ANTITRUST, UCL AND PRIVACY

CALIFORNIA LAWYERS ASSOCIATION

COMPETITION

ANTITRUST AND UNFAIR COMPETITION LAW

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MESSAGE FROM THE CHAIR

Written by David M. Goldstein
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The Antitrust and Unfair Competition Law Section is delighted to publish its Spring 2022 edition of *Competition*. As with our recent Spring editions, this volume includes the panels and presentations at our November 2021 Golden State Antitrust and Unfair Competition Law Institute (GSI). **Stephen McIntyre**, Editor of *Competition*, provides an excellent overview of the panels and articles in his column following this column.

The Section has undertaken several initiatives since COVID-19 arrived in early 2020. Most important, in conjunction with CLA's creation of a new Privacy Section, our Executive Committee has refocused its energy, time, and efforts on antitrust and competition law. Under the leadership of **Elizabeth Pritzker**, our 2019–2020 Chair, we adopted the Section's mission statement: "To engage, inform and inspire generations of lawyers to further the practice of antitrust and competition law in California." Building on our mission statement, our immediate past Chair, **Qianwei Fu**, led us to adopt a strategic plan to focus on four areas: programs, publications, membership, and diversity/inclusion. We added the UCL as an area of focus this past autumn.

Programs: **Jiamie Chen** is the chair of our Education Committee, which has continued to organize and sponsor panels and webinars. Most recently, **Jill Manning** and **Kate Patchen** organized the Section's Fifth Annual Celebrating Women in Competition Law in California event on March 10, 2022. Many of us remember that the same event in March 2020 took place a few days before the first pandemic lockdown; it was wonderful to get together again (without masks) almost two years to the day.

On November 18, 2021, we hosted our flagship annual event, the Golden State Antitrust and Unfair Competition Law Institute, under the leadership of **Aaron Sheanin** and **Rob McNary**. The resurgence of COVID forced us to switch to

virtual programming for GSI, but we were able to host an in-person reception at the Vault. The reception was our first in-person event since March 2020, and it was great to see so many of you in person. Dan Wall, our 2021 Antitrust Lawyer of the Year, spoke briefly at the reception, and he finally will be honored at the in-person phase of our 2021 GSI conference on **May 5, 2022**. For that event, programs and the dinner will be held in the Julia Morgan Ballroom, and for the reception we will walk over to the Vault. **Please reserve November 10, 2022 for our 2022 Golden State Antitrust & UCL Institute and 2022 Antitrust Lawyer of the Year reception and dinner**.

Publications: We continue to publish *Competition*, the Section's preeminent treatise *California Antitrust and Unfair Competition Law*, and *E-Briefs*, *News and Notes*. **Belinda Lee** and **Shira Liu** are leading the effort to update and refresh chapters of the *Treatise*. *Competition* continues to publish high-quality, scholarly articles and analyses of cutting-edge antitrust and UCL issues. And **Bob Connolly** has transformed *E-Briefs*, *News and Notes* into a robust monthly publication with updates about the Section, neutral case summaries, deep dive opinion pieces, links to agency statements and publications, and information for new lawyers and law students.

Membership: **Ian Papendick** is leading our effort to focus on the benefits we provide to our members and increasing membership in the Section. To that end, we have posted on the Section's website a summary of member benefits and we regularly update the website's landing page to highlight upcoming events and deadlines. We are continuing to add content regarding our activities, and we plan to add a section for new lawyers and law students by autumn 2022. We also are working with CLA to expand our membership both within and outside California. If you are not a member, please visit our website to learn why you should become a member! (Go to https://calawyers.org/section/antitrust-unfair-competition-law/about.)

Diversity/Inclusion: **Abiel Garcia** and **Anupama Reddy** continue make our Section a leader within CLA regarding diversity and inclusion. Several years ago, we adopted a Diversity and Inclusion Policy that is an integral part of the Executive Committee's activities. The Diversity Committee oversees our mentorship program and has developed presentations called "Pathways to Antitrust" for law students. The Diversity Committee also oversees the Section's Inclusion & Diversity Fellowship. Our inaugural fellow, LeeAnna Bowman-Caprio, interned at the California Attorney General's office in the summer of 2021, and this spring we will select the recipient of the 2022 fellowship. In the fall of 2021, CLA proposed diversity and inclusion guidelines for appointments to CLA-wide committees and Section Executive Committees, and our Executive Committee submitted comments based on our Section's experience.

UCL Committee: Many on the Executive Committee felt that we could and should spend more time and effort on the UCL. To that end, in September 2021 we added to the Executive Committee five UCL practitioners to replace the

"privacy" Executive Committee members who rolled off to the Privacy Section. As our new members joined the Executive Committee, we established a new Unfair Competition Law Committee. Our Secretary, **Jonathan Levine**, is chairing the UCL Committee, which holds regular meetings and is planning a half-day UCL program later this year.

Finally, CLA approved a new antitrust compliance policy on March 25, 2022. Of course, our Section was charged with drafting it. With so many lawyers involved across CLA and its many sections, it took a great amount of time and effort to finalize a policy. Thanks to **Cheryl Johnson** and **Paul Riehle** who led the effort to draft the policy.

Thanks to all our Executive Committee members and advisors, as well as standing committee members and other volunteers who contribute to our activities. Special thanks to our immediate past Chair, **Qianwei Fu**, for her leadership during another COVID year and her sage counsel and advice as I became Chair of the Section.

It is easy to get involved in the Section! You can serve on a standing committee, write an article for *Competition*, work on the *Treatise*, contribute to *E-Briefs*, *News and Notes*, join the mentorship program, participate on a panel, or host an event at your organization. If you would like to get involved in any of these activities, or if you have ideas of your own, please send me an email at dgoldstein@fbjgk.com.

MESSAGE FROM THE EDITOR

Written by Stephen McIntyre
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In November 2021, the Antitrust and Unfair Competition Law Section of the California Lawyers Association held the 31st Annual Golden State Antitrust and Unfair Competition Law Institute. For the second year running, the COVID-19 pandemic necessitated a virtual format. While we were disappointed to be unable to convene in person, the Section is pleased to report that participation in GSI was high—a testament both to the tireless efforts of GSI's organizers and to the quality of the presentations. This edition of *Competition* reproduces each of the excellent GSI presentations.

We begin with the "Recent Developments in Antitrust and Unfair Competition Law" panel, moderated by **Malinda Lee** of the California Attorney General's Office. Panelists **Thomas Greene** of the U.S. Department of Justice Antitrust Division, **Colleen Huschke** of the San Diego District Attorney's Office Consumer Protection Unit, and Professor **Shana M. Wallace** of Indiana University Maurer School of Law provide an overview on cutting-edge developments in federal antitrust law, federal procedure, and California state antitrust and unfair competition law.

Next up are two "Big Stakes" panels. The first, moderated by **Aaron M. Sheanin** of Robins Kaplan LLP, centers on *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, a case in which a class of NCAA Division I basketball and football players successfully challenged NCAA rules limiting financial aid and benefits that student-athletes may receive. Mr. Sheanin was joined by **Jeffrey L. Kessler** of Winston & Strawn LLP, who represented the plaintiffs; **Daniel A. Rascher**, Ph.D., of OSKR, LLC, who testified at trial as an expert witness supporting the plaintiffs; and **Jeffrey A. Mishkin** of Skadden, Arps, Slate, Meagher & Flom LLP, who represented the NCAA in *Grant-in-Aid*.

The second "Big Stakes" panel, moderated by **Shira Liu** of Crowell & Moring LLP, discusses the Federal Trade Commission and Pennsylvania Attorney General's challenge to a proposed merger between Thomas Jefferson University and Albert Einstein Healthcare Network. The panelists—**Jamie E. France** of Gibson, Dunn & Crutcher LLP; **Paul H. Saint-Antoine** of Faegre Drinker Biddle & Reach LLP; and **James A. Donahue, III** of the Commonwealth of Pennsylvania's Office of the Attorney General—address the challenges of litigating a hospital merger case, both generally and in the midst of a pandemic.

GSI was also honored to host an all-women panel on "Managing Antitrust Practice in Changing Times." Moderator **Jiamie Chen** of Parabellum Capital LLC was joined by panelists **Shana Scarlett** of Hagens Berman Sobol Shapiro LLP, **Dena Sharp** of Girard Sharp LLP, and **Susannah Torpey** of Winston & Strawn LLP, with input from **Kalpana Srinivasan** of Susman Godfrey LLP. This high-powered panel spoke on a range of topics relating to law firm management, from litigating multi-district antitrust cases in the age of COVID-19, to counseling "big tech" clients in the face of heightened regulatory scrutiny, to whether remote hearings and client pitches promote or hinder gender equality among practitioners.

This edition's report from the 31st Annual Golden State Institute concludes with an enthralling conversation with **Justice Martin J. Jenkins** of the California Supreme Court—the first African-American man to serve on the Court in over 30 years and the first openly gay Justice on California's highest court—who graciously provides insights into lessons he has learned through a life of public service. **Paul Moore** of the California Department of Justice, Office of the Attorney General; **Elizabeth Pritzker** of Pritzker Levine LLP; and **LeeAnna Bowman-Carpio**, a J.D. candidate at UC Hastings College of the Law and the Antitrust & Unfair Competition Law Section's inaugural Inclusion and Diversity Fellow, led the conversation with Justice Jenkins.

This edition of *Competition* also includes three exceptional articles:

First, **Christina Tusan**, **William Pletcher**, and **Alex Bergjans**—a trio of attorneys from the Office of the Los Angeles City Attorney—provide an in-depth, multi-jurisdictional study of how the UCL and other consumer protection laws have helped protect public health during the COVID-19 pandemic.

Next, **Seth Silber** and **Alexander Poonai** of Wilson Sonsini Goodrich & Rosati P.C. chronicle the Association for Accessible Medicine's challenge to AB 824, a California statute aimed at stamping out "reverse payment" patent settlements. As detailed in their article, the *AAM v. Bonta* litigation underscores that state-level attempts to institute broad antitrust reforms may run into constitutional limitations.

Finally, **Laura K. Kaufmann**, an associate at O'Melveny & Myers LLP, writes on the federal antitrust enforcers' newfound focus on potential antitrust violations

in labor markets—in particular the Department of Justice's criminal prosecution of alleged "no-poach" agreements among employers. Drawing from these recent enforcement actions, Ms. Kaufmann provides recommendations for minimizing antitrust risk.

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As of this writing, the COVID-19 pandemic appears at long last to be receding. While we have had many false starts in returning to "life as normal"—and predicting the virus's future course would be a fool's errand—we nonetheless look forward to the 32nd Annual Golden State Antitrust and Unfair Competition Law Institute on November 10, 2022, with optimism that we will be able to reunite in person.

Thank you to the organizers, moderators, and panelists who made the 31st Annual Golden State Antitrust and Unfair Competition Law Institute a success; to the talented authors who submitted articles for publication in this edition of *Competition*; to the Executive Committee of the Antitrust and Unfair Competition Law Section; and to Ben Covington, Jack Derewicz, Gillian Hawley, Tyler Helms, Daniel Lautzenheiser, Pauline Nguyen, and Winston Weinberg, who assisted with editing this edition.

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RECENT DEVELOPMENTS IN ANTITRUST AND UNFAIR COMPETITION LAW

Edited by Malinda Lee[1]

PANELISTS:

- Thomas Greene, U.S. Department of Justice, Antitrust Division
- Colleen Huschke, San Diego District Attorney's Office, Consumer Protection
- Shana M. Wallace, Indiana University Maurer School of Law
- Moderator: Malinda Lee, California Department of Justice, Office of the Attorney General

I. INTRODUCTION & OVERVIEW

Professor Shana Wallace of Indiana University Maurer School of Law was the first of three speakers on this panel. She covered developments in substantive federal antitrust law and highlighted major Section 2, Section 1, and Section 7 cases from the past year. The highlights include cases covering refusals to deal, monopsonies and price-fixing in labor markets, and criminal no-poach actions recently brought by the government.

Thomas Greene of the U.S. Department of Justice, Antitrust Division, next covered developments in federal procedure. His case highlights covered significant developments on jurisdiction, standing, and class actions. Mr. Greene also discussed important legislative developments including the Criminal Antitrust Anti-Retaliation Act, the Competitive Health Insurance Reform Act, and a federal appellate procedure rule amendment.

Deputy Attorney Colleen Huschke of the San Diego District Attorney's Office, Consumer Protection Unit, closed out the panel presentation by covering developments in state antitrust and unfair competition law. Her overview of legislation included changes in the area of automatic renewals in recurring service contracts and debt collection. She also covered significant unfair competition law cases that touch on damages, commercial speech, and unfiled escrow fees.

II. MODERATOR MALINDA LEE'S OPENING REMARKS AND INTRODUCTION OF PANELISTS

MS. LEE: Good morning, and thank you for joining us. It is my privilege to welcome you all to the 2021

GSI panel on recent developments in antitrust and unfair competition law.

My name is Malinda Lee, and I'm a Deputy Attorney General in the Health Care Rights and Access Section's Competition Unit in the California Attorney General's Office. I have the honor of moderating this panel of esteemed speakers: Shana Wallace, Thomas Greene, and Colleen Huschke.

I will begin with introductions.

Shana Wallace is a professor at the Indiana University Maurer School of Law. She teaches antitrust, civil procedure, and legal ethics. Prior to teaching, Shana practiced both criminal and civil antitrust law for over a decade with the Antitrust Division of the United States Department of Justice. At U.S. DOJ she represented the government in an appellate capacity in civil and criminal cases, served as an advisor to the directors of criminal and civil enforcement, and investigated mergers and anticompetitive conduct with the Telecommunications and Broadband Section. In 2016 she was recognized by the Attorney General for her contributions to the *Apple E-Books* litigation with the Distinguished Service Award. Professor Wallace also spent time as a deputy associate counsel in the White House and as a special assistant U.S. Attorney in the Eastern District of Virginia.

Thomas Greene is a trial attorney with the Antitrust Division of the U.S. Department of Justice. His practice includes both civil and criminal enforcement actions. He was previously Special Trial Counsel for the Federal Trade Commission's Bureau of Competition, where he led successful challenges to major health care mergers in Idaho and Illinois. Prior to the FTC, Tom served in the California Attorney General's Office, where he was the Chief of Antitrust. During his time in the office he also served as Chief of the Public Rights Division, the public protection arm of the AG's office, as well as the Chair of a Multistate Antitrust Task Force of the National Association of Attorneys General. He co-teaches the core antitrust course at UC Hastings and serves on the California Bar's Justice Gap Working Group. Tom has litigated a number of landmark cases and received a number of honors, including the Antitrust Lawyer of the Year Award awarded by CLA's Antitrust and Unfair Competition Law Section.

Colleen Huschke is a Deputy District Attorney in Consumer Protection in the San Diego District Attorney's Office. Colleen specializes in civil enforcement of consumer protection laws. Prior to joining the San Diego DA's office in 2016, she practiced civil litigation at Paul Hastings, where her practice focused on complex matters involving allegations of corporate wrongdoing, such as securities fraud, accounting improprieties, and failure to disclose material information.

I will now turn it over to Shana for her presentation on federal antitrust developments.

III. PANELIST PROFESSOR SHANA WALLACE'S PRESENTATION ON DEVELOPMENTS IN SUBSTANTIVE FEDERAL ANTITRUST LAW

MS. WALLACE: Thank you, Malinda, and also thank you to CLA for hosting this and inviting me. In addition to those that you've just heard from now, I just wanted to say thank you to the organizers including Rob McNary, Victoria Loeffler, and Elizabeth Pritzker, who are making this all happen. It's a pleasure to be back again this year.

So if you're a member of the antitrust bar, you know that there's just too much that's happened this year than can be covered in our update. My approach is to try and choose some cases that I think have contributed something interesting to the antitrust literature or litigation practice this year. I will highlight a significant Section 2, Section 1 (civil and criminal), and a Section 7 merger matter, and see if there's some sort of theme we could pick out here.

A. SECTION 7-*COMCAST V. VIAMEDIA*

I wanted to start with *Comcast v. Viamedia*.[2] This was a case out of the Seventh Circuit.

The Seventh Circuit had reversed a district court decision, which dismissed a refusal-to-deal claim at the motion to dismiss stage, and granted summary judgment on a tying claim.

Comcast sought certiorari and after we had our GSI update last year, the Supreme Court actually issued its Call for the Views of the Solicitor General in December. That brief didn't come in for a while—there was an administration changeover—but eventually DOJ weighed in and counseled not to grant certiorari on the basis that the Seventh Circuit's fact-bound decision had correctly applied precedent.[3] Interestingly, that precedent in large part featured *Aspen Skiing*,[4] which has been sparingly relied upon in the lower courts after the Supreme Court, while not overruling *Aspen Skiing*, had indicated it should be considered "at or near the outer boundary" of Section 2.[5]

1. SUMMARY OF FACTS

Before I try to connect this case up to what I think could be some potentially interesting takeaways and maybe some follow-on litigation, I want to briefly outline the facts as they're a little bit complicated. The market actually involves competition at several levels, as described below,[6] and the alleged anticompetitive conduct was effective at eliminating two of those levels of competition.

Comcast is a multichannel video programming distributor that offers cable services. Comcast also had a Division called Comcast Spotlight, which offered advertising services. First, you have some competition among Comcast and its two cable rivals in the geographic markets at issue here, RCN and WOW! Let's use Chicago as our particular market of focus. That level of competition thus involved competition in multichannel video programming—or cable TV—market.

Second, all cable providers use ad representation ("ad rep") services to help place and distribute advertising in their programming. Comcast, as mentioned, self-provisioned that service through Comcast Spotlight. RCN and WOW!, rather than using Comcast (their cable competitor) for services to market and sell advertising, used Viamedia, an outside company that provided ad rep services. Thus there was also competition between Viamedia and Comcast in the ad rep services market.

Finally, there was also competition among the cable providers for local advertising revenue, as distinguished from national and regional advertising. A substantial portion of cable advertising is regional or national in character and is placed through "interconnects"—cooperative ventures that were jointly established by cable companies to distribute national and regional advertising, but which are now controlled by Comcast. The remaining advertising spots, however, are sold to local businesses, and the cable companies will compete with one another in their pricing and placement of local ads.

Now Comcast, as we are probably familiar, over the last 20 years or so, has acquired hundreds and hundreds of local cable companies and in so doing, has taken control of these formerly cooperative interconnects. After doing that for a while, Comcast turned to RCN and WOW! and Viamedia and basically said, "If you want access to the interconnects and to national and regional advertising revenue, then you can't use Viamedia anymore. You have to essentially hire Comcast." RCN and WOW! held out for about a year, to a loss of millions of dollars (and Comcast lost millions of dollars in the process too), before they eventually gave in.

With Comcast now managing all of its cable competitors' advertising, competition was affected in the following ways. First, competition for local advertising disappeared because Comcast became the only cable company marketing local advertising spots. Second, there is obviously no more competition for ad rep services with the

disappearance of Viamedia. And third, competition for cable services will be lessened because Comcast now controls and manages all of its competitors' advertising inventory, along with any competitively sensitive business information that would come with that, and the ability to profit off of its competitors' ad sales. So those are the competitive dynamics that fed into the case.

2. SUMMARY OF ISSUES

Having a refusal-to-deal claim as part of this case was an opportunity for the Supreme Court to, if it wished, further limit *Aspen Skiing* or overrule it. The case was certainly well briefed. Not only did you have DOJ weighing in, but Comcast brought in Miguel Estrada of Gibson Dunn to represent it at the Supreme Court. Kellogg Hansen represented Viamedia.

Comcast's position was that *Aspen Skiing* is clinging to life and it's an artifact of an earlier era. Comcast, for example, relied on a quote by Judge Easterbrook from the Seventh Circuit at a Federalist Society conference that *Aspen Skiing* "bit the dust" in *Trinko*.[7]

In addition, a kind of interesting item that would also potentially have caught the Supreme Court's eye, is that one of the decisions discussed in this case was an opinion from Justice Gorsuch when he was on the Tenth Circuit in *Novell v. Microsoft*,[8] a late-arriving, follow-on litigation to the government's *Microsoft* litigation.

And what the debate centers around is how to measure harm. So we all know about the Section 2 cases that are ongoing with Google and Facebook. In fact, there is currently decently active Section 2 litigation, which was not a feature of the antitrust landscape much in my decade-plus of practice at the Antitrust Division in U.S. DOJ. So one of the key questions is going to be: How do you measure harm?

I'd center this debate around what's called colloquially the "no economic sense" test. It comes in part from an amicus brief that the government filed in *Trinko*, but it's in large part derived from an article authored by Greg Warden, the former head career economist at the U.S. DOJ Antitrust Division who retired last year.[9] The name of the test sounds very terse. It sounds like it means that if a defendant can think of *any* economic benefit for the alleged conduct, then it should be legal. And this was Comcast's reading of this "no economic sense" test: there shouldn't be any balancing test of anticompetitive harms and potential benefits. Rather, if you can think of *any* procompetitive benefit or an efficiency, then the activity shouldn't be illegal.[10]

But the government in oral argument before the Seventh Circuit said no, it's a balancing test. If you have actual harm that swamps any sort of alleged procompetitive benefit, then of course the harm should be noted.[11] This understanding of the "no economic sense" test was further outlined in the government's amicus brief in the Supreme Court,[12] and with the Supreme Court's denial of certiorari, discussion over the correct standard for assessing harm will certainly continue. Attorneys should be aware of this active debate: if you're going to be making antitrust allegations of Section 2 harm, how are you going to measure that harm and then what do you do when there's procompetitive benefits claimed against it?

Now that the Seventh Circuit opinion has been left intact, this is a really solid opinion on the books for Section 2 cases based on *Aspen Skiing*.

3. KEY TAKEAWAYS

a. *ASPEN SKIING* SURVIVES

I just want to highlight what I think a few key takeaways are. You have some great distillation of *Aspen Skiing* factors. The Solicitor General's brief really focuses on three factors: previous profitable course of dealing, foregoing short-term profits, and looking at comparable markets where this practice is still engaged in, when we think it's competitive.[13]

If you want a more granular explanation, the *Viamedia* court outlined how the allegations are actually the same as in *Aspen Skiing*. So unless *Aspen Skiing* is actually limited to ski mountain passes, on its facts, then the factors applied here.[14]

b. EFFICIENCIES ARE QUESTIONS OF FACT

Efficiencies are questions of fact. So if they're unsubstantiated at the motion to dismiss stage or summary judgment stage, and they are going to be disputed, an efficiencies argument just is not a good basis for tossing out the case. The case has to be tried.[15]

c. COURTS CAN HANDLE DIFFICULT REMEDIES

I also wanted to highlight some language that is standing somewhat alone in challenging two decades of Bork's *Antitrust Paradox*[16]—this kind of mantra that courts just aren't very good at this stuff and they're just judges and it's hard to do hard things and so they shouldn't be finding antitrust violations around things like refusal-to-deal because they're ill-equipped to put forward a remedy. Comcast basically made this argument in the Seventh Circuit and it had an amicus weigh in that wholeheartedly made this argument, that the court shouldn't be finding a violation here because what are you going to do about a remedy?[17] The Seventh Circuit dubbed this "the 'So what?' defense."[18]

I wanted to point out the Seventh Circuit's response, which agreed that courts shouldn't be thoughtless, but courts are often called upon to undertake complicated, long-term supervision of complex cases and remedies, and so they shouldn't be adopting a posture of learned helplessness in the face of proven antitrust violations. If courts can do asbestos cases, can do bankruptcy, can oversee 115,000 individuals on very detailed, complicated supervised release provisions, maybe courts can compare interconnect prices between two different markets—especially when Comcast has told the FCC that those prices are largely the same from market to market.[19]

So courts are not ready to cry uncle yet. It's nice to see some language endorsing the competency of the judiciary to weigh in if they think there's an antitrust violation.

d. GUIDANCE ON ALLEGING HARM

Another issue that may have legs is where else the Seventh Circuit pointed to for what looks like some harm alleged in this case. Obviously in the ad representation services market, competition went from two firms to one firm. Have prices gone up there? Has there been other follow-on anticompetitive effects? Who's been harmed?

In the market for cable competition, we have Comcast's conduct at issue in Viamedia; and if this is going on in other markets with the dominant cable provider potentially using interconnects to corral their cable providers, has there been some sort of harm in that market that might be a problem?[20]

The opinion also points to the local advertising market. Now for any market in which an incumbent cable provider or dominant cable provider has taken control of the interconnects, if they have taken over all of the local advertising spot inventory for all of their competitors, is that a problem?[21]

Finally, the opinion casts a skeptical eye on the interconnects. Those cooperative ventures had always been jointly operated by all the cable companies in specific geographic areas, in which the cable companies pooled ad inventory and agreed on a set fixed price. That joint price-setting activity—when operated to the benefit of all participating cable companies in an effort to compete for advertising dollars against broadcast television and satellite service looked very much like the legal, cooperative efforts described in *BMI/ASCAP*.[22] The Seventh Circuit pointed out, however, that if Comcast is now saying that their control over the cooperative interconnects is actually the source of its competitive advantage, that would

seem to call into question the legality of the interconnects themselves.[23]

The case was remanded back to the district court, where Viamedia asked for a protective order, saying they don't need any more discovery. That issue was briefed back in October of last year, and is still hanging out there. So Viamedia filed a notice in November 2021, explaining that there have been a few more depositions and they have been struggling to survive since the anticompetitive conduct. Viamedia sought a ruling on these discovery motions in order to proceed to trial.[24]

So despite favorable legal rulings for Viamedia, when looking at the facts on the ground, it's not clear that the remedy will be useful.

B. SECTION 1-CASE UPDATES

1. CIVIL CASES

If we move on to Section 1, I think everyone's familiar with the *NCAA/Alston* case.[25] This case comes out of Judge Wilken's courtroom in the Northern District of California, who previously heard the *O'Bannon*[26] matter. What was teed up for the Supreme Court in *Alston* were NCAA rules limiting education-related benefits for student athletes; the Court expressly did not address rules limiting other compensation for athletic performance, as the student-athletes had not challenged the district court's judgment on that issue.[27]

I want to first focus on Justice Gorsuch's opinion. The NCAA made "amateurism" the centerpiece of its defense. But Justice Gorsuch set the scene by pointing out in great detail the billions of dollars that flow through NCAA and NCAA-sanctioned activities, which makes the entity seem very non-amateur.[28] The resulting opinion ends up being a pretty straightforward rule-of-reason case focusing on the monopsony power that the NCAA exercises in this market and the resulting, significant anticompetitive effects, with a marked lack of procompetitive justifications. Not only does Justice Gorsuch criticize the NCAA for failing to define what it means by "amateurism" in a market worth billions of dollars, but the NCAA failed to engage with very basic economic observations that it is difficult to reconcile the argument that "amateurism" is what makes the NCAA's product attractive to consumers with the fact that consumer demand for college sports has increased even as student-athletes have gained additional sources of income.[29]

I also note Justice Kavanaugh's concurrence as the one that drops a bomb on everything, pointing out that price-fixing labor by incorporating price-fixed labor into the definition of a product market isn't necessarily going to work for litigation going forward. A monopsony can't launder its price-fixing of labor by calling it a product definition.[30]

We also have *House v. NCAA*[31] pending in front of Judge Wilken. Now NCAA players are talking about being compensated for their appearance in television broadcasts. We know the name, image, and likeness rule was suspended, so this case explores that area. There's other movement over whether or not athletes should be treated or be able to claim Fair Labor Standards Act and state wage law violations as employees.[32] So clearly this will continue to be an active area.

2. CRIMINAL CASES

The major Section 1 criminal cases this past year are no-poach matters. Just a reminder that back in 2011, the government had a consent decree with a tech company that it was a civil *per se* violation to agree not to compete for each other's employees (an exercise of monopsony power over the labor market)—dubbed a "no-poach agreement."[33] Fast forward to 2016 and we see U.S. DOJ's Human Resources Guidance come out that states U.S. DOJ will now proceed criminally against naked wage-fixing or no-poach agreements.[34] The development in this area after this 2016 announcement came after last year's update.

For several years, the Assistant Attorney General for Antitrust, Makan Delrahim, promised that the Division would be charging "no-poach" cases criminally.[35] There are now finally a couple of active matters going on.

The case I want to highlight came out of Texas, where the indictment was filed on January 5, 2021 in *United States v. Surgical Care Affiliates*.[36] So it was a very active last day in the office for the previous Assistant Attorney General. A motion to dismiss has been briefed, and one of the people briefing it is Paul Clement. And one argument that I wanted to focus on before we leave no-poach is in a footnote in the defendants' motion to dismiss. Surgical Care Affiliates argues that it's problematic that through U.S. DOJ Human Resources Guidance, the DOJ has decided to criminally prosecute these types of arrangements, and they reserve the right to dispute that the *per se* approach to criminal liability is appropriate at all.[37]

This argument echoes the *Sanchez*[38] petition for certiorari that had been filed with the Supreme Court about a year ago, for which the Court issued a Call for the Views of the Solicitor General regarding the challenge to the constitutionality of the *per se* approach to criminal antitrust.

C. SECTION 7-MERGER ENFORCEMENT

Finally, I'll note that in the recent merger enforcement action against Penguin Random House and Simon & Schuster,[39] the action is based on a theory of monopsony power. And I would just reflect back that when I started my practice, *Weyerhaeuser*[40] was on deck and the monopsony theory was something that was novel and rare. The theory seems to be all over the place these days, and all of this takes place against the backdrop of a lot of political ferment around antitrust and whether or not antitrust has been doing what it's supposed to have been doing over the last 30, 40 years.

The existence of a lot of viable monopsony cases and the fact that the level of concentration in our markets is such that everywhere we look we see monopsonies, may be one large macro indicator that maybe antitrust law has not done what it needed to do all along.

MS. LEE: Thank you, Shana, for giving us that great overview and incisive analysis.

We will now turn things over to Tom for developments in federal procedure.

IV. PANELIST THOMAS GREENE'S PRESENTATION ON DEVELOPMENTS IN FEDERAL PROCEDURE

MR. GREENE: Great. Thanks, Shana. Just a very interesting presentation and thank you very much, Malinda, for that lovely introduction.

I'm going to be looking at federal civil procedure this morning and the thing that really struck me as I've prepared this year's materials was how basic some of the developments are that we're going to be talking about this morning. So I think that you, like me, may be shocked at how significant some of these cases actually are.

Let me do the usual disclaimer here. Anything I say is my presentation, doesn't represent the views of the Antitrust Division or the U.S. Department of Justice.

Also an additional personal disclaimer: the presentation is a highly curated set of cases, it's not everything, so don't rely upon this as a complete download, in terms of significant procedural developments.

A. JURISDICTION-SPECIAL JURISDICTION STANDARD

Let's turn now to jurisdiction. This will be the first major piece for us; let me just remind you of recent activities in this space. The Roberts court has really made a meal out of jurisdiction over the last few years. The current state of play with respect to jurisdiction is that there's a distinction—and quite

a sharp distinction—between general jurisdiction and specific jurisdiction. General jurisdiction exists because the defendant either is incorporated in a particular forum or because its principal place of business, generally the headquarters, is located in the forum state. If general jurisdiction applies, you can bring any case that relates to that company in that forum.

The more common form of jurisdiction is special jurisdiction, which requires that something happened—generally an injury—within the state forum, plus some evidence of purposeful availment. On this second element, it can't be just an odd random incursion of the corporation into that jurisdiction, but if the corporation has some basic availment activities, such as seeking sales and profits in the forum state, that is enough.

In 2017, special jurisdiction in the *Bristol-Myers Squibb* case[41] was narrowed to a pinpoint. This case involved Plavix and cases addressing injuries arising from the use of this drug. All in all, this was a bad drug case. Bristol-Myers Squibb had done tens of millions of dollars of business within California. They had a research center in California. They still do. The California Supreme Court said that because of all that activity, jurisdiction in California was proper.

The United States Supreme Court said full stop, not true. The lower court's decision violates our emerging jurisprudence, in terms of special jurisdiction. In light of the fact that the plaintiff class did not include persons who took the drug or were injured within the state of California, there was no jurisdiction because defendant's activities did not give rise to the plaintiffs' injuries. This is a specific formula that flows out of *Bristol-Myers*.

So that brings us to *Ford Motor Company*.[42] Ford is looking at *Bristol-Myers* and says, this gives rise to an interesting opportunity for us, and on its face that may have been true. Specifically, they sold cars, they repaired cars, they brought parts in the forum states, things of that nature, resulting in millions and millions of dollars of revenues for Ford. But, Ford asserted, the cars were purchased outside the forum states so there was no jurisdiction, notwithstanding the company's substantial activity within each state.

The majority, with Justice Kagan writing, said, look, we're getting a little carried away with the specific linguistic formula that existed in *Bristol-Myers*. The majority turns to the Court's older jurisprudence where special jurisdiction exists if the activities of the defendant arise out of something they did specifically in the jurisdiction or related to it. The "or relate to" clause is the one that Kagan relies on to establish jurisdiction for the injured plaintiffs in Montana and Minnesota. The Court also says one of the implications of this test is that multiple states may have jurisdiction over various parts of the corporation.

So this is a very big change-up, and actually provides a little glimmer of light for plaintiffs after a long dry spell of jurisdictional cases.

The majority opinion generates a very strong reaction from the conservative side of the Court. They treat this "relating to" standard like some version of the *Return of the Jedi* jurisdictionally. Justice Alito says that the "relating to" standard may be unnecessarily broad. Justice Gorsuch, joined by Justice Thomas, argues that the "relating to" formulation is broad and can be used to significantly expand the jurisdiction of state courts.

Watch this space. "Related to" could be relatively narrow, or could, as suggested by the concurring opinions, be quite broad. If you're on the plaintiff's side, you'll want to focus on cases that might help define (or expand) this decision. If you're on the defense side, this is something you need to watch.

B. STANDING–ESTABLISHING CONCRETE INJURY

Obviously, *Spokeo*[43] has been a key case for members of the section who do privacy stuff. This is not news. This is an important area. This case is *TransUnion v. Ramirez*.[44] This case was brought

under the Fair Credit Reporting Act, and the facts are actually very strong.

TransUnion is a credit agency, so it issues reports on people's creditworthiness. It provided all the classic creditworthiness services generally offered by these kinds of companies. However, it added a new feature, which cross-linked its credit service to the terrorism no-fly list. Essentially this is a list created by the federal government of people that are potentially dangerous.

TransUnion linked to the no-fly list based on matches and near matches to first and last names. For example, Joe Smith would be a match if your name was Joe Smith. Joseph Smythe might be a match or J. Smithe, with an "E" on the end. This was a very simplistic method of matching, with no additional features such as Social Security numbers or other identifiers of that nature. As a result, there was an accident waiting to happen.

This accidental "match" did happen to Mr. Ramirez, the main plaintiff in a class action. Mr. Ramirez went to a car dealership in Dublin, California, which is a few miles from where we're talking in San Francisco. He goes to a Nissan dealer, picks out a car, picks out the color, and then he and his wife go into the office to discuss a loan for the car. The dealer taps in Mr. Ramirez's name and information into the TransUnion database and then he looks up at Mr. Ramirez and says: "We can't sell you a car because you're a terrorist, sir."

The car is actually purchased by Mr. Ramirez's wife because her husband is now labeled as a terrorist. He sues on behalf of himself and a similarly situated class. The jury here in California awards $60 million.

The thing to know about the Fair Credit Reporting Act[45] is that this is a kind of citizen suit law in the sense that private people can recover actual damages, but if you can't demonstrate that, you get statutory damages. So this statute is a lot like a lot of other citizen suit statutes you see in consumer protection, environmental protection, and other areas of the law.

Justice Kavanaugh writing the majority opinion picks language out of *Spokeo* and says, Article III requires concrete injury in a great stentorian statement about the beauty and wonder of Article III. Mr. Ramirez was injured and nobody else was injured—which is one point.

Concreteness, this idea that you were injured within the meaning of Article III, is keyed to traditional legal harms. So you open up Blackstone on Common Law or some older volume like that, and that's how you sort out whether concreteness has been established.

There is a significant poke in the eye to the Congress of the United States. The court makes it clear—Justice Kavanaugh is quite crisp—that Congress can't overcome this situation and can't define new kinds of injuries if the injury doesn't meet the Court's backward-looking concrete injury standard.

