.[71] In general, women of color witness a work environment that remains hostile. Women of color report not being taken as serious contenders for promotions, and continue to observe men perpetuating stereotypes towards them. For instance, Black women attorneys may be seen as "pushy and aggressive when offering a different path, even if it is more viable."[72] Asian women attorneys may be seen as "docile, quiet, and conflict adverse."[73]

All of these persistent issues in the legal profession may directly or indirectly cause diverse talent to leave their organizations. Diverse workforce suffers from these daily microaggressions. It requires them to devote energy to overcome these issues. Most diverse talent feel they constantly need to prove they have a right to be where they are. Others feel they continuously need to sever fundamental parts of who they are so that others do not feel uncomfortable in their presence. Mostly, they feel they need to be "excellent," and they cannot make mistakes.[74]

B. The Insufficient Demographic Data in the Antitrust Practice

1. A Practice Area Assumed Not to Be Diverse

While statistics on lawyers and the whole legal profession are readily available, statistics by practice areas remain hard to find. This lack of data applies to antitrust, a

---

69 *Median weekly earnings of full-time wage and salary workers by detailed occupation and sex*, U.S. Dep't of Labor, Bureau of Lab. Statistics, https://www.bls.gov/cps/cpsaat39.htm (last modified Jan. 22, 2021).

70 Peery et al., *supra* note 67 at ix.

71 Commission On Women In the Profession & Minority Corporate Counsel Association, *You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession*, Am. Bar Ass'n (Feb. 13, 2019), https://www.americanbar.org/products/ecd/ebk/358942050/ ("Fifty-eight percent of women attorneys of color, and half of white women lawyers surveyed say they have been mistaken for administrative staff or janitors, according to the new study.").

72 Peery et al., *supra* note 67 at 5.

73 Peery et al., *supra* note 67 at 5.

74 Brian J. Winterfeldt and Emily D. Murray, *The Importance of Excellence for Diverse Attorneys*, Inst. for Inclusion in the Legal Profession (2019-2020), https://theiilp.wildapricot.org/resources/Documents/IILP_2019_FINAL_web.pdf.

practice area that, as Dr. Bruce Hoffman declared during the recent Golden State Institute, has a "reputation of [being] one of the least diverse in the bar."[75]

Although very limited, the numbers available to evaluate diversity within the antitrust bar tend to confirm this assertion. For example, Global Competition Review (GCR), a worldwide law journal focused on competition and antitrust, publishes every year the 100 best law firms in antitrust practice in a list called the "GCR 100" or "Global Elite." When surveyed, law firms provide information about their antitrust specialists. In 2013, GCR published the fourth edition of their "Women in Antitrust" feature. Using the information received from their "Global Elite" pool, GCR profiles 100 women who contributed to antitrust, including private practitioners, enforcers, in-house counsel, economists, and academics.[76] GCR's former contributor Katy Oglethorpe indicated that within their Global Elite pool, "women nearly always [constitute] around half of the associate numbers" in the competition practices, but "the proportion of female competition partners drops to an average of just 20 percent."[77] The same document reports statistics on women's representation in antitrust agencies.[78] For example, the FTC in 2013 was 48% women, but only 35% of the senior employees were women. The European Commission was 51% of women, but only 23% were in senior positions. Regrettably, the feature does not report on other diversity issues. It is hoped that the subject will be tackled in their 6th edition expected later this year.

Another example of available data comes from the New York State Bar Association (NYSBA). The NYSBA published in 2017 the seventh edition of their diversity report card, which includes reports by sections. Based on the few answers received from the lawyers surveyed, the NYSBA reports that the Antitrust Section has a higher percentage of women "as Leaders and Executive Committee Members as compared to NYSBA as a whole, 45%, and 43% respectively."[79] Without giving numbers for communities other than women, the report mentions that "racial diversity in its general membership and leadership should be a specific goal for this section." The Section, praised for their actions towards diversity and inclusion, recognized that antitrust law is "a practice area that . . . requires more efforts to attract attorneys of color and from other diverse backgrounds."[80] That full results were not released is regrettable, and so is the fact that the NYSBA did not publish a new diversity report card since 2017.

A final example of available data comes from the Antitrust Law Section of the American Bar Association (ABA), which created a diversity committee named "Diversity.

---

75 D. Bruce Hoffman, Former Director, Bureau of Competition, Federal Trade Commission, Cleary Gottlieb Steen & Hamilton LLP, Panel at the 30th Annual Golden State Institute hosted by the California Lawyers Association: A Conversation About Diversity, Racism, and Equality in the Legal Profession (Oct. 29, 2020).

76 Kathy Oglethorpe, *Women in Antitrust*, 16 Global Competition Rev. 5, 5 (2013).

77 *Id.*

78 *Id.*

79 Committee on Diversity and Inclusion, *2017 Diversity Report Card Seventh Edition*, N.Y. State Bar Ass'n (2017), https://nysba.org/NYSBA/Committees/Committee%20on%20Diversity%20and%20Inclusion/Reports/DiversityReportCardwAddendum.pdf.

80 *Id.*

Advanced."[81] This committee aims to increase diverse representation within the Section, make the Section's diverse attorneys more visible, and facilitate their networking. To reach these goals, the committee offers for example, a mentorship program. The committee surveyed the program members—consisting of 65 mentors, 22 mentees, and 54 law students—and included questions about diversity. The contrast between the mentors' answers and prospective mentees' answers was such that the committee used the results in their mission statement. They found that "44% of the law students and 50% of the attorney/economist requesting mentors identified themselves as racially diverse" while on the mentor side "only 14% identified as racially diverse." The survey also revealed that "8% of the law students and 9% of the attorney/economists requesting mentors identified themselves as members of the LGBTQIA+ community," while no mentors at all self-identified as LGBTQIA+. Although the people surveyed only represent a portion of the Section, this survey is consistent with the view that current antitrust practitioners are largely non-diverse.

2. Limited Arguments Explaining the Lack of Diversity in Antitrust Practice

A few arguments are usually advanced to explain why there is not more diversity in antitrust practice. In their answer to the NYSBA's survey, the Antitrust Section mentioned that antitrust is often "viewed by law students and newer lawyers as more complex and inaccessible than other disciplines."[82] Students may also falsely believe that they cannot access the antitrust practice because they did not take an antitrust class during law school, or economics courses during their undergraduate program. Hiring practitioners also mention that they do not find sufficient diversity in applicant pools.[83]

However, these arguments appear short-sighted as they focus on the wrong side of the problem. If the antitrust practice is not diverse, it is not on the people who are not currently practicing antitrust. The lack of diversity within the profession may as well be due to the inaction of current antitrust practitioners. If there are not enough diverse applicants in the pool of candidates for a position, the hiring firm should devote resources to finding diverse talent. If there are not enough people interested in antitrust, current practitioners should increase their public presence. Visibility and networking are crucial in attracting diverse talent. As mentioned by John Gibson during the latest Golden State Institute, there has not been "a lot of discussion about antitrust . . . being a hot area for . . . an attorney of color."[84] In terms of race, the absence of a widely known representation of people of color in the antitrust bar highly reduces its visibility. In this regard, diverse attorneys are less likely to find a sponsor, mentor, or role model being an antitrust practitioner.

The absence of diversity in the antitrust bar is all the more surprising as several elements could make this practice a champion in this department.

---

81 *See Diversity.Advanced Antitrust Law Section Committee*, Am. Bar Ass'n, https://www.americanbar.org/groups/antitrust_law/committees/diversity-advanced/ (last visited Mar. 2, 2021).

82 Committee on Diversity and Inclusion, *supra* note 79.

83 *See* Deborah L. Rhode & Lucy Buford Ricca, *supra* note 66.

84 John Gibson, Antitrust Litigation Partner, DLA Piper, Panel at the 30th Annual Golden State Institute hosted by the California Lawyers Association: A Conversation About Diversity, Racism, and Equality in the Legal Profession (Oct. 29, 2020).

IV. THE ANTITRUST PRACTICE SHOULD CHAMPION DIVERSITY AND INCLUSION

A. The Antitrust Practice as a Tool to Fight Racism and Social Injustice

According to the US Department of Justice, antitrust laws are enforced to "protect economic freedom and opportunity by promoting free and fair competition in the marketplace."[85] In their own words, competition is said to "[benefit] American consumers through lower prices, better quality, and greater choice."[86] Each of these elements contributes to promoting "consumer welfare," a standard that US courts use to motivate decisions in the enforcement of antitrust laws for decades, including the Supreme Court of the United States.[87] The protection and promotion of consumer welfare concern every individual, regardless of their differences. Everyone is likely to either be a consumer or a business owner during their life. Consequently, antitrust laws have an impact on everyone's life and business. Recent developments in antitrust laws applied to digital markets should make this even more apparent. Based on this initial observation, there is no clear reason the practice of antitrust should be reserved to a specific community.

Further, antitrust laws may be utilized to reduce inequalities and fight racism. Consumer welfare is unlikely to be realized if discrimination, bias, unfair treatment, and disparity continue to exist and affect the market. Indeed, underrepresented communities appear to be impacted by competition laws both as consumers and business actors.

In a few instances, competition has been recognized to influence gender inequalities. For example, the "glass ceiling" women are often exposed to has been analogized to monopolization, a practice that deprives less powerful competitors of the ability to succeed on the merits.[88] In 2018, Chris Pike, Competition expert and member of the Directorate for Financial and Enterprises Affairs at the Organization for Economic Cooperation and Development (OECD), affirmed that competition policy could impact women as entrepreneurs, board members, and employees or consumers.[89] His study results have shown that barriers to entry in a profession—such as requiring the purchase of a license to practice, ownership of land, etc.—can reduce women's presence in businesses as they

85 *Mission,* U.S. Dep't of Justice Antitrust Div., https://www.justice.gov/atr/mission (last updated July 20, 2015).

86 *Id.*

87 *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007).

88 *See* Sally Hubbard & Washington Bytes, *How Monopolies Make Gender Inequality Worse*, Forbes (Dec. 20, 2017), https://www.forbes.com/sites/washingtonbytes/2017/12/20/how-monopolies-make-gender-inequality-worse-and-concentrated-economic-power-harms-women/?sh=4734de3d1b11.

89 Chris Pike, *What's gender got to do with competition policy*?, OECD On the Level (Mar. 2, 2018), https://oecdonthelevel.com/2018/03/02/whats-gender-got-to-do-with-competition-policy/.

have been for centuries excluded from access to capital.[90] They have also shown that women have different consumer experiences because businesses price discriminate on the basis of gender. While countries generally prohibit this practice, there are situations where businesses will "[set] different prices for slightly different versions of a product and [let] consumers self-select, thereby demonstrating their different willingness to pay."[91] Antitrust practitioners may elect to combat these practices that have adverse effects on gender equality.

Anticompetitive practices also have disproportionate effects on people of color. Former Vice-President of Strategy and Policy at the Roosevelt Institute, Nell Abernathy, exposed some of these practices during a presentation to the Congressional Antitrust Caucus, using the examples of price discrimination and disinvestment.[92] Historically, residents in segregated neighborhoods have lower incomes and are less likely to have access to upscale, good, and fair services. Statistically, in the US, people of color are most likely to live in segregated neighborhoods. Studies have shown that mortgage and credit lenders target these neighborhoods to sell a greater amount of subprime loans at higher costs and lower quality.[93] Therefore, price discrimination towards segregated neighborhoods adversely affected people of color. The same neighborhoods are suffering from disinvestment. Nell Abernathy here uses the examples of the grocery store deserts and broadband access development. Reduction of competition in the grocery store market caused a few local community-based markets to close. In parallel, major grocery chains no longer invest in low-income neighborhoods—where revenues are lower. In consequence, these neighborhoods have reduced access to grocery stores, a phenomenon also reported by the US Department of Agriculture.[94] Similarly, low-income neighborhoods are experiencing reduced internet speed due to lower investments from telecommunications providers.[95] Disinvestments in low-income neighborhoods resulted in adverse effects on people of color.

More recently, another anticipative practice had adverse effects on people of color, this time on the labor market. In research conducted in 2019, Orly Lobel, Professor of Law at the University of San Diego School of Law, has established that restrictive covenants in employment contracts—such as non-compete and no-poaching clauses—were perpetuating wage gaps and inequalities. Orly Lobel explains that competition

---

90 *See* Linda Scott, *It's time to end the male monopoly in international trade*, Fin. Times (Sept. 20, 2020), https://www.ft.com/content/054847da-3e24-43af-91bc-b15f8fc00c3a.

91 Chris Pike, *supra* note 89.

92 Nell Abernathy, *The Effects of Market Power on Women and People of Color*, Roosevelt Inst. (Mar. 7, 2018), https://rooseveltinstitute.org/2018/03/07/the-effects-of-market-power-on-women-and-people-of-color/.

93 *See* Jackelyn Hwang, Michael Hankinson, Kreg Steven Brown, *Racial and Spatial Targeting: Segregation and Subprime Lending within and across Metropolitan Areas*, 93 Soc. Forces 1081, 1081-1108 (2015).

94 *See Food Access Research Atlas - Documentation*, U.S. Dep't of Agric. Econ. Rsch. Serv., https://www.ers.usda.gov/data-products/food-access-research-atlas/documentation/ (last updated Oct. 31, 2019).

95 *See Digital Inequality and Low-Income Households,* U.S. Dep't of Hous. and Urban Dev., Off. of Policy Dev. and Rsch. (PD&R) (Fall 2016), https://www.huduser.gov/portal/periodicals/em/fall16/highlight2.html#title.

between hiring organizations improve work conditions, social relations at work, and wages. By reducing competition, these clauses have adverse effects on people of color, who count on mobility to "eradicate existing wage gaps" by leveraging external offers, or find a "workplace that values diversity and is free of discrimination and hostility."[96] Antitrust practitioners may elect to combat these practices that have adverse effects on racial equality.

"Antitrust can and should be deployed in the fight against racism," declared Rebecca Kelly Slaughter, recently appointed as Acting Chair of the Federal Trade Commission by President Joseph R. Biden.[97] In her view, "Antitrust law is clearly about economic structure, and economic structure in this country has a pretty profoundly racialized effect . . . There is a direct connection between the enforcement of antitrust law and the economic structures that tend to systemically under-privilege people of color."[98] Rebecca Kelly Slaughter explains that antitrust laws should not be value-neutral, because enforcement of antitrust laws can "either reinforce existing structural inequities or work to break them down." If we are comfortable prioritizing enforcement in other practice domains, such as choosing to prosecute particular behavior more than others, then there is no apparent reason why we could not do the same in enforcing antitrust laws. Antitrust enforcement agencies could use their "tools to ensure that markets are competitive and inuring to the benefit of historically underrepresented and economically disadvantaged consumers rather than incumbents."[99] The same call to action by antitrust enforcement authorities was made in 2018 by OECD's Competition Commissioner Margrethe Vestager, who believes that "when fairness is at risk, we need authorities to stand up for what is right. Authorities that can weigh the evidence and restore fair markets."[100]

With appropriate demographic data, antitrust practitioners could better understand where underrepresented communities are affected by anticompetitive practices, and as a result, increase their enforcement actions.

B. The Antitrust Practice Has Everything to Attract Diverse Talent

All of these elements considered, diverse attorneys aspiring to bring change to their communities may be interested in practicing antitrust law. When applying to law school, underrepresented applicants are often motivated to become lawyers in the hope of giving back to marginalized groups. The opportunity to drive change at the macrolevel, which impacts what happens at the microlevel, may encourage and attract young lawyers to the antitrust practice. This is true both in fighting for consumer welfare in general and

96 Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 Santa Clara L. Rev. 663 (2020).

97 Rebecca Kelly Slaughter, *Remarks of Commissioner Rebecca Kelly Slaughter at GCR Interactive: Women in Antitrust*, Fed. Trade Comm'n (Nov. 17, 2020), https://www.ftc.gov/public-statements/2020/11/remarks-commissioner-slaughter-at-GCR-Interactive.

98 Lauren Feiner, *How FTC Commissioner Slaughter wants to make antitrust enforcement antiracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html.

99 Rebecca Kelly Slaughter, *supra* note 97.

100 *See* Margrethe Vestager, Exec. Vice President of the European Comm'n for A Eur. Fit for the Dig. Age, Keynote Address at the 17th OECD Forum on Competition (Nov. 29, 2018).

combatting adverse effects towards diverse communities. In this regard, young diverse lawyers may be inspired by role models such as Rebecca Kelly Slaughter or Margrethe Vestager in utilizing antitrust laws to combat inequalities and persistent bias.

More generally, the practice of antitrust law should be attractive to diverse lawyers for the challenges it offers. More than just practicing the law, antitrust practitioners regularly use economic and business knowledge. It is also a practice where lawyers are continually learning about the law and various industries involved in antitrust cases. A handful of character traits generally present in diverse attorneys are particularly useful to the practice of antitrust law: "collaboration, compromise, finesse, risk-taking, perseverance, creativity, resilience, and growth mindset."[101] In addition to being curious, thoughtful, and having good judgment, these traits can make an individual a great antitrust lawyer.

Additionally, antitrust and competition laws are enforced at the national, international, and supranational levels. More than a hundred and twenty countries have adopted competition laws, and therefore there are lawyers in the world practicing antitrust. Legal departments in organizations doing business abroad, and law firms having such clients, should seriously consider international talent to fulfill positions in competition law. Indeed, any international lawyer coming to the United States carries their international experience, background, and culture. As such, LL.M. attorneys barred in any state should be considered as great assets for antitrust positions.

If diverse talent should be attracted to join the antitrust practice, organizations should double their efforts to promote diversity and inclusion.

V. RECOMMENDED ACTIONS TO ENHANCE DIVERSE REPRESENTATION IN THE LEGAL PROFESSION

A. Series of Recommendations for Employers

A growing number of organizations have implemented over the recent years and months diversity and inclusion programs. Efforts in this area must be commended, as everyone continuously learns how to navigate through and wrestles with the details of such a sensitive and difficult subject. The legal profession, which remains strongly non-diverse, must strive to make more noticeable progress. Despite early signs of improvement, there is still a lot of work to do. If organizations are consistent in their commitment to overcome this issue, progress may come more rapidly. The following are recommendations to improve diversity and inclusion within legal organizations. Even if your organization has already implemented a program, consider using these recommendations and ideas to increase or further reinforce your firm's diversity and inclusion culture.

1. Revise the Firm's Policy and Decision Process

The development of an internal diversity and inclusion program often begins with revising the firm's policies to encompass diverse and inclusive language. They should state values and best practices employees are expected to follow and respect. The policies may

101 *Ruled by Reason: Antitrust and Diversity in the Plaintiffs' Bar: A Conversation With Two Leading Private Enforcers*, Am. Antitrust Inst. (Nov. 3, 2020), https://www.antitrustinstitute.org/work-product/antitrust-and-diversity-in-the-plaintiffs-bar-a-conversation-with-two-leading-private-enforcers/.

also describe how diverse talent face microaggressions every day, and what people can do to suppress them. A simple list of values will not be enough to address these issues. Employees should know what they have to do when facing adverse behavior. The policy should also demand concrete actions to reduce bias and stereotypes from employees and clients. Thus, the policy ought to mention how the workforce is expected to interact when encountering non-inclusive behaviors from clients.

In revising the policy, firms should attentively listen to each community's concerns. Indeed, the policies should not make generalizations and use an intersectional approach to diversity. Each community has its own concerns and specific needs. The concerns of women of color differ from that of White women. Further, a woman who self-identifies as Asian does not have the same concerns as a woman who self-identifies as Black. All in all, the policy should help shape a safer and more inclusive work environment for diverse talent.

The policy revision should go further than only speaking about values and behavior. Firms must review their decisions and advancements processes. They also should reconsider who is currently making the decisions. Underrepresented communities should have a seat at the table. An inclusive culture requires that everyone has a real equal opportunity to grow. For this, diverse people must have a seat at the table. The process must be fair, objective, and as transparent as possible. It applies to performance evaluations, compensation, and any additional rewards: objective criteria should be used to consider who should be rewarded and why. It also applies to case assignments: objective criteria should be used in deciding who should work on a case and why. However, firms must cease to use diverse talent in cases simply where it will make the firm look good.

2. Make Accountability a Priority

Among the elements that make a diversity and inclusion program effective, accountability should be prioritized. As lawyers, we should know better than anyone else that failing to follow guidelines has consequences. The organization and its employees should be held accountable for their actions or inactions towards diversity and inclusion.

It is difficult to imagine a business where employees' work performance would not be tracked and evaluated according to objectives. If the employee does not perform well, they face the consequences. Similarly, if the employee performs well, they should be rewarded. Diversity and inclusion should be a goal for the business prioritized like any other one—if not a greater one.

