

# COMPETITION

ANTITRUST AND UNFAIR  
COMPETITION LAW

CALIFORNIA  
LAWYERS  
ASSOCIATION

## ANTITRUST AND UNFAIR COMPETITION LAW

### INSIDE THIS ISSUE

#### PRACTICAL CHALLENGES CONFRONTING MERGER REVIEWS OF LABOR MARKETS

By Joshua Holian and Nitesh Daryanani

#### THE PRICE OF FREE

By Lesley Chiou and Avigail Kifer

#### AN ECONOMIC ANALYSIS OF THE SELF-PREFERENCING DEBATE

By Juliette Caminade, Juan Carvajal, and  
Christopher R. Knittel

#### *EPIC V. APPLE*: AMICUS BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF NEITHER PARTY

By Kathleen Foote, Paula Blizzard, Shira  
Hoffman, Robert B. McNary, and Brian D. Wang

#### INCREASING PRIVATE EQUITY INVESTMENTS IN HEALTHCARE RAISE ANTITRUST AND UNFAIR BUSINESS PRACTICE CONCERNS

By Mary Mitchell

#### THE OTHER "QUICK LOOK"

By Ashish Sudhakaran and Tyler Helms

#### DIVERSITY IN THE ANTITRUST BAR: IS IT TRULY A PIPELINE PROBLEM?

Edited by Steve Vieux

#### BIG STAKES ANTITRUST TRIAL: *IN RE CAPACITORS ANTITRUST LITIGATION*

Edited by Anupama K. Reddy



# TABLE OF CONTENTS

3

---

## MESSAGE FROM THE CHAIR

By David M. Goldstein

6

---

## MESSAGE FROM THE EDITOR

By Stephen McIntyre

9

---

## EXECUTIVE COMMITTEE

12

---

## PRACTICAL CHALLENGES CONFRONTING MERGER REVIEWS OF LABOR MARKETS

By Joshua Holian and Nitesh Daryanani

22

---

## THE PRICE OF FREE

By Lesley Chiou and Avigail Kifer

30

---

## AN ECONOMIC ANALYSIS OF THE SELF- PREFERENCING DEBATE

By Juliette Caminade, Juan Carvajal, and  
Christopher R. Knittel

44

---

## *EPIC V. APPLE*: AMICUS BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF NEITHER PARTY

By Kathleen Foote, Paula Blizzard, Shira  
Hoffman, Robert B. McNary, and Brian D. Wang

54

---

## INCREASING PRIVATE EQUITY INVESTMENTS IN HEALTHCARE RAISE ANTITRUST AND UNFAIR BUSINESS PRACTICE CONCERNS

By Mary Mitchell

65

---

## THE OTHER "QUICK LOOK"

By Ashish Sudhakaran and Tyler Helms

77

---

## DIVERSITY IN THE ANTITRUST BAR: IS IT TRULY A PIPELINE PROBLEM?

Edited by Steve Vieux

91

---

## BIG STAKES ANTITRUST TRIAL: *IN RE* *CAPACITORS ANTITRUST LITIGATION*

Edited by Anupama K. Reddy

Rust Consulting and Kinsella Media are proud to support the California Lawyers Association Antitrust and Unfair Competition Law Section and sponsor the 32nd Annual Golden State Institute.

Unmatched subject matter expertise built over 8,000 engagements:

- Legal Notice and Settlement Administration
- Data Breach Responses
- Recalls
- Compliance Remediation Programs



rustconsulting.com  
kinsellamedia.com  
info@rustconsulting.com

# MESSAGE FROM THE CHAIR

Written by David M. Goldstein

*Farmer Brownstein Jaeger Goldstein Klein & Siegel LLP  
San Francisco, California*

Our Section has made tremendous progress since separating from the State Bar in 2017. In addition to continuing with our traditional publications, events, and programs, we adopted bylaws and other governing documents, formed Standing Committees, wrote our mission statement, crafted strategic plans, and implemented diversity programs. This past year we continued to move forward by making progress on five high-level priorities.

**Membership:** The Executive Committee engages in many activities that run like well-oiled machines, including our publications, events, and programs. But we need to continue to focus on delivering what our members want and developing broader and deeper relationships with our members. This year, our Membership Committee analyzed our membership and made significant strides in developing strategies focused on membership and our members. In the coming months, we will be reaching out to many of you and your firms, agencies, and companies.

**UCL:** In September 2021, we formed an ad hoc UCL Committee and tasked it with developing a strategy to increase and improve our UCL offerings. That Committee met regularly during the year, and in July 2022 the Executive Committee voted to make it a Standing Committee. The UCL Committee has been contributing content to our publications: *Treatise, Competition, and E-brief, News and Notes*. It has coordinated with the Education Committee on programming, including a UCL panel at the Golden State Antitrust and UCL Institute (GSI) on November 10, 2022. And the UCL Committee will host a half-day UCL Institute and reception on January 12, 2023 in Los Angeles.

**Education:** Many of us thought that as soon as Covid allowed, we should hold more in-person programs and CLE programming focused on thought-provoking topics. This includes in-person events such as GSI and the Antitrust Lawyer of the Year Award, Celebrating Women in Competition Law, the UCL Institute, and

networking events for members or those interested in becoming a member. Our plan for 2022–2023 will follow that path with a return to in-person programs and events, and a refreshed on-line CLE catalogue.

**New and Young Lawyers:** It can be intimidating and challenging for new and young lawyers to enter a new practice area and develop connections to practitioners. We have had a young lawyer serve as our representative to CLA's New Lawyers Committee (formerly the Young Lawyers Committee), but we felt that was not enough to accomplish our goals. This year we formed a New Lawyers Committee to work on strategies to make our practice area more interesting, exciting, and welcoming to new and young lawyers. The New Lawyers Committee has created a webpage to learn about antitrust, the UCL, and our Section: <https://calawyers.org/section/antitrust-unfair-competition-law/for-new-lawYERS>. This committee will coordinate with our other committees and CLA's New Lawyers Committee to develop pathways to join our practice area.

**Governance:** We adopted a new structure for the Executive Committee. In the past, the Executive Committee had a Chair, Treasurer, Secretary, and as many as 10 Vice Chairs. This year, we eliminated all but two of the Vice Chair positions. Now, the Treasurer and Secretary also have the Vice Chair title and role. Other Executive Committee members serve as Chairs or Vice Chairs of a Standing Committee or another committee, or simply as members of the Executive Committee. We also enlarged the pool of Executive Committee members eligible to serve as Chair, and now you can apply to join a Standing Committee on a rolling basis rather than only in January each year.

We undertook these big picture priorities in addition to our usual activities. Among other things, we (1) published a new edition of the *Treatise* in January 2022 and just sent the January 2023 edition to the printer; (2) published two editions of *Competition*; (3) sent the monthly *E-brief, News and Notes*; (4) hosted part 1 of 2021 GSI in November 2021 and continued with part 2 in May 2022; (5) honored **Dan Wall** of Latham & Watkins as our 2021 Antitrust Lawyer of the Year; (6) hosted Celebrating Women in Competition Law; (7) put on several other exciting programs and panels; (8) awarded our second Inclusion and Diversity Fellowship to Marshall Fern of California Western School of Law; (9) provided comments on proposed changes to CLA's diversity policy; and (10) wrote CLA's antitrust compliance policy. And we had great fun doing it all!

Next up, **GSI is November 10, 2022, in the Julia Morgan Ballroom**. Following GSI, we will host our **2022 Antitrust Lawyer of the Year** reception and dinner, honoring **Elizabeth Pritzker** of **Pritzker Levine LLP**. We hope to see you there!

Thank you to our Executive Committee members who are rolling off after contributing so much of their time and effort to the Section: **Robert Connolly, Abiel Garcia, Steve McIntyre, Rob McNary, Ian Papendick**, and our new lawyer representative **Mandy Chan**. Special thanks to **Paul Riehle**, the Section's representative to CLA's Board for the past four years.

I want to welcome **Dominique Alepin** (Chair), **Jonathan Levine** (Vice Chair and Treasurer), and **Belinda Lee** (Vice Chair and Secretary), who will lead the Executive Committee this year. And welcome also to **Jill Manning**, who is the Section's new representative to CLA's Board. This is a terrific group to lead the Section and represent us on CLA's Board.

Finally, I want to thank the members of the Executive Committee, our Advisors, and all of the Section's many members who contribute their time and effort to support our publications, programs, and events. Most of us joined the Section to become part of California's Antitrust and UCL community—and what a wonderful community it is! No matter how vigorously we represent our clients on opposite sides of the v., our community practices with professionalism, courtesy, and respect. My year as Chair—working closely with both co-counsel and opposing counsel in cases—confirmed how wonderful it is to practice antitrust and unfair competition law in California. Thank you for the honor and privilege of serving as Chair this past year.

# MESSAGE FROM THE EDITOR

Written by Stephen McIntyre

*O'Melveny & Myers LLP  
Los Angeles, California*

## NEW FRONTIERS IN ANTITRUST ENFORCEMENT

Earlier this year, Assistant Attorney General Jonathan Kanter, who heads the U.S. Department of Justice Antitrust Division, declared that we are witnessing a “once-in-a-century inflection point in terms of reach of corporate power and popular support for addressing corporate power.”<sup>1</sup> At the same time, Mr. Kanter said, “we’re seeing a once-in-many-generation[s] shift in how markets function, and the need to update and adapt our antitrust enforcement to address new market realities.”<sup>2</sup> This “21st-century anti-monopoly movement,” as some have called it,<sup>3</sup> has brought antitrust back into front-page news headlines, dinner-table conversations, and political stump speeches.

Antitrust law, which has taken shape through more than a century of common-law development,<sup>4</sup> is not known for turning on a dime. How well can existing antitrust doctrines be applied to novel (and rapidly changing) technologies, industries, and markets? *Should* the antitrust statutes even be applied to the range of social and economic concerns that currently animate our political discourse? In this edition of *Competition*, an impressive line-up of authors takes on issues at the cutting edge of public and private antitrust enforcement.

This edition begins with “Practical Challenges Confronting Merger Reviews of Labor Markets,” by **Joshua Holian** and **Nitesh Daryanani** of Latham & Watkins LLP. This article examines the implications and challenges associated with the antitrust agencies’ newfound focus on labor welfare—in addition to traditional consumer-welfare considerations—during the merger review process.

Next, in “The Price of Free,” Professor **Lesley Chiou** of Occidental College and **Avigail Kifer** of Cornerstone Research analyze the economics of “free”

products—a topic that we are increasingly seeing in antitrust matters involving digital markets and multi-sided platforms.

We then hear from a trio of economists—**Juliette Caminade** and **Juan Carvajal** of Analysis Group, Inc., and Professor **Christopher R. Knittel** of the MIT Sloan School of Management—in “An Economic Analysis of the Self-Preferencing Debate.” This article addresses the economic discourse and recent policy proposals surrounding so-called “self-preferencing” practices, that is, where a platform operator offers its own goods in competition with third-party sellers’ goods on its platform but disadvantages third-party sellers.

We are also pleased to publish an *amicus curiae* brief filed by the **State of California** in *Epic Games, Inc. v. Apple Inc.* In this closely watched litigation, Epic and Apple each appeal from Judge Yvonne Gonzalez Rogers’ September 2021 post-trial judgment, which found that Apple’s app distribution and in-app payment policies did not violate the antitrust laws, but that the iOS App Store’s “anti-steering” policy violated the Unfair Competition Law.<sup>5</sup> The *amicus* brief articulates how California’s top enforcement agency views the UCL’s much-disputed “unfair” prong. In light of the high-profile nature of *Epic v. Apple* and the cutting-edge questions this case presents, we believe readers on both sides of the *v.* will benefit from knowing how the California Attorney General’s Office reads the statute.

In our next article, “Increasing Private Equity Investments In Healthcare Raise Antitrust and Unfair Business Practice Concerns,” **Mary Mitchell**, a student at UC Hastings College of the Law who spent summer 2022 at Pritzker Levine LLP, takes on the phenomenon of private-equity firms acquiring stakes in healthcare providers—from nursing homes and hospitals to emergency medicine staffing groups and dermatology clinics.

Rounding out this edition’s slate of articles is “The Other ‘Quick Look,’” in which **Ashish Sudhakaran** and **Tyler Helms** of O’Melveny & Myers LLP analyze the Supreme Court’s suggestion in *NCAA v. Alston*<sup>6</sup> that a “quick-look” analysis, which has traditionally provided a shortcut for *condemning* facially anticompetitive restraints, may be applied to summarily *uphold* certain kinds of agreements without the need for a full rule-of-reason analysis.

In addition to these exemplary articles, this edition of *Competition* reproduces two timely and engaging panel discussions from the May 2022 Golden State and Unfair Competition Law Institute, which was held in San Francisco:

In “Diversity In the Antitrust Bar: Is It Truly a Pipeline Problem?,” moderator **Steve Vieux** of Bartko Zankel Bunzel & Miller speaks with panelists **Ye Eun (Charlotte) Chun** of Cleary Gottlieb Steen & Hamilton LLP; **Qianwei Fu** of Zelle LLP; **Jeff Negrette** of the U.S. Department of Justice Antitrust Division; and **Laura Wilkinson** of PayPal about whether the antitrust bar’s continuing lack of diversity is a “pipeline” issue or, rather, a matter of will.

And in “Big Stakes Antitrust Trial: *In re Capacitors Antitrust Litigation*,” **Elizabeth Castillo** of Cotchett, Pitre & McCarthy LLP moderates a discussion among lawyers who tried the *Capacitors* case not once, but twice: **Joseph R. Saveri** of the Joseph Saveri Law Firm, LLP; **Anupama K. Reddy**, currently of Google LLC but formerly of the Joseph Saveri Law Firm; **Roberto Finzi** of Paul, Weiss, Rifkind, Wharton & Carrison LLP; and **Bonnie Lau** of Morrison & Foerster LLP.

\* \* \*

For the past year, it has been my honor to serve as Editor-in-Chief of *Competition*. In that time, the journal has continued to publish timely, well-written, and incisive works of scholarship. Just as important, the Spring and Fall 2022 editions of *Competition* have featured submissions from an incredibly diverse group of authors and speakers—from lawyers, economists, academics, and students; from those in plaintiffs’ firms, defense firms, government, and private industry; from practitioners with decades of experience and those who are just starting their careers; and from many attorneys of color and members of historically underrepresented groups. I am grateful to the many people who contributed articles, moderated or spoke on GSI panels, assisted with preparing *Competition* for publication, and otherwise made Volume 32 a success.

I also congratulate **Anupama K. Reddy**, who will be serving as Editor-in-Chief of *Competition* in the coming year. I look forward to Volume 33.

- 
1. Stefania Palma, A “Once-In-a-Century Inflection Point”: DoJ’s Antitrust Chief on Curbing Corporate Power, *FIN. TIMES* (June 2, 2022), <https://www.ft.com/content/313550db-3006-401e-9908-981577663c51>.
  2. *Id.* (alteration in original).
  3. Ron Knox, *How Washington Got Back Into Trustbusting*, *WASH. POST* (June 25, 2021), <https://www.washingtonpost.com/outlook/2021/06/25/ftc-antitrust-monopoly-silicon-valley/>; see also Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, *HARVARD BUS. REV.* (Dec. 15, 2017), <https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement> (“We may be witnessing the rise of . . . a progressive, anti-monopoly, New Brandeis School.”).
  4. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531–32 (1983) (“The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the [Sherman Act’s] broad mandate by drawing on common-law tradition.”) (quotation omitted); *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 98 n.42 (1981) (“In antitrust, the federal courts enjoy more flexibility and act more as common-law courts than in other areas governed by federal statute.”).
  5. *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021).
  6. *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021).

# EXECUTIVE COMMITTEE

## GENERAL POSITIONS

---

### CHAIR

David M. Goldstein

### SECRETARY & CO-VICE-CHAIR FOR MARKETING & MEMBERSHIP

Jonathan Levine

### TREASURER & CO-VICE-CHAIR FOR MARKETING & MEMBERSHIP

Ian Papendick

## ANTITRUST & UCL POSITIONS

---

### CO-VICE-CHAIRS FOR GOLDEN STATE INSTITUTE

Robert McNary

Aaron Sheanin

### VICE-CHAIR FOR EDUCATION/CHAIR OF EDUCATION COMMITTEE

Jiamie Chen

### VICE-CHAIR FOR COMPETITION/CHAIR OF PUBLICATIONS COMMITTEE

Stephen McIntyre

### VICE-CHAIR FOR E-BRIEFS

Robert Connolly

### VICE-CHAIR FOR TREATISE/ CHAIR OF TREATISE COMMITTEE

Belinda Lee

### CO-VICE-CHAIRS FOR DIVERSITY & INCLUSION

Abiel Garcia

Anupama Reddy

## EXECUTIVE COMMITTEE MEMBERS

---

Lee Brand

Jennifer Elkayam

Shira Liu

Christina Tusan

Steven Vieux

Kevin Yeh

## OTHER POSITIONS

---

### IMMEDIATE PAST CHAIR

Qianwei Fu

### REPRESENTATIVE TO THE CLA BOARD

Paul Riehle

### CYLA LIAISON

Mandy Chan

## ADVISORS

---

Dominique-Chatale Alepin

Lee F. Berger

Albert J. Boro, Jr.

Elizabeth Castillo

Craig C. Corbitt

John F. Cove, Jr.

Thomas N. Dahdouh

Eric Enson

Robert Freitas

J. Thomas Greene

Geoffrey Holtz

Peter K. Huston

Cheryl Johnson

David Kesselman

Niall Lynch

Lindsay Lutz

Jill M. Manning

Jesse W. Markham

Sarretta C. McDonough

Daniel J. Mogin

Heather Steiner Nyong'o

Kenneth Ryan O'Rourke

Courtney Palko

Thomas A. Papageorge

E. Kate Patchen

Roxane A. Polidora

Elizabeth C. Pritzker

Paul J. Riehle

Trevor Stockinger

Steve Williams

Lawrence Wu

# ANTITRUST AND UNFAIR COMPETITION LAW SECTION

---

## BENEFITS OF MEMBERSHIP

Members of the Antitrust and Unfair Competition Law Section gain access to the largest community of attorneys practicing antitrust, unfair competition, and trade regulation law in California.

### SECTION MEMBERS RECEIVE SUBSCRIPTIONS TO THE SECTION'S PUBLICATIONS AND NEWSFEED:

- *Antitrust and Unfair Competition Law Daily Newstand* via Lexology (publishing over 500 articles every day from 900+ leading law firms and service providers)
- *Competition* (the Section's scholarly law journal)
- *Antitrust and UCL E-Briefs, News and Notes* (the Section's electronic newsletter)

### SECTION MEMBERS ALSO RECEIVE DISCOUNTS ON THE SECTION'S POPULAR PRODUCTS AND PROGRAMS:

- The Section's in-person events:
  - Golden State Antitrust and Unfair Competition Law Institute (the Section's annual day-long CLE event)
  - Antitrust Lawyer of the Year Award (the Section's annual reception, ceremony, and dinner)
  - Celebrating Women in Competition Law in California
  - Other networking events and mixers
- High quality MCLE content in multiple formats (including webinars, podcasts, videos, and self-study articles)
- Access to *Fastcase Legal Research* (a collection of cloud-based software for lawyers to quickly and efficiently accomplish research goals and complete tasks)

### SECTION MEMBERS CAN ALSO HELP ADVANCE THEIR CAREERS BY:

- Becoming part of the community of leading antitrust and UCL practitioners in California
- Becoming one of the leaders of or contributors to the Section's five standing committees: Diversity Committee, Education Committee, Publications Committee, Treatise Committee, and UCL Committee

# PRACTICAL CHALLENGES CONFRONTING MERGER REVIEWS OF LABOR MARKETS

Written by Joshua Holian and Nitesh Daryanani<sup>1</sup>

## I. INTRODUCTION

Section 7 of the Clayton Act (“Section 7”) prohibits mergers and acquisitions that are substantially likely to lessen competition, or that tend to create a monopoly.<sup>2</sup>

When reviewing mergers for potential Section 7 violations, the United States Department of Justice’s Antitrust Division (“DOJ”) and the Federal Trade Commission (“FTC,” and collectively, the “Agencies”) historically have focused their analyses on the probable effects that the merger in question will have on *consumer welfare*. Through decades of case law and enforcement practice, the Agencies have established a relatively well-understood path for connecting product market concentration to anticompetitive effects that—under the right conditions—would negatively impact consumers with higher prices, reduced quality, or lower investments in innovation. The precise boundaries of when a specific merger is substantially likely to lessen competition will of course be heavily contested in any given merger review, but the analytical frames (and areas for debate) are relatively well defined.

Over the past 18 months, the Agencies have expressed interest in expanding merger reviews to analyze the impact of a proposed merger on *labor welfare*, in addition to consumer welfare.

Incorporating questions of labor welfare into Agency merger reviews may prove challenging in practice. While product and labor markets are governed by the same underlying forces of supply and demand, these segments differ in meaningful ways, as well. In combination, these differences may constrain the ability of the Agencies to use their historical experience with analyzing product markets as a model for how to evaluate a merger’s effects on labor markets.

Of course, the observation that a task will be hard does not make it impossible. The Agencies may find the right case over time to overcome the below-described challenges and establish that a merger is substantially likely to cause a lessening of competition in a labor market. Correspondingly, parties pursuing mergers should bear in mind the risk that an Agency may scrutinize their transaction’s impact on labor markets, in addition to the usual product market-focused analysis. That said, at least

in the near term we anticipate that the Agencies will tend to look for opportunities to allege labor-based claims *in addition to* traditional allegations that a merger will impact consumer welfare, rather than pursue a labor-based theory as the sole grounds upon which to challenge a merger.

This article analyzes contemporary scholarship that has evaluated the question of whether merger review is an appropriate tool for analyzing impacts on labor markets. To contextualize that analysis, the article begins with a brief overview of the merger review process, and the typical role of the consumer welfare standard in that analysis, before we turn to an assessment of what a pivot towards assessing labor market competition would look like.

## II. BACKGROUND: MERGER REVIEW AND ENFORCEMENT

### A. THE BASICS OF MERGER REVIEW

Section 7 prohibits mergers and acquisitions that are substantially likely to lessen competition.<sup>3</sup> The Hart-Scott-Rodino Antitrust Improvements Act of 1976 established a framework whereby parties to a proposed merger must notify the Agencies before closing the transaction if the transaction is not exempt and exceeds certain thresholds.<sup>4</sup>

Over the years, the Agencies have issued and reissued guidelines that reflect their approach to evaluation of horizontal and vertical mergers, among other reportable transactions (the “Guidelines”).<sup>5</sup> Courts hearing challenges by the Agencies to mergers have defined a framework for evaluating mergers, as well.<sup>6</sup>

A healthy debate remains open among antitrust practitioners on the exact boundaries and requirements for assessing whether a merger violates Section 7, and who should bear what burden of proof on these issues. At a high level, however, the basic merger review “algorithm” for transactions involving *horizontal* competitors is as follows:

First, to understand whether a merger will substantially lessen competition, we need to understand the *relevant market* impacted by the merger.<sup>7</sup> The relevant market is the field of competition in which meaningful substitutes exist. The courts view market definition as an important threshold issue for merger review (the logic being, we cannot credibly assess the impact of a merger without first understanding what product and geographic markets might be impacted).<sup>8</sup> Given the prominence of the issue, practitioners have devised a range of tools for identifying or approximating the boundaries of relevant markets to a merger, including economic analysis, ordinary course of business documents, and customer testimony.

After identifying the relevant market at issue, we must understand whether the relevant market is *concentrated*.<sup>9</sup> Absent durable concentration, economics tells us that a merger is unlikely to have an anticompetitive effect, since consumers could avoid a price increase or reduction in quality by the merged firm by diverting their business to other suppliers.

Once we sufficiently understand the market we are talking about, we assess whether the merger is likely to cause an *anticompetitive effect*. In a horizontal merger between two competitors, an anticompetitive effect could be the product of *coordinated effects*—that is, a collective relaxing of competitive tension between the surviving competitors in the industry—or *unilateral effects*—a single firm relaxing its competitive behaviors without losing so many customers to alternatives as to render that reduced competition unprofitable.<sup>10</sup> In assessing competitive effects, we consider not only the incentives of the parties to the transaction, but also the incentives of actual competitors, potential competitors, and new entrants.

Antitrust agencies use essentially the same framework to evaluate horizontal combinations of buyers, as opposed to sellers.<sup>11</sup> Monopsony power is, in essence, market power exercised by a buyer against sellers of a good or service.<sup>12</sup> A merger of employers that compete for the same pool

of employees can enhance market power in the labor market, just as mergers of competing sellers can enhance market power on the selling side of the market.<sup>13</sup>

## B. THE MOVE TOWARDS INCLUDING LABOR MARKETS IN MERGER REVIEW

The move towards including labor markets in antitrust reviews starts from the general observation that labor welfare in the United States has declined over time. Research shows that wage growth in the United States has stagnated since the 1980s,<sup>14</sup> which is attributed, at least in part, to the diminishing relevance of unions and the collective bargaining process during that time.<sup>15</sup> Unions have gone from representing more than a third of American workers in the twentieth century to representing a tenth of the labor market, most of whom are in the public sector.<sup>16</sup> Scholars argue that a “fissured” labor environment is stacked against workers trying to organize and bargain collectively, *i.e.*, labor markets are geographically fragmented and heavily reliant on contractors, staffing agencies, and franchises.<sup>17</sup> Labor market enforcement actions brought by government agencies have also declined in recent years, and COVID-19 sharpened the decline.<sup>18</sup>

The Biden administration has looked for a range of solutions to address these challenges, including antitrust. In July 2021, President Biden issued an executive order emphasizing the importance of competitive labor markets to create more high-quality jobs and foster economic freedom to switch jobs or negotiate a higher wage.<sup>19</sup> The administration explained that industry consolidation has led to depressed wages because employers have market power and are able to pay lower wages than they would in a competitive market, while many workers are unable to find new jobs because there are few alternatives.<sup>20</sup> Monopsony theory predicts that a firm faced with less competition for labor may cut wages and benefits, or wastefully degrade conditions of employees to take advantage of employees who are “stuck” or locked into the job.<sup>21</sup> Declining labor mobility undercuts wage growth because employees

have less leverage to demand higher wages and better benefits.<sup>22</sup>

The administration has specifically looked at antitrust merger review as an opportunity to address challenges in the labor markets. In January 2022, the Agencies explicitly addressed labor markets in their request for comments on revising and updating the Agencies’ Guidelines.<sup>23</sup> Specifically, the Agencies raised the following questions relating to labor markets:

1. whether the guidelines adequately assess whether mergers may lessen competition in labor markets, thereby harming workers;
2. whether there are factors beyond wages, salaries, and financial compensation that the guidelines should consider when determining anticompetitive effects; and
3. whether cost savings generated through layoffs or reduction of capacity should be treated as cognizable efficiencies.<sup>24</sup>

In June 2021, FTC Chair Lina Khan expressed an intent to prohibit mergers that reduce competition in labor markets based on a mandate to “protect[] everybody, including workers.”<sup>25</sup> Relying on economic studies which suggest a link between employer concentration and low wages,<sup>26</sup> antitrust agencies and academics argue that wage stagnation in the United States economy is the result of allowing too many mergers that have increased concentration in labor markets go unchallenged.<sup>27</sup>

Beyond merger control, in the last decade the Agencies have prioritized enforcement against specific forms of conduct by employers, like illegal agreements amongst employers to fix wages and the imposition of no-poach agreements on high-skilled workers.<sup>28</sup> While outside the scope of this article, those enforcement efforts underscore the focus that the current administration is bringing to these issues.

### III. PRACTICAL CHALLENGES WITH DEFINING LABOR MARKETS AND CONCENTRATION LEVELS

As noted above, merger investigations traditionally begin with market definition. When the facts show that a cognizable market exists and that it is concentrated, the analysis then turns to whether anticompetitive effects are likely to follow, or if instead one or more features of the marketplace would tend to render an attempt to exert market power unprofitable.<sup>29</sup>

Scholarship suggests that a labor market may be defined as a group of jobs between which employees can switch with relative ease.<sup>30</sup> Within a labor market, employers are “buyers” of labor who compete with each other for employees.<sup>31</sup> A labor market is defined relative to the alternatives available to employees, just as a product market is defined relative to the alternatives available to consumers.<sup>32</sup> Labor markets are concentrated if prospective employers are few in number relative to employees. Because labor is an input that merging parties buy, the question is whether a proposed transaction would allow the merged firm to reduce competition substantially in a labor market and use its enhanced bargaining power to depress workers’ wages and benefits, including salary, commissions, and reimbursements.<sup>33</sup>

The human element of human capital makes defining the boundaries of a labor market in a given merger extremely complex. First, labor markets generally are highly fragmented.<sup>34</sup> Most employees will only consider prospective employers within a commutable zone, *i.e.*, a “geographic area in which they already live and work, not a position requiring a long commute or move.”<sup>35</sup> Indeed, even if a firm competes in only one product market, it may have employees in numerous labor markets.<sup>36</sup> This fragmentation creates practical analytical difficulties for an Agency reviewing a merger. For example, a smartphone manufacturer may sell its phones nationally, but its labor markets—for employees at its factories, retail outlets, and corporate offices—may be scattered throughout the country. To

review a merger of smartphone manufacturers, the Agency would define the product market based on substitutes available at the national level, but the labor markets presumably would need to be examined individually, at the local level, because there is likely a high degree of variation in employer concentration across each market.<sup>37</sup> Some professions may lend themselves to more geographic portability than others, and some professions may lend themselves to national markets, but for the most part, the Agencies would need to account for the observation that most employees are making hyper-local decisions based on their own individual needs and preferences.

Second, the question of which employers stand as substitutes to one another is complex. Unlike commodities and inputs, labor markets involve a high degree of differentiation, both in terms of jobs and employees.<sup>38</sup> Employees may consider a range of different work options at any given time.<sup>39</sup> At the same time, employee mobility may be limited by “frictions,” such as employees’ preferences (including their willingness or unwillingness to relocate), search and transaction costs (collectively, switching costs), and information asymmetry.<sup>40</sup> Firm-specific considerations include unfavorable features like commuting costs, which include time and convenience in addition to the price of a subway ticket or gasoline, and these preferences vary from one employee to another.<sup>41</sup> Employees may be willing to commute farther for some types of jobs than others.<sup>42</sup> Employees perceive and value these dimensions differently given their individual tastes over commutes and workplace benefits.<sup>43</sup> Given these factors, market definition based on a hypothetical monopsonist test—which asks whether a collection of buyers would be able to sustain a small but significant non-transitory decrease in wages—may not be an accurate reflection of competitive reality if observed wages do not reflect an employee’s entire consideration for their job.<sup>44</sup>

The complexities of how people choose (and switch) jobs makes labor market definition difficult in practice. As one example, in 2022, a federal district court rejected an argument that a distinct market for

“McDonald’s employees” could exist.<sup>45</sup> Plaintiffs had sought to certify a class against McDonald’s non-solicitation restrictions, and the plaintiffs argued that the relevant market for their labor was limited to McDonald’s outlets. The court rejected the plaintiffs’ position as implausible. The court held that McDonald’s and its franchisees did not have market power because there were almost 50 other quick-serve restaurants within three miles of the plaintiff’s home.<sup>46</sup> More generally, industry consultants who have analyzed the so-called “great resignation” of 2021 noted that employers of all stripes struggled to hire and retain personnel at all levels of the organization in part because employees were willing to leave for alternatives in entirely different fields that offer more favorable conditions, even if they involved deeply different work environments.<sup>47</sup> The above observation has its limits—not every potential employer competes for every potential employee.<sup>48</sup> From the perspective of merger review, however, the Agencies would face practical challenges in defining reasonably clear labor markets around a given merger or acquisition and demonstrating that those particular markets were concentrated.

The combination of these two factors—fragmented markets and diverse employment preferences—complicates market definition dynamics well beyond what we typically see in product market merger reviews. That is not to say that these challenges are insurmountable. The Agencies have experience dealing with complex markets, and there could in principle be a situation where the range of employers is so limited and the needs of employees so clearly defined that the Agencies could comfortably define a labor market in a merger investigation. But the practical difficulties of reducing complex employment dynamics to a recognizable market in a specific merger investigation suggest that, in most cases, merger review may not be the preferred tool for addressing actual or perceived inequities in labor markets.

## IV. CHALLENGES WITH ANALYZING LABOR MARKETS’ COMPETITIVE EFFECTS

As noted above, merger review ultimately seeks to answer the question of whether a proposed combination is likely to have an anticompetitive effect. In the case of labor markets, that would mean effects like wage stagnation, lower benefits, or other losses of quality.

As it relates to labor markets, the relationship between concentration and competitive effects is complex. In some cases, employee mobility may be limited in labor markets even when there are many prospective employers, for reasons that are unrelated to concentration and the number of employers competing for new hires.<sup>49</sup> At the same time, some academic studies into the effect of mergers on wages have not found a significant link between wages and labor market concentration. Labor market concentration *at the national level* has increased since the 1980s; *at the local level*—which is the relevant labor market for most workers—concentration has consistently decreased during that time.<sup>50</sup> The Treasury Department for its part has noted that the relationship between concentration and labor market power is ambiguous.<sup>51</sup>

Prager and Schmitt, who studied the effect of hospital mergers on the wages of hospital workers, found that increased employer labor market power via mergers may contribute to wage stagnation, but that such effects may apply in relatively narrow circumstances.<sup>52</sup> They grouped workers into three categories: unskilled workers whose job tasks are generally not specific to the hospital industry, such as janitors and cafeteria workers; skilled workers in non-medical occupations, such as workers in the employee benefits department; and skilled health care professionals, specifically nursing and pharmacy workers. For unskilled workers, they did not find evidence of differences in wage growth post-merger, irrespective of the change in employer concentration induced by the merger. For the two categories of skilled workers, they found evidence of reduced wage growth, but only in cases where the concentration increase induced by the merger was

large. These results suggest that monopsony power can persist even in large labor markets where there are many prospective employers.<sup>53</sup>

The complexity of workers' preferences further complicates the process of assessing whether a merger would have an anticompetitive effect on a labor market. An employee's job may be optimal if it uniquely fulfills some of the employee's personal needs, even if his wage is not "competitive" based on the alternatives available to him in the labor market.<sup>54</sup> Employers that offer favorable amenities attract labor at lower-than-average wages, because employees may be willing to sacrifice higher pay for better non-pay job characteristics, whereas employers offering unfavorable features pay a premium to attract employees.<sup>55</sup>

Any analysis of labor markets that focuses only on employer concentration and wages, while ignoring employee preferences and job differentiation, could result in false positives. Even academics who support the labor antitrust movement acknowledge that "antitrust can do little . . . if market power is generated by search frictions or heterogeneous, privately known costs and preferences."<sup>56</sup> Instead, they argue that employees can use the collective bargaining process to negotiate with employers to obtain fair wage and benefits,<sup>57</sup> and also overcome "frictional" market power by facilitating contracting and overcoming information asymmetries.<sup>58</sup>

## V. CHALLENGES WITH BALANCING WORKER WELFARE AND CONSUMER WELFARE

The final challenge we consider for the Agencies is a question of policy: how to balance worker welfare and consumer welfare in a merger review. If the evidence tends to show that a merger will lead to efficiencies that benefit consumers (lower prices, more innovative products, etc.), but the parties to the merger would achieve some of those efficiencies by reductions in labor force costs, how should the Agencies think about that merger? Should they reject the merger in the face of evidence that it will benefit consumers in order to protect workers,

or clear the transaction with the knowledge that some workers will lose their jobs or incremental bargaining power?

Historically, the Agencies have favored consumer welfare in this analysis.<sup>59</sup> Courts that have considered the question have found that wage effects or employment losses following a merger are not the kind of injuries the antitrust laws were intended to protect.<sup>60</sup> Reduced labor usage at a given firm due to increased efficiency of production is not anticompetitive under the consumer welfare standard.<sup>61</sup> Agency leadership has over time acknowledged that antitrust enforcement against specific forms of anticompetitive conduct may be important to preserve competition in labor markets, but the antitrust laws are not a panacea for resolving every concern relating to labor.<sup>62</sup>

To overcome this hurdle, scholars have proposed a "worker welfare" standard, whereby harm to workers is sufficient to trigger antitrust scrutiny.<sup>63</sup> They lean on the U.S. Supreme Court's "dynamic potential" and willingness to revise antitrust doctrine as economic understanding evolves to better understand the competitive consequences of firm's behaviors.<sup>64</sup> It remains to be seen, however, how the Agencies would balance a worker welfare standard against the welfare of consumers in a specific merger review.

## VI. CONCLUSION

Labor markets are complex. The impact of any given merger on a labor market may be difficult to detect using the predictive tools that the Agencies use today to assess competitive effects in product markets. Should the Agencies decide to pivot towards assessing mergers' impacts on labor markets in earnest, the Agencies will likely need to develop specialized iterations of their analytical models to account for the hyper-localized and personal dynamics of the choices that workers make in the face of employer concentration. The Agencies will also need to balance the application of those tools with their long-standing mandate to protect consumer welfare.

The Agencies have used antitrust laws as a tool to address competition in labor markets in other ways. For example, the Agencies have successfully targeted so-called “no-poach agreements” (where a bloc of employers agree not to hire each other’s employees) as anticompetitive.<sup>65</sup> The Agencies have also used merger reviews to curb the use of non-compete clauses.<sup>66</sup> Given the complexities of challenging a merger on labor market effects *alone*, however, we anticipate that for the time being at least, the Agencies will take on a merger’s impact on labor markets as an add-on theory of harm, rather than a standalone basis to challenge a merger.

1. Joshua Holian is a partner and Nitesh Daryanani is an associate in the San Francisco office of Latham & Watkins LLP. Megan Pynes, Megan Warren, Eric Gonzalez, and Ryleigh Chen provided research assistance for this article. The opinions expressed in this article are those of the authors and do not necessarily reflect the views of Latham & Watkins LLP or its clients.
2. 15 U.S.C. § 18 (“No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”).
3. *Id.*
4. 15 U.S.C. § 18a.
5. The current Horizontal Merger Guidelines were issued by the Agencies in 2010. U.S. DEP’T JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010) (“HMG”). The current Vertical Merger Guidelines were issued by the Agencies in 2020. U.S. DEP’T JUST. & FED. TRADE COMM’N, VERTICAL MERGER GUIDELINES (2020). On January 18, 2022, the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice launched a joint review of the Guidelines.
6. Courts generally assess Section 7 cases through a three-part burden-shifting framework. Typically, the plaintiff establishes a prima facie case by showing that the transaction in question will significantly increase

market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition. Once the plaintiff establishes the prima facie case, the defendant may rebut it by producing evidence to cast doubt on the accuracy of the plaintiff’s evidence as predictive of future anticompetitive effects. Finally, if the defendant successfully rebuts the prima facie case, the burden of production shifts back to the plaintiff and merges with the ultimate burden of persuasion, which is incumbent on the plaintiff at all times. See *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179, 199 (S.D.N.Y. 2020).