This yields two very strong dissents. Justice Thomas in his dissent rejects the majority's assertion that Article III requires rejection of statutory claims. He states, "the Constitution does no such thing," full stop.[46] He then goes through a very long, historical analysis, starting with a copyright case that was filed and accepted by federal courts in the first Congress, which, according to Justice Thomas, was exactly the kind of citizen suit that was rejected by Justice Kavanaugh here.

Interestingly, for those of us that practice in both state courts and federal courts, Justice Thomas says, look, this actually creates a really interesting backfire—which he described as a pyrrhic, potential victory for TransUnion—now that federal courts have no jurisdiction because there's no standing. The only place plaintiffs can go then is state courts, and because there's no jurisdiction, the case can't be removed to federal district court.

So there's this really interesting vice that's being created by this statute. If you deal in these kind of spaces, you need to know about *TransUnion v. Ramirez*.

Justice Kagan also writes a thoughtful dissent. In terms of the poke in the eye to the Congress, Justice Kagan concludes her opinion by saying simply that Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world. For that reason, courts should give deference to those congressional decisions.

Justice Kagan rebuffs, in this elegant way, the majority's rejection of Congress. We'll have to see how this all turns out, but your time would be well-spent to take a look at this particular case.

C. CLASS ACTION UPDATES

I've got three class action cases that I'd like to cover.

Bristol-Myers will be a major theme today. This first is a class action arising from unwanted sales calls, allegedly in violation of the Telephone Consumer Protection Act.[47] The question procedurally is how do you challenge the fact that the class may include people over which the state court has no jurisdiction because of *Bristol-Myers*? There are a couple of choices here.

Federal Rule of Civil Procedure 12(h) covers how you challenge jurisdictional questions, and the kicker is that a challenge has to be done early in the litigation process or you waive it. The trial court told the defendant that while its argument was interesting, it should have been made at the beginning of the case under Rule 12(h). The question for the Ninth Circuit panel, with a relatively new Trump-appointed judge writing the opinion, is to what extent can you use Rule 23(f), which is the way you appeal class certification issues to an appellate court, to raise such issues. The court basically concludes that use of Rule 23 is proper for this purpose. A dissent by Texas District Court Judge Cardone rejects this conclusion because this is contrary to the explicit text of Rule 12.

If you get into this kind of a situation, this discussion of how you deal with jurisdictional issues, when and under what provision, will be a big deal to you.

So there are two additional cases worth noting because of their potential significance. One major caveat, both cases may be vacated but I nonetheless want to bring these to your attention.

Olean is a class action that arose from the facts generated by a series of prosecutions in the San Francisco Field Office of the Antitrust Division.[48] Tuna canners in the United States had engaged in a long-term price-fixing agreement and *Olean* was the follow-on damages case. The issue was predominance.

The experts for the parties came up with different conclusions about the percentage of people who were not injured. The plaintiffs' experts concluded that four percent were uninjured while the defense experts concluded that 28 percent were uninjured.

The majority approves the basic statistical analysis of the plaintiffs' expert; however, it remands to the district court to resolve this fairly significant difference between the number of uninjured people from the plaintiffs' assessment versus the defense's assessment.

But then the kicker—and this is why this may be a very significant decision—appears to adopt with approval a D.C. Circuit case in which predominance can basically be defeated if more than a *de minimis* number of class members are uninjured.

The court says four to six percent of uninjured folks in your class is okay, that's *de minimis*. However, if the number is 28 percent, that is too much and the class cannot be certified.

This draws a very strong dissent from Judge Hurwitz and he says very straightforwardly, quote,

"Our case law squarely forecloses the majority's approach."[49] Citing longstanding Ninth Circuit law and general class action law, Judge Hurwitz says the crucial issue of predominance, "is whether the District Court can economically winnow out uninjured plaintiffs to ensure they cannot recover for injuries they did not suffer."[50] Typically this is done in the remedies phase when consumers may file their forms to get damages out of the class and the like.

So this is a dramatic confrontation, with very different ideas about the idea of predominance.

The majority opinion has been vacated and a rehearing *en banc* has been ordered. So this is a space I think we all need to watch because of the potential change in class action law the majority opinion represents.

The next case is another one which is interesting, regarding arbitration.

So the system that we operate under right now is that if you sign an arbitration agreement, you're bound by it. Most of the time there is a big exception based on California's Unfair Competition Law ("UCL"). The California Supreme Court's decision in *McGill*[51] calls out a public injunction for relief exception to this rule. *McGill* relied on a specific Civil Code provision.[52]

Relying on McGill, the Ninth Circuit, in *Rent-A-Center*[53] said that that public injunctions are not preempted by the Federal Arbitration Act,[54] so you can go ahead with your class action.

In this appeal, the relief proposed focused on people who were Comcast customers. It was undisputed that roughly two million Comcast customers in the state of California, or roughly 40 percent of all cable customers. But the majority here says that since the relief went primarily to the people who were Comcast customers, that was private, it's not within the confines of either *McGill* or *Rent-A-Center*.

Judge Berzon says, wait, time out. This is exactly the kind of relief that the California Supreme Court authorized in *McGill* and that we, the Ninth Circuit, approved in *Rent-A-Center*.

The Ninth Circuit has ordered Comcast to respond to plaintiffs' petition. That's the step before they order rehearing *en banc*. We'll have to see how this turns out but this, again, is another potential sea change case, in terms of class actions in California.

Very briefly, there are a couple of interesting federal pieces of legislation, indeed long overdue, enacted since last year.

In the Criminal Antitrust Anti-Retaliation Act,[55] employees of companies will enjoy whistleblower protection if they bring information about criminal antitrust violations—a defined term in the Act—to the attention of their own managements or if they bring it to the government. This is something that probably should have been done years ago, and is now in effect. Be aware of it.

The other legislation is The Competitive Health Insurance Reform Act.[56] McCarran-Ferguson is now limited, in terms of how it applies to health care insurers. So if you counsel health care entities, this is something you need to be aware of or if you're suing health care entities, particularly insurers, this is something that should be first on your reading list.

And finally, Federal Rule of Appellate Procedure 3 is adjusted to deal with traps for the unwary. If you are on the cusp of filing an appeal, you need to look at this because this is a big change in the rules. The amendment just makes it easier to notice an appeal, but you do need to be aware of it.

So Malinda, back to you. Thanks.

MS. LEE: Thank you so much, Tom, for that great summary. I will now turn it over to Colleen for the update on state law developments.

V. STATE LAW DEVELOPMENTS

Panelist Colleen Huschke's Presentation on Developments in State Antitrust Law and Procedure

MS. HUSCHKE: Thank you very much.

As with the other presenters, I am issuing the normal disclaimers in that I personally have decided what to present and my views don't reflect that of my office.

There's obviously a lot of issues going on at the state level when it comes to unfair competition and antitrust law.

I wanted to start out talking about some new pieces of legislation which will be coming into effect in 2022. I will review the legislation through the prism of consumer protection, but also civil law enforcement.

A. AUTOMATIC RENEWAL LAW

So the first piece of legislation is the amendment to California's automatic renewal law.[57] As many of you are aware, California has an automatic renewal law which states that if a contract is going to automatically renew for a certain period of time, say a three-month or six-month subscription, the consumer must receive clear, conspicuous disclosures of the terms of the agreement and must affirmatively consent to that agreement. The law also imposes certain ease of cancellation requirements.

The amendments to that statute fill in some gaps to the original law, thereby strengthening the automatic renewal law. There are now notice requirements for trial products that go 31 days or longer, as well as contracts that last one year or longer. There are also requirements that the notice, before the automatic renewal takes place, must contain some clear and conspicuous disclosures as well. It's important that you take a look at the statute to understand all of the details there.

The statute also strengthens the ease of cancellation. In the amendments, the consumer must be able to terminate the automatic renewal exclusively online, at-will, without engaging in any further steps that obstruct or delay the consumer's ability to terminate immediately. So it's really emphasizing again the ease of termination, no use of dark patterns or obstructions for the consumer to be able to terminate an automatically renewing contract. There are two methods specified in the amendment for termination: either a prominently located direct link or an immediately accessible termination email.

So you may be aware, San Diego County District Attorney is a member of the California Automatic Renewal Task Force, also known as CART. We've been very active in this arena for civil law enforcement. We're very interested in these amendments and we will be active in this arena going forward.

These changes take place July 1, 2022, so there is some time to bring a company's website and web flow into compliance.

B. SONG-BEVERLY CONSUMER WARRANTY ACT

As a complement to the automatic renewal law, I'd like to talk about the Song-Beverly Consumer Warranty Act, which covers recurring contracts for service.[58]

This piece of legislation is similar to the automatic renewal law ("ARL"), in that it also requires clear and conspicuous disclosures of any recurring or periodic service contract. Those disclosures must also contain the service that is covered by the contract and must contain any alternatives, such as a fixed term for service. Like the ARL, it requires the consumer's affirmative consent to entering into this recurring contract but unlike the ARL, it actually contains a definition of what affirmative consent is. So I would direct you to take a look at the language in the statute.

The Song-Beverly Consumer Warranty Act also requires that the ability for a consumer to cancel a service contract be unobstructed, with the ability to, at a minimum, access a toll-free number, email, postal address, and website for cancellation. The purpose behind the law is that the consumer should not be lured into some sort of recurring contract and have difficulty exiting that contract. The new legislation also covers, once a contract is terminated, the refunds that should be allowed.

These two pieces of legislation are a nice opportunity to reach out to some of your clients, alert them to these two new pieces of legislation, and just let them know that CART is going to be active in this field going forward as well. We're looking forward to seeing how companies will conform to these new requirements.

The other two pieces of legislation deal with debt collection—another area that my office has been interested in and obviously is very important for consumer protection.

Starting in January 2022, the Fair Debt Settlement Practices Act will go into effect, which prohibits any false, deceptive or misleading practices regarding debt settlement process, as well as any false, abusive, or deceptive practices for payment processor activities. So this Act requires disclosures be provided to the consumer. It also requires termination of any debt services contract. It does contain certain exemptions to who is not covered by the statute.

I would encourage you to take a look to see if your clients would fall within any of those exemptions. One of those exemptions would be an attorney or a law firm, if they fall within certain categories delineated within the statute.

The enforcement mechanism would allow for actual as well as statutory damages of no less than a thousand dollars and no more than $5,000 per violation, and injunctive relief. There's also attorneys' fees, which are allowable both for the prevailing consumer but also in certain circumstances if the matter was not brought in good faith for the debt services provider.

There is also a safe harbor that the service provider could take advantage of, and the statute of limitations would be four years from the date of the last payment or when the consumer discovered or reasonably should have discovered facts giving rise to the claim.

The next piece of legislation concerning debt collection is the requirement that any assignment of the debt have some notification to the debtor, upon written request. And it delineates within 30 days of the written request, what sort of information the debtor is entitled to have, as well as requiring that any assigned debt be backed up by supporting documentation that the debt collector will have access to.

Often we run into situations where debt is sold so far down the line, being able to validate and verify the debt has been a big issue. So this piece of legislation is geared towards remedying some of those situations in which the assignment of debt leads to certain situations where the debtor is unable to get any support for what was originally owed.

C. PRIVACY RIGHTS ACT

The last piece of legislation I'd like to bring your attention to is the fact that Proposition 24 was in fact passed. About a week after last year's GSI presentation, the voters went to the booth and decided that the enhancements that had already been passed through the California privacy law needed to be amended and expanded further.

As a result, the California Consumer Privacy Act of 2018 has now been expanded and amended through the California Privacy Rights Act.[59] There's a whole new section in the California Privacy Rights Act, which would require a completely new panel to go into the details, but be aware of this law that will come into effect in 2023.

D. CASE LAW UPDATES

The first case law update I'd like to address is one in which the California Supreme Court held that unfiled escrow fees that were charged to a consumer violate the Insurance Code.[60] The title insurance company had made a couple of arguments, one of which was that they had indemnity from any civil proceeding or prosecution because of the indemnification statutes within the Insurance Code.

The Supreme Court rejected the arguments and said no, this is not what is regulated, but only fees that are actually authorized under that Act fall within the scope of the indemnity.

The next argument that the title company had made was that this was within the exclusive jurisdiction of the Insurance Commissioner. That also was not found to be persuasive to the Supreme Court, which found the Act is a permissive statute to bring a complaint to the Insurance Commissioner, it was not mandatory.

The remedies allowed by the agency were not as fulsome as what you can get in private litigation or through prosecution, and the Commissioner himself took the position that he does not have exclusive authority to hear these cases. So the court ultimately ruled that unfiled escrow fees cases can in fact go forward.

The next case is very straightforward: UCL damages versus restitution. This case[61] involved an optometrist who had alleged violations of UCL by a large retail chain of optometrists and he had wanted to receive payments for lost market share that he was alleging, and the court looked at the underlying theory payments and saw that lost market share, lost opportunity, lost profits, were really a damages claim and not restitution because there was nothing he was deprived of that he could actually be restored to, and being a damages theory, it was not recoverable under the UCL.

The next case is *Best v. Ocwen Loan Servicing*,[62] and in that case the court found that nonjudicial foreclosures were consumer debt that was governed by the Rosenthal Act. The court went through history of case law regarding whether mortgages and deed trusts could be considered consumer debt.

The weight of more recent opinions is toward the fact that it was in fact consumer debt. The Rosenthal Act had been amended to specifically state mortgage debt was consumer debt, and that amendment made clear that this was not a change in the law but rather a declaration of already existing law.

I'll now jump to *Serova v. Sony Music Entertainment*.[63] We're all eagerly awaiting the California Supreme Court ruling on that case regarding an anti-SLAPP motion with commercial speech within that ruling. Sony Music had issued a Michael Jackson album but three tracks on that album were not sung by Michael Jackson. The factual dispute was: who was the lead singer?

The appellate court found that there was a public interest here and that these statements about who was the actual singer on those tracks was something that was an advancement of the right to free speech.

The second part of the anti-SLAPP motion interestingly found that the statements were noncommercial speech. They were noncommercial speech because there was a controversy over the facts of who was the actual singer, so it was Sony's opinion and not a factual statement; and second, the identity of the singer was so intertwined with the music itself that it was protected by the First Amendment.

This has been a much discussed opinion. It has a lot of amicus briefing on the topic and we'll see how the Supreme Court rules hopefully soon.

As a public service announcement, civil law enforcement is very interested in debt collecting

and fair debt collecting, especially as we come out of the pandemic and there will be financial hardship on a lot of Californians. The pieces of legislation I have covered reflect this concern.

To the extent that I didn't get the message out and you can improve your relationship with your clients through any sort of legal counseling on these topics, that would be to their benefit and greatly appreciated as well.

MS. LEE: Thank you, Colleen, for that great overview.

I'd just like to conclude by again thanking our esteemed panelists this morning, Shana Wallace, Tom Greene, and Colleen Huschke. You've all done a terrific job with your presentations, given us a lot to think about, so thank you so very much.

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1. Malinda Lee is a Deputy Attorney General with the Healthcare Rights and Access Section's Competition Unit in the California Attorney General's Office. Her practice is focused on enforcement of state and federal antitrust laws in healthcare and pharmaceutical markets, and other competition-related legal work that impacts services and products in those markets.

2. *Comcast Corp. v. Viamedia, Inc.*, 141 S. Ct. 2877 (2021).

3. Br. Amicus Curiae of the United States, *Comcast Corp. v. Viamedia, Inc.*, No. 18-2852 (U.S. May 25, 2021).

4. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

5. *Verizon Commc'ns v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 409 (2004).

6 For a more in-depth description of the various levels of competition involved in, and affected by, Comcast's conduct, see *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 436–49, 474–78 (7th Cir. 2020) (describing competitors and competition, as well as harm to competition from Comcast's conduct).

7. Pet. for Writ of Certiorari at 10, *Comcast Corp. v. Viamedia, Inc.*, No. 18-2852 (U.S. May 25, 2021) (citing Frank H. Easterbrook, *The Chicago School and Exclusionary Conduct*, 31 Harv. J.L. & Pub. Pol'y 439, 442 (2008) (noting the essay was given as "a talk for a panel of the Federalist Society's Conference on the Contributions of Judge Robert H. Bork on June 25, 2007")).

8. *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013).

9. Gergory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 422–25 (2006).

10. *Viamedia*, 951 F.3d at 461 ("Comcast proposes that if a defendant merely postulates 'a valid business purpose'—apparently including any business purpose a defendant could dream up, regardless of feasibility or value—that 'ends the inquiry.' '[T]here is no 'balancing' of benefits and harms,' Comcast declares."). For additional discussion of this standard, see *id.* at 461–62 & n. 13.

11. *Id.* at 461 ("[A]s explained by the government at oral argument here—it is an objective 'balancing' test that requires more than just 'a slight procompetitive benefit or efficiency gain.'").

12. Br. Amicus Curiae of the United States, *supra* note 3, at 17–19 ("As the government explained at oral argument below, the term 'balancing' can be used in this context to refer to the offsetting of any profits to the defendant both by the short-term losses it incurs, and by the portion of those profits that are attributable to anticompetitive (rather than efficiency) gains.").

13. *Id.* at 10–13.

14. *Viamedia*, 951 F.3d at 455–60.

15. *Id.* at 460–61, 478.

16. Robert H. Bork, The Antitrust Paradox (1978).

17. *Viamedia*, 951 F.3d at 480.

18. *Id.*

19. *Id.* at 480–81 ("Yet courts are often called upon to undertake complicated, long-term supervision of complex cases and remedies. The judiciary need not and should not adopt a posture of learned helplessness in the face of proven antitrust violations.").

20. *Id.* at 475.

21. *Id.* at 475–76.

22. *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

23. *Viamedia*, 951 F.3d at 476–78 (citing Fed. Trade Comm'n & U.S. Dep't of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000),

the Seventh Circuit noted that "Comcast's conduct . . . turned a previously procompetitive platform into a weapon to decrease competition" by running afoul of a half-dozen flags described by the Guidelines).

24. *Viamedia, Inc. v. Comcast Corp.*, No 1:16-cv-05486 (N.D. Ill. Nov. 1, 2021), ECF No. 471.

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

26. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part and vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

27. *Alston*, 141 S. Ct. at 2147.

28. *Id.* at 2148–51.

29. *Id.* at 2152–53, 2163.

30. *Id.* at 2167–68 ("[T]he NCAA says that colleges may decline to pay student athletes because the defining feature of college sports . . . is that the student athletes are not paid. In my view, the argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. . . . Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem. . . . Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.").

31. *House v. Nat'l Collegiate Athletic Ass'n*, No. 4:20-cv-03919 (N.D. Cal.) (motion to dismiss decision reported at 2021 WL 3578572 (N.D. Cal. June 24, 2021)).

32. *See, e.g.*, *Johnson v. Nat'l Collegiate Athletic Ass'n*, No. 2:19-cv-05230-JP (E.D. Pa.).

33. Final J., *United States v. Adobe Systems, Inc.*, No. 1:10-cv-01629 (D.D.C. Mar. 18, 2011).

34. Dep't of Justice Antitrust Div. & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016) *available at* https://justice.gov/atr/file/903511/download.

35. *See, e.g.*, Arindam Kar, *Antitrust Division to Criminally Prosecute No-Poaching Agreements*, Bryan Cave Leighton Paisner LLP (Feb. 7, 2018), https://www.bclplaw.com/en-US/insights/antitrust-division-to-criminally-prosecute-no-poaching.html (reporting that Assistant Attorney General Makan Delrahim "announced the possible upcoming criminal charges at a January 19, 2018 conference hosted by the Antitrust Research Foundation").

36. Indictment, *United States v. Surgical Care Affiliates, LLC*, No. 3:21-cr-00011 (N.D. Tex. Jan 5, 2021).

37. Mem. in Support of Defs.' Mot. to Dismiss at 17 n. 4, *United States v. Surgical Care Affiliates LLC*, No. 3:21-cr-00011 (N.D. Tex. Mar. 26, 2021) ("[A]pplying the *per se* rule in the criminal context is difficult to reconcile with the Supreme Court's repeated holdings that irrebuttable presumptions violate the Fifth and Sixth Amendments . . . [and] SCA reserves all rights to press those constitutional arguments should this Court allow this prosecution to proceed.").

38. Pet. for Writ of Certiorari, *Sanchez et al v. United States*, No. 19-288 (U.S. Aug. 30, 2019).

39. Compl., *United States v. Bertelsmann SE & Co. KGaA*, No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021).

40. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312 (2007).

41. *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773 (2017).

42. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021).

43. *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

44. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

45. 15 U.S.C. §§ 1681 *et seq.*

46. *TransUnion*, 141 S. Ct. at 2214 (Thomas, J., dissenting).

47. *Moser v. Benefytt, Inc.*, 8 F.4th 872 (9th Cir. 2021); *see* 47 U.S.C. § 227.

48. *Olean Wholesale Grocery Coop. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir.), *en banc pet. granted*, 5 F.4th 950 (9th Cir. Aug. 3, 2021).

49. *Id. at* 794.

50. *Id.* at 795.

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

52. Cal. Civ. Code § 3513.

53. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019).

54. 9 U.S.C. §§ 1 *et seq.*

55. 15 U.S.C. § 7a-3.

56. Competitive Health Insurance Reform Act, Pub. L. No. 116-327, 134 Stat. 5097 (2021).

57. Cal. Bus. & Prof. Code §§ 17600 *et seq.*

58. Cal. Civ. Code §§ 1790 *et seq.*

59. Cal. Civ. Code §§ 1798.100 *et seq.*

60. *Villanueva v. Fid. Nat'l Title Co.*, 11 Cal. 5th 104 (2021).

61. *Lee v. Luxottica Retail N. Am., Inc.*, 65 Cal. App. 5th 793 (2021).

62. *Best v. Ocwen Loan Servicing*, 64 Cal. App. 5th 568 (2021).

63. *Serova v. Sony Music Ent.*, 44 Cal. App. 5th 103 (2020), *pet. for review granted*, 461 P.3d 1251 (Cal. 2020).

BIG STAKES ANTITRUST TRIAL: *IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION*

Edited by Aaron M. Sheanin[1]

PANELISTS:

- For the Plaintiffs: Jeffrey L. Kessler, Winston & Strawn LLP; and Daniel A. Rascher, Ph.D., OSKR, LLC
- For the Defendants: Jeffrey A. Mishkin, Skadden, Arps, Slate, Meagher & Flom LLP
- Moderator: Aaron M. Sheanin, Robins Kaplan LLP

I. INTRODUCTION & OVERVIEW

In the landmark trial, *Alston v. National Collegiate Athletic Association*,[2] a class of NCAA Division I basketball and football players brought suit under the Sherman Act to challenge the NCAA rules limiting the level of financial aid and benefits that student athletes may receive.

Post-trial appeals resulted in a unanimous decision by the United States Supreme Court, affirming the class plaintiffs' victory.

Our panel discussed litigation strategies; the history of antitrust litigation against the NCAA; the emergence of state statutes allowing student athletes to earn money in connection with the licensing of their name, image and likeness; and what the future holds in store for antitrust and college athletics. Each of the panelists played a critical role in the *Grant-in-Aid* litigation.

Jeffrey L. Kessler is the Co-Executive Chairman of Winston & Strawn LLP and the Co-Chair of Winston's global antitrust and competition practice and sports law practice group. He served as co-lead trial counsel for the class in the *Grant-in-Aid* litigation. He has also represented classes of NBA, NFL, MLS, and USWNT players; the NFL, NBA, MLB, and NHL players associations; and many individual athletes.

Jeffrey Mishkin, Of Counsel at Skadden, Arps, Slate, Meagher & Flom LLP and the head of Skadden's sports practice for the last 21 years, represented the NCAA in the *Grant-in-Aid* litigation. Previously, he was the executive vice president and

chief legal officer of the NBA, where he oversaw every aspect of the league's legal affairs. Since joining Skadden, Mr. Mishkin has represented the PGA Tour, the NFL, the NHL, MLB, the NCAA, and the United States Tennis Association.

Dr. Daniel Rascher, a partner at OSKR, LLC, is an economist specializing in antitrust and competition analysis in the sports industry. His clients have included organizations involved in the NBA, the NFL, MLB, the NHL, the NCAA, and other sports-related matters. Dr. Rascher provided trial testimony for the class plaintiffs in the *Grant-in-Aid* litigation. He served as a consultant in the *White* case and as the class expert in the *O'Bannon* case,[3] which respectively challenged the NCAA's athletics-based scholarship and name, image, and likeness ("NIL") rules.

II. HISTORICAL & LEGAL CONTEXT

MR. SHEANIN: I'd like to start with the historical and legal context.

In 1984, the Supreme Court issued a decision in *NCAA v. Board of Regents of the University of Oklahoma*.[4] That case involved the NCAA's rules restricting the ability of its member schools to televise football games.

The Supreme Court's decision stated that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports," and that "the preservation of the student athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act."[5]

So how did we get from *Board of Regents* in 1984 to *Alston* in 2021, which successfully challenged the NCAA's defense that its rules preserved amateurism? I'd like to hear first from Jeffrey Mishkin.

MR. MISHKIN: Thank you, Aaron.

Good afternoon, everyone.

Once the Supreme Court had decided to hear the *Alston* case, one of the key legal issues was inevitably going to be how today's Supreme Court would read the decision of 37 years ago in *Board of Regents*.

Now we all understood and recognized that the issue in *Board of Regents* was not the legality of the NCAA's amateurism rules, but instead, that case had to do with limitations on telecasts of college football games. The Supreme Court, in 1984, found those restraints on telecasts to be a violation of the antitrust laws.

But in the course of that decision, the Supreme Court really went out of its way, in very clear language, to say that it would be procompetitive and lawful for the NCAA to have rules like a prohibition on "pay for play," that is, rules that maintain a distinction between amateur collegiate sports on the one hand and professional sports on the other.

And that would be procompetitive because maintaining a distinction between professional sports and collegiate sports created a different product and gave consumers choice, both of which are well-recognized procompetitive justifications.

Now again, we all understood that was not the holding of *Board of Regents*, but at least several circuits following *Board of Regents*, and in particular the Seventh Circuit—a pretty good antitrust court—took that language quite literally. As recently as 2018 in the *Deppe* case,[6] the Seventh Circuit held that if an NCAA rule was intended to maintain a distinction between collegiate sports and professional sports, then that rule was presumptively lawful and any antitrust challenge to such a rule should be summarily rejected and dismissed at the motion-to-dismiss stage.

So it appears to us that the Seventh Circuit cases were based largely, if not entirely, on the understanding that *Board of Regents* was applying a "quick look"—that is, an antitrust shortcut to uphold the legality of NCAA eligibility rules without the

need for a full rule-of-reason trial. That essentially is what we asked the Supreme Court to hold in *Alston*: that *Board of Regents* meant that a challenge to an NCAA rule that was designed to preserve the distinction between collegiate and professional sports—such as the "no pay-for-play" rule—could and should be dismissed on a quick look.

But as you all know, today's Supreme Court was not buying it. Justice Gorsuch, writing for a unanimous court, said that the NCAA's amateurism rules were not at issue in *Board of Regents*. That was true. And he said that what the Court in that case had to say about the NCAA's amateurism rules was said only in passing; it was not intended to, and did not, bind future courts in any way.

In any event—and I think most importantly—Justice Gorsuch said the nature of college sports, and the market and the economics of college sports, have changed substantially since 1984. Based on the realities of today, the Court said that the NCAA was not entitled to a quick look or any other antitrust shortcut, and would have to defend any of its rules in any case brought under the antitrust laws. There would have to be a full rule-of-reason analysis and a trial.

And that, in summary form, is how we get from *Board of Regents* to where we are today.

MR. SHEANIN: Thanks, Jeff.

So about a year ago I recall Jeffrey Kessler saying in a panel that he didn't think *Alston* was worthy of Supreme Court review. You may have slightly different views on that at this point. So I want to give you the opportunity to air them and see if you have any additional thoughts on how we got here from *Board of Regents* to *Alston*.

MR. KESSLER: Thank you, and welcome everyone.

I thought Jeff's summary of what happened in *Alston* is entirely accurate, so I'm not going to add a word to what Jeff has said about that.

I think he accurately described why the nine members of the Supreme Court concluded that the NCAA could not read *Board of Regents* any longer as creating some type of shortcut, or some type of special treatment. Instead, all that *Board of Regents* meant was that in dealing with these amateurism restrictions, the full-blown rule of reason would be applied. We had a full-blown rule-of-reason trial and they lost, and the Supreme Court said that the judge properly conducted that trial without legal error—which is what the Ninth Circuit found—and therefore the verdict would be affirmed.

In terms of the question as to our opposing cert., we did. Our position was that what the Ninth Circuit had decided was exactly right, which is that the full-blown rule of reason should be applied and that this was really a fact-based determination by a trial court, and therefore it did not present the type of fundamental legal issues that would ordinarily require cert. review.

We made that argument because our goal was to preserve the victory the players had won. Obviously if cert. was denied, that victory would have been preserved and we would have gone on to argue that the Ninth Circuit was correct.

In retrospect, you know, we always look back in history. Obviously from a players' standpoint, we're delighted the Supreme Court granted cert. because, as a result of the Supreme Court so strongly affirming the Ninth Circuit's decision and making it so clear that *Board of Regents* could not be read as creating some type of presumption of legality, that argument could no longer be made by the NCAA in any circuit.

So it's no longer possible for the NCAA to say, well, the Ninth Circuit got it wrong but the Seventh Circuit got it right. The Supreme Court, in effect, resolved that argument in favor of the players, and I believe that's had profoundly positive consequences for the players right now on a whole host of issues.

On both sides you could apply the old adage that sometimes you wish for something and it turns out you would have preferred the other. I'm happy cert. was granted. I suspect the NCAA would have preferred that cert. not be granted, if it knew what the outcome was going to be in advance.

III. THE CHANGING ECONOMIC LANDSCAPE

MR. SHEANIN: Jeffrey Kessler, you mentioned a whole host of outcomes that you think are favorable to players, and I do want to get into them in a little bit.

Jeffrey Mishkin mentioned that Justice Gorsuch discussed the changing nature of the market for college sports and the economics of it. So Dan, I'd like you to weigh in on the discussion here.

How has the economic landscape for college athletics changed over the last 37 years, and how did that economic evidence play out at trial before Judge Wilken?

DR. RASCHER: Yeah, that's a great question and a great point. Let's dial back to the mid-1980s with the restriction on the number of games on television that the NCAA had imposed itself—that's sort of the point of the *Board of Regents* case. What we now call FBS[7] programs—they were Division I-A programs then—were generating around $7 million in revenue for each athletic department on an annual basis. Today that's approaching $100 million dollars.

So the market has grown drastically. The total revenues being generated in Division I athletics exceed $15 billion per year. The *Regents* decision really helped with some of that, with the proliferation of games on television.

Over 80 schools have joined Division I. So, again, you've seen that increase in demand to be in Division I.

And the schools, the conferences, the NCAA, and their partners found creative and innovative ways to increase revenue and different revenue streams. Media has come in and increased those revenue streams even more.

And so when we step on to campus, we see what we call the "front porch effect" or the "Flutie Effect,"[8] which is the athletic department's ability to affect the rest of campus. We've seen that grow. So these universities are interested in using athletics as a marketing arm, as the "front porch," as a way to bring alumni back into the fold. Again, that demand to be in Division I continues to grow.

At the same time, switch over to the athlete side of the market, and the athlete's value has continued to grow this entire time. But we've had the cap, right? We've had the cap on the size of the scholarships and so forth, including on the athlete's ability to earn money even outside of campus.

When you have that cap, and you've got the forces pushing up against it in terms of increased demand and revenue, you get what we've seen, which is non-price competition. That started to grow over the last few decades. The schools started to compete in facilities, coaches, and other things that would get the athlete to come to school, because they couldn't offer the athlete money directly.

As we go through the *White*, *O'Bannon*, and *Alston* cases, and then all the changes the NCAA has made throughout the years, more freedom and equity have been gained by the athletes incrementally, as each of these steps has taken place.

Now, we've reached a point where the athletes are able to, through social media and other forums, grow their own brand. That leads to a discussion of name, image, and likeness. So each of these steps has changed.

The big question on the table in *Alston* and *O'Bannon* and even in *White*, was the idea of consumer demand: How important is the notion of athlete compensation to consumer demand?

And I'll just say that to the extent that it was important in the mid-1980s—and I'm not convinced that it was necessarily even that important then—that importance has lessened. We know that's the case, because we've seen these incremental gains that the athletes have gotten in their pockets, and we haven't seen a diminishment of the demand for the product.

MR. SHEANIN: I'm going to turn it to the lawyers on the panel and see if either of you want to weigh in on the economics.

MR. MISHKIN: You know, there's just no escaping it that the economics had, at the very least, an emotional impact, especially because before the advent of the NIL,[9] the athletes were limited to their scholarships. Those scholarships were not insignificant, but to many people, understandably, they were not sufficient given how much money was being earned by others.

I don't know that the antitrust analysis really should have been affected by these changes, but it clearly was.

Remember that Judge Wilken's decision in *Alston* was that maintaining a distinction between professional and collegiate sports is still a procompetitive justification. I don't know what the evidence will be in the next case. But in *Alston*, which was ultimately affirmed by the Supreme Court, the law today still is that maintaining that distinction between collegiate and professional sports is procompetitive. Judge Wilken found that the evidence in *Alston* supported the idea that that distinction was procompetitive.

Where Judge Wilken disagreed with the NCAA was in how you make that distinction. What rules are necessary or appropriate to distinguish between collegiate and professional sports? She found that the NCAA couldn't limit any payments that were related to education, because consumers wouldn't care. If student athletes in colleges were getting money or benefits for education-related purposes, then consumers are not going to view that as professional sports.

Going forward now, every case is a new case. The record's going to be a new record. I have no doubt that the continuing evolution of the economics—and perhaps continuing changes in perception of how important it is or isn't that there be a big distinction between collegiate and professional—will continue to evolve. We'll have to see what the record in the next case tells us.

MR. SHEANIN: Jeffrey Kessler, do you have anything you want to add?

MR. KESSLER: So I think the change in economics is not just in the size of the pool of money. Obviously the money is greatly higher, and I think that had an influential effect, but it also had to do with the character of how these sports are conducted—at least talking now about Division I basketball and FBS football, which were the two sports that we're focused on.

Thirty-seven years ago, in *Board of Regents*, I think there was still a concept in the Supreme Court dictum that having a Division I basketball team was like having the student newspaper. It was an extracurricular activity that was just part of being a student on campus.

What became clear 37 years later to all nine justices of the Supreme Court is that at least for these schools and these sports, they had become gigantic businesses. There was no question about that. You look at a school like the University of Texas that had formed its own TV network called Longhorn TV; you look at the University of Alabama, where the strength and conditioning coaches were making $550,000 a year, which is more than the president of Alabama was making for the whole school; and you couldn't help but say these are gigantic commercial enterprises. They are commerce. They weren't extracurricular activities anymore.

Once you looked at that transformation, it's easy to see now that the athletes are in fact labor and that this is a labor market. If you're looking at a labor market, you start to look, as the Supreme Court did, with extraordinary skepticism as to why these employers in effect should be able to generate this money in these commercial enterprises off the backs of labor, while agreeing not to pay them for that labor or not paying above the cost of attendance scholarship, which was their agreement at the time.

So I really think it was that transformation as to how this all has evolved that greatly altered the judicial perception of the NCAA.

And the irony here is that this all in part was a result of the competitive forces unleashed in *Board of Regents*. It is precisely because the TV restrictions were struck down that you started to see the explosion of revenues and games on different outlets in the top level of football, which helped speed along the creation of these big commercial enterprises that just happened to be run by schools.

MR. MISHKIN: Well, this is not the first time Jeff and I have debated or discussed these issues.

Look, there is no doubt that the amounts of money that are coming into the top, top football programs, maybe 25 or 30 of them—and I don't think that entirely defines college sports—affects how much time athletes have to spend.

I think the issue is still open, though, as to whether consumers really no longer care at all about a distinction between professional sports and college sports. As Jeff just described it, there really isn't much distinction. I mean, Jeff would describe the students on campus as employees, exactly as the employees of an NBA team would be, and I'm just not sure that we're there yet. Maybe we're closer. I give you that, we are closer than we have been.

But these are still universities. Wholly apart from consumer interest in this, I don't know whether these universities are ready to simply divorce themselves from the idea that their athletic departments are part of their overall educational mission, and that the universities really are now on the verge of just sponsoring professional teams.