Organizations are therefore encouraged to set reasonable performance goals for a selected period, track progress through the period, and evaluate at the end of the period whether the objectives have been achieved. The progress should be assessed for each level of the organization: for the business itself, for each department, and for employees. Efficient performance tracking requires collecting data before, during, and at the end of the period. However, it is essential to remember that accountability is not always negative. It is not only about sanctioning failures to follow guidelines: it also means rewarding when goals are reached or exceeded. Consequently, accountability incentivizes the workforce and the organization to comply with the firm's policies, ultimately favoring an inclusive culture.

3. Increase Relevant and Targeted Training

Like any compliance program, conducting training in diversity and inclusion plays an important role in reminding employees of their roles and responsibilities. It also helps raise awareness of the firm's policy and combats unconscious biases. It is also a great place to discuss the affirmative actions in the organization that worked, and those that did not. Role-plays can be used to better understand what behaviors should be avoided and which ones should be compulsory. Everyone should be invited to share about situations where they felt isolated or witnessed another person being excluded. They should express how they felt and how they wished people would have helped. Training can be as frequent as required, but it should at least be conducted once a year. Training should also be designed depending on the audience. For example, training designed for leaders should tackle subjects such as managing and staying connected with diverse talent. They should know when they need to stand up and advocate for diverse talent. They should also know when they need to listen and be an ally. In the same manner, leaders should also understand how diversity and inclusion can make a difference for them too.

4. Support in the Firm: Mentorship and Sponsorship

Everyone at work should feel supported by their peers. This means ensuring more senior employees are accessible. Firms should foster a safe work environment where people do not fear to reach out, ask questions, or be included in more work.

It also means ensuring pairing senior employees with more junior employees. As mentioned before, role models play significant roles for diverse talent. For this, firms are encouraged to implement mentorship or sponsorship programs. Finding a mentor or sponsor is often seen as difficult for diverse talent, even if they are said to be the persons who most likely have a sponsor or mentor.[102] At the recent Golden State Institute, John Gibson explained the difference between mentorship and sponsorship. In the first situation, mentors are "offering you advice and being helpful."[103] They help young lawyers navigate the firm's culture and grow their legal skills. Sponsors are more engaged than mentors. In John Gibson's words, sponsorship is a "really holistic investment in the protégé. It includes the sponsor using [their] contacts and influence for the benefit of the protégé."[104] It can include a careful review of the protégé's work, an introduction to clients, or even endorsing the protégé for a promotion. Both mentorship and sponsorship programs should be encouraged by law firms to help diverse talent grow within the organization. These programs also increase their feeling of belonging to the firm and the profession.

Further, firms should also encourage diverse leaders to be a voice for their community. They should avail themselves for public interventions or write articles. Diverse leaders have a duty to be visible and inspire junior crowds. In this manner, they may become role models and show that future diverse attorneys may later become leaders in a law firm too.

---

102 *See Report: Women of Color in U.S. Law Firms—Women of Color in Professional Services Series*, CATALYST (July 15, 2009), https://www.catalyst.org/wp-content/uploads/2019/01/Women_of_Color_in_U.S._Law_Firms.pdf.

103 John Gibson, *supra* note 84.

104 *Id.*

5. Show Your Diverse Talent You Care About Them

Firms should also undertake measures to show they genuinely care about their diverse talent. There is no perfect way to do this, but a few actions can help diverse talent feel they will receive the attention they deserve. For instance, if finances allow, the firm should hire or appoint a person or even a team responsible for developing and fostering an inclusive culture within the organization—such as a Director of Diversity and Inclusion. More than a title and position, it shows that at least one person's full-time job is to ensure diverse talent continues to feel welcome and that both diversity and inclusion are a priority for the firm. Having a person or a group of persons in charge of diversity and inclusion allows one to spend more time developing considerable actions. This can include putting in place benefits that target specific communities, such as the reimbursement of transition-related procedures for transgender, or other recruiting tools like diversity fellowships.

Though a single person or a single team cannot be responsible for diversity and inclusion at the firm on their own. Every leader needs to participate in fostering an inclusive culture. Firms should develop and promote safe forums where underrepresented communities can express themselves and network within the firm, such as Employee Resource Groups. These groups are an excellent tool for communities to gather, support each other, share their experience and reflect on what could be done better in the firm. They are also a great interface between communities and leadership. The group as a whole or their spokespersons should regularly give leaders feedback on how the firm is currently doing and what else could be done.

6. Refrain from Hiring Third-Party Agencies for Recruitment That Do Not Support True Diversity and Inclusion

Finally, if an organization publicly displays its attachment to a diverse and inclusive culture, it must refrain from hiring third-party companies that do not share the same values. This includes recruiting and staffing companies. Firms should ensure their recruiting partners do not automatically reject candidates because they failed to pass the bar multiple times, they are entry level or laterals with poor law school performance, or they graduated from third and fourth-tier law schools with average academic performance. Similarly, they should not automatically exclude candidates coming from in-house, the government, or with no law firm experience at all. It goes without saying that this mindset is anything but inclusive.

Using these patterns, recruiters admit utilizing bias and stereotypes in choosing who deserves to join a law firm. Because a candidate did not follow the traditional path, it is assumed they are unlikely to succeed in a major law firm. These preconceived ideas have an adverse effect on diverse talent, particularly people of color. For instance, the recruiter assumes that bad performance in law school was due to a lack of competence, while it might actually be due to other social, familial or financial factors. Admission to a third and fourth-tier law school may not have been a personal choice but one forced by society. Finally, diverse talent often have not been able to be hired in a law firm after graduation. Because their first experience was not in a law firm, the recruiter here would bar the diverse talent from having a chance to be considered. These practices do not favor social justice, diversity, and inclusion.

B. Series of Recommendations for Attorney and Bar Associations

1. Collect Additional Data by Practice Area

Finally, there are a few suggestions directed to legal professional associations. First, lawyers' associations such as the American Bar Association or the California Lawyers Association should continue promoting diversity and inclusion in the legal profession. Using their membership database, associations should conduct additional demographic census by sections, as the New York State Bar Association did with their 2017 Diversity report card.[105] The results obtained would help target practice areas where improvement is needed. However, because attorneys do not always become members of lawyers' associations, a step further could be considered at the State Bar level. Currently, the State Bar of California conducts an attorney census survey every year "to gather demographic and employment data from the state's licensees," which includes "questions on demographic characteristics, including race, ethnicity, gender, sexual orientation, disability, and veteran's status. The census also asks questions about employment, workplace environment, and issues key to recruitment, advancement, and retention."[106] Based on the census results, the State Bar published in 2019 for the first time a Diversity report card.[107] The report will be updated yearly. This effort should be commended, as it offers excellent perspectives on the state of diversity among California attorneys. However, the State Bar should add a question about attorneys' practice areas. Licensees could be invited to either check from a list five areas they practice the most, or all the areas they consider practicing at least 10% of their time. Thanks to this additional information, the State Bar would be able to provide statistics by practice for all surveyed licensees.

2. Make Diversity a Priority in CLE

State Bars should also consider increasing expectations from attorneys regarding diversity and inclusion. This starts with requiring attorneys in the whole country to attend diversity, inclusion, and elimination of bias training. Currently, only seven State Bars—California, Illinois, Missouri, New Jersey, New York, Oregon, and Vermont—require attorneys to dedicate an amount of Continuing Legal Education (CLE) credits to diversity, inclusion, and elimination of bias training. In Florida and Iowa, attorneys are also required to dedicate CLE credits to diversity, but contrary to the seven other states, it is mixed with other subjects (such as attorney wellness). By requiring attorneys to dedicate CLE credits to diversity and inclusion training, state bars would contribute to raising awareness in the profession. Thus, the state bars in the forty-one other states and the District of Columbia should be encouraged to implement this requirement.

---

105 Committee on Diversity and Inclusion, *supra* note 79.

106 *See Promoting Inclusion & Diversity*, The State Bar of Cal., https://www.calbar.ca.gov/About-Us/Our-Mission/Promoting-Inclusion-and-Diversity (last visited Mar. 3, 2021).

107 *See* Carolina Almarante et al., *Report Card on the Diversity of California's Legal Profession*, The State Bar of Cal. (July 20, 2020), https://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf.

3. Revise Attorneys' Rules of Professional Responsibility

Finally, state bars may consider revising their rules of professional responsibility to include affirmative duties towards diversity and inclusion. Currently, no states have ethical rules requiring attorneys to support diversity and inclusion. Generally, lawyers are only prohibited from engaging in discriminatory conduct, harassment, and retaliation—such as current Rule 8.4.1 of the California Rules of Professional Conduct,[108] and former rule 2-400.[109] In England and Wales, barristers have a few ethical duties to advance equality and inclusion in the profession explicitly described in their code of conduct. For example, they are required to "take reasonable steps to ensure that in relation to [their] chambers or [Bar Standards Board (BSB)] entity: (1) there is in force a written statement of policy on equality and diversity; and (2) there is in force a written plan implementing that policy."[110] A third element requires barristers to comply with a few other conditions, such as appointing at least one equality and diversity officer, engaging in training, recruiting using fair and objective criteria, regularly monitoring equality and diversity within the chamber or BSB entity, including in terms of case assignments, offering flexible working and reasonable adjustments, offering parental leave to everyone, collecting data, etc.[111] The BSB's code of conduct could be an inspiration for state bars in the United States to revise their rules of professional responsibility. They can either create an explicit and detailed duty to support diversity and inclusion—such as the BSB one, or otherwise create an implicit duty to promote liberty, justice, and inclusion for all.

VI. CONCLUSION

This article shows that there is no unique diversity approach. As a concept, it may be understood in various ways. In North America, it generally is the recognition, acceptance, and respect of every individual's uniqueness and differences. However, respecting others' differences is also respecting their interpretation of diversity. It is essential to engage in conversations to understand people's experiences and beliefs to address diversity in a better way. It is also necessary to promote an inclusive culture so that everyone feels safe to be their true self. Encouraging both diversity and inclusion is likely to make an organization more competitive.

Demographic statistics confirms that the legal profession remains significantly non-diverse despite yearly progress. Persistent issues in organizations, including bias and stereotypes, may be responsible for pushing diverse talent out of their firms and away from the profession. This assessment is consistent both for the whole legal profession and the antitrust bar that maintains a reputation of being essentially composed of senior white

---

108 *See Rule 8.4.1 Prohibited Discrimination, Harassment and Retaliation* (Rule Approved by the Supreme Court, Effective November 1, 2018), The State Bar of Cal., http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_8.4.1-Exec_Summary-Redline.pdf (last visited Mar. 3, 2021).

109 *See Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice,* The State Bar of Cal., http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Previous-Rules/Rule-2-400 (last visited Mar. 3, 2021).

110 *See Part 2: Code of Conduct*, *Rule C110*, Bar Standards Bd., https://www.barstandardsboard.org.uk/uploads/assets/f0d114af-9c5a-4be4-9dbffa9f80b1e47f/8c50a665-79ee-4bfa-b36eb5c138798d72/Part-2-Code-of-Conduct18092019092228.pdf (last visited Mar. 3, 2021).

111 *Id.*

men. Antitrust practitioners should look for diverse talent and encourage them to join their practice. This article develops various reasons to motivate diverse talent to join the antitrust bar. As an instrument currently utilized to reach consumer welfare, antitrust enforcement could also help fight against racism and inequalities. Given the multiple challenges antitrust practitioners face, diverse talent appears to be ideal candidates for the antitrust practice.

While not presenting an exhaustive list of essential elements making an organization's diversity and inclusion program effective, the recommendations developed in this article should inspire firms to increase their efforts. Firms should hold their employees and the whole organization accountable for fostering an inclusive culture. They ought to ensure diverse talent get the support they need. They also train leaders to manage diverse talent better. They should generally engage in conversations to better address diverse talent needs.

Similarly, lawyers' associations and State Bars should continue their efforts to promote the importance of diversity and inclusion. Demographic data collection by practice area would help assess where progress is needed. Finally, State bars could consider a revision of attorneys' codes of conduct and insert duties to promote diversity and inclusion in the legal profession.

As Supreme Court Justice Brennan said in *Keyishian v. Board of Regents*, the "nation's future depends upon leaders trained through wide exposure."[112] Leaders must understand their roles and responsibilities. As more senior leaders are approaching retirement, a younger and more inclusive generation is about to take their place. Genuinely more passionate about this subject, new generations are also recognized as "more ethnically and racially diverse."[113] Demographer William H. Frey declared "racial diversity will be the most defining and impactful characteristic of the Millennial generation."[114] The following generation, the even younger Generation Z, "represents the leading edge of the country's changing racial and ethnic makeup . . . One-in-four Gen Zers are Hispanic, 14% are black, 6% are Asian, and 5% are some other race or two or more races."[115]Aspiring to work in organizations with an inclusive culture, Millennials and Gen Zers expect more than intentions: they expect actions. Thus, their increasing presence in the workplace will profoundly change the workforce's mindset.

This predicts significant changes in the years to come . . ..

---

112 *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)).

113 *See* Rochelle L. Ford et al., *A Millennial Perspective on Diversity & Multiculturalism*, Am. Advert. Fed'n Thought Leadership (May 20, 2017), https://silo.tips/download/a-millennial-perspective-on-diversity-multiculturalism.

114 *See* William H. Frey, *Diversity Defines the Millennial Generation*, Brookings (June 28, 2016), https://www.brookings.edu/blog/the-avenue/2016/06/28/diversity-defines-the-millennial-generation/.

115 *See* Kim Parker & Ruth Igielnik, *On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Gen Z So Far*, Pew Rsch. Ctr. (May 14, 2020), https://www.pewresearch.org/social-trends/2020/05/14/on-the-cusp-of-adulthood-and-facing-an-uncertain-future-what-we-know-about-gen-z-so-far-2/.

THE CORRELATION BETWEEN ANTITRUST ENFORCEMENT AND GENDER EQUALITY

By Amy T. Brantly[1] *and Jennifer M. Oliver*[2]

I. "BIGNESS" AND INCLUSION: DOES ONE AFFECT THE OTHER?

America's monopolies, duopolies and oligopolies, and its citizens' increasing reliance on their services, are drawing scrutiny at levels unseen for more than a century. Like industrial concentration, gender inequality, and especially economic inequality, is similarly a well-known cause of increasing concern in this country.

Parallels can be drawn between gender inequality and behavior from America's dominant firms. Gender and competition policy are inextricably intertwined; persistent unjust discrimination in a concentrated market may be a by-product of market power. Dominant firms exclude new entrants from a market, whereas gender inequity and biases exclude women from full participation in the economy and workplace. Gender inequity and biases can deprive firms of the benefits of women's diverse experiences and viewpoints, just as monopolies and their ilk can deprive consumers of the benefits of innovative new competitors.

There is *correlation* between these two problems as well. One problem exacerbates the other. Start by considering the roles women play in the economy as consumers, workers, and entrepreneurs.

First, women bear the brunt of anticompetitive and monopolistic behaviors in their role as consumers. Firms with market power have the ability to impose elevated prices with fewer competitive restraints. Without competition, a monopoly's price is the market price. Even when faced with high prices, consumers often cannot substitute the monopoly's product for a more affordable alternative. Supracompetitive pricing—the classic measure of antitrust harm—disproportionately affects women, because women drive a staggering 70-80% of all consumer purchasing in this country. [3]

Women also find themselves the targets of price discrimination more often than their male counterparts, a relic of the outdated notion that women are spendthrift "shopaholics." One study conducted by the New York City Department of Consumer Affairs found that products marketed towards women and girls cost an average of 7 percent more than those

---

1 Amy T. Brantly is a founding partner of Kesselman Brantly Stockinger LLP specializing in antitrust and business litigation. The views expressed herein are solely those of Ms. Brantly and are not attributed to her law firm. Ms. Brantly would like to give special thanks to Samantha Pannier who assisted in research for this article.

2 Jennifer M. Oliver is a partner at MoginRubin LLP, where she specializes in antitrust litigation and merger control work, privacy litigation, and general business litigation. Jennifer is also an officer of the CLA Privacy Section. The views expressed herein are solely Ms. Oliver's and are not attributed to her law firm.

3 Amy Nelson, *Women Drive Majority of Consumer Purchasing and It's Time to Meet Their Needs*, Inc. Magazine, (July 17, 2019), https://www.inc.com/amy-nelson/women-drive-majority-of-consumer-purchasing-its-time-to-meet-their-needs.html.

marketed towards boys and men.[4] Researchers have dubbed this phenomenon the "pink tax," and it is estimated to cost the average woman $1,351 per year.[5]

And, as discussed below, in the labor market women are systematically underpaid compared to their male counterparts. The lower income the consumer, the more they are harmed since higher income consumers can more easily absorb monopoly rents than customers with less buying power.

Second, women workers suffer an inordinate share of monopolization's consequences. As Senator Elizabeth Warren said during a recent conference, studies show that market consolidation "contributes to driving down wages and driving up income inequality."[6] Among myriad other negative effects, concentrated market structures reduce competition in the labor markets, which leads to wage suppression. Consider, for example, the *In Re High-Tech* "no poach" cases, in which the Department of Justice sued Google, Apple, and others for colluding and agreeing not to recruit one another's employees.[7] This behavior is not limited to skilled employees; in the franchise no poach cases, fast food workers brought a class action case alleging that forbidding franchisees from poaching one another's employees violated antitrust law.[8] As the *High-Tech* case demonstrates, in concentrated markets employee mobility declines, either because there are simply fewer firms to move to, or because the small number of firms in the market facilitates collusion to suppress mobility and wages.

When employee mobility is suppressed, low-level workers have even fewer opportunities to achieve career advancement or increased pay by moving to, or threatening to move to, another firm. Again, this affects female workers more than male workers. Since the start of the COVID-19 pandemic, millions of women have lost their jobs or voluntarily left the workforce, and many of those women were low level workers without the means to hire outside help.[9] The Bureau of Labor Statistics reports that 227,000 jobs were lost

---

4 New York City Department of Consumer Affairs, From Cradle to Crane: The Cost of Being a Female Consumer, A Study of Gender Pricing in New York City 1 (2015), https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf.

5 *See* Meredith Hoffman, *The Pink Tax: How Women Pay More for Pink*, Bankrate, Jan. 11, 2021, https://www.bankrate.com/finance/credit-cards/pink-tax-how-women-pay-more/.

6 Senator Elizabeth Warren, Speech to Open Markets at Open Markets Institute, America's Monopoly Moment: Work, Innovation, and Control in an Age of Concentrated Power (December 6, 2017) (transcript available at https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5ea34a5ad75e2908a4ad1b85/1587759711866/EMBARGOED-Warren-Open-Markets-Speech.docx.pdf).

7 Complaint at 2, *US v. Adobe Systems*, No. 10-cv-01629-RBW, 2010 WL 1147874 (D.D.C. Sept. 24, 2010). The civil class case is *In re* High-Tech Employee Antitrust Litigation, (No. 11-cv-02509 LHK) 2011 WL 11683784 (N.D. Cal. Sept. 13, 2011).

8 *See, e.g.*, *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 18, 2019); Richmond v. Bergey Pullman Inc., 2:18-cv-00246 (E.D. Wash. Mar. 18, 2019); Stigar v. Dough Dough, Inc., 2:18-cv-00244 (E.D. Wash. Mar. 18, 2019).

9 Courtney Connley, *Women's Labor Force Participation Rate Hit a 33-Year Low in January, According to New Analysis*, CNBC, Feb. 8, 2021, https://www.cnbc.com/2021/02/08/womens-labor-force-participation-rate-hit-33-year-low-in-january-2021.html.

in December 2020, with women accounting for 196,000 of those jobs (86.3%).[10] If and when these women return to the workforce, many will be entry and low-level workers.

Likewise, when wages are suppressed, women, and especially women of color, are affected disproportionately. Women make 79 cents on the dollar compared to men in the same jobs, black women make just 62 cents, and Latina women only 54 cents.[11] When wages shrink, so do women's unequal share of the wage pool. High level executives, on the other hand, may benefit from the employee wage and mobility suppression in these concentrated markets, since lower wages and expenses associated with employee mobility drive up corporate profits. As of 2020, there are still nearly 13 American companies run by a man for every company run by a woman.[12] Women of color hold an even smaller share of management roles in U.S. companies, with Latina women at just 4.3% and black women at just 4%.[13]

Gender inequality also distorts our view of the labor markets. More than 30 years ago economist Marilyn Waring conducted a worldwide study that found that if workers were hired to perform all the unpaid work that women perform, unpaid work would be the largest sector of the global economy.[14] In 2020, the COVID-19 pandemic shed light on women's unpaid work once again, causing some to call for stronger antitrust enforcement as a means to address outsized corporate power and address income inequality.[15]

Third, women entrepreneurs are disproportionately harmed by market concentration as well. While some argue that preserving consumer welfare is the singular paramount goal of American antitrust law, many others would agree that it should also seek to preserve the pathways that allow for new, efficient, innovative market entrants to compete. Monopolies are often bad for consumer welfare because, among other things, they have the power to exclude smaller firms that might otherwise contribute new, innovative, and/or less costly products to consumers.