7. HMG, *supra* note 5, § 4.
8. *Deutsche Telekom AG*, 439 F. Supp. 3d at 199.
9. HMG, *supra* note 5, §§ 5.2, 5.3.
10. *Id.* §§ 6, 7.
11. *Id.* § 12.
12. The term “monopsony” was adopted by Joan Robinson in 1932 to refer to a single buyer of a good or service. Robinson recognized that the common term for a single buyer at the time—“monopoly buyer”—was illogical since it literally means “a single seller-buyer.” See Robert J. Thornton, *Retrospectives: How Joan Robinson and B.L. Hallward Named Monopsony*, 18 J. ECON. PERSPECTIVES 257, 257 (2004).
13. *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001).
14. Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States*, 133 QUARTERLY J. ECON. 553, 557 (2018) (finding that pretax income per adult for the bottom 50% of the distribution in the United States has stagnated at about \$16,000 a year).
15. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016).
16. *Id.* at 5 (“American labor unions have collapsed.”); see also Press Release, U.S. Bur. Lab. Stat., Union Members Summary (Jan. 20, 2022), <https://www.bls.gov/news.release/union2.nr0.htm> (in 2021, the union membership rate was 10.3%, and the union membership rate of public-sector workers (33.9%) was more than five times higher than the rate of private-sector workers (6.1%)).
17. Andrias, *supra* note 15, at 6 (“The NLRA, with its emphasis on firm-based organizing and bargaining, is mismatched with the globalized economy and its multiple layers of contracting.”); Lynn Rhinehart & Celine McNicholas, *Collective Bargaining Beyond the Worksite*, ECON. POL’Y INST. (May 4, 2020), <https://www.>

epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-and-their-unions-build-power-and-set-standards-for-their-industries.

18. U.S. DEP'T TREASURY, THE STATE OF LABOR MARKET COMPETITION 37 (Mar. 7, 2022), <https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf> ("STATE OF LABOR MARKET COMPETITION").
19. Press Release, The White House, Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy>.
20. *Id.*; Press Release, The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy>; *Antitrust and Economic Opportunity: Competition in the Labor Markets: Hearing before the Subcomm. on Antitrust, Com. & Admin. L. of the Comm. On the Judiciary*, 116th Cong. 2 (2019).
21. Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 537, 559 (2018), <https://harvardlawreview.org/2018/12/antitrust-remedies-for-labor-market-power>.
22. STATE OF LABOR MARKET COMPETITION, *supra* note 18, at 51.
23. Press Release, U.S. Dep't Just., Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), <https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal>.
24. Fed. Trade Comm'n, Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement at 3, Docket No. FTC-2022-0003 (Jan. 18, 2022), [https://www.ftc.gov/system/files/documents/public\\_statements/1599783/statement\\_of\\_chair\\_lina\\_m\\_khan\\_regarding\\_the\\_request\\_for\\_information\\_on\\_merger\\_enforcement\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf).
25. Bryan Koenig, *FTC's Khan Says Labor 'Absolutely' Part of Merger Probes*, LAW360 (June 9, 2022), <https://www.law360.com/articles/1501293/ftc-s-khan-says-labor-absolutely-part-of-merger-probes>.
26. *See, e.g.,* José Azar et al., *Labor Market Concentration*, 57 (SUPPL.) J. HUM. RES. S167 (May 2020), <http://jhr.uwpress.org/content/57/S/S167.full.pdf+html>; Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 57 (SUPPL.) J. HUM. RES. S200 (Sept. 2020), <http://jhr.uwpress.org/content/57/S/S200.full.pdf+html>.
27. *See, e.g.,* COUNCIL ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES, AND POLICY RESPONSES (Oct. 2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025\\_monopsony\\_labor\\_mrkt\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf); Ioana Elena Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031 (2018), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2967&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2967&context=faculty_scholarship).
28. Between 2010 and 2012, DOJ sued Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm, Pixar, and eBay for entering into unlawful no-poach agreements. In 2016, DOJ announced its intent to prosecute naked no-poach and wage-fixing agreements criminally. *See* U.S. DEP'T JUST. & FED. TRADE COMM'N., ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONS 4 (Oct. 2016), <https://www.justice.gov/atr/file/903511/download> ("ANTITRUST GUIDANCE"). In 2021, the DOJ brought its first indictment charging naked no-poach/wage fixing agreements. *See* Press Release, U.S. Dep't Just., Health Care Staffing Company and Executive Indicted for Colluding to Suppress Wages of School Nurses (Mar. 30, 2021), <https://www.justice.gov/opa/pr/health-care-staffing-company-and-executive-indicted-colluding-suppress-wages-school-nurses>.
29. In a labor market merger analysis, this analysis would follow a "monopsony" theory. Monopsony power is, in essence, market power exercised by a buyer against sellers of a good or service. *See Exxon Corp.*, 275 F.3d at 202 (noting that because "the equation for measuring market power in monopsony is a mirror image of the relationships that create market power in a seller[,] . . . [a] greater availability of substitute buyers indicates a smaller quantum of market power on the part of the buyers in question" (internal quotation marks and citation omitted)). The enforcement theory thus posits that employees are susceptible to the market power of employers, and that a merger that reduces competition for employees can enhance market power in a labor market, just as mergers that reduce competition among sellers can enhance market power. *See* Allan Shampine et al., *Workers, Wages, and Mergers: A Back-to-Basics Guide*, ANTITRUST MAG. ONLINE 2 (June 2022), <https://www.americanbar.org/content/dam/aba/publications/antitrust/magazine/2022/june/workers-wages-mergers.pdf>.
30. Naidu et al., *supra* note 21, at 538.

31. ANTITRUST GUIDANCE, *supra* note 28, at 2 (“From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.”).
32. Shampine et al., *supra* note 29, at 3.
33. Press Release, U.S. Dep’t Just., Counsel to the Assistant Attorney General of the Antitrust Division Doha Mekki Testifies Before House Judiciary Committee on Antitrust and Economic Opportunity: Competition in Labor Markets (“Doha Mekki Testifies Before House Judiciary Committee”) (Oct. 29, 2019), <https://www.justice.gov/opa/speech/counsel-assistant-attorney-general-antitrust-division-doha-mekki-testifies-house>.
34. Suresh Naidu & Eric A. Posner, *Labor Monopsony and the Limits of the Law*, 57 (SUPPL.) J. HUM. RES. S284, S298–S299 (2022) (“While some product markets are fragmented in this way, the problem for labor market antitrust is that fragmentation is pervasive if not universal.”).
35. *DeSlandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2021 WL 3187668, at \*12 (N.D. Ill. July 28, 2021); Herbert J. Hovenkamp, *Competition Policy for Labour Markets*, FAC. SCHOLARSHIP PENN CAREY L. ¶ 13 (2019) (“[M]ost labour markets are geographically quite small, many of them no larger than the commuting range of employees.”).
36. Shampine et al., *supra* note 29, at 3.
37. Caius Z. Willingham & Olugbenga Ajilore, *The Modern Company Town*, CTR. AM. PROGRESS (Sept. 10, 2019), <https://www.americanprogress.org/article/modern-company-town/> (noting that labor market concentration has declined over time, but some labor markets in the Great Plains and Appalachia may be highly concentrated).
38. The Clayton Act recognizes that “[t]he labor of a human being is not a commodity or article of commerce.” 15 U.S.C. § 17.
39. Naidu & Posner, *supra* note 34, at S299.
40. *Id.* at S300.
41. Marinescu & Hovenkamp, *supra* note 27, at 1048.
42. Naidu et al., *supra* note 21, at 575.
43. Naidu & Posner, *supra* note 34, at S291.
44. See Thibaut Lamadon et al., *Imperfect Competition, Compensating Differentials and Rent Sharing in the U.S. Labor Market*, 112 AM. ECON. REV. 169, 169 (2022).
45. *DeSlandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2022 WL 2316187, at \*6 (N.D. Ill. June 28, 2022) (“They could have sold their labor to other buyers.”).
46. *Id.*
47. Aaron de Smet et al., *Gone For Now, Or Gone For Good? How to Play the New Talent Game and Win Back Workers*, MCKINSEY & Co. (Mar. 9, 2022), <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/gone-for-now-or-gone-for-good-how-to-play-the-new-talent-game-and-win-back-workers>.
48. See *Exxon Corp.*, 275 F.3d 202–03 (noting that “[t]he question is not the interchangeability of, for example, lawyers with engineers . . . [a]t issue is the interchangeability, from the perspective of an [] employee, of a job opportunity in the oil industry with, for example, one in the pharmaceutical industry”).
49. Nancy Rose, *Thinking Through Anticompetitive Effects of Mergers on Workers* (Feb. 2019), <https://economics.mit.edu/files/20284>.
50. STATE OF LABOR MARKET COMPETITION, *supra* note 18, at 25 (citing Kevin Rinz, *Labor Market Concentration, Earnings Inequality, and Earnings Mobility* (U.S. Census Bur., Working Paper No. 2018-10, 2018)).
51. *Id.* at 26 (collecting sources).
52. Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 AM. ECON. REV. 397 (2021). For skilled workers, they found an effect on wage growth only for (i) workers with industry-specific skills and (ii) in markets where the concentration increase due to the merger was large.
53. Naidu & Posner, *supra* note 34, at S295–S296.
54. Lamadon et al., *supra* note 44.
55. *Id.* at 170.
56. Naidu & Posner, *supra* note 34, at S295–S296.
57. *Id.* at S314–S315. See also Lynn Rhinehart & Celine McNicholas, *Collective Bargaining Beyond the Worksite*, ECON. POL’Y INST. (May 2020), <https://www.epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-and-their-unions-build-power-and-set-standards-for-their-industries>.

58. Naidu & Posner, *supra* note 34, at S315. As we noted earlier, Prager and Schmitt found evidence of reduced wage growth in cases where the concentration increase induced by the merger was large, but this effect was attenuated in markets with strong labor unions. Prager & Schmitt, *supra* note 52. They found harm to workers only in right-to-work states, *i.e.*, states that prohibit mandatory union membership in some manner. *Id.* Benmelech, Bergman, and Kim found that the relationship between labor market concentration and wages is weaker in industries with high unionization rates. Benmelech et al., *supra* note 26.
59. See Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381, 393 (2020) (some antitrust decisions on college football suggest that courts will tolerate harms to student-athletes in favor of the benefit of delivering college sports to downstream consumers (citing *O'Bannon v. Nat'l Collegiate Athletic Ass'n.*, 802 F.3d 1049 (9th Cir. 2015))). For a description of the consumer welfare standard, see Naidu et al., *supra* note 21, at 586 (“[T]he ‘consumer welfare’ standard implies that the efficiency gain must be large enough that, on net, consumer welfare increases despite an increase in market power.”).
60. *Int'l Ass'n Machinists & Aerospace Workers, AFL-CIO, Loc. Lodge No. 1821 v. Verso Paper Corp.*, 80 F. Supp. 3d 247, 274–75 (D. Me. 2015) (“[L]oss of employment alone is insufficient for an antitrust injury.”); *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976).
61. Shampine et al., *supra* note 29, at 6.
62. Doha Mekki Testifies Before House Judiciary Committee, *supra* note 33.
63. Naidu et al., *supra* note 21, 586–87 (“[M]ergers that trigger scrutiny by reducing labor market competition should be subject to a ‘worker welfare’ standard.”); C. Scott Hemphill & Nancy L. Rose, *Mergers That Harm Sellers*, 127 YALE L.J. 2078 (2018).
64. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 461 (2015).
65. See Naidu & Posner, *supra* note 34, at S300.
66. U.S. DEP’T JUST. & FED. TRADE COMM’N, TRANSCRIPT OF FTC-DOJ DECEMBER WORKSHOP, DAY 1 (Dec. 6, 2021), [https://www.ftc.gov/system/files/documents/public\\_events/1597830/ftc-doj\\_day\\_1\\_december\\_6\\_2021.pdf](https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf).

# THE PRICE OF FREE

Written by Lesley Chiou and Avigail Kifer<sup>1</sup>

## I. INTRODUCTION

Offering products for “free” has long been an important tool in business strategy. The U.S. calendar is peppered with days on which consumers can receive treats for free: National Pizza Day (February), National Donut Day (June), and Free Slurpee Day (July), among others.<sup>2</sup> The Yellow Pages have been distributed to consumers free of charge for decades, as have free-to-air television and radio services. Brick-and-mortar retail establishments offer free samples or products to draw people into their storefronts, and companies have also offered branded apparel and “giveaways” in hopes that wearers would help spread brand recognition.

Nevertheless, “free” products have recently been the focus of many antitrust investigations and complaints, both in the U.S. and abroad. “Free” products have gained particular prominence and ubiquity as the digital economy has developed and expanded. Today’s consumers regularly use zero-price digital products or services in the form of search engines (Google, Yahoo, Bing), creative content (YouTube, Pinterest), social media (Facebook, Twitter, TikTok), communications products (Skype, Zoom), travel booking sites (Priceline, Kayak), and navigation services (Waze, Apple Maps, Google Maps).

While zero prices have received increased attention because of their frequency among digital products,

the related economic issues they raise are neither new nor unique to digital markets. Economists have long studied zero prices in non-digital contexts and have developed analytical frameworks that could be applied broadly, including to digital contexts.<sup>3</sup> Economists broadly acknowledge that “free” goods are particularly interesting because while they deliver clear consumer benefits, they, like other goods, may have the potential to negatively affect both competition and welfare.<sup>4</sup> This dichotomy may occur because firms that offer “free” products profit through a variety of different strategies, including by collecting valuable consumer data, collecting advertising revenue, bundling with a positive price product, and/or charging consumers for premium services.<sup>5</sup> Several government reports and antitrust complaints against firms offering zero price goods have taken issue with some of these strategies, contending that, for example, the collection of valuable consumer data or the bundling of products and services allegedly allowed certain firms to secure and maintain dominance in related markets, such as advertising.<sup>6</sup>

One of the challenges now facing the antitrust community is how to assess whether behavior related to zero-price products is anticompetitive, as many metrics for analyzing competition usually rely on a measure of price. Not surprisingly, regulatory agencies have expressed a keen interest in learning more about how zero-price products have affected competition in the modern economy. In January

2022, for example, the DOJ and FTC issued a Request for Information (RFI) soliciting public input on modernizing the agencies' merger guidelines. A key area of focus was "digital markets," where the agencies specifically referenced "zero-price markets, negative-price markets, or markets without explicit prices" and asked whether "'quality' and other characteristics play the same role as price in market definition."<sup>7</sup>

While it is possible for anticompetitive conduct to exist in markets containing "free" or zero-price products, there are clear procompetitive economic incentives for such pricing arrangements.<sup>8</sup> Understanding these incentives and the mechanisms through which zero-price products are offered, particularly in (but not limited to) the digital space, is critical to understanding the evolving legal and regulatory environment around zero-price products and competition. In this article, we lay out these incentives and mechanisms, and then discuss the role that quality plays in markets with zero-price goods.

## II. INCENTIVES AND MECHANISMS THROUGH WHICH "FREE" PRODUCTS ARE OFFERED

A seller that offers only a single product or service would not find it profitable to offer this sole product or service for "free" to *all* customers at all times.<sup>9</sup> In both traditional and digital markets, a "free" product is usually accompanied by a related, paid product. The relationship between the "free" and paid products or services (or between the customer groups paying zero and non-zero prices) is typically what incentivizes firms to offer products or services to certain customers for free in the first place. That is, a firm may find that giving Product A away for free leads to profitable increases in demand for Product B and ultimately higher profitability overall. This could be true whether Product B is an entirely different product from Product A, a higher quality version of Product A, or simply sales of Product A made later in time or sold to a different set of customers.

Evidence from behavioral economics provides further rationalization for the zero-price choice. Studies suggest that there can be a discontinuous change in demand when a product is priced at zero. In other words, demand for a product can jump sharply when its price is lowered to zero. When this discontinuity is present, firms have an additional incentive to offer free products.<sup>10</sup> An example often cited relates to one online retailer's introduction of free shipping in several countries, which triggered a dramatic increase in orders. In contrast, because the price of shipping in yet another country was mistakenly reduced to one cent rather than zero, the number of orders there remained relatively flat.<sup>11</sup>

There are several different types of economic arrangements in which the price of one product is free. These arrangements differ in terms of the relationship between the free and paid products, whether the consumers of the free and paid products overlap, and whether the zero prices are sustainable in the long run.

### A. MULTI-SIDED PLATFORMS

The first type of product that is frequently offered for free is "access" to one side of a multi-sided platform. Economists use the term "multi-sided platform" to refer to a business or firm that adds value by acting as an intermediary between two or more distinct types of agents or customers whose demands for access to the platform (which facilitates interactions or transactions) are interdependent.<sup>12</sup> For example, social media platforms connect users and advertisers; streaming services connect content creators, content consumers, and advertisers; credit cards connect consumers and merchants; health insurers connect patients and healthcare providers.

A multi-sided platform may offer "free" access to one side while charging the other side because the demand from one group is directly or indirectly related to the demand from the other group: the value that customers on at least one side of the platform place on the platform will depend upon the demand for the network by customers on the other side. Economists refer to this form of demand

interdependency as “indirect network effects” between the customer groups, or “cross-side effects.” For example, in the case of credit cards, the demand by merchants on one side and cardholders on the other is interdependent: the card is worth more to the cardholder when it is accepted by a greater number of merchants, and the value to the merchant of accepting payment cards from a particular brand is higher when more cardholders prefer to pay with cards from that brand. Similarly, the larger the audience on a streaming service, the more valuable the platform is to content creators and advertisers. The greater the variety in content, the more valuable the platform is to listeners or viewers.

Indirect network effects have important implications for how platforms price access to their services to each side of the platform and for overall consumer welfare. Demand interdependency means that a platform can increase the total usage of its platform and its profits by charging relatively more to the less price-sensitive group of customers and relatively less to the more price-sensitive group of customers.<sup>13</sup> In some cases, this can also increase the utility of both customer groups. Thus, in equilibrium, a platform will have an incentive to charge the less price-sensitive group of customers a higher price than the more price-sensitive group of customers, which may optimally result in the more price-sensitive group paying a zero price.<sup>14</sup> For example, a social networking site that allows consumers to join for free would attract more consumers than if it charges an access fee. In turn, the additional consumers would increase the site’s value to advertisers, possibly even to the point where the increase in advertising profits more than covers any profits that would have come from charging consumers an access fee. A platform may have a further incentive to offer the more price-sensitive customers access for “free,” as opposed to a cost slightly above zero, if transaction costs exist.

Note that for zero-priced platforms, at least one customer group is paying a non-zero price to the platform, which may come in the form of a subscription fee, a fixed fee per listing or sale, or a

percentage of the transaction price, among other arrangements. For example, service providers pay a monthly fee to Booksy, a beauty and wellness appointment booking service, while consumers may book the appointments for free.<sup>15</sup> In addition to charging restaurants a subscription fee, OpenTable charges them a booking fee for every reservation made, while the diners that make the reservations do not pay the platform.<sup>16</sup>

While a platform may elect to not charge certain customers a positive monetary access fee, these customers may offer something of value that allows the platform to increase its own value to both sides of the platform. These non-monetary payments may take a number of forms, depending on the platform’s monetization strategy. Some of the more common non-monetary payment types, particularly when the paid side of the platform involves advertisers, are characterized as the consumer’s “attention” and “data.” In return for accessing the platform’s product for a zero price, the consumer implicitly agrees to exchange his attention (a valuable commodity for advertisers) or data (also valuable, as they may reveal his preferences and facilitate targeted advertisements). A consumer’s data may include his contact information, social network, location, device ID, web browser history, past purchases, interactions with a business’s website, and other metrics. A platform can then use this information to sell high-quality advertisement opportunities to advertisers, in which advertisers can identify target audiences or consumers most likely to purchase their products, personalize ads and ad content to users, measure ad effectiveness, and increase their return-on-investment.<sup>17</sup> The more value advertisers place on interactions with consumers, the greater the value they place on consumer attention and data, which help them improve the success rates of those interactions. In other words, the value of such non-monetary payments increases with the strength of the indirect network effects.

Importantly, these data can, and are also used to, improve the user experience offered by the platform itself. Platforms that incorporate consumer data can improve recommendation algorithms for video

and music streaming services for search engines, for news feeds, and more.<sup>18</sup> They can also use that data to learn about the limitations or potential of a product, and devise strategies to address those limitations or expand the product's potential more efficiently.

## B. FREEMIUM OFFERINGS

The freemium strategy is characterized by the offer of a free, but basic, product or service, alongside a higher quality product with enhanced functionality or features. In this arrangement, the free and companion products are intertemporal complements (i.e., goods that are consumed together but at different times)<sup>19</sup> of different qualities purchased by the same consumers. Firms' incentives to employ this pricing structure lie in the fact that consumers are more likely to engage with the free product at first, which can then stimulate demand for the paid product. This demand may come both from (i) consumers buying the paid product sooner than they would have, had they not engaged with the free product; and from (ii) consumers that would not have otherwise bought the paid product, had it not been for the free version.

Freemium offerings exist in many contexts, including in multi-sided platforms. Key to the success of a freemium model is the likelihood that the revenues from the consumers of premium paid products will cover the costs of production for all the consumers. For example, in many instances, providers of online storage or music streaming services will offer a limited version of their service to consumers at no cost, but then charge a premium price for access to more space, a greater music library, the ability to curate playlists, etc. Mobile apps often have free and paid versions, where the paid version includes more features and functions. Online newspapers may offer a certain number of articles for free and require paid subscriptions from consumers who want to access more content. In fact, studies have shown that in some cases, offering a free product (via a freemium strategy) may be more effective at increasing revenues than offering a free trial.<sup>20</sup>

Such a business model is common among (but not exclusive to) providers of digital goods, as the low marginal costs of production may mean that even low volumes of sales of the paid product can compensate for losses on the free product.<sup>21</sup> Freemium business models are often well-suited for "experience goods," where consumers may be unable to assess the quality of (or their demand for) a product without "experiencing" it first. The option to experience a good for free has been shown to reduce the impact of product reviews in some settings, providing further incentive for companies to follow a freemium strategy. For example, while a paid mobile app's ratings affect the number of times it is purchased and downloaded, the ratings have a smaller effect on downloads for apps that offer free versions than for those that do not.<sup>22</sup>

## C. BUNDLED PRODUCTS

Another economic arrangement in which "free" goods are found is in products that are explicitly or implicitly bundled. In this arrangement, the free and companion products are in related markets and are purchased by the same customers. For example, some travel packages offer a paid product alongside a "free" component, such as hotel room bookings that come with free breakfast. Experimental evidence indicates that consumers may even shift their demand towards a cheaper, less preferred hotel precisely due to the free breakfast option.<sup>23</sup> As another example, smartphones are often offered for "free" with the purchase of a cellular plan. This scenario differs from the travel example in that the marginal cost of a phone or device is significant (particularly in comparison to the marginal cost of a breakfast). The buyer of the smartphone "internalizes the impact of his purchase on the demand and surplus attached to" the cellular plan.<sup>24</sup> In other words, the buyer accepts a higher price for the plan (sometimes in the form of a long-term contract) in exchange for the free phone.<sup>25</sup>

As above, the rationale behind this pricing structure is that increasing demand for one product (by setting its price to zero) can increase demand for the bundled product, allowing the firm to at least break

even on both.<sup>26</sup> In other words, when the demand for two products is related (such as a smartphone and a cellular plan, or lodging and food), adjusting the relative prices for those products may increase total sales and profits, even if one of the products is nominally sold below cost or even for “free.” As in the arrangements discussed above, in some cases, consumers may benefit from the free offering.<sup>27</sup>

## D. OTHER ARRANGEMENTS

For completeness, we note that there are other arrangements where one good has zero price. These include arrangements where the production of the zero-price good is motivated by altruism or funded by charitable donations (e.g., Wikipedia, Linux software), or where the offer of a zero price is temporary and part of a promotional period or free trial (e.g., some subscription services or memberships).<sup>28</sup>

Note that zero price products may be offered simultaneously through multiple arrangements. It is not uncommon, for example, to pair a freemium strategy with a multi-sided platform, such that the free product is supported both by a paid version and by advertisers on the other side of the platform.

Regardless of the type of arrangement, however, zero prices for categories of goods do not indicate that firms are not competing. Competition between and with zero price products often takes the form of vigorous competition on quality, particularly in the multi-sided platform context.

## III. QUALITY COMPETITION IN ZERO-PRICE PRODUCTS

As antitrust concerns targeting firms that offer zero price products continue to make headlines, understanding and appreciating competition on quality takes on significant import. In general, quality is a complex concept that is challenging to measure: there are many different dimensions of quality along which firms compete. Importantly, competition on the quality of the zero-price offering does not preclude competition on the quality of the

related non-zero price offering.<sup>29</sup> Due to the indirect network effects, any improvements in quality that attract more users to the zero-price side of a platform may also increase the attractiveness of that platform (and thus its competitive position) for customers on the other sides.

The quality of a zero-priced product or service can be affected by the features of the service and by the degree to which the service develops innovative new features or improvements. For example, the quality of a search engine (from the consumer—or the zero price side—point of view) may be related to the speed at which it produces search results, the relevance of those search results, and the degree of personalization vs. privacy offered.<sup>30</sup> Some academics and antitrust practitioners have increasingly been focusing on data privacy in antitrust work, and have recommended treating data privacy as another aspect of competition on quality.<sup>31</sup> The quality of a social media site may be related to the content formats offered (text, images, videos), the options available to interact with users and the content they post, and the algorithm that presents this content to users. The quality of a news aggregation platform may be related to the customization options it offers and its ability to identify high quality news that is local or relevant to the user: empirical research has found that whether or not users research news materials in depth can be influenced by the degree to which an aggregator presents local or high quality news.<sup>32</sup> These are all examples where consumers are generally *consuming* the platform’s product and thus their demand for the platform may depend on the product that the platform is offering them.

In cases where the platform acts as a matchmaker, the quality of the platform may additionally be affected by the sheer numbers of customers on each side of the platform. For example, the quality of a credit card network may be related to the travel perks offered, access to a dedicated concierge or customer service, and fraud protection features. It is also closely related to, in consumers’ eyes, the number of merchants that accept the cards, and, in merchants’ eyes, the number of consumers carrying

the cards. The quality of a streaming site may be related to its discovery features (e.g., the algorithm through which it recommends and curates new content) and audio quality offered. It is also closely related to, in consumers' eyes, the content available and the content creators on the platform, and, in content creators' eyes, the size of the audience. The content available, in fact, may be a meaningful differentiating factor for multi-sided platforms, which may find that signing exclusive arrangements with suppliers can enhance the competitiveness of the platform. In other words, differentiation can encourage consumers to multi-home across platforms in order to access a variety of content, which in turn stimulates competition among platforms for both consumers and the suppliers.

For digital platforms, the quality is also affected by features such as its user interface: Is the service easy to use? If the service includes online ads, do they create clutter?<sup>33</sup> Are they relevant for the user? While some posit that ads may be viewed as unwelcome or disruptive in some contexts, others suggest that ads may help users discover new brands and thus enhance the platform's value to consumers.<sup>34</sup>

Firms that offer zero-priced products may also compete by continually improving their products' features. For example, social media sites have developed user verification options, content that disappears after a set time, new ways to organize content, and a variety of engagement opportunities (likes, retweets, reactions, replies, shares).<sup>35</sup> They have worked to detect deepfakes<sup>36</sup> and to protect users from harmful or false content.<sup>37</sup> Similarly, search engines have been improving the artificial intelligence powering the search algorithms to better understand misspelled words, interpret very specific search phrases, or even conduct an image search. They have also experimented with the ways in which results are displayed, including by recognizing when a chart or graph may better serve a search request and processing the relevant data in order to do so, or by generating infographics.<sup>38</sup> In fact, for platforms that compete for user attention (the degree to which users engage with and spend time on the platform)

in addition to the number of users, the incentives for such innovation are clear: platforms need to ensure their users are engaged.<sup>39</sup> Innovation that improves a platform's ability to create value for consumers may strengthen indirect network effects, and strengthen a platform's competitive position.

## IV. CONCLUSION

The types of situations in which zero-price products are encountered have proliferated and evolved, raising questions about the effects of these products on the dynamics of competition. As producers of zero-price goods and services have developed new ways to deliver value and earn payment, the antitrust community has begun to re-evaluate traditional metrics for assessing market power and identifying anticompetitive practices.

As we discuss in this article, firms have numerous economic and strategic incentives for providing zero-price products. Understanding the incentives and mechanisms underlying these products is essential for understanding how, and the extent to which, zero prices can affect competition. Similarly, understanding the role that product quality plays is critical for assessing allegations of harm to competition and consumer welfare. The ways in which firms offering zero-priced products compete can take on a number of forms, which themselves may continue to evolve as digital markets grow.

- 
1. Lesley Chiou is the Laurence de Rycke Professor of Economics at Occidental College. Avigail Kifer is a Principal at Cornerstone Research. The views expressed herein are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.
  2. *National Donut Day*, THE SALVATION ARMY, <https://salvationarmypotomac.org/national-donut-day>; Joseph Lamour, *How to Get a Free Slurpee from 7-Eleven Today*, TODAY.COM (July 11, 2022), <https://www.today.com/food/restaurants/free-slurpee-day-7-eleven-rcna37661>; Aly Walansky, *11 Freebies and Discounts for National Pizza Day*, TODAY.COM (Jan. 26, 2022), <https://www.today.com/food/national-pizza-day-2022-where-get-free-pizza-deals-t245786>.

3. See Lesley Chiou, Nathaniel E. Hipsman, Jeffrey T. Prince, & Sachin Sancheti, Comment on the January 2022 DOJ and FTC RFI on Merger Enforcement: Issues Related to Digital Markets (Mar. 5, 2022), <https://www.regulations.gov/comment/FTC-2022-0003-0267>.
4. Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521 (2016).
5. See Alessandro Bonatti, Anindya Ghose, Avi Goldfarb, Daniel G. Goldstein, Anja Lambrecht, Randall Lewis, Anita Rao, Navdeep Sahni, & Song Yao, *How Do Firms Make Money Selling Digital Goods Online?*, 25 MKTG. LETTERS 331 (2014); John M. Yun, *Overview of Network Effects & Platforms in Digital Markets*, in THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 2 (Joshua D. Wright & Douglas H. Ginsburg eds., 2020).
6. Whether or not this dominance—and resulting harm—exists depends on the facts of each case. Such an assessment is beyond the scope of this article. See, for example, Matthew Perlman, *Google Hit With Landmark Antitrust Suit*, LAW360 (Oct. 20, 2020), <https://www.law360.com/articles/1321121>; *United States v. Google LLC*, No. 1:20-cv-03010 (D.D.C.); Dave Simpson, *House Report Slams Big Tech's Abuse of Monopoly Power*, LAW360 (Oct. 6, 2020), <https://www.law360.com/articles/1317483>; SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116th CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATION (2020).
7. U.S. Dep't of Just. & U.S. Fed. Trade Comm'n, Request for Information on Merger Enforcement (Jan. 18, 2022), <https://www.regulations.gov/document/FTC-2022-0003-0001>.
8. See John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49 (2016).
9. As described below, a platform may have an incentive to offer access to its services to one side of the platform at a price of zero. However, in order to make profits, it will likely charge at least one side of the platform a positive price.
10. See Mehdi T. Hossain & Ritesh Saini, *Free Indulgences: Enhanced Zero-Price Effect for Hedonic Options*, 32 INT'L J. RSCH. MKTG. 457 (2015); Kristina Shampanier, Nina Mazar, & Dan Ariely, *Zero as a Special Price: The True Value of Free Products*, 26 MKTG. SCI. 742 (2007).
11. Shampanier et al., *supra* note 10, at 756.
12. David S. Evans & Richard Schmalensee, *Markets With Two-Sided Platforms*, in 1 ISSUES IN COMPETITION LAW AND POLICY 667 (2008).
13. Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND J. ECON. 648 (2006).
14. It may even be profit-maximizing for a platform to charge a price below marginal cost to one group of customers in order to increase their participation, while recouping the platform's loss through a higher price on the less price-sensitive side.
15. *About Us—Booksy*, BOOKSY, <https://booksy.com/en-us/p/about>; *Pricing*, BOOKSY, <https://booksy.com/biz/en-us/pricing.html>.
16. *How OpenTable Works for Restaurants*, OPENTABLE (Nov. 19, 2010), <https://blog.opentable.com/2010/how-opentable-works-for-restaurants>.
17. The platform may also sell the data to third parties.
18. Mallika Rangaiyah, *How Spotify Is Using Big Data to Enhance Customer Experience*, ANALYTIC STEPS (Jan. 6, 2021), <https://www.analyticssteps.com/blogs/how-spotify-using-big-data>; Barrack Diego, *How Is Big Data Impacting Search Engine Optimization*, REFLECTIVE DATA (June 28, 2019), <https://reflectivedata.com/how-is-big-data-impacting-search-engine-optimization>.
19. Two goods are complements when a decrease in the price of the first good increases the quantity demanded of the second good. The goods are intertemporal complements if the second good is demanded at a different point in time (i.e., the goods are not consumed concurrently).
20. Liu, Charles Zhechao, Yoris A. Au, & Hoon Seok Choi, *Effects of Freemium Strategy in the Mobile App Market: An Empirical Study of Google Play*, 31 J. MGMT. INFO. SYS. 326 (2014).
21. David Evans, *The Antitrust Economics of Free*, COMPETITION POL'Y INT'L (May 20, 2011), <https://www.competitionpolicyinternational.com/the-antitrust-economics-of-free>; John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015).
22. Charles Zhechao Liu, Yoris A. Au, & Hoon Seok Choi, *Effects of Freemium Strategy in the Mobile App Market: An Empirical Study of Google Play*, 31 J. MGMT. INFO. SYS. 326 (2014).
23. Juan L. Nicolau & Ricardo Sellers, *The Free Breakfast Effect: An Experimental Approach to the Zero Price Model in Tourism*, 51 J. TRAVEL RSCH. 243 (2012).

24. Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 994 (2003).
25. Shampanier et al., *supra* note 10.
26. Evans, *supra* note 21.
27. David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications For Tying Law*, 22 YALE J. ON REGUL. 37 (2005).
28. Newman, *supra* note 21, at 157–58.
29. The 2010 Horizontal Merger Guidelines already advise practitioners to consider quality effects when assessing mergers: “Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality. . . . Such non-price effects may coexist with price effects, or can arise in their absence.” U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 2 (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010>; *see also* John Asker, Kostis Hatzitaskos, Bob Majure, Ana McDowall, Nathan Miller, & Aviv Nevo, Comments on the January 2022 DOJ and FTC RFI on Merger Enforcement at 12, 33 (Apr. 20, 2022), <https://www.regulations.gov/comment/FTC-2022-0003-1847>.
30. Some search engines, such as DuckDuckGo, advertise their policy of not collecting or sharing a user’s personal information (*see, e.g.,* [duckduckgo.com](https://duckduckgo.com)). Others offer personalized search results, based on data such as a user’s search history or physical location. *See, for example,* Bryan Horling & Matthew Kulick, *Personalized Search for Everyone*, GOOGLE BLOG (Dec. 4, 2009), <https://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html>; Aidan Crook & Sanaz Ahari, *Making Search Yours*, MICROSOFT BING BLOGS (Feb. 10, 2011), <https://blogs.bing.com/search/2011/02/10/making-search-yours>.
31. D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129 (2016); Allen P. Grunes & Maurice E. Stucke, *No Mistake About It: The Important Role of Antitrust in the Era of Big Data*, ANTITRUST SOURCE 1 (2015).
32. *See, for example,* Lesley Chiou & Catherine Tucker, *Content Aggregation by Platforms: The Case of the News Media*, 26 J. ECON. & MGMT. STRAT. 782 (2017).
33. Empirical research has shown that ads and ad content may affect consumer search patterns. *See* Lesley Chiou & Catherine Tucker, *How Does The Use of Trademarks by Third-Party Sellers Affect Online Search?*, 31 MKTG. SCI. 819 (2012).
34. *See About Discovery Campaigns*, GOOGLE, <https://support.google.com/google-ads/answer/9176876>; Aaron Barr, *Nearly Half of Consumers Will Try New Brands if the Ad is Relevant*, MKTG. DIVE (Sep. 28, 2020), <https://www.marketingdive.com/news/nearly-half-of-consumers-will-try-new-brands-if-the-ad-is-relevant/585972>.
35. Twitter, *Help Us Shape Our New Approach to Verification*, TWITTER BLOG (Nov. 24, 2020), [https://blog.twitter.com/en\\_us/topics/company/2020/help-us-shape-our-new-approach-to-verification](https://blog.twitter.com/en_us/topics/company/2020/help-us-shape-our-new-approach-to-verification); Joshua Harris and Sam Haveson, *Fleets: A New Way to Join the Conversation*, TWITTER BLOG (Nov. 17, 2020), [https://blog.twitter.com/en\\_us/topics/product/2020/introducing-fleets-new-way-to-join-the-conversation](https://blog.twitter.com/en_us/topics/product/2020/introducing-fleets-new-way-to-join-the-conversation); Rose Yao, *Improvements to Timeline*, FACEBOOK (Mar. 13, 2013), <https://about.fb.com/news/2013/03/improvements-to-timeline>.
36. Deepfakes use advanced artificial intelligence techniques to create realistic-looking but fake, misleading, and counterfeit videos and other digital content.
37. Xi Yin, *Detecting the Models Behind Deepfakes*, FACEBOOK (Jun. 16, 2021), <https://about.fb.com/news/2021/06/detecting-the-models-behind-deepfakes>; Amit Chowdhry, *Facebook Launches A New Tool That Combats Fake News*, FORBES (Mar. 5, 2017), <https://www.forbes.com/sites/amitchowdhry/2017/03/05/facebook-fake-news-tool>.
38. Prabhakar Raghavan, *How AI is Powering a More Helpful Google*, GOOGLE BLOG (Oct. 15, 2020), <https://blog.google/products/search/search-on>; Microsoft Bing, *Microsoft Bing Delivers More Visually Immersive Experiences That Save You Time*, MICROSOFT BING BLOGS (Mar. 4, 2021), [https://blogs.bing.com/search/2021\\_03/Microsoft-Bing-delivers-more-visually-immersive-experiences-that-save-you-time](https://blogs.bing.com/search/2021_03/Microsoft-Bing-delivers-more-visually-immersive-experiences-that-save-you-time).
39. *See* David S. Evans, *Attention Rivalry Among Online Platforms*, 9 J. COMPETITION L. & ECON. 313 (2013).

# AN ECONOMIC ANALYSIS OF THE SELF-PREFERENCING DEBATE

Written by Juliette Caminade, Juan Carvajal, and Christopher R. Knittel<sup>1</sup>

Over the last few years, some regulators and lawmakers have expressed concerns that certain intermediaries have engaged in strategies to favor their own downstream products or services over those of third parties, practices commonly referred to as “self-preferencing.” Despite the prevalence of intermediaries offering their own competing products in downstream markets in many sectors of the economy, for instance with private labels in retail, self-preferencing concerns are overwhelmingly discussed in the context of digital platforms.

Economists have referred to a platform that runs a digital marketplace and sells physical or digital products on it as operating “in dual mode.”<sup>2</sup> When platforms operate in dual mode, they have the potential to treat themselves differently from the way they treat third-party sellers on their marketplaces. In recent years, regulators and lawmakers across the globe have expressed concerns that such “self-preferencing” behaviors could be anticompetitive, under the theory that digital platforms would be exploiting their position as intermediaries in the digital sectors to favor their own products and services at the expense of third-party sellers. For example, one commonly expressed concern is that digital platforms operating in dual mode have an informational advantage over sellers and can use data obtained

from the transactions with third-party sellers to favor their own products or introduce new ones, drive third-party sellers out, and thereby suppress competition.<sup>3</sup> A different concern is that, since digital platforms control the algorithm that displays the products to consumers on its marketplace, they in principle could abuse that control to favor their own products over those of third-party sellers by displaying them more prominently than would be warranted based on natural consumer preferences or product quality.