Jeff's heard me use this example before. What if Harvard decided, "Yeah, I just really want the best football team I can have," and so Harvard takes a part of its endowment and buys the Patriots? Why not? Why fool around? Let's buy the Patriots and we'll call it "Harvard" because we want people to think that somehow it's connected with Harvard. But these are not students, not part of the student body. These are just the athletes, the employees that Harvard wants to employ to go out there and play football.

Is that really where we're headed, to a complete divorce between the educational setting here and that mission, and producing professional sporting events?

We're getting closer, I understand it, but I'm not sure we're there all the way.

MR. SHEANIN: Jeff just raised the question of whether consumers really care about the distinction between college and professional sports. Dan, my guess is you've probably done some analysis on that.

Do you want to weigh in there?

DR. RASCHER: What makes college sports distinct from professional sports is that they're college students, attending class. The New England Patriots are not an apt analogy, simply because those athletes wouldn't necessarily be part of the Harvard student body, right? So we currently have the best high school players coming in and playing in college, which means we do have the best players at that stage. They can't even go into the NFL directly, but they are attending classes and representing their universities.

What makes it unique is that they are college students, and I think the question on the table is whether individual schools or individual conferences decide, "Hey, we're willing to pay more to the athletes. We would like to do more for them. We're recruiting. We would like to get the ones that we want, and so we're willing to pay more."

And I think a related question is, would the fans care about that? Or to what extent would they care about that? Or what is the sort of level that they might care about that?

I would just say, historically, at each of these times we've seen more money come into the system, go into the hands of the athletes, and we haven't seen a diminishment in demand.

And we see that right now with name, image, and likeness—I know that's not a perfect analogy to having the schools pay them and I'll give you that, Jeff—but we see that pay happening, and we're not seeing an uproar or a decline (at least I haven't seen any) in terms of the fans' perception of college sports.

IV. THE MARKET FOR COLLEGE ATHLETES' NAME, IMAGE, AND LIKENESS

MR. SHEANIN: Well, you just raised name, image, and likeness, so let's talk about that for a little bit.

Even before *Alston* reached the Supreme Court, various states were enacting laws that would allow college athletes to be compensated for the use of their name, image and likeness. That started with California's Fair Pay to Play Act, which was enacted in 2019 but has yet to go into effect, and now other states have gone through it too.

Where is the market for a college athlete's name, image, and likeness, and what do you anticipate those markets to look like in the future?

I want to start with you, Dan, because you've probably gotten more focused on this than the rest of us.

DR. RASCHER: It's a great question. I think it's rare that we get to see a market start right in front of us. There are similar markets happening and so we see name, image, and likeness kicking off on a particular date. Again, I think that that's fairly rare, but very interesting.

So on July 1, 2021, the athletes were allowed to go out and market their right of publicity. Many of them did so on that first day and in those ensuing weeks. You know, I don't think we're at an equilibrium. I think it's going to take some time. I don't know exactly how long as I sit here, but there's more innovation and more growth. As the brands figure out how to use the athletes, the athletes figure out how to market themselves, and the schools figure out what they're able to do, I think we'll see the maturity of the market.

We're already seeing these platforms form. INFLCR, Opendorse, Learfield—which was already in the business—and Icon Source are now jumping into the platforms. So the platforms simply bring the brands and the athletes together and help them form marketing deals or endorsement deals.

Schools are trying to get the best athletes that they can, which they've been doing this whole time with fancy facilities, high paid coaches, etcetera. Now they are trying to help their athletes do well in the NIL market so they can go out to their recruits and say, "Hey look, our athletes are doing great. They're making a lot of money for their name, image and likeness. You know, come and play at our school."

I just saw a new sizzle reel that was out yesterday for LSU, and that's what it's saying. You know, it's 180 degrees from what we used to see when they were against those payments. Now those schools are like, "Yes, look at how well our athletes are doing, compared to other athletes."

And then the next step in the maturity—and we've only been doing this a few months—but the next step that we're starting to see is these entities are forming that are sort of next to campus. I don't mean that in the physical sense. These entities that

are associated with a particular athletic department are allowing fans, boosters, alumni—anybody—to donate money into these entities, and then these entities pay the athletes to do marketing for the brands that have partnerships with the entities. It's allowing folks to put money into the pool for the athletes at the school that they care about, and then there are brands associated with it so the athletes can market it.

That's an interesting response to the cap on the ability for the schools to directly bring the athletes in and sign them to name, image, and likeness deals. I think you're seeing that in Florida, South Carolina, North Carolina, and a number of places.

And then let me just give a quick update on the latest numbers. A couple days ago, two of these platforms, Opendorse and INFLCR, came out with some publicly available data. The average for INFLCR are a little over $1,000 per transaction. For Opendorse it's around $700 per transaction. The averages are much higher than the medians, which gives us some insight that there are a number of very large deals happening with athletes, and then there are lots and lots of athletes earning some money.

Much of this is in football, men's and women's basketball, although certainly not all of it. Much of the use of it is through social media postings. So that seems to be the way that the brand wants to use the athletes at this point.

And the group licensing bit is starting to grow. There are companies like Brandr Group and OneTeam Partners associated with the NFL, NBA, and Learfield, and others who are putting together these group licensing deals which could lead to the return of the video games. Every student I have is always asking about the video games. "What happened to the video games? I used to love the video games."

So I think we're seeing the maturity of the market, and I'm actually quite impressed how quickly it's moving forward. But I think it's going to take some time for us to really see what it's going to look like in the end.

And then final point—the joint product—I think that's where the equilibrium wants to go. The athlete's name, image, and likeness and intellectual property, the school's intellectual property, and the joint product. That's what the brands want.

I think in the end, the brands, the schools, and the athletes are going to find a way to be able to deliver that, and we're seeing a little bit of that with the group licensing already.

Group licensing, I think, is really quite interesting and whether that makes more sense than the individual license. I'd say it's more of a combination.

MR. SHEANIN: Jeffrey Kessler, do you have any thoughts about the group licensing versus individual licensing? Do you have any idea as to which is going to wind up being better, or which direction the market is going to go?

MR. KESSLER: So I don't think there's a "better."

I think there are a lot of different things going on in markets. Markets yield great results and we're seeing it for different people.

So if you are a swimmer or a gymnast or a volleyball player, these individual social media deals are fantastic for you.

This is particularly true in women's sports. They are giving opportunities to people who have great fan followings in not-high-revenue sports, to be able to monetize those outcomes.

For example, there are gold medal winners in those sports this year who were able to go back to school and also be students.

And by the way, where I disagree with Jeff is that, while I'm not in favor of anyone in college sports acquiring the Patriots, I do believe the restrictions on the athletes being students is a valid restriction. I do think that distinguishes college sports.

What doesn't distinguish it is whether the athletes are compensated or not, but I think their being students is important. It lets these athletes go back to being students and pursuing their education, as opposed to giving up on school because they now can monetize their Olympic experience, but couldn't do so if they went back to school before, because they wouldn't have been able to play on these collegiate teams and earn any income.

So I think those social media deals are very important. There is depth and scope in these social media deals, even though the individual numbers may not be very high. It may be $1,000 here, $1,000 there. But that's going to add up to where these individual students, I predict, are going to get $5,000 to $10,000 a year from that type of social media and similar NIL activity, which would be great for them.

The group licenses will primarily have their first value in the big-revenue sports. There is going to be a tremendous demand to get back that EA[10] video game that's been alluded to, and I predict by a year from now you will see that EA video game and the athletes in the college football video game. There will also likely be an NCAA Division I basketball game. The NCAA itself will probably end up licensing the NCAA tournament into that, separate and apart from the schools. You will then have a joint D1 basketball product, and consumers will get what they want, and the athletes will get reimbursed there.

You're also going to see group licensing by individual prominent schools. There's a market for jerseys from North Carolina for their basketball team to match the uniforms and the player names, just like there are for professionals.

People already started to develop that business for former student athletes because they were not limited by the NCAA rules anymore. The NCAA couldn't go after the former athletes because they were gone from the schools.

Now the current athletes are going to get similar deals. Let's keep in mind that the reason this is all so transformative is that most college athletes in any of these sports will never play in the pros. Even on the most successful teams—Alabama football—you will have maybe five percent of its roster that will have a long NFL career. Ninety percent won't even have an NFL career, five percent will get in and will be there a year or two, and maybe five percent will have more than three or four years in the NFL, from the best dominant college football program in the country.

So imagine what that is for the rest. In many of these other sports, there aren't always high revenue opportunities.

So this is the chance for these athletes, and particularly in the highest revenue sports, they are largely students of color and they frequently come from communities where this additional compensation can be life-changing for them and their families. This is a real big deal for these athletes, and competition is achieving this.

MR. SHEANIN: Jeffrey Mishkin, do you agree competition is achieving all of these things?

Are you concerned about it?

MR. MISHKIN: With all of this ability to earn money—and I am not gainsaying—it's a hugely important development.

Do I have any concerns about it?

I do think that the more the focus is on all of these potential incredibly lucrative business deals, this issue of whether these athletes are students or not is important. The general counsel of the NLRB just took the NCAA to task for daring to continue to use the term "student athletes," because, no, no, they're not—they're employees and as employees, everybody's earning as much as money as possible. So that's happening. I'd rather talk about the importance of this in terms of the NCAA's future

role here and what it's going to be doing or not doing here.

Obviously the sea change that's occurred, you can see it. Signing autographs or making use of your NIL used to be the quintessential no-no to the NCAA. That was pay for play—you know, Johnny Manziel, pay for play.[11]

But now the NCAA endorses NIL. How did that happen? Well, it happened through a number of channels, but one of the most important is a dilemma that the NCAA was faced with, which was one of the most important features of NCAA rules: If a non-athlete student is permitted certain benefits or the ability to get certain payments, athletes must be given the same right. That's central to the NCAA.

So when non-athlete students began making money on the Internet as influencers or bloggers, they weren't getting paid for play. They weren't playing. They're not athletes.

So the NCAA began to reason, "Well, then there must be some way of making a distinction here between student athletes who are not getting paid to play their sports, and all students at a university who can make money on their name, image, and likeness."

And I think that this is going to be a difficult needle to thread, to try to maintain that separation between earning lots and lots and lots and lots of money on your name, image, and likeness but not getting paid to play.

I'm not deeply involved in this so I'm not really speaking out of school. There's a new constitution floating around for the NCAA, and it draws this exact distinction. It reiterates that the no-pay-for-play rule is critical. We're trying to maintain the distinction between professional and collegiate sports, but NIL is fine.

And I think that is going to be a very difficult line to walk. You've got real students who are pursuing their education, with the ability to make lots and lots and lots of money if they're in the right position. They've got the right followers on Instagram. And yet, being "real students" when again the entire notion of student athlete is under such attack, there are many people who say we're not even allowed to use that term.

So we are in interesting and absolutely unsettled times right now.

V. ANTICIPATED LEGAL CHALLENGES TO THE NCAA'S COMPENSATION RULES

MR. SHEANIN: I want to go back a little bit to the trial and appellate decisions. In affirming Judge Wilken's decision, the Ninth Circuit said it struck "the right balance between crafting a remedy that prevents anticompetitive harm to student athletes, while serving the procompetitive purpose of preserving the popularity of college sports."[12] That was fully affirmed by the Supreme Court, but then Justice Kavanaugh wrote his sharply worded concurrence in which he voiced concerns about the legality of the NCAA's remaining compensation rules.[13]

I think that part of the animating feature of Justice Kavanaugh's concurrence dealt with the labor questions that both of you, Jeff Mishkin and Jeffrey Kessler, have discussed here today.

So what doors do you think the Supreme Court's decision and the Kavanaugh concurrence opened, with respect to further legal challenges to the NCAA's compensation rules?

I'll start with Jeffrey Kessler on that.

MR. KESSLER: So how I read Justice Kavanaugh's concurrence is that, at least in his view, he was articulating something that is not a separate point from the majority decision. He was stating: "This is what I believe are the implications of the majority decision." If you read through what he's saying, he's indicating that the majority decision has taken away—which I think is correct—the ability

of the NCAA to argue that NCAA schools should be treated any differently as a business when they operate a business. When college teams are operating businesses like this, they're subject to the normal antitrust laws. He ends up by saying the NCAA is not above the law.

I got asked this quite a bit by the justices, not only by Justice Kavanaugh. He noted that we didn't press on appeal a challenge to the part of the relief we lost, which was against the compensation restrictions that weren't education-related.

That issue wasn't before the Court. The majority opinion noted that as well. In fact, there were a number of justices who seemed willing to consider that that was an error by the courts below, but recognized that this issue of additional relief was not presented to the Supreme Court.

So yes, I view the forcefulness of the nine-nothing opinion, plus the concurrence, as leading to a future judicial questioning of a whole variety of other NCAA restrictions.

Right now we have a new case, *House v. NCAA*.[14] It's a class action that hasn't been certified yet, but a putative class action that is not only challenging the previous NIL restrictions—the ones that the NCAA has now suspended—but is also challenging the one's that they have maintained. Principally there are two remaining NIL restrictions by the NCAA, and I think the more profound one is the NCAA's restriction that the schools cannot compensate the athletes for NIL.

In other words, they've lifted it for third parties but the schools cannot acquire those NIL rights and bundle them, as Dan was talking about.

This becomes very significant in broadcasting. The reason is that in the professional sports, in the NBA and the NFL and the NHL and Major League Baseball, if you look at the TV contracts, the leagues all tell the television networks that they are delivering all of the NIL rights of their athletes for use in broadcasts. If you look at the collective bargaining agreements and the player contracts in professional sports, those rights are transferred from the players to the leagues, for the purposes of using them in the games. In other words, it's part of the consideration.

And of course in exchange for that, the players get all the benefits and things they get in their collective bargaining agreements. It's part of the quid pro quo that's exchanged.

In the NCAA, if you look at their TV agreements, they do the same thing in transferring athletes' NIL rights for broadcasting, but do not pay for them.

The NCAA conferences warrant to the broadcasters that they're delivering any needed player NIL rights for the broadcasts. Jeff Mishkin is right that the NCAA only does the Final Four for basketball, the tournament contracts. All the other Division I basketball and all the FBS football broadcasting contracts are done by individual schools or by the conferences.

If you look at those broadcast agreements with the individual schools or conferences, they convey rights and warranties to the networks regarding NIL. But the NCAA rule says you can't purchase those rights for the athletes.

So the athletes' NIL rights for broadcasts are being taken for zero compensation, but yet are being presented to the networks for their broadcasts. Our view is that some significant part of the compensation for those broadcast agreements—not all of it—but some significant part is due to the NIL rights of the players.

So that's an issue that's going to be litigated and determined in *House*, and we'll see how that works out. We believe strongly that the Supreme Court's decision lends lots of strength to challenging that restriction.

And finally I would note there's another very interesting legal issue for all the antitrust scholars who are watching this call: In the Ninth

Circuit decision, there was also a concurrence.[15] The concurrence in the Ninth Circuit raised this interesting issue as to whether or not a procompetitive effect under the rule of reason has to be shown in the labor markets that are being restrained, as opposed to in the output market for the games, which is basically how it was argued and presented by the economists for the NCAA in *Alston*.

Again, that was not an issue we raised in *Alston*. The Supreme Court had amicus briefs on that issue, and asked about it during oral argument. Were we making that argument? No, we had never raised it below, so that was not before the Supreme Court. So it's another one of these open legal issues, and the Supreme Court noted that this was an issue that it was not reaching.[16] But the Supreme Court did not indicate it was rejecting the point. It's just open, so we don't know where the Supreme Court would come out on that issue.

Well, we are pressing that issue in *House*, so we may also get a determination as to whether or not any procompetitive justification—this idea that the NCAA is selling a product in an output market and that we should look there for the justification—is legally sufficient, or whether the NCAA will have to show offsetting procompetitive effects in the labor market and balance those effects into one market. This is a very interesting and important issue. It's been discussed in the Supreme Court in the past, particularly in its *Topco*[17] decision, as to which markets you look to in order to balance competitive effects, and we may get a lot of learning on this issue in *House* going forward.

MR. SHEANIN: Jeff Mishkin, do you think we're headed for endless litigation, or do you think there's an endgame?

MR. MISHKIN: "Endless" sounds a bit apocalyptic. But look, the NCAA has been in nonstop, continuous—not continual, continuous—major antitrust litigation since 2008, without a day off. And here we are in almost 2022. Jeff's got his new *House* and *Oliver*[18] cases. You can bet that's going to take the NCAA into the mid-2020s, with really no end in sight. And the Supreme Court has said, look, the antitrust laws are the antitrust laws. All American businesses have to deal with them.

But for a regulatory body whose job is to make regulations and govern college sports to be told, as the NCAA has been, for better or worse, that every time you regulate, you are creating new facts and therefore, opening yourself up to another interesting, fascinating antitrust litigation, I think there are consequences of that for the NCAA. It is not sustainable for a regulatory body to face this kind of enormous burden and expense simply by doing the normal regulating.

So I think where this is headed is the NCAA has got to become quite reluctant to spend a lot of time regulating. I think you'll soon see an effort to decentralize decision-making down to the division or the conference level. That is going to raise a whole lot of other new antitrust issues.

So as I said, endless litigation? Endless is a long time, but we are certainly nowhere near the end of the kind of litigation that's going to be going on in college sports. If there is an easy endgame here, I don't see it.

MR. KESSLER: So I actually do think that's the possible endgame here. We actually advocated in *Alston* that what should happen is the NCAA should get out of the business of regulating compensation and benefits altogether. They shouldn't be in that business. Actually, that's a business nobody asked the NCAA to get into.

When the NCAA started, President Theodore Roosevelt asked a number of football schools to regulate the safety of the sport—which, by the way, no one objects to. The NCAA should do more in that safety area.

No one would object to the NCAA continuing to have educational standards, and the NCAA can do more in that area.

It's the compensation and benefits part of the NCAA regulations that have raised all these antitrust problems. What we have advocated is that those determinations about compensation and benefits should go to individual conferences because the conferences can compete with each other to determine the outcome. The conferences are really different leagues, if you will, and the competition among conferences would assure a competitive market outcome, while letting each conference pay attention to its own needs and resources.

No one believes, frankly, that the compensation and benefit programs at Harvard, to use Jeff's analogy, should be the same as the programs in Alabama because they're different economic animals. In Alabama, football generates—this is not the number—but something like $160 million. It's something in that neighborhood for the Alabama football program. In Harvard, it's a negative number. By the way, the Ivy League doesn't allow even athletic scholarships, and no one's challenged that because it's a different model economically.

So if you had the individual conferences deciding what to do, we think you'd end up with competitive market outcomes and not all conferences would be the same.

Where it is a big business, the athletes should all realize the gains of that big business. Where it's an extracurricular activity, like all of Division III, for example, you'll have a very different result.

Under no circumstances, though, is there any rationale for even in Division III, in my view, restricting the marketing of individual names, images, and likenesses by the athletes.

And that goes back to Jeffrey's principle. Allowing all students to monetize their NIL rights is independent of any issues regarding the different revenues of the sports. It's the same way you let other students, not athletes, at those schools be individual entrepreneurs that go on the Internet and earn social media revenues. There's no reason to restrict athletes in any of these sports, in terms of marketing their NIL rights. That is an area I think transcends whatever the revenues may be that are coming in to the schools.

DR. RASCHER: If I could just throw a minute in there. So on the decentralization point that both Jeffreys brought up, my business partner, Andy Schwarz, and I wrote an article in the year 2000 on that exact topic in college sports, the idea being that down at the conference level, the conferences could choose what to do and they could deal with their own consumer demand issue about, "Gee, if we paid too much, are our fans going to stop watching? So let's figure out what that area is."

And that may vary among different conferences. Someone might bring up the competitive balance issue, but what we've already seen is that the Alabamas and Clemsons are great every year, and some of the other schools are not. So there's not a lot of competitive balance that needs protection.

And so again, letting the conferences decide, I think takes the NCAA out of the equation and maybe stops that endless row of lawsuits.

MR. SHEANIN: I want to give Jeffrey Mishkin the last word on this. Any closing thoughts?

MR. MISHKIN: I'm not sure that simply devolving the authority down to the conferences is going to be the end of antitrust litigation. Even though Jeff Kessler has said he doesn't think the SEC[19] has market power, I'm not sure that given the ability to be creative in litigation, there will not be other plaintiffs' lawyers who will take the arguments that have been made against the NCAA and just bring them right down to the conference level, claiming that this conference is too big or these two conferences got together.

So anyway, I hope there's an endgame. I don't mean to deprive Jeff of any litigation for the rest of this millennium, but I think that getting out of the antitrust soup here is going to be very, very difficult.

MR. SHEANIN: I want to thank everybody for what has been a really spirited discussion. There's so much more that we could be talking about. I truly appreciate having all of you participate in this today. Thank you so much.

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1. Aaron M. Sheanin is Partner with Robins Kaplan LLP, a member of the Executive Committee of the CLA Antitrust and Unfair Competition Law Section, and the Co-Chair of the 2021 Golden State Antitrust and Unfair Competition Law Institute.
2. *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).
3. *White v. Nat'l Collegiate Athletic Ass'n*, No. 06-999 RGK (MANx) (C.D. Cal.); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 09-cv-3329 CW (N.D. Cal).
4. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).
5. *Id.* at 120.
6. *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498 (7th Cir. 2018).
7. NCAA Division I Football Bowl Subdivision.
8. Named after Boston College quarterback Doug Flutie.
9. Name, image, and likeness.
10. Electronic Arts Inc.
11. In August 2013, the NCAA and Texas A&M suspended Heisman Trophy-winning quarterback Johnny Manziel for one-half of a game for violating the NCAA by-law that precluded college athletes from allowing their name, image, or likeness to be used for commercial purposes.
12. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1263 (9th Cir. 2020).
13. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring).
14. *House v. Nat'l Collegiate Athletic Ass'n*, No. 20-cv-03919 CW (N.D. Cal.).
15. *Grant-in-Aid Cap*, 958 F.3d at 1267 (Smith, J., concurring).
16. *Alston*, 141 S. Ct. at 2155.
17. *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).
18. *Oliver v. Nat'l Collegiate Athletic Ass'n*, No. 20-cv-04527 CW (N.D. Cal.).
19. Southeastern Conference.

BIG STAKES MERGER: *FEDERAL TRADE COMMISSION, ET AL. V. THOMAS JEFFERSON UNIVERSITY, ET AL.*

Edited by Shira Liu[1]

PANELISTS:

- James A. Donahue, III, Office of the Attorney General, Commonwealth of Pennsylvania
- Jamie E. France, Gibson, Dunn & Crutcher LLP
- Paul H. Saint-Antoine, Faegre Drinker Biddle & Reath LLP
- Moderator: Shira Liu, Crowell & Moring LLP

I. INTRODUCTION & OVERVIEW

In September 2018, Thomas Jefferson University and Albert Einstein Healthcare Network signed a merger agreement. In February 2020, the FTC initiated an administrative proceeding seeking to permanently enjoin the proposed merger.[2] Fact discovery closed in July 2020, and a six-day permanent injunction hearing was held in September 2020. After the hearing, Judge Gerald Pappert of the Eastern District of Pennsylvania denied the motion, and the Third Circuit subsequently denied an emergency stay.[3] The FTC withdrew the matter from adjudication, and then dismissed the complaint in March 2021.

Trial counsel for the FTC, the Commonwealth of Pennsylvania, and Thomas Jefferson University shared their experiences trying this case in the midst of the COVID-19 pandemic with the Golden State Institute in November 2021 in a panel discussion moderated by Shira Liu.

Jim Donahue is the Executive Deputy Attorney General for the Public Protection Division of the Pennsylvania Office of Attorney General. The Division includes the antitrust charities, civil rights, consumer protection, fair labor, health care, special litigation, and tobacco sections. From 2009 to 2012, Jim served as the Chair of the National Association of Attorneys General Multistate Antitrust Task Force.

Jamie France is Of Counsel in Gibson Dunn & Crutcher LLP's Washington, D.C. office. She represents clients in merger and nonmerger investigations before the FTC and DOJ, as well as in complex private and government antitrust litigation. Jamie was previously an attorney in the Mergers IV Division of the FTC's Bureau of Competition. While at the FTC, she was a key member of the FTC's trial

teams and several hospital health care provider merger challenges.

Paul Saint-Antoine is a graduate of Columbia Law School and a partner at Faegre Drinker Biddle & Reath LLP, where he co-chairs its national antitrust practice. In 2020, he was a lead trial counsel for Thomas Jefferson University in the FTC's action to block its merger with Einstein Healthcare Network. This year the *Philadelphia Business Journal* named Paul one of its Best of the Bar in the category of business relations.

II. THE FTC'S CHALLENGE TO THE MERGER

MS. LIU: Thanks to everyone for joining us today. I will turn it over to Jamie to get us started on our topic today.

MS. FRANCE: It's a pleasure to be here today. Before I start, I'll just note that the views expressed today are my own and do not represent the views of the FTC or of Gibson Dunn. I'll start by going over some of the allegations in the complaint in this case. Jefferson and Einstein, who were two of the largest hospital systems in the five-county Philadelphia area, signed an agreement to merge in September 2018, and their proposed merger would create the largest hospital system in the greater Philadelphia area.

After an investigation that spanned into 2020, the FTC filed a complaint in administrative court seeking to permanently enjoin the merger, and the FTC and the Pennsylvania Attorney General's Office simultaneously sought a preliminary injunction in federal district court in the Eastern District of Pennsylvania to temporarily enjoin the merger during the pendency of the merits proceeding. After discovery, there was a six-day preliminary injunction hearing held in September and October 2020 before Judge Gerald Pappert, and Judge Pappert ultimately denied the FTC and Pennsylvania's preliminary injunction motion. Subsequently, after the Third Circuit denied the FTC's request for an emergency stay of the merger pending appeal, the Commission voted to dismiss its appeal to the Third Circuit, and the matter was withdrawn from adjudication before the FTC's administrative law judge.

We'll now talk about some of the allegations in the FTC and Pennsylvania's complaint. Pre-merger, Jefferson operated 11 general acute care hospitals in Pennsylvania and New Jersey, and three inpatient rehabilitation facilities ("IRFs") in Pennsylvania, and Einstein operated three general acute care hospitals and five IRFs in the Philadelphia area. The first step when analyzing a merger's likely effect on competition is to identify a relevant market, and there are two components to the relevant market. The first is the line of commerce, meaning the overlapping products or services that are provided by the merging parties, and the second is the geographic area, which can relate to the locations of the merging parties or the locations of their customers. At issue in the *Jefferson/Einstein* case were two lines of commerce or product markets. The first was inpatient general acute care ("GAC") hospital services, which is a cluster of medical and surgical diagnostic and treatment services that require an overnight hospital stay. The second product market alleged in the complaint is inpatient acute rehabilitation services, which is a cluster of acute rehab services that are provided to post-acute patients, *i.e.*, patients who were previously treated at a GAC hospital. This includes intensive multidisciplinary rehab therapies at least three hours a day for five days a week, and there are some other details about that product market in the complaint. Now, both product markets were limited through services provided to a particular set of customers, and that's commercial health insurers and their members.

Taking a step back for a minute to talk about that customer set, the FTC's and the state's hospital merger enforcement efforts have generally been in the context of what's called the two-stage model of competition, and this framework recognizes that hospitals compete in two separate but interrelated stages. In the first stage, hospitals compete for inclusion in insurers' provider networks, which is

largely competition on the basis of price. And in the second stage, hospitals compete to attract insurers and enrollees who require hospital care largely on the basis of nonprice factors. The two stages of competition are interrelated, but hospitals desire to be included in insurers' networks, and insurers desire to have hospitals in their networks to serve their enrollees. Both affect the relative bargaining leverage of insurers and hospitals, and thus the prices that they negotiate in that first stage of competition. And importantly, this analysis focuses on the insurer as the customer, but it recognizes that patient preferences may influence insurer demands.

Turning back to market definition and the geographic market allegations in the complaint, the FTC alleged that the merger would eliminate competition between Jefferson's and Einstein's general acute care hospitals in two geographic markets in and around Philadelphia and the nearby Montgomery County, as well as eliminate the competition between Jefferson's and Einstein's IRFs or their rehab hospitals in one geographic market that covered parts of Philadelphia and parts of Montgomery County. The antitrust agencies employed a hypothetical monopolist test to evaluate whether groups of products in geographic areas are sufficiently broad to constitute relevant antitrust markets. In the context of a hospital merger such as this one, the hypothetical monopolist test asks whether a hypothetical owner of all of the hospitals or all of the IRFs here in a candidate market could profitably impose at least a five percent price increase in negotiations with commercial insurers.

Now, importantly in this case, all three of the markets alleged in the FTC and Pennsylvania's complaint satisfied the hypothetical monopolist test. First, the northern Philadelphia area geographic market consisted of 11 GAC hospitals in Philadelphia and Montgomery County, and it focused on an area of overlap between two of Einstein's hospitals and two of Jefferson's hospitals. According to the complaint, the merged hospital system would control at least 60 percent of this market post-merger. Second, the Montgomery area geographic market consisted of ten GAC hospitals in or near Montgomery County, Pennsylvania, and it focused on the area of overlap between one of Einstein's hospitals and two of Jefferson's hospitals, and as alleged in the complaint, the merged hospital system would control at least 45 percent of this market post-merger. Third, the Philadelphia area geographic market for inpatient acute rehab services consisted of seven IRFs in Philadelphia and Montgomery County, and it focused on the area of overlap between Jefferson and Einstein's largest IRFs, Magee Rehab Hospital and MossRehab at Elkins Park. And as alleged in the complaint, the merged system would control at least 70 percent of this market post-merger. Under the merger guidelines, the post-merger concentration level and increase in market concentration in all three of the markets that we just went through created a presumption that the transaction was unlawful.

Beyond the structural presumption of illegality, the complaint also alleged that the merger would eliminate the close competition between the parties for inclusion in commercial health insurers' hospital networks and that this would enhance the merged system's ability to negotiate more favorable reimbursement rates with insurers in that stage one of competition as well as diminish their incentive to compete on the basis of quality and service offerings in stage two of competition.

The complaint also contained allegations related to entry or expansion, that entry or expansion by other GAC hospitals or other IRFs would not be timely, likely, or sufficient to counteract the transaction's adverse competitive effects.

And finally, the complaint alleged that the defendants had not asserted cognizable merger efficiencies and that even if the defendants could identify some cognizable efficiencies resulting from the merger, any savings likely to be passed on to patients would be far outweighed by the transaction's potential harm and would not be sufficient to justify the transaction.

MR. SAINT-ANTOINE: Thank you to GSI for giving us the opportunity to talk about the *Jefferson* case—a case that is very important to those of us that live in the Philadelphia area, but also a significant one for those of us that practice in this particular area of antitrust jurisprudence. Like Jamie, I should begin with the admonition that these are my views and don't necessarily reflect the views of my firm, Faegre Drinker, or any of its particular clients.

Those that have reviewed Judge Pappert's decision denying the government's request for a preliminary injunction know that the court ultimately grounded its decision on the plaintiffs' failure to prove a relevant geographic market for both the types of health care services that Jamie talked about in her presentation. But the defendants, in presenting their case to the court, did not want to limit their presentation to the market definition issues. They very much wanted to explain to the court why this transaction was so important to the parties, and there were two principal reasons.

First, the north Philadelphia flagship hospital is a safety net hospital, serving one of the poorer communities in Philadelphia with a very high percentage of government payor mix. For those that are familiar with health care markets, you know that the health care systems often rely on commercial insurance to stabilize their finances, and in this case the Einstein system was losing upwards of $30 million annually. The financial struggles of Einstein were well recognized in the community, and the large insurer Independence Blue Cross even provided favorable rates, higher rates, to avoid what it described in testimony as a financial tragedy. Einstein looked for a solution to its financial predicament and ultimately settled upon Jefferson, which remained the only strategic partner with a strong balance sheet that was willing to merge with Einstein.

Second, the other benefits of the merger that we wanted to convey to the court were the efficiencies to be gained, and this began with due diligence by the parties before the transaction and then ultimately was complemented in court with expert testimony from our expert Lisa Ahern, who identified as much as $58 million in annual merger-specific efficiencies. Now, again, we thought it was important to explain to the court why we wanted to do the transaction, but we recognized the high hurdles of pursuing defenses either based upon the financial situation or merger efficiencies, which is an affirmative defense. So, much of our focus was on the market definition issues where the government had the burden of proof, and if you could encapsulate the defendants' theme in its presentation on market definition issues, it was commercial realities.

The Third Circuit in the *Hershey* decision made clear that no matter what methodology experts pursued, whatever economic evidence was entered into court in support of one position or another, they've all had to comport with commercial realities in the particular proposed market, and this was where we took issue with the government's expert case.[4] We pointed Judge Pappert to a number of aspects we thought were incompatible with his opinions on market definition.

For example, in the Montgomery area market for inpatient hospital services that Jamie described in her presentation, part of that depended upon establishing that the parties' hospitals in that geographic area were close competitors, but if you're familiar with this geography of the Philadelphia area, you know that that part of Montgomery County is divided by a major interstate highway, the I-476, referred to as the Blue Route by us locals, and when we looked at the economic statistics, we found that 70 percent of Einstein's patients were on one side of the highway and 96 percent of Jefferson's patients were on the opposite side of the highway—incompatible, in our view, with the notion that these hospitals were close competitors.

Another commercial reality that we focused on in critiquing the plaintiffs' expert case was how they went about measuring closeness. The primary measure relied upon by the government's expert

was the distance between the parties' hospitals, but if you think about why you're measuring closeness, it's all about patient convenience, and we thought and advocated to the court that drive times were a much more reliable measure of closeness between the hospitals than distances; and in fact when you looked at drive times as opposed to drive distances, it changed the number of competing hospitals in either of the Montgomery or the Philadelphia markets. It expanded the number and therefore diluted the shares of the two-party hospitals.

And then also another aspect of commercial realities is we looked at the past as a predictor of the future, and for example, we looked at what happened when Einstein opened its Montgomery hospital in terms of the impact on Jefferson, again to assess whether or not they were particularly close competitors.

And what our expert, Cory Capps, was able to demonstrate was that the opening of Einstein's Montgomery facility in 2012 had little impact on Jefferson's own market shares in that proposed market. Another aspect of the market that we wanted to focus on in terms of commercial realities picks up on a point that Jamie mentioned, and this is the two-stage method of competition in hospital merger cases. Actually, this is one area where the parties agreed that you have to look at both the insurer level and the patient level to have a complete picture of the market dynamics, and in this case we thought it was important, when you looked at the competition at the insurer level, on the predominant influence of Independent Blue Cross ("IBC") in this market. In terms of negotiating leverage, we showed that statistically they accounted for about half of the market share for commercial insurance in the proposed market. IBC had enormous leverage over all of the health care systems. And in fact IBC, we discovered, had done some analysis to show that if Jefferson went out of network, they were going to lose far more than IBC was in terms of financial losses—upwards of tens of millions of dollars, by IBC's own calculations. And in terms of who IBC would turn to if Jefferson went out of network, our own analysis—and I think this was consistent with IBC's analysis—was that it was not Einstein, the hospital in north Philadelphia; it was Penn Medicine that IBC viewed as Jefferson's closest competitor. For us, this was a very important commercial reality, and anybody who lives and works in the Philadelphia area is very aware of the strong presence of Penn Medicine.

MR. DONAHUE: Thank you, Shira, thank you Paul and Jamie, and thank you GSI for inviting us to speak. You know, we're often asked from the Attorney General perspective, why do the Attorneys General get involved in these cases and what is your experience? And our experience is a little bit different from that of the Federal Trade Commission or the Department of Justice in these cases, in that the Attorneys General have a wide range of responsibilities in the health care arena—not only from the antitrust perspective, but oftentimes from the charitable trust perspective. California, Massachusetts, and Pennsylvania are the three states that are most actively involved in hospital transactions and the most actively involved in the health care area generally, so we have a lot of experience. That experience involves quite a bunch of different types of cases. And I want to talk a little bit about two that we thought had some relevance here in this matter.

First, the *Allegheny Health, Education and Research Foundation (AHERF)* case became the largest nonprofit bankruptcy in the history of the United States. It involved a health system that developed in the Pittsburgh area, expanded to the Philadelphia area and included about ten hospitals, a number of doctors' practices and a nascent attempt at establishing some type of health plan provider. All of these hospitals were acquired in quick succession, and their collapse led to the loss of endowments, the closing of most of the Philadelphia hospitals, and the loss of Allegheny General as one of the key tertiary care hospitals in the greater Pittsburgh area. We brought a number of adversary proceedings to try to reclaim the various endowments that were sort of shifted from the solvent parts of AHERF to the insolvent parts.