Women entrepreneurs are even more damaged than other would-be market entrants in this regard. Overcoming the barriers to entry in a concentrated market requires cash.

---

10 *Id.*

11 Robin Bleiweis, *Quick Facts About the Gender Wage Gap*, Center for American Progress, Mar. 24, 2020, https://www.americanprogress.org/issues/women/reports/2020/03/24/482141/quick-facts-gender-wage -gap/.

12 Catalyst, Women in Management: Quick Take (Aug. 11, 2020) https://www.catalyst.org/research/women-in-management/.

13 *Id.*

14 Marilyn Waring, If Women Counted, Harper & Rowe, 1988.

15 Diane Coyle, *Why Did It Take a Pandemic to Show How Much Unpaid Work Women Do?*, N.Y. Times, June 26, 2020, https://www.nytimes.com/2020/06/26/opinion/sunday/inequality-gender-women-unpaid-work.html.

Yet less than 5% of startup investment goes to women,[16] and the average loan for women-owned businesses is 31% less than for male-owned businesses.[17]

And just as monopoly firms can raise prices with minimal consequence, they can also refuse to serve customers, which can be detrimental or fatal to the companies that rely on the monopoly's product to survive. Consider, for example, the dominant role Facebook and Google play in the market for digital advertising, and the many small companies that rely solely on their digital advertising reach for sales leads. If the monopoly or oligopoly decides it will no longer serve market participants that are less profitable for the monopolist, those competitors are disenfranchised from participating in the market.

II. IS MARKET CONCENTRATION DRIVING INEQUALITY IN LAW FIRMS AS WELL?

When market concentration proliferates, diversity and inclusion is defeated: women and other historically underrepresented groups are disproportionately affected and foreclosed from the market. It stands to reason, then, that this trend translates to the legal market in particular as well.

The market for legal services is certainly nowhere nearly as concentrated as some, for example social media. However, it has seen a significant trend toward consolidation in recent years. There were 115 law firm mergers recorded in 2019, and after a precipitous drop during the COVID-19 crisis in 2020, many believe that law firm mergers will make a roaring comeback in 2021.[18]

Perhaps this movement toward greater concentration is partly to blame for the abysmal statistics surrounding the advancement of women, especially in "Big Law." In 2015, a special report from The American Lawyer entitled *Big Law Is Failing Women* estimated that, at the current rate, gender parity in equity partners at large law firms would not be achieved until the year 2181.[19] The study showed that law firms trail only investment banks and venture capital firms in the number of female leaders, coming in at just 16%.[20] In 2019, the ABA reported that "while entering associate classes have been comprised of

16 Sally Hubbard & Washington Bytes, *How Monopolies Make Gender Inequality Worse,* Forbes, Dec. 20, 2017, https://www.forbes.com/sites/washingtonbytes/2017/12/20/how-monopolies-make-gender-inequality-worse-and-concentrated-economic-power-harms-women/?sh=194fdf541b11.

17 Amy Nelson, *Women Drive Majority of Consumer Purchasing and It's Time to Meet Their Needs*, Inc. Magazine, July 17, 2019, https://www.inc.com/amy-nelson/women-drive-majority-of-consumer-purchasing-its-time-to-meet-their-needs.html.

18 Emily Lever, *Law Firm Merger Market to Bounce Back From 2020 Doldrums*, Law360, Jan. 5, 2021, https://www.law360.com/articles/1341694/law-firm-merger-market-to-bounce-back-from-2020-doldrums.

19 The American Lawyer, Special Report: Big Law is Failing Women, May 28, 2015; Julie Triedman, *A Few Good Women*, The American Lawyer, May 28, 2015, https://www.law.com/americanlawyer/almID/1202726917646/a-few-good-women/.

20 Triedman, *supra* note 19.

approximately 45% women for several decades, in the typical large firm, women constitute only 30% of non-equity partners and 20% of equity partners."[21]

As more seasoned antitrust practitioners well-know, for years, antitrust was one of the least diverse practice areas. Finding a woman or a person of color on an antitrust trial team was difficult. In the first "Women in Antitrust Survey" in 1999, Global Competition Review ("GCR") found only 29 women around the world to profile.[22] It also found that although women made up 40% of antitrust associates, only 15% of antitrust partners were women.[23] The Fortune 500 tended to only hire big firms to work on antitrust cases, and historically, those big firms were dominated by white men–especially the leaders of those firms.

Current statistics show that there has been progress over the past few years, but that the progress has been minimal. According to Law 360's latest Glass Ceiling Report, 37% of attorneys and about 25% of all partners at surveyed law firms are women.[24] The Report also found that less than a quarter of equity partners at surveyed U.S. firms are women, although the percentage of women equity partners is notably higher for firms reporting with less than 100 attorneys.[25] The American Bar Association's Model Diversity Survey Report, which compiled data on law firm equity and inclusion recorded between 2017 and 2019, includes similar results.[26] Data for in-house lawyers is better with 34% of Fortune 500 General Counsel spots going to women although the study only found a one percentage point increase from 2019.[27]

The statistics for antitrust practitioners seem to mirror the statistics for big firms generally. One 2016 study of women at large firms found that 48% of antitrust associates

---

21 Eric Bachman, *Why Women Lawyers At Big Law Firms Are Walking Out The Door*, Forbes Nov. 14, 2019, https://www.forbes.com/sites/ericbachman/2019/11/14/brand-new-aba-report-digs-into-biglaw-glass-ceiling-discrimination/?sh=6215bb1444d2 (citing Roberta Liebenberg & Stephanie Scharf, *Walking out the Door: the Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*, American Bar Association & ALM Intelligence (2019)).

22 Rachel Brandenburger & Meghan Rissmiller, Women in Leadership: Some Observations from an Antitrust Perspective, 12 Competition L. Int'l 131, 137 (2016).

23 *Id.*

24 Jacqueline Bell, *Law360's Glass Ceiling Report: What You Need to Know* Law360 (October 18, 2020), https://www.law360.com/articles/1311218. The report also shows that over the last 5 years, firms have made gains on average of only 3%.

25 *Id.*

26 Women lead the teams for several state attorneys general, co-lead Google's defense team, and multiple non-party petitioners. In game developers' monopolization challenge to Apple and Google's app store surcharges, Plaintiff's team is led by former FTC Commissioner Christine Varney. Finally, women lead defense teams in *In re Broiler Chicken Antitrust Litigation* (No. 1:16-08637) (N.D. Ill. 2021).

27 Sue Reisinger, *12 Major Companies Looking to Fill GC Posts, Study Says*, Law360 (Jan. 22, 2021, 4:01 PM) https://www.law360.com/articles/1347304/12-major-companies-looking-to-fill-gc-posts-study-says; *see also* Philip Bantz, *More Minority, women General counsel at Top US Companies Than Ever Before*, law.com (Aug. 31, 2020, 3:06 PM), https://www.law.com/corpcounsel/2020/08/31/more-minority-women-general-counsel-at-top-us-companies-than-ever-before/ (noting that women account for 34% of the Fortune 1000 General Counsel population).

were women and 21% of antitrust partners were women.[28] It is clear that the number of women who are antitrust partners still considerably lags behind the number of men and that women are promoted at lower rates.[29] Chambers only includes six women among the top 41 antitrust practitioners in its current USA Guide Rankings.[30]

Still, it is noticeable that there are more women leaders in antitrust than ever before. Two of the four FTC Commissioners are women, and it is likely that we will see some women appointed by the Biden Administration at the top of the Department of Justice Antitrust Division. Additionally, we are seeing trial teams with more women and people of color playing important roles. Today we see several women leading trial teams in high stakes litigation including in *US v. Google*, *In re Google Play Store Antitrust Litigation*, and *In re Broiler Chicken Antitrust Litigation*. In the most high-profile antitrust cases of 2020,[31] women accounted for 23.8% of all attorneys, 18.3% of lead attorneys and 32.9% of government attorneys.[32] Notably, these numbers include women representing interested parties and amici. This sample shows that more women acted as lead attorneys on government teams, especially state government, and when working for interested parties and amici. This again suggests that women are finding greater leadership opportunities representing small and mid-size businesses or the government agencies.

According to the ABA, the policies that experienced women lawyers say are effective in retaining and promoting women in big law firms are work from home (78%); paid parental leave (76%); clear consistent criteria for promotion to equity partner (75%); and a formal part-time policy for partners (75%). But as law firms consolidate, the scales tip. Employee mobility and wages are suppressed, and law firm employment becomes a "buyers' market." Will big law firms decide to implement policies like work from home and paid parental leave when there is little competition for qualified labor?[33]

III. CAN GREATER ANTITRUST ENFORCEMENT MAKE AN IMPACT?

On February 4, 2021, Senator Amy Klobuchar (D-Minn.), now head of the Senate's antitrust subcommittee, introduced legislation to reform the antitrust laws. Klobuchar's bill aims to better protect competition and to deter anticompetitive exclusionary conduct that harms competition and consumers while also strengthening the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws.[34] A large focus

28 Brandenburger & Rissmiller, *supra* note 22, at 137.

29 *Id.* at 138.

30 Chambers USA Nationwide Antitrust Rankings (2020), https://chambers.com/guide/usa?publicationTypeGroupId=5&practiceAreaId=363&subsectionTypeId=1&locationId=12788.

31 Matthew Perlman, *The Biggest Rulings in Antitrust Cases of 2020*, Law360 (December 22, 2020), https://www.law360.com/articles/1340329/the-biggest-rulings-in-antitrust-cases-of-2020.

32 The cases are New York et al. v. Deutsche Telekom AG, No. 1:19-cv-05434 (S.D.N.Y. Feb. 11, 2020); FTC v. Qualcomm Inc., No. 19-16122 (9th Cir. 2020); FTC v. AbbVie Inc., No. 18-2621 (3rd Cir. 2020); Comcast Corp. v. Viamedia Inc., No. 18-2852 (U.S. 2020).

33 Bachman, *supra* note 21.

34 Competition and Antitrust Law Enforcement Reform Act of 2021, S. ___, 117th Congress (2021), https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf.

of the legislation is to amend Section 7 of the Clayton Act to forbid mergers that "create an appreciable risk of materially lessening competition," broadening the current standard which bans mergers that "substantially lessen competition." The bill also expressly applies the law not only to monopoly power, but also to monopsony power. Importantly, the bill adds a provision to the Clayton Act barring "exclusionary conduct" that disadvantages competitors and risks harming competition. The bill also boosts much needed funding for the Department of Justice's Antitrust Division and the Federal Trade Commission, and empowers the agencies to seek civil monetary penalties for violations of the Sherman Act giving the law more teeth than it currently has.[35] Finally, the bill establishes a new FTC division to conduct studies of markets and past mergers.

The proposed legislation not only addresses the need for competitive markets to ensure the high quality of goods and low prices for consumers, but also addresses that "the presence and exercise of market power makes it more difficult for people in the United States to start their own businesses, depresses wages, and increases economic inequality, with particularly damaging effects in historically-disadvantaged communities."[36] The legislation expressly recognizes that monopsony power allows a firm to force workers to accept below market wages and reduces opportunities for workers, and that when "dominant employers exercise market power, they harm workers by paying them low wages, reducing their benefits, and limiting their future employment opportunities."[37]

These reforms should directly impact all workers, but especially women and people of color who have not traditionally had positions of power in America's dominant firms. While antitrust law has typically focused on effects on consumers, many in the profession have been thinking about how antitrust law itself can be used to promote racial and gender inclusion and equity. In her published remarks at the GCR Women in Antitrust Conference in November 2020, FTC Commissioner Rebecca Kelly Slaughter commented on how antitrust enforcers might think creatively about using existing authority to combat systemic racism and address gender inequality.[38] Commissioner Slaughter noted that in September 2020 alone 865,000 women dropped out of the workforce and that a recent report found that one in four women are considering downsizing their careers or leaving the workforce as a result of the coronavirus pandemic.[39] This was the first time in six years that the study found women intending to leave their jobs at higher rates than men.[40] More recent statistics show that 2.5 million women have left the workforce since the beginning

35 In her remarks at the GCR Women in Antitrust Conference in November 2020, FTC Commissioner Rebecca Kelly Slaughter noted that the FTC had roughly 50% more full-time employees at the beginning of the Reagan Administration than it does now. Rebecca Kelly Slaughter, Commissioner, Federal Trade Comm'n, Remarks of Commissioner Rebecca Kelly Slaughter at GCR Interactive: Women in Antitrust, Antitrust at a Precipice (Nov. 17, 2020) at 5, https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf.

36 *Supra* note 34 at 2.

37 *Id.* at 5–6.

38 Slaughter, *supra* note 35 at 3.

39 *Id.* at 1-2 (citing McKinsey & LeanIn.Org, Women in the Workplace 2020, 6, 9 (Sept. 30, 2020), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2020.pdf).

40 *Id.* at 2.

of the pandemic, a problem that Vice President Harris called a "national emergency."[41] This mass exodus may be caused by the pandemic, but it only underscores the importance of ensuring greater gender equity in the labor market: "Women have already been climbing a mighty mountain to reach the goal of gender equity on the job and in the labor market; even as we have been making progress on that climb, the mountain has just gotten even higher."[42]

Commissioner Slaughter went on the record stating that antitrust law should not be "value-neutral" because antitrust enforcement necessarily addresses fundamental economic and market structures that are historically and presently inequitable. As the Commissioner said, "when we make decisions about whether and where to enforce the law or how to deploy our enforcement resources, we are making decisions that will have an effect on structural equity or inequity."[43] The legislation proposed by Senator Klobuchar and some of her colleagues echoes Commissioner Slaughter's concerns and expressly acknowledges the effects of market power on historically-disadvantaged communities and the need for greater study and data on the effects of market concentration on wages and affected labor markets.[44]

Could these proposed reforms, if they become law, result in greater gender equality for women lawyers, specifically women lawyers who practice antitrust law? While some may think an affirmative response is pure speculation, it seems reasonable to think that less consolidation and more robust antitrust enforcement could and should result in increased opportunities for women lawyers.

Greater competition and less consolidation resulting from strengthened antitrust laws should lead to further progress for women antitrust lawyers as more challenges brought under Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act open up additional opportunities. Put simply, increased litigation and merger review equates with increased opportunities.

Moreover, by preserving smaller companies from consolidation, we preserve opportunities for women lawyers to represent these companies. As smaller companies are more likely to hire lawyers from mid-size and boutique firms, it also opens up greater opportunities for mid-size and small antitrust firms. Statistics show that there is a larger percentage of women in equity partnership and in leadership at mid-size and smaller firms.[45] Thus, it is more likely that women lawyers will have increased opportunities to represent these smaller businesses in lead roles. Additionally, a greater percentage of small businesses are run by women, and women business owners are more likely to hire other women including women lawyers. One recent study found that startups with at least one

41 *Women Leaving Work Force Is a 'National Emergency,' Harris Says,* N.Y. Times (Feb. 18, 2021), https://www.nytimes.com/video/us/politics/100000007612219/harris-women-work-force.html.

42 *Supra* note 35 at 2.

43 *Id.* at 4.

44 *Supra* note 35 at 16–17, 24–25.

45 Bell, *supra* note 24.

woman founder hire two and a half times as many women and raise more venture capital compared to start-ups exclusively founded by men.[46]

A further benefit should be felt by in-house counsel. As competition increases and allows innovative small firms to thrive instead of being acquired, increased employment opportunities and pay for women should be felt by all female employees inside these smaller rivals, including women in-house counsel.

Lastly, as the DOJ and FTC expand and government enforcement is more robust, there will be more work for antitrust lawyers in general and hopefully many of these opportunities will go to women. Government agencies are already better at promoting women to senior positions than big law firms—in 2013, women made up 35% of senior staff at the FTC compared to 20% of partners in private practice. In 2019, women made up 45% of all attorneys at the DOJ and 38% of those women held senior executive positions.[47] Consequently, an expansion of these agencies should result in more opportunities for women antitrust attorneys.

Is promoting gender equity through antitrust laws too ambitious–"hipster antitrust," if you will? Perhaps antitrust law is not the primary vehicle through which to achieve these goals, but recognizing that market concentration negatively affects women and people of color cannot hurt. The Competition and Antitrust Law Enforcement Reform Act of 2021, Senator Warren, Commissioner Slaughter and others, have already made this connection and are already raising awareness.

46 Collin West & Gopinath Sundaramurthy, *Startups With at Least 1 Female Founder Hire 2.5x More Women*, Kauffman Fellows (Oct. 17, 2019), https://www.kauffmanfellows.org/journal_posts/female_founders_hire_more_women; *see also* Dina Gerdeman, *Why Employers Favor Men*, Harvard business school working knowledge (Sept. 11, 2017), https://hbswk.hbs.edu/item/why-employers-favor-men (finding that when women make hiring decisions equally qualified women and men candidates have an equal chance of being hired. However, when men are making hiring decisions between two equal candidates women are only hired 40% of the time).

47 Jessica Schneider & Kate Sullivan, *DOJ Employees Call Out Lack of Women in Leadership Positions*, CNN (Feb. 13, 2019 8:45 PM), https://www.cnn.com/2019/02/13/politics/doj-lack-of-women-leaders/index.html.

DAMAGE METHODOLOGY TRENDS WITHIN FALSE ADVERTISING AND PRODUCT DEFECT CLASS ACTIONS

By Dan Werner, Ph.D., CPA and Garrett Glasgow, Ph.D.[1]

I. INTRODUCTION

Over the past decade, courts have increasingly focused on issues related to the calculation of damages during the class certification stage.[2] At the class certification stage, Rule 23(b)(3) requires the court to find that common issues predominate, including with respect to the alleged injury.[3] Cases such as *Comcast* highlight the need for a damages model to be tied to the theory of liability and for damages to be measurable on a classwide basis.[4] The increased rigor with respect to issues of predominance and damages can also be seen through the evolution of damage approaches within false advertising and product defect litigation. As a result, engaging a damages expert at the class certification stage is now a *de facto* requirement in many cases.

This article reviews several different approaches to calculating damages in false advertising and product defect class action litigation in recent years. Specifically, we review the full refund approach, the promised discount approach, and several different applications of a price premium approach, including a simple price comparison, regression analysis, conjoint surveys, and economic market simulations. Although one or more damages methodologies may be available in theory, practitioners must be careful to design and implement their damages model in a manner that fits the facts of the case.

---

1 Dan Werner is a Senior Consultant at NERA Economic Consulting. Garrett Glasgow is an Associate Director at NERA Economic Consulting. The views expressed within this article are solely those of the authors and do not necessarily reflect the views of NERA Economic Consulting, its clients, or other NERA consultants.

2 "The legal community can, however, agree on one central proposition: class certification has, in recent decades, become increasingly complex…This was not always the case, of course. Federal rule of Civil Procedure 23 was once a relatively simple procedural mechanism, and the class-certification determination typically occurred at the outset of any litigation, well in advance of significant discovery. With the advent of *Wal-Mart* and *Comcast*, however, and their expositions of the 'rigorous analysis' required of courts, litigants can expect that the recent trend of deferred class-certification decisions (in favor of substantial precertification discovery) will continue." Michael D. Hausfeld et al., *Antitrust Class Proceedings – Then and Now*, *in* 26 Research in L. & Econ. The L. & Econ. of Class Actions 77, 77–133 (James Langenfeld ed., 2014).

3 "A court may find a lack of predominance if the plaintiffs cannot prove injury, causation, or an element of a substantive claim on a classwide basis. Predominance may also be lacking if the defendant can assert individualized defenses to class members' claims or different state laws with material variations apply to different class members' claims. Courts agree that the mere existence of individualized damages does not preclude class certification because to hold otherwise would eviscerate the purpose and use of Rule 23(b)(3). Nevertheless, the need to determine damages on an individualized basis may be considered as a factor when determining whether the predominance requirement has been met." Caroline H. Gentry, *A Primer On Class Certification Under Federal Rule 23*, ABA Section of Litigation Corporate Counsel CLE Seminar, https://www.classactiondeclassified.com/wp-content/uploads/sites/26/2017/08/a_primer_class_certification_under_federal_rule.pdf.

4 In *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), plaintiffs alleged four different theories of antitrust impact, but only one was deemed suitable to classwide resolution. However, plaintiffs' proposed damages model was unable to isolate damages from the one remaining theory, and the Supreme Court found class certification was improper because plaintiffs failed to establish that damages could be measured on a classwide basis.

Whether a damages model is sufficient for class certification often hinges on the details of implementation and the facts of the case, as we show in several examples.

II. FULL REFUND APPROACH

The simplest damages model proposed by plaintiffs in false advertising and product defect class actions is the "full refund" approach. Under this approach, plaintiffs argue that consumers purchased the product solely due to some falsely advertised benefit, and the product is worthless without that benefit.[5] Thus, under this scenario, class members are entitled to a full refund of the purchase price. Damage calculations under the full refund approach are appealingly simple. In fact, the full refund approach can be regarded as a special case of the "price premium" approach discussed below, in which the price premium resulting from the alleged misconduct is equal to the entire purchase price.[6] However, demonstrating that this model is appropriate for a given case may pose significant challenges. For instance, defendants may argue that the product received by each class member had at least *some* value, and thus the full refund approach to damages does not apply.