In this paper, we start by providing a brief overview of prominent types of behaviors often classified as self-preferencing in the digital economy and the current debate around these practices, including related proposed ex ante regulation and ex post investigations on both short-run and long-run total and consumer welfare. We then explore varied economic perspectives regarding why concerns regarding self-preferencing have been heightened in the digital economy when such practices are not new and are widespread, and regarding perceived unfairness and potential considerations for “evening the playing field” among competitors. We conclude by reviewing recent economic research studying the effect of self-preferencing practices (both positive and negative) and proposed regulatory responses on

consumer welfare to shed some light on the possible effect of regulating these practices.

## I. SELF-PREFERENCING: EXAMPLES AND NOTED REGULATORY CONCERNS

### A. TYPOLOGY OF SELF-PREFERENCING BEHAVIORS

In the context of digital platforms, allegations of self-preferencing take multiple forms. This paper focuses on three allegations levied against digital platforms operating in dual mode: self-preferencing from the use of data, self-preferencing from ranking and display on the marketplace, and self-preferencing through platform fee discrimination.

**Self-preferencing data use.** One common set of self-preferencing allegations is that digital platforms introduce new products that compete with third-party sellers, identified and/or designed based on marketplace data surrounding competitor products. Such allegations have been levied against Amazon in the U.S. and Europe, accusing the company of relying on data originating from interactions between buyers and third-party sellers to make decisions about which products to introduce under its private label, as well as its marketing and pricing decisions.<sup>4</sup> For instance, the European Commission stated, “Amazon appears to use competitively sensitive information—about marketplace sellers, their products and transactions on the marketplace.”<sup>5</sup> The competitive concern would be that those marketplaces leverage proprietary data about competitors (for which a reasonable substitute is not available to other competitors) to set prices or product features, potentially disincentivizing product innovation by competitors.

**Self-preferencing ranking and display.** Another common self-preferencing allegation involves digital platforms ranking or displaying their own products more prominently than those of third-party sellers, for instance, in search results. For example, in Europe, the European Commission fined Google in 2017 for favoring its own products over those of competitors in the search results

with Google Shopping.<sup>6</sup> Similarly, Amazon is under regulatory scrutiny regarding the criteria used to choose which products are more prominently featured in the platform.<sup>7</sup> And Apple had been accused of “skirting” its rules on App Store rankings by the Wall Street Journal.<sup>8</sup> The competitive concern would be that those rankings and displays falsely suggest to consumers that the platform’s own products are superior in performance or pricing relative to competitor products, weakening their sales, potentially disincentivizing investments by competitors, or resulting in longer-run monopolization.

**Self-preferencing platform fees.** A third type of self-preferencing allegation relates to practices that involve charging different platform fees on third-party products compared to those of the platform. These allegations have arisen in the context of commissions charged by digital platforms that operate a marketplace for digital goods, such as apps or software. For instance, Spotify complained to the European Commission in 2019 about the App Store commission that Apple charges to third-party developers, but not to apps developed by Apple itself.<sup>9</sup>

These three categories of self-preferencing allegations are not the only ones. Other actions, outside the scope of this paper, include self-preferencing concerns involving digital platforms tying the usage of two of their products. For example, in 2018, the European Commission found that Google’s practice of pre-installing certain apps on Android devices was a way of self-preferencing its own applications compared to rival ones.<sup>10</sup> The competitive concern would be that platforms raise rivals’ costs in a way that will enable longer-run monopolization.

### B. BACKGROUND ON SELF-PREFERENCING REGULATORY CONCERNS, INVESTIGATIONS, AND PROPOSED REMEDIES

Regulators in many regions, including the European Union, the UK, and the U.S., have launched investigations into so-called self-preferencing

practices by digital platforms, over concerns that they “exploited their power in order to become even more dominant.”<sup>11</sup>

For instance, U.S. lawmakers, as part of the 2020 “Investigation of Competition in Digital Markets,” accused large digital platforms of engaging in various forms of self-preferencing that resulted in the platforms either favoring their own products or services, or “giving preferential treatment to one business partner over others,” ultimately “picking winners and losers in the marketplace.”<sup>12</sup> This investigation resulted in a request to Congress to establish “nondiscrimination rules to ensure fair competition and to promote innovation online,” which “would require dominant platforms to offer equal terms for equal service and would apply to price as well as to terms of access” to all participants in the platform.<sup>13</sup>

In the UK, the Competition and Markets Authority (CMA) published a research white paper in January 2021 entitled “Algorithms: How they can reduce competition and harm consumers.” The white paper studied, among other things, potential harm that could arise from digital platforms’ control of marketplace algorithms resulting in their favoring their own products, particularly when such ranking is not based on the merits of the products. One stated concern was that “a platform may manipulate rankings of results to favour certain options, because it derives benefit from a commercial relationship, such as higher commission payments or revenue shares. (It may also favour options that it owns, which are competing against other options on the platform[. . .]).”<sup>14</sup>

In this context, regulators have proposed, and at times implemented, remedies aimed at curtailing self-preferencing practices. The earliest of them were implemented in 2019, when India introduced a law to prevent Amazon and its local competitor Flipkart from selling products of companies in which they have an equity stake, effectively preventing them from operating in dual mode.<sup>15</sup> This type of regulatory remedy, in which digital platforms would be prevented from selling on the marketplace they

operate, was also proposed in the U.S. by Senator Elizabeth Warren in 2020, who tweeted that “You can be the umpire, or you can be a player, but you can’t be both at the same time. We need to #BreakUpBigTech so we can level the playing field.”<sup>16</sup>

In the U.S., a bipartisan bill has been proposed, the American Innovation and Choice Online Act (AICOA), which would aim to, among other provisions, prevent large digital platforms from unfairly preferencing their own products or services, or using non-public data obtained, generated, or collected through the platform to compete with third parties.<sup>17</sup>

In the European Union, the Digital Markets Act (DMA) received final approval by the EU Council. If approved, this legislation would regulate large digital platforms (effectively, Apple, Google, Facebook, and Amazon) and prevent, among other behaviors, self-preferencing in search results of the platform’s own products compared to third parties, the exclusive use of platform-generated data, or requirements to pre-install certain software.<sup>18</sup>

In the UK, the CMA recently published a discussion paper highlighting potential future enforcement actions it may implement against large digital platforms (“Online Choice Architects”) to regulate self-preferencing practices by dominant platforms.<sup>19</sup> Regulators have also recently stated their intention to investigate whether Amazon is giving its own retailers priority above third-party vendors, and whether this practice is considered anticompetitive.<sup>20</sup> The Australian Competition & Consumer Commission identified anticompetitive self-preferencing as key anticompetitive conduct, arguing that additional measures are necessary to prevent harm to consumers.<sup>21</sup>

Regarding data access, different regulators have envisioned reducing the asymmetrical access to data between digital platforms and third parties in different ways, with two different approaches emerging. The first approach would ban the platform from using certain data altogether. This was the requirement by the European Commission in the

Google/Fitbit acquisition in 2020, where the merger was approved on the condition that Google would “silo” Fitbit data and not rely on it to target search ads.<sup>22</sup> Both the DMA and the AICOA include similar provisions that would prevent a platform from using non-public data or data generated in the platform about third-party sellers to compete with those businesses.<sup>23,24</sup>

The second approach would instead require digital platforms to share their data with third-party sellers: the DMA contains a clause that, if approved, would require digital platforms to share, for free, customer data collected through their platforms with third-party sellers, subject to privacy requirements.<sup>25</sup> This requirement could mean that, for example, a developer could request data collected by Apple or Google regarding who downloaded their apps in a way that would preserve user privacy. There is an ongoing debate about the extent of these clauses and how exactly they should be implemented.<sup>26</sup>

It is still unclear how these proposed legislations and regulations would affect economic outcomes like prices, competition, innovation, or consumer welfare, and whether they would distort these markets. Section III.B of this paper aims to shed some light upon this open question based on recent advances in economic research.

## II. ANTITRUST CONCERNS REGARDING SELF-PREFERENCING: AN ECONOMIC PERSPECTIVE

### A. THE FOCUS ON DIGITAL PLATFORMS

A noteworthy aspect of the debate around the antitrust concerns surrounding self-preferencing is that such behaviors are neither new nor specific to digital platforms, and had not raised anticompetitive concerns of such magnitude before.

#### 1. THE PREVALENCE OF PRIVATE LABELS IN RETAIL BUSINESSES

Several non-digital companies and intermediaries have long operated in dual mode, selling their own

products alongside those of third parties, deciding on their pricing and placement, and often favoring their own products over those of competitors.

Many large supermarket chains sell their own products under “private labels.” Examples abound, including Costco with Kirkland, Kroger with Simple Truth, and Walmart with Great Value in the U.S. European supermarket chains like Carrefour, Auchan, Monoprix, and Sainsbury’s also offer their own private labels. Overall, private labels are usually successful with consumers: in 2020, they accounted for around 18% of product sales in U.S. supermarkets.<sup>27</sup> Large retailers, including Walmart and Target, have expanded private label options recently, offering a wide range of goods. For example, Kroger’s Simple Truth product line, primarily focused on edible products and household consumables, accounts for 30% of the company’s overall sales volume.<sup>28</sup> Private labels are also becoming increasingly popular in other product areas, including cosmetics and household products. For instance, store brands in hair care, baby furniture, and first aid products and accessories experienced double-digit growth in 2021 in the U.S.<sup>29</sup> Finally, private label sales are important to clothing and department stores, accounting for over a third of 2019 sales revenue for Kohls and JCPenney, for example.<sup>30</sup>

Private labels typically offer trusted and cheaper alternatives to their competitors, providing value and options, in particular for more price-sensitive customers: 2020 surveys found that nearly 20% of grocery shoppers increased their purchases of private labels due to their lower prices,<sup>31</sup> and that more than 85% of shoppers perceive private labels to be of equal or better quality than national brands.<sup>32</sup> Similarly, Carrefour France’s global director of private label attributed part of Carrefour’s private label growth to the coronavirus pandemic, which led customers to search for low-cost products. She credited Carrefour France’s private label appeal to its cost, explaining that “the Carrefour Bio brand aims to make organic products accessible to everyone, every day, thanks to its low prices.”<sup>33</sup> More recently, as inflation has been soaring

worldwide, private labels sales have increased as “cost-conscious consumers” are switching to private labels.<sup>34</sup> More generally, private labels have created value by providing alternative options to consumers and increasing price competition, both of which have likely increased total consumer welfare. The adoption and success of private labels by retailers, which may rely on practices that can be described as self-preferencing, can be welfare-enhancing, increasing choice, reducing prices, and enhancing competitive pressures on leading brands and firms.

These private label products can be, and have been, designed and introduced based on data collected from other sales, as well as preferentially placed and priced.<sup>35</sup> For instance, in the U.S., Costco has promoted its own private label, Kirkland, favoring it over third parties, including by replacing national brands across several product lines.<sup>36</sup> Other large retailers, such as Walmart and Kroger, have also replaced certain national brands and decided to feature their own products and labels instead.<sup>37</sup> Additionally, supermarkets can decide on the pricing of all the products they carry, and they charge manufacturers various types of fees, such as placement fees, which were reported to amount to \$200 billion in the U.S. in 2015.<sup>38</sup>

Despite the prevalence of private labels in the traditional retail sector, and despite retailers routinely using data from third-party sales, controlling prices and placement, there is limited evidence that competition by private labels has significantly curtailed innovation in this sector, otherwise harmed consumer choice, or lead to higher prices, while economists and antitrust practitioners have found that private label products can provide competitive constraints on branded products.<sup>39</sup>

## 2. SELF-PREFERENCING BEHAVIORS IN OTHER NON-DIGITAL BUSINESSES

Dual mode is not limited to retailers. For example, cable TV networks operate in dual mode when they sell advertising, as they need to decide to which third-party local or national advertisers

to sell their air space, while also advertising their own programming.<sup>40</sup> Networks strategically place their ads to influence viewers, reserving the best advertising times for their own programs, effectively self-preferencing these slots to their own products over those of third-party advertisers.<sup>41</sup> For example, the network airing the Super Bowl might choose to reserve certain ads for its upcoming premiere show. Additionally, cable TV networks may also operate in dual mode when they produce and distribute their own content alongside independent content. In this context, the Federal Communications Commission order approving the Comcast-NBCU merger included a non-discrimination condition, which barred Comcast from discriminating against video programming vendors on the basis of affiliation or lack thereof in the selection, price, terms, or conditions of carriage.<sup>42</sup>

In healthcare, it has become more common for health insurers in the U.S. to vertically integrate with healthcare providers. While this vertical integration helps solve the information asymmetry between insurers and providers, and can result in better care for patients, some of the outcomes of this vertical integration could be labelled as “self-preferencing,” such as offering plans that try to direct members to their own doctors.<sup>43</sup> One example is Optum (a subsidiary of UnitedHealth Group) purchasing the DaVita Medical Group.<sup>44</sup> At the end of the FTC’s review, Commissioners Phillips and Wilson noted that “vertical mergers often generate procompetitive benefits that must also factor into the antitrust analysis. A major source of these benefits is the elimination of double-marginalization, which places downward pressure on prices in the output market.”<sup>45</sup> Another is the merger between CVS and Aetna, which resulted in new health plans that aimed to direct members to CVS clinics and pharmacies, including free at-home prescription delivery and lower prices on health-related items at CVS locations.<sup>46</sup>

### 3. POTENTIAL DIFFERENCES BETWEEN TRADITIONAL BUSINESSES AND DIGITAL PLATFORMS

Given that intermediaries have long operated in dual mode, across many sectors, often preferring their own products or using their data to do so, why has self-preferencing raised increased regulatory concerns when it involves digital platforms? This section explores possible economic factors that would differentiate digital platforms from other traditional intermediaries as well as their limitations.

**Data access.** Traditional businesses, such as supermarkets introducing their own private labels, have long been able to collect data on third-party sales, and use it for their own business decisions (design, price, and entry) in very similar fashion to what digital platforms are currently accused of doing. In that context, some antitrust practitioners have argued that their heightened concerns in the digital world come from the greater extent and scale of data that can be gathered by digital platforms compared to traditional intermediaries. The argument is that such scale would allow digital platforms to use data differently than brick-and-mortar stores, causing similar self-preferencing behaviors to become anticompetitive. For instance, current FTC Chair Lina Khan argued in *Amazon's Antitrust Paradox* that “the type of behavior that online firms can track is far more detailed and nuanced” compared to what brick-and-mortar stores have access to, discussing how Amazon had “amassed significant troves of data on users. This data enables it both to extend its tug over customers through highly tailored personal shopping experiences, and, potentially, to institute forms of price discrimination.” Khan referenced press reporting about how “Amazon uses sales data from outside merchants to make purchasing decisions in order to undercut them on price,” and wrote that “this dual role also enables a platform to exploit information collected on companies using its services to undermine them as competitors.”<sup>47</sup>

However, it is worth discussing both this premise, the value and role of data, and the potential costs of sharing data. First, traditional retailers have had

increased access to many tracking technologies. For instance, as early as 2013, the consumer organization Consumer Reports reported on many ways traditional retailers track highly detailed customer actions.<sup>48</sup> Those included video analytics, captured from high-resolution cameras used in and outside the store that monitor all customers’ actions (including “gaze trackers” that track which brands consumers look at and for how long). Retailers can also use data from their online operations or acquired from data brokers.<sup>49</sup>

Second, economists specializing in the digital economy have noted that the value of data can be exaggerated. Lambrecht & Tucker (2017), for instance, find that the data collected by digital platforms is not particularly valuable in and of itself. Rather, value arises from the ability of platforms to analyze such data, through algorithms and data analytics.<sup>50</sup> Therefore, it is worth considering whether, if proposed remedies that would force data to be shared with third parties were used, these third-party sellers would have necessary processes in place. Data must also be rare to have some value. In that context, it is worth considering whether other sources of data that could be used as substitutes are available.

Third, any potential benefits of forcing platforms to provide data should be compared to the potential costs of doing so, in particular if third parties are not expecting many benefits out of the data. Costs would include administrative costs and the potential for data leaks and privacy issues.

**Placement and rankings.** On digital marketplaces, algorithms often play a key role in determining which products are shown to consumers and in what order, and, in some cases, prices shown to consumers. Algorithms often rely on machine learning and knowledge of consumers’ preferences or past behaviors. Ranking and prices can potentially be individualized. Since algorithms can be opaque to users, regulators in the European Union, the UK, and India have alleged that platforms can leverage such opacity to favor their own products and services.<sup>51</sup> As a result, regulators in the European

Union and India have passed legislation to improve transparency in how these algorithms work.<sup>52</sup>

However, a potential problem with the allegations regarding unfair and self-preferential ranking is that they can be hard to identify. There are several legitimate reasons that may cause algorithms to rank the platform's products higher than those of competitors: they can be cheaper, have features that consumers value such as priority shipping, or simply be preferred by consumers.<sup>53</sup> Businesses want to appear first in search engine results regardless of their products quality, but platform operators want their services to be profitable and reflect the needs of consumers, meaning the platform must maintain its value to users by showing them the best products.

**Lower barriers to entry and the “long tail” of digital marketplaces.** Some economists, such as Madsen and Vellodi, have argued that third-party sellers on digital platforms may be more vulnerable to anticompetitive practices from marketplace owners than in traditional retail channels. Specifically, these economists argue that the barriers of entry for third-party sellers in digital platforms can be significantly lower than those to sell in more traditional settings, such as grocery stores.<sup>54</sup> As a result, the argument follows that third-party sellers on digital platforms are often small companies that, they argue, could potentially be more vulnerable to competition from the platform itself (via private labels or other self-preferencing behaviors).

On the other hand, economics would also predict that low barriers to entry and the resulting smaller competitors are often beneficial to consumers, as they promote competition, including with a platform's own offering. In this way, low barriers to entry have also enabled the wide array of products and services available on digital platforms. Thanks to their nearly unlimited shelf space, online marketplaces can provide consumers access to a much larger variety of products and services than can typically be found on brick-and-mortar stores. For instance, Brynjolfsson et al. (2006) study the “long tail” of digital stores, finding that 30–40% of

Amazon book sales come from books not normally found in physical stores, leading to an additional one billion dollars annually in consumer surplus.<sup>55</sup> These authors argue that digital platforms crucially contribute to the diversity of available products for users.

## B. THE CONCERN WITH UNFAIRNESS: AN ECONOMIC PERSPECTIVE

While the effect of self-preferencing on competition, prices, and consumer welfare can be ambiguous, as there is evidence these actions can benefit consumers, antitrust practitioners and regulators argue that these actions are simply unfair to competitors. The concept of “fairness,” particularly when it relates to competitive actions that improve prices or enhance competition, is not a well-defined term in economics. It can therefore be difficult for economists to analyze the debate around self-preferencing, particularly when regulatory concerns about self-preferencing are often rooted in beliefs that a “level playing field” is necessary for all competitors.<sup>56</sup>

Some critics of self-preferencing argue that self-preferencing is inherently “unfair,” stating, for example, that “self-preferencing occurs when a firm *unfairly* modifies its operations to privilege its own, another firm's, or a set of firms' products or services.”<sup>57</sup> However, even those same critics admit there are “benign” cases of self-preferencing where firms engage in allegedly unfair practices but there is no harm to consumers.<sup>58</sup>

Some antitrust practitioners have questioned whether fairness itself should be the relevant criterion to evaluate self-preferencing,<sup>59</sup> and economists have usually recognized the difficulty of creating a fairness standard to enforce on multi-sided platforms. In an article advocating for increased regulation of self-preferencing, Inge Graef acknowledged as much, noting that “it seems impossible to require a platform to act in one particular way that can be considered ‘fair,’” largely because the interests of platforms, third-party businesses, and users can conflict.<sup>60</sup> Others

go further, arguing that enforcing a prescribed standard of fairness on digital platforms would result in potentially “unfair” disadvantages in other areas since the platform’s online and offline rivals would not be subject to the same regulations.<sup>61</sup>

The link between unfairness and anticompetitive conduct is sometimes weak, given that unfairness is not necessarily inherently anticompetitive and that antitrust laws, especially in the U.S., are designed to protect consumers and competition itself rather than competitors.<sup>62</sup> In particular, the absence of a fairness mandate in U.S. competition law has been corroborated in some jurisprudence,<sup>63</sup> as the harm to individual competitors, which could be characterized as unfair, does not violate U.S. antitrust law. In *Brooke Group*, the Supreme Court further explained, “Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws,” rejecting similar efforts to use antitrust law to enforce principles of “fairness.”<sup>64</sup> It may therefore be useful to reframe the question from whether self-preferencing is “unfair” and harms certain competitors to whether it leads to worse outcomes for consumers. Do self-preferencing behaviors lead to reduced output, higher prices, reduced innovation, or lowered product quality?

Critics of proposed remedies of self-preferencing for digital platforms argue that allegedly self-preferencing behaviors need to be evaluated on a case-by-case basis to see whether unfair practices are being used in an anticompetitive manner to eliminate threats to the platform itself, monopolize a downstream market, or exclude named competitors from a downstream market, all of which could be rightfully deemed unlawful and anticompetitive.<sup>65</sup> Some have argued that blanket regulations requiring uniform treatment for all sellers on a platform, such as Mandated Neutrality Standards, would not promote any inherent standards of fairness or efficiency, and could lead to economically intrusive outcomes and damage to consumers,<sup>66</sup> and generally ignore that there is nothing automatically economically efficient about uniformity.<sup>67</sup> As such, they argue that economic harm arises only when

unfair practices are used to support anticompetitive conduct, and that there is no economic harm from unfair practices in and of themselves.

### III. WHAT ECONOMICS TEACHES US ABOUT SELF-PREFERENCING

Older economic tools and more recent research provide relevant tools for the analysis of self-preferencing behaviors by digital platforms. We start with the most classical framework of analysis, that of vertical integration, with the related concepts of the “elimination of double marginalization” and “raising rivals’ costs,” which provide a helpful model to understand the incentives of digital platforms. Compared to traditional firms, a strategy of raising rivals’ costs goes directly against a platform’s business model and can endanger its profitability. We then look into more recent economic research, still in its early days, which has focused on the positive and negative welfare implications of self-preferencing by digital platforms and, in particular, the potential impact of proposed regulations that would affect platforms’ ability to operate in dual mode. This research offers mixed findings, suggesting the need for a careful and case-by-case approach.

#### A. DIGITAL PLATFORMS AS VERTICALLY INTEGRATED FIRMS: ELIMINATING DOUBLE MARGINALIZATION OR RAISING RIVALS’ COSTS?

Traditional economic theory of vertical mergers and vertical integration can provide a useful framework to study firms that operate in dual mode. This is because digital platforms can be viewed as vertically integrated firms when they decide to operate in dual mode. For instance, Nintendo operates the Nintendo eShop, a digital platform where Nintendo publishes its own games for users to purchase. As such, Nintendo produces and sells games (the “downstream market”), but also operates the distribution network where these games are sold (the “upstream market”).

Economists and regulators have long understood that, in certain conditions, vertical integration can have procompetitive effects by incentivizing firms to lower final prices consumers, through the “elimination of double marginalization.” This is because, absent integration, if firms have market power, they will price goods above marginal cost in both the upstream and downstream market, and final consumers pay a price that includes both markups. However, when firms are vertically integrated, the firm has access to inputs at marginal cost, leading to lower prices, and the elimination of one of the two markups.<sup>68</sup> The implication here is that digital platforms may be able to eliminate double marginalization and benefit consumers through lower prices when they introduce their own products.

On the other hand, because digital platforms operate in the upstream market, as intermediaries, they can potentially influence the costs faced by third-party sellers to distribute, or even produce, goods and services in the downstream market. Following the example above, as third-party developers can publish their games and content on Nintendo eShop, Nintendo decides how much it costs to publish games in its platform and it can make coding on its platform more or less easy.

Economists have studied these situations under the model of “raising rivals’ costs,” when a vertically integrated entity, in this case a digital platform, has the ability and an incentive to raise the costs of third-party sellers in order to benefit their own products and services downstream. Under this theory, the digital platform would lose profits in the upstream market, but it could make its own products more attractive in the downstream market by forcing competitors to increase downstream price, or even leave the market entirely. For example, Nintendo could decide to increase the cost of publishing third-party games on Nintendo eShop, which would make the platform less attractive to third-party sellers, and lower profits of Nintendo eShop, in order to drive more users towards Nintendo games.

However, compared to traditional one-sided businesses, digital platforms might have lower incentives to raise rivals’ costs. This is because raising rivals’ costs would be profitable only if the increase in profits in the downstream market were larger than the losses suffered by making the platform less attractive, and digital platforms create most of their value by facilitating interactions between buyers and sellers in the platform. With digital platforms, not only would third-party developers be less likely to publish games for Nintendo, but the Nintendo platform would become less attractive to consumers as well, making the platform even less valuable for third-party developers. Such a downward spiral is the result of a defining characteristic of digital platforms—indirect network effects—which implies that the more sellers the platform is able to attract, the more attractive the platform becomes to buyers. Similarly, the more buyers there are using the platform, the more attractive it becomes to sellers.

More generally, actions and behaviors that decrease the attractiveness of the platform for third-party sellers (e.g., raising costs) would reduce the value of the digital platform to buyers, and conversely actions and behaviors that decrease the attractiveness of the platform for buyers (e.g., showing them inferior products, deterring innovation or entry) would reduce the value of the platform to third-party sellers, potentially creating a destructive loop that would lead to a platform less valuable for both sides. Those dynamics therefore limit the incentives to raise rivals’ costs, compared to a traditional framework.

## B. NEW INSIGHTS

Over the last couple of years, economists have started studying the competitive effects of so-called self-preferencing behaviors. They have analyzed how such behaviors would affect consumer surplus and welfare in a variety of contexts and modelled the effects of proposed remedies and regulations. While this research is still nascent, its results are so far mixed and ambiguous overall. Such ambiguity reflects that the effects of self-preferencing on

competition are not obvious and may vary on a case-by-case basis. They also suggest that blanket regulations could have unintended consequences, as the risk of benefiting competitors but not consumers is substantial.

Considering different types of self-preferencing, Gilbert (2021) models the effect of a structural or functional separation of a marketplace from its downstream activities. He finds that, from a theoretical perspective, such remedies have “complicated welfare effects.”<sup>69</sup>

From an empirical perspective, most of this new strand of literature has focused on the competitive effects of platforms operating in dual mode. For instance, in a 2021 working paper, Lee and Musolf find that while Amazon displays its own products above those of third-party sellers in its marketplace, doing so results in greater consumer welfare because consumers do prefer those products.<sup>70</sup> As a result, Amazon’s higher ranking of its own products reduces search costs and increases price competition. The authors also caution that in the long run, such increased price competition could reduce entry in the market. Another working paper, Lam (2022), creates a model in which a platform operating in dual mode ranks its products randomly on its marketplace.<sup>71</sup> Using Amazon data, Lam similarly finds that a random ranking of Amazon’s products would decrease consumer welfare, reflecting that the current ranking is beneficial to consumers. Lam further finds that preventing Amazon from operating in dual mode would increase third-party seller profits but decrease consumer welfare due to reduced price competition.

Others are more cautious or offer ambiguous results. For instance, De Corniere and Taylor (2019) find that whether self-preferencing on search results benefits or harms consumers depends on how the incentives of the consumers and the platform align.<sup>72</sup> A recent working paper by Devesh Raval, Deputy Director at the FTC, documents Amazon’s self-preferencing behavior in its choice of default merchant for the Amazon Buy Box, favoring products fulfilled and shipped by Amazon over

third-party sellers, and discusses how different remedies could affect consumer surplus.<sup>73</sup> Raval argues for a separation of Amazon’s platform, its retail service, and its fulfillment service, over a ban on self-preferencing, which is hard to identify, but warns that the former policy “would remove any efficiencies generated from vertical integration, which could lead to higher prices or worse quality for consumers.” Last, Hagi et al. (2021) show that while a ban on dual mode would benefit third-party sellers, it would often harm consumer and reduce total welfare.<sup>74</sup>

Researchers have also studied the effect of remedies preventing platforms from relying on data from third-party sales to introduce their own private label products. Madsen and Vellodi (2022), based on a theoretical model, find that a ban on this type of self-preferencing behavior would have mixed effects: It would stimulate innovation in product categories where there is “significant upside demand potential,” but it would reduce innovation otherwise.<sup>75</sup> They instead argue for “data patents,” which would limit the platform’s ability to use third-party sales data for a limited time instead.

## IV. CONCLUSION

Self-preferencing behaviors by digital platforms are, and are expected to continue to be, a topic of focus to both regulators and economists. While these types of behaviors are commonplace across non-digital businesses, the ability of digital platforms to favor their own products has become a focus of legislators and regulators in recent years, and legislation and regulations aimed at curbing such conduct have passed and will continue to be considered in many countries. This expanded focus and these shifting regulatory regimes have sparked new focus by economists trying to understand the potential impact of regulating these platforms. A review of this literature advises caution, as no consensus has been reached on whether limiting platforms’ ability to self-preference would benefit consumers, and a careful analysis of both the static and dynamic impact of proposed legislation is advised. This is because, oftentimes,

**digital platforms provide goods and services that consumers enjoy, and because these platforms, by nature, are able to bring together buyers and sellers, facilitate interactions, reduce search costs, and reduce prices through intense competition.**

1. Juliette Caminade is a vice president at Analysis Group, Inc.; Juan Carvajal is an associate at Analysis Group, Inc.; and Christopher R. Knittel is the *George P. Shultz Professor* and a Professor of Applied Economics at the MIT Sloan School of Management. We thank William Sandy from Analysis Group for his assistance. Views expressed here are our own and do not necessarily reflect the views of Analysis Group, its affiliates, or its clients.
2. Andrei Hagiu, Tat-How Teh, & Julian Wright, *Should Platforms Be Allowed to Sell on Their Own Marketplaces?*, 53 *RAND J. ECON.* 297 (2022).
3. Patrice Bougette, Oliver Budzinski, & Frédéric Marty, *Self-Preferencing and Competitive Damages: A Focus on Exploitative Abuses*, 67 *ANTITRUST BULL.* 190 (2022).
4. Dana Mattioli, *Amazon Scooped Up Data From Its Own Sellers to Launch Competing Products*, *WALL ST. J.* (Apr. 23, 2020), <https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015>.
5. Rod Carlton & Rikki Haria, *Self-Preferencing—Legal and Regulatory Uncertainty for the Digital Economy (and Beyond?)*, 23 *CPI ANTITRUST CHRON.* (June 2020), <https://www.competitionpolicyinternational.com/self-preferencing-legal-and-regulatory-uncertainty-for-the-digital-economy-and-beyond>.
6. Case AT.39740, *Google Search (Shopping)*, 2017 O.J. (C 9).
7. See, e.g., Joel Poultney, *Amazon to Face Antitrust Probe Over Third-Party Practices*, *LAW360* (July 6, 2022), <https://www.law360.com/articles/1508662/amazon-to-face-antitrust-probe-over-third-party-practices>.
8. Tripp Mickle, *Apple Dominates App Store Search Results, Thwarting Competitors*, *WALL ST. J.* (July 23, 2019), <https://www.wsj.com/articles/apple-dominates-app-store-search-results-thwarting-competitors-11563897221>.
9. *Consumers and Innovators Win On a Level Playing Field*, *SPOTIFY* (Mar. 13, 2019), <https://newsroom.spotify.com/2019-03-13/consumers-and-innovators-win-on-a-level-playing-field/> (“Apps should be able to compete fairly on the merits, and not based on who owns the App Store. We should all be subject to the same fair set of rules and restrictions—including Apple Music.”).
10. Case AT.40099—*Google Android*, Comm’n Decision (July 18, 2018), [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/40099/40099\\_9993\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf).
11. See, e.g., SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116th CONG., *INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATION* (2020).
12. *Id.* at 382.
13. *Id.*
14. *Algorithms: How They Can Reduce Competition and Harm Consumers*, COMPETITION & MKTS. AUTH., (Jan. 19, 2021), <https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers>.
15. Saheli Roy Choudhury, *If You Hold Amazon Shares, Here’s What You Need to Know About India’s E-commerce Law*, *CNBC* (Feb. 4, 2019), <https://www.cnbc.com/2019/02/05/amazon-how-india-ecommerce-law-will-affect-the-retailer.html>.
16. See, e.g., Elizabeth Warren (@ewarren), *TWITTER* (Dec. 18, 2020, 4:19 PM), <https://twitter.com/ewarren/status/1340044102386266124?s=20>.
17. Tom Romanoff, *The American Innovation and Choice Online Act: What It Does and What It Means*, *BIPARTISAN POL’Y CTR.* (Jan. 20, 2022), <https://bipartisanpolicy.org/explainer/s2992>.
18. Press Release, Council of the EU, *Digital Markets Act (DMA): Agreement Between the Council and the European Parliament* (Mar. 25, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/03/25/council-and-european-parliament-reach-agreement-on-the-digital-markets-act/>.
19. See COMPETITION MKTS. AUTH., *ONLINE CHOICE ARCHITECTURE: HOW DIGITAL DESIGN CAN HARM COMPETITION AND CONSUMERS* (2022), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1066524/Online\\_choice\\_architecture\\_discussion\\_paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1066524/Online_choice_architecture_discussion_paper.pdf); *UK Competition Authority to Use “Full Powers” to Challenge Harmful Online Choice Architecture*, *PINSENT MASON’S LLP* (Apr. 14, 2022), <https://www.pinsentmasons.com/out-law/news/uk-competition-authority-use-full-powers-challenge-harmful-online-choice-architecture>.

20. Joel Poultney, *Amazon to Face Antitrust Probe Over Third-Party Practices*, LAW360 (July 6, 2022), <https://www.law360.com/articles/1508662/amazon-to-face-antitrust-probe-over-third-party-practices>.
21. Angela Flannery, *Sector Specific Regulation For Digital Platforms: The ACCC Develops the Case For New Powers*, HOLDING REDLICH (Mar. 21, 2022), <https://www.holdingredlich.com/sector-specific-regulation-for-digital-platforms-the-accc-develops-the-case-for-new-powers>.
22. European Commission Press Release, *Mergers: Commission Clears Acquisition of Fitbit by Google, Subject to Conditions* (Dec. 17, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2484](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484).
23. EUR. PARLIAMENTARY RSCH SERV., BRIEFING: DIGITAL MARKETS ACT 4–5 (2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS\\_BRI\(2021\)690589\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS_BRI(2021)690589_EN.pdf).
24. Romanoff, *supra* note 17.
25. Matthew Gooding, *Amazon's €1.3bn Fine Is the Latest Blow Against Big Tech "Self-preferencing"*, TECH MONITOR (Dec. 13, 2021), <https://techmonitor.ai/policy/digital-economy/big-tech-self-preferencing-italy-eu-digital-markets-act>; Jacques Crémer et al., *The Digital Markets Act: An Economic Perspective On the Final Negotiations*, VOX EU (Feb. 11, 2022), <https://voxeu.org/article/digital-markets-act-economic-perspective-final-negotiations>.
26. Meredith Broadbent, *Implications of the Digital Markets Act for Transatlantic Cooperation*, CTR. FOR STRATEGIC & INT'L STUDIES (Sept. 15, 2021), <https://www.csis.org/analysis/implications-digital-markets-act-transatlantic-cooperation>.
27. PRIVATE LABEL MFRS. ASS'N, PLMA'S 2021 PRIVATE LABEL YEARBOOK 3 (2021), <https://plma.com/sites/default/files/files/2021-05/plma2021yearbook2.pdf>.
28. Jim Lochner, *The Impact of the Growth of Private Label Brands*, CREATIVES ON CALL (June 23, 2021), <https://creativesoncall.com/blog/post/the-impact-of-the-growth-of-private-label-brands/550>.
29. INFO. RES. INC., PRIVATE BRANDS 2021–CONSUMER DEMAND FOR PRIVATE BRANDS 22 (2021), <https://www.iriworldwide.com/IRI/media/Library/Consumer-Demand-for-Private-Brands-Dec-2021.pdf>.
30. Kohl's Corp., Annual Report 3 (Form 10-K) (Mar. 17, 2022), [https://s26.q4cdn.com/950703131/files/doc\\_financials/2021/ar/KSS-10-K-2021-Filed.pdf](https://s26.q4cdn.com/950703131/files/doc_financials/2021/ar/KSS-10-K-2021-Filed.pdf); J.C. Penney Co., Annual Report 27 (Form 10-K) (Mar. 20, 2022), [https://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE\\_JCP\\_2019.pdf](https://www.annualreports.com/HostedData/AnnualReports/PDF/NYSE_JCP_2019.pdf).
31. Steven Begley & Angus McOuat, *Turning Private Labels Into Powerhouse Brands*, MCKINSEY & Co. (Oct. 30, 2020), <https://www.mckinsey.com/industries/retail/our-insights/turning-private-labels-into-powerhouse-brands>.
32. Kristen Kazarian, *The Retail Reset: Private Label Brands*, PACKAGING STRATEGIES (Dec. 9, 2020), <https://www.packagingstrategies.com/articles/95807-the-retail-reset-private-label-brands>.
33. *The Private-Label Issue—Carrefour France*, EUR. SUPERMARKET MAG. (May 17, 2022), <https://www.esmmagazine.com/features/the-private-label-issue-carrefour-france-173585>.
34. Annie Gasparro, *More Shoppers Buy Store Brands, Eating Into Big Food Companies' Sales*, WALL ST. J. (July 23, 2022), <https://www.wsj.com/articles/more-shoppers-buy-store-brands-eating-into-big-food-companies-sales-11658581202>.
35. John Quelch & David Harding, *Brands Versus Private Labels: Fighting to Win*, 74 HARV. BUS. REV. 99 (Jan.–Feb. 1996), <https://hbr.org/1996/01/brands-versus-private-labels-fighting-to-win>.
36. Tom Ryan, *Why Has Kirkland Signature Been So Successful?*, RETAILWIRE (Feb. 15, 2022), <https://retailwire.com/discussion/why-has-kirkland-signature-been-so-successful>.
37. Mike Pomranz, *Grocery Stores Are Choosing Their Own Product Placement, Pushing Out Big Brands*, FOOD & WINE (Feb. 20, 2020), <https://www.foodandwine.com/news/grocery-store-shelf-placement-backlash>.
38. Cardiff Garcia & Sally Hershops, *How Grocery Shelves Get Stacked*, INDICATOR FROM PLANET MONEY (Apr. 30, 2019), <https://www.npr.org/transcripts/718711109>.
39. See, e.g., Matt Schmitt & Loren Smith, *The Competitive Implications of Private Label Mergers*, 83 ANTITRUST L.J. 621 (2021).
40. Erik Hovenkamp, *Proposed Antitrust Reforms in Big Tech: What Do They Imply for Competition and Innovation?*, CPI ANTITRUST CHRON. (forthcoming 2022) (manuscript at 7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4127334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4127334).
41. Zach Lazzari, *The Influence of Television Advertising*, CHRON. (Mar. 5, 2019), <https://smallbusiness.chron.com/influence-television-advertising-64010>.