We ultimately filed the bankruptcy claim of about $78 million and recovered about $34 million, which went back into similar endowments for health care, but there was a significant loss of assets for the charitable mission here in the AHERF case.[5]

Second, *UPMC/Highmark* was a little bit of a different story. UPMC, which is the University of Pittsburgh Medical Center, was the largest health system in the greater Pittsburgh area, especially after the AHERF failure. Highmark was the largest health plan in the Pittsburgh area, with a market share of around 60 percent. That ten percent difference between IBC in Philadelphia and high 60 percent in Pittsburgh is actually a very big difference in terms of how hospitals deal with them. And Pittsburgh has some unique characteristics. One of those characteristics is that the public is very loyal to its insurance company, Highmark, and they're very loyal to UPMC. So, people would have been customers of Highmark and its predecessors through generations, and they would have been patients of UPMC and its predecessors through generations. So, Highmark announced that it was going to acquire the West Penn Allegheny system, which was the successor to AHERF. UPMC turned around and said, we're going to terminate your contract with us then, and that created a tremendous amount of turmoil about where people would get their care, especially in certain areas like cancer and transplants, where UPMC was pretty significant. We ultimately got consent decrees from both of them, basically dealing with their charitable missions, not so much from a competitive standpoint, but we got consent decrees.[6] Just as sort of an aside and to give some color to this, the two groups, the UPMC and Highmark, would not communicate directly with each other during those negotiations, nor would they sign the same documents. So, we negotiated two identical, parallel consent decrees. Under the consent decrees, individual consumers could make, you know, complaints or ask for mediation. Twenty-five thousand of them did. We had three hearings involving potential contempt or violation of the consent decrees, and at various times there were 25 attorneys working full-time in this across our office, the Insurance Department, and the Pennsylvania Department of Health. So, the bottom line is we didn't want to go through this again.

So, we see some similarities between the Jefferson and Einstein situation and the AHERF and UPMC situations. As has been mentioned, Einstein had some financial issues. Now, I want to note that Einstein's management and Jefferson's management were leagues above, in terms of quality, the management at AHERF, but you have a health system merging with another health system and some pretty significant financial issues and what sort of risks are involved there. Jefferson had done a series of other transactions in pretty short succession, but it merged with three other hospital systems and it merged with another college. Jefferson is actually known as Thomas Jefferson University, but prior to the merger with Philadelphia University, it was really only a medical school and a nursing school. The merger with Philadelphia University basically made it into a full-service university, covering many different majors and programs. And Jefferson also had an interest in expanding into the health plan area. So, all of these factors weighed heavily in our decision to join the Federal Trade Commission to challenge this transaction.

III. MARKET DEFINITION IN HOSPITAL MERGER CASES

MS. LIU: Thanks to everyone for introducing those issues. I'd like to ask you a few questions, starting with the court's holding. Jamie and Paul, you talked a bit about the court's holding and focus on insurance companies as the most relevant buyer, and the court also rejected testimony from one of the insurer witnesses, noting that that witness opposes all hospital mergers. So, where does that leave the government in future hospital merger cases and what kind of evidence can it put forward from insurers to meet its burden?

MS. FRANCE: Thanks, Shira. I can take this first, and then I'm sure Paul has plenty to say about it as well. I think that it's important to remember

Judge Pappert's opinion in *Jefferson* was a very fact-specific holding, and it was based a lot on the judge's credibility determinations about insurer witness testimony, and that's discussed at length in Judge Pappert's opinion.

At trial the government put up evidence through its economic expert that showed that each of the geographic markets passed the hypothetical monopolist test and that in each of those three markets, the central Einstein hospital's closest competitor was a Jefferson hospital, and this analysis was focused on competition at the hospital level. As Paul highlighted earlier, the defense emphasized insurer witness testimony that related more to system-level competition. So, there's a bit of a disconnect there. But since the *Jefferson* holding, we've seen that insurer testimony is still important evidence in hospital merger cases. For example, there was a hospital merger case litigated by the FTC after *Jefferson/Einstein* in the district of New Jersey, so also the Third Circuit. This was the FTC's challenge to the Hackensack-Englewood merger, and in that opinion the court relied on insurer testimony as well as other evidence in holding that the FTC met its burden of proving that the merger was likely to substantially lessen competition.[7] So, I think juxtaposing those two opinions highlights the very fact-specific nature of this opinion, but I do think that the *Jefferson* opinion really underscores the importance of ordinary-course, documentary evidence from insurers that supports their testimony.

MR. SAINT-ANTOINE: So, I think that's my cue. There is actually a fair amount in what Jamie just said that I think the defendants agreed with in terms of first the importance of evaluating insurer evidence. As I think we both talked about earlier in our presentations, this is a two-stage model of competition, and you've got to be aware of that. As the courts recognized, patients are largely insensitive to these hospital prices, and the real bargaining takes place between the providers and the insurers.

And to give you an example of the significance of the distinction between the negotiations between insurers and providers and patients, are the statistics that economists—often on both sides—rely on but sometimes over-rely on, and these are the diversion ratios. And essentially, with diversion ratios, you're looking at where would a patient's next best option be if its best option wasn't available? This is an important statistic, but as Judge Pappert recognized and as the Third Circuit recognized, its focus is on patient preferences, but insurer preferences are really focused on price. So, one lesson, I think, is if you're going to rely diversion ratios, you've got to be aware of limitations.

And then another point to pick up on that Jamie mentioned are the ordinary-course documents and the specific testimony of the insurers. Again, this isn't a very important source of information, but it is very fact-specific, and in this case, we were able to show that IBC had some conflicting interest. It was not purely a disinterested bystander commenting on the market. Among other things, it was looking to see whether Jefferson was going to improve its position as a potential competitor for certain forms of insurance. So there were reasons why Judge Pappert ultimately concluded that not everything they said could be taken at face value.

IV. THIRD-PARTY EVIDENCE AND WITNESSES

MS. LIU: That actually leads me into my next question, which is more generally, do you have thoughts on how to use third-party evidence and third-party witnesses effectively in antitrust cases, where most witnesses from third parties are still likely to have a preferred outcome in the case?

MR. SAINT-ANTOINE: I guess the point I would make on this topic is you can't forget that this is a trial. By the time the case gets to a preliminary injunction proceeding, the party and their counsel have spent a lot of time together at the investigative stage in meetings with the Commission and the Attorney General's Office,

and you've also spent a lot of time with your experts, and there could be a potential that you get too narrow of a focus on certain aspects of the case, including the expert testimony. In this particular case the government put together, with a very qualified economic testifying expert, a case that laid out, in a very specific methodology, the hypothetical monopolist test, and applying that test and some other criteria, drew lines in Montgomery County and Philadelphia and then computed market shares.

And if you just listen to it in the abstract, it gave you one view of the merits, but ultimately Judge Pappert, sitting in the court in Philadelphia, aware of the bigger picture as well as aware of the ordinary-course documents and the evidence of lay testimony, had to balance all of that against conflicting expert testimony. So, I think one lesson to be drawn from this is get a great expert, develop a great expert case, but make sure that you can buttress that with fact testimony.

And secondly and briefly, again because this is a trial and there's going to be conflicting testimony, make sure you have accounted for any issues with credibility. And as I mentioned before with IBC, a very important fact witness, Judge Pappert found some reasons to discount the testimony because of their own self-interest.

MR. DONAHUE: I'll just say, look, as a general rule, the fact testimony and the expert testimony have to coincide, and some of the concepts and the terminology that we use on the antitrust side, like the hypothetical monopolist test and diversion ratios, are sort of foreign to sort of the way businesses talk about stuff. Although they actually do use those concepts, they just call them different things. And I think it's certainly important to draw the connection between the two.

In this particular case, as Jamie mentioned, there's a two-stage level of competition, and the insurers kind of wear two hats. One hat is they're negotiating for themselves and for their insured product, but they are also a proxy for the people who are buying insurance, the consumer and the employer, who also have slightly different interests, and it's important to make sure that those interests, and what the insurer is doing in that area to get across its representation of its interests, are revealed in the testimony.

MS. FRANCE: I just have one thing to add, which is to echo what I said before, I think the interests or the potential interests of third parties are always going to be an issue in antitrust cases because so often we're looking to those who are potentially going to feel the effects of a merger, the customers, and customers have various interests at play. We're also often looking to competitors when we're defining a market or potential competitors to get other evidence, aside from just evidence from the merging parties or just evidence from an economic expert about the competitive dynamics at play.

So, I think there is the potential for there to be competing interests from third-party witnesses at a variety of levels, and I think this underscores the importance of having ordinary-course documents from third parties to support their testimony.

V. LITIGATING NEW PRODUCT MARKET DEFINITIONS

MS. LIU: You mentioned the GAC product market definition has been used quite a lot in similar cases, but I believe that IRF market is new, and the court rejected this product market. Do you have thoughts on this outcome and any recommendations for litigants who are bringing antitrust cases with new product market definitions or defending against allegations, including new product market definitions?

MS. FRANCE: Ultimately, as antitrust practitioners know, market definition is a very fact-specific inquiry. I think courts in the antitrust agencies will continue to evaluate both documentary and testimonial evidence from the parties, from third parties, and economic evidence, when they're evaluating new product market definitions. So, I think there is a lot of room to read Judge

Pappert's opinion as very fact-specific on this particular market.

I will note in *Jefferson* there was a dispute between the parties, and this played out a lot at the hearing, about whether skilled nursing facilities should be included in the IRF product market. Those services are provided, as the government alleged, at IRFs rehab hospitals. Ultimately Judge Pappert's opinion did not rule on whether the IRF market was a properly defined product market, but earlier this year the State of California, in a different action, ordered a divestiture to resolve competitive concerns in a merger between two skilled nursing facility companies.[8] I think it's possible that if that matter had gone to trial, one of the questions likely to have been disputed would have been a similar product market question about whether the California Attorney General could support its allegation that skilled nursing facility services was the relevant market.

So, I think we'll continue to see this play out in a variety of different health care spaces. But I think more broadly, the court's holding on market definition in *Jefferson* just highlights the need, as we were talking about before, for antitrust plaintiffs to build multiple types of evidence that supports whatever market definition that they're alleging. And it was clear from Judge Pappert's opinion that he thought the fact testimony and the economic expert analysis should have lined up even more closely than they did.

MR. SAINT-ANTOINE: So just a pickup on that. Because this was the rehab services market and was something new—there are a lot of merger cases dealing with inpatient acute care services—I think it was fair to say that this was really taking both sides a bit outside their normal comfort zone, and we were throwing out words about IRFs and SNFs like we have been dealing with this product market for years and decades, but really, no, this was really new stuff, I think, in terms of the analysis.

For defendants, we really went back to our theme, in terms of commercial realities, and emphasized to the court when there was bargaining going on between the providers and the insurers for the full range of services, how little attention was paid to rehab services, no matter how you defined it, and I think our effort was really focused on putting this aspect of the overall market in perspective.

MR. DONAHUE: If I can just add something about these two IRFs, Moss and Magee, were nationally renowned rehab facilities and oftentimes were responsible for developing some of the most effective treatments of various types of rehabilitation needs. So, there was that other little aspect of this where not only do you have sort of a new market, but you also had two very significant players in the research and clinical area that were merging, and you would be losing some competition as a result of that as well.

VI. REMOTE HEARINGS–LESSONS LEARNED

MS. LIU: Let's go back to this timeline, and you can see that, as you mentioned, discovery took place March through July of 2020 and the hearing took place September of 2020. I think we all remember what was going on in the world at those times, and so I was wondering if you could discuss how it went with the actual depositions and how the hearing went in September of 2020, and if you have any advice for litigants moving forward in these situations.

MR. DONAHUE: I think we did 45 depositions, almost all of which were seven hours long, between the last week of June and the first week of August. That's a lot. Several things we learned, some of which are just basic and others are more important. One thing is make sure if you are doing a deposition, whether you are asking the questions or defending or you're the witness, that your laptop is plugged in. Several times we've had people—you know, these videoconferences use a lot of your battery power and that they go out.

I think another sort of helpful tip is that you have a court reporting firm that has multiple court reporters in multiple locations. The court reporters were all basically doing this from home, and in one of the depositions a thunderstorm came through and wiped out the electricity in the court reporter's house, so the firm was able to find another court reporter and get them set up. It wasn't a huge delay, maybe ten to 15 minutes, but you don't want to have something happen when you're doing this stuff remotely and not be able to continue the deposition. On the whole, though, it was actually fairly efficient to do these depositions. You know, people got the hang of sharing their screens and moving exhibits and that type of thing. It's important that everybody had good Internet connections. Not everybody did. But when they did, things went smoothly.

At the trial, giving the sort of caution that Jamie and Paul did—I am speaking for myself and not the Office of Attorney General—the brand of videoconferencing used by the Eastern District of Pennsylvania is not something I'd recommend. It couldn't hold a lot of people. It kept crashing. It was really difficult dealing with remote witnesses. And I think that had an impact on the judge, in terms of even people's credibility. One might think, "If this was really important, they would have come to the courthouse in person, as opposed to doing this remotely."

The other thing that I think is very important is that when you're doing this, a remote witness has to be, in effect, in a clean room. They can't have anything that would disturb them and they can't have their email or their cell phone there. One of the witnesses looked at a text or something that she got during her testimony and everybody remarked on it and thought that maybe she was looking at notes and that sort of thing, and that really hurt that witness's credibility. So, those are just sort of pragmatic things from doing things remotely. I'm sure Jamie and Paul have other things that they noticed through this process.

MR. SAINT-ANTOINE: So, I'll jump in with some thoughts, many similar to those shared by Jim. I'm looking at the timeline, and it does just underscore this sort of parallel between our schedule and the really worst part of the pandemic created some unique challenges.

Obviously, as the audience can tell from this discussion, the parties and their counsel had very divergent views on the merits. But I will say that there's no way we get the case ready for trial in the time we did if it weren't for the professionalism by both the Federal Trade Commission and the Attorney General office and the cooperation that we got, in terms of scheduling and logistics and technology; the leadership was just essential to getting this done. And if you think about it, we were six days in court, pre-vaccination. That was a very unusual, challenging experience.

In terms of lessons learned, Jim's absolutely right: make sure that you've got good technology, good Internet access, but also think about backup plans. We had some remote witnesses who were going to be looking at documents online, but we know things happen, so we would send them hard copies, with the permission of the other side, and if the technology failed, at least you had a back-up plan.

Again, echoing what Jim said, I thought that the efficiency of the deposition process remotely was surprisingly good. Get a good vendor. It makes a big difference if you have a good vendor. And I think this is something—once we get past this terrible pandemic, I think we're going to evaluate whether a lot of depositions should continue to be remote, particularly when the alternative is crisscrossing the country. So, very challenging, definitely some lessons learned at a premium, in terms of cooperation between opposing counsel.

MS. FRANCE: I just have one thing to add, which is that we were talking earlier about a central market definition question in the case related to whether skilled nursing facilities should be included in the rehab market, and there were a number of skilled nursing facilities, as well as hospitals that were third

parties in the case, and it was a very sensitive time to be dealing with health care providers as third parties. I think all of the parties in the case really grappled with how to deal with gathering evidence from these very important witnesses, who were the hardest hit by the pandemic at that time. And I think everyone really tried to be sensitive there, but there were a lot of competing interests at play, so I think it was a difficult time and all sides were appreciative of the cooperation from those third parties who had a lot more to think about than complying with a third-party subpoena

VII. CALIFORNIA MERGERS

MS. LIU: Of course this merger is in the Philadelphia area. I actually have learned a lot about the Philadelphia suburbs today. The California AG's office has been active on hospital mergers as well. Two recent settlements actions come to mind: First, the settlement in the *People of the State of California v. Sutter Health*;[9] and second, the settlement regarding the affiliation of Huntington Memorial in Pasadena with Los Angeles-based Cedars-Sinai Health System.[10]

MR. DONAHUE: You know, we work very closely with our California colleagues, and a lot of these terms have been in other consent decrees that we have done in prior cases. We share a lot of information, in terms of theories and how to address different problems, and as I said at the beginning, you can look at these cases and say, "Okay, these hospitals shouldn't merge because it will result in an anticompetitive situation." But sometimes you have a situation where, absent the merger, one of the systems is going to fail or something like that, and a lot of people will be displaced from their jobs and that sort of thing. From the Attorney General's perspective, we often take a broader view of what is an appropriate remedy.

You'll see that a lot of these remedies here—and I'm sure Jamie will weigh in on this—the FTC wouldn't do that. They would really want a structural remedy as opposed to conduct remedies. But from our perspective—and I'm not speaking for the California Attorney General but from our perspective—sometimes you do look at other types of commitments, in terms of a remedy, to address this to deal with the overall impact of a particular transaction.

MR. SAINT-ANTOINE: I'll jump in with just a general observation. So, this is dealing with contractual provisions outside of the merger context, but nonetheless, when you're doing the analysis—and often it's the case that this is very fact-specific, market-specific analysis—you nonetheless don't want to lose sight of the same thing we've been talking about today, and that is the two-stage aspect of competition in the health care space.

So, in evaluating whether any of these provisions are procompetitive or potentially anticompetitive, you can't lose sight of who's doing the bargaining, who has the bargaining leverage, and what are the effects at either the insurance stage of competition or the patient stage. So, it is a different context but the same two-stage aspect of competition.

MS. LIU: Well, it looks like we are out of time, but thank you so much for your time and for this great discussion.

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1. Shira Liu is Counsel at Crowell & Moring LLP in Orange County. Her practice focuses on antitrust and complex commercial litigation. She earned an A.B. in Economics *magna cum laude* and an A.M. in Statistics from Harvard as well as a J.D. from Stanford Law School, where she was the Executive Editor of the Stanford Law Review and a member of the Supreme Court litigation clinic. She clerked for Judge A. Wallace Tashima of the U.S. Court of Appeals for the Ninth Circuit.

2. *See In the Matter of Thomas Jefferson University and Albert Einstein Healthcare Network*, FTC Matter/File No. 181 0128; Complaint, *In the Matter of Thomas Jefferson University and Albert Einstein Healthcare Network*, Dkt. No. 9392 (Feb. 27, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/d09392_administrative_part_iii_complaint.pdf.

3. *Fed. Trade Comm'n v. Thomas Jefferson Univ.*, 505 F. Supp. 3d 522, 528 (E.D. Pa. 2020), *appeal dismissed sub nom. Fed. Trade Comm'n v. Thomas Jefferson Univ.*, No. 20-3499, 2021 WL 2349954 (3d Cir. Mar. 4, 2021).

4. *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327 (3d Cir. 2016).

5. *See, e.g.*, *In re Bankr. Appeal of Allegheny Health, Educ. & Rsch. Found.*, 252 B.R. 309, 313 (W.D. Pa. 1999).

6. *See* Press Release, Office of Att'y Gen. Josh Shapiro, AG Shapiro, Governor Wolf Announce New 10-Year Contract Between UPMC and Highmark (June 24, 2019), https://www.attorneygeneral.gov/taking-action/ag-shapiro-governor-wolf-announce-new-10-year-contract-between-upmc-and-highmark/.

7. *See Fed. Trade Comm'n v. Hackensack Meridian Health, Inc.*, No. CV 20-18140, 2021 WL 4145062, at *1 (D.N.J. Aug. 4, 2021).

8. *See* Proposed Final Consent Judgment, *California v. Providence Group, Inc.*, No. 3:21-cv-07331 (N.D. Cal. Sept. 21, 2021).

9. Final Approval Order, *UFCW & Employers Benefit Trust v. Sutter Health*, No. CGC-14-538451 (Cal. Super. Ct. Aug. 27, 2021), *available at* https://oag.ca.gov/system/files/attachments/press-docs/Final%20Approval%20Order%20Sutter.pdf.

10. *See* Press Release, Office of Cal. Att'y Gen., Attorney General Becerra Conditionally Approves Affiliation Agreement Between Cedars-Sinai and Huntington Memorial Hospital (Dec. 10, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-conditionally-approves-affiliation-agreement-between.

VIEWS FROM THE TOP: MANAGING ANTITRUST PRACTICE IN CHANGING TIMES

Edited by Jiamie Chen[1]

PANELISTS

- Shana Scarlett, Hagens Berman Sobol Shapiro LLP
- Dena Sharp, Girard Sharp LLP
- Kalpana Srinivasan, Susman Godfrey LLP
- Susannah Torpey, Winston & Strawn LLP
- Moderator: Jiamie Chen, Parabellum Capital LLC

I. INTRODUCTION & OVERVIEW

Antitrust practice is changing like never before. Unprecedented focus on competition concerns by regulators, law makers, and the private bar, particularly in big tech and related areas, combined with emergence from pandemic-era litigation practice, continue to drive transformation. This all-women panel provides unique perspective as top antitrust practitioners who hold senior management positions. In the discussion below, they provide practice tips, predictions, and candid reflections on how the practice has changed (or not) over the past two years, and where it is headed.

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MS. CHEN: Welcome to views from the top.

To my right we have **Shana Scarlett**. She is the Managing Partner of Hagens Berman Sobol Shapiro LLP's Berkeley office and on the firm management committee. You may know her from her role in *Broiler Chickens*, *Poultry Wage Workers*, *Animation Workers*, *Lithium Ion Batteries*, *eBooks*, *Optical Disk Drives*, and *Railway No-Poach*, which are among the many, many antitrust matters that she has worked on.

To her right we have **Dena Sharp**, who is our gracious host for today. She is a named partner at Girard Sharp LLP and co-lead counsel in *Xyrem*, *Juul*, *California Gas Spot Market*, *Restasis*, and *Lidoderm*, and to top it all off, earlier this year she obtained a $15 million jury verdict in the *Pacific Fertility Center* litigation.

To my left is **Susannah Torpey**, who traveled all the way from New York to be with us here today. Susannah is a partner at Winston & Strawn LLP. She's the Co-chair of the firm's Technology and

Antitrust Group, which is a bit of a hot topic these days. Susannah represents major U.S. and international corporations in high stakes antitrust matters, including in industries such as high-tech, artificial intelligence, mobile apps, e-commerce platforms, wireless connectivity, semiconductors, as well as biotech and pharmaceuticals.

And finally, **Kalpana Srinivasan** is unfortunately unable to join us in person today, but she did share some of her thoughts with me in advance and I will be passing on her insights to you. Kalpana is the managing partner of Susman Godfrey LLP and a member of the firm's executive committee. She represents both plaintiffs and defendants in high stakes antitrust matters, including as co-lead class counsel. She also won a $706 million jury verdict in 2018 in a trade secret misappropriation and breach-of-contract matter.

As you'll notice, as we went through our panelists, I did not go through their accolades. That's because, between them, they have won every accolade you have ever heard of; Titans of the Plaintiffs Bar, Law Dragon, Top 100 Trial Lawyers in America, California Attorneys of the Year, Super Lawyers, Super Super Lawyers, and every top antitrust lawyer list that exists.

Thank you all for being here with us today. Let's jump right in.

II. STEERING ANTITRUST MDLS AND MAJOR LITIGATIONS IN THE NEW NORMAL

In the past year and change, there have been significant delays in litigations across the country, in every type of case. Antitrust cases are not known for proceeding quickly, and in the past year, that was certainly exacerbated. However, in certain cases, there were meaningful resolutions reached during that delay, which is a remarkable feat.

Turning to Shana, you have a critical role in *Broiler Chickens*,[2] one of the cases that moved along most meaningfully during the pandemic delays.

Can you discuss how you were able to accomplish that, and give us a little bit of insider perspective on what that was like?

MS. SCARLETT: Yeah, that's a really good example because I think what happened in the *Broiler Chickens* case kind of was really demonstrative of what happened across all of my cases, which was the pandemic kind of came into effect and everything ground to a halt; depositions stopped, hearings stopped, right? Everybody started staying home. No one knew how to deal with what was happening, and it was just this immediate and grinding absolute halt to everything moving forward on a litigation track.

And you can see that there was really only $5 million in settlements in that first year of the pandemic, but then at some point there was just this reality that struck the judges, that struck counsel, and we all kind of thought, "Well, we have to get our stuff together and figure out how to make this work or none of us are going to be employed a year from now."

Deposition protocols got entered that allowed us to start up on remote depositions again, and I'm a huge proponent of remote depositions. I used them well before the pandemic when I had small children, to not travel to Asia to depose witnesses and leave my kids for six months.

I was already kind of comfortable doing that, and so, when we got up and running, I think that really started the wheels moving again, and it really helped when courts learned to use Zoom and would start holding hearings again, and would start making sure cases were back on schedule.

And then it all, I would say hit full speed, and it just felt like it was a train that we could not slow down. I'd be doing depositions and arguing in the Ninth Circuit—and I was thinking of not telling this story because I feel like the video is going to go to Child Protective Services, but I'm going to tell it anyway—where I was arguing in the Ninth Circuit, and I just lined up food on the counter for my two kids and

told them not to bother me and I just had to get through my argument. At the end of it, I have these four big eyes staring at me like, did we do okay, Mom? You're great.

MS. CHEN: Did you ask how the feedback worked out for them?

MS. SCARLETT: Well, they give me a scorecard at the end. But when that happened, I think people really started leaning in; leaning into the technology, leaning into online mediations. I would say that's my one happy thing to take away from the pandemic is that JAMS and the other mediators have learned to use Zoom.

It was actually the last trip I took right before the pandemic went into effect. I was traveling to New York, we had it on calendar for a really long time, dozens of people needed to be there, it took a really long time, everyone went. It was one of those awkward days where nothing happened; it seemed like a waste of time and, during the pandemic, all of a sudden we could do it on Zoom. Mediators are able to be available a lot quicker, and I think that that helped us move through the next round of settlements.

In 2021 there was $175.5 million in settlements in my end-user case and the *Broiler Chickens* case, and that has started rolling over to the other cases that I'm litigating as well. That single thing, being able to hold mediations on Zoom, really broke through a lot—the wall of early 2020.

I'm curious to hear if that was the same experience you guys had.

MS. TORPEY: Yes. For me, I have been managing an MDL that was midway through a hundred depositions when everything shut down, and if I could give one piece of advice to any of the young lawyers watching, I think the way that we really moved the schedule forward is to get very tight, court-ordered deadlines.

So we shut down, we were about halfway through. I was probably traveling back to New York from one of my depositions when you were traveling home from New York, and we had to very quickly get a court order to say we'll have one month to try out all of the remote services, agree on a vendor, and then get right back in it.

And I think it is going to change depositions forevermore because for better or worse, it meant that I could actually do a lot more of them in the second half of the case schedule because now I could easily do two depositions a week; otherwise, they might have been across the country and somebody else would have had to do one of them. So hopefully that is going to stay.

MS. SCARLETT: I'll go one further. I'll say I know that's going to happen because I now write the protocols and put in the provisions that say this is going to happen.

MS. SHARP: Let me ask a question: Heading into what we hope is the late stage of the pandemic, are you all inclined to keep taking depositions virtually?

MS. SCARLETT: Absolutely.

MS. SHARP: Are there any that still want to take in-person depositions?

MS. SCARLETT: Perhaps. I'm not saying no.

But for the most part—and here's why: because when you have a video deposition, I feel like two things can happen. Number one, you're forcing everyone to use electronic exhibits. This was a mission I was on, again for years. I would have to lug ten boxes of documents to depositions. At the end of it everybody throws the exhibits out. I hated the waste of paper and the degraded quality of your exhibits, because the court reporter scans them, and what was a beautiful, all-color PowerPoint presentation that you would use to impeach a witness, came back as this murky black-and-white document with dots all over it, and it just didn't have the same punch.

MS. SHARP: It's inadmissible.

MS. SCARLETT: So having the Zoom platform and having the electronic exhibit exhibits is one.

And then the other one is—and this is a little more controversial—I think that the questioning attorney should be recorded. I like the Zoom platform and the ability to record not only the witness, but also, let's say that it's me as examining counsel, to have me recorded as well so that when you're getting ready and doing your depo snippets for trial—because most of these witnesses aren't coming to trial, these are trial depositions—you're going to have the ability to have, you know, Dena and her face questioning the witness. They can also see the exhibit and then you see the witness themselves.

I think that more accurately mirrors what people see on TV and it keeps them more engaged. It lets everybody see who's questioning, rather than just having this booming voice that's like reverberating out because there's always terrible quality. I think there's a lot of value to Zoom depositions.

MS. SHARP: Yeah, same. The one thing I'll add to that is get the defending attorney's face on screen too.

MS. TORPEY: Right?

MS. SHARP: I'm not kidding. Separately from the witness. Oh, no, no, we've insisted on it because—I'm currently in an MDL right now in which we were appointed in December of 2019. We had one hearing and it's all been Zoom since then. We've completed fact discovery, we've taken more than a hundred depositions. They've almost all been by Zoom. And the one thing that we've learned, and that the special master taught us, is to put the defending attorney's face on the camera too because it does change the demeanor, and I think it's really going to affect the trial cuts.

I think it's going to be fascinating to see the first generation of trials post-COVID, because I think what we're going to see is a much, much more efficient way to run trials.

MS. TORPEY: More dynamic.

MS. SHARP: That's right, juries are going to love it.

MS. TORPEY: It's like TV.

MS. SHARP: That's right. And there is even a sea change a little bit in terms of Rules 43 and 45. Some courts are kind of looking at, yeah, maybe we should allow some witnesses who are outside of the subpoena power of the court to still be called live but by video, and that way you're still within a hundred miles of your own home district but could testify live.

It's unclear to me how that one's going to come out, but for me, Zoom depositions have been sort of truly transformational and, you know, you said the one good thing to come out of COVID.

The other thing I'll say that's related to that, in my mind, is that it feels like litigation and civil litigation and the competitive and adversarial nature of it, just on its own, made it almost impossible for there to be systemic changes, in terms of how we worked; for women, for men, for parents, for nonparents—everybody.

And COVID, for all of its horribleness, I think has precipitated changes whose time had come but which nobody was really ready to take the plunge into.

So I feel like it's going to make litigation so much more efficient. I'm really curious how you all feel judges have taken it because, you know, some judges have—not in the Northern District of California—I'll say every single judge in the Northern District, as far as I know, is absolutely adept at Zoom; not only adept, but insisting on having all case management conferences (CMCs), even for those of us who live right down the street, just saying, "Look, it's more efficient, everybody is saving their clients a lot of money by doing these things by Zoom."

Monthly CMCs are so important to keep a case moving, for the reasons that you said, Susannah. But they are also really, really expensive for our clients and for the case, for the class, whoever it is. There's just no downside, in my mind, to doing a lot of these depositions, a lot of these hearings by Zoom.

One last good thing I'll say about that is that it's given a lot of younger lawyers access to those kinds of proceedings who wouldn't have had it. We've all been in the circumstance where somebody's kind of looking askance at you because you've got your entourage coming with you, and that too costs our clients and ourselves money. This, to me, has just been a huge benefit of COVID. While the management challenges are real—and I think there's a real concern about people falling through the cracks—on the other hand, if we can manage to encourage people to tune in, even if it's not billable time, that's a great mentorship opportunity.

MS. TORPEY: We actually set up a program so that our summer associates could view all of the arguments going on in different courts around the country throughout the summer, remotely, so got them a lot of experience they wouldn't have gotten otherwise.

III. ANTITRUST ENFORCEMENT FOCUS ON BIG TECH–BALANCING PRIVATE ENFORCEMENT WITH GOVERNMENT ACTIONS AND GUIDING CLIENTS IN THE CROSSHAIRS

MS. CHEN: You mentioned some cases that you have leadership positions on, and one of them that I want to get into a little bit more—we all know tech is a huge antitrust priority right now for enforcers, for private attorneys, for those in the industry. Google alone has, what, four or five different regulator lawsuits going on against it right now?

MS. SCARLETT: And counting.

MS. SHARP: And counting.

MS. CHEN: And counting. We've heard rumors.

Those cases are obviously still in the early stages. The one that's probably a little bit further along is the display ads matter, and that one started out—the class case started out in the Northern District of California, the Texas AG action started out in the Eastern District of Texas. Those were all consolidated over in the Southern District of New York recently.

Dena, can you talk a little bit about your experience with the case so far and how you think it's been going?

MS. SHARP: Sure. I'll start with your second question first. How it's been going is really slowly, and that's not a discredit to any member of the judiciary or anything like that, but when we have an antitrust case that has parallel regulatory cases or actions or impending actions that are out there, it creates a completely different dynamic, as I think we all know.

The case was subject to two different MDL motions. The first time it didn't get consolidated and the second time it did. I think there's a whole lot more to be revealed about what is going to be alleged about Google and, you know, the case—

MS. CHEN: That sounded very interesting.

MS. SHARP: I'm not saying anything I'm not supposed to. I think we all are optimists in terms of our ability to figure out where anticompetitive conduct is actually happening and frankly, it's really difficult in the tech space because it is so, so specialized—not surprisingly, in technology—but there are ways to effect anticompetitive conduct or to act anticompetitively, that are hard to see on the surface and are especially hard when it's something that's as convenient as Google or Facebook or whatever it is.

Heading down the road in that litigation, my judgment on it has been that, when we have state enforcers and when we have federal enforcers that

are working on the case, it's a benefit, because, ultimately, we're in it to just get good results for our clients and for consumers and to make sure that people aren't paying more for services than they should.

There are a lot of competing interests in the Google antitrust cases because there are a lot of different kinds of clients and classes and proposed classes and opt-outs. Some of those classes overlap, some people are part of multiple classes, and so I think our judgment has been in the first instance—and this is Judge Castel's judgment as well in the Google MDL—is to let the states go first and get that complaint somewhat settled.

The State Attorneys General—there's like 40 of them—they filed a consolidated complaint last week, and Judge Castel is going to issue an order on the motions to dismiss there.

That briefing schedule is going to play itself out pretty quickly, and I think we'll have a much better sense then of what the shape of the timetable will be. We have to make decisions sometimes in the private bar about whether we want to be aggressive about pushing ahead or not, and this one, for all the reasons that I've said and also because you kind of can't fight with an 800-pound gorilla, we think it makes a lot of sense to see how the enforcement actions go and then go from there.

MS. CHEN: Absolutely. That makes a lot of sense.

On the industry side, Susannah, you counsel a lot of these major technology companies. What has been the reaction to this type of antitrust focus that you've seen?

MS. TORPEY: Well, it's very diverse. There are a lot of different types of tech companies, obviously.

The Google case is a great example of how we're really just in the beginning stages of what I know a lot of people—and you probably feel like it's been forever and has been going on for a long time—

MS. SHARP: But it's COVID time.

MS. SCARLETT: It's all the same thing.

MS. TORPEY: Yes, yes, but now, you know, with that complaint, for example, just being unsealed, there are a lot of smaller tech companies that are just learning how they have been affected themselves.

I think we're still at the very beginning stages and we're really at what I would call the "tip of the iceberg" phase of this tech boom in litigation, because right now so much of what is going on is really beneath the surface and there's so much activity in the agencies, both at the FTC and DOJ, that people don't even know about because it's confidential. But as soon as those investigations do become public, I think there will be a new wave of private tech litigation among the actual tech companies. And you'll see that—

MS. CHEN: Are you writing that down?

MS. SHARP: Oh, yes.

MS. TORPEY: But you'll see a divergence, I think, in the way that these companies are reacting to things, right? So the Biden administration has actually been very forthcoming with information about its priorities, and you see different companies reacting in very different ways.

So even this morning we learned, for example, that Apple is now releasing self-repair services for consumers. That's no coincidence, obviously, when the Biden administration, in President Biden's executive order in July, raised that as one of their investigative priorities.[3]

So, you know, these companies are listening, they are reacting. But then I think there are other companies that are looking at how some of these investigations are going to go to the heart of their business models, and are more entrenched and unable to pivot and be nimble, and are going to wait and see if there are real guidelines that do come out from the agencies, which is not necessarily

clear. There has been a lot of disagreement, as we know, both across the agencies and within them, so we'll have to see what happens.

And then of course there's the question of what happens to the guidelines when they come out? Because there are the courts and lots of precedent on the books, and a lot of companies will not want to make moves until they are forced to.