Recent court decisions involving alleged misrepresentations on product labels have helped clarify when the full refund approach to damages is appropriate. For example, *In re Tobacco Cases II*, the California Court of Appeal wrote, "A full refund *may* be available in a UCL case when the plaintiffs prove the product had *no* value to them."[7]

When consumers received at least some value from their purchase, however, courts tend to reject the full refund approach for failure to satisfy *Comcast's* requirement that classwide damages must be tied to the liability theory to satisfy Rule 23(b)(3)'s predominance requirement. For example, in *Werdebaugh v. Blue Diamond Growers*, a case involving allegations that various almond milk products were falsely advertised as "all natural," the court ruled against plaintiffs' full refund model during the class certification stage, "because it is based on the assumption that consumers receive[d] no benefit whatsoever from purchasing the accused products [, which] cannot be the case, as consumers received benefits in the form of calories, nutrition, vitamins, and minerals."[8] Another example is *In Re: Pom Wonderful LLC Marketing and Sales Practices Litigation*, a case involving allegations that certain Pom juice products falsely claimed to provide various health benefits. There, the court rejected the full refund methodology because it did not

---

5 Similarly, in product defect cases, plaintiffs argue that the product was defective, and the alleged defect resulted in the product having no value.

6 This view is consistent with the view of the California Court of Appeal in *In re Tobacco Cases II*, 240 Cal. App. 4th 779 (2015), which noted that the court in *Ortega v. Natural Balance, Inc.*, 300 F.R.D. 422, 430 (C.D. Cal. 2014), "certified a class action where the plaintiffs sought a full refund for a dietary supplement on the ground it falsely advertised aphrodisiac qualities and had no value apart from that claim. In that type of case, it appears the *Vioxx* measure of restitution would still apply, since the price paid minus the value actually received equals the price paid. In that instance, a full refund is not based solely on the defendant's conduct, but on the dual considerations of the plaintiffs' losses and the defendant's conduct." *Id.* at 795-96.

7 *Id.* at 795.

8 *Werdebaugh v. Blue Diamond Growers*, Case No. 12-CV-2724-LHK, 2014 WL 2191901, at *22 (N.D. Cal. May. 23, 2014) ("*Werdebaugh I*").

account for any value received by consumers independent of the contested labeling claims.[9] Without accounting for the value received, the damages model did not isolate damages that resulted from the alleged misconduct and failed *Comcast*. More recently, the court denied class certification for the same reasons in *Bruton v. Gerber Products,* a case involving allegations that certain Gerber food products are deceptively labeled with various claims.[10]

Courts apply similar logic outside the context of food labeling claims. For example, in *Chowning v. Kohls*, a case involving allegations of a deceptive reference price for apparel (*e.g.*, comparing a selling price alongside a significantly higher fictitious "original" price), the plaintiff put forth a full refund approach to damages, among others.[11] However, the court rejected the full refund model because it "fail[ed] to account for the value Plaintiff received" and "neither party dispute[d] that the [contested products] each provided some value."[12] The court also suggested that a "viable measure of restitution" could include "a 'price premium' model in which an expert isolates the amount of the price attributable to the false representation."[13] On appeal, the Ninth Circuit confirmed that the proper calculation of restitution in this case is the difference between the price paid and the value received.[14]

Even in situations where the full refund approach may apply, the implementation of the approach may come under scrutiny. For example, in *Lambert v. Nutraceutical Corp.*, which involved a nutritional supplement that was alleged to be falsely advertised, the court initially certified a class that had proposed using the full refund approach, but later decertified the class because the plaintiff's damages model was based on the *suggested* retail price, rather than the *actual* retail price paid by class members.[15] As a result, common issues did not predominate since the plaintiff had not provided the evidence required to apply the full refund model for classwide damages.[16] However, on appeal, the Ninth Circuit reversed the order decertifying the class, noting that "uncertainty regarding class members' damages does not prevent certification of a class as long as a valid method has been proposed for calculating those damages."[17] Since the plaintiff had presented evidence that the product was worthless, the court suggested that the full refund model was a

---

9 *In re Pom Wonderful LLC Mkt. & Sales Practices Litig.*, Case No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at *3 (C.D. Cal. Mar. 25, 2014) ("*Pom Wonderful*").

10 *Bruton v. Gerber Products Co.*, Case No. 12-CV-02412-LHK, 2018 WL 1009257, at *9 (N.D. Cal. Feb. 13, 2018) ("*Bruton*").

11 *Chowning v. Kohl's Dep't Stores, Inc.*, Case No. 2:15-cv-08673-RGK-SP, 2016 WL 1072129, at *7 (C.D. Cal. Mar. 15, 2016) ("*Chowning I*").

12 *Id.*

13 *Id.* at *12.

14 *Chowning v. Kohl's Dep't Stores, Inc.*, 735 Fed. Appx. 924, 925 (9th Cir. 2018) ("*Chowning II*").

15 *Lambert v. Nutraceutical Corp.*, 870 F.3d 1170, 1174-75 (9th Cir. 2017), reversed on other ground sub. nom *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019).

16 *Id.* at 1175.

17 *Id.* at 1182.

workable method with only the suggested retail price and unit sales information, sufficient for the class to be certified.[18]

III. PROMISED DISCOUNT APPROACH

Within allegations of a falsely advertised discount or reference price, plaintiffs have also proposed a "promised discount" approach, sometimes called an "actual discount" or a "false transaction value" model. Damages under this approach are based on the advertised discount that consumers did not receive. For example, suppose a product was listed for sale at $20 and this price was advertised as being "50% off," even though $20 was the normal selling price. If the promised discount of 50% had been applied to the normal selling price of $20, consumers would have paid $10 (instead of $20). Under this hypothetical example, a promised discount approach would calculate damages of $10 based on the difference between the price paid ($20) and the price consumers would have paid if the advertised discount was applied to the normal selling price of the product ($10).

Courts have had mixed reactions to the promised discount approach. This approach was sufficient to certify the class in *Spann v. J.C. Penney Corporation*, a case involving allegations of a deceptive "original" price advertised next to a "sale" price.[19] In that case the court concluded that "[t]he amount plaintiff thought she was saving was a factor in her purchase decisions" and that "[p]laintiff is entitled to argue that payment of the 'transaction value' [the difference between expected and received value], if measurable and supported by evidence, would restore sums acquired by defendant's allegedly unfair pricing practices."[20] However, the same approach was rejected in *Chowning v. Kohls,* in which the court noted that, "[t]o determine Plaintiff's loss for purposes of restitution, the focus should be on what Plaintiff *actually received* given the price she paid, not on the bargain Plaintiff *thought she was receiving*."[21] The Ninth Circuit upheld this decision on appeal, noting that the correct approach was "price paid versus value received," and pointing out that the promised discount approach was not available as a method for calculating restitution in a UCL action, because it "would effectively seek damages sounding in contract, not equity."[22]

IV. PRICE PREMIUM APPROACH

The economic logic for damages under a price premium theory is straightforward: plaintiffs allege that the misconduct (*e.g.*, false advertising or concealing a product defect) leads to higher consumer demand for the product, which in turn leads to higher market prices for the product. Thus, under this theory of injury, all class members paid a higher price for the product relative to what they would have paid if class members had not been misled when purchasing the product. Damages are calculated as the difference between

18 *Id.* at 1183–84. The Ninth Circuit concluded however, that "whether Lambert could prove damages to a reasonable certainty on the basis of his full refund model is a question of fact that should be decided at trial." *Id.*

19 *Spann v. J.C. Penney Corporation*, 307 F.R.D. 508 (C.D. Cal., May 18, 2015).

20 *Id.* at 520–521.

21 *Chowning I*, 2016 WL 1072129, at *10 (emphasis original).

22 *Chowning II*, 735 Fed. App. at 925–26.

what class members actually paid in the real-world (the "as-is" world) and the estimated market price for the product under a scenario in which the defendant did not engage in the alleged misconduct (the "but-for" world). As suggested by the prior cases, the price premium approach is economically appropriate when consumers received a product with some value. The challenge for any damages expert is to isolate the harm caused by the alleged misconduct (*i.e.*, properly identify the price premium tied to the alleged misconduct). Below we discuss four recent approaches to calculating a price premium: (i) a simple price comparison, (ii) regression analysis, (iii) conjoint analysis, and (iv) economic market simulations.

A. Calculating Price Premiums Through a Simple Price Comparison

One simple approach to isolating the price premium, assuming sufficient data exist that are tied to the facts of the case and the relevant marketplace, may be to compare the price of the product with the alleged deception to a nearly identical product without the alleged deception. This approach is consistent with the well-accepted market approach to valuation, which "provides an indication of value by comparing the asset with identical or comparable (that is similar) assets for which price information is available."[23]

Although this method is conceptually sound, price comparisons of insufficiently similar products will fail to accurately identify the value of the product received by the plaintiffs and, as a result, fail to isolate the price premium caused by the alleged misconduct. Several cases involving false advertising allegations have noted this issue. For example, *In re Pom Wonderful LLC Marketing and Sales Practices Litigation*, plaintiffs put forth a price premium model that compared the price of the contested pomegranate juice product to a benchmark of prices for orange, grape, apple, and grapefruit juices. However, the court rejected this approach, concluding that this simple price comparison merely, "observed that Pom's juices were more expensive than certain other juices. Rather than answer the critical question why that price difference existed, or to what extent it was a result of Pom's actions, [plaintiffs] instead assumed that 100% of that price difference was attributable to Pom's alleged misrepresentations."[24] The court's decision to decertify the class underscores the importance of an appropriate damages model in light of the *Comcast* decision.

Similarly, in *Bruton v. Gerber Products*, plaintiffs put forth a simple price premium model comparing the price of an allegedly mislabeled product to the prices of allegedly comparable products that did not include the contested labeling statements. The court rejected this model, finding that it "presume[d] that the entire price difference between Gerber baby food and a competitor such as Beech Nut baby food [was] attributable to Gerber's misleading statements, when any number of factors—such as brand recognition or loyalty, ingredients, and product quality—might explain all or part of the difference."[25]

These court decisions, among others, underscore the importance of isolating the alleged misconduct from other factors that may influence pricing, and thus tying the alleged misconduct to the price premium paid by class members. Although a simple price

23 International Valuation Standards Council, International Valuation Standards 2017.

24 *Pom Wonderful*, 2014 WL 1225184, at *5.

25 *Bruton*, 2018 WL 1009257, at *9.

comparison model may be informative in certain cases where a sufficiently similar product is found without the contested labeling claims, a comparison that does not properly account for all relevant factors influencing pricing cannot sufficiently measure the harm sustained by class members due to the alleged misconduct.

B. Calculating Price Premiums Through Regression Analysis

A "regression analysis" is a statistical method that measures the influence of one or more independent variables (*e.g.*, supply and demand factors) on a dependent variable (*e.g.*, price). By including a number of independent variables in a properly specified regression model, the practitioner is effectively "controlling" for those factors (*i.e.*, measuring the effect of each independent variable on the dependent variable, while holding all of the other independent variables constant). As a result, with proper data and implementation, in some cases a regression analysis can measure the incremental impact of alleged misconduct on prices paid by class members, while controlling for other important factors that also influence price.

Courts have long accepted a properly implemented regression analysis with appropriate data as a reliable method for analyzing the impact of alleged misconduct on prices paid by class members (*e.g.*, under price fixing allegations).[26] When applying regression analysis to analyze the price of consumer products, economists often view such products as a "bundle of attributes," in which each component of the product is responsible for some portion of the price. These types of regressions are often called "hedonic regressions."[27] Under certain market conditions and with sufficiently rich data on comparable products, product attributes, and prices paid, a regression analysis can account for each of the contested product's attributes while measuring the incremental effect of the alleged misconduct (*e.g.*, the falsely advertised feature or undisclosed product defect) on the product's price at a specific time. The acceptance of hedonic regression analysis by courts for the purposes of class certification has been mixed, depending on the facts of the case, available data, and implementation of the method. Courts have certified classes under this approach in some false advertising cases such as *Brown v. The Hain Celestial Group*, a case involving allegations that certain cosmetic products were falsely advertised as organic, and in *Pettit v. Procter & Gamble Company*, a case involving allegations that certain cleaning wipes were

---

26 "The most common statistical method employed in antitrust litigation involves the estimation of 'reduced-form' price equations. A typical reduced-form model might explain the variation in the price of a product as a function of a series of variables relating to cost, demand, and market structure. In some cases, the model would include additional 'dummy variables' (i.e., variables that take on the values zero or one) that represent geographic or time differences in prices that account for variables omitted from the model (the set of such variables are the 'fixed effects'). The model is called 'reduced form' because the price equation is derived from other more basic economic relationships relating to demand and supply. As a result, the parameters (the variable coefficients in a multiple regression model) of a reduced-form equation are typically themselves functions of a number of the structural parameters (the parameters of the underlying economic relationships)" (Rubinfeld, Daniel L. "Quantitative methods in antitrust." *Issues in Competition Policy* 723 at 724-25*, ABA Section of Antitrust Law* (2008)).

27 *See, e.g.,* Sherwin Rosen, *Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition*, 82 The Journal of Political Economy 34 (1974); Michael Greenstone, *The Continuing Impact of Sherwin Rosen's 'Hedonic Prices and Implicit Markets: Product Differentiation in Pure Competition'*, 125 Journal of Political Economy 1891 (2017).

falsely advertised as "flushable."[28] In other cases, courts reject a regression-based approach to estimating a price premium for a variety of reasons, some of which are discussed below.

Although regression analysis is theoretically able to measure a price premium caused by false advertising or the failure to disclose a product defect, care must be taken to ensure proper application. For instance, when two or more independent variables are highly correlated (an issue known as "multicollinearity") a regression model can have difficulty measuring the extent to which each variable is independently influencing the dependent variable. In the extreme case, independent variables can be "perfectly collinear" in a way that prevents a regression model from measuring the independent effect of each variable.

An example of the perfect collinearity issue arose in *Werdebaugh v. Blue Diamond Growers*. Although the court initially found that plaintiffs' regression model was sufficient for class certification,[29] upon implementation of the model the expert omitted the Blue Diamond brand variable in an attempt to address the problem of perfect collinearity, and defendants successfully argued that plaintiffs' application of the regression model "conflate[d] the effect of the alleged mislabeling with the value of Blue Diamond's brand."[30] As a result, the court decertified the class, "conclud[ing] that the perfect collinearity problem here renders the damages model insufficient under *Comcast* because [plaintiff's] model is incapable of isolating the damages attributable to Defendant's alleged wrongdoing."[31]

The concept of "omitted variable bias" is another well-known issue that could result in a flawed application of the regression approach in false advertising and product defect cases. Omitted variable bias can occur when a regression model excludes one or more important variables that influence price. As a result, the regression model may produce a biased result that does not accurately measure the influence of the alleged misconduct on pricing, meaning that the price premium has not been reliably estimated. For example, in *Bruton v. Gerber Products*, plaintiffs put forth a regression analysis to measure the price premium. Although the court granted that "absolute precision is not required at the class certification stage," and it is not necessary at the class certification stage to show that the method will work with certainty,[32] the court found the proposed regression did not satisfy *Comcast* in part because plaintiffs "d[id] not explain how the proposed Regression Model w[ould] account for independent variables that might affect the products' price or sales, such as advertising, brand recognition or loyalty, the prices of competing products, regional differences, consumers' income, and seasonality."[33] From an econometric perspective, the absence of a variable within a regression analysis, in theory, does not necessarily prove that

---

28 *Brown v. Hain Celestial Grp.*, Case No. 11-cv-03082-LB, 2014 WL 6483216, at *18-20 (N.D. Cal. Nov. 18, 2014); *Pettit v. Procter & Gamble Co.*, Case No. 15-cv-02150-RS, 2017 WL 3310692, at *4 (N.D. Cal. Aug. 3, 2017).

29 *Werdebaugh I*, 2014 WL 2191901, at *26.

30 *Werdebaugh v. Blue Diamond Growers,* Case No. 12-cv-2724-LHK, 2014 WL 7148923, at *10 (N.D. Cal. Dec. 15, 2014) ("*Werdebaugh II*").

31 *Id.* at *11.

32 *Bruton*, 2018 WL 1009257 at *12.

33 *Id.* at *10.

the regression results are (or will be) biased.[34] The standards of the economic discipline do not require that every theoretically possible variable be accounted for in a regression analysis, only that the primary determinants are included.[35] However, the recent decision in *Bruton* suggests that plaintiffs should perform analyses at the class certification stage to establish that the regression analysis is workable.

The time frame covered by a regression analysis is another important consideration. While some analyses compare the price of the contested product to a benchmark of prices for products sold without the alleged misconduct during the proposed class period, others take the form of a "before-and-after" approach, which compares the price of the contested products before and after the alleged misconduct took place. The strength of the before-and-after approach is that the price comparison is for the same product with and without the contested labeling, eliminating the concerns related to comparing the contested product to other products. However, a regression analysis using the before-and-after approach should also consider additional variables related to supply and demand factors that might have caused prices to change over the relevant time period.

Practitioners also should ensure that sufficient data are available to implement the before-and-after approach in a manner that will accurately capture the alleged misconduct. In *Werdebaugh v. Blue Diamond Growers*, plaintiffs first put forth a before-and-after regression analysis in support of their motion for class certification, but later abandoned the approach following the close of fact discovery because plaintiffs' expert concluded that there was not sufficient evidence to precisely determine the before-and-after periods.[36]

When there is uncertainty as to when the "before" period (*i.e.*, without alleged misconduct) and "after" period (*i.e.*, with alleged misconduct) actually occurred, "measurement error" may influence the variable identifying the accused conduct. For example, plaintiffs in *Bruton v. Gerber Products* put forth a before-and-after application of regression analysis, but the court acknowledged an "important flaw" that undermined their ability to "determine precisely when consumers were buying Gerber products with the challenged label statements, and when consumers were buying Gerber products without the challenged label statements."[37] For example, Gerber reported that there were timing differences in when a new label might appear on store shelves and submitted evidence that at certain times, there were two different labels—one with the contested statement and one without—on a product for sale within the same store. The court concluded, "Given

---

34 An omitted variable will cause bias when it is correlated with both the dependent variable and the variable of interest.

35 "Of course, the model is only a simplification of reality. It will include the salient features of the relationship of interest, but will leave unaccounted for influences that might well be present but are regarded as unimportant. No model could hope to encompass the myriad essentially random aspects of economic life. It is thus also necessary to incorporate stochastic elements. As a consequence, observations on a dependent variable will display variation attributable not only to differences in variables that are explicitly accounted for, but also to the randomness of human behavior and the interaction of countless minor influences that are not." Greene, William H. *Econometric Analysis*. Fifth Edition. Boston: Prentice Hall, 2003, p. 2.

36 *Werdebaugh II*, 2014 WL 7148923, at *4, *9.

37 *Bruton*, 2018 WL 1009257 at *11.

the absence of a reliable means to compare products with and without the challenged labeling, the Court finds that the proposed Regression Model fails to satisfy *Comcast*."[38]

In sum, regression analysis is a generally accepted and widely used methodology in the economics discipline. However, the widespread acceptance of the method does not necessarily mean that it can be proven to be a workable method to reliably measure the economic harm caused by the alleged misconduct in every case. Practitioners should carefully consider whether a given regression analysis is appropriate for the facts of the case and the available data.

C. Calculating Price Premiums Through Survey-Based Approaches

Surveys of consumers have also been used to calculate damages in false advertising and product defect class actions. Rather than analyze historical data, survey-based approaches rely on survey responses from individuals whose preferences, purchasing habits, and/or responses to product advertising, labeling, and/or characteristics could be said to reasonably represent the putative class (or the desired target population).

Perhaps the most common type of survey experts use to calculate damages in false advertising and product defect class actions is a choice-based conjoint analysis, often referred to simply as "conjoint analysis." In a choice-based conjoint analysis, survey participants are presented with a series of questions, each of which asks them to select their most preferred product from among several available product options with different attributes (including price). A statistical model can use data from a conjoint survey to estimate the influence of each product attribute on the choices made by survey respondents. In particular, the model would measure how each product attribute affects the probability that consumers will select a given product configuration. The results from this statistical model therefore provide a measure of demand for each attribute of a product. Researchers can use these results to estimate consumers' "willingness-to-pay" for a given product attribute by observing how consumers make trade-offs between higher or lower prices and the presence or absence of the attribute. For instance, a conjoint analysis might reveal that consumers are willing to pay an additional $1 for a product advertised with a misleading claim, or would want a $1 discount for the product when the presence of a defect is known. Thus, a properly implemented conjoint analysis may help to provide empirical conclusions that directly link consumer demand to the contested claims (*e.g.*, mislabeling).