42. Comcast–NBCU, 26 FCC Rcd. 4238, 4287 (¶121), 4358 (App. A, § III(1)) (Jan. 2011).
43. See, e.g., John Tozzi, *UnitedHealth’s Recipe For Lower Costs: Send Patients to Its Own Doctors*, BLOOMBERG QUINT (Mar. 2, 2020), <https://www.bloomberquint.com/onweb/unitedhealth-s-recipe-for-lower-costs-send-patients-to-its-own-doctors>.
44. Press Release, UnitedHealth Group, Optum Completes Acquisition of DaVita Medical Group From DaVita (June 19, 2019), <https://www.unitedhealthgroup.com/newsroom/2019/2019-06-19-optum-davita-medical-acquisition.html>.
45. Statement of Commissioner Noah Joshua Phillips and Commission Christine S. Wilson, In the Matter of UnitedHealth Group and DaVita, Comm’n File No. 181-0057 (June 19, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1529366/181\\_0057\\_united\\_davita\\_statement\\_of\\_cmmrs\\_p\\_and\\_w.pdf](https://www.ftc.gov/system/files/documents/public_statements/1529366/181_0057_united_davita_statement_of_cmmrs_p_and_w.pdf).
46. Rebecca Pifer, *Aetna Unveils Plan Nudging Members to CVS Clinics, Pharmacies*, HEALTHCARE DIVE (Sept. 1, 2020), <https://www.healthcaredive.com/news/aetna-unveils-plan-nudging-members-to-cvs-clinics-pharmacies/584475>.
47. Lina Khan, Note, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 710, 764, 781–83, 788 (2017).
48. *How and Why Retail Stores Are Spying On You*, CONSUMER REPORTS (Mar. 2013) <https://www.consumerreports.org/cro/2013/03/how-stores-spy-on-you/index.htm>; Sara Morrison, *How Retailers Track Your Every Move In Exchange For Coupons and Convenience*, VOX (Dec. 4, 2020), <https://www.vox.com/recode/21587779/shopping-deals-coupons-privacy-data-collection-retail>.
49. See, e.g., Paul Sawers, *Microsoft and Kroger to Create Data-driven Connected Grocery Stores*, VENTURE BEAT (Jan. 7, 2019), <https://venturebeat.com/2019/01/07/microsoft-and-kroger-to-create-data-driven-connected-grocery-stores>; Tricia McKinnon, *How Kroger Uses Artificial Intelligence (AI) to Innovate*, INDIGO DIGITAL (June 10, 2019), <https://www.indigo9digital.com/blog/kroger-use-artificial-intelligence-to-innovate-in-its-store-of-the-future>.
50. Anja Lambrecht & Catherine E. Tucker, *Can Big Data Protect a Firm from Competition?*, CPI ANTITRUST CHRON. (Jan. 2017), <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/01/CPI-Lambrecht-Tucker.pdf>.
51. See, e.g., *Algorithms: How They Can Reduce Competition and Harm Consumers*, *supra* note 14.
52. *Algorithmic Transparency In Rankings—A Possible Expansion to Personalization?*, MAASTRICHT UNIV. LAW BLOG (May 2, 2022), <https://www.maastrichtuniversity.nl/blog/2022/05/algorithmic-transparency-rankings-possible-expansion-personalisation>.
53. See, e.g., Kwok Hao Lee & Leon Musolf, *Entry Into Two-sided Markets Shaped By Platform-guided Search* (Princeton Univ. Dep’t of Econ. Working Paper, 2021), [https://lmusolf.github.io/papers/Entry\\_and\\_Platform\\_Guided\\_Search.pdf](https://lmusolf.github.io/papers/Entry_and_Platform_Guided_Search.pdf).
54. Erik Madsen & Nikhil Vellodi, *Insider Imitation* (Jan. 11, 2022) (manuscript at 7), <https://ssrn.com/abstract=3832712>.
55. Erik Brynjolfsson, Yu Jeffrey Hu, & Michael D. Smith, *From Niches to Riches: Anatomy of the Long Tail*, 47 SLOAN MGMT. REV. 67, 67–68 (2006).
56. See, e.g., Warren, *supra* note 16 (tweeting “You can be the umpire, or you can be a player, but you can’t be both at the same time. We need to #BreakUpBigTech so we can level the playing field.”).
57. See Daniel A. Hanley, *How Self-Preferencing Can Violate Section 2 of the Sherman Act* at 3, CPI ANTITRUST CHRON. (June 2021) (emphasis added), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3868896](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868896).
58. This author argues that harm or lack thereof is a function of the monopoly power of the firm engaging in self-preferencing. See *id.* at 8 (“[W]hile benign forms of self-preferencing exist, such as a non-dominant grocery store changing the shelving placement of food items to favor its own in-store brands, there are critical differences that distinguish that conduct from Google’s and similarly situated digital giants. Unlike an individual grocery store, Google has monopoly power.”).
59. James Bernard, Rebecca Kirk Fair, & D. Daniel Sokol, *Why Does the Consumer Welfare Standard Work? Matching Methods to Markets*, CPI ANTITRUST CHRON. (Nov. 2019), <https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/CPI-Bernard-Kirk-Sokol.pdf>.
60. Inge Graef, *Differentiated Treatment In Platform-to-Business Relations: EU Competition Law and Economic Dependence*, 38 YEARBOOK EUR. L. 448, 457 (2019).
61. Aurelien Portuese, *“Please, Help Yourself”: Toward a Taxonomy of Self-Preferencing* at 15, INFO. TECH. & INNO. (Oct. 25, 2021), <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing>.

62. D. Bruce Hoffman & Garrett D. Shinn, *Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem* at 8, CPI ANTITRUST CHRON. (June 2021), <https://www.clearygottlieb.com/-/media/files/cpi-hoffman-final-pdf.pdf>.
63. Barak Orbach, *Mandated Neutrality, Platforms, and Ecosystems* at 8–9 (Ariz. Legal Studs. Discussion Paper No. 21-28, Dec. 2021) (“In *Linkline*, the US Supreme Court rejected these legal theories [requiring vertically integrated firms to leave rivals a ‘fair’ or adequate’ margin] and was [sic] refused to ‘endorse a new theory of liability.’”).
64. *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).
65. See, e.g., Hoffman & Shinn, *supra* note 62, at 8–9; Portuese, *supra* note 61, at 13.
66. Portuese, *supra* note 61, at 15 (“Here is where the prohibition of self-preferencing becomes both economically intrusive and damaging for consumers and economically unfair. . .”).
67. Orbach, *supra* note 63, at 2.
68. Jeffrey R. Church & Roger Ware, *Industrial Organization: A Strategic Approach* 685–86 (2000).
69. Richard J. Gilbert, *Separation: A Cure for Abuse of Platform Dominance?*, 54 INFO. ECON. & POL’Y (2021).
70. Lee & Musolff, *supra* note 53.
71. H. Tai Lam, *Platform Search Design and Market Power* (Nw. Univ. Working Paper, 2021), [https://www.anderson.ucla.edu/sites/default/files/document/2021-09/Lam\\_JMP\\_Platform\\_Search\\_Design.pdf](https://www.anderson.ucla.edu/sites/default/files/document/2021-09/Lam_JMP_Platform_Search_Design.pdf).
72. Alexandre De Corniere & Greg Taylor, *A Model of Biased Intermediation*, 50 RAND J. ECON. 854 (2019).
73. Devesh Raval, *Steering in One Click: Platform Self-Preferencing in the Amazon Buy Box*, (Harv. L. Sch. Working Paper, 2022), [https://questromworld.bu.edu/platformstrategy/wp-content/uploads/sites/49/2022/07/PlatStrat2022\\_paper\\_52.pdf](https://questromworld.bu.edu/platformstrategy/wp-content/uploads/sites/49/2022/07/PlatStrat2022_paper_52.pdf).
74. Hagiü et al., *supra* note 2.
75. Madsen & Vellodi, *supra* note 54.

# EPIC V. APPLE: AMICUS BRIEF OF THE STATE OF CALIFORNIA IN SUPPORT OF NEITHER PARTY

Written by Kathleen Foote, Paula Blizzard, Shira Hoffman, Robert B. McNary, and Brian D. Wang

The State of California recently filed an amicus brief regarding California’s Unfair Competition Law (UCL) in the *Epic v. Apple* appeal pending before the Ninth Circuit. In that dispute between game developer Epic and app store owner Apple, the trial court found that Apple’s app-related policies did not violate federal or state antitrust laws, but one of those policies—Apple’s anti-steering policy—did violate the UCL. The Attorney General of California enforces the UCL and regularly brings actions in the name of the People under the statute to protect consumers and competition, and California has a strong interest in the UCL’s proper interpretation and development. Accordingly, to assist the Ninth Circuit, the State submitted the following amicus brief focused on the “unfair” prong of the UCL.

The amicus brief discusses the history and development of the UCL, the current UCL tests recognized by the California Supreme Court, the relation of the UCL to federal and state antitrust laws, and the appropriate scope of injunctive relief when a plaintiff establishes a violation of the “unfair” prong. The amicus brief does not support either party in the *Epic v. Apple* case, nor does it take a

position on whether the judgment below should be affirmed or reversed.

\* \* \*

## I. BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

### A. INTEREST OF AMICUS

The State of California has a strong interest in the proper interpretation and development of its Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.*, which is among the State’s most important consumer protection and business regulation statutes.<sup>1</sup> The Attorney General of California enforces the UCL and regularly brings actions in the name of the People under the statute to protect consumers and competition.

Apple’s cross-appeal raises issues related to the proper application of the UCL. The district court found that Apple’s anti-steering provisions violated the UCL, while at the same time concluding that Epic had not established that Apple’s conduct

violated the federal Sherman Act or California's Cartwright Act. Based on Apple's UCL violation, the district court enjoined Apple from enforcing its anti-steering policies. After the district court denied Apple's motion for a stay of the injunction pending appeal, Apple renewed its motion for a stay in this Court, which the Court granted on December 8, 2021, citing *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 691-92 (9th Cir. 2015) and *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001). Among the issues before the Court are the appropriate scope of the UCL's "unfair" prong and the availability of injunctive relief under California law against a California company.

To assist the Court in deciding this matter, the State submits this brief focused on the "unfair" prong of the UCL. In particular, the State will discuss the history and development of the UCL, the current UCL tests recognized by the California Supreme Court, the relation of the UCL to federal and state antitrust laws, and the appropriate scope of injunctive relief when a plaintiff establishes a violation of the "unfair" prong. The State's legal analysis is based on the Attorney General's expertise and experience as the chief enforcer of California antitrust and unfair competition laws. This brief does not support either party or take a position on whether the judgment below should be affirmed or reversed. The State's arguments on the limited issues addressed in this brief do not indicate agreement or disagreement with the trial court's rulings on other issues, or with any other party's arguments on those issues.

## **B. SUMMARY OF ARGUMENT**

**I.** As a broad and equitable statute, the UCL provides courts with discretion to identify and prohibit unfair conduct. This authority is essential to business regulation and consumer protection in California, and a proper understanding of the UCL is essential to the resolution of this case.

*First*, the UCL creates a broad equitable standard that enables courts to redress myriad forms of unfair, unlawful, or fraudulent business behavior. In

operation for almost a century, the UCL expanded traditional elements of the unfair competition tort both to cover more types of conduct and to protect consumers in addition to competitors.

*Second*, the California Supreme Court has identified three tests governing the "unfair" prong of the UCL: a balancing test; a test that asks whether the finding of unfairness was "tethered" to a legislatively declared policy or proof of some actual or threatened impact on competition; and a three-part test borrowed from the test used to determine unfairness under Section 5 of the Federal Trade Commission (FTC) Act. While the balancing test is the traditional standard, the California Supreme Court has held that the tethering test applies in an action by a competitor alleging anticompetitive practices. Importantly, that Court has not endorsed a single universal test for all claims under the "unfair" prong.

*Third*, as the district court recognized below, a UCL plaintiff need not establish a concurrent antitrust violation. *Chavez* and *San Jose* are not to the contrary. Those cases recognized a safe harbor under the UCL for conduct affirmatively authorized by law, but that exception does not apply when no source of law affirmatively authorizes conduct being challenged under the UCL.

*Fourth*, the California Supreme Court has not required the strictures of a typical antitrust analysis when evaluating conduct for unfairness under the UCL. Trial courts are free to consider a variety of factors. Those factors include limits on the free flow of price information, which the California Supreme Court has explicitly recognized as anticompetitive.

**II.** The UCL does not allow a California company to avail itself of the privileges of California law while simultaneously violating California law in its interactions with individuals or entities located in other States. Courts do not contravene the dormant Commerce Clause when they enforce that prohibition against a California company.

III. Finally, if this Court is unsure about any questions of UCL interpretation, this Court should certify those questions to the California Supreme Court.

## C. ARGUMENT

### 1. THIS COURT'S ANALYSIS SHOULD BE INFORMED BY A PROPER UNDERSTANDING OF THE UCL

#### a. THE CALIFORNIA LEGISLATURE ENACTED THE UCL TO ADDRESS A BROAD RANGE OF WRONGFUL BUSINESS CONDUCT

California's Unfair Competition Law imposes "broad" and "sweeping" prohibitions against unfair, unlawful, or fraudulent business acts or practices. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999); see Cal. Bus. & Prof. Code § 17200 *et seq.* In enacting the statute, the Legislature sought "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 320 (2011). The UCL thus authorizes courts to use their equitable power to combat the varied forms of unfair practice that "may run the gamut of human ingenuity and chicanery." *People ex rel. Mosk v. Nat'l Research Co.*, 201 Cal. App. 2d 765, 772 (1962).

The UCL originated in 1887 in California Civil Code Section 3369 to enforce basic rules of "common honesty and accepted business ethics." See, e.g., *Hesse v. Grossman*, 152 Cal. App. 2d 536, 540 (1957). The Legislature expanded Section 3369 in 1933 to authorize courts to enjoin "unfair practices." See *Krause v. Trinity Mgmt. Servs. Inc.*, 23 Cal. 4th 116, 129 (2000). Section 3369 authorized injunctive relief against "any person performing or proposing to perform an act of unfair competition," where injunctive relief could be pursued by the Attorney General and others. Cal. Civ. Code § 3369(2) (1933) (as amended by 1933 Cal. Stat. ch. 953, § 1 at 2482). The modern UCL is broader than the original 1887 version, extending to consumers the protection once afforded only to direct competitors. *Barquis v. Merch. Collection Ass'n*, 7 Cal. 3d 94, 109 (1972). "With passage of time and accompanying epochal changes in industrial and economic conditions,

the legal concept of unfair competition broadened appreciably . . . partly by the flexibility and breadth of relief afforded by equity, and partly by changing methods of business and changing standards of commercial morality." *Nat'l Research*, 201 Cal. App. 2d at 770.

The UCL provides law enforcers a broad and flexible tool for combating unfair business practices harming competitors or consumers. See, e.g., *id.* at 770–72; see generally Thomas A. Papageorge, *The Unfair Competition Statute: California's Sleeping Giant Awakens*, 4 Whittier L. Rev. 561, 564–65 (1982). Indeed, California courts have recognized that the Legislature intentionally framed the UCL in broad language to address the innumerable "new schemes which the fertility of man's invention would contrive." *American Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698 (1935); accord, e.g., *Cel-Tech*, 20 Cal. 4th at 181. As the *Claibourne* court observed: "When a scheme is evolved which on its face violates the fundamental rules of honesty and fair dealing, a court of equity is not impotent to frustrate its consummation because the scheme is an original one. . . . [A]n equity court must not lose sight, not only of its power, but of its duty to arrive at a just solution of the problem." 3 Cal. 2d at 698–99.

The California Supreme Court has rejected narrower interpretations of the UCL, instead endorsing the view that the California Legislature intended the UCL's "sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur." *Barquis*, 7 Cal. 3d at 111. The Court has even noted that "whenever the Legislature has acted to amend the UCL, it has done so only to expand its scope, never to narrow it." *Stop Youth Addiction, Inc. v. Lucky Stores*, 17 Cal. 4th 553, 570 (1998).<sup>2</sup>

The modern UCL has three prongs: "unfair" (addressed herein) as well as "unlawful" and "fraudulent." *In re Tobacco II Cases*, 46 Cal. 4th 298, 311 (2009); see Cal. Bus. & Prof. Code § 17200. In keeping with its history, the "unfair" prong has been interpreted to be "intentionally broad, thus allowing courts maximum discretion to prohibit new

schemes to defraud.” *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1103 (1996). For almost 100 years, the California Supreme Court has endorsed broad discretion under the UCL to trial courts, noting that “[i]t is difficult indeed to draw the line” between acceptable and illegitimate methods of competition, but nonetheless firmly entrusting that line-drawing exercise to the trial court’s discretion. See *Fidelity Appraisal Co. v. Federal Appraisal Co.*, 217 Cal. 307, 314 (1933).

While the UCL does not authorize courts to “simply impose their own notions of the day as to what is fair or unfair,” it “undeniably establishes . . . a wide standard to guide courts of equity” because “the Legislature evidently concluded that a less inclusive standard would not be adequate.” *Cel-Tech*, 20 Cal. 4th at 181 (quoting *Barquis*, 7 Cal. 3d at 111–12). California courts thus have long held that each UCL case must be analyzed based on its particular facts and circumstances: “no inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself.” *Pohl v. Anderson*, 13 Cal. App. 2d 241, 242 (1936). Instead of a narrowly defined rule, the UCL empowers the court with broad equitable authority to redress a scheme that “violates the fundamental rules of honesty and fair dealing.” *Barquis*, 7 Cal. 3d at 112 (quoting *Claibourne*, 3 Cal. 2d at 698–99).

b. THE CALIFORNIA SUPREME COURT HAS IDENTIFIED THREE TESTS TO DETERMINE WHETHER CONDUCT VIOLATES THE UCL’S “UNFAIR” PRONG

Within the historical broad equitable reach of the UCL, there are three tests that guide trial courts in applying the UCL unfair prong: the balancing test, the tethering test, and the FTC test.

Before the *Cel-Tech* decision in 1999, courts applied a “balancing” test in both consumer and competitor cases. That test requires a court to determine whether a business practice or act is unfair by “examination of the impact of the practice or act on its victim balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant’s conduct against the gravity of

the harm to the alleged victim.” *Progressive W. Ins. Co. v. Superior Court*, 135 Cal. App. 4th 263, 285 (2005) (internal quotation marks omitted). *Cel-Tech* makes clear that this test is no longer appropriate in UCL actions brought by competitors alleging anticompetitive conduct, 20 Cal. 4th at 186–87, but the test continues to be applied in consumer cases, see, e.g., *Progressive W. Ins. Co.*, 135 Cal. App. 4th at 286 (concluding that “the balancing test should continue to apply in consumer cases . . . because consumers are more vulnerable to unfair business practices than businesses and without the necessary resources to protect themselves from sharp practices”).

In *Cel-Tech*, the California Supreme Court articulated what has come to be known as the “tethering” test. 20 Cal. 4th at 180. The Court held that “any finding of unfairness to competitors under [the UCL] be tethered to some legislatively declared policy or proof of some actual or threatened impact on competition.” *Id.* at 186–87 (emphasis added). The Court explained that when a plaintiff brings a UCL claim alleging injury from a direct competitor’s “unfair” act or practice, the word “unfair” means “conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” *Id.* at 187. As the Court recently reaffirmed, however, *Cel-Tech* holds only that the tethering test applies in “an action by a competitor alleging anticompetitive practices.” *Nationwide Biweekly Admin., Inc. v. Superior Court*, 9 Cal. 5th 279, 303 (2020).

Finally, instead of the tethering test or the balancing test, a handful of California appellate courts have borrowed the test used to evaluate conduct for unfairness under Section 5 of the FTC Act, 15 U.S.C. § 45(n), when interpreting the UCL. That test requires “(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.” *Drum v. San Fernando Valley Bar Ass’n*, 182

Cal. App. 4th 247, 257 (2010) (internal quotation marks and citation omitted).

The California Supreme Court recently observed that “[i]n the years since *Cel-Tech*, a split of authority has developed in the Courts of Appeal with regard to the proper test for determining whether a business practice is unfair under the UCL in consumer cases, with appellate decisions adopting three different tests for determining unfairness in the consumer context.” *Nationwide Biweekly Admin.*, 9 Cal. 5th at 303; see also *Zhang v. Superior Court*, 57 Cal. 4th 364, 380 at n.9 (2013) (collecting cases).<sup>3</sup> The California Supreme Court has not yet adopted a particular test to govern UCL consumer cases. For its part, the Ninth Circuit has declined to apply the FTC test with respect to anti-consumer conduct when analyzing the UCL’s unfairness prong. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007).

- c. A UCL PLAINTIFF NEED NOT ESTABLISH A CONCURRENT VIOLATION OF ANTITRUST LAW
- i. CALIFORNIA SUPREME COURT PRECEDENT RECOGNIZES THAT CONDUCT MAY VIOLATE THE UCL WITHOUT VIOLATING ANTITRUST LAW

The California Supreme Court has held that conduct can be unfair under the UCL without being unlawful under any other law: “The statutory language referring to ‘any unlawful, unfair or fraudulent’ practice (italics added) makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law.” *Cel-Tech*, 20 Cal. 4th at 180 (internal quotations omitted). Instead, for an “unfairness” case under *Cel-Tech*, a plaintiff must show harm to competition or a significant threat of such harm. See 20 Cal. 4th at 187. That standard supports “a major purpose” of the UCL: “the preservation of fair business competition.” *Id.* at 180 (quoting *Barquis*, 7 Cal. 3d at 110).

*Cel-Tech* made clear that finding a defendant’s conduct “unfair” in the absence of a violation of any other law should require more than a disgruntled competitor, and identified three such potential circumstances, each of them explicitly designed with fair competition in mind. First, “unfair” could

mean conduct that “threatens an incipient violation of the antitrust laws.” *Cel-Tech*, 20 Cal. 4th at 187. Second, “unfair” could mean violating the “policy or spirit” of the antitrust laws, because the “effects are comparable or the same.” *Id.* And finally, “unfair” could mean conduct that “otherwise significantly threatens or harms competition.” *Id.* All three of these formulations expressly contemplate that conduct may be actionable under the UCL even if it does not rise to the level of an antitrust violation.

*Cel-Tech* recognized that the California Legislature intended for the UCL “to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur . . . precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man’s invention would contrive.” *Id.* at 181. A focus of the UCL is fair competition, and in order to reach novel or unique types of unfair business conduct, the statute is expressly intended to be broader and more flexible than antitrust statutes. The UCL and the antitrust laws provide cumulative remedies by design. *People v. Nat’l Ass’n of Realtors*, 120 Cal. App. 3d 459, 473–74 (1981); see Cal. Bus. & Prof. Code § 17205 (“Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.”).

At the same time, *Cel-Tech* acknowledged that the UCL’s unfair prong is not a license for courts to pursue their own policy agendas. “Although the unfair competition law’s scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair.” *Cel-Tech*, 20 Cal. 4th at 185. That consideration, the Court explained, made it appropriate to “devise a more precise test for determining what is unfair under the unfair competition law” in actions brought by competitors alleging anticompetitive conduct. *Id.* Therefore, although *Cel-Tech* held that “unfair” can mean something less than an antitrust violation, the last 20 years have not seen a rush of trial courts finding anticompetitive unfairness without concurrent unlawfulness. To the contrary, state and federal courts have exercised sound

discretion in making such findings only when circumstances warrant.

The State has identified two published opinions since *Cel-Tech* in which a federal court within the Ninth Circuit allowed a UCL unfairness claim alleging anticompetitive conduct to proceed without a concurrent unlawful claim. In *Sun Microsystems, Inc. v. Microsoft Corp.*, 87 F. Supp. 2d 992, 999 (N.D. Cal. 2000) the court held that “*Cel-Tech* appears to distinguish the proof required in cases by a competitor alleging ‘unfair’ anticompetitive business practices from claims by competitors or consumers for ‘fraudulent’ or ‘unlawful’ business practices or ‘unfair, deceptive, untrue or misleading advertising.’” After Microsoft licensed Sun’s Java technology and then extended it to have deliberate “strategic incompatibilities” with Sun’s original version, the court issued a preliminary injunction against Microsoft under the unfair prong of the UCL, despite recognizing that “[t]here has been no showing that Microsoft has engaged in any fraudulent business practice or scheme or that it violated some specific statutory proscription.” *Id.* at 995, 999. In *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1117-19 (C.D. Cal. 2001), the court ruled that a UCL unfairness claim regarding a pharmaceutical supply contract can proceed “beyond the pleading stage” when “Plaintiff . . . sufficiently alleg[es] that Defendants’ actions were ‘unfair’” even though “Plaintiff does not assert that any of Defendants’ actions were ‘unlawful’ or ‘fraudulent.’” The court went on to grant summary judgment to the defendant when the plaintiff was unable to show that the alleged unfair conduct resulted in reduced supply of medication or prices above competitive levels. *Id.* at 1119.

Thus, while a violation of the UCL’s “unfair” prong will frequently involve a concurrent violation of antitrust statutes or other laws, that is not uniformly true.

## II. THE “SAFE HARBOR” RULE APPLIES AT MOST TO CONDUCT THAT IS EXPRESSLY PRECLUDED FROM ANTITRUST LIABILITY

The California Supreme Court has recognized that “[w]hen specific legislation provides a ‘safe harbor,’

plaintiffs may not use the general unfair competition law to assault that harbor.” *Cel-Tech*, 20 Cal. 4th at 182. The California Supreme Court has emphasized, however, that the “safe harbor” rule is narrow. To “bar a UCL action, another statute must absolutely preclude private causes of action or clearly permit the defendant’s conduct.” *Zhang*, 57 Cal. 4th at 379–80 (citing *Stop Youth Addiction*, 17 Cal. 4th at 565–66 and *Cel-Tech*, 20 Cal. 4th at 182–83). In other words, a defendant seeking to invoke the “safe harbor” rule “must show that a statute ‘explicitly prohibit[s] liability for the defendant’s acts or omissions,’ or ‘expressly precludes an action based on the conduct.’” *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1379 (2012) (quoting *Krumme*, 123 Cal. App. 4th at 940 n.5 and *Chavez*, 93 Cal. App. 4th at 374). “To forestall an action under the unfair competition law, another provision must actually ‘bar’ the action or clearly permit the conduct. There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful.” *Cel-Tech*, 20 Cal. 4th at 183.

The California Court of Appeal has applied that safe-harbor principle to certain longstanding antitrust doctrine that has been recognized by the federal courts. In *Chavez*, the plaintiff challenged a minimum resale price agreement that the court deemed to be unilateral manufacturer conduct “permissible under the *Colgate* doctrine,” which dates back over a century. 93 Cal. App. 4th at 367 (citing *United States v. Colgate & Co.*, 250 U.S. 300 (1919)). *Chavez* held that the defendant’s *Colgate*-compliant pricing policy was affirmatively permitted under the antitrust laws and the claims were accordingly subject to demurrer. *Id.* In accordance with *Cel-Tech*, the *Chavez* court did “not hold that in all circumstances an ‘unfair’ business act or practice must violate an antitrust law to be actionable under the unfair competition law.” *Chavez*, 93 Cal. App. 4th at 376. Rather, the court held that conduct that was “deemed reasonable and condoned under the antitrust laws” could not satisfy the “unfair” prong of the UCL. *Id.* Thus, the appeals court held that conduct that was expressly precluded from antitrust liability would in essence be granted a safe harbor under the UCL.

*San Jose* likewise involved conduct that was deemed to qualify for the safe-harbor rule because it was expressly precluded from antitrust liability—in that case, by baseball’s longstanding exemption from the antitrust laws. See 776 F.3d at 691–92. In *San Jose*, this Court explained that “[o]ur analysis is governed by three Supreme Court cases decided over the course of half a century; taken together, they set the scope of baseball’s exemption from the antitrust laws.” *Id.* at 688–89.<sup>4</sup> Similar to *Chavez*, *San Jose* holds that an express exemption of this kind qualifies for the safe-harbor rule and the claims were subject to a motion to dismiss. *Id.* at 691–92.

But neither of these cases stand for the proposition (suggested in an unpublished decision from this Court) that “a finding that the conduct is not an antitrust violation precludes a finding of unfair competition,” *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App’x 554, 557 (9th Cir. 2008). That reading is overbroad and cannot be squared with California Supreme Court precedent.

Furthermore, a failure of proof with respect to a plaintiff’s companion antitrust violation does not grant the defendant a safe harbor from the UCL. *Chavez* and *San Jose* were both decided at the initial pleading stage, where the courts held that as a matter of law, no such antitrust claim could be stated and thus the UCL “unfair” claim based on same conduct should also be dismissed. *San Jose*, 776 F.3d at 688; *Chavez*, 93 Cal. App. 4th at 367; see also *LiveUniverse*, 304 F. App’x at 555–56. *Chavez* and *San Jose* do not address a situation where an antitrust claim could have been proven, but the plaintiff failed to carry that burden. The broad equitable reach of the UCL is expressly designed to allow a trial court to find a UCL violation where it finds anticompetitive effects but not necessarily a violation of the antitrust laws. As discussed above, the California Legislature specifically intended for the UCL to empower courts with broad equitable authority to redress schemes that “violate the fundamental rules of honesty and fair dealing.” *Barquis*, 7 Cal. 3d at 112. Such flexibility is needed to “enable judicial tribunals to deal with the innumerable new schemes which the fertility of

man’s invention would contrive.” *Cel-Tech*, 20 Cal. 4th at 181.

d. NOTHING IN CALIFORNIA SUPREME COURT PRECEDENT REQUIRES APPLYING SPECIFIC METHODS FROM ANTITRUST ANALYSIS TO UCL CLAIMS AND COURTS ARE FREE TO CONSIDER A VARIETY OF FACTORS

The California Supreme Court has made clear that the “unfair” prong of the UCL does not depend on a finding that the conduct in question violates antitrust law (or any other law). Accordingly, the UCL does not require the type of quantitative analysis commonly found in antitrust cases, such as the highly technical “substitutability” analysis typically required for establishing an antitrust product market. See, e.g., 1-ER-59–61.

Indeed, it would be illogical for a competition law that is expressly intended to be broader and more flexible than antitrust statutes to have the exact same limitations as those antitrust statutes. Such a requirement in this category of UCL cases would make *Cel-Tech* and its tethering test effectively a nullity. It is clear that the California Supreme Court did not intend such a result. Instead, UCL actions “often concern a nuanced and qualitative determination regarding whether a business practice should properly be considered unfair or deceptive within the meaning of the UCL” and “often requir[e] the consideration of a variety of factors or circumstances identified in prior cases in California or other jurisdictions or in administrative guidelines developed by the Federal Trade Commission or other consumer protection administrative agencies.” *Nationwide*, 9 Cal. 5th at 304. In exercising its equitable powers, a trial court is free to consider this “variety of factors” and is not constrained by standard antitrust strictures and precedents.

Rather, as *Cel-Tech* explains, the UCL may reach conduct that “violates the policy or spirit” of the antitrust laws, even if there has not been an evidentiary showing sufficient to make out a formal antitrust violation. 20 Cal. 4th at 187. Limits on the free flow of information—and in particular price information—have been found to have anticompetitive effects and be against public

policy under California law. In *Oakland-Alameda County Builders' Exch. v. F. P. Lathrop Constr. Co.*, 4 Cal. 3d 354 (1971) (*Lathrop*), the California Supreme Court explained that an agreement that “directly interfere[d] with the free play of market forces” by “impos[ing] a rule of silence” was “no less stifling to open price competition than [an] agreement not to advertise.” *Id.* at 363–64 (citing *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961)); see also, e.g., *Marks v. Loral Corp.*, 57 Cal. App. 4th 30, 53 (1997) (“[T]he use of price is basic to any functioning economic system, and marks the classical difference between a command and a free market economy.”).

*Lathrop* involved an agreement that forbade subcontractors from submitting bids to general contractors outside of the builder’s exchange bidding process and prevented general contractors from seeing sealed bids from subcontractors until the bidding process ended. 4 Cal. 3d at 359–60. The California Supreme Court determined that the builder’s exchange’s restrictions on the flow of price information had an anticompetitive effect and violated public policy, since “public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand” and “‘economic forces of supply and demand’ can have little impact on a bidding system which is conducted in secrecy and which leaves general contractors no alternative but to accept the lowest bids submitted through the Depository or withdraw from the bidding.” *Id.* at 363–64 (quoting *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 44 (1946)).

The U.S. Supreme Court’s analysis of a credit-card company’s anti-steering provisions under the federal Sherman Act in *Ohio v. American Express*, 138 S. Ct. 2274 (2018), has no direct relevance to the question of whether another anti-steering provision would violate the UCL. No California state law precedent applies the novel holdings of the closely divided *American Express* Court to any analysis under the Cartwright Act or the UCL, and there is no indication that any California appeals court would be likely to

do so. “[S]imply because the [U.S.] Supreme Court has changed course regarding the Sherman Act does not mean the California Supreme Court will regarding the Cartwright Act.” *Darush v. Revision LP*, No. CV 12-10296 GAF AGRX, 2013 WL 1749539, at \*6 (C.D. Cal. Apr. 10, 2013). “Until the California Supreme Court has given a persuasive indication that it will, the Court cannot simply disregard” the California Supreme Court’s existing precedent. *Id.*<sup>5</sup> California courts have not held *American Express* to be relevant for any analysis of anti-steering conduct on platforms under the Cartwright Act or the UCL.

## 2. AN INJUNCTION PROHIBITING A CALIFORNIA COMPANY FROM VIOLATING THE UCL IN INTERACTIONS WITH OUT-OF-STATE CUSTOMERS IS CONSISTENT WITH THE COMMERCE CLAUSE

The UCL authorizes California courts to enjoin California companies from violating the statute in their interactions with out-of-state customers, thereby denying to California companies the ability to injure others with “conduct emanat[ing] from California,” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 243 (2001)<sup>6</sup>; see also *In re Tobacco II Cases*, 46 Cal. 4th at 312 (The UCL’s focus is “on the defendant’s conduct, rather than the plaintiff’s damages, in service of the statute’s larger purpose of protecting the general public against unscrupulous business practices.”). An injunction against a California company under the UCL limits the anticompetitive behavior of the company within the State, which can result in incidental benefits to consumers and competitors elsewhere. See, e.g., *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 616 (1987); *Norwest Mortg., Inc. v. Superior Court*, 72 Cal. App. 4th 214, 222–25 & n.13 (1999).

This approach is consistent with the Commerce Clause, which “precludes the application of a state statute to commerce that takes place *wholly outside of the State’s borders*, whether or not the commerce has effects within the State.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (emphasis added). *Healy* concerned a state pricing-regulation statute that restricted out-of-state commerce for the benefit of its own state residents. See *id.* at 326–29. In contrast, barring a California company from enforcing a

contract that violates the UCL does not restrict commerce “wholly outside” of California. Rather, such an injunction would bar that company from enforcing anticompetitive contract terms that arose from decisions made at the company’s California headquarters, have effect in California, and in many cases are governed by California law. If the UCL cannot apply to a California company’s interactions with out-of-state customers, a company could avail itself of the benefits of California law while using California as a launching pad for anticompetitive acts with effects in other States.

### 3. THIS COURT SHOULD CERTIFY TO THE CALIFORNIA SUPREME COURT ANY NOVEL QUESTIONS REGARDING THE UCL’S PROPER SCOPE AND INTERPRETATION

If this Court is uncertain about whether the district court correctly applied the UCL, it should certify that issue to the California Supreme Court, as authorized by Rule 8.548 of the California Rules of Court. This Court has recognized the importance of deferring to the California Supreme Court regarding the proper interpretation of the UCL, *see Lozano*, 504 F.3d at 736, and the California Supreme Court should remain the foremost authority on the scope and interpretation of the UCL.

If this Court believes that the UCL precedents discussed above do not provide adequate guidance to resolve this appeal, certification would be appropriate because the UCL issues would be clearly pivotal to the outcome of this appeal and would involve an issue that no California Supreme Court case has addressed. *Murray v. BEJ Mins, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019). Moreover, all relevant considerations for ordering certification would be met. These considerations include: (1) whether the question is unresolved with important public policy consequences; (2) whether the question is “new, substantial and of broad application”; (3) whether certification would overburden the state court; and (4) “the spirit of comity and federalism.” *Id.* The UCL is an important and far-reaching California statute, making it appropriate for the California Supreme Court to consider any novel state law questions in the first instance. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 294 F.3d 1085, 1092 (9th Cir.

2002) (certifying questions to Washington Supreme Court due to the “sensitivity and complexity of . . . state-law issues, and because of their significant policy implications”). In such cases, the California Supreme Court is often “better qualified” to answer the question. *See id.*

In addition, the importance of the issue and the spirit of comity and federalism would be served by permitting the state court the opportunity to resolve these important questions of California state law. While this Court should be “[m]indful of the burgeoning caseload of the California Supreme Court,” certification in this case would certainly not be “presum[ing] to certify a run-of-the mill case” to the California Supreme Court. *Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003); *see, e.g., Barnes-Wallace v. City of San Diego*, 607 F.3d 1167, 1170 (9th Cir. 2010) (seeking certification where case raised difficult questions of state law with broad implications).

## II. CONCLUSION

The Court should ensure that the UCL is properly applied in accordance with California law.

1. The State, through its Attorney General, files this amicus brief pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure.
2. The statute’s 2004 amendment, enacted by statewide voter proposition, limited private plaintiff standing in certain UCL cases, but did not modify the scope of unfair practices covered by the law.
3. *See Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176, 1192 (2012) (public policy that is predicate for action must be tethered to specific constitutional, statutory or regulatory provisions); *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 539 (2008) (applying balancing test, but also examining whether practice offends established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers); *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394, 1403 (2006) (consumer injury must be substantial, and neither outweighed by countervailing benefits nor avoidable by consumers); *Progressive West Ins. Co. v. Superior*

*Court*, 135 Cal. App. 4th 263, 285 (2005) (impact of the act or practice on victim is balanced against reasons, justifications and motives of the alleged wrongdoer).

4. Citing *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953); *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972).
5. See also *In re Cipro Cases I & II*, 61 Cal. 4th 116, 142 (2015) (“Interpretations of federal antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California’s sister states around the turn of the 20th century.”)
6. Disapproved of on other grounds by *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260, 269 (2018).

# INCREASING PRIVATE EQUITY INVESTMENTS IN HEALTHCARE RAISE ANTITRUST AND UNFAIR BUSINESS PRACTICE CONCERNS

Written by Mary Mitchell<sup>1</sup>

## I. INTRODUCTION

Changes in the regulation of U.S. financial markets that began in the 1980s have allowed private equity (PE) firms to thrive in the last few decades.<sup>2</sup> In that time, PE investments in healthcare have increased steadily, particularly since 2010.<sup>3</sup> PE firms now play a significant role in the ownership and management of many U.S. healthcare facilities and providers. In 2018, PE funds were involved in 45% of mergers and acquisitions in the healthcare sector.<sup>4</sup>

Whether private equity investment provides a net benefit or net detriment to the long-term quality of healthcare markets is the subject of much debate. Supporters argue that PE acquisitions increase efficiency and innovation for both doctors and patients while maximizing returns for investors. Medical practices can derive benefits from consistent access to capital, including referrals from other practices owned by the same PE firm.<sup>5</sup> As a result, many physicians, especially those seeking to spend less time on the administrative side of

medicine, have actively sought out PE ownership for their practices.<sup>6</sup>

Despite these upsides, PE firms have come under fire amid reports of staffing shortages,<sup>7</sup> cost hikes, overreliance on cheap labor,<sup>8</sup> and pressure placed on practitioners to treat more patients or perform unnecessary procedures.<sup>9</sup> Critics say that the PE business model, which aims to buy, build, and sell on a relatively quick timeline, is at odds with a patient-focused approach to medical care and undermines the doctor-patient relationship.<sup>10</sup>

Relatedly, antitrust experts have raised concerns that PE firms increase healthcare market consolidation and engage in unfair business practices, and that these tactics contribute to cost and quality issues.<sup>11</sup> As a result, a diverse set of voices—including medical workers, patients, and lawmakers—have called for greater scrutiny of the ways that private equity can impact healthcare markets.