MS. CHEN: Kalpana contributes that there is a lot of focus on data as a valuable form of IP and commodity generally, and that it is permeating many different practice areas and causing a shift in how we view many types of laws, from antitrust to breach of contract to trade secret. Thank you for that.

IV. THE DYNAMICS OF VIRTUAL HEARINGS AND CLIENT PITCHES–PROMOTING EQUITY OR NOT SO MUCH?

MS. CHEN: So shifting gears a little bit, it was mentioned earlier on that when we do these hearings through Zoom, one potential benefit is that now the entire team gets to be on-screen. It's not just one person or two people in front of the judge and the rest of the team is behind them, and nobody really can see them or maybe they're not even in the courtroom at all.

MS. SCARLETT: Just to be clear, you have the lead attorneys who are arguing on-screen and visible to the judge. There may be lots of people watching, but that's not necessarily translating to having more face time, so there is still kind of a barrier.

MS. SHARP: I will say, though, that my colleagues and associates are usually texting me when I'm screwing up the hearing.

MS. SCARLETT: That's true. You get a lot more real-time feedback.

MS. SHARP: Telling me things I should have said.

MS. TORPEY: Plenty of feedback.

MS. SHARP: It is actually awesome, though, during hearings, during depositions, to be able to have that free communication flow—all joking aside—and I do welcome it when they tell me I screwed something up because maybe I can fix it.

MS. SCARLETT: It's so obvious when someone comes up and gives you a Post-it note when you're up there speaking to the judge, obvious that you've missed a part of the record.

MS. TORPEY: And the handwriting is terrible.

MS. SCARLETT: So when you're on the Zoom screen and people can just be live messaging you and you can incorporate that into what you're saying in a more natural way, that is truly great. But I know where you're going with this and I want to jump in because I see something really terrible that's happening at Zoom hearings that I want to address. I'm also curious because, in my little isolation bubble of one, I have a lot of things that I'm not sure other people see them.

The issue is Zoom hearings and interrupting female judges, female lawyers. There is the tendency in court for men to dominate the microphone, and that has always existed and always happens, and so that certainly has translated, in terms of speaking time, to Zoom hearings.

But the difference is when I'm in court I have felt that if I stand up and approach the microphone, if I make a sign to the judge that I'd like to speak, that I have something to say, there have been times when I've physically, yet gently, pushed aside someone to make sure that I have my chance to speak. Those things, these mechanisms, existed in court to make sure that you can get up there and that you can speak in a way that does not exist on Zoom.

I have been frustrated myself but I have also seen many times that on Zoom, when someone's speaking, they'll speak over others. You have a judge that will be saying something, you have a very loud voice, usually male, who keeps speaking, and who doesn't see that the judge's box is lit up

and that the judge wants to speak. And that, to me, has been a real problem.

I love what the Supreme Court has done where, in moving to the telephone conferences, that they now have a particular order in which the Justices ask questions.

In part, I believe this was implemented because the female Justices were getting interrupted so much—at a higher frequency than the men—and I wondered, ladies, have you seen this as well? Is this something that's out there in the world? Is this something we should keep bringing to people's attention?

MS. SHARP: Do we need a negative emoji for hearings? A red "X" over somebody who interrupts, a frowny face.

MS. TORPEY: Well, I argue against a lot of women, actually, so I haven't had that much in my biggest cases, so—

MS. CHEN: Interesting.

MS. SHARP: I have to say I haven't noticed it as acutely as you have but that may be in part because overall, I kind of welcome it, in the sense. Especially if I'm appearing in front of a female judge who is having that experience, I will put myself on mute and just sit there and watch it happen.

MS. SCARLETT: That is true. I find it difficult because when you sit back and there are 20 associates who are watching this. One judge in the Northern District of California—I won't name her—really talked about how a lot of stuff that happens outside of the court's eyes is the rough and tumble of the world, and when we ask why so many women leave this profession, I think a large part of it is behavior that happens in depositions. The feeling that you get in court that your voice isn't welcome, and for me, it's just stepping back over the last 18 months and watching this come about.

I worry that the 20 associates who are watching, who are seeing women being spoken over, who are seeing more soft-voiced people being spoken over, that there's a message that they're hearing, that I don't want them to hear.

MS. SHARP: That is totally fair, yeah, and I don't mean to be glib about it. I'm just saying that I hadn't appreciated it, but you're making a really good point. And it doesn't feel like it's very different from a lot of the situations that I think we've all probably had to face in our practice, and you're right, I mean, there's a question about how to handle it in a way that models good behavior.

MS. SCARLETT: Right.

MS. SHARP: And in the Zoom setting, it's really, really difficult.

MS. SCARLETT: It's a challenge.

MS. SHARP: Yep, because you've got to do it on the fly.

MS. SCARLETT: I feel like we adjusted to it in court. I feel like I personally managed to adjust to it, right? And I'm somewhat tall so I just lurk behind Dena when she's talking too much. I don't know how to lurk on Zoom yet.

MS. CHEN: That's a little bit less than encouraging, to see that that's permeating in the Zoom practice, just like it may have happened in court.

Do you see that also happening in, for example, leadership hearings, where there might have been an issue in live court where there's certain people that might get in front of the judge more than others and then others are not as visible?

Now that we're on Zoom, assuming that the members of the team are all on Zoom and the boxes are all similar in shape and color and so forth, that the folks who might otherwise have a, shall we say, dominant presence in court physically, are now kind of on a more level playing field with others?

MS. SCARLETT: I'll jump in.

So I just think there was such a swell happening before the pandemic that the judges became so aware of it, and it's just so on the mind of so many of the judges, I don't think that's changed.

When I look at the leadership appointments, you know, Dena shockingly getting leadership appointments—

MS. SHARP: It can't be on the merits, that's for sure.

MS. SCARLETT: Time is up, right? It was time for this to start happening, and it was happening before the pandemic. I see it during the pandemic and I'm glad to have it happen. I don't see the pandemic changing that or Zoom hearings changing that one way or the other.

When I was thinking about what I have seen, it was the behaviors we had developed in court to try and overcome being spoken on top of, have now reared their ugly heads on Zoom. And I've seen that at leadership hearings, I see that in motion-to-dismiss hearings. I see it at discovery hearings over and over again, in a way that we need to find a way to address it.

MS. SHARP: Yeah, it's interesting because I was going to say I think leadership hearings are probably among the most tame and organized, in a sense, because usually the judge realizes when there are a lot of people applying, "Okay, I've got to set an agenda and do something that is actually going to help corral all these cats."

And so those Zoom hearings, in my experience over the past couple of years, have actually been quite effective. Especially when people are on a clock, it's just like, get the buzzer and get the cane, pull 'em off.

And it's great when the clerk mutes people. It's hilarious. I don't know if you guys have ever seen that happen.

MS. SCARLETT: I have not.

MS. SHARP: There are a couple of clerks who have really learned the power, I will say, and it's wonderful to watch that happen.

But I think it's what Shana's identifying, which is the more rough-and-tumble hearings, which are the discovery hearings or the dispositive motion hearings or the informal conference that the judge convenes, and suddenly you're on a Zoom with a whole bunch of people. Those are the times where I do think there's basically the same kind of stomping around that we've all experienced for our whole careers, and I hadn't really focused on it but that's probably just a discredit to my own thinking about these things.

But I think Shana's right that there's some capacity for that. And I also think a judge who can manage their courtroom well can really help alleviate a lot of those concerns.

MS. CHEN: Do you think it would be a good idea to do a little bit more pre-planning for these more rough-and-tumble hearings like they do for leadership hearings, so that it's more controlled?

MS. SHARP: In my mind, it depends so much on the issue. Generally not. I think we do best in court when we're ready for anything.

MS. SCARLETT: But that benefits your personality and my personality, where we do throw elbows and we take shots, right? And it takes a certain fearlessness that doesn't come naturally to me and I certainly have had to develop over the years. When I speak to associates that are—I'm not going to put years on myself—but many years behind me and I think, like, what do I want for them that's different than what I grew up through? I don't want them to have the same experience that I had at depositions and discovery hearings. I don't want them to kind of have to learn to suck it up and show up anyway.

And so trying to change the culture of the law just a little bit so that when they show up, they do feel

like they have the mic, it's their mic, they get to keep the mic for as long as they want the mic.

MS. TORPEY: Yeah. One thing we often do is agree with opposing counsel before these unstructured hearings as to how we expect to divide it up, and then if you have a more junior associate arguing, hopefully that time can be a little bit more carved out without somebody stepping on their toes.

MS. SHARP: That is such a good idea and it is really, really important.

The other thing that we found pretty effective on that, if you're trying to make space for that more junior person—because you're right, I mean when you've had experience in court over the years, there's a comfort that comes with it.

MS. SCARLETT: Yeah, sure.

MS. SHARP: Not that I don't have absolute butterflies every single hearing still—I mean, I do. Everything is always scary, as far as I'm concerned—in the good way, I hope, most of the time.

MS. SCARLETT: It means you care.

MS. SHARP: Definitely do care, but one thing that we've found pretty effective in terms of using Zoom is, one, getting those associates the opportunity to be on screen and being able to actually choreograph it a little bit.

So if you have a judge, especially a judge who is receptive to hearing from younger lawyers, you can say, "Yes, Your Honor, thank you very much, we're prepared to address that and actually Ms. So-and-so is going to address that now." And it would take a pretty brazen act, I think, for somebody on the other side to then step in and elbow that junior out of the way.

So that's kind of what I was saying in terms of not having experienced that as much, Shana. I think you're completely right, but I think the point for me is that there are ways to clean up that mess on Zoom in some ways when you have somebody who's overstepping.

MS. SCARLETT: Are you lecturing me now that you were already taking care of this problem, is that what's happening?

MS. SHARP: I am. Let me just explain to you how that works. Hang on, let me use a very loud voice to do it. No, but I do think that sometimes stepping back and letting bad behavior unfold is the best way to handle it.

MS. TORPEY: It's not scoring points.

MS. SHARP: That's right.

MS. CHEN: Maybe we'll call it Dena-splaining.

MS. SCARLETT: Oh, yes. That one I'm writing down.

MS. SHARP: Hope nobody from my firm is watching right now.

MS. SCARLETT: They are.

MS. CHEN: Susannah, on the counseling side, on the defense side, have you been using Zoom for pitch meetings, and how do you think that's been going?

MS. TORPEY: Yes, and it's been fantastic.

Before the pandemic I would often fly to Texas or California for an hour-long meeting or just a lunch or dinner or something like that. You know, it used to be unusual to say, "Hey, do you want to get on Zoom and have a cup of coffee or a happy hour?"—you know, something social, leading up to a real formal pitch over Zoom.

We do that a ton now, it's commonplace, it's normalized. You know, it used to be really awkward to reach out to somebody that you don't know or LinkedIn and say, "Hey, do you want to do this?" Now people are used to it and I do it all the time. It's fantastic.

MS. SHARP: Give the kids feedback.

MS. TORPEY: Exactly. Just put it on the counter, no problem. Great.

MS. CHEN: I think Kalpana agrees and she says that clients have really quickly adapted to Zoom and virtual pitches. It used to be a requirement to meet in person for pitching for the big cases and now, you know, they send PowerPoints and pitch memos in advance so that they can have a really productive Zoom pitch meeting.

MS. TORPEY: Oh, yeah, that's great.

MS. SHARP: Can I ask one question about pitches?

MS. TORPEY: Of course.

MS. SHARP: Do you find that that formal setting—I feel like judges have been really, really understanding and accommodating, for the most part, of, you know, the little kid, you know, the naked kid who comes running in, the streaker—not that that's happened to me at all.

One of the best hearings we had during the pandemic was—a very early pandemic hearing, one of the judges here in the Northern District, we were having a discovery hearing and she said, "Hang on a second. Stop talking. My son just started running the blender and I can't hear you." And that sort of felt like, okay, we can—pretty much anything can happen in these hearings now.

But I'm curious if your clients or prospective clients are similarly understanding, or is it a little more buttoned up?

MS. TORPEY: They are, no, and actually it's been fantastic because I feel like I've been able to forge more close, more personal relationships with my clients through this.

I do a ton of counseling on the defense side with lots of companies. In the beginning, we didn't have our remote virtual backgrounds that look very professional, and I live in a small apartment in Manhattan. It was just me in my bedroom and it seemed very weird to me but, you know, they'd have their kids popping in, my kids would pop in and then you get to talk about your families and things beyond just your work. I feel like it's actually forged deeper, more meaningful relationships with a lot of our clients. It's great.

MS. SHARP: Yeah, it's humanizing.

MS. TORPEY: Very humanizing.

MS. SCARLETT: It's equalizing.

MS. SHARP: Exactly.

MS. SCARLETT: Always coming back to the gender dynamics with me, but I'm going to do it anyway.

For me, being a working mom, I really noticed—like I've worked at three of the largest plaintiffs' firms in the country over my career, and the men have like the one very posed picture of their child on their desk and women have nothing, right? Like a lot of women were very afraid to identify as working moms.

MS. TORPEY: You should see mine. I've got a big bulletin board collage.

MS. SCARLETT: And I'm glad of it because I certainly try to have that in my office and try to make it more normalized that working moms are here, committed, we can be everything. And I feel like the Zoom world just equalized everybody.

MS. CHEN: Everything.

MS. SCARLETT: Because my male colleagues have streakers behind them. You've got a six-year-old coming in that wants food and the dad's like, "Pardon me, one minute," right? It has just like normalized being a working parent in a way I hope never dials back, in a way that I hope is now here to say, it's working parents, we're completely committed, we're at our law firms, and this is the way it's going to be.

MS. TORPEY: Yeah, and we've been more productive than ever in the pandemic, right?

MS. SCARLETT: Yes.

MS. TORPEY: That hour that it used to take me to get to the office and back, while we're starting to go back to the office, there are still days when you're so busy in the morning taking stuff from Asia or whatever is going on, super early in the morning and you just never get that chance to get out of your yoga pants, but then you spend—

MS. SCARLETT: We're professional from here up.

MS. TORPEY: Exactly.

MS. SCARLETT: Slippers all day.

MS. TORPEY: Then you have a very, very productive day that was never interrupted by having to change locations, you know, and I think it's going to show at the end of the year for a lot of the big firms, we've had great years.

MS. SHARP: Yeah.

V. SAVINGS AND COSTS IN PANDEMIC-ERA ANTITRUST PRACTICE

MS. SCARLETT: So feeding into Jiamie's next question—

MS. CHEN: It's almost like she knows where I'm going. It's really weird.

MS. SHARP: It's unnerving.

MS. CHEN: I mean, dollars and cents, right? I have the privilege of sitting here with four women who actually do hold the purse strings and see the firm cash flow.

In terms of dollars and cents in COVID, I think it's fair to say there are areas where there have been cost savings, there have been areas where there have been productivity gains. Would you say that COVID, overall, has been a net positive for firm cash flow?

MS. TORPEY: Yes. I'll just put it out there. I think yes. I think this has forced firms to catapult into a new stage that they wouldn't have gotten to on their own if they weren't forced into it, and they know that people can work remotely.

Now we're seeing firms, including our firm and various places, starting to try things out like hoteling, or getting rid of some extra office space that you didn't necessarily need, and the savings can be huge from those types of opportunities.

And I think there was just a report about the big firms having bigger revenues this year than ever. I don't want to make any promises to our folks, but I think we might have a record year this year, and I think a lot of other firms are reaping the benefits of these more inventive structures and opportunities that really I don't think many firms would have been bold enough to just jump into without being pushed by the pandemic.

MS. SHARP: I keep thinking that the cat's kind of out of the bag.

MS. TORPEY: Yeah.

MS. SHARP: People don't need to be in the office and face time isn't really a thing and, you know, people work really well in different scenarios.

I don't know how to answer your question, Jiamie, whether COVID's been net positive in terms of the balance sheet, because I'm trying think about the costs that don't end up on the balance sheet. Productivity is great. I mean, no doubt about it, I think everybody's found that we can all be really, really productive and what was initially a really scary dip in, you know, the stock market and everything else—everybody starts moving to cash in March of 2020 and then we bounce back and it's like, "Hey, everything's okay because we have Zoom, right, and we can keep going about our lives." I don't mean to dodge the question because

you're asking about money, but there's a pretty big cost, I think. I think a lot of us have yielded the huge benefits of more time with our families.

MS. SCARLETT: That's true.

MS. SHARP: It's what you were saying, Susannah, it's that hour or two hours a day where you're sitting—you know, you get to spend that time with your family.

MS. TORPEY: Yeah.

MS. SHARP: On the flip side, that commute time was probably good for some of us, as parents, just to be totally honest, right? My kids probably know a little more about my work and the language I use at work than I would always want them to, and I'm someone who was a big proponent of working from home before the pandemic, especially for folks who need it for whatever reasons—health reasons, family reasons—whatever it is.

But I think there have been really significant costs and I think it's too soon for us to really know long-term, from my perspective, whether this is a game changer or whether this is a time when it's a boom for litigation.

I mean, the truth when we look at it year-over-year, both for plaintiffs' firms and for defense firms, I think I kind of feel like every year I read these headlines that are like "Best Year Ever," "Record Results," you know, for all kinds of firms and our firm is included.

We've had a really great year, we've had a series of really great years, and we have high hopes for the future. But in terms of the actual financial implications of the pandemic, if any, if there's any real concrete ones—I think we've talked about the cost savings—big picture, I'd like to wait a couple years and see how things pan out a little bit.

MS. SCARLETT: And picking up on that, here's the warning sign to me, is that lateral recruiting is impossible.

MS. SHARP: Exactly.

MS. SCARLETT: So to me it feels like there is a missing segment of the working market right now and I suspect it's working moms. I suspect that what we see more nationally at companies has happened in the law and we just haven't been able to sort that out and tease out the effects yet.

MS. TORPEY: That's fair. A lot of women left the workforce, for sure.

MS. SCARLETT: Right. And I feel like there are still those that are working now that are at a breaking point, that still haven't had the cavalry come in and help them, that still have kids that are getting sent home for two weeks for quarantine, they're still trying to juggle all these things and they don't have the kind of help that we had before the pandemic, where other people could help pick up the slack for working parents.

So that part of it, I don't think we see the end of yet. I think we're still going to be seeing a lot of people leaving, dialing back their hours, moving to part-time, and people that just come to the point, I think if this goes on for another six months, saying, "I can't do it anymore, I just can't."

MS. SHARP: That's right, and that was an issue before the pandemic.

MS. SCARLETT: Yeah.

MS. SHARP: There are all these women lawyers who came before us, upon whose shoulders I feel like I stand at least, who have pointed out year after year, what you said before, Shana, that women tend to leave the practice more than men and, you know, the characteristic that they say tends to define who stays versus who goes is grit, right? We've all heard this.

MS. SCARLETT: Sure. I have it but I don't know what it is.

MS. SHARP: I know what it is when it's in my teeth.

MS. CHEN: You might know it when you see it.

MS. SHARP: I might know it when you see it.

I have some concerns about that idea in the setting of a pandemic, because it's just not like, "Man up, be tough"—whatever the terminology is.

MS. TORPEY: It's impossible.

MS. SHARP: That's right, exactly, and I think that dynamic, that child care dynamic or whatever it is, has been exacerbated for a lot of people.

MS. TORPEY: Yeah. I know for me it was, sure.

MS. SHARP: That's right. And I think we're going to see it all the way down the chain because it's not just that lateral talent. I mean, we're all seeing the absolute flight of talent in the young lawyers too, and I just think it's going to be really fascinating to see what the trajectory is because I think—for some people I think the cat's also out of the bag that, hey, being a lawyer is really hard, difficult sometimes.

MS. TORPEY: Although I do think there is a silver lining, in that it has forced this conversation and really shone a light on the struggles of working parents, more generally, in the practice.

For us, we now are starting all of these new initiatives that we didn't have when I was coming up through the ranks, which is just fantastic; these work-life integration resources for parents, we're starting an affinity group for parents—which I kind of can't believe we never had before—but it has really spotlighted the challenges that people face, in a way that I feel like a different generation did not fully appreciate until the pandemic.

MS. SCARLETT: But I think that's a weight that we all carry because—

MS. TORPEY: Yes.

MS. SCARLETT: This program is called "A View From The Top"—Dena and I joke that we don't know what we're at the top of, so we're not sure it's aptly named, but I think there's no abdicating the responsibility that we all have at this point to be the ones that implement solutions to the problems that we're seeing.

MS. TORPEY: Yes.

MS. SCARLETT: And the problems that we're all personally struggling with, and so for me there's certainly like this layer of responsibility on top of everything else; on top of being a working parent, I do have a heavy litigation load.

Like there's a lot of things going on in my life, and yet on top of that I feel this responsibility to implement systemic changes that are going to address some of the problems the working parents have.

MS. SHARP: Absolutely. And I feel the guilt for not doing that sooner, for not seeing the writing on the wall.

MS. TORPEY: That's right.

MS. SHARP: Yeah. Which is crazy, but true.

MS. CHEN: So what are some of the solutions, do you think?

MS. SCARLETT: Well, for me personally, it has to be a more accepted work-from-home policy, where you have very clear boundaries that people are allowed to work from home, and then the boundaries around working from home. That doesn't mean on-call 24/7. You have to have hours in place.

I think it means law firms investing more in hardware, to have people working from home—not look like a hostage video with the whitewall behind them, to have more professional—

MS. SHARP: Cord violations.

MS. SCARLETT: Cord violations. No cord violations.

To also make sure that they have—we're joking because there's this Room Rater Twitter account that Dena and I love, but I do it to my colleagues, right? I don't want to see them with some kind of camera that's all blurred out and I can't quite bring them into focus.

I think law firms need to be really proactive, reaching out to make sure that the at-home office is a tolerable place for their attorneys to get stuff in a very productive way, and accept that that's a new normal.

MS. SHARP: Agreed. And provide office space that is tailored to the needs of the firm.

I mean, you know, during the pandemic periodically we sent out surveys to our attorneys and just said, hey, when—if this thing is ever over—because I think we've all now kind of accepted this is the new normal.

MS. SCARLETT: Right.

MS. SHARP: But if and when we have the option to go back to the office, what do you want? Like if you could just snap your fingers and the partner said, don't tell us, tell, you know—tell our office manager and she won't tell. It's okay if you say, "I never want to see any of you people in person again." It might affect our views of your lawyering but, you know, I mean in all seriousness, though, I think that we're very actively evolving in terms of how we see the office space and what it needs to be, and I think it can be a very different thing for each lawyer. We can't completely tailor it but we can try.

MS. TORPEY: I think we really need to have the balance, though, because while I agree work from home and flexibility are so important, more important now than ever, what has really been eye-opening to me is how the junior lawyers need more in-person time, though, right? So I think we need to make sure we have the balance of providing the resources for the junior associates to have access to partners and mentoring.

We've started partner office hours and now, thank God, with vaccinations we can have more cocktail parties and bring people in and make them want to come, as opposed to just forcing them in.

MS. CHEN: That's right.

MS. SHARP: One way we're dealing with that is we're having team days here at the office.

MS. TORPEY: We're doing that too.

MS. SHARP: So for any given case, Tuesday is the *Xyrem* day, right? And anybody who's on the team, you don't have to come in but if you want to participate in the meetings in person or if you want to know that the partners who you're working with are going to be there, so you can do the old—the one thing that we haven't been able to do during the pandemic is pop the head in and say, do you have a minute for me? And that is, I think—especially with new relationships—with established relationships, we can just send a text and say, "When you have a minute, call me." But with those people you don't know, that is so hard, especially when it's your boss.

MS. TORPEY: Yeah, because you can't sort of walk past, you know, when you're virtual.

MS. SHARP: Do the head check.

MS. TORPEY: See if somebody is—

MS. SHARP: In a bad mood. Shana?

MS. CHEN: Bad mood, occupied.

MS. SCARLETT: But in the office you can do that.

MS. SHARP: Just resting face, sorry. Anyway. That's why there's windows into offices. You can see if somebody's yelling into the phone.

VI. ANTITRUST LIGHTNING ROUND

MS. CHEN: Okay, so actual lightning round, two quick questions. One, during the remaining years

of the current administration with Jonathan Kanter just now having been confirmed to lead the Antitrust Division, which of the following do you think is most likely to occur—and this is not the bar exam—"none of these" is not an answer, so pick one, all right?

A breakup of a leading tech company, a second criminal no-poach prosecution—

MS. SCARLETT: Yes.

MS. CHEN: Antitrust division withdraws from another existing settlement, or an antitrust MDL related to testing, prevention, or treatment of COVID.

MS. SCARLETT: I'm staying with my answer.

MS. TORPEY: Yeah, I think no-poach is likely.

MS. SCARLETT: It's so hot right now, yeah.

MS. SHARP: I have to pick something different now. A, I think there will be some tech breakup, and it's going to be highly controversial.

MS. TORPEY: Breakup or spin-off.

MS. CHEN: So lightning round question number two, again during the remaining years of the current administration, will U.S. enforcement agencies, state and federal together, impose more or less in antitrust fines on big tech companies than the European Commission?

MS. SCARLETT: Less.

MS. TORPEY: Less.

MS. SHARP: Less.

MS. SCARLETT: That's a unanimous vote by the panel.

MS. SHARP: I tried to beat you guys so I'd have some original thought.

MS. TORPEY: If it's cumulative.

MS. SHARP: Yeah, there's no way they're catching up.

MS. TORPEY: Yeah, the Euros are ahead by a lot.

MS. CHEN: Maybe during the remaining part of the administration if it's not cumulative, it's just the next three years forward looking, what do we think? It seems like the answer is going to be the same.

MS. TORPEY: But I do think there will be structural relief.

MS. SHARP: And you would think the U.S., just with how competitive Americans are, at some point would realize that they're falling behind.

We'll fight all day about French fries.

MS. SCARLETT: And COVID numbers. We definitely have to be best in the world.

MS. SHARP: Right. Talk about views from the top, yeah.

MS. CHEN: Not the kind of top you want to be.

MS. SHARP: No, exactly.

VII. CLOSING THOUGHTS

MS. CHEN: We've got five minutes left. I will open it up for closing thoughts. You may provide any closing thoughts you would like; suggestions might include, What do you expect your firm or practice group to look like in three years versus today? What are the biggest changes you think will be? What main changes, if any, do you expect to see in antitrust practice generally in the next two to three years? Or, looking backwards, if you could have done one thing differently in the past 18 months, what would it be?

MS. TORPEY: I'll start with the last because I was really surprised with the pandemic. Being a parent

of three children, I knew what other parents were going through and I knew how hard it was for them. But if I could change anything, I think it would be greater sensitivity to how hard the pandemic was for the single, more junior associates who were just isolated. We were overwhelmed with all of our competing responsibilities, but I think the isolation of being separated from everyone was way harder on junior associates than I recognized or realized at first, and I wish I had greater sensitivity to that in the beginning.

MS. SCARLETT: Mine's similar to that. I feel like I didn't listen to the very wise people that are above me at my firm who knew this was going to be an 18-month thing, who told me this was going to be 12 months, 18 months, 24 months, and I—as sometimes I do, wrongly—Steve Berman, if you're watching, I'm very sorry—I ignored that kind of longevity of view and I wish I had listened, and I wish I had implemented policies for my office and the people that are in my group that were more long-term, that looked more at like people who are alone and isolated. I'm sure we could have done a better job having some in-person stuff during the pandemic, and I think I'm taking that to where we are right now, which is: I don't think this is over. I don't think this is ending in two months. I think that what policies we have in place now need to be something that are sustainable over the next 12 months.

And so, trying hard to put policies in place that don't change every two months, that don't change every three months, instead having very much what Steve encouraged me to have, which is the longevity.

And so, putting those policies in place, and I think that's what I did wrong as a manager during the pandemic, that I didn't see coming, that I'd never lived through before, that I hope I don't have to again but that's what I'd change.

MS. CHEN: If you saw this coming, I think you know something that many of us did not.

MS. SCARLETT: But I mean people senior to me have never lived through a pandemic and yet I felt like they brought this, you know, this like calmness and sereneness and longevity, in terms of their conversations with me and trying to get us all through it, that I look back on now and it's kind of amazing, right?

It's amazing that they'd never lived through a pandemic and yet they could see what was coming, and I guess that just tells me I still have more gray hair to get, more to learn. I'm not at the top yet.

MS. SHARP: I agree with all that but since this is an antitrust conference and we're all nerds, I'll talk about what I see happening in antitrust law. I think we're going to see a renaissance of Section 2 claims.

I feel like—

MS. TORPEY: Especially in New York.

MS. SHARP: That's right. That's right.

MS. SCARLETT: It's already happening. It's well underway.

MS. SHARP: That's right, yeah, I think it is well underway, I'm just saying I think it's going to pick up steam and I suspect that we'll see some adjustments in terms of the prevailing legal principles because I think that courts are going to start seeing that Section 2 is probably being construed a little more tightly than it should be, to actually work to deal with—yeah, yeah, I think I'll say that. I'll stop there. I think that the standards will become more flexible and will become better suited to address the very nuanced, cutting-edge issues that we're seeing.

It's kind of like the difference between legislative change and the change in case law, where Section 2 is actually quite brilliantly drafted, it's just the way it's been construed that I think has narrowed the path for successful claims—at least for plaintiffs—and I think that those Section 2 claims are so well-

suited to some of these tech issues. I do think it's going to have kind of a new day in the U.S.

MS. TORPEY: Yeah, we're seeing a lot of tension right now in our cases between district court cases that have been very specific, carved-out new rules, versus actually the Supreme Court precedent like in *Aspen Skiing*,[4] exclusionary conduct. It's a very broad standard and I do expect courts to start looking to that broader standard more specifically, going forward, like you're suggesting.

MS. SHARP: And this goes back to the European point, I think, because the Euros have for so long been focused on abuse of a dominant position in the market and have applied it so flexibly, I think that's why they're ahead of us.

MS. TORPEY: Yeah. And now we're seeing in New York—if they actually pass the new law that has already passed one chamber in New York[5]—it's going to be much closer to an abuse of dominance-type of standard, and there will be a lot more antitrust litigation in New York.

MS. SHARP: Yeah.

MS. TORPEY: Not just MDL.

MS. CHEN: Well, you've heard it here first, everyone. Section 2 cases in New York are going to be the next hot thing.

Thank you so much, panelists. Thank you for tuning in.

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1. Jiamie Chen is the Director of Investment Initiatives at Parabellum Capital LLC, a litigation finance firm. Jiamie has practiced antitrust class action litigation, antitrust defense, as well as merger counseling. She also served as an Assistant United States Attorney in the Criminal Division for the District of Nevada. Jiamie serves on the Executive Committee and as Chair of the Education Committee for the Antitrust & UCL Section of the California Lawyers Association.

2. *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637 (N.D. Ill. Sept. 2, 2016).

3. Exec. Order No. 14,036, Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 14, 2021).

4. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

5. Twenty-First Century Anti-Trust Act, N.Y. Senate Bill S933A (2021).

A CONVERSATION WITH CALIFORNIA SUPREME COURT JUSTICE MARTIN J. JENKINS

Edited by Paul Moore[1]

INTERVIEWERS:

- Elizabeth Pritzker, Pritzker Levine LLP
- LeeAnna Bowman-Carpio, J.D. Candidate, May 2022, U.C. Hastings College of the Law
- Paul Moore, California Department of Justice, Office of the Attorney General

I. INTRODUCTION & OVERVIEW

In November 2020, Justice Jenkins was confirmed as the newest Associate Justice of the Supreme Court of California.

Born and raised in the Ingleside neighborhood in San Francisco, Justice Jenkins grew up in a family that prioritized hard work and community. His family moved to San Francisco to escape the Jim Crow South. Comfortable here, his parents dedicated their lives to their family and city. His mother was a nurse and his father was a custodian at Coit Tower. His father's dedication to his job and the people he supported instilled in Justice Jenkins the desire to dedicate his life to public service.

Justice Jenkins came of age in San Francisco during the '60s and '70s, where he had a "bird's eye view" of the change and upheaval occurring around the Bay Area. From protests against the Vietnam War, to the Free Love movement, to the strikes that rocked San Francisco State University, the young Jenkins witnessed institutions being toppled as a younger generation started to find its voice—much of it in his hometown. He absorbed everything occurring around him and felt that supporting his community would be how he could most effectively serve and give back.

Justice Jenkins earned an Associate of Arts degree from the City College of San Francisco and then enrolled at Santa Clara University, where he majored in history. While at Santa Clara, he excelled academically and athletically, serving as a team captain of the university's football team. He originally planned to be a professional football player for a few years, and then teach high school history or coach football. After a debilitating injury in a preseason game during his first year as a free agent, he left the NFL and enrolled at the University of San Francisco School of Law, determined to use law as a vehicle for a life in public service. He

studied law and learned how it could be a tool to accomplish change and make an impact in the lives of others. He worked hard and received the Judge Harold J. Haley Award for his "exceptional distinction in scholarship, character, and activities."

Through the entirety of his substantial career, Justice Jenkins has maintained a deeply rooted community spirit and dedication to justice. As a mentor and a role model, he has touched innumerable lives. From helping to coach his high school's football team while he was in law school to creating "fireside" chats with Judge Sandra Armstrong for USF law students from underserved communities, Justice Jenkins has prioritized giving back to the communities that played foundational roles in his life. In recognition of these admirable attributes, the USF Board of Trustees conferred upon Justice Jenkins an honorary degree: The Degree of Doctor of Humane Letters Honoris Causa. He received the annual St. Thomas More Award from the St. Thomas More Society of San Francisco for his "distinguished record of service and dedication to his family, his church and his community." And for his constant advocacy for youths, he received the Children's Advocacy Award, presented by Legal Services for Children, San Francisco.

We are deeply fortunate for Justice Jenkins' decision to dedicate his life to public service and, as you will see, to apply his considerable intellectual talents to making California a more just and inclusive place to live.

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MS. PRITZKER: I am the past Chair of the Antitrust and UCL Section of the California Lawyers Association. It is our great honor to have with us today California Supreme Court Justice Martin J. Jenkins.

In November 2020, Justice Jenkins was confirmed as the newest Associate Justice of the State's highest court. Behind his formidable legal career is a lifetime of community service and a passion for helping others flourish. A true champion of justice and integrity, he has never lost sight of the importance of living a life of authenticity.

Justice Jenkins was born in San Francisco and raised in the Ingleside district. He grew up in a family that prioritized hard work and community. After moving to San Francisco from the Jim Crow South, his parents dedicated themselves to their family and the city that became their home. Justice Jenkins' father was a custodian at the San Francisco landmark Coit Tower for over 40 years. His mother worked as a trained nurse.

Justice Jenkins attended Santa Clara University, where he majored in history. While at Santa Clara, he excelled academically and athletically, serving as a team captain of the university's football team. After college, Justice Jenkins briefly played professional football for the Seattle Seahawks. The rivalry was between the Raiders and Seahawks in those days—both were AFC teams.

While playing professional football obviously had its merits, Justice Jenkins wanted to continue his education and find a career that would allow him to give back to his community. He left the NFL and enrolled at USF law school, determined to use law as a vehicle for a life in public service.

Justice Jenkins began his legal career as prosecutor in the Alameda County DA's office and subsequently as a trial attorney with the U.S. Department of Justice's Civil Rights Division, Criminal Section, in Washington, D.C. While at DOJ he traveled the country, handling police misconduct and racial violence cases.

In 1986 Justice Jenkins returned to the Bay Area to support his ill mother and worked as an in-house attorney at Pacific Bell.

From there he took his first step down the long path of his judicial career, taking up residence as a young judge in the rough and tumble of Oakland's municipal court. He was then appointed by Governor Pete Wilson to the Alameda County

Superior Court where he served as presiding judge of the juvenile division.

In 1997 he was nominated by President Clinton to the U.S. District Court for the Northern District of California, where, among other notable assignments, he presided over the *Dukes v. Walmart*[2] class action, which many in our audience are of course familiar with. At the time of certification, *Dukes* was the largest sex-based discrimination class action in the country.

Justice Jenkins also coauthored the Jenkins-Laporte Doctrine. This oft-cited doctrine provides an innovative three-part analysis that clarifies the parties' respective burdens in copyright cases involving contractual licensing of digital works. It continues as a mainstay of federal jurisprudence.

After a decade on the federal bench, in 2008 Justice Jenkins was nominated and confirmed as an Associate Justice of the California Court of Appeal for the First District in San Francisco.