Courts are well-attuned to analyzing the reliability of a survey design,[39] and they have not hesitated to reject damages calculations based on data where the underlying survey

---

38 *Id.*

39 As the *Manual for Complex Litigation* explains, "The sampling methods used must conform to generally recognized statistical standards. Relevant factors include whether the population was properly chosen and defined; the sample chosen was representative of that population; the data gathered were accurately reported; and the data were analyzed in accordance with accepted statistical principles . . . In addition, in assessing the validity of a survey, the judge should take into account the following factors: whether the questions asked were clear and not leading; whether the survey was conducted by qualified persons following proper interview procedures; and whether the process was conducted so as to ensure objectivity (e.g., determine if the survey was conducted in anticipation of litigation and by persons connected with the parties or counsel or by persons aware of its purpose in the litigation)." Federal Judicial Center, Manual for Complex Litigation, § 11.493 (4th Ed. 2004).

failed to replicate the real-world conditions in which the accused conduct took place. For example, in *Townsend v. Monster Beverage Corp.*, plaintiffs put forth a survey designed to estimate the price premium associated with allegedly deceptive labeling on certain Monster Beverage products. However, the survey did not use the precise language in the accused labeling, but instead relied on paraphrased versions of the allegedly misleading statements. The court concluded that, in this case, "[i]n order to evaluate the price premium attributable to each of the alleged misstatements, [plaintiffs] would have had to conduct a survey that included the specific statements themselves."[40] The court excluded all testimony that relied on the paraphrases of the allegedly deceptive advertising, and denied class certification.[41]

While a properly applied conjoint analysis can measure incremental changes in demand and willingness to pay due to the alleged misconduct, a central issue in recent cases is whether or not the measured willingness to pay can be used as the estimate of the price premium paid by class members.[42] Basic economic theory notes how prices are the result of not only demand conditions (*e.g.*, consumers' willingness to pay for the product), but also supply conditions (*e.g.*, companies' willingness to supply a given amount of the product for a given price). Therefore, quantifying a change in demand for a product as a result of certain challenged conduct is not necessarily sufficient to quantify the effect of the conduct on the price of the product. Thus, depending on what is assumed about the economic market, a conjoint analysis that only considers the effect on demand through the consumer's willingness to pay for a given product attribute may not accurately capture the price premium consumers paid.

Two recent decisions highlight these issues: *Hadley v. Kellogg Sales*, which involved allegations that certain products are mislabeled as healthy, and *Schechner v. Whirlpool,* a case involving allegations that certain ovens were falsely advertised as self-cleaning.[43] In *Hadley*, plaintiffs submitted a choice-based conjoint analysis to measure the monetary value that consumers attached to the alleged misrepresentations, which was used as the price premium for damages. Defendants argued that the approach could only measure demand-side factors, and thus failed to properly measure the price premium, while plaintiffs argued that the model properly considered supply-side factors by using market prices and by assuming that supply is fixed.[44] The court explained:

---

40 *Townsend v. Monster Beverage Corp.*, 303 F. Supp. 3d 1010, 1024 (C.D. Cal. 2018).

41 *Id.* at 1024, 1052.

42 *See, e.g., In re NJOY, Inc. Consumer Class Litig.*, 120 F. Supp. 3d 1050, 1070-73 (C.D. Cal. 2015); *In re Dial Complete Mktg. & Sales Practices Litig.*, 320 F.R.D. 326, 334 (D.N.H. 2017) ("However, whether conjoint analysis can be used to ascertain a price premium attributable to a particular product feature is not fully resolved."); *Broomfield v. Craft Brew Alliance, Inc.*, Case No. 17-CV-01027-BLF, 2018 WL 4952519, at *14-20 (N.D. Cal. Sept. 25, 2018).

43 *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084 (N.D. Cal. 2018); *Schechner v. Whirlpool Corp.*, Case No. 2:16-cv-12409, 2019 WL 4891192 (E.D. Mich. Aug. 13, 2019).

44 *Hadley*, 324 F. Supp. 3d at 1103-04. Under certain assumptions, a fixed supply may provide a reasonable but-for world for a short-term economic equilibrium. For example, if defendants had already manufactured a batch of products and subsequently discovered a product defect, a reasonable but-for world may be one in which the manufacturer has an incentive to sell all of them for any price the market would bear. However, for longer class periods and cases that do not adhere to this unique "sunk cost" circumstance, assuming a fixed supply is inconsistent with economic theory.

> [C]ourts have repeatedly rejected conjoint analyses that only measure demand-side willingness-to-pay. However, courts have also found that conjoint analyses can adequately account for supply-side factors—and can therefore be utilized to estimate price premia without running afoul of *Comcast*—when (1) the prices used in the surveys underlying the analyses reflect the actual market prices that prevailed during the class period; and (2) the quantities used (or assumed) in the statistical calculations reflect the actual quantities of products sold during the class period.[45]

Thus, in this case, the court accepted plaintiffs' willingness to pay measure of the price premium for the purposes of class certification.

In *Schechner*, the court initially ruled that plaintiffs' conjoint analysis for estimating damages was admissible under *Daubert*, but ultimately decided that the conjoint analysis failed to satisfy *Comcast*, because it did not sufficiently consider prevailing market conditions under which the product would be sold.[46] The court rejected plaintiffs' argument that the use of historical transaction prices within a conjoint analysis incorporates supply-side factors, noting that the use of historical transaction prices, at best, only accounts for *historical* supply-side factors, whereas a price premium approach should account for the difference between actual prices paid and the prices that would have been paid without the misconduct (prices in the but-for world).[47] In this case, but-for prices depended on the prevailing market conditions without the misconduct, including competitors' reactions to the change in demand for the product in the absence of the misconduct, meaning the use of historical prices alone did not imply proper consideration of the supply-side conditions.[48] As a result, the court ruled that plaintiffs' approach failed the *Comcast* requirements and denied plaintiffs' motion to certify the class.[49]

Finally, some plaintiffs have proposed a hybrid approach to damages that combines a conjoint analysis with a regression analysis. One example comes from *In re Conagra Foods*, which involved allegations that products contained genetically modified organisms ("GMOs") and were thus falsely advertised as "100% Natural."[50] In this case, plaintiffs put forth a two-step approach: First, they proposed a regression analysis to measure the market price premium associated with the labeling statement "100% Natural."[51] Second, to tie the overcharge to the non-GMO aspect of their claim, plaintiffs proposed a conjoint analysis to apportion the price premium associated with "100% Natural" down to the value consumers attributed to the product being GMO-free.[52] Rejecting defendants' argument that the conjoint analysis failed to fully account for supply side issues, the court ruled that

---

45 *Id.* at 1105.

46 *Schechner*, 2019 WL 4891192, at *7-8.

47 *Id.* at *7.

48 *Id.*

49 *Id.* at *8-9.

50 *In Re Conagra Foods, Inc.*, 90 F. Supp. 3d 919 (C.D. Cal 2015).

51 *Id.* at 944.

52 *Id.* at 944, 954.

plaintiffs' hybrid approach was sufficient under *Comcast* and certified the class.[53] While this hybrid approach was sufficient for class certification in 2015, it is possible that such a hybrid approach may be reevaluated by future courts in light of more recent scrutiny applied to price premiums calculated through conjoint analyses, as described above.

D. Calculating Price Premiums Through Economic Market Simulations

More recently, economic market simulations have been applied in litigation as a way to estimate a price premium in a manner that accounts for the courts' concerns about the ability of conjoint analysis to address supply-side factors (*e.g.*, production costs, supply response, and competitor interactions). An extensive body of academic literature focuses on combining the consumer demand side of the market with the supply side of the market to determine market equilibrium prices.[54]

In the presence of basic economic assumptions (*e.g.*, multiple profit-maximizing sellers interacting with rational consumers), a properly applied market simulation incorporates information on the defendant's (and its competitors') prices, costs, and market share, along with demand-side information (*e.g.*, consumer's willingness-to-pay for product attributes and elasticity of demand) to estimate market equilibrium prices.[55] Economic market simulations are typically calibrated to real-world data using a representative price and product sold by each firm, to ensure the model will accurately capture real-world interactions to reasonably estimate actual market prices.

After proper calibration to real-world data, economic market simulations can estimate equilibrium prices in the but-for world by first calculating the change in demand that would have occurred in the absence of the alleged misconduct. This change of demand can be estimated using a variety of methods, including using the parameters from a statistical model based on conjoint survey data. The change in demand for the defendant's product then leads to a supply response from each company, which in turn leads to a new set of equilibrium market prices. The new equilibrium price for the defendant's product represents the price that consumers would have paid in the absence of the alleged misconduct. Finally, the economic simulation will calculate the price premium as the difference between the estimated equilibrium price and the actual price consumers paid.

Courts have allowed the economic market simulation approach under the *Daubert* standard. For example, in *Johannessohn v. Polaris Industries*, which involved an alleged product defect in all-terrain vehicles, plaintiffs' expert first used a conjoint survey to test

---

53 *Id.* at 1027-31, 1035.

54 For example, Steven Berry, et al., *Automobile Prices in Market Equilibrium*, 63 Econometrica 841 (1995); Aviv Nevo, *A Practitioner's Guide to Estimation of Random-Coefficients Logit Models of Demand*, 9 Journal of Economic and Management Strategy 513-548 (2000); Steven Berry, et al., *Differentiated Products Demand Systems from a Combination of Micro and Macro Data: The New Car Market*, 112 Journal of Political Economy 68-105 (2004); Petrin, Amil, *Quantifying the Benefits of New Products: The Case of the Minivan*, 110 Journal of Political Economy 705–729 (2002); Greg Allenby, et al., *Valuation of Patented Product Features*, 57 The Journal of Law & Economics 629-663 (2014).

55 Note that some damage calculations described as "market simulations" assume that the defendant and competitors do not adjust supply in response to demand, and thus measure willingness-to-pay rather than a price premium. *See* Greg Allenby, et al, *Valuation of Patented Product Features,* 57 The Journal of Law & Economics 629-663, 648 (2014).

and measure the impact that an appropriate disclosure would have had on consumers' willingness-to-pay for the contested products.[56] Next, a separate expert incorporated this information into an economic market simulation, estimated the market equilibrium price that would have resulted under proper disclosure of the alleged defect, and calculated price premium damages accordingly.[57] The court admitted the economic market simulation methodology under *Daubert*, noting that "[t]here is no question that a market simulation is a scientifically valid method to determine the market equilibrium price in a counterfactual world."[58]

However, as with all prior methods, the general acceptance of economic market simulations does not mean that courts will universally allow the method in all instances. The reliability of the results of an economic market simulation depends on its implementation. Indeed, courts have disallowed the application of this method under *Daubert* due to of the use of flawed inputs. For example, in *Unwired Planet, LLC v. Apple, Inc.*, a non-class, patent infringement case, the court rejected plaintiffs' proposed market simulation approach for failing to satisfy *Daubert* because the market simulation was based, in part, on unsupported assumptions.[59] The *Unwired Planet* decision underscores the importance of using reasonable assumptions and reliable inputs within an economic market simulation. Where there is uncertainty over a particular input, practitioners would be wise to test a range of reasonable input values to ensure their results are not being driven by a particular assumption about an input's value.

V. CONCLUSION

In the wake of *Comcast*, courts have increasingly focused on damage models at the class certification stage. As a result, in false advertising and product defect class actions there has been a trend toward hiring experts to perform a thorough analysis of damages in advance of class certification, and the damages models themselves have become increasingly sophisticated and rigorous. Recent court rulings, *Daubert* motions, summary judgement motions, and class certification motions have helped to provide a roadmap of what constitutes an acceptable approach to the calculation of damages in false advertising and product defect class actions. However, while approaches to calculating damages in these cases continue to evolve, appropriate damages calculations will always depend both on the facts of the case and the proper application of the relevant damages model.

---

56 *Johannessohn v. Polaris Indus., Inc.*, 450 F. Supp. 3d 931, 970 (D. Minn. 2020).

57 *Id.* at 970-71.

58 *Id.* at 972-73.

59 *Unwired Planet, LLC v. Apple Inc.*, Case No. 13-cv-04134-VC, 2017 WL 589195, at *2 (N.D. Cal. Feb. 14, 2017).

ANTITRUST ANALYSIS OF FRAND LICENSING POST-*FTC v. QUALCOMM*

By Aminta Raffalovich and Steven Schwartz[1]

A great deal of recent attention is being paid to the Ninth Circuit's decision in *Federal Trade Commission ("FTC") v. Qualcomm*.[2] On one side of the debate are those, like the FTC and various *amici,* who reject the view expressed by the Ninth Circuit and consider the licensing behavior by Qualcomm as a quintessential antitrust violation. That argument views Qualcomm's licensing behavior as a blatant example of the illegal exercise of monopoly power.

On the other side of the debate are those, like the Antitrust Division of the Department of Justice and still other *amici*, who decry the District Court's decision[3] as an inappropriate extension of the antitrust laws into a non-antitrust arena and applaud the Ninth Circuit's decision as drawing reasonable boundaries around the application of antitrust laws.

What complicates the assessment of the decision in *Qualcomm* is the context in which the behavior at issue occurs. The patent overhang and, in particular, the standard-setting and essential-patent context make the analysis different—and arguably more challenging—than a typical analysis of pricing or licensing behavior in a vertical setting.

However, while arguably more challenging, the fundamental elements of the analysis are largely the same as for any other antitrust analysis. The analysis necessarily includes an assessment of the extent of the market power held by the target firm, whether the market power flows from an effort to monopolize the market, the impact of the behavior on competition, and other familiar questions.

I. WHAT IS MARKET POWER?

Our discussion begins with market power.[4] It is axiomatic among antitrust practitioners on the economic and legal sides that an assessment of the extent of the market

---

1 Aminta Raffalovich, J.D., M.S. is a Vice President at Intensity, LLC specializing in the economics of technology and innovation. She serves as a trusted advisor and economic expert in complex commercial litigation and disputes.

Steven Schwartz, Ph.D. is a Managing Director at Intensity, LLC with over 35 years of economic consulting experience. He has been retained as an economic expert in numerous litigation and non-litigation matters and has provided testimony in numerous Federal and State courts, as well as before the U.S. International Trade Commission and the U.S. Tax Court.

Stephanie Khoury, Ph.D. and Kira Stearns, Ph.D., Economists at Intensity, LLC, contributed to the preparation of this article.

The views expressed are those of the authors and may not reflect the views of Intensity, LLC, its clients, or any of its or their affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

2 *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).

3 *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

4 In the discussion below, we largely ignore the issues surrounding market definition. We recognize the centrality of the relevant market to an antitrust analysis, but we choose here to focus on the issues surrounding market power and the impact of the licensing behavior on competition.

power enjoyed by the relevant entities is central to an antitrust analysis. Unfortunately, there is often confusion about what market power means, and what it does not. To economists, market power is a non-pejorative term that simply means that a firm can influence the amount of goods (or services) it sells by altering the price of the product or service.[5] Noting that a firm has some degree of market power is not, by itself, a negative statement because any time a firm faces a downward sloping demand curve, *i.e.*, a situation in which a price increase leads to a reduction in quantity demanded and vice versa, that firm has some market power. Since most goods are sold in markets in which firm demand curves slope downward, most sellers, therefore, have at least some market power. From an antitrust perspective, the issue is whether a firm has so much market power—call it "monopoly power"—that the firm has the ability to *sustain* prices above and output below competitive levels.[6] Thus, a key question in an antitrust analysis is whether a firm (or collection of firms) has sufficient market power to rise to the level of "monopoly power."

From an economic perspective, market power manifests itself in the ability to set price above marginal cost—that is, the cost incurred to produce an additional unit of a good (or service). In a perfectly competitive market, where a seller cannot influence the quantity they sell by adjusting the selling price, the sales price is equal to marginal cost. In that situation, the demand curve faced by the seller is horizontal, and not downward sloping, and the profit-maximizing price will be equal to marginal cost.[7] Accordingly, if a firm's price is above its marginal cost, it is not operating in a perfectly competitive market.[8] The firm's demand curve will slope downward and, hence, it has market power.[9]

---

5 *See, e.g.*, N. Gregory Mankiw, Principles of Microeconomics 279–280 (6th Ed. 2012) .

6 The focus on whether such price increases or quantity decreases can be sustained is a critical element. If a firm raises price and enough alternatives are available such that enough consumers switch their purchases and render the price increase unprofitable, the firm did not successfully exercise monopoly power. This relationship between a firm and its ability to sustainably increase price has led to the development of a hypothetical monopolist test, the small but significant and non-transitory increase in price, or "SSNIP," test. In essence, the test examines whether a hypothetical monopolist can increase prices (typically, an increase of 5% to 10% is used) and do so profitably, without losing sales to other products or competitors. This test was originally developed for use in mergers, but has been applied more generally to antitrust market definitions. *See* U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines 8–10 (2010); Steven Salop, et al., Antitrust Economics for Lawyers 6 (2017); John D. Harkrider, Operationalizing the Hypothetical Monopolist 1, 11, available at https://www.justice.gov/sites/default/files/atr/legacy/2007/08/30/202598.pdf.

7 Profits are maximized when a firm's marginal revenue is equal to its marginal cost. In a perfectly competitive market, because the firm's demand curve is horizontal, price will equal marginal revenue. Thus, when a firm is profit maximizing, price = marginal revenue = marginal cost. *See, e.g.*, Dennis Carlton & Jeffrey Perloff, Modern Industrial Organization 56-59, 66-67 (3rd Ed. 2000).

8 In a case where demand curves slope downward, the profit-maximizing price will exceed marginal revenue. Thus, when profits are maximized, price > marginal revenue = marginal cost. It is not necessarily the case that the amount of market power can be inferred directly from the price-cost margin.

9 Economists have a variety of ways to measure market power. One well-known measure—the price-cost margin—is frequently used. This margin—also known as the Lerner Index—is expressed as: (price − marginal cost) / price. When price and marginal cost are equal, the Lerner Index is zero. As the gap between price and marginal cost (the price-cost margin) grows, the index rises. Its upper bound is one, in cases where marginal cost is zero. In practice, of course, prices are readily observable, but marginal costs are more difficult to measure. As a practical matter, economists will often approximate the Lerner Index by using average costs as a proxy for marginal costs.

In practice, of course, markets generally are not perfectly competitive. Economic evidence and antitrust tradition acknowledge this. For this reason, there is generally no expectation that prices will be set to be equal to marginal cost and, thus, the mere fact of a deviation of price from marginal cost is not cause for antitrust concern. Typically, it is only deviations of price from marginal cost that are substantial and persistent that are issues for antitrust analysis. Thus, from an antitrust perspective, it is a reasonable shorthand to be concerned with "market power" that results in the ability to set and sustain price *substantially* above marginal cost, *i.e.*, monopoly power. As stated by an Assistant Attorney General for Antitrust:

> Antitrust enforcers are not in the business of price control. We protect competitive process, not a particular result, and particularly not a specific price. In fact, if a monopoly is lawfully obtained, whether derived from IP rights or otherwise, we do not even object to setting a monopoly price.[10]

This is a crucial point: it is when monopoly power is obtained or maintained unlawfully that monopoly prices are a matter for antitrust inquiry. If that monopoly power is obtained or maintained through the exercise of superior business skill or acumen, for example, or through effective and thoughtful innovation that results in a competitively superior product, the resulting exercise of market power—even monopoly power—is not an issue of antitrust concern. This point is especially critical to remember in the context of lawful monopolies, *e.g.*, a monopoly over a patented technology.[11] This is where the analysis of *Qualcomm* begins.

II. THE RELATIONSHIP BETWEEN PATENTS AND MARKET POWER

Patents present a challenging situation in economics and antitrust precisely because a patent confers on the patent owner a legal monopoly on the technology taught in the patent. That means that no entity is allowed to practice that technology without a license from the patent owner. However, it is also the case that such a legal monopoly does not necessarily allow the patent owner to exercise market power, much less monopoly power, either with respect to the patent (*e.g.*, licensing) or products using the patented technology (*i.e.*, with respect to pricing, output, and other terms and conditions of sale). The patent monopoly and the ability to exercise monopoly power with respect to the patent are often mistakenly viewed as different sides of the same coin, but they are not. To understand why this is so, consider how a patent owner may exercise a degree of market power above and beyond what they could do, absent the patent.[12]

---

10 R. Hewitt Pate, Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust 8 (2005) (remarks before the 2005 Competition Workshop, Florence, Italy), available at http://www.usdoj.gov/atr/public/speeches/209359.pdf.

11 To be sure, a monopoly over a technology is, in the first instance, narrow. It provides a legal right to exclude others from the use of that technology. But, it does not necessarily translate into any meaningful market power in a product market in which a product (or products) implementing the patented technology is sold.

12 For purposes of this discussion, we are assuming downward sloping demand curves and, thus, some degree of market power for the seller. The question we focus on is the *incremental* market power attributable to the patent.