Though it remains to be seen if this increased attention will result in substantive shifts, some signs of change are afoot. The Federal Trade Commission (FTC) and Department of Justice (DOJ) have expressed their commitment to getting to the bottom of the issue and have indicated that they are actively exploring ways to increase oversight for PE deals.<sup>12</sup> California has also taken recent action, and a bill to heighten reporting requirements is currently under consideration in the California State Senate.<sup>13</sup>

## II. BACKGROUND: PRIVATE EQUITY STRUCTURE

Private equity firms establish a PE fund by borrowing money from investors, managing 4.5 funds at a time on average.<sup>14</sup> During this time, PE funds makes acquisitions that they then aim to sell for a profit.<sup>15</sup> This cycle operates on a tight timeline—a typical PE fund operates for ten years.<sup>16</sup> PE funds are structured as limited partnerships, with investors serving as limited partners and the PE firm itself serving as general partner.<sup>17</sup> The general partner contributes 1–5% of a fund’s total capital, limited partners contribute 20–30%,<sup>18</sup> and around 70–80% of the fund is comprised of debt equity.<sup>19</sup> U.S. tax policy incentivizes this model because firms can deduct interest paid on debts from their corporate income taxes.<sup>20</sup>

After acquisition, PE firms have wide latitude to make strategic changes that will increase their profits in a sale.<sup>21</sup> Firms exercise significant influence over healthcare company leadership by appointing the board of directors.<sup>22</sup> Firm principals often serve on the board themselves.<sup>23</sup> Furthermore, firms retain the power to fire the Chief Medical Officer.<sup>24</sup> Strategies employed by PE firms to increase an acquisition’s value include merging the acquisition with another company in the firm’s portfolio, reducing staff, and negotiating increased reimbursement rates with insurance companies.<sup>25</sup>

When the time comes to sell a company—usually within a timeframe of three to seven years<sup>26</sup>—PE firms will sell to a strategic acquirer, another PE fund, or back to the acquired company; they can also take

the company public.<sup>27</sup> Profits from the sale are then distributed among the fund’s partners. Provided that a sale exceeds a certain threshold, the general partner typically receives 20% of profits regardless of the size on their own contribution.<sup>28</sup> PE firms therefore can maximize profits without relying on a substantial investment of their own money.<sup>29</sup>

## III. TRENDS IN PRIVATE EQUITY INVESTMENT IN HEALTHCARE

Several factors make United States healthcare markets attractive to private equity investors. The United States spends more on healthcare than any other country,<sup>30</sup> and the rate of healthcare spending is projected to grow at 5.5% per year through 2027.<sup>31</sup> An aging population and high rates of chronic illness ensure continued need for care.<sup>32</sup> Investors can also rely on third-party spenders, including the federal government, which contributes 40% of U.S. healthcare spending.<sup>33</sup> Additionally, the fragmented nature of healthcare sectors and subsectors, as well as ever-changing needs for technology, provides fertile ground for PE’s “buy and build” strategy.<sup>34</sup>

Private equity transactions are generally not subject to reporting requirements unless they reach the basic threshold set by the Hart-Scott-Rodino Act (Section 7A of the Clayton Act),<sup>35</sup> which was \$101 million for 2022.<sup>36</sup> As a result, data about PE activity relies on public announcements and proprietary data from industry insiders and does not always paint the full picture.<sup>37</sup>

However, it is clear that PE firms have been making healthcare acquisitions since the 1990s, and that their investments have been steadily growing.<sup>38</sup> In 2000, PE invested less than \$5 billion in healthcare; in 2018, it invested over \$100 billion;<sup>39</sup> and 2021 saw the most PE deals in healthcare yet, with investments totaling \$194.5 billion.<sup>40</sup> Overall PE activity in healthcare has declined so far in 2022, with \$22.7 billion spent through May.<sup>41</sup> Experts say that inflation, rising interest rates, and the war in Ukraine are to blame.<sup>42</sup> Despite these speed bumps, 2022 is on track to be a strong year by historical standards.<sup>43</sup>

In addition to hospitals, nursing homes, and pharmaceuticals, PE firms have made significant acquisitions in physician staffing groups.<sup>44</sup> Emergency medicine, anesthesiology, and radiology were common acquisitions of the 2010s, while investments in single-specialty and outpatient practices like dermatology, orthopedics, ophthalmology, and emergency veterinary care have emerged as recent targets.<sup>45</sup>

Most PE acquisitions operate in one of three ways: leveraged buyouts (acquisitions made largely with borrowed funds), add-ons (when a PE firm merges an acquired company into another company in its portfolio), or secondary buyouts (when one PE firm sells to another).

Notably, add-ons are an increasingly prominent acquisition strategy. Between the years 2000 to 2005, 40% of PE healthcare investments were leveraged buyouts, while add-ons made up 26% of investments, and secondary buyouts 15%.<sup>46</sup> In contrast, between 2014 and 2019, 35% of PE dollars spent on healthcare were add-ons, 34% were leveraged buyouts,<sup>47</sup> and 23% were secondary buyouts.<sup>48</sup> Nearly three times as many deals between 2013 to 2019 were add-ons versus leveraged buyouts: 791 and 2,035, respectively.<sup>49</sup>

One explanation for the growth of add-ons is that acquiring and selling larger organizations is harder to pull off profitably within PE firms' typical three-to-seven-year timeline.<sup>50</sup> The PE model incentivizes add-ons because a "buy and build" strategy can effectively increase a company's value within a PE fund's ten-year lifespan.<sup>51</sup> Add-ons are a particularly popular strategy in physician staffing, where firms acquire small companies that focus on specialty practices and combine them into large-scale, multi-specialty organizations that operate across the United States.<sup>52</sup>

Federal and state lawmakers have homed in on PE involvement in healthcare after data revealed that PE ownership results in more surprise billing to patients, and that PE firms spent millions to defeat legislation that would have protected patients

against it.<sup>53,54</sup> Surprise billing has caused a major outcry from struggling families and lawmakers. As a result, Congress initiated an investigation of PE firms' involvement in surprise billing practices that culminated in the passage of the No Surprises Act, which aims to protect consumers from exorbitant bills.<sup>55</sup>

Additionally, multiple studies have found that hospitals acquired by PE firms tend to have higher charge-to-cost ratios and higher income,<sup>56</sup> and this gap has grown over time.<sup>57</sup> Health economists at Yale University found that after PE-owned Envision Healthcare Corporation took over staffing for an emergency room, it nearly doubled the cost of care.<sup>58</sup> These numbers could indicate that PE-owned hospitals are charging for more expensive procedures than what was actually needed or performed.<sup>59</sup> One study found that PE ownership increases the short-term mortality of Medicare patients in nursing homes by 10%,<sup>60</sup> despite billing an average of 10% more per patient.<sup>61,62</sup>

## IV. ATTENTION AT THE FEDERAL LEVEL

The Biden administration has had tough words for private equity as a suspected threat to the affordability and quality of care. In his 2022 State of the Union Address, President Biden announced a crackdown on "Wall Street firms" that have been "tak[ing] over more nursing homes" and decreasing quality while increasing costs.<sup>63</sup> The crackdown aligns with his July 2021 executive order establishing a government-wide effort to reinvigorate competition within multiple sectors, including health,<sup>64</sup> as well as a February 2022 briefing on the detrimental impacts of PE ownership of nursing homes.<sup>65</sup> In the briefing, the White House admonished private equity for putting "profits before people," and noted that PE is a "particularly dangerous model" within the healthcare context.<sup>66</sup>

FTC Chair Lina Khan has used similar language. In a September 2021 memo to Federal Trade Commissioners and Commission staff, Khan included investigation of private equity in her list of priorities, saying that the FTC will examine whether

PE encourages unfair competition and undermines consumer safety.<sup>67</sup>

To that end, the FTC and DOJ held a public comment period and listening forums to gather input on federal merger guidelines earlier this year.<sup>68</sup> Many of the comments the FTC received identified PE-driven consolidation in healthcare as a threat to working conditions and quality of care.<sup>69</sup> Likewise, patients, healthcare workers, and academics at the April listening forum on health shared their experiences dealing with negative impacts of consolidation in research and medicine.<sup>70</sup>

On June 3, 2022, Andrew Forman gave his first public remarks as Deputy Assistant Attorney General of the DOJ Antitrust Division at the American Bar Association's Antitrust in Healthcare Conference.<sup>71</sup> He said that "[p]rotecting competition in health care is among the highest priorities of the Antitrust Division," and that "[v]igorous competition in health care means lower costs . . . increased quality . . . innovations . . . and more good-paying jobs."<sup>72</sup> He also emphasized the special relationship between doctor or nurse and patient, and cautioned against "distant private equity owner[s]" who can "influence, or in some cases even determine" the treatment a patient receives.<sup>73</sup> Forman noted that private equity investment can "add value and help," but that they can also "reduc[e] quality and imped[e] innovation which competition brings." Within this context, he called out private equity "roll-ups," or add-ons, and the fact that smaller deals can lead to both vertical and horizontal consolidation within a market.<sup>74</sup> To get to the bottom of this issue, Forman said the Antitrust Division is analyzing whether PE can stifle competition, and also whether PE is shirking their reporting responsibilities under the Hart-Scott-Rodino Act.<sup>75</sup> Furthermore, he emphasized that the DOJ is "thinking a lot about enhancing antitrust enforcement" for PE specifically.<sup>76</sup>

No dramatic policy changes have resulted from this increased scrutiny so far, but gears are turning.

For one, in February 2021, the FTC and DOJ put an indefinite hiatus on exercising authority to allow early termination of the waiting period for parties reporting under the Hart-Scott-Rodino Act.<sup>77</sup> Typically, regulators have thirty days to review filings mandated by the Act, but can allow mergers to continue before that window has elapsed if the deal appears benign.<sup>78</sup> Commissioner Rebecca Slaughter said the FTC needs the full thirty days "to ensure we are doing right by competition and consumers."<sup>79</sup> Though the pause was supposed to be temporary, Commissioner Noah Phillips recently indicated that there are no plans to reinstate early terminations.<sup>80</sup>

The FTC also heightened prior approval requirements in July 2021 by reinstating a requirement that parties involved in anticompetitive mergers obtain approval for additional acquisitions in relevant markets for at least ten years following the offending deal.<sup>81</sup> This policy had previously been in effect but was rescinded in 1995.<sup>82</sup>

Additionally, in June 2022, the FTC implemented new prior notice and prior approval requirements on a PE firm seeking approval for a veterinary services merger. The order requires JAB Consumer Partners (JABCP) to divest several veterinary clinics across the country before proceeding with a \$1.65 billion dollar acquisition of SAGE Veterinary Partners.<sup>83</sup> JABCP must also receive prior approval for any acquisition of a specialty or emergency veterinary clinic within twenty-five miles of another clinic owned by JABCP in California or Texas over the next ten years.<sup>84</sup> JABCP also must provide prior notice for acquisition of any specialty veterinary clinic throughout the country that lies within twenty-five miles of another JABCP clinic.<sup>85</sup> The FTC found that, without these provisions, the proposed acquisition could create a monopoly for veterinary services in several U.S. markets, including San Francisco, Oakland, and Concord, California.<sup>86</sup>

FTC Chair Khan identified the prior approval requirement as "the first of its kind in a Commission order."<sup>87</sup> The provision goes beyond the FTC's reinstated prior approval policy, which applies only to markets relevant to the initial complaint.<sup>88</sup> By

contrast, the Commission's order to JABCP applies prior approval requirements to proposed deals throughout California and Texas, even where the FTC did not find threat of monopolization in its first review.<sup>89</sup> The prior notice requirement also extends the FTC's review beyond the geographic and service markets identified in the complaint.

These two provisions raised debate between the Democratic and Republican Commissioners about the scope of out-of-market remedies.<sup>90</sup> At the core of the debate are differing perspectives on the role of PE investment in healthcare, and whether the PE model should, by its nature, raise concerns for antitrust enforcers.<sup>91</sup> Democratic Commissioners Khan, Slaughter, and Alvaro Bedoya argued that the prior notice and prior approval provisions help "address stealth roll-ups by private equity firms," which they said raise special concerns within healthcare markets.<sup>92</sup> In their concurring opinion, Republican Commissioners Phillips and Christine Wilson called out the Democrats' "obvious distaste for private equity as a business model," and expressed fears that the Democrats would treat PE as "disfavored groups" by imposing restrictions based on "who they are rather than what they have done."<sup>93</sup> Despite the Republican Commissioners' strong reservations on this point, the order was passed 5-0.<sup>94</sup>

## V. STATE ACTIONS

Washington, Florida, Oregon, Indiana, Nevada, and California have all introduced bills that would heighten reporting requirements beyond Hart-Scott-Rodino Act thresholds.<sup>95</sup> California legislators have introduced bills targeting healthcare consolidation for the last three years.

California Senate Bill 977, introduced in 2020, would have required that entities pursuing deals that would result in acquisition or change of control<sup>96</sup> for a healthcare provider or facility obtain pre-approval from the California Attorney General.<sup>97</sup> Though SB 977 did not pass the Senate,<sup>98</sup> a related bill was soon introduced in 2021. As first written, Assembly Bill 1132, called the Health Care Consolidation and

Contracting Fairness Act, would have required AG approval for healthcare acquisitions valued at \$5 million or more.<sup>99</sup> Under the terms of the bill, the AG would be required to hold a public hearing and have ninety days to issue a decision.<sup>100</sup> Additionally, the bill gave the AG discretion to deny proposals for a wide variety of reasons, including impacts on quality of care.<sup>101</sup> This latter provision would have increased antitrust authority beyond any federal or state regulation to date.<sup>102</sup> However, the bill was heavily amended for unclear reasons, and now focuses on separate healthcare issues.<sup>103</sup>

This year, AB 2080, the Health Care Consolidation and Contracting Fairness Act of 2022, was introduced in February and passed the California State Assembly in May.<sup>104</sup>

AB 2080 proposed to expand the state's oversight of healthcare mergers and acquisitions by requiring written consent by the AG for any deal involving a for-profit medical group, hospital, skilled nursing facility, acute psychiatric hospital, healthcare service plan, or health insurer valued at \$15 million or more.<sup>105</sup> The bill would have required merging parties to give the AG notice ninety days prior to the acquisition, or at the same time that they provide notice to other federal or state agencies (whichever comes sooner).<sup>106</sup> AB 2080 was held in the Senate Health Committee and will not move forward.<sup>107</sup>

## VI. LITIGATION: AMERICAN ACADEMY OF EMERGENCY MEDICINE V. ENVISION HEALTHCARE CORPORATION

Though still in its early stages, a suit filed in federal court in the Northern District of California recently brought the spotlight on PE investments in healthcare to the courtroom.

In December 2021, the American Academy of Emergency Medicine Physician Group (AAEM-PG) filed suit against Envision Healthcare Corporation for violating California's corporate practice of medicine laws and Unfair Competition Law by offering kickbacks to hospitals, requiring healthcare workers to sign restrictive covenants, and employing

false and misleading advertising tactics.<sup>108</sup> Envision became the largest emergency medicine staffing company in the country when it merged with AmSurg Corporation in 2016.<sup>109</sup> Private equity firm Kohlberg Kravis Roberts & Company owns the physician staffing powerhouse as well as medical practices in other specialties.<sup>110</sup>

Envision made headlines as a source of a disproportionate number of instances of surprise medical billing,<sup>111</sup> and for contributing millions to a dark money campaign to defeat surprise billing legislation.<sup>112</sup> Surprise billing is of particular concern in emergency rooms, where physicians do not see what their patients are charged for, and patients are usually in no position to shop around for alternatives.<sup>113</sup> Envision's focus on ER staffing means the tactic would have dramatic impacts on profits. As previously noted, one study found that Envision nearly doubled the cost of care when it took over staffing at emergency rooms.<sup>114</sup> And at one hospital, the percentage of patients billed for the most expensive level of care jumped from 6% to 28% after Envision took over emergency room staffing.<sup>115</sup>

In its suit, AAEM-PG alleges that Envision engages in unlawful conduct under California's corporate practice of medicine laws, California Business & Professional Code §§ 2400 *et seq.*, which prohibit corporations and any unlicensed entity from practicing medicine.<sup>116</sup> California's corporate practice of medicine doctrine has been in effect since the 1920s, when the American Medical Association successfully advocated for state laws that prohibit corporations from managing medical practices, require that practices are doctor-owned, and require states to issue licenses for doctors and nurses.<sup>117</sup> These laws, including California's, have since included various exceptions to the rule, such as for incorporated doctors' practices, hospitals, and management services organizations that connect hospitals and physicians in various specialties.<sup>118</sup> In describing the motivation for the doctrine, the district court overseeing the AAEM-PG case has explained that "[w]hile the principal evils of the corporate practice of medicine may arise from . . .

the profit motive . . . the courts have also noted the danger of lay control."<sup>119</sup>

AAEM-PG's complaint alleges that Envision's business constitutes lay ownership of medical practices and violates the corporate practice of medicine doctrine. Relatedly, it claims that Envision's billing practices amount to illegal fee-sharing with a corporate entity.<sup>120</sup>

AAEM-PG also alleges that Envision violates California's Unfair Competition Law (UCL) in multiple ways.<sup>121</sup> AAEM-PG claims that, by violating corporate practice of medicine laws, Envision violates the "unlawful" prong of the UCL.<sup>122</sup> Additionally, AAEM-PG says that by offering reduced prices for hospitals at its anesthesia groups in exchange for exclusive emergency room contracts, Envision is guilty of providing illegal kickbacks.<sup>123</sup> Furthermore, the complaint alleges that Envision restrains competition by requiring its employees to sign non-compete agreements.<sup>124</sup> Envision is also accused of engaging in false advertising by misrepresenting itself as a physician group.<sup>125</sup> Finally, the complaint claims that Envision violates the Cartwright Act by stifling competition with legitimate and law-abiding management service organizations and that AAEM-PG has lost business as a result.<sup>126</sup>

AAEM-PG seeks declaratory relief that Envision's business practices constitute the corporate practice of medicine, that its restrictive covenants are invalid, and that the incentives it offers for exclusive contracts are illegal.<sup>127</sup> It additionally asks that Envision be enjoined from engaging in corporate practice of medicine and offering kickbacks to hospitals.<sup>128</sup> On May 27, 2022, the district court denied Envision's motion to dismiss.<sup>129</sup>

## VII. CONCLUSION

It is still unclear whether the present moment is leading towards a major inflection point in antitrust regulation of PE, but change seems likely. The FTC has reportedly been asking more questions than usual during merger reviews involving PE firms.<sup>130</sup>

Additionally, the FTC’s and DOJ’s public comment period on merger guidelines could be the first step in a restructuring of merger review. Meanwhile, the JAB Consumer Partners order could signal a new approach to PE acquisitions that looks beyond the limits of traditional geographic and service market definitions.

At the same time, some experts remain doubtful that recent scrutiny will amount to substantive shifts in antitrust enforcement and say that recent enforcement actions have been par for the course.<sup>131</sup> Despite a marked increase in the number of transactions reported under Hart-Scott-Rodino requirements in the last ten years, the number of challenged mergers has not yet increased under the Biden administration, and actually declined in 2021.<sup>132</sup>

One likely avenue for change would be to increase transparency by lowering the Hart-Scott-Rodino threshold or instituting other reporting requirements for physician practice acquisitions or for private equity acquisitions generally.<sup>133</sup> States could also continue to pursue laws like California’s AB 2080 that heighten scrutiny within state boundaries.

---

1. Mary Mitchell is a 2L at University of California, Hastings College of the Law. She was a Summer Associate at Pritzker Levine LLP in 2022 and continues to work there during the school year.
2. Eileen Appelbaum & Rosemary Batt, *Private Equity Buyouts In Healthcare: Who Wins, Who Loses?* 4 (Inst. for New Econ. Thinking, Working Paper No. 118, 2020), [https://www.ineteconomics.org/uploads/papers/WP\\_118-Appelbaum-and-Batt-2-rb-Clean.pdf](https://www.ineteconomics.org/uploads/papers/WP_118-Appelbaum-and-Batt-2-rb-Clean.pdf).
3. *Id.*
4. *Id.* at 17.
5. MEDICARE PAYMENT ADVISORY COMM’N, REPORT TO CONGRESS: MEDICARE AND THE HEALTH CARE DELIVERY SYSTEM 99–100 (2021), [https://www.medpac.gov/wp-content/uploads/import\\_data/scrape\\_files/docs/default-source/reports/jun21\\_medpac\\_report\\_to\\_congress\\_sec.pdf](https://www.medpac.gov/wp-content/uploads/import_data/scrape_files/docs/default-source/reports/jun21_medpac_report_to_congress_sec.pdf).
6. MEDICARE PAYMENT ADVISORY COMM’N, *supra* note 5, at 98.

7. Andrew Forman, *The Importance of Vigorous Antitrust Enforcement In Health Care*, U.S. DEP’T OF JUST. (June 3, 2022), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust>.
8. Emily Pisacreta & Emmarie Huetteman, *Betting On “Golden Age” of Colonoscopies, Private Equity Invests In Gastro Docs*, KAISER HEALTH NEWS (May 27, 2022), <https://khn.org/news/article/private-equity-gastroenterologist-colonoscopy>.
9. MEDICARE PAYMENT ADVISORY COMM’N, *supra* note 5, at 98.
10. Forman, *supra* note 7.
11. RICHARD M. SCHEFFLER ET AL., SOARING PRIVATE EQUITY INVESTMENT IN THE HEALTHCARE SECTOR: CONSOLIDATION ACCELERATED, COMPETITION UNDERMINED, AND PATIENTS AT RISK 2 (2021), <https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf>.
12. Lina M. Khan, *Vision and Priorities for the FTC* at 3, FED. TRADE COMM’N (Sept. 22, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1596664/agency\\_priorities\\_memo\\_from\\_chair\\_lina\\_m\\_khan\\_9-22-21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf); Arindam Kar, *Private Equity Pass No More: Antitrust Enforcers Look to Increase Scrutiny on “Roll Up” Acquisitions*, JD SUPRA (June 16, 2022), <https://www.jdsupra.com/legalnews/private-equity-pass-no-more-antitrust-2436455>.
13. Dennis Williams et al., *Proposed California Legislation Imposes Attorney General Approval Requirements*, KIRKLAND & ELLIS LLP (June 21, 2022), <https://www.kirkland.com/publications/kirkland-alert/2022/06/california-attorney-general-approval-requirements>.
14. MEDICARE PAYMENT ADVISORY COMM’N, *supra* note 5, at 77.
15. *Id.* at 86.
16. *Id.*
17. *Id.* at 77.
18. *Id.*
19. Appelbaum & Batt, *supra* note 2, at 6.
20. Anaeze C. Offodile II et al., *Private Equity Investments In Health Care: An Overview Of Hospital And Health System Leveraged Buyouts, 2003–17*, 40 HEALTH AFFAIRS 719, 719 (2021).
21. Appelbaum & Batt, *supra* note 2, at 79.
22. *Id.* at 6.

23. *Id.*
24. *Id.* at 59.
25. Zawn Villines, *What is Private Equity In Healthcare?*, MED. NEWS TODAY (Nov. 10, 2021), <https://www.medicalnewstoday.com/articles/private-equity-in-healthcare>.
26. MEDICARE PAYMENT ADVISORY COMM'N, *supra* note 5, at 86.
27. *Id.* at 79.
28. *Id.* at 80.
29. *Id.* at 78.
30. *Health Spending*, ORG. ECON. COOP. & DEV. (2021), <https://data.oecd.org/healthres/health-spending.htm>.
31. SCHEFFLER ET AL., *supra* note 11, at 5.
32. BAIN & CO., GLOBAL HEALTHCARE PRIVATE EQUITY AND M&A REPORT 2022 42 (2022), [https://www.bain.com/globalassets/noindex/2022/bain\\_report\\_global\\_healthcare\\_private\\_equity\\_and\\_ma\\_2022.pdf](https://www.bain.com/globalassets/noindex/2022/bain_report_global_healthcare_private_equity_and_ma_2022.pdf); SCHEFFLER ET AL., *supra* note 11, at 5; MEDICARE PAYMENT ADVISORY COMM'N, *supra* note 5, at 77.
33. Appelbaum & Batt, *supra* note 2, at 16.
34. *Id.* at 14.
35. 94 Pub. L. No. 435, 90 Stat. 1383.
36. *Hart-Scott-Rodino Act Thresholds Jump in 2022*, COOLEY LLP (Jan. 24, 2022), <https://www.cooley.com/news/insight/2022/2022-01-24-hart-scott-rodino-act-thresholds-jump>.
37. Offodile et al., *supra* note 20, at 722; SCHEFFLER ET AL., *supra* note 11, at 4.
38. SCHEFFLER ET AL., *supra* note 11, at 11; Appelbaum & Batt, *supra* note 2, at 4.
39. Appelbaum & Batt, *supra* note 2, at 14.
40. Ryan Prete, *PE Investors Home In On Value-based Healthcare Deals In Q1*, PITCHBOOK (April 18, 2022), <https://pitchbook.com/news/articles/pe-investors-value-based-healthcare-q1-charts>.
41. Chris Cummings, *Antitrust Authorities Take Aim at Private-Equity Healthcare Deals*, WALL ST. J. (June 14, 2022), <https://www.wsj.com/articles/antitrust-authorities-take-aim-at-private-equity-healthcare-deals-11655243804>.
42. KPMG, DEAL MAKING COMES BACK TO EARTH: M&A TRENDS IN HEALTHCARE 2 (2022), <https://advisory.kpmg.us/content/dam/advisory/en/pdfs/2022/ma-healthcare-dwindled-q1-2022.pdf>.
43. PITCHBOOK, US PE BREAKDOWN Q2 2022 14 (2022), <https://pitchbook.com/news/reports/q2-2022-us-pe-breakdown>.
44. Appelbaum & Batt, *supra* note 2, at 4.
45. MEDICARE PAYMENT ADVISORY COMM'N, *supra* note 5, at 88; Appelbaum & Batt, *supra* note 2, at 4; BAIN & CO., *supra* note 32, at 42.
46. Appelbaum & Batt, *supra* note 2, at 19.
47. *Id.* at 18–19.
48. *Id.* at 19.
49. *Id.*
50. *Id.* at 18.
51. *Id.* at 52; SCHEFFLER ET AL., *supra* note 11, at 38; David W. McCombie III, *The Alchemy Of Private Equity Explained*, FORBES (Mar. 31, 2022), <https://www.forbes.com/sites/davidwmccombie/2022/03/31/the-alchemy-of-private-equity-explained/?sh=5ac5a38c3c6c>.
52. MEDICARE PAYMENT ADVISORY COMM'N, *supra* note 5, at 88; Appelbaum & Batt, *supra* note 2, at 65.
53. Appelbaum & Batt, *supra* note 2, at 73; Pisacreta & Huetteman, *supra* note 8.
54. Surprise billing occurs when insured patients receive treatment from physicians that they did not realize were out-of-network, often within otherwise in-network facilities. See Pisacreta & Huetteman, *supra* note 8.
55. Appelbaum & Batt, *supra* note 2, at 65; Eileen Appelbaum, *A Surprise Ending for Surprise Billing?*, AM. PROSPECT (Dec. 16, 2020), <https://prospect.org/health/surprise-ending-for-surprise-billing/>.
56. Joseph D. Bruch et al., *Changes in Hospital Income, Use, and Quality Associated With Private Equity Acquisition*, 180 JAMA INTERNAL MED. 1428, 1432 (2020); Offodile et al., *supra* note 20, at 724.
57. Offodile et al., *supra* note 20, at 724.
58. Zack Cooper et al., *Surprise! Out-of-Network Billing for Emergency Care in the United States*, 128 J. POL. ECON. 3626, 3629 (2020).

59. Bruch et al., *supra* note 56, at 1433.
60. Atul Gupta et al., *Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes 14* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28474, 2021).
61. *Id.* at 19.
62. *But see* Marcelo Cerullo et al., *Association Between Hospital Private Equity Acquisition and Outcomes of Acute Medical Conditions Among Medicare Beneficiaries*, 5 JAMA NETWORK OPEN (Apr. 29, 2022), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2769549> (finding that PE ownership is associated with lower mortality for patients who suffered heart attacks, and no difference in quality or outcome was observed for four other acute medical conditions).
63. *President Biden's State of the Union Address*, THE WHITE HOUSE (Mar. 1, 2021), <https://www.whitehouse.gov/state-of-the-union-2022/>.
64. Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 9, 2021).
65. *Fact Sheet: Protecting Seniors by Improving Safety and Quality of Care in the Nation's Nursing Homes*, THE WHITE HOUSE (Feb. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-protecting-seniors-and-people-with-disabilities-by-improving-safety-and-quality-of-care-in-the-nations-nursing-homes>.
66. *Id.*
67. Khan, *supra* note 12, at 3.
68. Bryan Koenig, *Doctors' Worries Over PE Deals Dominate Merger Comments*, LAW260 (Mar. 23, 2022), <https://www.law360.com/articles/1476116/doctors-worries-over-pe-deals-dominate-merger-comments>.
69. *Id.*
70. Forman, *supra* note 7.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. E. John Steren & Patricia M. Wagner, *Return of Early Termination of the HSR Waiting Period Not on the FTC's Agenda, According to Commissioner Phillips*, NAT'L L. REV. (Mar. 10, 2022), <https://www.natlawreview.com/article/return-early-termination-hsr-waiting-period-not-ftc-s-agenda-according-to>.
78. *HSR Headwinds: FTC Hits "Pause Button" On HSR Early Terminations*, COOLEY LLP (Feb. 10, 2021), <https://www.cooley.com/news/insight/2021/2021-02-10-ftc-pause-button-hsr-early-terminations>.
79. *Id.*
80. E. John Steren, *supra* note 77.
81. *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers*, FED. TRADE COMM'N (Oct. 25, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-restrict-future-acquisitions-firms-pursue-anticompetitive-mergers>.
82. *Id.*
83. *FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners From Private Equity Firm's Rollup of Veterinary Services Clinics*, FED. TRADE COMM'N (June 29, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics>.
84. Lauren Battaglia et al., *Private equity in health care: in the Antitrust crosshairs*, JD SUPRA (June 22, 2022), <https://www.jdsupra.com/legalnews/private-equity-in-health-care-in-the-3540695>.
85. *Id.*
86. *Id.*
87. *Id.*
88. *FTC to Restrict Future Acquisitions for Firms that Pursue Anticompetitive Mergers*, *supra* note 81.
89. Battaglia et al., *supra* note 84.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

95. Amanda Wait & Vic Domen, *HSR Statistics Show Increasing Scrutiny of Health Care M&A*, LAW360 (May 24, 2022), <https://www.law360.com/articles/1496138/hsr-statistics-show-increasing-scrutiny-of-health-care-m-a>.
96. In this context, change of control occurs when “a health care system . . . acquires direct or indirect control over the operations of a health care facility or provider in whole or in substantial part.” Mallory Warner, *Post-Mortem Reflection on SB 977: The Significance of What Could’ve and Should’ve Been*, SOURCE ON HEALTHCARE PRICE & COMPETITION (Sept. 16, 2020), <https://sourceonhealthcare.org/post-mortem-reflection-on-sb-977-what-it-couldve-done-and-why-was-it-important>.
97. *Id.*
98. Jonathan F. Buck et al., *Health Care Consolidation Legislation (AB 1132) No Longer Under Consideration in California Assembly*, NAT’L L. REV. (Apr. 30, 2021), <https://www.natlawreview.com/article/health-care-consolidation-legislation-ab-1132-no-longer-under-consideration>.
99. *Id.*
100. *Id.*
101. *Id.*
102. Paul W. Pitts et al., *California Legislature Debates Restricting Private Equity Investments and Competitor Acquisitions In Health Care*, REED SMITH LLP (Mar. 15, 2021), <https://www.reedsmith.com/en/perspectives/2021/03/california-legislature-debates-restricting-private-equity-investments>.
103. Buck et al., *supra* note 98.
104. Williams et al., *supra* note 13.
105. *Id.*
106. *Id.*
107. *2021–2022 Legislation*, JIM WOOD: 2nd ASSEMBLY DISTRICT, <https://a02.asmdc.org/2021-2022-legislation>.
108. Compl. at 3, *Am. Acad. of Emergency Med. Physician Grp., Inc. v. Envision Healthcare Corp.*, No. 3:22-cv-00421-CRB (N.D. Cal. Jan. 1, 2022), ECF No. 1-1.
109. Dave Barkholz, *Physician Staffing Firm Envision Wants to Be Hospitals’ “One Throat to Choke”*, MODERN HEALTHCARE (Dec. 7, 2016), <https://www.modernhealthcare.com/article/20161207/NEWS/161209935/physician-staffing-firm-envision-wants-to-be-hospitals-one-throat-to-choke>.
110. Appelbaum & Batt, *supra* note 2, at 55.
111. Tara Bannow, *Envision CEO Steps Down Amid Surprise Billing Scrutiny*, MODERN HEALTHCARE (Feb. 6, 2020), <https://www.modernhealthcare.com/providers/envision-ceo-steps-down-amid-surprise-billing-scrutiny>.
112. Margot Sanger-Katz et al., *Mystery Solved: Private-Equity-Backed Firms Are Behind Ad Blitz on “Surprise Billing”*, N.Y. TIMES (Sept. 13, 2019), <https://www.nytimes.com/2019/09/13/upshot/surprise-billing-laws-ad-spending-doctor-patient-unity.html>.
113. *What is a “Surprise Medical Bill” and What Should I Know About the No Surprises Act?*, CONSUMER FIN. PROTECTION BUR. (Feb. 2, 2022), <https://www.consumerfinance.gov/ask-cfpb/what-is-a-surprise-medical-bill-and-what-should-i-know-about-the-no-surprises-act-en-2123>.
114. Cooper et al., *supra* note 58.
115. Julie Creswell et al., *The Company Behind Many Surprise Emergency Room Bills*, N.Y. TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/upshot/the-company-behind-many-surprise-emergency-room-bills.html>.
116. Compl., *supra* note 108, at 3–4.
117. Appelbaum & Batt, *supra* note 2, at 59.
118. *Id.*
119. Order Denying Mot. to Dismiss at 5, *Am. Acad. of Emergency Med. Physician Grp., Inc. v. Envision Healthcare Corp.*, No. 3:22-cv-00421-CRB (N.D. Cal. May 27, 2022) (citing *Cal. Physicians’ Service v. Aoki Diabetes Rsch. Inst.*, 163 Cal. App. 4th 1506, 1516 (2008)).
120. Compl., *supra* note 108, at 9.
121. *Id.* at 12–14.
122. *Id.* at 12–13.
123. *Id.* at 7–8.
124. *Id.* at 10–12.
125. *Id.* at 13.
126. *Id.* at 6–7.
127. *Id.* at 16.
128. *Id.*

129. Order Denying Mot. to Dismiss, *supra* note 119.
130. Cummings, *supra* note 41.
131. Bannow, *supra* note 111.
132. Amanda Wait & Leslie Roter, *Data On Biden's Tough Antitrust Stance Paints Subtler Picture*, LAW360 (Feb. 1, 2022), <https://www.law360.com/articles/1460601/data-on-biden-s-tough-antitrust-stance-paints-subtler-picture>.
133. ERIN FUSE BROWN ET AL., *Private Equity Investment As A Divining Rod For Market Failure: Policy Responses To Harmful Physician Practice Acquisitions 19* (2021), <https://www.brookings.edu/wp-content/uploads/2021/10/Private-Equity-Investment-As-A-Divining-Rod-For-Market-Failure-14.pdf>.

# THE OTHER “QUICK LOOK”

Written by Ashish Sudhakaran and Tyler Helms<sup>1</sup>

## I. INTRODUCTION

The Supreme Court’s recent decision in *NCAA v. Alston*<sup>2</sup> will likely have a significant impact on how courts assess restraints of trade challenged under Section 1 of the Sherman Act. Most will focus on *Alston*’s description of the proper framework for a “rule-of-reason” analysis in antitrust jurisprudence. But less obvious in the Court’s decision is its approval once and for all of an abbreviated “quick-look” analysis—previously used to presumptively condemn facially anticompetitive restraints—to summarily *approve* restraints that are facially procompetitive. The NCAA ultimately failed to convince the Court that its conduct should benefit from a “quick-look” stamp of approval, but the Court agreed with the NCAA in principle: a “positive”<sup>3</sup> quick look can be used to summarily approve certain restraints of trade under Section 1 when the potential for anticompetitive harm is minimal.

While it remains to be seen just how prevalent the “positive” quick-look approach will be, *Alston* has three key implications for antitrust litigation. First, *Alston* suggests that the fact-intensive rule-of-reason analysis is no longer the most deferential standard of scrutiny that may be applied to restraints challenged under Section 1. Rather, *Alston* suggests that courts might now require plaintiffs to make a threshold showing that a challenged restraint has sufficient anticompetitive effects to even warrant a closer look under the rule of reason. Second, unless

plaintiffs can make such a showing, courts may be more likely to entertain and grant early dispositive motions dismissing antitrust cases at the pleading stage. Third, even failing early motions to dismiss, a “positive” quick look militates in favor of courts using certain tools already at their disposal—such as early summary judgment motions and sequenced discovery—to narrow the scope of potentially expensive and protracted antitrust litigation. Accordingly, *Alston*’s pronouncement arguably represents a victory for antitrust defendants, and a caution to plaintiffs and judges against “mistaken condemnations of legitimate business arrangements”<sup>4</sup> that are often costly and contrary to the purpose of antitrust law.

## II. BACKGROUND: THE RULE OF REASON

### A. BIRTH OF THE RULE

The antitrust “rule of reason” has its roots in the Supreme Court’s 1911 decision in *Standard Oil Co. v. United States*, where the Court reviewed a lower court decision ordering the break-up of the Standard Oil “trust.”<sup>5</sup> The trial court had entered judgment in favor of the government, finding that the Rockefellers and Standard Oil had violated Sections 1 and 2 of the Sherman Act.<sup>6</sup> With respect to Section 1, the government contended that “the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves

no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language.”<sup>7</sup>

The Supreme Court disagreed. Though Section 1 does appear to speak categorically—it prohibits “[e]very contract, combination . . . or conspiracy in restraint of trade or commerce”<sup>8</sup>—Chief Justice Edward D. White, writing for the Court, thought it “obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act.”<sup>9</sup> Because Section 1 does not “specifically enumerate[] or define[]” the types of restraint to which it applies, the Chief Justice reasoned, the necessary implication was that application of the statute must be “determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute.”<sup>10</sup> And so the rule of reason was born.