In 2019 he was tapped to serve as Governor Newsom's Judicial Appointment Secretary, advising the Governor on all state court judicial appointments. During his tenure, Justice Jenkins worked closely with the Governor, appointing 45 jurists from a diverse array of backgrounds.

In 2020, Governor Newsom nominated Justice Jenkins to the California Supreme Court to fill a position vacated upon Justice Ming William Chin's retirement. At the time of his confirmation, Justice Jenkins was the first African-American man to serve on the California Supreme Court in 30 years, one of the only three to have ever served, and the first openly gay justice to serve on California's highest court. In their nomination report, the members of the JNE Commission praised Justice Jenkins, emphasizing that his humility, lifelong commitment to public service, and passion for justice make him a most deserving and worthy addition to the State's highest court. You will witness some of that passion here today. He's shared it—a lot of it—in our preparation for this session.

We are thrilled beyond measure to have Justice Jenkins here in conversation with us this morning.

Today's presentation will be an informal conversational format. Sharing the interviewer role with me today are Paul Moore and LeeAnna Bowman-Carpio.

Paul Moore is a Deputy Attorney General for the Antitrust Law Section of the Office of the California Attorney General, where he participates in a variety of merger and conduct investigations, as well as enforcement actions.

LeeAnna Bowman-Carpio is a third-year student at Hastings College of the Law, and now serves as Editor-in-Chief of the *Hastings Law Journal*. LeeAnna is the Antitrust and Unfair Competition Law Section's inaugural Inclusion and Diversity Fellow. As part of that fellowship, she spent her 2L summer at the California DOJ with the Competition Unit of the Healthcare Rights & Access Section.

Our first question to the Justice comes from LeeAnna.

MS. BOWMAN-CARPIO: Thank you again, Justice Jenkins, for being here.

JUSTICE JENKINS: Pleasure.

MS. BOWMAN-CARPIO: And for giving this opportunity to us.

So we have a number of judges and antitrust attorneys who were born and raised in San Francisco. Would you like to describe for the audience what the experience of growing up in San Francisco was like for you?

JUSTICE JENKINS: Sure, I'd be happy to do so, and let me start by thanking all of you for the opportunity to be in conversation with you here today.

If the prep session that we had is any indication, it's going to be a marvelous conversation and there will be contributions made by everybody here in the room, and I hope some of you in the audience as well.

San Francisco was a magical place. That's the best term I could use to describe it, to grow up here. I came of age, graduated from high school in the early '70s here, and it was a time of quite a bit of tumult in our society. There was the Vietnam War and the protests against that. There was sort of an unrest in society about institutions; banking institutions, the establishment, *per se*; and there was a growing movement, the Free Love movement, that was spawned by music and protests happening in the Haight-Ashbury, and I got to have a bird's eye view of that. I grew up in the outer southern boundary of San Francisco near San Francisco State College, so every day I got to watch the First Amendment in operation.

The president of San Francisco State was a man named S.I. Hayakawa—you're probably too young to remember him—but he would be out there with a bullhorn and there was tear gas.

And so even before I knew about law, I was experiencing the First Amendment in all of its grandeur, in the way that those protests were handled.

My father was a custodian at Coit Tower and so summers were spent in North Beach, where there were a number of Italian businesses and prosciutto hung in many of the windows of the delicatessens. The language of choice in North Beach was Italian. And my brother and I would come to work with my father there every summer and we had the run of the place then. You could get anywhere in San Francisco on a bicycle, pretty much within an hour to an hour-and-a-half. I was exposed to so many different cultures because San Francisco was a cultural melting pot then. There was a much larger middle class, lower middle class, blue collar workers, of which my father was one.

So it was a wonderful, wonderful place to be exposed both culturally and in terms of race. Great schools. And so academically my parents, from the South, focused on that. That was the way to fulfil integration. It was a way to have a life of the mind and perhaps to be able to be a little bit more in control—perhaps a lot more—of your future. San Francisco was a wonderful place to grow up because I was exposed to people of different races and cultures.

MR. MOORE: Thank you. And welcome, and it's a pleasure to meet you in person as well.

So you plainly had many options for a career path, including one in professional sports. What influences informed your decision to pursue law?

JUSTICE JENKINS: There was one. I never thought about law school. When I went to college at Santa Clara, my goal was to become a high school teacher and perhaps do a little coaching. I played tennis—which was rare then for an African American—and got to be decent and so I thought, I could teach history. My major was history and I had a minor in economics. I thought perhaps they needed someone to fill in for one of the teachers. We had some burgeoning economics classes, I could do that, and that would put me in touch with young adults, which has always been a desire of mine, a passion of mine.

And so I went there and one day the football coach came up to me and he said, "What are you going to do when you leave here?" I was a junior then and I said, "I'm going to play professional football, then I'm going to teach and coach." He shot back very quickly, "Well, the initials of this school are USC, University of Santa Clara, but you're at the wrong one. If you want to play professional football, you should be at the USC that's about 400 miles to the South. They have a lot of young men who have gone to the NFL."

He said, "I think you should become a lawyer." I looked at him very strangely and asked why. He said, "Because you have good grades, you're smart, you're a team captain, you're a leader, and I think

you could do more for your community—not that teaching isn't a noble profession—but you could do more for your community as a lawyer."

And then he doubled down on that. He set up a meeting in his office with three African-American law students at Santa Clara University and they talked to me about why they chose law. One became President Clinton's Secretary for the Department of Agriculture, Mike Espy.

And so I've always had those kinds of fork-in-the-road moments. You go left or you go right, and someone has always been there to say, "Trust me, go right on this occasion," and I've had the good judgment to follow those suggestions.

MS. PRITZKER: Yet you tried sports first.

JUSTICE JENKINS: I did. I did. I had to get that out of my system and got to play in a couple of preseason games, the last of which was here against the 49ers. It was a wonderful homecoming and I remember people in Candlestick Park, which is where we played, calling my name. And of course I was a free agent, so I wasn't going to see the light of day, but I got to play a little bit and the last thing I remember was running down the field on a kickoff. As rookies, you have to make it on the special teams. And I remember running down the field and then I woke up and I was at St. Mary's Hospital, and St. Mary's Hospital happened to be right across the street from USF School of Law and—

MS. PRITZKER: Yet another sign.

JUSTICE JENKINS: Absolutely. And USF had been one of the schools that admitted me and they said I could come late—because school had already started. I thought about how the book doesn't move and I could take as much time with the concepts as I needed to learn them. . . . Those guys were really big and fast and strong and they had been lifting weights, obviously, when I had been studying, so I made the best decision for me.

MS. PRITZKER: Well, let's get back to law for a moment.

JUSTICE JENKINS: Okay.

MS. PRITZKER: Throughout your career you've served the public. Even when you worked at Pacific Bell as an in-house attorney, it was for a public utility.

JUSTICE JENKINS: Right.

MS. PRITZKER: Why did you choose public-interest law?

JUSTICE JENKINS: Well, I think through osmosis.

I came to appreciate the value of service. So you mentioned my father in the introduction. My father was a custodian at Coit Tower and in the summers, as I said, we'd go to work with him. And I watched him. He'd wash windows and clean toilets in the morning, he'd don a suit by afternoon and take the numbers of tourists who came from all around the world up to the observation decks, give them sort of a description of the panoramic view they were observing from the top deck. He'd come down and talk to them about the big murals that still adorn those walls there, and he loved it. He was just passionate about it.

And I saw that there was value. How those people lit up because someone took time, was concerned about them, would give them suggestions about places to eat and things that they should see and it just made sense, it clicked.

And so modeling after him, I decided—not any particular area of law so much then, but that I wanted to give back, that I wanted to add value to people's lives in any way that I could, and law became a tool to do that.

MS. BOWMAN-CARPIO: So we now have kind of a sense of what pulled you into the legal field and to public service. What drew you to a career in the judiciary? And this is a little bit of a two-part question. What drew you to the career in the

judiciary, and what influenced your decision to continue as a judge?

JUSTICE JENKINS: What drew me to the judiciary is, this is not an uncommon story, many people who don the black robe have first thought about doing so at the behest of someone else.

And so I started in the DA's office, as you mentioned, then went to the Department of Justice and had a real-time experience with racial violence cases in the Deep South and even in the Midwest. When I came back [to Pacific Bell] it was just post-divestiture. This was after the antitrust lawsuit that split up AT&T and created the Bell Operating Companies, and now it's all back together again. And so they were employing a lot of lawyers, some who had trial experience, to handle the myriad cases that the company found itself on the other end of.

And so for me, I was called one day by a good friend, Justice Carol Corrigan, who had been in the DA's office and she said, "You know, we were at lunch today talking about who would make a good judge and your name kept coming up." I said, "You need to tell me in what context it came up. I don't particularly like judges. I've never thought about being a judge. They make my life difficult."

But we talked it through and one of the things that became very clear is that I didn't have substantial experience, but I had broad experience, and I think the breadth of experience is one of the things that is good for a judge. Judges are generalists. No one comes to the bench with subject-matter experience in every area that you're going to see.

And so the notion of becoming a judge and convincing myself, after several interviews with people. I shouldn't say interviews, but I talked to folks who were judges and I wanted to know, what's the upside? What's the downside? And coming to the notion that perhaps I did have what it took. It was the Muni Court, so I couldn't hurt anyone too terribly if I made a mistake.

And if I liked it and I got in early, perhaps then I could create a career for myself as a judge, and that's exactly what has transpired.

MS. BOWMAN-CARPIO: And you enjoyed it enough that you've stuck around.

JUSTICE JENKINS: I did. Judge Patel always used to tell me that the best training she ever had to become a federal judge was being a municipal court judge. She learned how to call a calendar, to run a courtroom, those kinds of things. She learned about things that happen in those courts that are so completely unpredictable, and yet to remain poised in that regard.

And I found her experience to be spot on, in terms of mine. I learned quite a bit about judging—and even more about me. I'll talk in a little bit about how important I think it is for people who wear black robes.

MS. PRITZKER: Do you want to talk about that now?

JUSTICE JENKINS: I can. I'll give an example. The first murder case that I heard was a very tragic case that involved an African-American woman in East Oakland who had been killed in a robbery attempt. I was on the Alameda County Superior Court by then. She had employed a number of African Americans in East Oakland, giving them jobs in the check-cashing business when they couldn't find jobs. And someone found out about when she made her drops through another employee there and tried to rob her, and killed her.

So this person was convicted of first-degree murder. You don't have any discretion. It's a 25-to-life top sentencing hearing, with a felony murder theory. But no one told me that I would have real feelings about the legal issues that I was involved in.

So at the sentencing a hoard of people got up from the community and talked about how great this woman was and how she improved the quality of life for so many people. Tragic. The defendant

had never been in trouble before and he was a drug addict, and this was a felony murder—but in a sense premeditated, but not so much. It was circumstances that drove this.

And so on either side of this it was just a tragedy all the way around, and as I listened, I became emotional. A tear dropped down and I saw it on the pad and I thought, I better call time-out.

So one of the things that I learned early on is that you don't come to these jobs with a blueprint for how to respond to things. Like everything else in life, you learn through the experience and I think early in my judicial career I had enough exposure to enough different matters that I was able to sort of hold a mirror up to myself and try to see through that experience and through counsel with other people who had appeared in front of me and get a picture of myself. I think it is important for someone that wears a black robe, to know where your biases are, know what your strengths and weaknesses are, because if you don't, it will inevitably at times affect the way in which you rule and how you treat people.

MR. MOORE: Also, I think it brings humanity and compassion to the role.

JUSTICE JENKINS: Absolutely.

MR. MOORE: So focusing a little bit more on why we're here today, without speaking to any case, are there any specific antitrust or unfair competition law case precedents that stand out to you as particularly noteworthy?

JUSTICE JENKINS: Well, I think there are the old sawhorses, you know, *Copperweld*[3] and some of those cases. I don't know about precedents, *per se*. I came to the District Court without any background in antitrust law, although we had UCL cases on the Superior Court. I keep a list of the cases I handled in the ten-and-a-half years I was there, and I had three antitrust cases the entire time.

What was really a case or types of cases that were pretty regular in a district court then were securities fraud and patent and trademark litigation.

So I didn't have much exposure coming in and I didn't see a lot of those cases while I was on the court.

I've always, though, viewed antitrust and the way in which that law seeks to, in a neutral way, ensure competition as valuable; as valuable to not only consumers, but particular kinds of consumers; minorities, vulnerable groups. I think antitrust litigation can—the rippling effect of those cases can—create a more level playing field, in terms of one's purchase power or lack thereof. So not particular sort of jurisprudentially specific cases, but I see it as a valuable tool.

The telephone industry is one example. I think the things that transpired in the antitrust settlement and the decree that ensued in Washington, D.C. Judge Green presided over that case. I had the pleasure of appearing before him. He ran the communications industry in this country. Think about that. I mean, there's no place in the world—there's no other country whose laws ensure that competition is impacted in a way that allows for robust competition, but also I think in that case the competition did inure to the benefit of consumers along the continuum.

Now as I said, we're back there again. So it's hard to know but of course we have a lot of new technologies too. For example, the case that Judge Yvonne Gonzalez Rogers just heard comes to mind in terms of that platform and Apple's platform of in-app restrictions with respect to the provision of other types of games in that litigation.[4] I don't know if you've had a chance to look at her opinion. It's a very interesting opinion. It's thorough, to be sure. And we'll see how it's treated by the Ninth Circuit because there certainly will be appeals there.

But all kinds of young folks play games, from all sectors of the spectrum; race, ethnicity, and it matters to them—they may not realize it—but it

matters to them what happens in this litigation. It affects them, I should say.

MS. PRITZKER: And that case has gotten a lot of attention from the public.

JUSTICE JENKINS: Right.

MS. PRITZKER: And including from a lot of gamers and young people, generally speaking.

JUSTICE JENKINS: Right, right, right.

II. JUDICIAL APPOINTMENTS

MS. PRITZKER: So I want to switch subjects for a moment. You spent a year as Governor Newsom's Judicial Appointment Secretary, and I know you've spoken a lot about your approach to judicial appointments and how you worked to make that process transparent.

What do you see as the benefit of transparency in the judicial appointment process and how does that fit into creating a more diverse judiciary?

JUSTICE JENKINS: That's a great question. I think transparency is the hallmark of the judicial branch. There's a reason why we have to make findings consistent with the First Amendment protections before you can close a courtroom.

We do our work under the glare of the light in public courtrooms and we're one of the few disciplines that when we reach a decision, we write it out or we deliver it orally, in public. There are no star-chamber determinations about how and why a party wins. We explain it. I've always been proud of that.

So it struck me that when I got this job, the one place where there wasn't a lot of transparency was in judicial appointments. It's this sort of Byzantine process that people know there's an application, they fill it out, they submit it, and nothing happens. Then on the state side perhaps their name gets referred to the JNE Commission,[5] which is the state bar commission that evaluates applicants. And they're told they've got to submit several names, and evaluation forms go out and nothing happens. And unless you're a candidate for the Court of Appeal or the Supreme Court, you're never told how JNE felt about your candidacy, right? And judges and lawyers assist the Appointments Secretary in the initial vetting of judicial candidates.

When I came along, the son of a janitor who dared to become a judge, I was told there was something called a secret committee that I had to get through, right? I said, well, who is the secret committee? Well, that's why it's secret, Jenkins. Can't tell you the names, right? And so that always seemed very exclusionary to me, right?

So in talking with this Governor, his total view was transparency, all day, every day, and so we made those vetting committees transparent. We listed the names, we put it out there and a bio on each of them so that when you apply, you have a sense of who's wading into the important decisions that affect your life and your desire to become a judge.

We did the same thing in terms of training for those folks, implicit bias training, things that people don't always think about, and the assessment of the qualifications of human beings, or judges in this particular case, that are important because we all have biases. A lot of them are latent. But they're there and we try to tease them out, to have people be thoughtful about them.

We tried very much and in the first year there I visited about 20, almost 25, counties. I almost killed myself. But that hadn't been done. Because my view was people need to understand in real time what this Governor is looking for. Again, transparency.

And so when you start to put all that together, you start to create a construct in which you demystify this process and when you demystify the process, then you invite people in. They feel more

comfortable about applying. No one's guaranteed a position because California has an embarrassment of riches. There are far more qualified people than there are spots.

But I felt, just taking the Governor's lead and I think his establishing that transparency produces a broader, deeper, more numerous applicant pool, which redounds to the benefit of Californians, when those individuals are placed on the bench to make the important decisions that affect the lives of people here in California.

MS. BOWMAN-CARPIO: So then, kind of homing in from that overall structure and restructuring and moving towards the decision process itself, what criteria are important to analyze when making a decision about a potential appointee?

JUSTICE JENKINS: Well, you start with a construct that includes: Do they have the intellectual horsepower to do the work? And are they curious when confronted with a problem that, as you are in the judiciary sometimes, as you are as lawyers, what are the surrogates? What do we look at to help us resolve this issue? So are they curious? Do they want to get their teeth in it and hang on to it?

Integrity is a must. A commitment to ethics is a must, right? Community service. This governor really did a deep dive on that. He really believed that he wanted to appoint people who had—whether you come from private practice or not—who had manifested a desire to work for the common good in their communities, in whatever way that manifested.

So one example he gave me was you have women sometimes who are lawyers and they have children and they can't be as robustly involved in bar activities but they are very much involved in their children's lives and involved in the PTA. He valued that the same as he did anyone who was president of a bar association, right? So a very deep dive there, and we were able to talk about that.

The other thing that was really important to him—and I think I have not heard anyone say this but it's something I felt, is what you mentioned—was humility.

So I put together for him a list of criteria. We started with about 15 or 20, some of which I've mentioned today, and we finally got it down to five; and it was public service or commitment to the public, integrity, and ethics. And I said, "Okay, so now the heavy lifting. You have to pick one. What's your most important criterion?" He said humility. I said, why? He said because you can have someone in a black robe who is really smart but if it's not tethered to humility, it's driven largely by their decisions, by ego.

Humility is the tether to all these other great qualities that he wanted manifested in every judge he picked. He said, you'll listen better. You don't think you're the smartest person in the room—although many judges sometimes are—and as you lawyers know, many judges think they are but they're not.

So that struck a nerve with me because I just think humility is really an important character trait or attribute, not just for judges, but across the spectrum of disciplines in our daily lives. It's important to understand the importance of humility and seeing people through that lens and experience.

MS. BOWMAN-CARPIO: I was just going to quickly jump in. I see the connection between humility and the drive to always be learning, and it feels like that's two of the most important things for a judge because of the scope of the work and how you have to present yourself.

JUSTICE JENKINS: The greatest thing about my job and all of them, and in particular, now, the Supreme Court too, is every day I come to work, I learn something new.

III. JUDICIAL INFLUENCES AND PHILOSOPHY

MR. MOORE: So that's interesting. I wanted to sort of talk about your influences and how your judicial philosophy has evolved over time and how your experience as a state judge, state court municipal judge, and a federal district court judge, and a California appellate judge and now a California Supreme Court judge, played a role in that evolution?

JUSTICE JENKINS: Right. As you know, I started on the Muni Court. I started with a notion about what a judge was and what judges do and I remember about three months into the job, I ran into another judge on my bench then who had tried a number of death penalty cases. He was a luminary in the criminal law [bar] and yet he sat on the same bench that I did, and I said, "Well, how is your transition going?"

Expecting him to say, well, it's not utilizing, you know, all the skill sets that I have, and what he said was, "Why didn't someone tell me that what seemed so easy as a lawyer is so hard as a judge?"

So really understanding that the look is different, the perspective is different; that the parties bring all the gifts to the altar and then it's for you to sort through them. That you don't have a dog in the fight. To make sure that, as best you can, you've reached the best outcome that the law and the facts allow.

And so that has been my philosophy in every job, is fidelity to the law. Many times, as a trial judge, you accept the law as it is. Where you have an opportunity to write on a blank slate, you do. You know who your audience is. But you realize you're not going to be the last word, right?

And I used to always wax eloquent about, well, if I could really strike a blow in this area, this is where I would go, but I'm not at liberty to do so. Well, be careful what you ask for. I can't make that statement anymore.

So fidelity to the law, but I think where I've evolved is the perspective is different in each of these jobs. Trial judges primarily are purveyors of facts and if you look at the Supreme Court's decision in the *Alston* case recently,[6] you'll see how important a really robust factual record, factual findings are because they really doubled down on Judge Wilken's factual findings in that case, to arrive at the conclusions that they reached.

So that perspective innervated what I did as a trial judge. When I got to the Court of Appeal, that's a court of error. It's the great search for error all day, every day. And that's really what it is. And a lot of the cases sometimes—I shouldn't say a lot—but many cases that get filed in the Court of Appeal probably shouldn't be there because they're really arguing about factual issues, which are beyond the purview of the appellate court.

Now the Court that I've been sitting on for the last nine or 10 months—and I have to admit I'm still learning my way around the building in that job—is no longer a court of error. Let's be honest, it's a policymaking court.

And so the perspective is far broader and more expansive. Even the metrics we use to determine whether we take a case or not are broader and more expansive, because there we are now trying to settle law where there's a conflict or announce what the appropriate legal standards should be, legislative enactment or something of that nature.

We have a burgeoning initiative process in this state that takes up a lot of time on the Supreme Court then sort of reconciling the language in some of those initiatives that you might know are not always written so well.

So I think fidelity to the law, and then understanding the role of each of the courts; the exposure. That is how I've evolved, in terms of being a judge.

MS. PRITZKER: So Paul's question sort of leads me into my question, which is this: I mean as

you've described, you've sat as a federal district court judge, you've sat on the California appellate courts, you're now sitting in the California Supreme Court and in all of these areas, in all of the bench positions that you've had, you've had the opportunity to address complex matters. A few antitrust, some UCL cases throughout these 10 years. Does the type and level of court affect how you approach each case; and if so, how?

JUSTICE JENKINS: I think within the strictures I've already outlined, which is what is the role of the particular court that you're sitting on. So I think that gets superimposed on the way in which—at least for me—I would deal with cases.

I think aside from that, not really.

The toolbox that a trial judge uses is the same toolbox that an appellate court judge uses, and if that toolbox doesn't have enough of the amount of tools that you need to resolve the problem then, you know, that can affect the outcome. Different judges see these cases a little differently.

I'm reminded of the economic cohort from the Seventh Circuit in Posner and Easterbrook, especially in this area where economics is so crucial. What I learned in microeconomics, for example, the cross-elasticity of price theory, essentially, is so important that they could use those concepts to breathe life into how they analyzed questions of monopolistic behavior and restraint on prices and how that affects competition.

But philosophically, I don't really see a huge difference.

There can be at the appellate side, since you have more opportunity to write more broadly, some of these concerns and some of the economic theory that one has cultivated and learned over time can be superimposed on how you decide where to draw the line in the sand, in terms of the element of analysis for not only UCL but also for Sherman Act claims under Section 1 or Section 2.

It would be interesting to have a sense of how the legal cadre, the bar, feels about how the Supreme Court is marching down the road, in terms of—I keep seeing these decisions' concern for being hyper-technical—concern in sort of applying the rule of reason, and you get to sort of this balancing of procompetitive and anticompetitive factors that you may have found already. In that balance, making sure that you don't draw the balance too narrowly because businesses also have to thrive and it's okay to be successful, in that context.

So I do think that inroads that can be made based on one's own jurisprudential thinking about the kinds of science that impact the determination, the ultimate resolution of antitrust cases, but—

MS. PRITZKER: They are difficult cases for lawyers.

JUSTICE JENKINS: Right.

MS. PRITZKER: And they're clearly difficult cases for judges too.

JUSTICE JENKINS: Right, right.

MS. PRITZKER: They take a long time to litigate.

JUSTICE JENKINS: Right.

MS. PRITZKER: There are complex theories and issues that have to be resolved.

JUSTICE JENKINS: Right.

MS. PRITZKER: And some of them are of the moment, like the tech cases that you mentioned.

JUSTICE JENKINS: Right. Well, it's interesting.

I often hear in some of the patent cases before me the parties get up and say, well, Judge Jenkins, this is an easy case. Now I've been looking at a patent specification, some of the drawings, and nothing about it looks easy. Whenever I hear that I go—I just—all right. We're going to be on the nightshift here because nothing is easy about this case.

MS. BOWMAN-CARPIO: Kind of sticking with antitrust and fair competition for a moment.

When deciding an antitrust or unfair competition law matter, how much do you look at analogous federal precedents, and what is your philosophy regarding state antitrust or competition law, as compared to federal law?

JUSTICE JENKINS: Yeah. Well, let me start with the latter question because I don't know that I have enough of a sample size to have really have arrived honestly about a view in that respect, but clearly I think the United States Supreme Court precedents, Ninth Circuit or other Circuit Court precedents in sort of delineating the rules that apply in Section 1 or Section 2 claims, read over and are persuasive authority when you're vetting issues under the Cartwright Act.

But I think the California Supreme Court has made very clear that they're persuasive only.

I think way back in the *Texaco*[7] case, the California Supreme Court clearly indicated that the model for the Cartwright Act was not based on the Sherman Act, right? There was, as it says in the decision, other sister states—primarily Texas—that helped the Court discern that the Cartwright Act did not apply to mergers.

When you've got a tough issue, you're looking for persuasive authority where you can find it, and then you're trying to reconcile that against a body of law, perhaps common law, that preexists, in order to craft something going forward that harmonizes the two.

IV. ANTITRUST & ANTIRACISM IN THE LAW

MR. MOORE: I'd like to sort of turn back to some of the themes we struck at the very beginning. FTC Commissioner Slaughter raised the idea of value-based law[8] and commented on the fact that antitrust is generally conceptualized as neutral, which is sort of the concept that we discussed.

While other areas of law can have priority set within them that are founded in rather subjective values, what are your thoughts on the idea of values-based law, generally?

JUSTICE JENKINS: Well, I think it's really hard. I read Commissioner Slaughter's article, and she's continued to be quite prolific in talking about these issues.

It strikes me that the subtext of law is value-based. Law really is about people in the ordered society and how they regulate their relationships one to another in the business sense, in their personal space. So I mean generally, I think that resolving legal issues without a context for how they affect real people doesn't make a lot of sense to me.

The question really is to what degree the sort of value-based notion interfaces with, perhaps superimposes itself on, for instance the analytical model you use for resolving antitrust cases.

And when I read her article, I thought the one thing that was interesting is when a U.S. Attorney hits town, takes the mantle, they have a platform, for more robust, vigorous prosecution of white-collar crime. And when I read Commissioner Slaughter's article, the first thing I thought was the sort of value-based considerations make good sense on the enforcement side. Clearly make good sense to me on the enforcement side. How then do you harmonize or reconcile some of the concerns of full equity, inclusion, those kinds of predicates, in the way that you analyze the issues in the litigation before you?

And the Supreme Court has said continually, antitrust is about the free market and competition, robust competition. You have a whole set of laws that deal with discrimination issues and they're really focused on this value-based consideration. One of the ways in which I think that—when I think about the interface between values-based considerations and antitrust law is Judge Wilken's decision in the *O'Bannon* case.[9]

It's not lost on anyone that a great number of the plaintiffs in that case, or putative plaintiffs in that case, are minority kids who play in a lot of one of these Division 1 programs, and for many, many years the restrictions that were placed on scholarship benefits had a significant impact on them.

So while the case does not ostensibly look like a case that is oriented in values-based considerations, they were clearly there, looming beneath the surface. In terms of what actually transpired in that case and the procompetitive rejection of amateurism that ultimately that case and the United States Supreme Court in *Alston* actually rejected that notion.

But I just wonder, given the current construct of the law, the way we decide these cases, if the law always is sort of stodgy and it moves much more slowly and less reactive. And so the enforcement side where you have a mandate, you can try to effect changes more quickly.

It will be interesting to see the FTC and Commissioner Slaughter and some of the actions that they bring, if these value-based considerations, how they resonate in the ultimate analysis of the cases that they bring. That's yet to come.

MS. PRITZKER: My question was related, so you sort of stole my thunder, but that's okay.

JUSTICE JENKINS: Or maybe I wandered into it by mistake.

MS. PRITZKER: It is related to the values-based law discussion, and you've also spoken quite frequently about diversity and equity in the law. That's been kind of a mainstay of some of your public speaking.

JUSTICE JENKINS: Yeah.

MS. PRITZKER: And you've spoken about the *Alston* case and its significance, I think, for particularly minority students who depend on these scholarships and who work hard to keep them.

JUSTICE JENKINS: Yes.

MS. PRITZKER: Based on your experience, you know—*Alston* is one example—but based on your experience, have you seen ways in which antitrust or unfair competition laws can be used to advance inclusion, social justice ideals, and diversity in the law?

JUSTICE JENKINS: Yeah, I could mention my sample size is not large. I actually do view the antitrust litigation with AT&T in the 1980s as when I saw some of the products that were spun off as a result of that litigation, in terms of the offerings by Pacific Bell. I saw there were benefits that flow from it, but that doesn't directly answer your question. That's the rippling effect of litigation, which was primarily thrust on time-honored antitrust principles.

So I haven't. But my sense is in areas of provision of medical care, for example, we've seen a lot of merger activity with some of these big medical entities and how in fact those mergers affect potential pockets of individuals who need medical care, who may be deprived of it or have it significantly diminished. I mean, how do you work that then into a competition model so that the court can weigh that in, as we say, procompetitive/anticompetitive impacts of the merger?

I think if lawyers are attuned to it, they are really good at finding ways to make it relevant but they have to be attuned to it and I think really, like most everything else in life, value diversity in all of its stripes and then find ways for that value to be reflected in the legal positions in the cases that they bring.

V. DIVERSITY IN THE LAW

MS. BOWMAN-CARPIO: All right, so another two-parter, and kind of tied to the previous question.

JUSTICE JENKINS: Are you still in law school?

MS. BOWMAN-CARPIO: I am.

JUSTICE JENKINS: Your questions have been some of the toughest.

MS. BOWMAN-CARPIO: So this one focuses again on diversity broadly.

JUSTICE JENKINS: Yes.

MS. BOWMAN-CARPIO: Why is diversity important—and whatever diversity means to you—why is it important in the legal field, and what type of diversity is crucial?

JUSTICE JENKINS: Yeah. Well, why, I think, is a question that I can speak to, and I think it just comes out of my experience. When I think of diversity, I think of inclusion. For me that's a better way to think about it, inclusion versus exclusion, because inclusion is a big tent.

I went to a Catholic grammar school where there were Irish kids and Italian kids and kids from El Salvador and from Mexico, and so I grew up in a community that had a tremendous array of cultures and ethnicities and races, and I saw the value added that came from that, in terms of how it brought us together, how we shared and learned from one another. So I think I came up in that construct understanding and not being fearful of it.

But law really, as I said earlier, is about people. It's about people and how the law affects our relationships, one to another. And so if people are going to buy into law, they have to see themselves in it. They have to see that their values are at least reflected. Law doesn't always resolve itself in a way that fully achieves their goals or fully addresses their sense of self or their sensibilities, but I think on the way to resolution, that when people can see for themselves the things that they care about have been addressed and discussed, then you forge a credibility link that I think is important, and I think that then lends itself to having judges who have different experiences in the practice of law.

As I said earlier, no one comes to the bench with subject-matter experience across a broad expanse and there's some rich cross-pollination that occurs on benches when a judge who's been a DA most of his or her life is put in the family law department, and there's someone on that bench who's experienced that or came from that practice, and just like you lawyers talk all the time, we judges talk all the time too.

And so I think that actually—again, that diversity of experience, that inclusiveness, I think can't do anything but add value to the work that we do and more importantly, to how people perceive the work that we do. Now this may seem a little altruistic, given the sort of political tumult and conflict that we're experiencing in our society now, but I believe and continue to believe this is true.

The other thing that I think is that lawyers, especially lawyers who try cases, your job isn't just to learn the law, it's to learn about people, because, ultimately, you're going to be asking people to recognize the persuasiveness of your position. And so I always tell young lawyers, your job really is to reach out beyond where you sit now and have some real-time experience with people who are different.

That's why I took that job at the Department of Justice. I heard my parents talk about a Jim Crow South but I hadn't had my own experience and I found a way to have it and, you know, I learned there were some terrible people committing some horrible crimes but in those same localities there were some amazing people.

And so it gives you a sense of balance, from diversity, and that's what the law is supposed to be, the scales of justice. That's what we aspire to, anyway.

MR. MOORE: There's a pattern to our questions. We sort of open an issue and then sort of dig a little deeper. You've already touched on this area a little bit and it's sort of how inclusion benefits the judiciary and judicial philosophy which you've addressed.

JUSTICE JENKINS: Right.

MR. MOORE: But how does practice-area diversity intersect with other forms of diversity?

JUSTICE JENKINS: Well, I think the same thing.

I mean, I'm reading a book by David Epstein called *Range*[10]—I think I've mentioned it—and his thesis in the book is that problems that have sort of a recurring kind of pattern to them—he uses, for example, chess—that one can, if you start early enough, you can expose yourself to a number of patterns that manifest in a chess game and you can become very good at it, but problems like the ones we deal with in the law that look like something else but then raise a bit of a different feature that we haven't seen, that it's broad-based experience across disciplines, across life experience, across professional experience that sometimes can be suggestive of the answer or a pathway to resolving those questions.

And so I think the same thing too. It's difficult now because if you've got a case and it's a bank case and you want the foremost expert in that area handling that case, to produce a good outcome. So some of what we do sort of pushes us to specialization.

But I also think that when you climb down out of that tree of specialty, then the way in which you express those claims, your position, to people more broadly, like jurors, can benefit from the cross-pollination that comes from different specialty areas and approaches.

I don't know that there's a hypothetical you could raise with me where I will say that there's no value to seeing things in a broader context.

MS. PRITZKER: Applying some of these thoughts and principles to your very active role as Governor Newsom's Judicial Appointment Secretary, what are some of the most persistent barriers to diversifying the judiciary and how can they best be addressed or overcome?

JUSTICE JENKINS: Yeah. Well, if Jenkins had the answer to this, I don't know that I would retire because this is the most amazing job ever—but I might think about leaving it because I could then travel around the country in corporate America and the judiciary and give them the keys to the kingdom, so to speak.

But one of the things that I see, that still exists today, was this notion that I talked about when someone talked to me about becoming a judge—my father was a custodian, I don't have any political friends. I don't know a governor, I don't know a senator, and how am I going to be taken seriously?

And I think that notion is common to more people than you would think at first blush; white, Black, Asian all share sort of different views on that topic.

So there are people who opt in. I mean they're never in doubt about their qualifications to serve in one of these positions; however, there are a lot of others who are not insecure, but don't understand enough about the process itself so that it feels like something they can navigate.

And so one of the things that I realized early on when I got there, after about the first six months we already had about 300 applications, but I think there was one Latino who put in an application from Santa Clara County. And I thought—I went and looked at the number of Latino, Latinx lawyers there, 10 years' experience, there's substantially more. So something's accounting for that.

Women now, the increased numbers of women on the bench has grown exponentially, but the same thing.

The ability to see yourself in that position from where you stand, we have to find a way to instill in people a kind of confidence that comes from understanding the process; that it's not that you have to be someone who has a governor for a best friend—and that's part of what I was trying to do.

So the pool was sparse, in terms of women and minorities. The pool was sparse, in terms of people who come from a probate practice or a family

law practice, and yet those are very important assignments. Some people think, in juvenile, the most important.

So looking at people from those practices and not saying, well, in that practice you don't try a lot of jury trials; but saying, what are the skill sets that one needs to be successful in this job? What analogous experience does that person have that allows you to project that they will accommodate the skills that they need in other assignments in the Superior Court? It's the same thing for federal court too.

This is all about projecting from the skillset you have now, how are you going to accommodate the skills that you need, when you land in the job you desire?

MS. PRITZKER: Do you have thoughts about on how to create that pipeline? How to encourage people to look at themselves, people from diverse backgrounds, and say, "I can do this"?

JUSTICE JENKINS: Well, that's a great question.

We all talk about mentors and we've been talking about mentors for a number of years. One of the things that I realized as I've traveled around the State, is I told you visiting all these counties, but there were in some counties, there weren't a lot of potential mentors for people, and it caused me to start to think about the role mentors had played in my life. I mentioned Carol Corrigan and the Justice that I replaced, Ming Chin, invited me early on in my career to come and sit pro tem when Justice Werdegar went to the Supreme Court. When Judge Chin called and invited me, I told him, I said, "Well, I appreciate the invite but I don't want to be a Court of Appeal Justice." Silence.