Patents confer market power to the extent that they allow the patent holders to set prices at a higher level, that is, farther above marginal cost, than would otherwise be the case, absent the patent.[13] The patent system allows this so that the patent owner has the opportunity to recover the cost of innovation and earn a return on that innovation investment. Indeed, it is precisely the prospect of being able to exercise some greater degree of market power that is the incentive to the innovator that produces the innovation.[14] In this sense, it is by design that patents are intended to create the opportunity for firms to enjoy greater market power and earn higher profits than would be the case, absent the patent.

As a practical matter, the *economic value* of a patent is no greater than the amount of money people are willing to pay for the advantage conferred by the patented technology over the next-best alternative. This is true in the product marketplace, where the seller of a product with a patented feature (1) can set prices above competitors' prices to the extent that the market (*i.e.*, consumers/users) perceives an advantage attributable to the patented feature that it is willing to pay for and (2) is constrained in setting that premium by the size of that perceived advantage. In other words, where a patent allows a product to incorporate features, performance attributes or some other meaningful differentiator that consumers value, consumers will pay "more" for that product. However, the amount of "more" will depend on how much better or advantageous those features are. Where the differences are small or large, the "patent price premium" will be correspondingly small or large, all else equal.

The same situation holds in the marketplace for technology, where the price or "royalty" a patent holder can reasonably obtain in exchange for a license to the patented technology is constrained by the benefits the patented technology confers on a potential licensee who incorporates that technology into their product(s). In other words, a patent holder seeking to license their technology will, all else equal, receive a higher royalty the greater the advantage to the licensee from being able to utilize the patent relative to the next-best alternative. For patent practitioners, this is a familiar line of reasoning; indeed, the assessment of the appropriate "reasonable royalty" in a patent damages setting accounts for the relative advantage of the patent versus alternative technologies (among other things).[15]

The value of a patent also depends on the institutional setting in which the patent is used and licensed. One example is when patents are considered essential to the standards set by a standard-setting organization ("SSO"). An SSO is an organization whose principal

---

13 For further discussion, see, *e.g.*, *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 38–46 (2005).

14 Innovation—research and development activity generally—is risky. The patent monopoly and the prospect of being able to exercise increased market power because of the patent (though not the uncertainty) creates the prospect for supra-normal returns to the patent holder and extra returns specifically attributable to the patent. Those returns to successful patents provide the return on all R&D investment projects, whether successful and not.

15 The determination of a "reasonable royalty" typically involves consideration of the factors described in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), which are often referred to as "the *Georgia-Pacific* factors." Georgia-Pacific factor 9 is: "The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results." *Id.* at 1120.

role is to develop, coordinate, and promulgate technical standards to facilitate the operation of firms producing products covered by the standard. The practical effect of standards set by an SSO is to create uniformity with respect to things like terminology, specifications, and so forth. One example of products subject to standards is medical devices that work the same way and display information in the same way, regardless of manufacturer.

Compliance with and incorporation of standards into manufactured products typically requires access to patented technology. When there are patents that are considered essential to being able to comply with the standard, patent owners can agree to designate their patents as "standard-essential." Standard-essential patents ("SEPs") are patents that teach technology that must be used to comply with the standard. To ensure that compliance is possible, the owner of an SEP is often required to license the SEP to all comers on fair, reasonable, and non-discriminatory ("FRAND") bases.[16] This agreement to license on FRAND terms is between the patent owner and the SSO.[17]

As a general matter, whether a patent is an SEP or not, patent owners will often license their patents to others in return for payment in the form of a royalty. That royalty can be paid as a lump sum, in which the license is "bought and paid for" at the time of the license. Royalties can be "running"—that is, paid based on the sales of the products (or services) sold that use the technology embodied in the licensed patent(s). In that case, the royalty is commonly specified as some percentage ("the royalty rate") of some measure of the sales value of the product sold ("the royalty base"). The royalty is set by negotiation; the outcome of that negotiation reflects a variety of factors, including, as noted above, the alternatives to the patented technology. All else equal, when there are viable (albeit imperfect) alternatives to the patented technology, royalties will be relatively lower than in a situation where the licensee has no access to viable alternatives.

Where licensing in a standard-setting context differs from the usual case is in that royalty-setting process; the typical royalty-setting analysis is different for SEPs. By its very nature, an SEP designation means that the covered technologies are *essential* to an industry standard (*i.e.*, must be practiced) and, thus, there are no alternatives to the technology once the standard has been implemented.[18] That is the case, as a tautological matter.

Because compliance with the standard requires a license to the SEPs, absent some rules governing licensing, the patent owner would be able to exploit the SEP status and extract relatively larger royalties from all of the adherents to the standard, all else equal. The patent owner could behave opportunistically and, if there were no rules governing the terms on which licenses had to be granted, the SEP holder could engage in "patent hold-up." Patent hold-up, as it is commonly used, is the exploitation of firms that produce products governed by a standard and that are locked-in to the technology embodied in the standard. That is a very specific source of market power that would allow the SEP owner to obtain higher royalties than might otherwise be the case. Hold-up, all else equal, is

16 *See, e.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 313 (3d Cir. 2007); Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust through a Historical Lens*, 80 Antitrust Law Journal 39, 42 (2015).

17 *See generally* Joshua D. Wright, *SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts*, 21 George Mason Law Review 791–809 (2014).

18 *See, e.g.*, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007).

likely either to slow the pace at which technology is adopted through a standard or lead to higher prices of the products meeting the standard as a result of the higher royalties resulting from hold-up. That is, at least in part, the economic rationale for the FRAND obligation. The ability of firms to obtain a license under FRAND conditions is critical to the acceptance of a standard and the use of the technologies in SEPs.

Minimizing the risk of hold-up is important for the standard-setting process to work and for an SSO to function; a key purpose of the FRAND requirement is to guard against patent hold-up.[19] While SSOs require SEP holders to commit to licensing their patented technologies on FRAND terms, two key points must be understood. First, the obligation to license an SEP on FRAND terms is a contractual obligation. The Patent Act does not impose this obligation. It exists because the SEP owner agrees to comply with the rules of the SSO and to license pursuant to FRAND terms. Indeed, several decisions have held that a firm's violation of its FRAND commitment is a breach of contract.[20] The second point is that there is no unique definition of "FRAND." There are no explicit criteria to determine whether SEP licenses are either individually or collectively FRAND. That creates one of the challenges in evaluating the competitive impact of licensor behavior in an SEP/FRAND setting.

III. ANTITRUST ANALYSIS OF QUALCOMM'S LICENSING POLICY

A. General Principles

It is well-recognized among economists and antitrust lawyers that the mere possession of market power and the associated ability to exercise some degree of control over prices and set prices above marginal cost, in and of itself, does not give rise to antitrust liability. This is true as a matter of economic theory and empirical analysis. As a theoretical matter, control over prices and the ability to price above marginal cost does not equate to the ability to sustain anticompetitive outcomes. Factors such as conditions of entry, elasticity of demand, and, more generally, the competitiveness of the markets in which products are sold influence whether a firm has sufficient market power to sustain anticompetitive outcomes. Economists have also studied a variety of markets where competition is vigorous while, at the same time, competing firms have market power. Examples include consumer goods and grocery items and categories where product differentiation gives rise to some

19 This has been recognized by various courts, including the Ninth Circuit. *See, e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 876 (9th Cir. 2012) ("Many SSOs try to mitigate the threat of patent holdup by requiring members who hold IP rights in standard-essential patents to agree to license those patents to all comers on terms that are 'reasonable and nondiscriminatory,' or 'RAND.' . . . For example, consider the ITU, whose H.264 standard is implicated in this appeal. The ITU's Common Patent Policy (the 'ITU Policy') provides that 'a patent embodied fully or partly in a [standard] must be accessible to everybody without undue constraints.' Anyone who owns a patent declared essential to an ITU standard must submit a declaration to the ITU stating whether it is willing to 'negotiate licenses with other parties on a non-discriminatory basis on reasonable terms and conditions.' If a 'patent holder is not willing to comply' with the requirement to negotiate licenses with all seekers, then the standard 'shall not include provisions depending on the patent.'").

20 *E.g.*, *id.* at 889; *In re Innovatio IP Ventures, LLC Patent Litig.*, 921 F. Supp. 2d 903, 923 (N.D. Ill. 2013); *see also Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d 998, 1005, 1008 (N.D. Cal. 2013).

degree of market power for sellers, yet competition within categories and product groups is often quite intense.

As we understand it, the law generally reaches the same conclusion. For example, the Supreme Court has recognized that market power can be the outcome of the competitive process antitrust law is designed to protect. For example, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, the Supreme Court stated:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[21]

Thus, as we noted above, to give rise to antitrust liability, market power must be large enough to permit conduct that allows a firm to sustain prices above and output below competitive levels, that is, to the "monopoly power" level. A critical focus, then, for purposes of evaluating antitrust liability, is the effect of the challenged conduct on the firm's market power—*i.e.*, the firm's ability to charge prices above the competitive level.[22] Does the behavior enhance market power? Does it elevate market power to a level of monopoly power, where non-competitive outcomes are sustainable? Are there competitive mechanisms that defeat the effort to exercise this monopoly power? Those are among the key questions. With patents, those questions are equally important and the answers no less challenging.

For purposes of illustration, assume Firm A has monopoly power over a product and charges prices above the competitive level (*i.e.*, supracompetitive prices). Now assume that Firm A obtains a patent on technology used in the product and further increases prices. Is there an antitrust issue associated with the price increase resulting from the patent grant? The simple answer is "not necessarily." Firm A had monopoly power over the product both before and after the grant of the patent. The patent did not necessarily change Firm A's ability to charge supracompetitive prices. This does not mean, however, that the ability to further increase prices as a result of the patent grant is never an antitrust issue. Indeed, that may be *the* issue.

B. The *FTC v. Qualcomm* Decision

Qualcomm is a publicly traded, semiconductor company headquartered in San Diego, California that specializes in telecommunication technology. Its principal ventures include developing, designing, and selling baseband processors and other semiconductor devices, or "chips," used in cellular handsets (*i.e.*, cellphones, tablets, etc.). Qualcomm sells its chips to cellular handset makers—called original equipment manufacturers or

---

21 540 U.S. 398, 407 (2004) (emphasis in original).

22 *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570–571 (1966); ABA Section of Antitrust Law, Antitrust Law Developments 240–241 (8th Ed. 2017).

"OEMs"—like Apple, Samsung, and Huawei. In addition to its chip business, Qualcomm generates substantial revenue by licensing its intellectual property portfolios. The company owns numerous patents covering the technologies required for most cellular handsets to communicate on an operator's network. Licensing intellectual property has been lucrative for Qualcomm, through its business unit Qualcomm Technology Licensing ("QLT"), with over $7.6 billion in revenues and earnings before taxes of $6.5 billion in the fiscal year ending in September 2016.[23]

In January 2017, the FTC filed suit in the Northern District of California against Qualcomm, alleging that Qualcomm's conduct with respect to certain of its licensing practices violated Sections 1 and 2 of the Sherman Act, and thus Section 5 of the FTC Act, 15 U.S.C. § 45(a).[24] Specifically, the FTC alleged that Qualcomm unlawfully maintained its monopoly in two chip markets—3G code division multiple access ("CDMA") and 4G long-term evolution ("LTE")—with a set of interrelated policies that excluded competitors, reduced both the incentives and the abilities of competitors to innovate, and resulted in supracompetitive licensing fees for Qualcomm's SEPs, which were passed on to the prices paid by consumers for cellphones and tablets.[25]

Qualcomm was a leading developer in the 2G-CDMA telecommunication standard and an active participant in developing the standards for 3G-CDMA and 4G-LTE.[26] As a result, Qualcomm holds a substantial share of all SEPs for the 2G-CDMA, 3G-CDMA, and the 4G-LTE markets.[27] In addition, Qualcomm holds SEPs in cellular and non-cellular technologies that include location services, camera and multimedia, and user interface technologies.

Unlike many of its competitors with SEPs in telecommunications technology, Qualcomm is active not just in those technology markets, but in markets for products that employ that telecommunication technology, including cellular hardware and chips. Modem chips, which Qualcomm began selling in 1996, are what allow cellular handsets to communicate with each other over a network. By all metrics and for an extended period of time, Qualcomm has been a very successful player in the modem chip market, achieving as much as a 96% share of the worldwide CDMA modem chip market and up

23 Complaint at 5, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Feb. 1, 2017).

24 Brief of the Federal Trade Commission at 16-17, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (9th Cir. Nov. 22, 2019).

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a), prohibits "unfair methods of competition," including violations of Sections 1 and 2 of the Sherman Act, among other antitrust law.

25 Complaint at 2, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Feb. 1, 2017).

26 Cellular standards are described as evolving over generations. Second generation ("2G") technology is usually associated with the early 1990s. Fourth generation ("4G") technology was first established in the United States in 2011.

27 Complaint at 12–14, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Feb. 1, 2017).

to 89% of the premium LTE modem chip market.[28] The FTC alleged that Qualcomm has monopoly power with respect to those chips and maintains that power through its alleged anticompetitive business practices.

The FTC identified a set of interrelated Qualcomm policies spanning both markets that it claimed violated antitrust law. One important policy at issue was Qualcomm's practice to not sell chips to any OEM that would not also pay royalties for licenses to Qualcomm's patent portfolios, which include SEPs and non-SEPs. This practice is called the "no license, no chips" policy.[29] Qualcomm requires OEMs that purchase chips to obtain a license to the patented technologies, rather than licensing the patents directly to chip manufacturers that must develop products compatible with the current standard of telecommunication technology. Qualcomm argued that by passing over competing chipmakers and only licensing to those further downstream, it was simply exerting more control over its intellectual property by avoiding patent exhaustion.[30]

The issue presented by the FTC was that because OEMs needed to purchase chips, and because Qualcomm dominates in the 3G-CDMA and 4G-LTE chip markets, OEMs were often forced to work with Qualcomm to meet their chip needs. According to the FTC, if an OEM were denied access to Qualcomm's chips, as was threatened under the "no license, no chips" policy, it would be at a severe disadvantage in efforts to design and sell critically important premium-tier phones and phones for use on CDMA networks.[31] Thus, OEMs had little leverage to negotiate the royalty and license terms demanded by Qualcomm. Further, once the OEM agreed to pay the royalty, it was owed on all cellular handsets the OEM produced, regardless of the manufacturer of the chip employed in that device. Additionally, and perhaps most importantly, the FTC alleged that the royalty rates charged for the licenses were supracompetitive and not within Qualcomm's FRAND commitments.

The FTC argued that because Qualcomm's licensing fees were supra-FRAND, this resulted in a cascade of harms that affected rival chipmakers, OEMs, and end-consumers. The FTC reasoned that by requiring end-producers to pay these supra-FRAND licensing fees, it effectively made it cheaper for the OEM to purchase and use Qualcomm's suite of chips, including both those chips in which Qualcomm had a monopoly and those

---

28 *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 687, 694 (N.D. Cal. 2019). Recent estimates suggest Qualcomm controls a 79% share of the CDMA chip market. Qualcomm alleges that its share in the LTE market is below 50%. *See* Opening Brief for Appellant Qualcomm Inc. at 118, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (9th Cir. Aug. 23, 2019).

LTE chips are those chips compatible with a 4G cellular standard.

29 The FTC claimed that the "no license, no chips" policy led to competitive harm in conjunction with interrelated Qualcomm policies, including: (i) incentive payments, (ii) refusal to license to rivals, and (iii) exclusive dealings. *See* Complaint at 2–3, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Feb. 1, 2017).

30 Under the doctrine of patent exhaustion, the purchaser of a component containing the licensed patented technology does not also need to obtain a license (*i.e.*, there is no "double licensing"). For a discussion of the doctrine of patent exhaustion, *see, e.g.*, *Quanta Computer, Inc. v. LG Electronics, Inc.*, 533 U.S. 617, 625–638 (2008).

Qualcomm also argued that it is appropriate to license only to OEMs because it is their products (*i.e.*, cellular handsets), and not the chips, that practice the standards associated with Qualcomm's SEPs.

31 Complaint at 18, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Feb. 1, 2017).

chips in which Qualcomm had several competitors. In antitrust terms, this policy "raises rival's costs."

Under the FTC's theory, because Qualcomm is capturing supracompetitive royalties in the technology market, a rival chipmaker would either have to lower the price of their chip, making it more attractive for a customer to purchase it, or increase their chip prices to maintain an acceptable level of profit, but making them a weaker competitor in the chip market. Regardless of the actual pricing behavior adopted by the rival chipmakers to compensate, the FTC was clear that this supra-FRAND royalty makes the chip market less attractive for a new company to enter while squeezing the profits of an existing company enough to make them likely to exit.

Further, according to the FTC's theory, since Qualcomm owned a significant share of SEPs and had monopoly power in the two chip markets, 3G-CDMA and 4G-LTE chips, the "no license, no chips" threat allowed Qualcomm to successfully charge high license fees for its intellectual property portfolios that included the SEPs. An expert for the FTC testified that Qualcomm's royalty rates for its SEPs were supra-FRAND. Additionally, the FTC argued that, just as OEMs were forced to agree to less-than-ideal licensing terms due to the threat of losing access to Qualcomm chips, the same threat stopped OEMs from challenging those license terms with the SSO or in court.

After trial at the District Court, Judge Lucy Koh agreed with the FTC and barred Qualcomm from continuing its "no license, no chips" policy. Judge Koh stated:

> Qualcomm's practice of refusing to sell modem chips until an OEM signs a patent license agreement, and Qualcomm's associated threats, generate and sustain Qualcomm's unreasonably high royalty rates. Because Qualcomm receives royalties on any handset sale, even when that handset contains a rival's modem chip, Qualcomm's unreasonably high royalty rates impose an artificial and anticompetitive surcharge on the price of rivals' modem chips. At times, Qualcomm has even charged OEMs higher royalty rates when OEMs purchase rivals' chips than when OEMs purchase Qualcomm's chips, which further harms rivals.[32]

The decision was appealed to the Ninth Circuit, which vacated Judge Koh's ruling in August 2020. Regarding the "no license, no chips" policy, the Ninth Circuit found that Qualcomm's policies are "chip supplier neutral."[33] The Ninth Circuit explained:

> Because rival chip manufacturers practice many of Qualcomm's SEPs by necessity, Qualcomm offers these companies what it terms "CDMA ASIC Agreements," wherein Qualcomm promises not to assert its patents in exchange for the company promising not to sell its chips to unlicensed OEMs. These agreements, which essentially function as patent-infringement indemnifications, include reporting requirements that allow Qualcomm to know the details of its rivals' chip supply

32 *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 698 (N.D. Cal. 2019).

33 *FTC v. Qualcomm Inc.*, 969 F.3d 974, 985 (9th Cir. 2020).

agreements with various OEMs. But they also allow Qualcomm's competitors to practice Qualcomm's SEPs royalty-free.

Qualcomm reinforces these practices with its so-called "no license, no chips" policy, under which Qualcomm refuses to sell modem chips to OEMs that do not take licenses to practice Qualcomm's SEPs. Otherwise, because of patent exhaustion, OEMs could decline to take licenses, arguing instead that their purchase of chips from Qualcomm extinguished Qualcomm's patent rights with respect to any CDMA or premium LTE technologies embodied in the chips. This would not only prevent Qualcomm from obtaining the maximum value for its patents, it would result in OEMs having to pay more money (in licensing royalties) to purchase and use a competitor's chips, which are unlicensed. Instead, Qualcomm's practices, taken together, are "chip supplier neutral"—that is, OEMs are required to pay a per-unit licensing royalty to Qualcomm for its patent portfolios regardless of which company they choose to source their chips from.[34]

C. Are Supra-FRAND Royalties Anticompetitive?

To establish a violation of Section 2 of the Sherman Act, there must be (1) monopoly power in a relevant antitrust market, and (2) anticompetitive conduct.[35] For purposes of our discussion, we assume that Qualcomm has monopoly power in both CDMA and premium LTE modem chips, and that each of these constitutes a relevant antitrust market.[36] That leaves the question of whether, within those relevant markets, there is anticompetitive conduct. Here, the challenged conduct is Qualcomm's "no license, no chips" policy.[37]

Of the several examples of harm put forth by the FTC, the assertion undergirding all of them was that Qualcomm's royalty rates for its SEPs were supra-FRAND. To demonstrate this, the FTC relied on a licensing expert for the analysis of Qualcomm's licensing rates. According to the testimony, Qualcomm's historical licensing rates were near 5%.[38] The licensing expert testified that based on his analyses, these rates were well

34 *Id.* at 984–985.

35 *Id.* at 990.

While the FTC claimed violations of both Section 1 and Section 2 of the Sherman Act, for purposes of our discussion of the "no license, no chips" policy, we focus on Section 2. Further, while the FTC claimed violations under both sections of the Sherman Act, the suit was brought under Section 5 of the FTC Act, which allows the FTC to challenge any potential anticompetitive conduct, including but not limited to, violations of Sections 1 and 2 of the Sherman Act.