The Court’s adoption of this flexible standard was cold comfort to Standard Oil; Chief Justice Wright wrote that the lower court’s judgment that Standard Oil violated Section 1 was “clearly appropriate,” and that its remedy was warranted.<sup>11</sup>

## B. DEVELOPMENT OF THE RULE OF REASON

### 1. A FACT-INTENSIVE ANALYSIS

The Supreme Court further expounded on the rule of reason seven years later, in *Chicago Board of Trade v. United States*.<sup>12</sup> In that case, the government challenged a rule adopted by the Board of Trade of the City of Chicago—an exchange for trading grain.<sup>13</sup> The “call” rule, as it was known, prohibited the Board’s 1,600 members “from purchasing or offering to purchase, during the period between the close of the call”—“calls” were special trading sessions held immediately after the close of regular sessions—“and the opening of the session on the next business day, any wheat, corn, oats or rye ‘to arrive’ at a price other than the closing bid at the call.”<sup>14</sup> (Sales “to

arrive” referred to agreements to deliver on arrival grain that was already on its way to Chicago or which was to be shipped within a specified time.<sup>15</sup>) In practical terms, the rule meant that “bids had to be fixed at the day’s closing bid on the call until the opening of the next session.”<sup>16</sup> Prior to the rule’s adoption, the Board’s members were free to fix bids throughout the day at whatever prices they deemed appropriate.<sup>17</sup> According to the government’s suit, the “call” rule was an unlawful agreement in restraint of trade.<sup>18</sup>

In response, the defendants asserted that the rule’s “purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago.”<sup>19</sup> The government successfully moved to strike the defendants’ allegations concerning the purpose of the “call” rule, and in trying the case, “made no attempt to show” that the rule had any actual anticompetitive effects.<sup>20</sup>

The Supreme Court held that the district court had erred in “striking from the [defendants’] answer allegations concerning the history and purpose of the call rule and in later excluding any evidence on that subject.”<sup>21</sup> Writing for a unanimous Court, Justice Louis Brandeis gave a now-famous explanation for the rule of reason:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting

the particular remedy, the purpose or end sought to be attained, are all relevant facts.<sup>22</sup>

In the decades since *Standard Oil* and *Chicago Board of Trade* were decided, the rule of reason has embedded itself in antitrust jurisprudence as “the default mode of analysis” for restraints of trade challenged under Section 1 of the Sherman Act.<sup>23</sup> Consequently, outside of claims challenging horizontal price fixing, market allocation, or bid rigging—conduct that is considered *per se* illegal<sup>24</sup>—“most [Section 1] antitrust claims are analyzed under a ‘rule of reason.’”<sup>25</sup>

Though the rule of reason’s end goal may seem simple enough—determining whether a challenged restraint is, on balance, anticompetitive<sup>26</sup>—the analysis, as Justice Brandeis’s formulation suggests, is “fact intensive.”<sup>27</sup> That reality has invited both judicial<sup>28</sup> and scholarly criticism.<sup>29</sup>

## 2. A BURDEN-SHIFTING FRAMEWORK

Perhaps in an effort to bring structure and discipline to the rule of reason, the courts in recent decades have coalesced around a burden-shifting framework, whereby (1) “the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market”; (2) if the plaintiff makes that showing, “then the burden shifts to the defendant to show a procompetitive rationale for the restraint”; and (3) if the defendant bears its burden, “then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.”<sup>30</sup>

Even under this framework—which the Supreme Court has twice endorsed in recent years<sup>31</sup>—questions remain. (For example, is a showing of market power required?<sup>32</sup> And when, if at all, does balancing come into play?<sup>33</sup>)

Nonetheless, the rule of reason remains a mainstay in modern antitrust law. Since the mid-1970s, the Supreme Court has only expanded the rule of reason’s role, holding in a series of decisions that

vertical nonprice restraints, vertical maximum resale price maintenance agreements, and vertical minimum resale price maintenance agreements should be evaluated under the rule of reason rather than the *per se* rule.<sup>34</sup>

## C. AN ALTERNATIVE TO THE RULE OF REASON: THE “QUICK LOOK” TO CONDEMN PRESUMPTIVELY ANTICOMPETITIVE RESTRAINTS

Ever since 1927, when the Supreme Court first recognized horizontal price fixing as *per se* illegal under Section 1 of the Sherman Act,<sup>35</sup> the Court has largely “divided antitrust analysis into two modes, the *per se* rule and the rule of reason.”<sup>36</sup> According to Herbert Hovenkamp, the “large amount of empty space” between these two “silos,” combined with “[t]he high cost and indeterminacy of antitrust litigation under the rule of reason[,] led to exploration of that empty space for useful shortcuts.”<sup>37</sup> The *Antitrust Law* treatise proposed an “alternative view”: namely, that “the modes of antitrust analysis represent a continuum, or ‘sliding scale,’ with different fact finding requirements for different situations.”<sup>38</sup> The Supreme Court itself eventually expressed agreement with the notion of a “sliding scale,” though perhaps with some reticence.

In *California Dental Association v. FTC*, the Court agreed with *Antitrust Law* that “[t]here is always something of a sliding scale in appraising reasonableness,”<sup>39</sup> but cautioned against cursory analyses.<sup>40</sup> In that case, the Federal Trade Commission had applied an “abbreviated” rule-of-reason analysis to condemn the restraint at issue—an ethical rule adopted by a nonprofit dental association that placed restrictions on its members’ advertising—“without an elaborate industry analysis.”<sup>41</sup> The Court acknowledged that in at least some circumstances, something short of a full-blown rule-of-reason analysis was appropriate. Indeed, the “most condensed rule-of-reason analysis” might allow one to conclude in “the twinkling of an eye” that a restraint was unlawful.<sup>42</sup>

The Court acknowledged that certain of its prior decisions provided a “basis for what has come to be called abbreviated or ‘quick-look’ analysis under the rule of reason.”<sup>43</sup> In *NCAA v. Board of Regents*, for example, the Court had ruled that a “naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.”<sup>44</sup> And in *National Society of Professional Engineers v. United States*, the Court had held that “no elaborate industry analysis [was] required to demonstrate the anticompetitive character” of an “absolute ban on competitive bidding.”<sup>45</sup> In those and other cases involving horizontal restraints on price or output, the Court explained, “quick-look analysis carries the day [because] the great likelihood of anticompetitive effects can easily be entertained.”<sup>46</sup> Put another way, it said, “quick-look analysis applies ‘where a practice has obvious anticompetitive effects.’”<sup>47</sup>

But in the case of the California Dental Association’s advertising ethics rule, any anticompetitive effects were not so obvious.<sup>48</sup> The rule was ostensibly aimed at preventing false or misleading advertising, and in the Court majority’s view, the rule did not have clear effects on price or output.<sup>49</sup> And so, the Court concluded, the FTC and the Court of Appeals should have given the restraint “a more deliberate look”—or at least “a less quick look”—before condemning it.<sup>50</sup> Giving a nod to *Antitrust Law’s* “sliding scale” approach, the Court suggested that “the fullest market analysis” *might* not be required on remand—but it stopped short of providing concrete guidance on when an abbreviated rule-of-reason analysis is appropriate.<sup>51</sup> Rather, it left the lower courts with the (somewhat question-begging) instruction that “[w]hat is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”<sup>52</sup>

In *FTC v. Actavis, Inc.*,<sup>53</sup> decided 14 years later, the Supreme Court again acknowledged that some intermediate level of antitrust scrutiny—a “quick-look” application of the rule of reason—could be appropriate. That case involved “reverse-payment settlements,” that is, agreements to settle patent-infringement litigation under which

the patent holder (typically a brand-name drug company) pays the alleged infringer (typically a generic drug company) to stay off the market for a period of time.<sup>54</sup> (The settlement payment is said to be “reverse” because, unlike in a run-of-the-mill settlement, it flows from the plaintiff to the defendant.)

The FTC advocated that reverse-payment settlements should be subject to “quick-look” scrutiny, which would treat the restraints as “presumptively unlawful.”<sup>55</sup> The Court did not take issue with the FTC’s formulation of the “quick-look” inquiry; citing *California Dental*, the Court agreed that quick-look analysis “in effect” treats restraints as presumptively anticompetitive by “shift[ing] to a defendant the burden to show empirical evidence of procompetitive effects.”<sup>56</sup> The Court just didn’t think reverse-payment settlements were so clearly harmful that quick-look scrutiny was called for.<sup>57</sup>

Once again invoking the “sliding scale” metaphor, the Court indicated that trial courts could “structure” reverse-payment litigation so as to avoid opening the door to “consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences.”<sup>58</sup> But as in *California Dental*, it left that structuring to the lower courts to figure out.<sup>59</sup> As it happens, courts have generally construed *Actavis* as requiring full-blown rule-of-reason analysis.<sup>60</sup>

Although *National Society of Professional Engineers*, *Board of Regents*, *California Dental*, and *Actavis* do not provide the clearest guidance about *when* a “quick look” can be substituted for the full-blown rule of reason, these decisions all agree that an abbreviated inquiry is available, and that the inquiry creates a rebuttable presumption of anticompetitive effects.<sup>61</sup> On this understanding, “quick look” alleviates plaintiffs’ initial burden of proving actual anticompetitive effects in cases involving restraints that are almost certainly unreasonable, but which fall short of *per se* condemnation.

And that is, as a general matter, how the lower courts and antitrust agencies have understood the quick-look inquiry. The U.S. Courts of Appeals, for instance, have described quick look as “presuming anticompetitive harm,”<sup>62</sup> as treating certain restraints as “inherently suspect,”<sup>63</sup> as requiring defendants to proffer a “justification on procompetitive grounds” once “a restraint is deemed facially anticompetitive,”<sup>64</sup> and as permitting a court to “condemn[] the practice without ado.”<sup>65</sup>

In administrative proceedings, the FTC has similarly treated quick look as a shortcut to finding obviously anticompetitive restraints unlawful. In *In re Polygram Holding, Inc.*, the Commissioners explained that when “anticompetitive effects . . . are obvious[,] the burden of proceeding switches,” such that the respondents “would have the burden of showing that the procompetitive benefits of the restraint justify the anticompetitive effects.”<sup>66</sup> Likewise, in *In re Realcomp II Ltd.*, the FTC stated that when restraints have “obvious anticompetitive effects,” they “may be held unlawful under a rule of reason framework unless the defendants proffer some acceptable ‘competitive justification’ for the practice.”<sup>67</sup> The FTC proceeded to treat the respondent’s challenged policies as “presumptively unreasonable” under a quick-look framework.<sup>68</sup> The FTC has continued to apply the quick-look inquiry to condemn restraints as unreasonable, though it tends to describe its approach as an “‘inherently suspect’ analysis.”<sup>69</sup>

The Department of Justice, for its part, generally favors the *per se* rule and has stopped short of endorsing the “quick look” approach, except in rare cases. In one case involving an alleged “no-poach” agreement in a commercial-franchise relationship, the DOJ asserted that the “quick-look analysis” applies only “when the great likelihood of anticompetitive effects can easily be ascertained, and it is ‘implausible’ that procompetitive benefits would outweigh harm to competition.”<sup>70</sup> Similarly, in opposing a defendant’s motion to dismiss, the DOJ argued that although the *per se* rule should apply to an alleged agreement between eBay and Intuit to not compete for hiring each other’s employees, the quick-look analysis should be applied in the

alternative.<sup>71</sup> The DOJ acknowledged that the quick-look analysis concerns “[c]onduct [that] may be condemned after a ‘quick look’ if ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.’”<sup>72</sup>

### III. THE OTHER QUICK LOOK

#### A. THE SUPREME COURT APPROVES A “POSITIVE” QUICK LOOK TO APPROVE PRESUMPTIVELY PROCOMPETITIVE RESTRAINTS

In *NCAA v. Alston*, decided in June 2021, the Supreme Court confirmed that a “quick-look” inquiry also may apply to restraints of trade that are obviously *procompetitive*.<sup>73</sup> In *Alston*, the plaintiffs (three classes of Football Bowl Subdivision and Division 1 basketball players) challenged the NCAA’s ban on member schools compensating their student athletes. The district court held that the NCAA could limit traditional compensation, *i.e.*, “salaries” for athletic performance, but not “education-related benefits” such as “scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships.”<sup>74</sup> The Ninth Circuit upheld the district court’s judgment, and the NCAA appealed to the Supreme Court.<sup>75</sup>

On appeal, the NCAA argued that the district court and Ninth Circuit erroneously applied the traditional rule-of-reason analysis in determining that the NCAA’s restrictions on education-related benefits violated the Sherman Act; in the NCAA’s view, the lower courts should instead have given the restrictions “at most an ‘abbreviated deferential review,’ . . . or a ‘quick look,’ . . . before approving them.”<sup>76</sup> This was so, the NCAA contended, because (1) it is a joint venture, and collaboration among its members is necessary to offer consumers the benefit of intercollegiate athletic competition,<sup>77</sup> and (2) the NCAA’s member-schools are not “commercial enterprises” but institutions that further the important noncommercial purpose of providing undergraduate education to students.<sup>78</sup>

Writing for a unanimous Court, Justice Gorsuch explained that the “quick-look” analysis should be applied to “restraints at opposite ends of the competitive spectrum” as opposed to “restraints in the great in-between” that require a full-blown rule-of-reason analysis.<sup>79</sup> At one end of the spectrum, “some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look.”<sup>80</sup> That observation is nothing new. As discussed, courts have traditionally applied the quick-look inquiry to *facially anticompetitive* restraints that may be deemed unlawful without a full rule-of-reason analysis.

But then things got interesting. Justice Gorsuch went on to acknowledge that the NCAA was correct in principle: the quick-look framework also applies to restraints that “may be *so obviously incapable of harming competition* that they require little scrutiny.”<sup>81</sup> Put differently, according to Justice Gorsuch, there are *presumptively procompetitive* restraints that can be deemed *lawful* without the need for a traditional, fact-intensive rule-of-reason analysis.

As an example, Justice Gorsuch described a situation where a joint venture commanded such a small market share (say, five to six percent) that it was “incapable of impairing competition” because any reduction of output on the joint venture’s part would have “no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business.”<sup>82</sup> Justice Gorsuch pointed to authorities recognizing that if antitrust defendants lack market power, their conduct is unlikely to affect let alone reduce competition in violation of Section 1.<sup>83</sup>

Unfortunately for the NCAA, the Court concluded that the NCAA could not benefit from a quick look in this instance. The NCAA’s restrictions on providing education-related benefits to its student-athletes did not fall into the category of presumptively procompetitive benefits that could be approved following an abbreviated analysis.<sup>84</sup>

## B. NEW GROUND OR OLD HAT?

As we have seen,<sup>85</sup> courts, antitrust enforcers, and practitioners have overwhelmingly treated “quick look” as code for presumptive illegality since the term first entered the antitrust lexicon. The Supreme Court’s recognition of a “positive” quick look in *Alston* breaks with that tradition. But is it really a novel idea? Maybe not.

For one, as we must acknowledge, *Alston* picked up on a thread the Court had left dangling over a decade earlier in *American Needle v. NFL*.<sup>86</sup> There, the Court hinted at the use of quick look to exonerate “restraints on competition [that] are essential if the product is to be available at all”—which are “likely to survive the Rule of Reason”—noting that “depending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it ‘can sometime be applied in the twinkling of an eye.’”<sup>87</sup> The implication was that such restraints are presumptively *lawful* and can be upheld against antitrust challenge without needing to apply the full rule of reason. Indeed, relying on *American Needle*, the Seventh Circuit concluded in a pre-*Alston* case that certain NCAA bylaws could be deemed procompetitive in the “twinkling of an eye.”<sup>88</sup> (Whether that Seventh Circuit decision survives *Alston* is a question for another day.<sup>89</sup>)

Not only that, some earlier antitrust decisions can be read as upholding restraints in the blink of an eye, even if the courts did not employ the language of “quick look.” Any antitrust practitioner worth her salt can identify types of agreements that routinely withstand Section 1 scrutiny without elaborate analysis or fanfare. For instance, courts have summarily dismissed antitrust claims challenging exclusive contracts that were relatively short in duration or could easily be terminated.<sup>90</sup> Courts similarly have declared exclusive distributorships to be “presumptively legal.”<sup>91</sup>

Regardless of whether Justice Gorsuch was truly breaking new ground in *Alston*, it now seems beyond dispute that courts may apply a “positive” quick-look analysis to summarily approve restraints that are *facially procompetitive*.<sup>92</sup>

### C. IMPLICATIONS OF A “POSITIVE” QUICK LOOK

What are the implications of courts taking just a “quick look” at facially procompetitive conduct that would likely be upheld under a full rule-of-reason analysis?

First, *Alston* suggests that the full-blown rule of reason is no longer the most deferential level of scrutiny that courts must apply to restraints of trade challenged under Section 1. Traditional wisdom dictated that all restraints of trade were subject to the rule-of-reason analysis *unless* the restraint was obviously anticompetitive.<sup>93</sup> But if there is a “positive” quick look, then the rule of reason is not the “floor” when it comes to assessing restraints and their competitive effects. That in turn indicates that Section 1 plaintiffs must do *more* than simply allege an agreement in restraint of trade to unlock the door to the rule of reason and subject defendants to the costs of protracted antitrust litigation.

Exactly how much must be alleged remains to be seen. One situation where *Alston*’s “positive” quick look might have an impact is in cases involving alleged reverse-payment settlements. In *Actavis*, the Supreme Court explained that reverse-payment settlements *could* “bring with [them] the risk of significant anticompetitive effects” but only *if* the payments were “large and unjustified.”<sup>94</sup> Applying *Alston*’s rationale, trial judges might require plaintiffs to make a threshold showing that a challenged reverse-payment patent settlement was “large and unjustified” before allowing the case to proceed to the fact-intensive rule-of-reason analysis.

Second, *Alston* suggests that where plaintiffs fail to make a preliminary showing that a full factual record is likely to reveal anticompetitive effects, courts can efficiently and quickly resolve claims challenging facially procompetitive restraints by granting early dispositive motions. Granted, some courts have already been doing this, as in the case of short-term or readily terminable exclusive agreements.<sup>95</sup> But *Alston* suggests, at the very least, that it is time to reconsider the refrain that the rule of reason’s fact-intensive nature is itself a reason to decline pleading-

stage dispositive motions.<sup>96</sup> Unless the plaintiffs’ factual allegations “present[] complex questions requiring more than a blink to answer,” as *Alston* puts it,<sup>97</sup> courts should be hesitant to commit the litigants (or the judicial system itself) to the rigmarole of protracted antitrust litigation.

Third, even where dismissal on the pleadings is not warranted, *Alston* supports the notion that district courts should structure litigation so as to facilitate the early and efficient adjudication of threshold questions about whether full-fledged rule-of-reason scrutiny is appropriate. The Federal Rules give district judges ample discretion to sequence discovery and to hear early summary judgment motions,<sup>98</sup> which would allow these threshold issues to be explored and resolved as a precondition to “full merits discovery on all issues relevant to the rule of reason analysis.”<sup>99</sup>

District courts already use these tools in other contexts. As an example, in *In Re Capacitors Antitrust Litigation*, a case involving an alleged price-fixing cartel, the district judge ordered early summary judgment motions and briefing in “phases” to resolve questions concerning the application of the Foreign Trade Antitrust Improvements Act.<sup>100</sup> As the court put it, in “set[ting] a separate and early briefing track for FTAIA issues,” “[t]he goal was to resolve the parties’ FTAIA disagreements early enough to realize downstream efficiencies and economies in discovery and class certification and other motions.”<sup>101</sup> In light of *Alston*’s recognition of a “positive” quick look, courts should consider using these same procedural tools to prioritize discovery and dispositive motions on whether a full-scale rule-of-reason analysis is warranted. For instance, if there is a question about the existence of an exclusivity or tying arrangement, courts may address that issue—which may be outcome-determinative under a positive quick look—before requiring fact and expert discovery on market definition, market power, price and output effects, and other fact-intensive considerations.

Ultimately, these implications will go some way towards addressing the Supreme Court’s enduring concerns with antitrust litigation: (1) expensive

discovery,<sup>102</sup> (2) the settlement of weak antitrust claims for fear of protracted litigation and the threat of prohibitive liability;<sup>103</sup> and (3) “mistaken condemnations of legitimate business arrangements [that] chill the very procompetitive conduct the antitrust laws are designed to protect.”<sup>104</sup> *Alston’s* elucidation of another “truncated” analysis is one that courts can use to avoid these dangers in favor of realizing the judicial “efficiencies and economies”<sup>105</sup> that are so often rare in antitrust litigation.

## IV. CONCLUSION

The Supreme Court’s approval in *Alston* of a positive quick-look approach to exonerate certain restraints of trade represents a new tool in an antitrust defendant’s arsenal. For one, it confirms that the “sliding scale” approach to antitrust analysis does not solely tip in favor of plaintiffs. Whereas some restraints may be so clearly anticompetitive that they can be condemned with only a “quick look,” it is now clear that facially procompetitive restraints can be upheld without elaborate analysis. While it remains to be seen how and when courts will use the “positive” quick look, *Alston* suggests that courts may quickly and efficiently resolve cases involving facially competitive restraints by requiring a threshold showing of anticompetitive effects, entertaining early dispositive positions, and sequencing discovery. Doing so will ensure that litigants are not unnecessarily subjected to costly antitrust discovery, while guarding against coercive settlements and enforcement efforts that deter procompetitive conduct.

envisioned using a truncated analysis to approve of certain joint venture conduct).

---

1. Ashish Sudhakaran is a counsel in the San Francisco office of O’Melveny & Myers LLP, and Tyler Helms is an associate in the Los Angeles office of O’Melveny & Myers LLP. The opinions expressed in this article are those of the authors and do not necessarily reflect the views of O’Melveny & Myers LLP or its clients.

2. *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141 (2021).

3. See Eric H. Grush & Claire M. Korenblit, *American Needle and a “Positive” Quick Look Approach in Challenges To Joint Ventures*, 25 ANTITRUST 2 (2011) (arguing that the Supreme Court has previously

4. *Id.* at 2161 (quoting *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004)).

5. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

6. *Id.* at 45–46.

7. *Id.* at 63.

8. 15 U.S.C. § 1 (emphasis added).

9. *Standard Oil*, 221 U.S. at 63.

10. *Id.* at 63–64.

11. *Id.* at 79–82.

12. *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231 (1918).

13. *Id.* at 235–37.

14. *Id.* at 237.

15. *Id.* at 236–37.

16. *Id.* at 237.

17. *Id.*

18. *Id.* at 237–38.

19. *Id.* at 237.

20. *Id.* at 237–38.

21. *Id.* at 238–39.

22. *Id.* at 238.

23. *In re Processed Egg Prods. Antitrust Litig.*, 962 F.3d 719, 726 (3d Cir. 2020); see also *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1306 (10th Cir. 2017) (“The rule of reason is the default approach, and there is a presumption in favor of its application.”); *Cal. ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011) (“The rule of reason is the presumptive or default standard . . .”).

24. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1910b (2022 suppl.).

25. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

26. As the D.C. Circuit put it in the *Microsoft* case, the rule of reason requires plaintiffs to “show that [the

- defendant's] conduct was, on balance, anticompetitive.” *United States v. Microsoft Corp.*, 253 F.3d 34, 95 (D.C. Cir. 2001) (per curiam).
27. *In re Wellbutrin XL Antitrust Litig.*, 868 F.3d 132, 170 n.64 (3d Cir. 2017) (collecting cases).
  28. See, e.g., *Kimberlin v. Dep't Just.*, 139 F.3d 944, 949 (D.C. Cir. 1998) (referring to the “open-ended kitchen sink rule of reason in antitrust law”) (cleaned up); see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (observing that the virtue of *per se* illegality is that, in contrast to the rule of reason, “it avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken”).
  29. See, e.g., AREEDA & HOVENKAMP, *supra* note 24, ¶ 1742c (“[R]ule of reason review is expensive, burdensome, uncertain, and prone to error.”); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 US DAVIS L. REV. 1375, 1461–62 (2009) (“Rule-of-reason litigation, however, is a crusade, enlisting legions of economists, lawyers, and paralegals. It is unclear how many private litigants (even with the prospect of trebled damages) will incur the ‘litany of costs’ and risks associated with suing companies with market power by embarking on such a crusade—especially if their chance of prevailing is less than one in three.”); Edward D. Cavanaugh, *The Rule of Reason Re-Examined*, 67 BUS. LAWYER 435, 435 (2012) (“From the beginning, federal courts have been troubled by the open-ended nature of the Brandeis formulation of the Rule of Reason, which directed courts to examine a broad range of factors in analyzing competitive conduct but provided no guidance for how these factors should be analyzed or weighed so as to provide some semblance of clarity, predictability, and consistency in the application of antitrust standards.”).
  30. *Ohio v. Am. Express Co.* (“Amex”), 138 S. Ct. 2274, 2284 (2018) (citations omitted).
  31. See *Alston*, 141 S. Ct. at 2160 (2021); *Amex*, 138 S. Ct. at 2284.
  32. Compare *Fed. Trade Comm’n v. Ind. Fed’n Dentists*, 476 U.S. 447, 461 (1986) (concluding that “the finding of actual, sustained adverse effects on competition” could “obviate the need for an inquiry into market power” or “elaborate market analysis”), to *Amex*, 138 S. Ct. at 2283–84 (explaining that courts must “conduct a fact-specific assessment of market power and market structure to assess the restraint’s actual effect on competition” in cases involving vertical restraints).
  33. Historically, balancing the harms and benefits of the challenged conduct has been treated by courts as the final step of the rule-of-reason analysis. See, e.g., AREEDA & HOVENKAMP, *supra* note 24, ¶ 1507d (after proceeding through the “basic burden-shifting framework,” the “court must then determine whether the anticompetitive effects” of the conduct “are sufficiently offset by the proffered defense.”); *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (“Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage.”); *Microsoft*, 253 F.3d at 59 (“[I]f the monopolist’s procompetitive justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.”); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) (“Finally, the court must weigh the harms and benefits to determine if the behavior is reasonable on balance.”). But in recent cases, the Supreme Court has endorsed a “three-step” burden-shifting formulation with no mention of balancing, casting doubt on the role balancing plays in the rule-of-reason analysis. See, e.g., *Alston*, 141 S. Ct. at 2160; *Amex*, 138 S. Ct. at 2284. The Ninth Circuit and its district courts also have a history of omitting a balancing step from the rule-of-reason analysis. See, e.g., *Fed. Trade Comm’n v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1070–74 (9th Cir. 2015) (endorsing a “three-step framework of the Rule of Reason” and, after finding both anticompetitive and procompetitive effects, “turn[ing] to the final inquiry—whether there are reasonable alternatives to the NCAA’s current compensation restrictions.”) (emphasis added). In one case, the Ninth Circuit affirmed summary judgment against the plaintiffs for failing to carry their burden of showing a viable less restrictive alternative, ending the analysis and finding for defendants without any mention of balancing. See *Hairston v. Pac. 10 Conf.*, 101 F.3d 1315, 1319 (9th Cir. 1996) (“The burden then returned to the athletes to show that the Pac-10’s procompetitive objectives could be achieved in a substantially less restrictive manner. . . . This they failed to do. . . . Hence summary judgement was proper.”).
  34. Stucke, *supra* note 29, at 1379–80 (discussing *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), *State Oil Co. v. Khan*, 522 U.S. 3 (1997), and *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)).
  35. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397–402 (1927) (“The aim and result of every price-

- fixing agreement, if effective, is the elimination of one form of competition.”).
36. Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 122 (2018).
  37. *Id.* Others have suggested that the search for some intermediate form of scrutiny between *per se* illegality and the rule of reason was spurred by “growing antagonism by courts to reflexive application of the *per se* rule, especially with regard to conduct that arguably had a valid anticompetitive purpose.” Max R. Schulman, *The Quick Look Rule of Reason: Retreat From Binary Antitrust Analysis*, 2 SEDONA CONF. J. 89, 90 (2001).
  38. Hovenkamp, *supra* note 36, at 123 (quoting and citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶¶ 1500, 1507 (4th ed. 2017)).
  39. *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 780 (1999) (quoting PHILLIP E. AREEDA, *ANTITRUST LAW* ¶ 1507 (1986)).
  40. *See id.* (“At the same time, Professor Areeda also emphasized the necessity, particularly great in the quasi-common-law realm of antitrust, that courts explain the logic of their conclusions. ‘By exposing their reasoning, judges . . . are subjected to others’ critical analyses, which in turn can lead to better understanding for the future.’”) (quoting AREEDA, *supra* note 39, ¶ 1500).
  41. *Id.* at 763 (quotations omitted).
  42. *Id.* at 780. As the Court noted, Phillip Areeda was the first to “enrich[] antitrust law” with the “twinkling of an eye” metaphor. *Id.*; *see* Phillip Areeda, *The Changing Contours of the Per Se Rule*, 54 ANTITRUST L.J. 27, 30 (1985) (“[T]here is a spectrum in which the rule of reason can sometimes be applied in the twinkling of an eye.”).
  43. *Cal. Dental*, 526 U.S. at 770.
  44. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984).
  45. *Nat’l Soc’y Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978).
  46. *Cal. Dental*, 526 U.S. at 770.
  47. *Id.* (quoting *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020 (10th Cir. 1998)).
  48. *Id.* at 771.
  49. *Id.* at 771–75.
  50. *Id.* at 779–81.
  51. *Id.*
  52. *Id.* at 781.
  53. *Fed. Trade Comm’n v. Actavis, Inc.*, 570 U.S. 136 (2013).
  54. The Supreme Court described reverse-payment settlements as follows: “Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent’s term expires, and (2) Company A, the patentee, to pay B many millions of dollars.” *Id.* at 140. These settlements are predominately, if not exclusively, confined to the pharmaceutical industry.
  55. *Id.* at 158–59.
  56. *Id.* at 159 (quoting *Cal. Dental*, 526 U.S. at 775 n.12).
  57. *Id.*
  58. *Id.* at 159–60.
  59. *See id.* at 160 (“We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation.”).
  60. *See, e.g., King Drug Co. of Florence, Inc. v. Smithkline Beecham Corp.*, 791 F.3d 388, 398 n.15 (3d Cir. 2015) (holding that *Actavis* requires application of “the traditional, full-fledged rule of reason standard” to reverse-payment settlements); *In re Humira (Adalimumab) Antitrust Litig.*, 465 F. Supp. 3d 811, 838 (N.D. Ill. 2020) (claims challenging reverse-payment settlements “require full rule of reason analysis”), *aff’d*, 42 F.4th 709 (7th Cir. 2022).
  61. *See Actavis*, 570 U.S. at 158–59 (quick-look approach treats challenged restraints as “presumptively unlawful”); *Cal. Dental*, 526 U.S. at 775 n.12 (“quick-look analysis in effect requires” that the burden be “shift[ed] to defendant . . . to show empirical evidence of procompetitive effects,” even where the “claim of anticompetitive effects” is “theoretical”); *Bd. of Regents*, 468 U.S. at 110 (“This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.”); *Nat’l Soc’y Prof’l Eng’rs*, 435 U.S. at 692–93 (“On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.”).
  62. *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 832 (3d Cir. 2010) (“[C]ompetitive harm is initially presumed under ‘quick look’”).

63. *N. Tex. Specialty Physicians v. Fed. Trade Comm'n*, 528 F.3d 346, 360–61 (3d Cir. 2008) (“The ‘inherently suspect’ paradigm that the FTC employed in the present case is a ‘quick-look’ rule-of-reason analysis.”).
64. *Realcomp II, Ltd. v. Fed. Trade Comm'n*, 635 F.3d 815, 825 (6th Cir. 2011).
65. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992).
66. *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 477 (2003), *aff'd sub nom. Polygram Holding, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29 (D.C. Cir. 2005).
67. *In re Realcomp II Ltd.*, 148 F.T.C. 137, 375 (2009), *aff'd sub nom. Realcomp II, Ltd. v. Fed. Trade Comm'n*, 635 F.3d 815 (6th Cir. 2011).
68. *Id.* at 388–89. Notably, the FTC proceeded to analyze Realcomp II's policies under the full rule of reason as well. *Id.* at 396–416.
69. *E.g.*, *In re 1-800 Contacts, Inc.*, 166 F.T.C. 250 (2018), *vacated sub nom. 1-800 Contacts, Inc. v. Fed. Trade Comm'n*, 1 F.4th 102 (2d Cir. 2021); *In re N.C. State Bd. of Dental Exam'rs*, 153 F.T.C. 1749 (2012), *rev'd sub nom. N.C. State Bd. Dental Exam'rs v. Fed. Trade Comm'n*, 574 U.S. 494 (2015).
70. Statement of Interest of the United States of America at 17, *Stigar v. Dough Dough Inc.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 7, 2019), Dkt. 30 (citing *Cal. Dental*, 526 U.S. at 770, 775–76).
71. *See* Opposition of the United States to Defendant's Motion to Dismiss Pursuant to FRCP Rule 12(b)(6) at 17, *United States v. eBay, Inc.*, No. 5:12-cv-05869-EJD (N.D. Cal. Feb. 26, 2013), Dkt. 24 (citing *California ex rel. Harris v. Safeway Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011) (en banc)); *see also* Competitive Impact Statement at 7, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629-RBW (D.D.C. Sept. 24, 2010), Dkt. 2 (arguing that the agreements could be condemned as *per se* illegal or under a “quick look”).
72. Opposition of the United States, *supra* note 71, at 17 (quoting *Safeway*, 651 F.3d at 1134).
73. *Alston*, 141 S. Ct. at 2155.
74. *Id.* at 2154.
75. *Id.*
76. *Id.* at 2155.
77. *Id.*
78. *Id.* at 2158.
79. *Id.*
80. *Id.* at 2156.
81. *Id.* at 2155 (emphasis added).
82. *Id.* at 2156 (citing *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 217 (D.C. Cir. 1986)).
83. *Id.* (citing *Rothery Storage*, 792 F.3d at 217 (holding that firm with six-percent market share was incapable of harming competition); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 191 (7th Cir. 1985) (“Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial.”); and *AREEDA & HOVENKAMP*, *supra* note 38, ¶1507a (“If . . . the exercise of market power is not plausible, the challenged practice is legal.”)).
84. *Id.* at 2166.
85. *See supra* Part II.C.
86. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *see* Grush & Korenblit, *supra* note 3 (“*American Needle* suggested that similarly abbreviated [quick-look] analysis can also be used to approve of conduct.”); Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV. 39, 65 (2017) (“[T]he Supreme Court in *American Needle* recognized the concept of presumptive legality . . .”).
87. *Am. Needle*, 560 U.S. at 203 (internal citations omitted).
88. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 341 (7th Cir. 2012); *see also* Cavanagh, *supra* note 86, at 66.
89. In petitioning for certiorari in *Alston*, the NCAA argued that Supreme Court intervention was necessary to resolve disagreement among the Courts of Appeals surrounding the level of antitrust scrutiny that applies to NCAA rules. Petition For a Writ of Certiorari at 19–23, *Nat'l Collegiate Athletic Ass'n v. Alston*, No. 20-512 (Oct. 15, 2020). According to the NCAA, several Circuits, including the Seventh, had properly “upheld [NCAA rules] without trial and fact-intensive analysis,” whereas the Ninth Circuit had subjected NCAA rules to “demanding rule-of-reason scrutiny.” *Id.* at 19, 22. In *Alston*, of course, the Court held that the challenged NCAA bylaws were subject to the traditional rule of reason. 141 S. Ct. at 2166.
90. *See, e.g., Omega Env't, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997) (reversing district court's

denial of defendants' denial of motion for judgment as a matter of law, explaining that, "the short duration and easy terminability of the[] agreements negate substantially their potential to foreclose competition"); *PNY Techs., Inc. v. SanDisk Corp.*, No. 11-cv-04689-WHO, 2014 WL 1677521, at \*5–6 (N.D. Cal. Apr. 25, 2014) (dismissing exclusive dealing claims where contracts at issue were relatively short in duration and easily terminable because they "are not anticompetitive").

91. See *E&L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 30 (2d Cir. 2006) ("Thus, we have noted that exclusive distributorship arrangements are presumptively legal.") (quotation omitted); cf. also *Paddock Publ'ns, Inc. v. Chi. Trib. Co.*, 103 F.3d 42, 47 (7th Cir. 1996) (affirming dismissal of exclusive distributorship claims where "[c]ontract terms [were] short, so competition for the contract [could] flourish," and where "exclusive distribution of news or features through a single paper" allowed newspapers to distinguish themselves and better compete with rivals); *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 453 (6th Cir. 2007) (affirming dismissal of claims against multi-year exclusive-dealing arrangements between a supplier and retailers where the exclusive arrangements had clear procompetitive benefits to both parties, allowing "the retailer to insist that the supplier charge lower prices" and "eas[ing] an aspiring [supplier]'s ability to clear existing market barriers").
92. See, e.g., Jesse Addo, *Antitrust Implications of the NCAA's Restrictions on the Use of Name, Image, and Likeness of Student-Athletes*, 18 U. ST. THOMAS L.J. 188, 206 (2022) ("[F]or the first time, the Court recognized that restraints can also be exonerated with a 'quick look' approach—a lower antitrust standard of review."); *NCAA v. Alston Signals Peril for the NCAA's Amateurism Defense But Implications for Antitrust Go Well-Beyond Collegiate Sports*, CROWELL & MORING, LLP (June 23, 2021) ("[T]he Court recognized for the first time that restraints can also be exonerated with a 'quick look.' The Court explained, for example, that agreements which are needed to produce a sports league—such as the number of players and the time of play, but not wages—could pass muster with a quick look, providing an especially powerful tool to joint venture participants."); Jodi S. Balsam, *What NCAA v. Alston Means for Professional Sports Leagues 2*, HARV. J. SPORTS & ENT. L.—SPECIAL ISSUE (Fall 2021) ("Alston elucidates that 'quick look' antitrust review is available not just to condemn, but also to approve a challenged business practice.").
93. See *supra* note 23 and accompanying text.
94. *Actavis*, 570 U.S. 136 at 158.
95. See *supra* notes 90–91 and accompanying text.
96. See, e.g., *Lumber Liquidators, Inc. v. Cabinets To Go, LLC*, 415 F. Supp. 3d 703, 713 (E.D. Va. 2019) ("Because of the inherently fact-intensive nature of [the rule-of-reason] inquiry, 'disposition of an antitrust suit at the pleading stage is accordingly rarely appropriate.'" (quoting *Cont'l Airlines, Inc. v. United Air Lines, Inc.*, 120 F. Supp. 2d 556, 563 (E.D. Va. 2000)); *Pecover v. Elec. Arts Inc.*, 633 F. Supp. 2d 976, 983 (N.D. Cal. 2009) ("The rule of reason analysis requires a factual analysis of the line of commerce, the market area and the affected share of the relevant market. . . . Such a factual inquiry is improper at this stage in the proceedings.").
97. *Alston*, 141 S. Ct. at 2157.
98. See, e.g., FED. R. CIV. P. 26(b)(1), (2) (courts have discretion to limit the scope of discovery, the number of discovery requests and depositions, and the length of depositions); FED. R. CIV. P. 26(c)(1) (courts may, for good cause, issue orders limiting discovery to "protect a party or person from . . . undue burden or expense"); FED. R. CIV. P. 56(b) (court may issue orders governing the timing of summary judgment motions); see also *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) ("Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.").
99. See Grush & Korenblit, *supra* note 3.
100. See Order Re Phase I of Summary Judgment on Foreign Transactions, No. 14-cv-03264-JD (N.D. Cal. Sept. 24, 2010), Dkt. 1302.
101. *Id.*
102. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) ("[P]roceeding to antitrust discovery can be expensive").
103. *Id.* at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.")
104. *Alston*, 141 S. Ct. at 2161 (quoting *Trinko*, 540 U.S. at 414); see also *NCAA v. Alston Signals Peril*, *supra* note 92 (noting the Court's "continued emphasis on false positives as a concern in antitrust enforcement").
105. Order Re Phase I of Summary Judgment, *supra* note 100.