And then he said, "I'm going to ask you that question again, Marty," and he said, "Do you think that you will be a better trial judge if you understand how we review your records?" Well, you know, the bell went off, right? And so I went. Opened a whole new world to me.

Thinking about mentors, we began a program when I left the Governor's office where we chose to test a mentoring program and have it be comprised of judges, sitting judges. This had not been done. It's done sort of anecdotally, that Judge Corrigan reached out to me, but we set up a program where you can apply for a mentor, for both the trial court and appellate court. We have a pilot program here in the First District Court of Appeal. You get matched with a judge, who then gives you the benefit of their experience and sort of demystifies, illuminates that process, based on their experience, to help you submit the best application you can. It's open to any- and everybody.

And who better to provide that kind of input and support and help than someone who's successfully negotiated the process him- or herself?

So I think, again, the importance of mentoring just cannot be overstated, whether you're in a large firm, the DA's office, a City Attorney's Office or you desire to become a judge—and sometimes even when you're given a judgeship. You hear judges talking about mentors all the time. Judge Henderson talks about Judge Peckham and how amazing of a mentor Judge Peckham was to him when he first came to the District Court.

So I think that program is one that I'm really hopeful will not only increase the number of individuals we have applying, but the quality of the applications that will ultimately then give the Governor a more diverse, inclusive pool from which to draw and that will redound to the benefit of the citizens of the State.

MS. BOWMAN-CARPIO: So kind of stepping back again, I think you started touching upon this earlier. So how do your personal experiences as a diverse person—and I mean we are all diverse people in our own ways.

JUSTICE JENKINS: Yeah.

MS. BOWMAN-CARPIO: How has that influenced your judicial philosophy?

JUSTICE JENKINS: Well, I think most pointedly, it has allowed me to sort of be open, as open as I can, to the people and the issues that come before me. That sort of broad-based experience, it's in areas of discretion, it's easy to default. Sometimes it happens subliminally, just impacts what we do. Before we know it, we're operating on them.

And I think having had lots of different experience and exposure to individuals, I think makes me a better judge. I'm confident that once the really good lawyers who are in front of me explain the issues to me, I can put the pedal to the metal and reach a decision.

But on the way there, the process by which I get there has to be one that's robust and enriched by counsel and by their ability to draw analogies that make sense to me and to see a problem in a broader context or perspective. I think it is also a function of broader experience.

So I think it has helped me. I don't know much about what people say about me, but one thing that I do hear—I stopped reading what they write about me years ago—is that he's open-minded.

It used to bother me—and I know this is going off a bit—but it used to bother me when I'd walk into a courtroom, and I have always been the kind of person who will come out and say, even in the District Court, "Here are the issues I have before me, here's what I understand of the respective positions, just a thumbnail sketch. Here are the questions I have for each of the parties."

And then someone told me that they were saying, "Well, Jenkins has his mind made up when he comes on the bench." Well, you filed a thousand pages of briefing and I would think you'd be disappointed if I did not have some sense of how I saw the issues. Maybe you should retreat to thinking that he's giving you a nice big round curveball to hit and your job is to hit it out of the ballpark, because if I didn't have any questions, then you wouldn't be here.

MS. PRITZKER: Yeah, sometimes the best part of the argument is in the judge's questions.

JUSTICE JENKINS: Right.

MS. PRITZKER: It makes you think about the case in a different way.

JUSTICE JENKINS: Right. And when that happens, those are the best days on the bench.

MS. PRITZKER: Good to hear.

JUSTICE JENKINS: Right? What a judge told me early on, I asked her what was the upside? She said to me, "Well, I just had a trial and what was amazing, it was everything I thought a trial would be when I became a judge." I thought, oh, aren't they all like that? For some people not, I guess. For me, they have all been like that.

VI. MAINTAINING BALANCE

MR. MOORE: Well, speaking of other judges, there was a profile of you posted on your law school's website where Judge Saundra Brown Armstrong was quoted as praising your equanimity and open-mindedness.[11]

How do you keep that composure and levelheadedness in the midst of what can be especially heartbreaking cases or enraging cases where either the facts are sort of difficult, like you said, tears were falling—

JUSTICE JENKINS: Right.

MR. MOORE: —or you realize the attorneys are engaging in sort of hand-to-hand combat, and that can be difficult or frustrating for a judge as well.

JUSTICE JENKINS: Right, right.

Well, you develop a number of things. I used to teach a class in the California judiciary about judicial stress, and I came about this quite accidentally. I don't know how I came about it, but when I would come out of the courtroom during a

trial, my—one of my clerks would always say, "You know, Judge, look at your palm," and there were like a thousand black dots on it, which meant that I was jabbing myself. So that's one way. It's not very sophisticated.

But no, I think that you start to learn what your triggers are. You use your staff. I would tell my law clerks to let me know if I am getting a little bit intemperate. There are signals that they would give and let me know.

I think most importantly is to understand that this can happen, that you can become embroiled in ways and that understanding, which I think is also a—reflective of a degree of humility, that you don't walk in thinking that you're this impregnable force—that you're human. I think understanding that and setting up different constructs to help you deal. I would write, sometimes, on my pad as opposed to jabbing the palm—to deal with that.

Each day, each day I would go home at night and I would say to myself, if I had a day where I thought I was particularly intemperate, "I have to get better tomorrow." And I still do that. Although I don't see lawyers as often, I still do that.

What are the ways that I can improve the way I communicate or ask questions or not signal, when a question is asked before I answer it—when I ask a question, before it's answered, what I think are my views. Not perfection, but I'm always trying to improve, and maybe that comes from my athletic background.

MS. PRITZKER: Thirty seconds or less, what do you do to de-stress? What do you like to do when you're off the clock?

JUSTICE JENKINS: I took piano lessons when I was 10 for about a year and then I quit to play football and obviously that didn't work out so well. So two years ago I started taking piano lessons again, and I love it. I mean, I just love everything about it. I will never be good.

MS. PRITZKER: It's about the process.

JUSTICE JENKINS: You're going to hoist me on my own petard there, okay.

MS. PRITZKER: Thank you so much, Justice Jenkins.

JUSTICE JENKINS: My pleasure.

MS. PRITZKER: This has just been a generous and wonderful interview. And we really thank you for spending your time with us today.

JUSTICE JENKINS: Thank you.

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1. Paul Moore is a Deputy Attorney General in the California Department of Justice.
2. *See Dukes v. Wal-Mart, Inc.*, No. C01-02252 MJJ (N.D. Cal.).
3. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).
4. *Epic Games, Inc. v. Apple Inc.*, __ F. Supp. 3d __, No. 4:20-cv-05640-YGR, 2021 WL 4128925 (N.D. Cal. Sept. 10, 2021).
5. Commission on Judicial Nominees Evaluation.
6. *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).
7. *Cal. ex rel. Van De Kamp v. Texaco*, 762 P.2d 385 (Cal. 1988).
8. *See* Lauren Feiner, *How FTC Commissioner Slaughter Wants to Make Antitrust Enforcement Antiracist*, CNBC (Sept. 26, 2020), https://www.cnbc.com/2020/09/26/ftc-commissioner-slaughter-on-making-antitrust-enforcement-antiracist.html.
9. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 114 F. Supp. 3d 819 (N.D. Cal. 2015).
10. David Epstein, Range: Why Generalists Triumph in a Specialized World (2019).
11. *See* Erin Gordon, *All Rise: From the NFL to the Federal Bench, California Court of Appeal Justice Martin J. Jenkins '80 Has Made a Career of Helping Others Grow*, USF School of Law, https://www.usfca.edu/law/profiles/martin-jenkins (quoting Judge Saundra Brown Armstrong as saying of Justice Jenkins, "He presides and decides in an open-minded, even-tempered, courteous, patient, and compassionate manner.").

COMBATTING COVID THROUGH . . . CONSUMER PROTECTION? A MULTI-JURISDICTIONAL APPROACH TO PROTECTING PUBLIC HEALTH THROUGH ENFORCEMENT OF CONSUMER FRAUD LAWS

Written by Christina Tusan, William Pletcher, and Alex Bergjans[1]

I. INTRODUCTION

We have been impressed, unfortunately, with the ability of the SARS-CoV-2 virus, as well as associated scams, to mutate into succeeding waves of variants over the ongoing course of the pandemic. Courts also have long recognized the ability of frauds to evolve to ever-changing conditions.[2] The novel, global, and multiyear nature of the COVID-19 crisis—along with the evolving scientific consensus and shifting regulatory environment regarding COVID-19 testing and treatment—allowed enterprising scammers to engage in deceptive and unlawful business practices that existing legal authority and tools were not specifically designed to address.

Fortunately, the adaptability of consumer protection laws—often described as sweeping in scope[3]—made them an effective tool for addressing new consumer frauds that rapidly developed in the face of the COVID-19 pandemic. This emergency demanded that consumer protection prosecutors and regulators creatively use this existing, adaptable authority to find ways to protect the public from deceptive and, at times, dangerous business practices. It also created the opportunity for prosecutors, regulators, and policymakers to reevaluate and rethink ways that consumer protection laws should be adjusted to more effectively protect the public during the long-term and global environmental and public health emergencies we will face in the future.

This article will discuss: (1) the unfair and deceptive business practices that arose in the COVID-19 pandemic, (2) the consumer protection tools and authorities available to combat those practices, (3) how federal, state, and local regulators and prosecutors used existing consumer protection authority—such as California's Unfair Competition and False Advertising Law, the Federal Trade Commission Act, and other states' Unfair & Deceptive Acts and Practices laws—to halt and deter COVID-19-related unlawful business activities, and (4) how consumer protection tools can be improved to better respond to future crises.

II. THE NOVEL CORONAVIRUS ARRIVES IN THE UNITED STATES; COVID-19 RELATED UNLAWFUL AND DECEPTIVE BUSINESS PRACTICES FOLLOW

In December 2019, health officials identified an outbreak of a deadly respiratory illness caused by SARS-CoV-2, a novel coronavirus, in Wuhan City, China.[4] In late January 2020, the Centers for Disease Control and Prevention ("CDC") confirmed the first case of COVID-19 in the United States.[5] On January 31, 2020, the U.S. Secretary of Health and Human Services declared the SARS-CoV-2 virus a public health emergency, and the White House 2019 Novel Coronavirus Task Force announced new travel policies to be effective on February 2, 2020.[6] In early March 2020, after more than 1,600 Americans were diagnosed with the disease,[7] the World Health Organization declared COVID-19 a pandemic.[8] The federal government declared a national state of emergency[9] and state and local governments quickly followed with their own emergency declarations.[10]

Policymakers at all levels of government issued orders and implemented guidelines aimed at "flattening the curve" and slowing the spread of COVID-19 to keep hospitals and healthcare facilities from being overwhelmed by patients infected with this highly contagious disease.[11] New York State, which suffered the largest outbreak in the early pandemic, shut down schools on March 16, 2020 and bars and restaurants the following day.[12] On March 19, 2020, the Governor of California and the Los Angeles County Board of Supervisors issued emergency "Safer at Home" orders mandating that residents shelter in place except to engage in "essential activities" like buying food or medicine.[13] New York followed suit one day later when it ordered that all non-essential workers stay home.[14]

A vital element of all COVID-19 mitigation and suppression strategies was testing for the disease and isolating those who contracted it or were in close contact with an infected person. However, tests were not readily available in California or nationwide during the first several months of the pandemic. For example, as of March 11, 2020—a whole week after California declared a public health emergency—the *Los Angeles Times* reported that only 1,138 people in California had received a COVID-19 test in a public health lab and the state only had an additional 7,675 tests available for its approximately 40 million residents.[15] The media reported on national testing shortages well into the summer of 2020, months after the federal government first declared a state of emergency.[16]

Mass public fear, confusion, and uncertainty accompanied the arrival of COVID-19 in the United States. Early in the pandemic, doctors, public health officials, and the pharmaceutical industry had not yet developed therapeutics effective against COVID-19.[17] In turn, many members of the fearful public bulk-purchased various purported "treatments" of dubious efficacy in an effort to protect and treat themselves and their families. The public fear was exacerbated by the fact that at the beginning of the state of emergency scientists and public health officials did not know precisely how the novel coronavirus spread.[18] One of the popular early theories was that the virus spread through infection by "fomites"—inanimate objects such as packages, doorknobs, and surfaces helping to spread infection, indirectly, from person-to-person.[19] The fear of fomite transmission led to a nationwide run on and subsequent shortage of

disinfectant products, along with related price gouging of those products.[20]

COVID-19 illustrated that public health emergencies can quickly transform into consumer protection emergencies. Deceptive business practices thrive in atmospheres of confusion and fear. Scarcity, real or perceived, promotes price gouging. And desperate consumers are more likely to buy products and services advertised with promises and representations that are too good to be true than they would in calmer situations where they can exercise more scrutiny. The pandemic produced significant opportunities for enterprising scammers and unscrupulous businesses to advertise and sell unauthorized COVID-19 test kits and fake COVID-19 cures and treatments, as well as to price-gouge essential products and services.[21]

A. UNLAWFUL SALES OF UNAPPROVED COVID-19 TEST KITS

Some of the earliest and most prominent consumer-facing scams that arose from the COVID-19 pandemic were the advertising and selling of unauthorized "home" COVID-19 test kits.

At the beginning of the pandemic, the Department of Health and Human Services ("HHS") and the Food and Drug Administration ("FDA") took steps to increase the supply and availability of COVID-19 tests. HHS declared a state of emergency and invoked Section 564 of the Food, Drug, and Cosmetic Act, which allowed the FDA to issue Emergency Use Authorizations EUAs allowing for the development, distribution, and use of medical products, including COVID-19 tests, that the FDA had not formally approved under its normal procedures.[22] Because of the novelty of the virus and the need to make available hundreds of millions of tests for it, the FDA was required to engage in a delicate balancing act of simultaneously promoting the creation of a new industry while ensuring that the testing products met standards of scientific accuracy and reliability.

To do so, the FDA issued its Policy for Diagnostic Tests for Coronavirus Disease-2019 ("Interim Guidelines") governing the manufacture and distribution of COVID-19 tests developed under the EUA process, including tests that applied for but had not yet obtained EUA approval. The Interim Guidelines announced the FDA's policies regarding the development and use of COVID-19 tests in four sections:

- Section IV.A: clinical labs developing tests and the process for received Emergency Use Authorization;
- Section IV.B: states setting their own validation standards;
- Section IV.C: commercial manufacturers of diagnostic tests that are provided to laboratories or healthcare providers prior to EUA submission; and
- Section IV.D: commercial manufacturer development and distribution, and lab development and use of serology tests prior to or without an EUA.[23]

Reflecting the need for testing capacity, the policies permitted manufacturers of COVID-19 tests to sell, use, and distribute them even before the FDA granted an EUA application, provided that an application for the device was filed with appropriate validation paperwork.[24]

Although it generally exercised regulatory flexibility, the FDA's policy drew certain bright lines, most notably the requirement that the use of tests under the policy be limited to laboratories or at the "point-of-care,"[25] and not at home unless expressly authorized by the FDA. Due to the FDA's concerns about the sensitivity of the tests, the difficulty and potential danger of having individuals self-collect saliva and/or nasal tissue, and (in the case of serology or blood tests) the reliability of the tests themselves,[26] the FDA had "not authorized any COVID-19 test to be completely used and processed at home" even months after the state of emergency was declared.

Despite the best efforts of the FDA and other public health authorities, "tests of 'frankly dubious quality'" flooded into the stream of commerce, leading to false positives and false negatives.[27] The purveyors of these unreliable and unauthorized test kits relied on the FDA's regulatory flexibility (and the accompanying uncertainty) to dupe consumers into believing that their tests were approved or otherwise permitted by the FDA. They also filled an unmet demand for "home" test kits that would allow customers to diagnose the disease while socially distancing and self-isolating.

The early pandemic saw a wave of unauthorized test kits that did not comply with the FDA's Interim Guidelines introduced to the market. The advertisements for these tests—many of which were serological, a category of tests the FDA deemed so unreliable that it announced they "should not be used as the sole basis to diagnose COVID-19"—made various false, misleading, and unsupportable representations about their accuracy, reliability, and regulatory approval. Some entities selling such tests included:

- Yikon Genomics, Inc., which allegedly advertised and sold a SARS-COV-2 IgG/IgM At-Home Screening Kit that it represented used a simple finger stick procedure to test the presence of the aforementioned antibodies in the bloodstream, making it possible to detect current or recent viral infections of COVID-19.[28]
- RootMD, Inc., which allegedly sold an "at-home" COVID-19 exposure and immunity kit for $249.00 per test, and claimed that "[w]hile the test has not yet completed the several month investigation periods by the FDA to be labeled as approved, they did issue a statement on March 16th allowing its use under emergency provisions."[29]
- Applied BioSciences, Inc., which allegedly advertised a "home" COVID-19 test that it represented was a "HUMAN 15 MINUTE ACCURATE, AFFORDABLE AND RELIABLE FINGER PRICK CORONA VIRUS COVID-19 BLOOD TEST" that "can be used for Homes, Schools, Hospitals, Law Enforcement, Military, Public Servants or anyone wanting immediate and private results."[30]
- Wellness Matrix Group Inc., which allegedly sold an "FDA Approved Home Test Kit" that it represented could deliver a test result "in 10 minutes, without a prescription and no special equipment needed. Best of all, it's in the privacy of your own home."[31]

B. TWENTY-FIRST CENTURY SNAKE OIL: THE EMERGENCE OF FAKE COVID-19 "CURES"

Various media figures, self-styled entrepreneurs, and businesses advertised purported COVID-19 cures and treatments that the FDA had not studied or approved for use against the disease.

The types of "cures" and representations ranged from some exaggerating the efficacy of common nutritional supplements like Vitamin C to others claiming that they invented miracle pills and injections that could eradicate COVID-19.[32] One of the highest profile and most commonly advertised miracle cures was colloidal silver.

Colloidal silver is a purported "nutritional supplement" consisting of "tiny silver particles in liquid" that has been advertised for decades as a cure-all for everything from the common cold and chest congestion to cancer and AIDS.[33] In reality, the FDA has warned against the use of colloidal silver since 1999, noting that it not only is unsafe and ineffective against any disease or condition, but also has serious side effects and can permanently turn a person's skin bluish-gray.[34] Nonetheless, many businesses and organizations advertised and sold colloidal silver as both a prophylactic and therapeutic treatment for COVID-19 that could "usher" coronavirus out of a person's body and "prevent the disease totally and completely"[35] or kill the coronavirus within 12 hours.[36]

Other companies attempted to pitch more common supplements as COVID-19 cures. Some claimed that, when taken in high doses, Vitamin C "acts as an antiviral drug" that could kill COVID-19.[37]

Others advertised radish paste as "a must-have product for the protection and prevention of the COVID-19."[38] And certain companies represented that CBD oil prevented infection with COVID-19 by decreasing a person's stress and thereby strengthening the immune system.[39] These, and other representations about similar products, were not supported or approved by the FDA.[40] Yet false and misleading claims of cures and treatments for COVID-19 proliferated in the early pandemic and remain prevalent even after the development and widespread availability of vaccines and effective therapeutics.[41]

C. COVID-19 PRICE GOUGING

Price gouging also appeared at the beginning of the pandemic. As the need and demand for cleaning supplies, disinfectant products, and personal protective equipment such as surgical and N95 masks became dire, the prices for these products skyrocketed in certain marketplaces and storefronts.

Price gouging was not just identified at traditional brick-and-mortar stores, but was also seen on online marketplaces like Amazon[42] and Craigslist. As the first global emergency in the e-commerce era and one that required people to stay home and avoid crowded commercial areas as much as possible, it was inevitable that the COVID-19 pandemic would create the opportunity for profiteering online. The pandemic price gouging was blatant. One online retailer allegedly increased the cost of N95 masks from $14.95 per ten pack to $104.99, and another allegedly increased the cost of N95 masks from $39.99 per pack to $269.99.[43] One online retailer allegedly advertised and sold a two-liter bottle of hand sanitizer for $249.99.[44]

Online marketplaces offer opportunities for new market entrants and small-time operators to access the global marketplace at relatively low start-up costs.[45] But unlike well-established vendors with long-term incentives to comply with laws and regulations, these new market entrants initially encountered few barriers to earning a quick profit by hoarding and selling goods related to the pandemic at inflated prices. This not only increased the number of price gougers, but it also helped create a game of enforcement whack-a-mole with new violators appearing moments after others were shut down. Fortunately (and likely understanding their own potential risk and exposure), a number of online marketplaces, including Amazon, partnered with law enforcement to identify the price gougers operating on their sites for prosecution.[46]

D. COVID-19 PCR TESTING FRAUD AND POP-UP TESTING SITES

The need for rapid and reliable testing led to the creation of numerous start-up companies purporting to provide PCR testing services to customers. PCR (or polymerase chain reaction) tests for COVID-19 are molecular tests that analyze specimens taken from a person's upper respiratory system for RNA from the coronavirus. According to public health experts, "[t]he PCR test has been the gold standard test for diagnosing COVID-19 since authorized for use in February 2020."[47] PCR tests are the types of tests most frequently required by most airlines, governments, and businesses.[48]

Although PCR tests were available (often for free) at schools, businesses, traditional healthcare providers, and government-operated sites, private testing companies offered a key advantage: for a premium, they guaranteed results quickly. One company, the Center for COVID Control, allegedly promised customers lab results "within 24 to 48 hours."[49] The promise of speed is an important inducement as many airlines and organizations require people to present negative test results from samples taken within 72 hours for entry.[50]

Unfortunately, the promises made by some of these start-up testing companies appear to have been false. For example, the Center for COVID Control, an Illinois company with up to 275 testing sites nationwide, allegedly routinely failed to deliver test results within its promised deadline. Worse, to cover up their false advertising, some companies allegedly created false negative test results—

including for some customers whose samples were never actually analyzed—and sent them to customers. The Center for COVID Control, for instance, is accused of sending "negative" antigen test results to customers that only took a PCR test and "negative" results to some customers who never took a test at all.[51]

During the COVID-19 Omicron variant surge of late 2021 and early 2022, a significant number of pop-up street vendors opened in major cities and began offering purported PCR testing to meet the increased demand.[52] Many of these sites promised to return test results to consumers in less than 48 hours and claimed that their service was free.[53] However, a number of them allegedly failed to deliver any test results to their customers.[54] Moreover, some of the sites allegedly required customers to provide insurance and personal identifying information—including their social security numbers—stoking concerns that the sites were created to engage in identity theft or insurance fraud.[55] The pop-up testing sites managed to slip through the patchwork of federal, state, and local regulations governing COVID-19 testing and street vending. The fact that the sites claimed to be offering FDA-approved tests that were analyzed by Clinical Laboratory Improvement Amendments ("CLIA")-certified laboratories limited the ability of federal regulators to step in, and the fact that the sites claimed to offer the tests for free and the fact that enforcement of some street vending ordinances was suspended during COVID-19 made it more difficult to utilize local ordinances and laws regulating street vending.[56]

III. USING THE UNFAIR COMPETITION LAW, FALSE ADVERTISING LAW, SECTION 5 OF THE FTC ACT, AND PRICE GOUGING LAWS TO PROTECT CONSUMERS FROM A NEW SET OF SCAMS ASSOCIATED WITH THE PANDEMIC

The pandemic created unprecedented challenges—both in volume and novelty—for consumer protection prosecutors and regulators. Although law enforcement could utilize some authority—like price gouging laws—triggered by the declaration of a state of emergency, traditional consumer protection laws remained the primary tools available to the government to curb these unlawful practices.

These authorities—such as California's Unfair Competition Law and False Advertising Law, the Federal Trade Commission Act, and other state Unfair Deceptive Acts or Practices ("UDAP") laws—were largely able to meet the demands created by the pandemic. The statutes, which broadly prohibit deceptive, misleading, unlawful, and unfair conduct, offer both flexibility (allowing their use against any industry or practice) and powerful remedies (interim injunctive relief, restitution, and mandatory civil penalties) that encourage swift enforcement and early resolution. They were used at all levels of government to respond to pandemic-related scams.

A. THE UNFAIR COMPETITION LAW IS AN IMPORTANT TOOL TO HALT DECEPTIVE AND UNLAWFUL PANDEMIC-RELATED BUSINESS PRACTICES

The Unfair Competition Law ("UCL"),[57] which expresses the public's right to protection from fraud, deceit, and unlawful business acts and practices,[58] serves as a key tool in combatting COVID fraud. "Its coverage is sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law."[59] To establish a violation of the UCL, a plaintiff must show either an "unlawful, unfair, or fraudulent business act or practice,"[60] each of which is a distinct violation and theory of liability.[61] "[A] practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' or vice versa."[62]

Each of the three prongs of the UCL prohibit different practices. The unlawful prong prohibits "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made."[63] It "borrows" the elements from other laws and makes them actionable as unlawful business practices; if a

practice violates an existing predicate law, it violates the UCL.[64] The fraudulent prong prohibits any fraudulent business act or practice, even if it does not rise to the level of common law fraud.[65] Under the UCL's fraudulent prong, "[a] violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public are likely to be deceived."[66] Finally, the unfair prong prohibits conduct that (1) threatens an incipient violation of an antitrust law, (2) 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 (3) otherwise significantly threatens or harms competition.[67]

The law is intentionally broad. It applies to all manner of business practices across industry, including highly regulated business practices such as the advertisement and sale of medical devices and treatments.[68]

Perhaps most importantly for enforcement purposes, the UCL is a "strict liability" statute with powerful remedies, including preliminary and permanent injunctive relief, full restitution (without the corresponding demand to identify all consumer victims), and civil penalties of up to $2,500 per violation. On top of all that, courts have held that the UCL creates a low bar to establish individual officer liability under either the control test[69] or responsible corporate officer doctrine.[70] This combination creates both the ability for law enforcement to quickly halt the unlawful practices at issue and the leverage to obtain early resolutions from defendants.

B. THE FALSE ADVERTISING LAW, WHICH MERELY REQUIRES A LIKELIHOOD OF DECEPTION, IS A POWERFUL AUTHORITY TO FIGHT PANDEMIC SCAMS

The False Advertising Law ("FAL"), which makes it unlawful for any person to knowingly or negligently make any public statement relating to real or personal property or services that is untrue or misleading with the intent to dispose of real or personal property, or perform the services,[71] is also an important law that can be used to effectively combat pandemic-related fraud. Government prosecutors do not need to prove intent to deceive, reliance, fraud, or damages.[72] A violation of the FAL occurs when the statement is made, and once it occurs it cannot be eliminated by subsequent disclosures.[73] Thus, California courts have repeatedly held that a violation occurs at the time a consumer is solicited, regardless of whether the consumer purchases the goods or services offered. Identifiable victims are also not required; as the FAL prohibits just the *likelihood of deception* and does not require proof that anyone was actually deceived.[74]

The FAL asks whether the "statement" at issue is likely to mislead members of the public.[75] Thus, it prohibits "not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public."[76] And "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under" the FAL.[77] Moreover, the evidence required in a false advertising case is the advertising itself. Government prosecutors are not required to present extrinsic evidence or consumer surveys to prove that the advertising is likely to mislead.[78]

And like the UCL, the FAL has powerful interim and permanent remedies in the form of injunctive relief, restitution, and civil penalties of up to $2,500 per violation and a relatively low bar to establish liability both for an entity and individual officer.[79] This too creates opportunities for prosecutors and regulators to swiftly halt misleading and deceptive misconduct.

C. SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Section 5 of the Federal Trade Commission Act ("FTC Act") is an important tool that the FTC used

to protect consumers during the pandemic. This section prohibits "[u]nfair methods of competition in or affecting commerce[] and unfair or deceptive acts or practices in or affecting commerce. . . ."[80] Courts have held that an act is deceptive if there is a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances, and that representation, omission, or practice is material.[81] In order to establish that a representation is likely to mislead, the FTC must establish that (1) the representation was false or (2) the advertiser lacked a reasonable basis for its claims.[82] A misrepresentation is material if it involves facts that a reasonable person would consider important in choosing a course of action.[83] Both express claims—"ones that directly state the representation at issue"—and implied claims—other claims that do not fit within the definition of "express claims"—made in advertising can be actionable.[84] Consumers are not required to question the veracity of express claims because they are presumed to be material.[85]

In determining an alleged violation of Section 5, courts evaluate the "net impression" created by the representation to determine if it is deceptive.[86] Proof that defendants' misrepresentations were made in bad faith or with an intent to defraud or deceive is not required.[87] Additionally, defendants who attempt to rely on disclaimers to change the apparent meaning of a claim must include disclaimers that are prominent and unambiguous.[88] A violation also occurs when a seller "induces the first contact through deception, even if the buyer later becomes fully informed before entering the contract,"[89] a practice sometimes referred to as a "deceptive door opener."[90]

State consumer protection laws like the UCL are often referred to as "Mini-FTC Acts" because of similarities between the laws. Much like the UCL and FAL, under Section 5 "[a]dvertisements as a whole may be completely misleading although every sentence separately considered is literally true"[91] and "[t]he failure to disclose material information may cause an advertisement to be deceptive, even if it does not state false facts."[92]

Like government prosecutions under the UCL and FAL, the FTC also does not need to prove that each misled consumer relied on the claims at issue[93] as courts have held that requiring the FTC to prove individual reliance is an unreasonable burden.[94] Although the FTC is not required to prove individual reliance by each consumer, a standard that tracks the UCL and FAL requirements for prosecutors, there is a difference in how the standard is applied. Under Section 5 the FTC has a unique burden-shifting requirement that does not exist under the UCL and FAL. Once the FTC proves material, widespread misrepresentations, "the burden shifts to the defendant to prove the absence of reliance."[95]

Another difference between the UCL and the FTC Act is that the FTC Act spells out a specific requirement concerning substantiation. Under Section 5, a representation is deceptive if the maker of the representation lacks a "reasonable basis" for the claim at the time it is made.[96] If a claim is made without adequate substantiation evidence, the maker necessarily lacks a reasonable basis.[97] Under the FTC Act, "[d]efendants have the burden of establishing what substantiation they relied on for their product claims"[98] and "[t]he FTC has the burden of proving that Defendants' purported substantiation is inadequate. . . ."[99] In determining whether an advertiser has satisfied the reasonable basis requirement, the court must determine whether an advertiser possessed the necessary level of substantiation for that claim at the time it was made.[100]

But perhaps the most significant difference between the FTC Act and UCL is the remedies. The UCL allows plaintiffs and public prosecutors to obtain restitution of any money or property obtained through unfair competition.[101] Section 13(b) of the FTC Act—the Act's primary provision governing remedies when the FTC seeks judicial redress while its administrative proceedings against a defendant are still pending—provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction"[102] and was long interpreted

to empower courts to grant the FTC "'any ancillary relief necessary to accomplish complete justice,' including restitution."[103] However, in the 2021 case, *AMG Capital Management, LLC v. Federal Trade Commission*,[104] the Supreme Court adopted a far more limited interpretation of Section 13(b) as permitting only injunctive, not monetary relief.[105] In reaching this decision, the Court analyzed both the language of the specific provision at issue—which only expressly permitted courts to grant injunctive relief—and the overall design of the FTC Act, which expressly permits courts "to impose limited monetary penalties and to award monetary relief in cases where the Commission has *issued cease and desist orders*, *i.e.*, where the Commission has engaged in administrative proceedings."[106] The Court held that its interpretation "read[s] § 13(b) to mean what it says" and "produces a coherent enforcement scheme."[107] The Court has thus recognized the FTC's ability to obtain monetary relief following administrative proceedings under Sections 5 or 19—but has taken a narrow reading of the types of relief currently available under Section 13, circumscribing monetary orders.[108]

D. PRICE GOUGING LAWS

California's price gouging law[109] was a helpful tool to combat unlawful business practices in the pandemic. The price gouging law prohibits—upon the declaration of a national, state, or local emergency and for thirty days thereafter—anyone from selling certain goods, services, or emergency supplies for a price more than 10 percent greater than the price charged by that person for the same items or services immediately prior to the emergency declaration.[110] The law also prohibits rent increases of more than 10 percent in the first 30 days following the declaration of an emergency and for any period of time after the declaration has been extended.[111]

The provision of the law governing the sales of goods and services was a helpful tool in the beginning of the pandemic. The law, however, was designed to respond to shorter-term emergencies, like natural disasters, but not longer-term crises, which the COVID-19 pandemic ended up becoming. Moreover, the law that was in effect at the beginning of the pandemic failed to account for "crisis-entrepreneurs"—persons or entities that only start selling goods after the declaration of emergency and therefore have no original price to set the statute's required baseline—or goods, like COVID-19 test kits, that are not available or even invented until after the state of emergency is declared.

These limitations required policymakers in California to adopt more creative solutions and approaches to curb price gouging. The City of Los Angeles passed a price gouging ordinance that (1) is in effect throughout the entire life of a state of emergency and not just the initial 30 days, (2) does not limit its prohibition of price gouging to persons or businesses that only sold items before the emergency declaration, and (3) does not limit its prohibition to price gouging on items that were in existence and available pre-emergency.[112] California's price gouging law, Penal Code Section 396, also was amended during the pandemic to include a new requirement that prohibits new market entrants from charging more than 50 percent more than their costs.[113] And during the Omicron surge of late 2021 and early 2022, the Governor of California issued an executive order, described as being enforceable under Government Code Section 8665,[114] prohibiting price gouging of COVID-19 home tests.[115] Such an order was necessary because price gouging at issue occurred 18 months after Penal Code Section 396's prohibition on price gouging during the COVID-19 pandemic expired and because the price gouging concerned items that were not in the stream of commerce at the time the emergency was declared.

On the other hand, the California price gouging law's rental provision offered strong protection for consumers through the pendency of the COVID-19 emergency. Unlike the consumer goods provision, the section of the price gouging law governing rent prohibits raising rents by more than 10 percent both "for a period of 30 days following" the proclamation or declaration of emergency

and "any period the proclamation or declaration is extended by the applicable authority."[116] In other words, the protection for renters remained in effect for the entire state of emergency. This provision, along with the nationwide eviction moratorium, protected renters from unfair price hikes and homelessness during the pandemic.

At the federal level, the Defense Production Act is a robust authority that can prevent both price gouging and hoarding. Under the Defense Production Act, the President—or the President's authorized delegate—can, in a state of emergency, designate that certain goods or materials are needed to respond to the emergency and prevent any person from accumulating those materials "(1) in excess of reasonable demands of business, personal, or home consumption, or (2) for the purpose of resale at prices in excess of prevailing market prices."[117] During the pandemic, President Trump authorized the Secretary of Health and Human Services to designate materials under the Defense Production Act.[118] The Secretary designated various personal protective equipment, face masks, drugs, ventilators, disinfectant, and other related goods deemed necessary to combat the pandemic. The Defense Production Act could serve as a powerful predicate violation under the UCL's "unlawful" prong to prosecute price gougers and hoarders.[119]

IV. LAW ENFORCEMENT EFFORTS TO HALT AND CURB PANDEMIC-RELATED DECEPTIVE AND UNFAIR BUSINESS PRACTICES

Government agencies and law enforcement worked actively to halt or otherwise thwart unlawful and predatory business practices during the pandemic. In addition to traditional tools such as criminal prosecution and civil law enforcement, the scale and volume of fraudulent practices required agencies to use informal methods such as warning letters and consumer education to curb the negative impact of the unfair and unlawful behavior.

A. WARNING LETTERS EFFECTIVELY ADDRESS LARGE NUMBERS OF EMERGING PANDEMIC SCAMS

As new and unexpected scams quickly emerged during the pandemic, the FDA, the FTC, and local law enforcement agencies attempted to thwart unlawful practices by issuing hundreds of warning letters. Issuing targeted warning letters has enabled law enforcement agencies to use their limited resources to seek voluntary compliance against pandemic-related violations instead of devoting time and resources to engage in protracted litigation.