36 This was alleged by the FTC and not disputed by Qualcomm.

37 We understand that the FTC alleged that other conduct by Qualcomm, in conjunction with the "no license, no chips" policy, harms competition. We focus on the "no license, no chips" policy herein.

38 Trial Tr. at 1011:5–8, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Jan. 14, 2019) ("Q. Can you please briefly explain Qualcomm's historical licensing practices? A. Yes. I mean, historically, they have charged 5 percent for CDMA based devices with–well there are caps also.").

above FRAND, and that appropriate rates should have been under 1%.[39] Qualcomm opposed the FTC's FRAND analyses and conclusions; however, Qualcomm did not put forth its own FRAND analysis.[40]

If we take the FTC's FRAND analyses as true for purposes of this discussion, there is a further issue that is raised by the Ninth Circuit. If Qualcomm is charging a supra-FRAND rate, that is, in the first instance, a breach of the FRAND obligations it undertook when identifying its patents as SEPs for the standards. Thus, the initial question is whether that is a violation of the contract that exists between the SSO and Qualcomm. The Ninth Circuit concluded that the issue was a contract one, and the extension into antitrust law was unwarranted.

But many antitrust cases arise out of contracts. For example, price fixing cases often arise out of contracts.[41] What makes this case different than other contract situations?

Ultimately, that question turns on a point that even the FTC's economic expert, Dr. Carl Shapiro, conceded.[42] That is, if the Qualcomm licensing royalty rate met the FRAND criteria, the predicate for the FTC's allegation against Qualcomm falls away. Importantly, the FTC challenged neither the grant of Qualcomm's patents nor their incorporation in industry standards. *Absent the challenged conduct, Qualcomm still holds its SEPs and is entitled to royalties*. Under the FTC's theory, it is a breach of the contract between the SSO and Qualcomm—and not the contract itself—that produces the harm claimed by the FTC.

In other contract situations, the question of whether there has been an antitrust violation does not depend on whether the conduct breached a particular agreement. In *Qualcomm*, however, the theory advanced by the FTC was premised on the existence of a contractual breach.

---

39 Trial Tr. at 1011:9–12, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Jan. 14, 2019) ("Q. And do you have an opinion as to whether Qualcomm's licensing rates are consisted with its FRAND obligations? A. Yes. In my opinion, they're far too high to be consisted with their FRAND obligations.").

In his unsealed testimony, the FTC's licensing expert states various numbers from his analyses that range in value depending on methodology and the relevant devices, but all fall below 1%. For example, for LTE multimode devices, he states that his analysis showed that a FRAND rate would be a maximum of 0.67%. *See FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK, Trial Tr., at 1013:3–6 (N.D. Cal. January 14, 2019) ("Q. And what were the results of your analysis? A. So for the top down analysis for LTE multimode, I had a minimum royalty rate of 0.52%, a median royalty rate of 0.58 percent, and a maximum royalty rate of 0.67%.").

40 Opening Brief for Appellant Qualcomm Inc. at 93–94, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (9th Cir. Aug. 23, 2019); *see also* Trial Tr. at 1097:2–5, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Jan. 14, 2019) ("Q. Did counsel for–did Qualcomm put forth any expert analysis correcting your analysis or quantitatively showing what would happen if you used a different methodology? A. No they did not.").

41 *See, e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980).

42 Trial Tr. at 1198:2–25, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Jan. 15, 2019) ("Q. Okay. So point one: If the court were to determine that the evidence doesn't support the existence of a supra-FRAND royalty, then the rest of your analysis can be ignored; right? It depends on that as a starting point? . . . A. Then the economic consequences of the surcharge would not come into play. I think that's logical. . . . Yes, the building block for, for this discussion of the effects is that Qualcomm was able to achieve a royalty surcharge by applying the chip leverage.").

Still, if we put aside the breach of contract issue, it is not clear that Qualcomm's licensing policy actually harmed competition in the relevant markets.[43] Thus, it is uncertain, at best, whether it is appropriate to consider such behavior an antitrust violation. To see this, suppose that Qualcomm charged a much lower rate, in line with the FTC's proposed FRAND rate. OEMs would still have to pay this royalty rate on each handset that practices Qualcomm's SEPs, but the OEMs would be capturing more of the profits than they had in the supra-FRAND world. Rival chipmakers must still compete with Qualcomm, who benefits from licensing revenue. Indeed, it is difficult to imagine how "no license, no chips" can be considered a threat to chip competition in this setting.

This does not mean, however, that supra-FRAND royalties can never be anticompetitive. There can be situations where supra-FRAND royalties create opportunities for an SEP holder to engage in anticompetitive behavior that would not be possible if the firm were bound by its FRAND commitment. This may be particularly concerning in cases where the SEP holder is also competing elsewhere in the supply chain—as was the case in *Qualcomm*. While every case requires a thorough examination of the facts at hand, we provide a few examples of circumstances where supra-FRAND royalties combined with the "no license, no chips" policy may be anticompetitive from an economic perspective. While these circumstances were hinted at in *Qualcomm*, we argue that none were sufficiently demonstrated by the FTC.

Predatory pricing. It is theoretically possible for an SEP holder to drive out its competitors in a complementary market by pricing the complementary good (here, modem chips) at artificially low levels, given that the SEP holder can "make up the difference" via its supra-FRAND SEP price. This kind of pricing behavior is sometimes referred to as "predatory pricing."[44] Indeed, the Supreme Court has recognized predatory pricing as anticompetitive where: (1) "the prices complained of are below an appropriate measure of its rival's costs"; and (2) the alleged predator had "a dangerous probability" "of recouping its investment in below-cost prices."[45]

---

43 We do not address whether Qualcomm's licensing policy is or could be competitively problematic outside of these markets or under a different market definition herein. We note, however, that the Ninth Circuit did not reject the possibility of anticompetitive effects to OEMs and their customers, stating:

> [E]ven assuming that a deviation between licensing royalty rates and a patent portfolio's 'fair value' could amount to 'anticompetitive harm' in the antitrust sense, the primary harms the district court identified here were to the OEMs who agreed to pay Qualcomm's royalty rates—that is, Qualcomm's *customers*, not its *competitors*. These harms were thus located outside the 'areas of effective competition'—the markets for CDMA and premium LTE modem chips—and thus had no direct impact on competition in those markets.
>
> *FTC v. Qualcomm Inc.*, 969 F.3d 974, 999–1000 (9th Cir. 2020) (emphasis in original).

Antitrust scholars have questioned this aspect of the Ninth Circuit's decision, arguing that higher prices for OEMs and their customers—and not just harm to competitors—concerns antitrust laws. *See, e.g.*, Herbert Hovenkamp, *FRAND and Antitrust*, 105 Cornell Law Review 1683, 1685–87 (2020).

44 For further discussion, see, *e.g.*, Phillip Areeda & Donald F. Turner, *Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harvard Law Review 697 (1975).

45 *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–224 (1993).

While we are not privy to all the facts of the case, if Qualcomm indeed effectively lowered its chip price in a manner that was predatory or with the intent of ultimately driving out competition, this could be problematic from an antitrust perspective. For example, if Qualcomm priced its chips at or below marginal cost, other competing chip manufacturers may not have been able to effectively compete in the market, resulting in the elimination or reduction of chip competition. However, it appears the FTC did not provide sufficient evidence that this kind of pricing existed, or that it was the result of Qualcomm's supra-FRAND pricing. Indeed, the FTC's economic expert claimed the opposite—that Qualcomm had maintained artificially *high* prices in the chip market.[46] According to the Ninth Circuit, "Here, not only did the FTC offer no evidence that Qualcomm engaged in predatory pricing, the district court's entire antitrust analysis is premised on the opposite proposition: that Qualcomm 'charge[s] monopoly prices on modem chips.'"[47]

Behavior that punishes customers who challenge the SEPs or the associated royalties. The patent system works when it allows for debate over the validity, infringement, and value of a firm's patents. Indeed, one of the hallmarks of the system is that it incentivizes marketplace participants to challenge assessments made by an increasingly overburdened patent office (which receives hundreds of thousands of applications every year),[48] creating a system of checks and balances that we believe should readily work together to promote valuable innovation. This is especially true in the context of SEPs, given the greater potential for abuse relative their non-essential counterparts.[49]

Patent challenges play an important role in preventing the exercise of unjustified market power. The Supreme Court has recognized that "[l]icensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery. If they are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification."[50] Indeed, discussions surrounding the role of patent challenges on competition have been growing following the Supreme Court's decision in *FTC v. Actavis, Inc.*[51] In that case, the Supreme Court held that reverse payment agreements—those that some pharmaceutical companies pay to prevent patent challenges from generic manufacturers seeking to enter the market—may violate antitrust laws.[52]

---

46 It is worth noting that it appears Dr. Shapiro's claim of increased chip prices by Qualcomm was not shared by the FTC in its complaint, or by a group of 46 law and economics scholars that submitted an amicus brief in support of the FTC following the reversal by the panel. The *amici* state that "the panel ignored the district court's factual findings that Qualcomm in its licensing agreements offset patent royalty surcharges by providing chip rebates when the OEM purchased Qualcomm chips." Brief of 46 Amici Curiae Law and Economics Scholars in Support of Petition for Rehearing En Banc, 15, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (9th Cir. Oct. 5, 2020).

47 *FTC v. Qualcomm Inc.*, 969 F.3d 974, 1001 (9th Cir. 2020).

48 U.S. Patent and Trademark Office, U.S. Patent Statistics Chart: Calendar Years 1963–2019, available at https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm.

49 It is unsurprising, then, that SEPs are litigated more often than non-SEPs. These litigations indicate that a large number of SEPs are not, in fact, essential. *See* Mark A. Lemley & Timothy Simcoe, *How Essential Are Standard-Essential Patents?*, 104 Cornell Law Review 607–642 (2019).

50 *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969).

51 133 S. Ct. 2223 (2013).

52 *Id.* at 2227, 2233.

Several legal scholars have argued that patent challenge clauses, a contractual element that prohibits patent licensees from challenging the validity of licensed patents, should receive antitrust scrutiny.[53]

Again, while we are not privy to all the facts of the case, if Qualcomm's threats to withhold chips from any OEM that challenged the license agreements proved effective, this could be deemed to violate antitrust law. However, it appears the FTC did not sufficiently demonstrate this. The Ninth Circuit stated that "it appears that OEMs have been somewhat successful in 'disciplining' Qualcomm's pricing through arbitration claims, negotiations, threatening to move to different chip suppliers, and threatened or actual antitrust litigation. These maneuvers generally resulted in settlements and renegotiated licensing and chip-supply agreements with Qualcomm, even as OEMs continued to look elsewhere for cheaper modem chip options."[54]

Tying. It is possible for an SEP holder to drive out its competitors in a complementary market by making the grant of a license to the SEPs (the tying product) contingent on purchasing the complementary good (the tied product—here, modem chips). This is often referred to as "tying." From an economic perspective, tying can generate anticompetitive effects.[55] Tying can enable a firm to leverage market power in the tying product market by forcing buyers to purchase the tied product with the tying product.[56] When implemented in this way, tying can reduce competitors' access to the market for the tied product and reduce buyers' choices among competing products, thereby harming competition. Tying can deny competitors' access to the tied product market not because the party imposing the tying arrangement has a better product or a lower price, but because of market power in the tying product market.

While the FTC did not present a tying claim as such, the Ninth Circuit directly addressed this issue, stating that "[i]f Qualcomm were to refuse to license its SEPs to OEMs unless they first agreed to purchase Qualcomm's chips ('no chips, no license'), then rival chip suppliers indeed might have an antitrust claim under both §§ 1 and 2 of the Sherman Act based on exclusionary conduct."[57] The Ninth Circuit determined that this was not the case:

> [U]nlike a hypothetical "no chips, no license" policy, "no license, no chips" is chip-neutral: it makes no difference whether an OEM buys Qualcomm's chip or a rival's chips. The policy only insists that, whatever chip source an OEM chooses, the OEM pay Qualcomm for the right to practice the patented technologies embodied in the chip, as well as in other parts of the phone or other cellular device.[58]

---

53 *See, e.g.*, Michal S. Gal & Alan D. Miller, *Patent Challenge Clauses: A New Antitrust Offense?*, 102 Iowa Law Review 1477 (2017); Thomas K. Cheng, *Antitrust Treatment of the No Challenge Clause*, 5 NYU Journal of Intellectual Property and Entertainment Law 437 (2016).

54 *FTC v. Qualcomm Inc.*, 969 F.3d 974, 1001–1002 (9th Cir. 2020).

55 Abbott, Alden F. & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, *in* Antitrust Law and Economics 183 (Keith N. Hylton ed. 2010).

56 David S. Evans & Michael Sallinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 Yale Journal on Regulation 37, 38–39 (2005)

57 *Qualcomm*, 969 F.3d at 1002.

58 *Id.* at 1002–1003.

D. Does It Matter Where the Royalty Is Collected in the Production Chain?

In addition to challenging Qualcomm's licensing rates as anticompetitive, the FTC challenged Qualcomm's practice of collecting royalties at the OEM stage of the production chain as anticompetitive. We thus turn our focus to this economic and competitive question: does it matter that Qualcomm collects its royalties from OEMs rather than rival chip manufacturers and, if so, how does it matter?

As a matter of economic theory, the total revenues of a given industry are equal to the sum of the payments to the inputs plus the profits earned by all firms in the production chain. In equilibrium, the profits earned by any firm, wherever their location in the production chain, are bounded by the demand curve for the *final* product and the payments to other inputs. The reasoning behind this is that no input is of any value unless it is used to produce the thing consumers value—the final product. Thus, any attempt to value a given input must account for consumer demand for the final product, the payments to all inputs in the production chain, and the profits earned by all firms in the production chain. No stage of the production chain is independent of the others. There is no "fixed pie" associated with any individual stage of the production chain.

In the context of smartphones, the source and limit of all profits in the production chain is the value consumers assign to smartphone features and functionalities. While the technologies and components that enable and manufacture those features and functionalities have value in that they contribute to production, neither the technologies nor the components have value by themselves. This means that the royalties earned by the holders of the SEPs that enable smartphones to work are constrained by the difference between what consumers are willing to pay for a smartphone with the patented features and all other costs of producing a smartphone across the entire production chain. This is true regardless of where the royalties are earned in the production chain.

This is also true when the provider of an input enjoys monopoly power. When an input provider exercises monopoly power in one stage of the production chain and charges monopoly prices, the distribution of revenues and profits across the production chain changes, but final market prices still determine the overall revenues and profits. Thus, the monopolist, and the rest of the vertical market players, will still be constrained by the amount that consumers pay for the final product.

In *Qualcomm*, the FTC took the stance that collecting royalties at the OEM stage of the production chain was anticompetitive because it imposed an "artificial surcharge" on rival chip manufacturers' sales. The FTC's argument continues as follows: because rival chip manufacturers and OEMs were sharing the additional costs from the supra-FRAND royalty rates, this squeezed the profits rival chip manufacturers could appropriate from the sale of each chip. Therefore, to remain profitable enough to continue to participate in the market, rivals had to raise the price they charged OEMs for their chips, thereby making them less competitive against Qualcomm. The FTC's economic expert testified that this harm to competing chip manufacturers would trickle down and affect end-consumers; he argued that with higher chip prices from competitors, Qualcomm would then also have an

incentive to raise (not lower) its chip prices to OEMs[59]—a harm that would likely trickle down to end-consumers.

If Qualcomm were to license to chip manufacturers, the increased cost to chip manufacturers from paying for the licenses would likely be passed along to OEMs, at least in part. Thus, OEMs would still incur some, if not all, of the cost of licensing fees. Further, it appears that despite its once larger market presence, Qualcomm is competing with other chip manufacturers on price in the chip market.[60] Based on our understanding of the facts, and absent additional circumstances such as those discussed in Section III.C, we conclude that it does not matter where Qualcomm collects its royalties.[61] Our conclusion might be different outside of the standard-setting context if Qualcomm forced OEMs to pay royalties on all sales, regardless of the chips used *if* the rival manufacturers did not infringe Qualcomm's patents. In this setting, it is reasonable to expect that such behavior *could* be competitively problematic.[62]

---

59 Dr. Shapiro testified:

> Why will Qualcomm's all-in prices go up? Well, there's two reasons. First, they've got rivals who are weakened and charging higher all-in prices because they're having to pay the surcharge. So as a general rule, when your competitors raise their price, it tends to give a firm incentive to raise his price as well in oligopolies, and in addition to that, Qualcomm is less keen to compete to win business from its competitors because even when it loses, it gets a royalty surcharge.
>
> And so that's another reason why Qualcomm will not be as aggressive in pricing and will tend to raise its all-in prices due to the royalty surcharge.

Trial Tr., 1142:2–1144:18, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. Jan. 15, 2019).

60 *See, e.g.*, *FTC v. Qualcomm Inc.*, 969 F.3d 974, 983–984 (9th Cir. 2020).

61 There are, of course, situations where a monopolist in an upstream market can leverage that power in a downstream market to increase profit above the monopoly profit level. When, why, and how this happens is beyond the scope of this article. *See, e.g.,* Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself (1978); Michael D. Whinston, *Tying Foreclosure, and Exclusion*, 80 American Economic Review 837 (1990); Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harvard Law Review 397–481 (2009).

62 If this were the case, it would be economically similar to the allegations against Microsoft in *Caldera Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 1244 (D. Utah 1999). In that case, it was alleged that Microsoft was charging licensing fees for its software on all processors, even those that were not running Microsoft's operating system. *Id.* at 1249–1250. This meant that for those processors not running Microsoft's operating system, customers of the processor were paying two licensing fees—one to Microsoft and one to the licensor of the operating system actually running on said processor. *Id.* at 1250.

There have been arguments, both by the FTC and the *amici* in support of the FTC, that this case mirrors that surcharge, since OEMs pay royalties on all chips, no matter if they were produced by Qualcomm or its rivals. However, *Qualcomm* differs in that the licensing fees are in fact *owed on all chips in the market as they are SEPs*, while in *Caldera* the additional fee imposed by Microsoft was for nothing of value on those processors not running Microsoft's operating system. An amicus curiae brief in support of Qualcomm states:

> In *Caldera*, however, "[the] effect of [a per-processor licensing] arrangement was that an OEM who chose to install [a competing system] would pay two royalties on the same machine." 87 F. Supp 2d at 1250. Thus, the per-processor arrangement could serve as a disincentive for OEMs to purchase or invest in competing systems. Here, by contrast, OEMs pay for use of Qualcomm's SEPs that are essential to every cellular device produced, regardless of which supplier's chip is used.

Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, 17–18, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (9th Cir. Oct. 5, 2020).

IV. CONCLUSION

The *Qualcomm* case presents a number of interesting and challenging economic questions that are fundamental to an antitrust assessment of licensing behavior for patents, especially SEPs. From both a legal and economic standpoint, the setting of the case is unique, and gives rise to a number of difficulties in interpreting and analyzing antitrust harm. This is further demonstrated by how controversial *both* decisions have been and the discussions of the impact the decisions may have on future antitrust cases.

The Ninth Circuit determined that an alleged failure to meet FRAND licensing obligations pursuant to an agreement with an SSO is, first and foremost, a contractual issue. The decision is an important cautionary note that not every licensing activity immediately rises to an antitrust issue, even if it affects pricing and other terms and conditions of sale. The decision also cautions against theories of anticompetitive harm that are premised on the existence of an unproven contractual breach.

Even more fundamentally, the antitrust analysis of licensing behavior must consider the actual market conditions and a correct counterfactual analysis. When, as is the case here, every handset sold by an OEM, for example, embodies the technology covered in the Qualcomm SEP portfolio, *someone* is going to pay a royalty, and the antitrust analysis must reflect that. For the end result to favor the FTC, it would have had to convincingly show that (1) the licensing rates were supra-FRAND and caused by the alleged behavior, and (2) the alleged supra-FRAND rates harmed competition, not just competitors.

HIGH IMPACT

CLIENT DRIVEN

BFA's Antitrust Group enforces laws meant to protect markets from anticompetitive behavior on behalf of private companies, municipalities, and individual consumers in landmark cases. We congratulate the Golden State Institute on another successful annual event.