# DIVERSITY IN THE ANTITRUST BAR: IS IT TRULY A PIPELINE PROBLEM?

Edited by Steve Vieux<sup>1</sup>

## PANELISTS

- Ye Eun (Charlotte) Chun, Cleary Gottlieb Steen & Hamilton LLP
- Qianwei Fu, Zelle LLP
- Jeff Negrette, U.S. Department of Justice, Antitrust Division
- Laura Wilkinson, Paypal
- Moderator: Steve Vieux, Bartko Zankel Bunzel & Miller, PC

## I. INTRODUCTION & OVERVIEW

The issue of diversity in the legal profession is constantly discussed and remains a pressing area in need for improvement, especially within the antitrust bar. The main question that needs to be addressed candidly is whether our bar's lack of diversity can best be described as a "pipeline" issue or an issue of will. This panel at GSI is noted not only for its demographic diversity, but diversity in practice and professional background. It included recognized practitioners from the private law firm sector (both defense and plaintiffs' side), the corporate sector, and government. They offered their honest thoughts on whether the diversity issue in our bar is truly a "pipeline" issue, how to improve diversity and inclusivity in the antitrust bar, what impediments

exist to improving diversity, and what incentives can be used to encourage diversity and inclusivity.

\* \* \*

MR. GOLDSTEIN: I'm David Goldstein, and I'm the Chair of this Section.

So I have a really easy job today to introduce **Steve Vieux**, the moderator of this program. He is so well-known to this group, a member of the Executive Committee of the Antitrust and Unfair Competition Law Section; he is also Senior Counsel at Bartko Zankel Bunzel & Miller. Steve previously served as a Senior Attorney at the Federal Trade Commission, where he worked primarily in investigations in the health care and pharma industries.

So thanks so much, Steve, for moderating this terrific panel on diversity.

MR. VIEUX: Thanks, David. First I just want to welcome everyone joining us this afternoon for this important discussion. It seems like a discussion we're continually having every year, but it's a discussion we have to have, to not only talk about ways to improve the diversity of not only in the bar in general, but specifically in the antitrust and unfair competition bar. And as you know, you guys that are in the

practice, you know diversity in our practice area is not that great compared to other practice areas.

Joining me today—we have a great panel, a great panel that’s not only diverse in terms of demographics, but also diverse in terms of their practice.

We have panelists that represent each sector of our antitrust bar, and when I say “sector,” I’m talking about whether it’s private practice, from the corporate defense perspective, from the plaintiffs’ perspective, or from government, and we also have somebody from in-house from the corporate legal department realm who can offer their insights on diversity in that sector as well.

Our panel is going to discuss diversity, the issues of diversity, whether it’s the issue with the pipeline or is it more an issue of will.

We’ll also discuss what the data says and what we can do to improve diversity.

And finally, we hope to end it with a call to action because you guys are all stakeholders and many of you, whether you’re junior, midlevel, or senior, have a role in improving diversity, improving the metrics in our profession and in our bar.

Let me just introduce my distinguished panelists. First I’ll start off with the gentleman to the left of me, **Jeff Negrette**. He’s an attorney at the DOJ’s Antitrust Division, a leading attorney in their civil conduct task force in Washington, D.C. He’s also a co-chair of the Division’s diversity committee.

Followed by that is **Charlotte Chun**. She’s a rising associate at Cleary Gottlieb’s Bay Area office, where she specializes in antitrust criminal investigations and civil enforcement. She’s also a member of Cleary’s women’s working group leadership committee and the woman’s lawyers advisory committee.

And then further down is my old friend from D.C., **Laura Wilkinson**. She’s a Senior Director and Associate General Counsel for Global Antitrust at

PayPal. Before PayPal she was an antitrust partner at Weil, Gotshal and before that Clifford Chance, and that followed an impressive stint where I first met her at the FTC, where she rose through the ranks, eventually serving as a Deputy Assistant Director in the Bureau of Competition.

And then **Qianwei Fu**, who is the former Chairperson of our Section. She focuses on representing plaintiffs in antitrust litigation, and is a well-respected member of the plaintiffs’ bar here in San Francisco. In addition to antitrust, Qianwei specializes in complex commercial litigation and insurance class defense.

Now first, before we go into the substance of this discussion, I’m sure each of you guys have your own disclaimers to give. I just have to say this—any statements from myself or our panelists do not necessarily reflect the views of our employers or our clients.

And I’d first like to give you an insight as to how this is going to go. I’m just going to throw out questions for our panelists and we’re not breaking it up in terms of responsibility between each panelist.

Everybody’s going to give their thoughts on these important topics and important issues as it relates to diversity and improving the pipeline and actual diversity in our bar.

## II. PERSONAL CAREER INSIGHTS INTO DIVERSITY

First, if everybody can just give a brief background on how they rose to their current position, how they got there, what obstacles they faced, and specifically if they can also talk about the importance of mentors, vis-à-vis sponsors. To kick that off I’ll turn it over to Laura first.

MS. WILKINSON: Good afternoon. Thank you, Steve, for that introduction and I think you gave away part of my story already as you introduced me.

I am currently Senior Director and Associate General Counsel at PayPal, responsible for Global Antitrust, and I started that position in the middle of 2019.

Prior to that, my antitrust practice, my legal practice, has all been in the Washington, D.C. area. I began at the Federal Trade Commission in the Bureau of Competition in Mergers I, and so I've been working in primarily merger clearance for most of my career. I was at Mergers I and rose to Deputy Assistant Director, so I was there for ten years through the late '80s to the mid '90s. Giving away my age a bit, but it does show that I've seen quite a progression in terms of diversity within the bar in general and the antitrust bar.

After the Federal Trade Commission I went to private practice first at Clifford Chance, where I became a partner and then later I was a partner at Weil, Gotshal.

I was in private practice for almost 20 years, representing clients in lots of different industries, and gained a lot of experience in analyzing industries and counseling as well.

I made the switch to in-house in order to be closer to the business, but also to get a different perspective on practicing antitrust law. In this role I bring the experience of the government enforcement, as well as the counseling and private practice. I've done a little bit of antitrust litigation but primarily mergers and acquisitions and regulatory, and so that's been my path.

In terms of mentors, I've certainly had mentors along the way, and the one thing I do want to say is mentors don't have to look like you. My mentors, particularly since I started in the mid '80s, were not African-American women, as you can imagine. It was definitely either white men or white women, and I think that that's perfectly fine. You can gain a lot of experience and exposure and knowledge through mentors that are not like you, don't have the same characteristics, but you will find that you may have a lot in common in a lot of other ways.

I also think that it is important to have role models, and so those of us who are diverse attorneys probably have more of a light shining on us as a role model in the legal profession as well as in the antitrust bar, and I think that's important as well—but we can't look to the diverse attorneys to be the only role models, to be the only mentors or the only sponsors for attorneys through their career.

So with that as an intro, I'll pass it on to the other panelists, and I'm sure we're going to dive in more as we go through the questions.

MR. VIEUX: If we could, Charlotte, you're probably the most junior person here but if you could just talk about how you arrived at this current place, and also specifically what obstacles you're facing now as a woman of color.

MS. CHUN: Yeah, sounds good.

So I was formerly in Cleary's New York office and then moved out here back to the Bay Area very recently as we opened up our California office. I used to practice a little bit more in the civil enforcement and white collar investigation space. As we came out here to California, we were transitioned more into antitrust work, and as someone who's received mentorship, maybe I could add a little value as to what good mentorship feels like as an associate rising up the ranks.

More than anything for me, it's about feeling valued. It's not just a participatory act of having mentoring circles or having monthly check-ins. Those are all valuable opportunities but the biggest part is for senior lawyers to really get to know the associate, to understand what their value added is, to understand their background, how they got there; and then to be able to convert that into something that is very meaningful capital, you know, for the firm, for the community, and just make sure that there are opportunities that are provided for them in ways that they may not be able to do so themselves. A lot of diverse associates don't have the same networks that nondiverse associates have, and having that kind of mentorship and sponsorship is just really

critical and it's—you know, having great mentors is partly why I'm here today and it's just something that I hope to be able to also pass on as more junior associates join ranks below me as well.

MR. VIEUX: Thanks. Qianwei?

MS. FU: Sure. So as Steve introduced me already, I'm a partner at Zelle LLP. My main practice is focused on plaintiffs' class actions, and I'm just loving being on this panel with all these distinguished speakers and quite impressed by their backgrounds.

And so I, you know, speaking of my background, I did not follow a linear career path. I practiced law in China for three years before I moved to the States. When I was younger, I just had this curiosity, always wanting to explore places unfamiliar to me or meeting people who are nothing like me.

So, you know, there is this classic Chinese novel written by a renowned scholar, Qian Zhongshu, in the 1940s, and the name of the book is *Fortress Besieged*.

The story is set in the background of a war but the story is really about the behaviors and the pathos of that special period of the country. The name of the book, *Fortress Besieged*, is actually a metaphor from a French proverb, and it goes like this: "Marriage is like a fortress besieged." Those who are outside want to get in, and those who are inside want to get out.

Later people extended this metaphor to other situations to describe this constant desire, always wanting something you don't have access to.

So I was in that restless stage, just wanted to get outside the fortress and to see the outside world.

At the time, you know, I had two options. One was to continue to practice law; I needed a law degree in a different legal system but I couldn't afford law school right out of the gate. The other option was to find another area related to law enforcement. So I landed in a criminology major because I, at the time, had an interest in the subject and I was

offered a full scholarship with donations, to pass the criminology program.

After graduating I couldn't find a job. I couldn't do a law enforcement job because I was not a U.S. citizen at the time, and I couldn't practice law either because I mainly practiced in a civil law system.

So I had to start all over again. I went to law school, I got my JD degree and I eventually landed with a job at my current law firm. I'm a lifer at my firm. I've stayed with my firm for 15, 16 years as of now.

So, you know, I do think this mixed background shaped my way of thinking, my approach to a lot of things; how I treat others, how I honor other people's experiences and consider different perspectives. I really have the honor to be in this practice and I am constantly, constantly inspired by the quality, the energy, and the collegiality of the antitrust lawyers and the antitrust bar.

Speaking of mentorship, if I have to be honest, with no social network to begin with, I've had a lot of struggles along the way. When I was in law school, I always felt like, you know, I had to figure things out on my own. Few mentors, few professors looked like me or shared similar experiences. They don't have the same experiences as me and there was no support network in law school to provide opportunities for students like me.

So, you know, when you are one of the few minority women in the room, oftentimes that's not a safe place for you to speak up, for you to ask questions or ask for help.

I know some of my peers, they have generations of lawyers in their family or in their social circles, who acted as a guide or provided something more for their critical career decisions. I think, in a way, that short-circuited the process.

I think I can relate to those who have aspirations, you know, those law students who have aspirations to become antitrust lawyers but do not have the social capital or guidance they need.

So I can certainly see having the mentorship, having the right social capital can help young lawyers break into this practice area.

And I want to say one more thing—just one more thing, you know, the concept of you don't know what you don't know, I think that really reiterates and highlights the importance of network and mentorship.

MR. VIEUX: Thank you, Qianwei. I think that makes a good point especially about the point of networking—and to make a pitch for our Section, especially for younger attorneys, for diverse attorneys out there, this is a great opportunity to meet various folks who can help you along in your career, especially if you don't come out of the gate privileged with a lot of that social capital.

Jeff, if we can turn it over to you, in terms of your background and how you got to where you are now.

MR. NEGRETTE: Thank you, Steve, and I will offer up the as-promised obligatory disclaimer that my comments today are mine alone and don't necessarily reflect those of the Department of Justice.

I started my career with the Antitrust Division right here actually in San Francisco at our field office and was only there, though, for a short while before transferring to D.C. I joined our technology and digital platforms group there and worked there for a while, and then transitioned to our appellate section and then most recently, as Steve mentioned, joined our newly formed Civil Conduct Task Force and I've been there since.

I'm also a reservist in the military, so it's definitely been a challenge, I would say, juggling two careers, serving that entire time. Multiple deployments, training exercises, definitely can create some tension with the day-to-day rigor of practicing antitrust law.

I think the importance of serving warrants the effort and so I've been happy to serve in those two roles.

I think we heard some great comments today about mentorship and I think all that's very important. I'd say where I see a helpful way to contribute in a mentorship capacity is actually at the organization level.

So, you know, we normally think about mentorship in a one-to-one, person-to-person type relationship. That can certainly be very gratifying, but to make the really substantial impacts, sometimes that mentorship actually needs to occur at the organization level.

So I've really been focusing a lot of energy on trying to make those changes and initiatives happen organization-wide. It can be slower progress, but certainly very impactful.

MR. VIEUX: Thank you. I don't want to put you on the spot and ask you a follow-up question to surprise you but, yes, if you can speak to that, because we're going to discuss this later on in the program, I do think that enforcement agencies have an important role to play in this issue.

But are there any specific initiatives in the DOJ Antitrust Division, in terms of cultivating diverse attorneys? I've heard that my old agency, the FTC, they're engaging in some initiatives such as mentorship programs. So is there anything you can shed light on?

MR. NEGRETTE: Sure. We have a lot of stuff going on behind the scenes, of course, but publicly we do have a diversity committee and it's grown in size, in scope, and I think we've accomplished a lot.

I'm very proud of some of the results we've delivered, but there's still a lot of work to do. It's great having the support, though, of leadership and being able to see the changes, the impacts that those initiatives are happening.

I think as an enforcement agency we may take on some additional responsibility—or at least I feel it does in the broader antitrust bar—and some of that's just because as an enforcement agency, right, we

represent the American public and the perspectives of the American public and so we should probably have those perspectives firsthand on staff to ensure we are representing those perspectives. So I think that's a unique responsibility that the enforcement agencies carry.

I would also say that the enforcement agencies are looked at by the rest of the antitrust bar as a bit of a guidepost for what they should be doing. Certainly on substantive matters we are looked at for interpretations of the law, and it really isn't any different in terms of how we should be focused on personnel matters.

So there's probably some extra responsibility there to provide some guidance to the rest of the bar.

And I guess lastly I would say that we talked a little bit about the pipeline and in some ways the enforcement agencies are part of that pipeline. We certainly provide new attorneys with significant training opportunities. That's one of the reasons why we are able to attract them—it certainly isn't our starting salaries. And so because of that, as part of the pipeline, you know, if we are able to bring in a diverse group of new hires, they're going to graduate out into the other sectors and help them with their representation.

### III. IS IT TRULY A PIPELINE PROBLEM?

MR. VIEUX: And then also if we could talk about, get to the meat of the program too, what could be done in terms improving diversity in our antitrust bar?

And Qianwei, I'll start with you. Is it truly a pipeline problem? We always hear—you know, and I don't want to be negative about it—but sometimes the excuse is, well, the pipeline is just not there. Is it really truly a pipeline problem or do you see it more as an issue of will? And we'll start with Qianwei.

MS. FU: Well, Steve, as you know, when we were doing the prep session and I questioned this topic, I said this is such a daunting topic to unpack.

I think the answer really depends. And in the slides we provided some data and the data is based on the state bar 2019 attorney census, and I think the data reveals three observations.

One is despite the significant growth in the proportion of attorneys who are women and who are people of color in the past 30 years, the California attorney population does not represent the state's diversity, with Latinos being particularly underrepresented.

And the second point is that women of color are underrepresented among leadership positions in all legal employment settings, with Asian women particularly being underrepresented.

And the third observation is that women, people of color, LGBTQIA, and people with disabilities consistently report low-level satisfaction with workplace experiences.

I think the pipeline in general is strong for women, just in general. I think we really need to look at the bias that's baked into our organizations that serve as obstacles for women attorneys to grow and thrive.

The pipeline for people of color, I think is getting stronger. We saw rapid growth in the number of Asian attorneys since the 1990s, although that growth has since levelled off.

And as I mentioned, Asian women are underrepresented in leadership positions.

Latinos and Black attorneys are underrepresented in all legal employment sectors.

So if we do nothing, those groups will be left behind.

And, you know, I have to say this because we discussed this during the prep session. I think the demographic disparity is rooted in the educational system.

You know, it starts early and runs deep but I think the problem is compounded by the legal profession's approach to recruitment and retention.

I know it's intuitive for leaders with DEI work to start with the hiring pipeline, you know, how to get more people with X background in the room, right?

But one of the gaps we often have to wrestle with is history, because certain minority groups aren't just underrepresented, they are also intentionally excluded and historically marginalized.

So I think taking a closer look at the racial history and really trying to understand the social, historical, and political barriers that have excluded people from the legal profession is equally important.

A diverse place is not necessarily an inclusive workplace and, you know, an analogy I like to use is our neighbors have this great tradition to host new year holiday parties each year and they all come from different ethnic and cultural backgrounds, so we get to enjoy a great selection of a variety of foods.

That's diversity.

But my husband has certain food allergies. He's also a picky eater. My neighbors always ensure there is food that he can eat at the party so he can enjoy a good meal and he can enjoy the parties too. That's inclusion.

You know, diversity is a numbers game but inclusion is about impact.

MR. VIEUX: That's a good point, actually, diversity versus inclusion too. We'll talk about this a little bit later and it's something I've noticed too in the defense bar. Yes, you can have something that looked diverse, but without people really being included. That plays a role in retention and whether five, six years down the line of recruitment of when these folks entered the profession, whether they're still there at that same place of work, and that's an issue we see certainly in private practice.

And I even noticed it too, I have to say, even in government. I can speak freely now, since I'm no longer an employee of the government.

MS. FU: I also think that it's a leaky pipeline. We're looking at a leaky pipeline.

MR. VIEUX: Yeah. Oh, yeah.

MS. FU: The pipeline is leaky starting from elementary school all the way to the end of college and the pool of prospective minority students is already small in number, compared to the groups that are going to law school in larger numbers.

And then we have the retention problem. The pipeline gains aren't reaching to the top, right?

Again, we're fighting a war for talent in the post-pandemic era and if minority lawyers do not feel they're included, do not see a career path at the firm, do not feel they are offered opportunities to grow, they will leave.

MR. VIEUX: Yeah. The "great resignation."

#### IV. WHAT CAN BE DONE TO IMPROVE DIVERSITY?

MR. VIEUX: I mean on that point, too, in terms of a leaky pipeline, what can diverse attorneys do themselves? I mean, I'm a big believer that, look, you worry about what you can control, yes. Advocate, agitate, you know, for other folks to do the right thing but in this environment, what can women, diverse attorneys, in terms of disabilities—and even veterans too, because that's an issue with veterans too, in terms of discrimination against them or just not getting opportunities because folks think they're not as available—what can they do to improve their careers, protect their careers?

You know, one of the things I thought as a former FTCer and I think something that helped me, is I probably wouldn't be an antitrust lawyer if I didn't start my career at the agency, at the FTC. Although it wasn't perfect, I think there were a lot of opportunities I got early on, you know, trial opportunities, leadership opportunities, that I probably wouldn't have gotten if I went straight to a firm.

So that was one idea I had are pursuing those opportunities, but are there any things you can recommend to attorneys to make sure they stick through the pipeline?

I'd like to throw that to anybody, not necessarily Qianwei.

MS. FU: I have to give a pitch to our Section.

MR. VIEUX: Okay.

MS. FU: So we talk about the importance of mentorship and our Section, the Antitrust and Unfair Competition Law Section, has doubled down its DEI efforts in the past several years and really, you know, making sure we inject diversity components in our programs and activities and also create strategies and methods to further our diversity initiative goals.

One example is the creation of the D&I fellowship. The fellowship was incubated under our former Chair, Elizabeth Pritzker's leadership—I see Elizabeth is in the audience—and so the fellowship, in addition to providing financial assistance, it also offers a summer internship with a state or federal antitrust agency, as well as a year-long mentorship.

Last year our fellow was fantastic, and we just selected this year's D&I fellow. We truly thank the law firms and the corporate sponsors who have contributed their generous support to our fellowship, and for those who have not contributed, I strongly urge you to contribute to our fellowship.

But there are also other ways to help law students to break into this practice area and one example is our DEI committee. They have brought on presentations like, you know, pathways to antitrust to law students, with the goal to introduce law students to the different portals of antitrust practice.

And also I think they are currently developing learning modules to provide skill trainings to minority diverse lawyers or early career lawyers.

So if you cannot contribute financially, consider contributing in kind, and we always need volunteers

for those programs. So those are just two examples what our Section has been doing.

And if you are a member of a group that has traditionally had more power, you have the opportunity to use that privilege to advocate for others.

I know the national conference of the Women's Bar Association has put on what is called the Good Guys Program to encourage male allyship.

The program is designed to break the impasse in women's advancement by including people who have long been missing from the conversation: the guys. They've been trying to involve good guys, trying to involve men in women's issues and women's organizations and inject event components based on studies showing the best way to engagement—like highlighting men that other men want to emulate and know, and providing implicit bias trainings in a straightforward and nonjudgmental way, and just showing good guys that diversity and inclusion are where the money is and telling them how they can contribute.

I think these are all helpful strategies to involve everybody.

So when we talk about diversity, what is diversity? You know, it's not something somewhere in the book. It's not like in this program we have to do, right? It's everybody. It's everybody's effort. You know, even if you are a heterosexual white male, you have diversity. Everybody has diversity. I think, you know, the key here is really how to embrace everyone's experience and to act upon it and to make sure everyone be seen and be heard and feel uninhibited to share their perspectives.

MR. VIEUX: Thank you, yeah. That's a good point. Also to echo what Qianwei said too, I think for diverse attorneys getting involved in CLA, also other bar associations like the ABA Antitrust Section. I think you probably have to double up on those efforts compared to some of your colleagues.

But yeah, if I could turn to other members of the panel too, in terms of what they've done.

Laura, then Charlotte, you're in the thick of it now as a young attorney too, in terms of what you're doing but Laura, if you can talk.

MS. WILKINSON: Sure, I'll jump in.

I'll try to start with your pipeline versus will question, and tie it back together.

I think that it's really both the pipeline issue and a will issue, but if we think about the pipeline, only as the very beginning—the education system and getting people into law school—I don't think that's enough.

I think that there are multiple pipelines, right?

There is that pipeline at the very early stages and we need to do more at that stage but there are pipelines through the law school process, making sure that people are—for antitrust, are exposed to antitrust and see it as a valuable area to practice in.

There are pipelines in each of the sectors, whether it's government or law firm or in-house, being able to progress and what we need to do to make that pipeline move along so that people can get into leadership roles in any of those sectors, and that is the really the retention issue that we've started to talk about.

And I think that what we can do and bring it into why it's also a will question is that we each have a role to play in helping to move those various pipelines along by, you know, stepping up and being a champion for diversity. Where you are, whatever your role is, you can do something towards that, whether that is acting as a mentor or just making sure that you don't just let the status quo stay.

It is the easiest thing, in an in-house setting, to hire the antitrust chair of some large law firm. Look to who else is in the practice group. There may be someone with really direct expertise that you could

reach out to and make sure they get credit for it, rather than just going to the chair of the department.

If it is in the law firm, can you make sure that everyone has a chance to work on the cases that are going to be visible, that will impact their career, that will help them gain visibility or prominence even within the firm.

Everybody has a role that they can play where they can help move their respective pipelines along. Bringing in an analogy, one that I recall from Verna Myers, who is a consultant or had been a consultant in legal diversity for many years and now I think is in-house at Netflix in the diversity space. She's written several books coauthored with the ABA around diversity issues and one of the analogies she has is, diversity is being invited to the party and inclusion is being asked to dance. You can be there and standing against the wall—we've all been in junior high or high school parties where people are standing against the wall and no one's asking them to dance.

They were invited to the party but they don't feel included. That's the analogy that we need to think about: how can we make people feel a part of the environment where they are, whether it's a law firm, a company or a government agency?

MR. VIEUX: Charlotte?

MS. CHUN: This is super exciting because usually I have to like grasp my colleagues at happy hour to talk about DEI, and I'm sure that's not everyone's idea of a fun Friday evening.

One of the things that we hear a lot about in Big Law is our huge diversity issue. We hear it a lot in the antitrust bar because a lot of the Big Law firms that specialize in antitrust tend to be on the East Coast, where we're facing a lot more diversity issues than, for example, the California bar.

Where I was coming in from on Wall Street, I couldn't particularly say that diversity was doing very well there, right?

And one of the things that was always a source of confusion, I think, to some of the senior management at law firms that I spoke to was we have this incredibly diverse incoming class. We could make pamphlets of how diverse these incoming associates are. Why aren't they reflected in our ranks on the website when you go in and check the partnership, the counsel, the promotions?

Where are they? Where did they go?

And it's because a lot of firms—they're trying very hard—but they're sort of creating cookie cutter diversity programs. They sort of put a stamp on it and they say, we did the monthly chat for first-generation attorneys. We did the chat for the East Asian women associates.

But where is the engagement?

Every firm has different needs, right?

It's sort of like if you're building a city as an architect and you have this blueprint and you use it for every single city that you create, and you go into the city and you wonder why aren't people flourishing in every single city? We used the same blueprint and it worked here but it's not working there, and it's sort of like that for the law firms too.

I think a lot of law firms are getting consulting about what kind of programs worked one place and don't really critically think about how that might apply to their associates, and young attorneys increasingly are really understanding their value, their worth, and they're demanding more because they know their value. I think it's partly what's contributing to the "great resignation."

So they're going to continue to ask for a spot. They've worked so hard to be there and I think firms are going to have to start listening to them. A lot of them are starting to listen to them, but it is a slow process and I think young attorneys in particular are going to be really driving that effort to make sure that at least on the law firm front, diversity is going to have to improve over the next few years.

MR. VIEUX: And how would you advise young attorneys do that? At the start of your career it's intimidating, especially depending on what background you come from, at a law firm. You don't want to be seen as a troublemaker.

MS. CHUN: Good trouble.

MR. VIEUX: Good trouble, yeah.

How do young attorneys do that, advocate for that but still protect their careers?

MS. CHUN: It's a hard question because on the one hand I don't want to put the burden on diverse associates to make the path for themselves but if no one is making that path for them, they have no choice, right?

I think my first advice for the diverse associates is just to first be in the room—and I know it's different to be in the room and then to be sort of invited to dance—but being in the room is sort of the foot in the door.

And then I think more than anything, though, it's going to have to be an institutional change. I think a lot of times, at least in Big Law, the way diversity and inclusion are thought of is sort of siloed. We have DEI and we have DEI programming and we have partners who are in charge of the DEI program, but it's sort of a separate, siloed existence than viewing every aspect of the business through the lens of diversity, looking at the staffing and saying, is there an issue with how we're staffing these cases? Looking at the clients and seeing what their demands are for diverse teams, right?

It's not just about having the programming, it's just really making sure that the firms are looking at diversity, and the lens of diversity and inclusion applies to all aspects of their business.

MR. VIEUX: Putting that pressure.

Well, Jeff, you have a unique experience, being in the government.

What would you recommend to folks, diverse attorneys, in terms of making sure the pipeline is reflective of themselves, of people in their group?

MR. NEGRETTE: Yeah, so I think that's gotten a little better than it has been in the past but there still are real challenges.

I think one of the best avenues that is available for new diverse attorneys is to join any of the number of affinity groups that we now see in the agencies; some of them occur at the division level, some of them are at the department level, but quite a few opportunities for people to feel that sense of inclusion because it's not enough just to get people in the door and to make the numbers look good. It's very inefficient to spend all your time trying to recruit people that don't stick around.

And so it's very much a culture change that needs to occur in the organization, and that obviously starts at the top. There needs to be a leadership level of commitment to what it means to have a diverse organization and why that's important, why that's valuable, pushing that message throughout the chain of command and in doing so, creating this environment that younger people will feel comfortable participating in, being a part of, and in turn contributing to of their own accord.

MR. VIEUX: I don't want to put you on the spot, but one thing I remember too from the government it was great in terms of at the entry level, getting that experience, getting hired. But one thing I noticed too was just moving through the ranks, and a lot of folks felt—and Laura, I'll turn it over to you since you did move through the ranks at the FTC—but a lot of folks felt that was closed to them, and that certainly had an effect, in terms of retention of diverse attorneys.

And I notice, on a positive note, the DOJ with Doha Mekki, the management has gotten more diverse, but any insights that you can speak to in terms of improving or being more intentional about improving those promotional opportunities for diverse attorneys?

MS. WILKINSON: I'll start off—it's been some time since I've been out of the government but I do think I agree with you, I'm seeing more movement in terms of progression of diverse attorneys through the ranks at all of the government agencies and I think that's a very positive step in many of the programs that you spoke of, of probably partly contributing to that.

I think that there are things that, as I said, we can all do where we are. In the in-house sector and in the law firms there are programs such as diversity lab or other things like that where the law firm or the company or even the government agency, you know, makes a commitment to increasing diversity or taking steps to increase diversity, not only in their hiring and advancement but on the in-house side, on making sure that the attorneys that work for us are also diverse and putting commitment around that so that it's a shared responsibility for everyone. Again, not just the diverse attorney's responsibility or the diversity committee's responsibility but everyone's responsibility, and part of how people are evaluated or compensated is often a motivating factor.

And so those kinds of commitments, incentives, things like that will help spur increased diversity, whether it's for someone's own self-interest to make things happen or whether it's because it's the best for the organization. I think it's really both.

And there are many programs like that, that we should all, in our own environments, think about what, you know, as you said fits your environment.

It's not a one-size-fits-all, but make the effort to say, what can we do to increase our commitment and make it a shared responsibility, not just on the diverse attorneys or the committee that has that charge?

And I think that there's still a valuable role for the affinity groups for the diverse attorneys and allies, because you do need to have some safe spaces where you can talk about issues like this and how to navigate, so there's a very important role for that. But that's not the only thing and that is not going

to be enough to advance the needle, but it will help with retention.

MR. VIEUX: To add to that, too—and I'm going to ask this question for each I guess for lack of a better word, representative for each sector—but what do you think, Laura? In terms of the corporate world, what can they do in terms of improving diversity? Not only corporate legal departments, but just generally? I think you touched on that a little bit, in terms of hiring decisions, but if you can expand on that.

MS. WILKINSON: Yeah. I mean, I do think a large part of it is hiring decisions both internally within the legal departments because as the legal departments are more diverse, there will be different perspectives and different networks of people that they may reach out to, in terms of hiring from the retention of external counsel for the company.

So the internal hiring and promotion is a big piece of it and then the other part, as you said, is the law firms that we retain and making sure that, you know, even if you have, you know—I know many in-house law departments have historical law firms that they use and so it's harder to shift to another firm—but really take the time to look at the ranks of those firms and try to get some of the more diverse attorneys or women involved in your matters so that they can get experience. Or, where appropriate, look to other firms and other partners that may have even more relevant experience and give them a try because just because you've always used that firm, doesn't mean you have to continue.

And part of that may be whether they have shown progress on the diversity front, maybe one of those factors that make you decide that maybe we should look at some other outside counsel.

MR. VIEUX: And yes, the legal market in terms of business for corporate defense clients is getting a lot more competitive, I've noticed.

MS. WILKINSON: And the in-house departments are getting more diverse as well, and I think that that

will have an impact on bringing the pipeline of law firm partners along as well.

MR. VIEUX: Jeff, you touched on this too, in terms of diversity and the role of public agencies can play.

Could you speak to that, not only in terms of hiring within the Department or the FTC or State AGs, but what role the enforcement agencies can play, in terms of diversity in general, even diversity in the private bar?

MR. NEGRETTE: So I do think of the agencies as part of the pipeline. And so, how we structure ourselves, I think in part contributes to diversity elsewhere in the bar. And the way that we—at least the way I look at it—are trying to maximize diversity within the organization is really a multistep process.

We've talked about hiring but it really begins with outreach, you know, just trying to get people to apply, right, is a very important first step.

And then in the hiring cycle, it's really important to convey to hiring officials what it means to hire up a new attorney that reflects the characteristics that the organization is looking for, and it's easy to fall into traps, right? I think someone mentioned bias here but we, just as human beings, right, we commonly fall into the convenience traps, right, of engaging in unconscious bias.

So we may objectively and openly put a great deal of value on diversity but we're all very busy and when we're staring down the barrel of 300 resumes, it's extremely tempting to take shortcuts, but those shortcuts really do undermine the process of trying to capture someone who really reflects the characteristics that we're looking for. So hiring is a very big part of it.

And then of course retention and advancement.

That's sort of the four-step process, as I see it, in terms of trying to build and maintain a diverse organization which, in turn, hopefully will benefit the rest of the bar through natural career progression.

MR. VIEUX: Yes, I definitely agree.

Charlotte, just to follow-up on that too, you have an interesting perspective as being a similar perspective of mine—you know, corporate private bar, in terms of defense.

I'll ask this of you: what role, as somebody sitting on the opposite side of government enforcers, what role do you think the enforcement agencies play in diversifying the profession, diversifying the bar?

MS. CHUN: This is something that we talked about during our prep session as well.

Clery in particular works a lot with international clients, so what ends up happening sometimes is that you have foreign clients who look at the enforcement—look at the government side. They look at the folks who are sitting on the opposite side of the table as them and they try to mirror that sometimes implicitly in their own defense counsel; maybe strategically it would be better if we have white male counsel talk to the DOJ because they happen to have a white male panel—I'm just using the DOJ as an example. No shots fired.

And sometimes that could be a part of the calculus in the client's mind as well. So sitting as a junior attorney and looking at what, you know—what the room composition looks like, I can't help but wonder, maybe the client is thinking the same thing. Maybe they would prefer to have folks that look like the government, and to have a more diverse government sitting on the opposite end of the table, I think is actually going to really help diversify teams on the defense side as well.

I mean, I can't really say it's one party's burden or the other, but I do think it is a little bit of a feedback loop. It does affect, I think, people's choice in their counsel as well.

MR. VIEUX: That's an interesting perspective, definitely. And Qianwei, as we talk about diversity, a lot of the discussion and a lot of the initiatives, like with the Mansfield Rule, a lot of it seems geared

towards the defense bar, defense corporate bar, in-house counsel, legal departments.

I think the plaintiffs' bar obviously is very important and some folks, a lot of diverse attorneys, they want to be plaintiffs' lawyers, they want to be on that side.

So what are the incentives for folks in the plaintiffs' bar to pay attention to diversity, and what initiatives are there to improve diversity in the plaintiffs' bar? Because it's lacking on the plaintiffs' side of things too.

MS. FU: Well, you do need the plaintiffs' bar, for this practice to exist.

MR. VIEUX: Yes. We wouldn't get paid.

MS. FU: I think both plaintiffs' and the defense bars face some common challenges.

You know, if you think the picture is dismal for antitrust practice, it's even worse for the private sector compared to public and corporate sectors, but I do think the plaintiffs' bar face some unique challenges and issues that undermine diversity.

When I first started, the leadership appointments for antitrust actions were monopolized by a few repeat players. I've seen a positive change in the past 15 years. More women are appointed to leadership positions, more minority lawyers are taking on more meaningful roles litigating those cases, but I think the change has been far too slow.

And I also think, you know, we've lost some diverse talent, talented minority attorneys, who did not get the right or proper exposure opportunities in their most crucial years for growth and advancement.

And in other cases I think we've made some good progress because more and more in-house counsel, as Laura mentioned, have demanded our legal terms to include diverse talent, and institutional clients recognize there is this correlation between diversity and good business, right?

But for the plaintiffs' bar, there are also pressures from the bench, demanding more women to be part of the leadership and more minority lawyers to argue dispositive motions or have a seat at the trial counsel table.

And I want to read you an excerpt from your slide. I just think it's a fantastic opinion.

So Judge Lewis Liman in the Southern District of New York, he has made an eloquent case for promoting diverse leadership in class action cases and I just—I don't want to paraphrase it because it's just beautifully written and I'm just going to read it.

So he says: "There is an obvious social value in promoting diversity within the ranks of the legal profession. A firm's commitment to diversity, though, does not just demonstrate that it shares with the courts a commitment to the values of equal justice under law, rather the intuition and/or diversity criterion is soundly grounded in the court's obligation to select counsel who will best represent the interest of the class. That intuition is recognized and validated by the views of a consensus of corporate general counsels of some of the leading companies of the United States, each charged with fiduciary duties to protect the interests of the absent shareholders, and on their behalf to select counsel best able to represent the corporation. There is no reason why the courts, faced with a similar choice of selecting counsel, but this time on behalf of the putative absent class members, should not consider and give weight to that same factor."<sup>3</sup>

Indeed, I think Judge Liman's made an eloquent case that all sectors—the bench, the public, the corporate and private sector—should live and breathe D&I.

MR. VIEUX: It should, definitely.

I want to thank our panel. This was a great discussion. I enjoyed it, even though I lost track of time, and I hope you guys found it helpful too as well.

state court litigation concerning commercial and consumer matters, as well as counseling clients on various antitrust and consumer protection issues. Steve previously served in the Federal Trade Commission's Bureau of Competition where he participated in antitrust litigation and investigations focusing on the health care and pharmaceutical industries. Steve serves on the Executive Committee and as Chair of the Education Committee for the Antitrust and Unfair Competition Law Section of the California Lawyers Association.

2. *City of Providence, Rhode Island v. AbbVie Inc.*, No. 20-CV-5538 (LJL), 2020 WL 6049139, at \*6 (S.D.N.Y. Oct. 13, 2020) (emphasis added).

---

1. Steve Vieux is Senior Counsel at Bartko Zankel Bunzel & Miller, PC. Steve represents clients in federal and

# BIG STAKES ANTITRUST TRIAL: *IN RE CAPACITORS ANTITRUST LITIGATION*

Edited by Anupama K. Reddy<sup>1</sup>

## PANELISTS

- For the Plaintiffs: Joseph R. Saveri, Joseph Saveri Law Firm, LLP; and Anupama K. Reddy, Google LLC
- For the Defendants: Roberto Finzi, Paul, Weiss, Rifkind, Wharton & Carrison LLP; and Bonnie Lau, Morrison & Foerster LLP
- Moderator: Elizabeth Castillo, Cotchett, Pitre & McCarthy LLP

## I. INTRODUCTION & OVERVIEW

In the *In re Capacitors Antitrust Litigation* trial, a class of direct purchasers brought suit against 23 capacitor manufacturers under Section 1 of the Sherman Act. Plaintiffs alleged that defendants participated in a 13-year-long conspiracy to fix the prices of aluminum, film, and tantalum capacitors.

Antitrust cases rarely go to trial. But this one did, and not once, but twice! This case was first tried before Judge James Donato and a Northern California jury in March 2020. That trial was suspended due to the COVID-19 pandemic two weeks into the plaintiffs' presentation of evidence. The judge declared mistrial in the summer of 2020. The case was then retried by the same trial team, before a different jury, in November 2021. Going into the second trial, the

plaintiffs had already secured settlements (\$435 million) that exceeded the single damages figure (\$427 million) calculated by the plaintiffs' expert.

This panel explored plaintiffs' motivations behind trying the case for treble damages despite enforcement challenges in Japan, and defendants' motivations behind defending the case despite having eight guilty pleas stacked against them. The panelists also touched upon settlement strategies and presentation of expert evidence, and left the audience with trial tips.

**Joseph R. Saveri** is the founder of the Joseph Saveri Law Firm. Joseph Saveri served as lead trial counsel for the direct purchaser plaintiffs. **Anupama Reddy** is currently Associate Competition Counsel at Google and was formerly an attorney at the Joseph Saveri Law Firm. Mr. Saveri and Ms. Reddy represented the direct purchaser plaintiffs.

**Bonnie Lau** is a partner at Morrison & Foerster LLP, and **Roberto Finzi** is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP. Mr. Finzi and Ms. Lau represented Japanese capacitor manufacturer defendants Nippon Chemi-Con and Matsuo Electric, respectively.

**Elizabeth Castillo** is a partner at Cotchett, Pitre & McCarthy, LLP. Her practice focuses on complex litigation, specifically antitrust class actions, including representing end-payor plaintiffs in *In Re Automotive Parts Antitrust Litigation*.

\* \* \*

## II. HISTORICAL AND LEGAL CONTEXT

MS. CASTILLO: Good afternoon, and welcome to the Big Stakes Antitrust Panel: *In Re Capacitors Antitrust Litigation*, which the parties tried not once but twice during the COVID-19 pandemic to a jury before the Honorable James Donato in the Northern District of California.

The direct purchasers' trial against 10 capacitor manufacturers took place first in March 2020. Due to the pandemic, the court suspended trial proceedings that same month and later declared a mistrial. Several defendants settled right before or during the first trial.

A new trial against the last three remaining defendants took place in December 2021. The direct purchasers settled with Matsuo three days into the second trial, and with Nippon Chemi-Con and its U.S. subsidiary right before closing statements. The direct purchasers ultimately settled with 19 defendant groups for over \$600 million.

With that background, we'll begin with the lightning round to get some trial highlights, then move to Q and A for an in-depth discussion, and finish with never-before-heard closing statements that the parties would have given had the second trial progressed further.

So turning to the lightning round. Panelists, please limit your answers to less than 30 seconds.

Bonnie, what was your favorite moment at trial?

MS. LAU: My favorite moment during trial was during opening statements. Joe had used a trial exhibit photo and he cropped it to focus on three

gentlemen, insinuating that this was a price-fixing meeting and that an American company, AVX, had participated in.

So during my opening I threw up the same slide but I zoomed out to show the entire photo and I said to the jury: Class counsel hasn't shown you the full picture, and what the full picture revealed was this is just a global industry conference meeting. There were a dozen people milling around in the background, there was a photographer, and so it clearly demonstrated that this was not some secret price-fixing gathering.

And when that moment occurred, there was a pretty audible gasp from the jury. So that's my favorite, most memorable moment.

MS. CASTILLO: Joe, what was the most challenging part of trial?

MR. SAVERI: I think the most challenging part was getting the case tried a second time when, after the first trial, we had basically put all our cards on the table and put our case on, which gave the other side a pretty good view about what our case was.

MS. CASTILLO: Anu, what was the most fun part of trial for you?

MS. REDDY: For me, I think the most fun part was I felt like I was really on a team. I almost felt like I was in a band or a Broadway troupe or something because every day we would get ready, plan everything, and then come back and debrief on how the plan went. I really loved that. I loved that I felt like I belonged to something big.

MS. CASTILLO: I'm sorry, I forgot to give the disclaimer for Anu.

MS. REDDY: Yes.

MS. CASTILLO: The views she expresses here today are not Google's, they are her own.

MS. REDDY: I'm new to this.

MR. SAVERI: The same is true of me. None of my views should be ascribed to Google.

MS. CASTILLO: All right. Roberto, what was the most unexpected part about trial for you?

MR. FINZI: For us it was—and I think you mentioned this in the introduction—when three days into trial our co-defendant, the last remaining co-defendant, settled the case and there was an announcement that morning. We hadn't, for reasons I understand, we didn't have any notice of that.

But we had planned, much as Anu says; you know, you go in there with a game plan, who is going to cross this witness, who is going to put on this direct, who is going to argue this, that, and the other, and we had charted it all out with, you know, some precision and then all of a sudden you find out that, hey, you know, half the team is gone. And so you've got to pick up some other crosses and arguments and rethink certain aspects of the presentation to the jury. So that was quite a surprise.

We managed to roll with it and Morrison Foerster and Bonnie, to their credit, were very helpful in terms of—you know, to the extent they could—in helping us out, but that was quite a shock.

MS. CASTILLO: Joe, can you tell us when Judge Donato was at his finest?

MR. SAVERI: Well, I think he was at his finest when he—well, he just really demonstrated I think a lot of attention and care for the jury. I think he demonstrated that he cares very deeply about the jury and the jury process, and so seeing him exhibit that and handle that I think was really admirable.

MS. CASTILLO: Bonnie, when was Judge Donato at his fiercest?

MS. LAU: He was pretty terrifying and fierce at the moment that he struck part of the plaintiffs' expert's testimony, Hal Singer.

MS. CASTILLO: Can't wait to hear more.

Roberto, what was the best part about trying a case during the pandemic?

MR. FINZI: I think two things, really.

I guess in the lightning round you should do one only but I'll speak quickly.

One was what Anu said, the sense of being part of a team. In the courtroom generally there was less people because of COVID. We felt like even with your adversaries, you were part of a team and you were doing something, and even with the jury.

So that kind of sense of mission and cocoon-like feeling was actually a positive one.

MS. CASTILLO: And finally, Anu, what was the worst part about settling the case when you did?

MS. REDDY: I think it was a great outcome for the class, but I remember when Joe called and he told our team that we settled, I was 99 percent happy but like one percent sad that I didn't get to cross-examine the defense economist that I was supposed to cross-examine. The cross kept getting pushed out for some or the other reason, like there was a flood or something else happened, and I kept preparing and preparing and preparing for that moment and then we settled.

MS. LAU: Kind of the theme of both trials.

MS. REDDY: Yes.

MS. CASTILLO: Thanks for the quick highlights. Let's go to the Q and A portion, and first I'd like to talk about going to trial.

### III. TRIAL AND SETTLEMENT STRATEGIES

MS. CASTILLO: This question is for Joe. Antitrust cases almost never go to trial. What do you believe created the perfect storm here to make it happen?

MR. SAVERI: A few things. I think, one, there was a very strong liability case.

Second, you know, I'm really proud of our team, particularly Anu, Chris Young, Steve Williams. I mean, we were really—we had the courage, I think, to take a case like this to trial.

And I think part of it is just having the fortitude and the passion for that and being committed to the jury trial process. I think the other thing that was important was that we had a pretty rapid schedule for a case like this. It did take seven years, I guess, but that was actually pretty fast, given two of those were during the pandemic.

And then I think ultimately it had to do with the fact that we didn't want to settle for single damages. You know, we wanted more and we thought that that was what these were—there was serious wrongdoing, our clients had sustained substantial losses and it was really important for us to get them compensated.

MS. CASTILLO: Roberto, your client, Nippon Chemi-Con, pleaded guilty and paid a \$60 million criminal fine for its role in price-fixing electrolytic capacitors. Why try the case?

MR. FINZI: I mean, look, obviously walking in representing a defendant who has already been convicted of the conduct that they're on trial for isn't necessarily where you want to be. That being said, we felt like we had an opportunity and we felt like, with all due respect to the plaintiffs, who tried a great case, that they had overreached, and overreached substantially so, and had therefore put us in a position—had given us an argument or an edge that we might not otherwise have. And whereas we were not going to get one ounce of sympathy from the jury because our clients had pled guilty—they had already admitted it, they had sort of confessed, we could not argue that there was no conspiracy—but we had fairness to argue.

And that gave us a leg to stand on, which is to stand up and tell them point-blank, and we did it—I made a point to do it in the first minute of my opening—is to acknowledge my clients' responsibility, acknowledge their guilt for it, say we stood by it and

recognize it, but that doesn't mean that they get what they ask for, and that they have stretched and taken advantage and asked for damages they did not suffer.

And so I mean when you ask why take this to trial, part of it is there's not like a great alternative. I mean, we weren't prepared to pay what the damages were at the time and so we thought that—and truly believed that it was in the client's interest to defend the case, take it to trial, and keep litigating it.

And so that's exactly what we did.

MS. CASTILLO: Bonnie, on the same note, were you concerned about going to trial, given that your client Matsuo, a relatively small player that also pled guilty, was potentially subject to joint and several liability and treble damages for a conspiracy that involved not only electrolytic capacitors—which your client pled guilty to—but also film capacitors?

MS. LAU: Certainly. I think I echo a lot of the things that Roberto said, but independent of the risks of trial and the potential outcome, Matsuo had two very unique things working in its favor.

One is that Japanese law does not enforce punitive damage awards; and then the second is Matsuo is an exclusively Japanese company, with no assets located in the United States. The Supreme Court of Japan has held twice, in 1977 and 2021, that punitive damages awards are not enforceable in Japanese civil courts and that's because the civil tort process in Japan doesn't seek to deter or punish, it's focused exclusively on essentially single damages.

So we felt we had a pretty strong case that any award against us would not be enforceable in Japan or collectable against Matsuo, and so it actually was quite an easy decision for us to roll the dice and go to trial here, and it helped actually relieve a little bit of the pressure of going into such a high stakes trial.

MR. FINZI: The other thing to keep in mind—and everybody here who tries cases knows this—is that

you can lose a trial and still come out better than the settlement demand.

I mean, it's not—I think people forget that a lot and people say, oh, I have no case, I'm done on liability, I've got to cave. The reality is—and my experience has shown this time and time again—I've practiced primarily in the criminal world where, you know, if the prosecutor makes me an offer of 10 years imprisonment and I say no and I go to trial and lose but my client gets five years, I've won.

So the kind of binary looking at it like, oh, why go to trial? You may lose, is it's just all about the outcomes and it's all about how do you maximize what might otherwise be a bad outcome?

MS. CASTILLO: Anu, next question is for you.

So you began working on *Capacitors* in 2019 and the parties had been litigating the case for over five years at that point. How did you get up to speed on the hundreds of depositions and the thousands of exhibits and prepare yourself for a trial the following year in 2020?

MS. REDDY: Liz actually shared all these questions with us before, so I have a prepared response for this. So three reasons, really broadly.

One was, you know, when I came to the firm, the firm already had a lot of really good associates and they had put in a lot of work in organizing this huge case and I feel like I went back to those resources several times to come up to speed.

The second thing was I would basically camp outside Joe's and Steve's offices and, you know, I'd have a list of questions in my notebook and I'd just run through them every day and I'd get the origin story on a lot of things and that was super helpful.

The third thing is, because of the speed at which trial went, I could only focus on like one fire drill at a time. So if I had one problem, I would just really learn everything I needed to learn to solve that one problem and accumulate a little puddle of knowledge

and then the puddles kept aggregating and I eventually knew enough.

MS. CASTILLO: Let's talk about trial strategy.

Joe, people have told me you're a pro when it comes to knowing when to keep litigating and when to settle. Can you share your expertise in this and tell me how much of this is gut feeling?

MR. SAVERI: I don't know how much of it is gut feeling and how much I've just kind of developed and internalized over the years. You know, I have a couple observations about this.

I think in a multi-defendant case there are kind of two groups. I think there are what we call the pilgrims, they are the early settlers, and there are those who are going to be in there for a long haul, and being able to kind of identify parties or lawyers who appreciate the value of engagement on an early settlement is a really important thing.

You know, and then I think the other thing is to be willing to mediate and to be involved in ADR efforts whenever those are available, and we used I think four different mediators in the case, which was really important.

And look, at the end I think part of it had to be being willing to push the case all the way to trial, and I think that maximized the value of the case.

So I mean those are really three main points.

MS. CASTILLO: Roberto, the pandemic halted the first trial and the defendants then asked the court to declare a mistrial. Why not request the court to resume the first trial?

MR. FINZI: So we actually thought about that a lot and the way the first trial was interrupted—this just shows how things went during the pandemic, how all of us had no idea what was going to happen—when the judge suspended it the first time, he's like, oh, we'll be back in 10 days. Everything here will blow over and, you know, don't cancel your hotel rooms

and we'll start again right away, and so some of it was based on how long is this delay going to be.

We were also at some point reluctant to move for the mistrial because we felt like we had gotten some good rulings Bonnie alluded to on a plaintiffs' expert and the judge had stricken some testimony.

Ultimately, though, the idea of having a jury that had sat for months and maybe even at some point, you know, a year or more with the plaintiffs' case—because when the mistrial was called, it was I think the day before or the day after plaintiffs had rested, and so we found ourselves in a situation where the jury had heard and seen the plaintiffs' evidence, then taken, you know, a long break, and we were just a little concerned that a year later they would have made up their minds already and wouldn't have the open mind needed to hear our case.

So we went back and forth on that and discussed with the remaining defendants, two of us still at the time, and then ultimately just made that strategic decision, but it wasn't an obvious one.

MS. CASTILLO: Bonnie, shortly before the first trial, six of the 10 remaining defendants settled and a week into the first trial, another defendant settled, leaving three defendants to try the case. This probably wasn't a good situation for the last three defendants, so how did this impact your preparation for trial?

MS. LAU: Yeah, it was tough.

It certainly impacted my team's ability to sleep that week and I do want to just shout out the MoFo team and thank everybody for their incredible hard work during what were some very, very tough, long, sleepless nights.

In terms of strategy, Roberto alluded to this in his lightning round answer, it was just extraordinarily fast, how quickly defendants settled out and it was every other day. So I think we must have rejiggered and restructured our opening statements three

or four times that weekend. There were a flurry of witnesses that had to be reassigned.

But the one thing that I do want to say—and I see some of our co-settling defendants out in the audience—is just, you know, how amazing the defense bar is. People were extraordinarily fantastic, supportive.

Even though they dropped out, they didn't like jet off to a desert island and enjoy their cocktail. They stayed, they pitched in, they pretty seamlessly transitioned existing work product and draft examination outlines, and that really helped us through what was a very challenging situation.

The other component that I think was very challenging—and we confronted this in particular in the second trial—is as the defendants settled, we had these different components of the defense story that demonstrated the plaintiffs' overreach, right?

So we wanted to tell the story of film capacitor manufacturers, which was separate from aluminum and tantalum. We wanted to tell the story of American companies. And so when AVX settled, it's not that we couldn't pick up that story, but we lost kind of the perspective of being able to tell it through the American company that had never attended any of the industry meetings in Japan, and that was exceptionally challenging.

MS. CASTILLO: Anu, given Judge Donato's concerns about the lack of diversity in the practice of law, it must have been refreshing for him and the jury to see and hear from you. What were the advantages and also the disadvantages of being diverse at trial?

MS. REDDY: Let me start with some advantages, all right? Lawyers are quite boring, so am I, so I think it's difficult for jurors to really pay attention while you're presenting a really complicated case to them and I think when you have diverse people in the room, from a presentation point of view, it brings in a different cadence, a different style. It is a show, after all, right? And it's a better show for the jury when you have different people in the show.

And that diversity also brings with it different points of view and different worldly experiences, which affects the strategy and it affects how you really choose to present the case.

Being different also points the spotlight on you, so it's a little bit of pressure when you're different. Personally, when I was in the courtroom, I felt like, oh, I'm so tall, I'm so different, like everyone was watching me. So I felt like I had to be like on guard all the time and there wasn't that much room for me to, you know, make mistakes. So I think that's a disadvantage when you're a diverse person in a courtroom.

MS. CASTILLO: I kind of want to float this question to Bonnie as well. Bonnie, I know you had a trial team that was diverse, from partner to the paralegal level. Was this strategic or just coincidence?

MS. LAU: It's absolutely strategic. I think everybody who knows me knows, you know, I work on a lot of diversity issues in our profession and so when I select my teams, it's really important to me that we have a variety of perspectives. I think everybody's familiar with the research that shows when you have that diversity of opinions, you tend to come up with more creative ideas and hopefully arrive at better solutions.

And I think the other thing that I would say too is that, you know, look at our shifting population demographics. We are becoming increasingly diverse. Our jury pools are really diverse. And I think it helps us connect with a broader swath of jurors, when you have a really broad team that brings all sorts of shapes, sizes, perspectives to the table.

The other thing that I just wanted to say is I really am thankful to Judge Donato and the N.D. Cal. bench because they've really made diversity such a priority.

We've had that standing order now for years that encourages young attorneys to have speaking opportunities. If anybody is young in this audience and doesn't know about it, go ask for this opportunity.

And, you know, one thing that I've heard from my female attorney friends who are across the v. is that there's not as much accountability on the plaintiffs' side, right? On the defense side we have clients who have a diversity imperative.

And so it's actually been really nice to see Judge Donato and other judges in N.D. Cal. push back when the slate of proposed lead counsel is too homogenous.

And then lastly, just a pitch. Everybody please join ABA Women.Connected and Diversity.Advanced. It would be great to have as many advocates and allies as possible, as we try to continue to shift the needle on this.

MS. CASTILLO: That was overreaching. This is a CLA event, Bonnie.

MS. LAU: And thank you to GSI for spotlighting the next diversity panel. I think that's such a critically important part of the conversation.

I'm sorry to meld organizations here.

MR. SAVERI: Let me just jump in on this.

You know, I do think the plaintiffs' bar really has done a good job, so to the extent that there's people on the other side of the v. kind of saying, well, the plaintiffs don't do a good enough job or we can do better, I think this trial in itself shows what the plaintiffs' bar has done and how seriously we take this.

I think the mission of our firm, among other things, is to train the next generation of antitrust lawyers. I mean we are all so fortunate to be practicing in this area in this state and we take the obligation to train the next generation very, very seriously and part of that is to being able to provide opportunities for all sorts of people from all sorts of background.

So I really do think we do a good job at that, and this trial in particular demonstrates that.

MR. FINZI: Also, to build on that, I thought some of the happiest moments during the trial were when one of the young lawyers for either side was able to do their first examination or first cross-examination or first substantive argument before the court.

I remember those moments of after court that day going over and shaking somebody's hand and saying, you know, hey, great job and welcome and congratulations, and it brought me back to the mentors I had that gave me my first opportunities. I feel like this "pay it forward" mentality in the bar of giving young people an opportunity to get up and do their first thing and make their first mistake or hit their first home run is a great thing about our profession and one that I'm personally proud of.

MR. SAVERI: Yeah and you know, when you try these cases, there are a lot of different personalities and you get to know everybody very well. What Roberto said is absolutely true, and I think one of the remarkable things about it is that I think that that was true regardless of what side of the v. you were on, and while we were very fierce adversaries, I think we were, as a group, generally supportive of those opportunities for everybody, and I certainly felt that and I know it was reciprocated.

MS. CASTILLO: This is a perfect segue into my next question and the next topic, which is experts.

## IV. PRESENTATION OF EXPERT EVIDENCE AT TRIAL

MS. CASTILLO: Anu, this is for you. So you examined the class's technical expert, Adam Fontecchio, and were slated to cross-examine defendants' economist Laila Haider.

How did you get this starring role, as a young attorney?

MS. REDDY: How? I'm not sure.

It is kind of being in the right place at the right time, but in some ways I think Joe and Steve might be able to answer the "how" better than I can.

But I think in terms of like the job I did on trial in the beginning, it was very heavy on expert work. While doing that, I developed a lot of relationships with all of the experts on the case. I had a big role in drafting all of the scripts and prepping the experts, designing the focus groups, and even impersonating Dr. Haider for one focus group that we did. I basically pretended to be Dr. Haider in front of the jury. And all of that really helped me engage with the expert material quite deeply.

So although at the point that I got these tasks I didn't have the skill set I needed to really do the cross or do the direct, I felt like the firm, and Joe and Steve particularly, thought I could get there within the time frame that we had and that's probably why I got those tasks.

MS. CASTILLO: Staying on the topic of experts, Roberto, the class claimed \$427 million in damages.

Judge Donato struck testimony by your client's expert witness that damages do not exceed \$66 million.

Can you elaborate on what happened, and anything you would have done differently?

MR. FINZI: Yeah, it was actually tricky and interesting—to me at least—on a couple of different levels. We had made a very deliberate choice to not present a damages number of our own and that the theory we were going with was they have not proved their damages.

They had overreached. Their damages model included—and, you know, we'll come to this in the mock summations, you know, the sale of every single capacitor made by every single defendant for every single product, and that was just way overblown.

And that raised the question then to us, we're like, well, should we be presenting an alternative? If we're saying that their \$427 million number is wrong, what is the right number? And we made a kind of studied decision, mostly because of trebling of damages, that we did not want to present a number of our own.

Now interestingly enough, plaintiffs didn't present an alternative either, and the way we looked at their model at least was that the jury wasn't going to be able to say, okay, I buy that there's a conspiracy but I want to back out the part that film capacitors were involved, and how do I do that? What formula is there that allows me to back out the film capacitors?

Or what allows me to back out—if I find that the American companies weren't part of this conspiracy, how do I back that out?

And so to some extent we felt like that uncertainty was going to be an advantage, in that it put the the plaintiffs to a sort of all or nothing. You either persuade them that the number is \$427 million or they run a risk of finding the damages weren't proven with sufficient specificity.

So it's in that context that this issue came up.

We also had the problem that we didn't want our expert to buy into the plaintiffs' methodology and so again, if you're proposing a number of your own, you're sort of saying, yeah, well, I can accept this part of the methodology.

You know, the way it came out, we were ultimately happy with the way it came out. The judge struck it. I wouldn't have, but not sure it really mattered at the end. We were very happy with how that testimony went.

Now it's easy to say that because she ended up not getting crossed, so we would have seen how the cross went, but it ended very fortuitously on a Thursday afternoon or a Friday where we weren't sitting over the weekend and the judge didn't correct that part of it or didn't grant the motion to strike until after the weekend, and so we were happy with how the jury was left on the last day of trial.

And then, you know, we settled over the weekend and so the cross never happened.

MS. CASTILLO: Joe, before the second trial against the last three defendants, the last had reached settlements of around \$440 million, which was more

than the \$427 million that the class's damages, the experts testified, was the overcharge incurred.

How much were you asking the jury to award and how did you intend to persuade the jurors to do so?

MR. SAVERI: Well, our single damage number was \$427 million and the jury didn't have any evidence of the settlements, so we were going to prove that number and we had very strong expert testimony to support that.

You know, frankly we felt like the issue of setoffs and enforceability was an issue, but we felt comfortable with the idea that it's a happy problem to solve if you have an over-billion-dollar judgment and we would take it one step at a time.

MS. CASTILLO: Bonnie, during a break on the third day of the second trial and just before your partner was going to cross-examine the class's damages expert Jim McClave, plaintiffs informed the court that they had settled with your client, Matsuo.

Can you tell us what happened during the cross-examination of Hal Singer during the first trial and how you think that impacted the strategy and timing of the settlement with your client in the second trial?

MS. LAU: Sure. So as background, Judge Donato had issued a *Daubert* ruling prohibiting Singer from relying upon DOJ/FTC guidelines in his qualitative analysis, so he used a corporate test from the guidelines in order to characterize certain defense communications as "suspect."

So after Singer testified on direct at the first trial, my partner, David Cross, raised with the court that he believed Singer's testimony was based on these excluded guidelines and therefore, violated the court's *Daubert* ruling.

And so this prompted Judge Donato to cross-examine Singer directly on the stand and he admitted that he did rely on the guidelines and, you know, this is that fierce moment that I was describing. Judge Donato exploded. He immediately

struck Singer's testimony and instructed the jury to disregard it.

And then later in the day he invited the defendants to brief, actually striking all of Singer's testimony because he said, quote, the tentacles of that analysis pervaded all of Singer's opinions, such that Judge Donato just couldn't engage in a surgical strike here.

But unfortunately, that occurred on March 12, 2020. So even though the parties had a crazy flurry of emergency briefing over the weekend, San Francisco shut down the following Monday so the court never ruled on it, and of course we ended up in a mistrial.

But then fast forward two years to the second trial, I think plaintiffs didn't want MoFo anywhere near one of their experts again and so, you know, we were in discussions, those accelerated, and we reached a resolution shortly before David was about to cross-examine McClave.

MR. SAVERI: From our perspective, that didn't matter at all.

## V. TRYING THE CASE DURING COVID-19

MS. CASTILLO: I want to talk about the pandemic, since it was a big part of both trials.

Roberto, I know you prepared for this trial at least twice, and probably more times, given there was some uncertainty about when the court would hold a new trial. Can you tell us how you handled preparing for a moving target, and managing expectations with your client?

MR. FINZI: It's to some extent—and I don't know if it was Anu who said it before—this is like a live show and so things are going to happen all the time and you've got to be prepared and you kind of go into this knowing I'm not going to be able to script it and nothing's going to happen exactly on the day you think it's going to happen and according to the schedule you think it's going to happen.

That being said, you don't necessarily plan for pandemics like this, and where it became most complicated, I think for all of us, is that we had—more than half of the witnesses were in Japan and had to come from Japan, and travel from Japan became very on again/off again.

Very complicated. There were different rules on how long people had to quarantine.

There were questions about whether or not party representatives could come over. Questions about whether or not people could testify from Japan or whether people could testify remotely or whether people could testify from other places in Asia remotely, and so we were constantly dealing with a constantly changing landscape, and it was frustrating.

It was frustrating to make a decision on day one, only to find out, you know, five days later that the rules of travel had changed and therefore the witness could be here and therefore your motion was moot.

But, you know, I think in a bigger scale, you've just got to roll with it and make the best decisions you can, based on the information you have and proceed that way.

It was—more than the client for us—it was keeping the team motivated and keeping the team safe. Most of our team was in from New York, they were away from home, they were away from their families, it was early in the pandemic, so we didn't know what this meant.

At some point people were worried, you know, am I going to be locked into California, away from my home for 10 days or a month? What's going to happen?

So it definitely presented challenges.

MS. CASTILLO: Joe, you tried this case twice.

Were there any efficiencies gained or lessons learned from the first trial that you then applied to the second trial?

MR. SAVERI: Yeah, yes.

First of all, I think that when we started the first trial, we thought that we didn't have enough time to get in all the evidence that mattered or we needed, and we learned from the first trial that we could do it quickly and we could probably do it even more quickly and so we were very comfortable with that.

I also think we realized the first week of trial was very important and so our initial week was an introductory expert, liability evidence, and we closed the first week with our damage expert.

And so I think that, you know, frequently in these cases—and I don't know if it's conceit or how much we fall in love with our experts—but we think that these cases are largely about expert analysis and antitrust economics.

You know, ultimately this was about a story, and we realized that if we could tell our story quickly and efficiently in the first week, we would have all the kind of benefits of being the first mover, and especially being able to have that story kind of tied up with a bow when the jury went home for the first weekend, I thought was very important to us.

The other thing I would say is we did a fair amount of focus group testing and I think one of the things we realized is that we could do a lot of that and do it remotely via Zoom and we learned to be very efficient about that.

MS. CASTILLO: Bonnie, the courtroom parties had an innovative jury selection process that allowed the jury to be empaneled quickly, despite COVID concerns and the significant number of juror no-shows before the second trial. Can you talk about this process and whether it should be here to stay?

MS. LAU: Sure. So in advance of the second trial, Judge Donato required all of our prospective jurors to complete a pretty thorough written questionnaire. It screened for vaccination status, COVID, hardship, and then asked all of your basic voir dire questions.

And then a couple days before the first day of trial, we met over Zoom with the court. We reviewed all the written questionnaires together and it helped us prescreen and excuse a handful of the prospective jurors.

This, I think, contributed to a lot of efficiency the first day. I want to say we were closer to two hours the second time around, whereas the first time jury selection took us the better part of a half-day.

And I at least—I welcome the group's thoughts—would welcome continuing that process into the future, even after pandemic concerns recede.

I thought that it gave the jurors a real opportunity to provide unvarnished, more fulsome answers to the questions than they might have delivered on the spot in the courtroom, and better helped us assess the jurors that we thought might be favorable to our case.

MS. CASTILLO: Anu, you told me that it felt like you were preparing for trial for two years straight.

MS. REDDY: I was.

MS. CASTILLO: Can you share with us how you kept your morale up, especially during the pandemic?

MS. REDDY: So I know Roberto just highlighted a lot of the difficulties that came with the pandemic, and I'm sensitive to that and I understand that, but for me personally, the pandemic saved me.

I was at home and I was able to channel my productivity, have "on time," "off time," really be present in my life, rather than just coming back at the end of the day and watching my life. I think that helped with my mental health.

And also there are obvious answers like exercise, eat healthy, get two dogs, I think those are all important things.

MS. CASTILLO: So I want to thank the panelists for answering these questions about the trial and now I want to give them an opportunity to present the

closing statements that they would have given, had trial proceeded.

## VI. MOCK CLOSING STATEMENTS

MS. CASTILLO: So Joe, you have six minutes.

MR. SAVERI: So one of the big differences, of course, is we had more than six minutes.

MR. FINZI: Not much more than six minutes.

MR. SAVERI: But after you hear this, guys, you're not getting any of your money back, just so we're clear about that.

MR. SAVERI: Good afternoon.

On behalf of Mr. Kryzwinski, Mr. Lubman, their companies, and the 1,763 other purchasers of capacitors in the United States, I want to thank you.

We've covered a lot of territory in the last two weeks and I just wanted to say how grateful we are for your time and your attention. We've done our best to organize and present our case in the time we've had.

For over 12 years, the defendants illegally conspired to reduce, eliminate, and prevent competition. They agreed with one another that they would raise prices when they could, and when the market was forcing prices down, they agreed to slow it down.

In doing so, the defendants broke the law and caused the plaintiffs to pay higher prices than they otherwise would have. Now, during the opening, the defendants said and we heard them say, "Well, we own it," but after hearing the evidence the last two weeks, what did they do? They didn't own it, they ran away from it.

You didn't hear one defense witness say they did it; that they violated the antitrust law, that there was a conspiracy, that they joined it, that it occurred in the United States and indeed here in California.

We didn't hear them say that they took the money that did not belong to them. We didn't hear them

say they were willing to give any of that money back, even though they pled guilty to participating in the conspiracy. Did you hear any indication of remorse or apology for what they did?

Now, there are four main points to this lawsuit. First, that there was a price-fixing conspiracy; second, that the defendants participated in the conspiracy; third, that the conspiracy caused plaintiffs' damage; and fourth, how much are those damages.

[Referring to slide presentation.] So here's a chart which shows the 22 companies involved in the conspiracy, and as I said when I spoke to you two weeks ago, the evidence of the conspiracy is different for each of the 22 companies.

And as we saw, there was no meeting involving all 22 defendants. Some of the defendants went to some meetings and not to others. Some had clandestine meetings in coffee shops or bars. Some stayed out all night drinking. Some played golf. Some talked on the telephone. Some by email. And some had private conversations we will never know about because they deny they occurred or they destroyed the evidence.

And I was waiting for someone who was actually involved in the conspiracy to come in, but you didn't see one. Did that occur to you? Where were Mr. Okubo or Mr. Kakizaki? You saw them in the openings.

Has it occurred to you that you did not hear from one person who was actually involved in the decision-making? Not one of the presidents, not one of the directors, group managers, sales managers, or any of the persons who attended the meetings for Chemi-Con, or in fact any of the companies involved in the conspiracy.

Instead we heard from Mr. Inoue who, at the time of the conspiracy, was a very young man, a low-level employee. And he said everything he testified about at the trial, he learned from one of the lawyers sitting here today. The lawyer for UCC.

Now, defendants said that the conspiracy did not involve film capacitors but we learned that the companies that manufactured film capacitors also met and exchanged information regularly.

Remember Ishigami? He was a participant in dozens and dozens of film meetings and he testified that he regularly met with competitors before the film meetings to confirm pricing information that each were quoting to certain customers. He testified about specific conversations with Shinyei. He also testified that he met severally with Panasonic, Okaya, Hitachi, Toshin Koygo, Chemi-Con, and Nitsuko. And Ishigami testified that when he was at the meetings, he made notes and he first denied that there was any discussion at all of pricing, but what did he say when we confronted him with the documents? He admitted that he falsified documents.

He concealed what they were doing.

And as we also learned from Ishigami, he was aware the electrolytic manufacturers were having group meetings at the same time.

Now you heard a lot about direct and circumstantial evidence. Well, when we talk about circumstantial evidence, one pretty good example are all the efforts taken to conceal the conspiracy, to cover their tracks. We have seen dozens of examples of these. If one is not doing something wrong, if one is guilt-free and not involved in a price-fixing conspiracy, there's nothing to hide, there's nothing to conceal. And when someone makes such a blatant effort many, many times, that is strong, very strong evidence of a conspiracy.

And we have examples from every defendant. They tried to hide the truth and they tried to hide the truth from this court and they tried to hide it from you and my clients. They tried to hide it from you.

MS. CASTILLO: Thank you. All right. Bonnie.

MS. LAU: And I'll just caveat this, that we settled on day three, so this is based on how I would have put the case in.

Good afternoon. My name is Bonnie Lau, and along with my colleagues at Morrison & Foerster, I represent defendant Matsuo Electric Co., Ltd.

Thank you so much for your time and patience during this trial.

On day one of this case, class counsel promised to prove to you a 12-year sweeping global conspiracy that encompassed 22 defendants, three capacitor types, and he claimed injured 1,800 businesses in the United States, where they suffered higher charges for every single capacitor that they purchased.

But the evidence at trial has shown that that sweeping conspiracy never happened. It's not what Matsuo participated in and it's not what Matsuo pleaded to.

Instead, as you heard from Matsuo's former employee Satoshi Okubo, he admitted that on the limited occasions where a price-fixing agreement was reached, it was a narrow agreement with a specific customer, a specific product, and primarily in Japan.

He expressed remorse for what he did, but he also explained that this purported conspiracy is not nearly as broad as class counsel would have you believe.

It did not include any film capacitors, it certainly didn't include all capacitors, and it didn't include 1,800 U.S. customers.

In fact, as Mr. Okubo explained to you, the sweeping conspiracy that plaintiffs would have you believe is simply not feasible because of the significant variations in capacitor type, size, use, specification, customer, and product. In fact, not a single witness during this entire two-week trial testified to the sweeping conspiracy. Not even the witnesses that were cooperating with the plaintiffs.

Despite the evidence showing that any conduct here was narrow and specific, plaintiffs are still seeking to be compensated for every single capacitor purchased over 12 years, for \$427 million, but I want you to remember nearly 40 percent of these damages are attributable to two American suppliers, AVX and Kemet, who had no participation whatsoever in the industry meetings in Japan.

So Matsuo is here today accepting full responsibility for what it did, but defending where plaintiffs have overreached and sought damages for conduct that is not justified by the evidence that you heard today. Thank you.

MR. FINZI: So when this trial started almost a month ago now, I told you very plainly, very clearly, as bluntly as I could, that the proof would show that my client, NCC, had been involved in an illegal agreement with competitors to fix prices of certain capacitors sold by certain manufacturers to certain class members, and that, ladies and gentlemen, is what the proof has shown.

The proof has shown a conspiracy by certain manufacturers to fix prices of certain products sold to certain class members, but that is not what the plaintiffs here have alleged, and it's not what they're asking you to compensate them for.

What they're asking you to compensate them for is something much, much broader. What they're asking you to find and what they're asking you to award them in damages, is based on an impossibly grand conspiracy that involves the sale of every single capacitor sold by 22 different defendants to every single class member over a period of 12 years. Think about it.

You have heard in this case the evidence about how those capacitors differ. How they go from as small as a fingernail and the cost of a penny, to as big as a van and \$30,000, and you are to believe that every single one of those capacitors sold by every single defendant for a period of 12 years was the subject of a conspiracy?

That is not what the evidence has shown.

So ladies and gentlemen, look, the plaintiffs are allowed to allege what they allege. That's how it works in our system. They make a claim, they ask for a certain amount of money. But with that right, with that right to make a claim, comes an obligation, a burden; a burden to prove to you, by a preponderance of the evidence, that they have suffered those damages and on this record, on these facts, with what you have heard, that burden hasn't been met. Thank you.

MS. CASTILLO: Thank you to our panelists.

## VII. TRIAL TIPS

MS. CASTILLO: So I actually didn't think we would have time for this but we do have a few minutes for everyone to give a few words, so I'm going to call this section "pearls of wisdom." I'm going to ask each person to give a little piece of advice.

So Joe, do you have any advice for appearing in front of Judge Donato?

MR. FINZI: We're on tape, Joe. You have rights.

MR. SAVERI: I'm kind of looking out. I think one of the things you have to do is be prepared to be flexible, because what you predict is going to happen is predictably not going to be what is going to happen. And so being able to be kind of in the moment, being able to be flexible about that, I think is super important.

I guess the other thing I would say is, you know, there is a real premium on being willing to take bad news and a bad result in stride and being able to move forward because it can be a little bumpy, but those are really the most important things.

MS. CASTILLO: Bonnie, do you have any tips for effective time management during trial?

MS. LAU: Absolutely. I mean, I think it's really important to tell your story as precisely and

concisely as possible to the jury. So it's really important, as Roberto was saying, for us to map out as a team on the defense side, you know, precisely how many minutes are allocated to every particular witness, and to make sure that we are not overlapping and drawing the same facts out of different individuals.

MS. CASTILLO: Anu, do you have any advice for keeping the jury engaged or even awake during trial?

MS. REDDY: I think I kind of talked about this before in a different answer, which is cadence and style are important. So being methodical about every change you introduce in the courtroom can make a huge difference to how much attention they're paying because the courtroom is so dull, that every change is magnified like multiple times.

And I would say, spend the money on a really good trial technician. It is completely worth it. A smooth presentation goes a long way, in terms of like how your case is presented. It also like shows the judge that you're respectful of the jury's time and you want the case to be smooth for the jury.

MS. CASTILLO: And Roberto, any tips you would give to someone trying their first antitrust case, on the eve of trial?

MR. FINZI: Well, it was my first antitrust case. I think people get caught up in antitrust cases because it's at this intersection of law and economics and statistics and all that. What this case showed me, as much as others have, is that the jury really doesn't understand the depths of the economics. I don't understand the depths of these economics.

I'll be honest with you, I put on experts in these cases where I didn't fully understand the opinions they had and the theories they had, but what's important about that is that the jury doesn't either.

So all you got to do is know it a little bit better than the jury and present it in as simple of terms as possible and in a way that, as somebody said

before—I think Joe said—that tells a story rather than proves a bunch of mechanical points.

I really can't stress that enough.

And then another thing just to end on, because I thought we did actually a pretty good job in this trial—and this is not just for antitrust stuff—is try to be collegial to people.

I think, you know, the whole reputation we've gotten as lawyers is bickering with each other and trying to undermine each other. I think jurors pick up on it, I think other younger lawyers pick up on it and members of the team and at the end of the day, this stuff is incredibly important but it's just about money.

At the end of the day, the relationships and the practice of law and the kind of—not to sound all corny—but the higher calling part of it, and how you're going to feel about yourself when the trial's done and when the trial day's done, that's going to be more important.

MS. CASTILLO: All right. Thank you, panelists, and we appreciate your time and all the advice you've given us.

- 
1. Anupama Reddy is Associate Competition Counsel at Google Inc. She is a member of the California bar and a member of the Executive Committee of the California Lawyers Association Antitrust and Unfair Competition Law Section.

# ANTITRUST AND UNFAIR COMPETITION LAW

## CALIFORNIA LAWYERS ASSOCIATION

400 Capitol Mall, Suite 650  
Sacramento CA, 95814

CALIFORNIA  
LAWYERS  
ASSOCIATION

## Introducing new membership options for 2022!



We're excited to introduce two new membership offerings! We've consistently heard from you, our members, that you want and need more options.

You can now choose what works for you for the 2022 membership year:

- **New!** The **Introductory** membership is for members who want a simpler offering. It includes access to CLA-wide benefits.
- **New!** The **All-Access** membership is for members who want it all. Be a part of CLA and access all 17 Sections.
- The **Standard** membership is for members who like things the way they are. It includes access to 1 Section of your choice. Add additional Sections anytime for \$40 each.

Current members will not have to do anything; we will roll you over into the appropriate membership plan. However, we wanted to inform you of these adjustments as soon as possible for your convenience.

Learn more at [CALAWYERS.ORG](https://CALAWYERS.ORG)