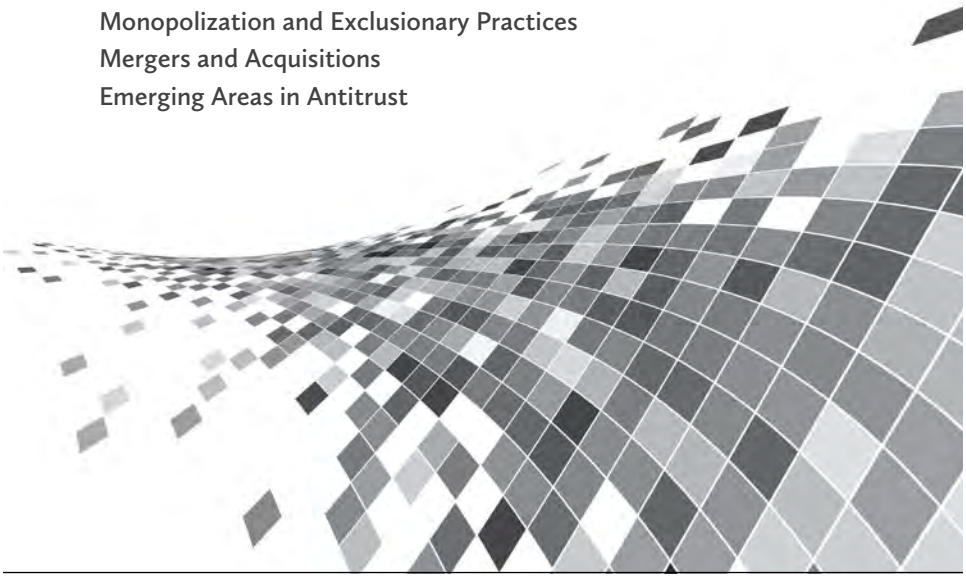
New York California Canada

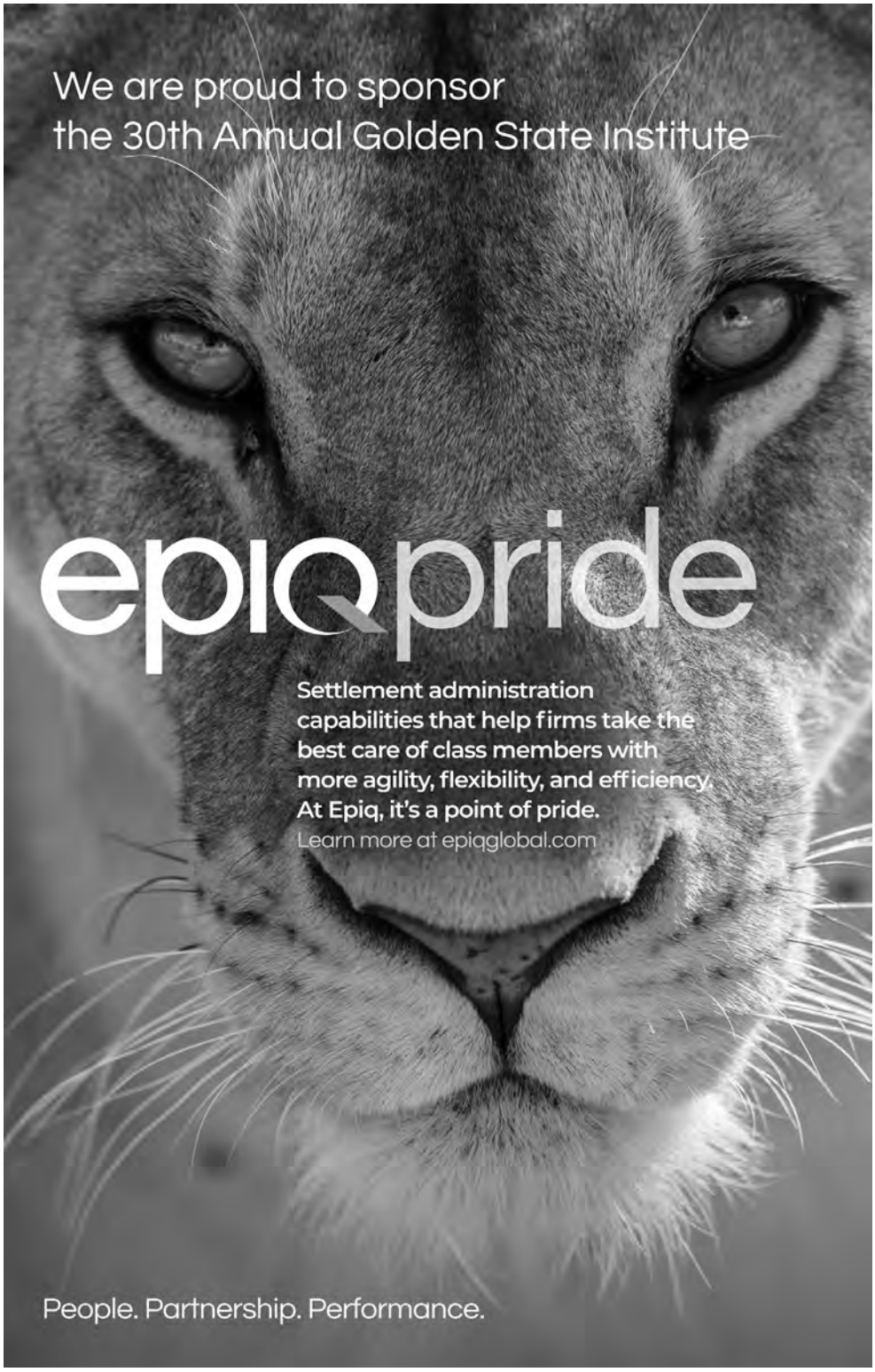
WWW.BFALAW.COM

High-Stakes Issues in Antitrust Litigation

Allegations of harm to competition often give rise to complex litigation and regulatory inquiries. To address the high-stakes issues in these matters—including emerging issues such as scrutiny of large tech platforms, no poach agreements, and "killer" acquisitions—experience is crucial. Cornerstone Research staff and experts bring deep expertise, insightful approaches, and advanced data analytics capabilities to every matter.

Price Fixing and Horizontal Conduct
Class Certification
Monopolization and Exclusionary Practices
Mergers and Acquisitions
Emerging Areas in Antitrust




We are proud to sponsor
the 30th Annual Golden State Institute
epiqpride
Settlement administration capabilities that help firms take the best care of class members with more agility, flexibility, and efficiency. At Epiq, it's a point of pride.
Learn more at epiqglobal.com
People. Partnership. Performance.

FARMER
BROWNSTEIN
JAEGER
GOLDSTEIN &
KLEIN LLP

ATTORNEYS AT LAW

We are honored to sponsor the
30th Golden State Institute and to support
its important work for the people of
California and the nation.

Freitas & Weinberg LLP
is proud to sponsor
the 30th Annual Antitrust,
UCL and Privacy Section
Golden State Institute
Virtual Conference.

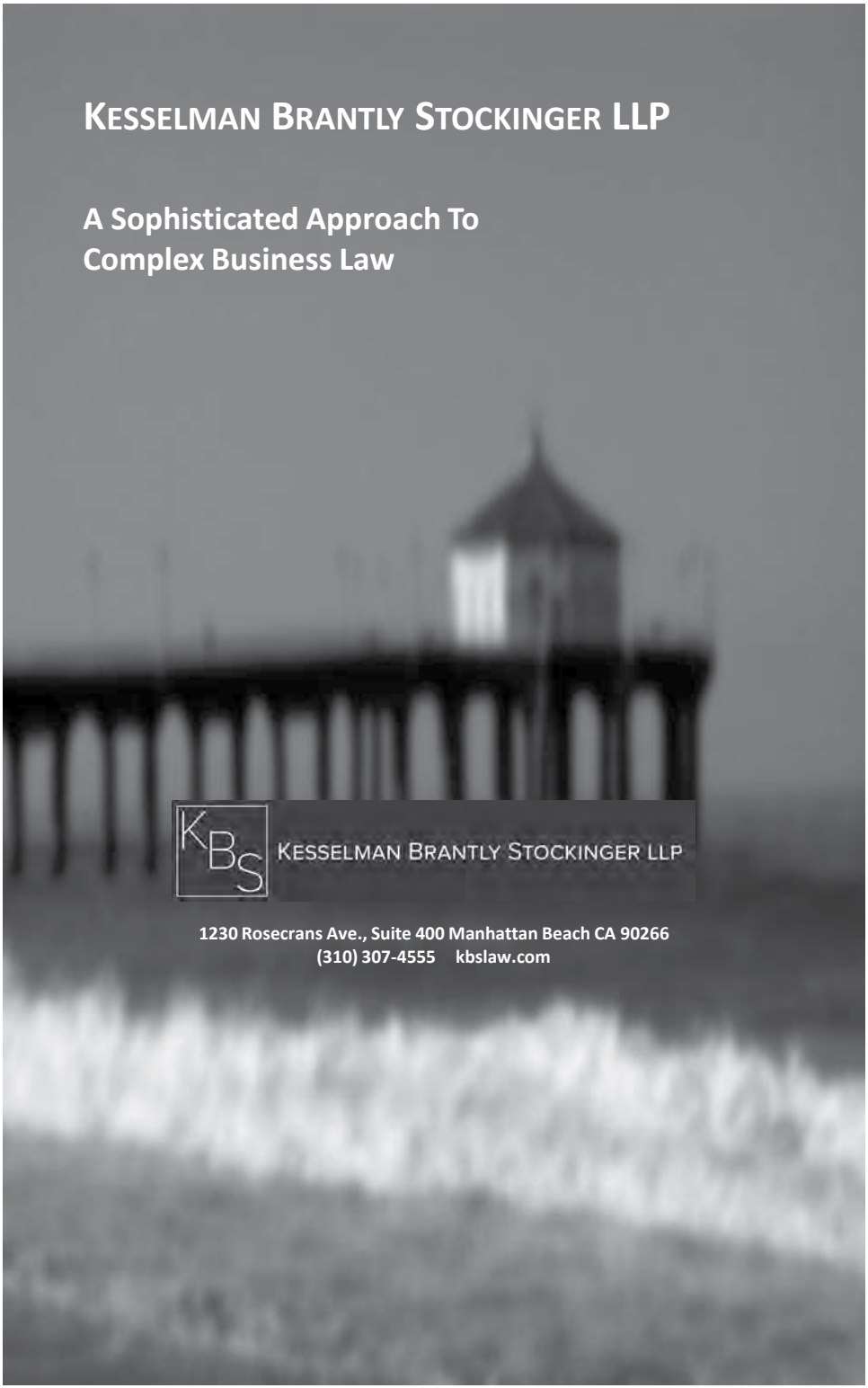
WWW.FAWLAW.COM


GIBSON DUNN
www.gibsondunn.com
Beijing
Brussels
Century City
Dallas
Denver
Dubai
Frankfurt
Hong Kong
Houston
London
Los Angeles
Munich
New York
Orange County
Palo Alto
Paris
San Francisco
São Paulo
Singapore
Washington, D.C.

We're the bank that looks out for people. We're Huntington.

At Huntington, we know the business of banking is about moving money responsibly. But we also know that behind the numbers there are always people. Human lives. Our families, friends and neighbors. It's an honor to be part of the lives that help our communities prosper. And for that privilege, we thank you.

Huntington
Welcome.®


KESSELMAN BRANTLY STOCKINGER LLP
A Sophisticated Approach To
Complex Business Law
KBS
KESSELMAN BRANTLY STOCKINGER LLP
1230 Rosecrans Ave., Suite 400 Manhattan Beach CA 90266
(310) 307-4555 kbslaw.com

We are proud to support the

30th Annual Golden State Institute hosted by the Antitrust, UCL and Privacy Section of the California Lawyers Association

SHEARMAN & STERLING

As one of the leading providers of litigation services, U.S. Legal Support is the only litigation support company that provides a full suite of in-person and remote court reporting solutions, record retrieval, interpreting & translations, trial services and transcription services to law firms, major corporations and insurance companies nationwide.

Network of
5,000+
INDEPENDENT COURT REPORTING PROFESSIONALS

85+
NATIONWIDE OFFICES

1,100,000+
ACTIVE RECORD LOCATION/ PROVIDER ESTABLISHED RELATIONSHIPS

27,000,000+
PAGES OF RECORDS RETRIEVED ANNUALLY

WE HAVE A NETWORK OF
3,000+
INTERPRETERS PROFICIENT IN 200+ LANGUAGES

WE'VE CONSULTED ON
20,000+
TRIALS, MEDIATIONS AND ARBITRATIONS

GEOFF COHEN
Director of Business Development
gcohen@uslegalsupport.com
415.259.8302

USLEGALSUPPORT.COM

Court Reporting | Record Retrieval | Interpreting & Translations | Trial Services | Transcription Services

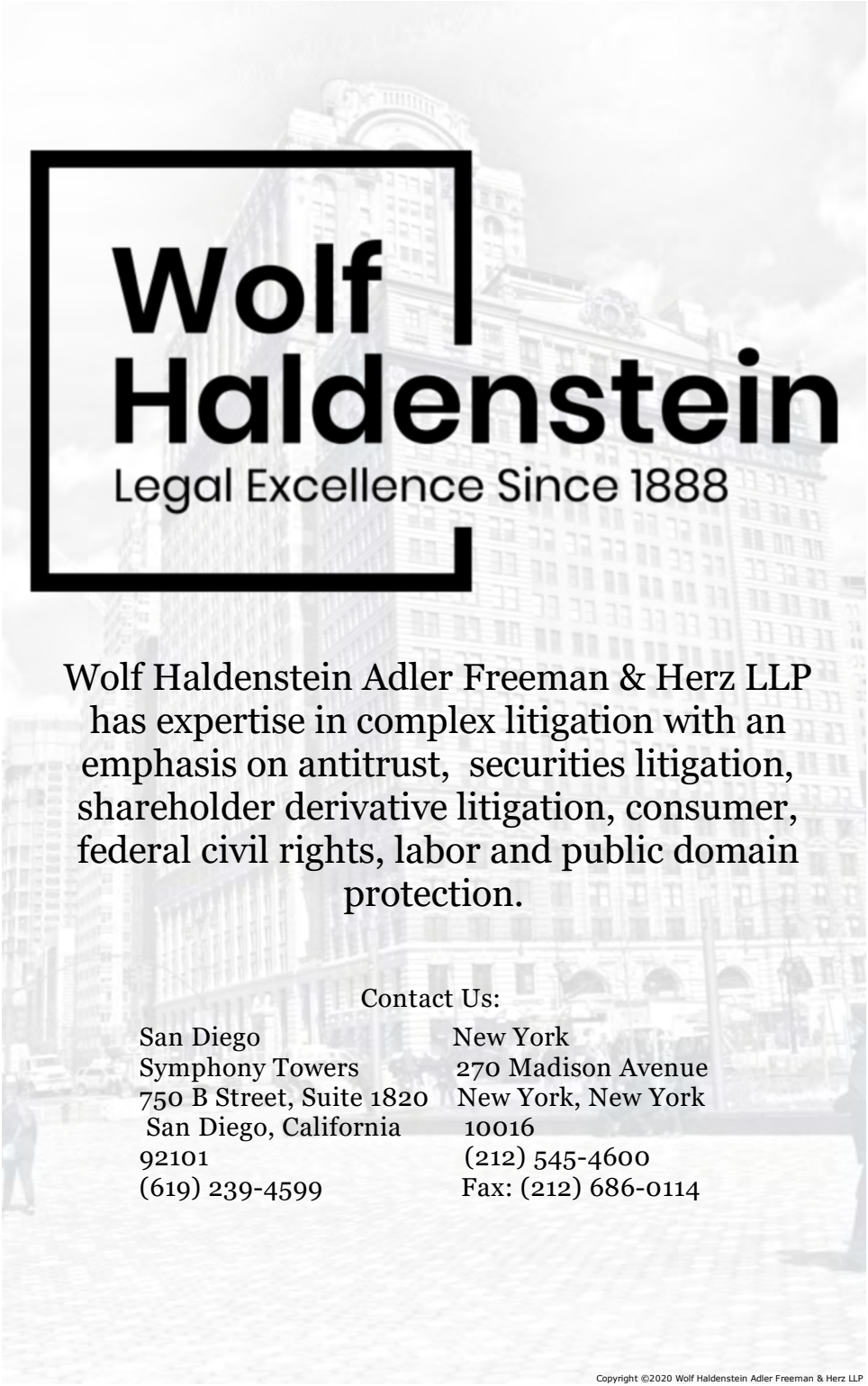
Wilson Sonsini's antitrust attorneys are uniquely positioned to assist clients with a wide range of issues, from day-to-day counseling and compliance to crucial bet-the-company matters.

Based in New York City, Washington, D.C., San Francisco, Silicon Valley, and Brussels, our highly regarded antitrust attorneys advise clients with respect to mergers and acquisitions, criminal and civil investigations by government agencies, antitrust litigation, and issues involving intellectual property, consumer protection, and privacy. We advise clients on a full range of issues, including pricing, distribution, vertical restrictions, standard-setting activities, joint ventures, and patent pooling. Working with Fortune 100 global enterprises as well as venture-backed start-up companies, our attorneys have expertise in virtually every significant industry sector, including technology, media, healthcare, services, transportation, and manufacturing.

Learn more at wsgr.com.

Attorney Advertising

Austin Beijing Boston Brussels Hong Kong London Los Angeles New York Palo Alto
San Diego San Francisco Seattle Shanghai Washington, DC Wilmington, DE



Wolf Haldenstein Adler Freeman & Herz LLP has expertise in complex litigation with an emphasis on antitrust, securities litigation, shareholder derivative litigation, consumer, federal civil rights, labor and public domain protection.

Contact Us:

San Diego
Symphony Towers
750 B Street, Suite 1820
San Diego, California
92101
(619) 239-4599

New York
270 Madison Avenue
New York, New York
10016
(212) 545-4600
Fax: (212) 686-0114

THE ANTITRUST AND UNFAIR COMPETITION LAW SECTION

The Antitrust and Unfair Competition Section was established in 1981 for the purpose of furthering the knowledge of its members in federal and state antitrust and unfair competition law. The focus of the Section is on litigation, counseling, compliance, and government enforcement.

The Section is governed by an Executive Committee appointed by the Board of Representatives of the California Lawyers Association.

SECTION MEMBERSHIP

There are no prerequisites to membership. All interested attorneys, judges, non-attorneys, paralegals, law students and out-of-state attorneys are invited to enroll in the Section.

STANDING COMMITTEES

The Section has the following standing committees in which the Section members are urged to participate:

- Diversity
- Education
- Publications
- Treatise

JOURNAL

The Section publishes Competition, a periodic journal. Members who wish to author articles or assist with publications are encouraged to contact the Editor-in-Chief.

PROGRAMS

The Section presents an annual MCLE-accredited Golden State Institute, an Antitrust Lawyer of the Year Award, and webinars and in-person presentations on antitrust and unfair competition law developments, as well as substantive programs at the Section Education Institute and the California Lawyers Association Annual Meeting. We also offer a Diversity and Inclusion Fellowship to provide training, mentorship, and career opportunities for students from underrepresented groups with interest in antitrust and unfair competition law.

MEMBERSHIP BENEFITS

- Free annual subscription to the Section's journal, Competition, and the monthly electronic E-Briefs to keep members current on issues and developments.
- Discount on all Antitrust and Unfair Competition Law Section programs.
- Discounts on all Section publications including the California State Antitrust and Unfair Competition Law Treatise.
- Opportunity to participate in Section and Committee activities and leadership.
- Opportunity to meet other members of the Antitrust and Unfair Competition Law Section.

ENROLL NOW AND START RECEIVING YOUR MEMBERSHIP BENEFITS!

ANTITRUST AND UNFAIR COMPETITION LAW SECTION ENROLLMENT FORM

You can join the Antitrust and Unfair Competition Law Section ONLINE by visiting:
https://calawyers.org/join-us/

Or, if paying by check or joining as a Judge, a Non-Attorney, or a Non-Attorney Law Student, please use the form below.

Please enroll me as a member or associate member of the
Antitrust and Unfair Competition Law Section of the California Lawyers Association.

Name: _____State Bar Number:_____

Firm: _____

Address: _____

City, State, Zip:_____

Telephone: _____ Fax:_____

E-mail:_____

SECTION ENROLLMENT PAYMENT INFORMATION (CHECK ONE):

❑ Attorney (Members) and Non-Attorneys (Associate Members)	$99
❑ Judges (Associate Membership)	FREE (Join Form ONLY)
❑ Non-Attorney Law Student	FREE (Join Form ONLY)
(*Up to 3 Complimentary Sections for Non-Attorney Law Students)*	

Enclose your check, payable to the California Lawyers Association, and mail to:
Section Enrollments; California Lawyers Association; 400 Capitol Mall, Suite 650, Sacramento, CA 95814

If paying by credit card, you may mail this form to the above address or email to:
Section Enrollments at ProgramRegistrations@CALawyers.org

CREDIT CARD INFORMATION:

I authorize the California Lawyers Association to charge my program registration and/or fees as noted above to my VISA or Mastercard account. **(No other cards will be accepted)**

Account number: _____Expiration Date: _____

Cardholder's Name: _____ Cardholder's Signature:_____

For further information, please contact the Antitrust and Unfair Competition Law Section at 916.516.1740, or visit our website at www.calawyers.org/section/antitrust-unfair-competition-law/

California Lawyers Association
Antitrust and Unfair Competition Law Section
400 Capitol Mall, Suite 650
Sacramento, CA 95814