1. THE FTC ISSUES WARNING LETTERS

Starting in late March 2020, the FTC began its efforts to eliminate false or misleading information about the pandemic from the marketplace by issuing letters "to warn companies that their conduct is likely unlawful and that they can face serious legal consequences, such as a federal lawsuit, if they do not immediately stop."[120] The FTC sent more than 120 warning letters which, in some cases, were sent jointly with the FDA or the FCC.[121] These letters were sent to companies making deceptive or scientifically unsupported claims about their ability to treat or cure COVID-19, multi-level marketers regarding health and earnings claims related to coronavirus, and Voice over Internet Protocol ("VoIP") service providers and other companies for "assisting and facilitating" illegal coronavirus-related telemarketing calls.[122] The types of products were varied and included vitamins, herbs, colloidal silver, teas, essential oils, and other products pitched as scientifically proven COVID-19 treatments or preventatives, general therapy products, supplements, and herbal treatments, nebulizers, naturopathic and homeopathic treatments, hydrotherapy, and even freeze-dried horse milk.[123]

The FTC's warning letters instructed targets to immediately remove their deceptive advertising, demanded a response within 48 hours, and advised targets that the Commission might

seek a federal court injunction and an order requiring money to be refunded to consumers if the conduct didn't cease. The FTC notes that recipients overwhelmingly "t[ook] steps quickly to correct problematic advertising or marketing language and come into compliance with the law."[124] Although the FTC described these warning letters as "the most rapid and effective means to address the problem,"[125] it did pursue enforcement actions too.[126]

2. FDA ISSUES WARNING LETTERS IN CONJUNCTION WITH ENFORCEMENT ACTIONS

The FDA also took significant proactive steps to monitor firms marketing products with fraudulent COVID-19 prevention and treatment claims. In early 2020, the FDA, which received more than 1,486 reports of fraudulent products related to COVID-19, launched Operation Quack Hack "[t]o proactively identify and neutralize threats to consumers."[127] As of July 15, 2021, this team had reviewed thousands of websites, social media posts, and online marketplace listings, resulting in more than 180 warning letters to sellers, more than 312 reports sent to online marketplaces, and more than 299 abuse complaints sent to domain registrars.[128]

The FDA primarily addressed false claims regarding the efficacy of masks, tests, and other COVID-19-related products by sending companies warning letters. It issued warning letters to companies concerning false statements about FDA approvals of KN95 masks that also were considered to be "adulterated" and "misbranded" because they were sold "without marketing approval, clearance, or authorization from the FDA."[129] The FDA additionally confronted the dangerous sale of unapproved and misbranded testing kits, which unlawfully displayed FDA logos, by issuing warning letters to the responsible companies.[130] Consumers' unwitting use of unreliable tests is particularly dangerous as it could cause COVID-positive patients to unknowingly infect others.

During the pandemic, many companies made false and misleading extended efficacy claims about COVID-19 disinfectants that they claimed were safe and effective.[131] The FDA sent warning letters to several of these companies.[132] In those letters, it noted that false claims "endanger the public health by creating a false sense of security for the general public that may result in infrequent hand washing or the substitution of these products for protective gloves and clothing, which are the principal methods for protecting against the spread of diseases caused by pathogenic microorganisms."[133] The agency further warned of the consequence of such false claims:

> [T]his product may give users the false impression that they need not rigorously adhere to interventions such as social distancing and exercising good hygienic practices that have been demonstrated to curb the spread of COVID-19. Users who do not follow these interventions are at increased risk for contracting COVID-19 and for spreading disease if they have been exposed to the virus, thereby prolonging the pandemic and increasing its associated morbidity and mortality.[134]

The FDA warning letters also advised that because the disinfectants are being offered to diagnose, cure, mitigate, treat, or prevent COVID-19 and affect the structure or function of the body, they are new drugs requiring FDA approval. The FDA advised that these unapproved sanitizers are not generally recognized as safe and effective for use under the conditions prescribed, recommended, or suggested in their labeling (namely to address COVID-19), and required preapproval.[135]

Another category of warning letters, often issued jointly with the FTC, involved purported "cures." The warning letters explained that the FTC Act[136] prohibits companies from advertising that a product can:

> prevent, treat, or cure human disease unless you possess competent and reliable

> scientific evidence, including, when appropriate, well-controlled human clinical studies, substantiating that the claims are true at the time they are made. To make or exaggerate such claims, whether directly or indirectly, through the use of a product name, website name, metatags, or other means, without rigorous scientific evidence sufficient to substantiate the claims, violates the FTC Act.[137]

In one case, the FDA and FTC identified a nasal spray ad claiming that the product "kills viruses of the *Coronaviridae* family including the 2019 Novel Coronavirus and SARS at their point of entry into your body."[138] The FDA made it clear that this product was considered an unapproved new drug that was misbranded and demanded that the company stop making deceptive claims.

B. ATTEMPTS TO EDUCATE THE PUBLIC ABOUT PANDEMIC SCAMS

Large-scale educational campaigns also protected consumers from COVID-19 scams. The FDA issued more than 325 news announcements on COVID-19 topics to alert the public about misleading and dangerous products.[139] For example, the FDA issued warnings about hand sanitizers that its testing revealed contained hazardous ingredients.[140] The FDA currently has a shockingly-long list of 273 unsafe hand sanitizers marketed during the pandemic that consumers should consult before purchasing sanitizer.[141] The challenge for consumers in this context is evaluating which products they can safely purchase if they do not know about or have the time to regularly check the FDA list.

Another source of confusion occurs when companies use phrases like "FDA registration" and "EPA efficacy" to suggest approvals by these agencies for their COVID-related products. As the FDA notes, "When a facility *registers* its establishment and lists its devices, the resulting entry in the FDA's registration and listing database does **not** denote approval, clearance, or authorization of that facility or its medical devices."[142] As a result, FDA registrations are virtually meaningless, outside the context of the simple fact of registration with the FDA's database. However, to the general public, these "registration" claims can lead consumers to mistakenly presume products are reliable and FDA approved. Similarly, consumers often don't understand that an "EPA establishment number" only identifies the location where the product was produced in contrast to an "EPA registration number" which signifies that the pesticide and its claims have been reviewed and approved by EPA.[143]

Other federal agencies also offered pandemic-related advice to provide consumers with the important tools to help them identify the large numbers of proliferating scams. The CDC issued warnings to consumers about counterfeit masks and tips on identifying fake products.[144] The EPA expressed concern about pesticide and pesticide device products that are fraudulent, counterfeit, and/or otherwise ineffective being sold online on e-commerce platforms.[145] To address consumer confusion about effective COVID-19 disinfectants, particularly in a marketplace filled with new entrants making a variety of efficacy claims, the EPA created "List N." This list includes disinfectants that meet the EPA's criteria for use against the virus that causes COVID-19.[146] The EPA warned that "just because a product label states that it 'kills 99.9% of viruses,' this does not necessarily mean that it will be effective against the coronavirus."[147] It is easy to understand how claims concerning the effectiveness of COVID-19 disinfectants can mislead consumers who are unfamiliar with these distinctions.

Similarly, the Consumer Financial Protection Bureau ("CFPB") launched a sustained consumer education campaign on COVID-19 scams, especially those related to fraudsters' attempts to gain access to consumers' financial information. Examples include reminders that you do not need a social security number in order to get a COVID-19 test or vaccine[148] and that no one needs to pay a fee (including for early access) or share financial or

personal information for a vaccine.[149] The CFPB also warned consumers about coronavirus charity scams,[150] government imposter scams,[151] funeral or burial expense scams,[152] student loan scams (including warnings that the CARES Act does not include a student loan forgiveness component),[153] unemployment benefit scams,[154] and child tax credit scams.[155]

C. ENFORCEMENT ACTIONS AND SEIZURES

1. FEDERAL ENFORCEMENT ACTIONS

a. *FEDERAL CIVIL LAW ENFORCEMENT ACTIONS*

i. FTC

Before the passage of the COVID-19 Consumer Protection Act of 2020 ("CCPA"), the FTC pursued actions under Section 5 of the FTC Act. In April 2020, the FTC filed an administrative action against Marc Ching, who was doing business as Whole Leaf Organics, for his sale of a product he claimed could treat COVID-19 as well as other products he claimed could treat cancer.[156] The FTC pursued this action after defendants failed to comply with a request, which was made in a November 2019 FDA warning letter, that defendants stop suggesting that their products could be used in the mitigation, treatment, or prevention of diseases from their website.[157] Defendants stipulated to a preliminary injunction in federal district court. An administrative order subsequently was issued prohibiting defendants from making prohibited statements and requiring corrective notices to prior purchasers.[158]

The FTC agreed to settle a case with the medical director of California-based Golden Sunrise Nutraceutical, Inc. based on charges that he took part in deceptively advertising a $23,000 treatment plan as a scientifically proven way to treat COVID-19. This included claims that he was "uniquely qualified to treat and modify the course of the Coronavirus epidemic in CHINA and other countries," and that users could expect the "disappearance of viral symptoms within two to four days."[159] The defendant will be barred from making similar unsupported health claims in the future and will pay $103,420 to provide refunds to defrauded consumers.[160]

The Federal Trade Commission also took actions pursuant to the new authority it was granted under the CCPA.[161] The CCPA specifically made it unlawful under Section 5 of the FTC Act to engage in any deceptive act or practice associated with the treatment, cure, prevention, mitigation, or diagnosis of COVID-19 or a benefit related to COVID-19. The law provides that "a violation shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under Sec. 18(a)(1)(B) of the FTC Act."[162] The Commission can seek emergency injunctions, asset freezes, and civil penalties of up to $46,517 for each violation of the CCPA.[163]

The FTC has utilized the CCPA to address COVID-19 claims. It recently filed a lawsuit under the CCPA alleging that a company falsely claimed that its nasal sprays are "an effective solution to the pandemic" that provides four-hours of protection against coronavirus.[164] Additionally, a chiropractor and his company who allegedly claimed their vitamin D and zinc supplements were scientifically proven to treat or prevent COVID-19, and that they were equally or more effective than vaccines, were also sued using the CCPA.[165] Additionally, the Commission used the CCPA to pursue a case against a marketer who allegedly failed to deliver PPE within promised timeframes and falsely claimed consumers would get certified N95 respirators but instead provided inferior cloth masks.[166]

ii. SECURITIES AND EXCHANGE COMMISSION

In contrast to the FTC, the Securities and Exchange Commission's ("SEC") mission is investor-focused; it seeks to support the fairness of the securities market, not necessarily the marketplace for consumer goods and services. But in the context of responding to a rapidly evolving pandemic, the SEC has also played a significant role.

There are multiple, often related, types of securities fraud that have been seen during the pandemic. First, a fraud of sufficient scale will require some capital formation. Fraudsters often need capital to facilitate orders to attempt to import unauthorized or un-approved test kits, for example. Offerings or sales of securities can be an efficient way to raise that capital, especially in the earliest days of a pandemic when information on what test kits or treatments are FDA-approved is uncertain. A second form of pandemic-related securities fraud is more prosaic—pump-and-dump schemes, especially involving penny stocks. If a company looks like it might have an early "cure" or "treatment," it becomes a company that has the potential to secure massive market share for a very desired product. The SEC has launched enforcement actions on both of these types of COVID-19 fraud, and all of these enforcement actions have also helped protect consumers and public health.

During the pandemic, the SEC initiated a number of enforcement actions arising from companies allegedly making false statements to investors and the market about their purported development of products and services relating to COVID-19. In May 2020, the SEC filed actions against Applied BioSciences and Turbo Global Partners. In the Applied BioSciences case, the SEC alleged that the company made false statements claiming it had developed "home" COVID-19 tests when none had yet been approved for distribution by the FDA.[167] And in its enforcement action against Turbo Global Partners, the SEC brought a claim for violations of Section 10(b) of the Securities and Exchange Act after the company allegedly falsely claimed it had entered into a large multi-national public-private partnership to sell thermal scanning equipment to detect people with fevers.[168] In February 2021, the SEC filed an action against Arrayit Corporation and its CEO for allegedly making false statements in March and April 2020 that the company had developed a blood test to diagnose COVID-19, when in reality it had not even purchased the necessary materials.[169]

b. *Federal Criminal Law Enforcement Actions*

In addition to civil enforcement actions, the federal government also brought criminal charges against individuals engaged in COVID-19-related deceptive practices. The United States Attorney for the Central District of California brought the first COVID-19 criminal prosecution in March 2020, charging a small-time actor with attempted wire fraud after he falsely claimed on a viral video that he invented the cure for COVID-19 and sought seven-figure investments for his injections and pills.[170] In another criminal fraud case from the early pandemic, the United States Attorney for the District of Columbia charged the CEO of Decision Diagnostics Corp. with securities fraud after he allegedly defrauded investors "by making false and misleading statements about the purported development of a new COVID-19 test, leading to millions of dollars in investor losses."[171] The government alleged the company falsely claimed it developed a 15-second test to detect COVID-19 from a finger prick sample of blood and was on the verge of receiving FDA approval, leading the company's stock to jump by more than 1,500 percent within a month.[172] In truth, the test allegedly was not a validated method of accurately detecting COVID-19, much less an actual product ready for manufacture and sale.

c. *Federal Seizures*

Throughout the pandemic, United States Customs and Border Patrol Agency ("CBP") seized unlawful COVID-19-related products that were being shipped into the United States.[173] In one case CBP seized 28,800 of what it described as "[a] Chinese medication, falsely advertising to treat COVID-19."[174] In another case in Seattle, CPB seized "eight shipments of unauthorized influenza treatments being marketed to treat COVID-19."[175]

2. State and Local Enforcement Actions

State and local law enforcement agencies also played an important role in protecting the public from and shutting down COVID-19 scams.

In California, state and local agencies used the UCL and FAL to great effect to quickly halt consumer COVID-19 scams in their infancies. In a little over two months after the state of emergency was first declared in California, the Los Angeles City Attorney's Office shut down four different companies allegedly selling unauthorized and falsely advertised "at-home" COVID-19 test kits by bringing enforcement actions under the UCL and FAL.[176] These actions also alleged predicate violations of California's Sherman Food, Drug, and Cosmetic Law for the unlawful sale and false advertisement of unapproved medical devices.[177] The office obtained judgments for permanent injunctions prohibiting future sales, full restitution, and more than $4 million in civil penalties.[178]

The Consumer and Workplace Protection Unit of the Los Angeles City Attorney's Office also brought actions to fight price gouging, the sale of false cures, and the advertisement of unregistered disinfectant pesticide claiming to "kill" the novel coronavirus for at least 28 days after application. The office brought a UCL and FAL action against a company, KNature, selling $100 jars of radish paste that it allegedly claimed could treat COVID-19.[179] The office was able to obtain a temporary restraining order halting the advertisements under the UCL's more deferential standard for law enforcement seeking preliminary equitable relief,[180] which induced an early resolution for full restitution, an injunction, and penalties. And in *People v. Wellness Matrix Group, Inc.*, the office obtained a judgment for restitution, injunctive relief, and millions in civil penalties against a company that allegedly sold unapproved FDA test kits and unregistered disinfectant pesticide in violation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[181] The company is alleged to have falsely claimed its product was an "EPA approved" disinfectant guaranteed to "kill[] corona on contact" for "28 days or more" after application and provided an allegedly false white paper the company said supported those claims.[182] The office also successfully prosecuted eight COVID-19 criminal price gouging cases, including some of the first cases in the nation brought against online retailers for price gouging.

California's Attorney General also brought a case under the UCL pertaining to workplace protection concerns in the pandemic. In November 2021, the California Attorney General filed a UCL case against Amazon related to its COVID-19 notification practices alleging that its COVID-19 notifications to employees and to the employers of subcontracted employees, and reports to local health agencies, did not fully satisfy the requirements of the California Labor Code and constituted unfair competition.[183] Ultimately, the case was settled with Amazon being ordered to update its COVID-19 notification polices, take action to protect workers, pay $500,000 to be used for the enforcement of consumer protection laws, issue notices to workers within one day that identify the exact number of new COVID-19 cases in their workplace, inform workers of disinfection and safety plans and COVID-19-related rights, notify health care agencies of COVID-19 cases within 48 hours, and submit to monitoring by the California Attorney General.[184]

The UCL and FAL are such flexible and powerful tools for combatting COVID-19 fraud that federal agencies frequently referred cases to California state and local agencies for litigation. For instance, as part of its broader focus on healthcare fraud, the Department of Defense's Defense Criminal Investigative Service ("DCIS") investigated Applied BioSciences for allegedly advertising fake COVID-19 home tests. After working up the case, DCIS referred it to the Los Angeles District Attorney and Los Angeles City Attorney for prosecution and enforcement, as the UCL provided the opportunity for an effective and speedy end to the unlawful conduct. The local prosecutors filed a civil law enforcement action in just weeks and the action settled for a permanent injunction, full restitution, and penalties doubling the company's sales revenue from the unlawful tests[185]—just one example of how the UCL encouraged cross-jurisdictional collaboration between state, local, and federal agencies.

Consumer protection prosecutors in other states used their UDAPs to halt and curb deceptive and unlawful COVID-19 business practices in their jurisdictions. The Attorney Generals of Arkansas and Missouri, for instance, brought civil law enforcement actions against televangelist James Bakker for falsely advertising and unlawfully selling colloidal silver as a cure for COVID-19.[186] Both obtained settlements—after Bakker unsuccessfully sought to have all investigations into his misconduct enjoined as purported violations of the First Amendment's Establishment and Free Exercise Clauses[187]—for permanent injunctions and full restitution to consumers.[188] And the Minnesota Attorney General sued the Center for COVID Control, a company operating hundreds of COVID-19 testing storefronts nationwide, for violations of Minnesota's Consumer Fraud, False Advertising, and UDAP statutes for falsely guaranteeing fast test results and creating false and inaccurate result reports.[189] The litigation is ongoing, but as a result of the filing of the lawsuit, the Center for COVID Control suspended operations nationwide.[190]

V. PROPOSALS TO IMPROVE LEGAL OPTIONS TO PROTECT CONSUMERS IN FUTURE LONG-TERM STATES OF EMERGENCY

Evaluating the challenges that law enforcement agencies have faced during this unprecedented pandemic is critical in determining the legislative changes that are necessary to create more robust consumer protections. Requiring the legislature to restore the FTC's ability to obtain monetary relief pursuant to Section 13(b) of the FTC Act, which it lost following the Supreme Court's decision in *AMG Capital Management*,[191] is one of the most critical and urgently needed changes.[192] As of January 28, 2022, the FTC had received more than 292,000 COVID-19-related fraud reports, reflecting $674 million in fraud losses.[193] Restoring the FTC's ability to provide redress to wronged consumers through its 13(b) authority, which has been a fundamental part of its consumer protection mission, is critical.[194] Here, where the financial losses are so significant, true relief for victims of COVID-19 scams can only come with the restored ability to obtain nationwide redress.

Although the CCPA eventually was passed to provide the FTC with additional tools to address pandemic-related issues, it's important that the FTC be able to move swiftly to provide redress in cases that may not fit within the parameters of that new law. The FTC's broad authority to obtain consumer redress should be reinstated.

State price gouging laws should be reformed to better respond to longer-term emergencies like pandemics or environmental disasters. The current laws, like California Penal Code Section 396, are designed for what are hopefully shorter-term emergencies—earthquakes, wildfires, and the like. They do not take into account the fact that price gouging may occur months or years after the initial declaration of emergency or that the products being gouged may not even have existed when the disaster started. A hybrid model combining elements of Penal Code Section 396 and the Defense Production Act could strike an appropriate balance. Like in Section 396, price gouging of all consumer goods would be prohibited for the first 30 days following the declaration of emergency, but going forward until the expiration of the declaration, a product must be designated under the Defense Production Act in order to be subject to the anti-price gouging law. This approach provides broad, short-term protection for consumers at the inception of a crisis, while providing more targeted protection (if necessary) in a longer-term emergency. By tying the price gouging prohibition to a product's designation under the Defense Production Act, the new approach limits liability only to those products directly related to the emergency and supports the broader public response to the disaster.

"Pop-up" testing centers are a new challenge that should also be addressed legislatively. Without specific laws designed to address pop-up centers, it is difficult for regulators and law enforcement to

have the necessary tools to ensure that locations are safely engaging in the testing of consumers and are not, instead, engaged in identity theft or are taking samples that are not being properly tested. New laws should be adopted to prescribe specific requirements that must be met before such facilities are allowed to operate. This could include a registration requirement with the local, state, and/or federal government that includes information about which CLIA-certified lab is being used, who the responsible parties are for the operation, what steps are being taken to ensure the safe collection of samples, and information concerning (1) what types of personal information is being collected, (2) the steps that are being taken to secure sensitive health information and other personally identifying information, and (3) where the operation will be located.

Finally, civil penalties for violations of California's UCL and FAL could be increased to reflect the harm that can be caused by these types of schemes when they are perpetrated during a state of emergency. The current maximum penalty of $2,500 per violation is a far cry from the recently passed CCPA penalty amount of $46,517, and even a simple, conversative inflation estimate suggests that a maximum penalty of $10,000 today would still be worth less than $2,500 was in 1977, the year the penalty was enacted by the California Legislature.[195] In order to create more consistency on the state and federal levels, and to create a deterrent, increasing civil penalties in California may be an important modification to consider.

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1. The views expressed herein are solely the authors, and not necessarily the Los Angeles City Attorney's views.

2. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 181 (1999) ("[U]nfair or fraudulent business practices may run the gamut of human ingenuity and chicanery," so it is "impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited.") (cleaned up).

3. *Id.*

4. *CDC Museum COVID-19 Timeline*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/museum/timeline/covid19.html (last visited Mar. 2, 2022); Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

5. *Id.*

6. *Id.*

7. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

8. *CDC Museum COVID-19 Timeline*, *supra* note 4.

9. Proclamation No. 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020).

10. *See, e.g.*, Proclamation of a State of Emergency issued by the Governor of California (Mar. 4, 2020); Public Order Under City of Los Angeles Emergency Authority issued by the Mayor of Los Angeles (Mar. 15, 2020); Safer At Home Order for Control of COVID-19 issued by the Los Angeles County Board of Supervisors (Mar. 19, 2020); Cal. Exec. Order No. 33-20 (Mar. 19, 2020), *available at* https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf.

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29. *See generally* Compl., *People v. RootMD, Inc.*, No. 20STCV15180 (Cal. Super. Ct. Apr. 20, 2020); Press Release, L.A. City Att'y, Feuer Secures Judgment Against La-Area Covid-19 At-Home Test Distributor (Apr. 20, 2020), https://www.lacityattorney.org/post/

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cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html (last visited Mar. 2, 2022); *Testing for COVID-19: When to Get Tested and testing Results*, Gov't of Canada, https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/symptoms/testing/diagnosing.html (last visited Mar. 2, 2022).

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58. *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499, 520 (1997).

59. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999) (citations and internal quotation marks omitted).

60. Cal. Bus. & Prof. Code § 17200.

61. *Cel-Tech Commc'ns, Inc.*, 20 Cal. 4th at 180.

62. *Id.*

63. *Saunders v. Superior Ct.*, 27 Cal. App. 4th 832, 839 (1994).

64. *State Farm Fire & Cas. Co. v. Super. Ct.*, 45 Cal. App. 4th 1093, 1103 (1996).

65. *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167 (2000).

66. *Id.*

67. *Cel-Tech Commc'ns, Inc.*, 20 Cal. 4th at 187.

68. *Id.* at 181 (citing *Am. Philatelic Soc'y v. Claibourne*, 3 Cal. 2d 689, 698 (1935) ("The unfair competition law has a broader scope for a reason. The Legislature intended by this sweeping language to permit tribunals to enjoin on-going wrongful business conduct in whatever context such activity might occur. Indeed, the section was intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of man's invention would contrive." (cleaned up))).

69. *See People v. Conway*, 42 Cal. App. 3d 875, 885 (1974) (company president "was in a position to control the activities" of corporation and "thus could be held [] liable" for his employees' violations of the law); *see also People v. Toomey*, 157 Cal. App. 3d 1, 15 (1984) ("[I]t is settled that a managing officer of a corporation with control over the operation of the business is personally responsible for acts of subordinates done in the normal course of business.").

70. *See People v. Roscoe*, 169 Cal. App. 4th 829, 831–32 (2008); Statement of Decision, *People v. WBI LLC*, No. CV17-1989 (Cal. Super. Ct. May 10, 2021).

71. Cal. Bus. & Prof. Code § 17500.

72. *See Chern v. Bank of Am.*, 15 Cal. 3d 866, 876 (1976); *People v. Super. Ct.*, 96 Cal. App. 3d 181, 190 (1979).

73. *People v. Super. Ct.*, 9 Cal. 3d 283, 289 (1973); *Prata v. Super. Ct.*, 91 Cal. App. 4th 1132, 1145 (2001).

74. *Chern*, 15 Cal. 3d at 876.

75. *Fletcher v. Sec. Pac. Nat'l Bank*, 23 Cal. 3d 442, 451 (1979).

76. *People v. Overstock.com, Inc.*, 12 Cal. App. 5th 1064, 1078 (2017).

77. *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332–33 (1998); *see also People v. Toomey*, 157 Cal. App. 3d 1, 17 (1984) ("[F]ailure to disclose conditions and limitations on the use of the coupons misrepresented the nature and value of the product and therefore in itself constituted 'unfair competition' and 'false or misleading statements' under sections 17200 and 17500.").

78. *Brockey v. Moore*, 107 Cal. App. 4th 86 (2003); *Colgan v. Leatherman Tool Grp., Inc.*, 135 Cal. App. 4th 663 (2006).

79. *See e.g.*, *People v. Conway*, 42 Cal. App. 3d 875, 885 (1974); *Toomey*, 157 Cal. App. 3d at 15 (individual officers liable for false advertising conducted by subordinate employees under "control" theory).

80. 15 U.S.C. § 45(a)(1).

81. *Fed. Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (adopting standard in *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164–65 (1984)); *accord Fed. Trade Comm'n v. LoanPointe, LLC*, 525 F. App'x 696 (10th Cir. 2013); *Fed. Trade Comm'n v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009).

82. *Fed. Trade Comm'n v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012) (citing *Fed. Trade. Comm'n v. U.S. Sales Corp.*, 785 F. Supp. 737, 748 (N.D. Ill. 1992)).

83. *See Fed. Trade Comm'n v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006).

84. *In re Thompson Med. Co., Inc.*, 104 F.T.C. 648 (1984), *aff'd sub nom. Thompson Med. Co. v. Fed. Trade Comm'n*, 791 F.2d 189, 197 (D.C. Cir. 1986).

85. *See Pantron I Corp.*, 33 F.3d at 1095–96.

86. *Cyberspace.com LLC*, 453 F.3d at 1200 ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures."); *Stefanchik*, 559 F.3d at 928 ("Deception may be found based on the 'net impression' created by a representation.").

87. *Fed. Trade Comm'n v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997); *accord Removatron Int'l Corp. v. Fed. Trade Comm'n*, 884 F.2d 1489, 1495 (1st Cir. 1989); *Fed. Trade Comm'n v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988).

88. *Fed. Trade Comm'n v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 12 (1st Cir. 2010).

89. *Resort Car Rental Sys., Inc. v. Fed. Trade Comm'n*, 518 F.2d 962, 964 (9th Cir. 1975).

90. *Fed. Trade Comm'n v. City West Advantage, Inc.*, No. 2:08-cv-00609-BES-GWF, 2008 WL 2844696, at *2 (D. Nev. July 22, 2008).

91. *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188 (1948).

92. *Sterling Drug, Inc. v. Fed Trade Comm'n*, 741 F.2d 1146, 1154 (9th Cir. 1984); *see In re Thompson Med. Co.*, 104 F.T.C. 648, 818 (1984) (stating that to make a case that advertising is deceptive, the FTC has the burden of showing that the material claims communicated to reasonable consumers by the advertising are false in some manner).

93. *Fed. Trade Comm'n v. OMICS Grp. Inc.*, 374 F. Supp. 3d 994, 1010 (D. Nev. 2019); *Fed. Trade Comm'n v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993).

94. *In re Sanctuary Belize Litig.*, 482 F. Supp. 3d 373, 434 (D. Md. 2020) (requiring such proof "'would thwart the effective prosecutions of large consumer redress actions and frustrate the statutory goals of the' FTC Act" (quoting *Figgie Int'l, Inc.*, 994 F.2d at 605)).

95. *Figgie Int'l, Inc.*, 994 F.2d at 606.

96. *See Fed. Trade Comm'n v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010).

97. *Id.*

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99. *Id.*

100. *Fed. Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994).

101. Cal. Bus. & Prof. Code § 17203 (authorizing courts "to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition").

102. 15 U.S.C. § 53.

103. *Fed. Trade Comm'n v. Com. Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016); *see also Fed. Trade Comm'n v. Ross*, 743 F.3d 886, 890–92 (4th Cir. 2014); *Fed. Trade Comm'n v. Gem Merch. Corp.*, 87 F.3d 466, 468–70 (11th Cir. 1996); *Fed. Trade Comm'n v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314–15 (8th Cir. 1991); *Fed. Trade Comm'n v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571–72 (7th Cir. 1989).

104. *AMG Capital Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1349 (2021).

105. *Id.*

106. *Id.* at 1348–49.

107. *Id.* at 1349.

108. *Id.*

109. Cal. Penal Code § 396.

110. *Id.* § 396(b).

111. *Id.* § 396(e).

112. L.A. Mun. Code § 47.12(d) (2020).

113. Cal. Penal Code § 396(b) ("If the person, contractor, business, or other entity did not charge a price for the goods or services immediately prior to the proclamation or declaration of emergency, it may not charge a price that is more than 50 percent greater than the cost thereof to the vendor as 'cost' is defined in Section 17026 of the Business and Professions Code.").

114. Section 8665 provides that "[a]ny person who violates any of the provisions of this chapter or who refuses or willfully neglects to obey any lawful order or regulation promulgated or issued as provided in this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not to exceed one thousand dollars ($1,000) or by imprisonment for not to exceed six months or by both such fine and imprisonment." Cal. Gov't Code § 8665.

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118. Exec. Order No. 13,910, Preventing Hoarding of Health and Medical Resources to Respond to the Spread of COVID-19, 85 Fed. Reg. 17,001 (Mar. 23, 2020).

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120. *FTC Coronavirus Warning Letters to Companies*, Fed. Trade Comm'n, https://www.ftc.gov/coronavirus/enforcement/warning-letters (last visited Mar. 2, 2022).

121. *Id.*; Press Release, Fed. Trade Comm'n, FTC Sends Letters Warning 50 More Marketers to Stop Making Unsupported Claims That Their Products and Therapies Can Effectively Prevent or Treat COVID-19, https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sends-letters-warning-50-more-marketers-stop-making.

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123. Press Release, Fed. Trade Comm'n, FTC Sends Letters Warning 50 More Marketers to Stop Making Unsupported Claims That Their Products and Therapies Can Effectively Prevent or Treat COVID-19 (May 21, 2020), https://www.ftc.gov/news-events/press-releases/2020/05/ftc-sends-letters-warning-50-more-marketers-stop-making.

124. *FTC Coronavirus Warning Letters to Companies*, *supra* note 120.

125. *Id.*

126. *Pandemic: The FTC in Action*, Fed Trade Comm'n, https://www.ftc.gov/coronavirus (last visited Mar. 5. 2022) (summarizing the FTC's enforcement efforts and including links to articles about specific actions); *see, e.g.*, Press Release, Fed. Trade Comm'n, FTC Sues PPE Marketer for Falsely Promising Quick Delivery of N95 Facemasks (June 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/ftc-sues-ppe-marketer-falsely-promising-quick-delivery-n95; Press Release, Fed Trade Comm'n, FTC Sues California Marketer of $23,000 COVID-19 "Treatment" Plan (July 31, 2020), https://www.ftc.gov/news-events/press-releases/2020/07/ftc-sues-california-marketer-23000-covid-19-treatment-plan; *see also infra* Sections IV.A.2, IV.C.1.a.i.

127. U.S. Food & Drug Admin., FDA COVID-19 Response 1 (2021), https://www.fda.gov/media/137005/download.

128. *Id.*

129. Warning Letter from Donna Engleman, Div. Mkt. Intel. Dir., U.S. Food & Drug Admin., to Databazaar.com (Sept. 3, 2021), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/databazaarcom-617199-09032021; Warning Letter from Donna Engleman, Div. Mkt. Intel. Dir., Food & Drug Admin., to Manhattan Stitching Co. (Apr. 13, 2021), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/manhattan-stitching-company-inc-611719-04132021.

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Admin., to Rich Butler, Managing Dir., DermaCare Biosciences, Ltd. (Dec. 1, 2021), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/dermacare-biosciences-ltd-617910-12012021; Warning Letter from Timothy T. Stenzel, Off. In Vitro Diagnostics & Radiological Health Dir., Food & Drug Admin., to Chris Ormiston, USH Diagnostics, Inc./Covidinstanttest.net (July 9, 2021), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/ush-diagnostics-inccovidinstanttestnet-612084-07092021.

131. Warning Letter Donald D. Ashley, Off. Compliance Dir., Food & Drug Admin., to Michael Reiber, Prefense LLC (Apr. 23, 2020), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/prefense-llc-605488-04232020; Warning Letter from Donald D. Ashley, Off. Compliance Dir., Food & Drug Admin., to Despo Caldwell, CEO, Disinfect & Shield (May 6, 2021), https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/disinfect-shield-613716-05062021.

132. *See id.*

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AAM V. ROBERT BONTA: AN END TO CALIFORNIA PHARMACEUTICAL LEGISLATIVE REFORM?

Written by Seth Silber[1] and Alexander Poonai[2]

In December 2021, California's latest ambitious legislative effort to reform the healthcare industry ran into another hurdle. California Assembly Bill No. 824, "Preserving Access to Affordable Drugs" ("AB 824"),[3] was introduced back in February 2019 to reduce drug costs to consumers by increasing scrutiny of so-called "reverse payment" or "pay-for-delay" agreements. These agreements are used to settle certain complex patent infringement lawsuits in federal district courts throughout the country. The bill's supporters argue that reverse payment agreements harm consumers by protecting "weak" patents on expensive drugs. Opponents of the bill argue that AB 824 would unconstitutionally regulate business outside of California's borders, that it is preempted by the federal patent and antitrust laws, and that it would have the opposite of its intended effect on drug prices.

Soon after the bill's enactment, the Association for Accessible Medicines ("AAM") brought suit to block its enforcement.[4] AAM is a trade association representing manufacturers and distributors of generic prescription drugs and others in the U.S. generic drug industry.[5] After initially facing adverse decisions at both the district court and the Ninth Circuit, on remand, the Eastern District of California ruled in late 2021 that AB 824 was likely unconstitutional in *Association for Accessible Medicines v. Bonta*.[6] After over two years of litigation since the bill's passage in 2019, U.S. District Judge Troy Nunley granted AAM's motion for a preliminary injunction preventing enforcement of the law, holding that the law likely violated the Dormant Commerce Clause of the U.S. Constitution.

A*AM v. Bonta* is the latest in a long line of decisions challenging the constitutionality of far-reaching California laws. In 2019, California successfully defended against a suit from out-of-state industry groups arguing that California's Low Carbon Fuel Standard unconstitutionally regulated activity outside of California's borders.[7] The Ninth Circuit held that that regulation was not unconstitutional because it did not aim to control fuel-related transactions outside of California and was narrowly focused and expressly written to address carbon emissions within the State. In 2015, the Ninth Circuit held that a California law requiring a royalty payment following the sale of fine art was unconstitutional under the extraterritoriality

doctrine because, unlike the carbon emissions case, this law could apply to isolated transactions outside of California.

California's recent state-level efforts at broad reform come as new federal legislation slows to a trickle. In an increasingly divided Congress, federal legislative reform appears to have become prohibitively difficult. This trend has resulted in state legislators attempting to enact laws to meet their own policy goals. *AAM v. Bonta* provides further guidance for legislators and policy professionals as to the constitutional limits of state regulation, and could cause state legislatures to rethink their attempts to regulate national industries.

I. A REFRESHER ON REVERSE PAYMENT AGREEMENTS

In February 2019, Assemblymember Jim Wood (D-Santa Rosa) introduced AB 824 in partnership with then-Attorney General Xavier Becerra.[8] In a joint press release, with Assemblymember Wood, Attorney General Becerra stated that the bill was "a crucial step in combating predatory pricing practices, like 'pay-for-delay' schemes."

A. WHAT ARE REVERSE PAYMENT AGREEMENTS?

"Reverse payment" or "pay-for-delay" agreements relate to patent litigation settlement agreements between pharmaceutical manufacturers. In a typical alleged reverse payment, a company that holds a patent sues a potential competitor to prevent the launch of a generic version of its drug. These suits arise under the federal patent laws, including the Hatch-Waxman Act. After litigation and negotiation, the parties reach a settlement in which the patent owner conveys some form of value to the generic company. In exchange, the potential generic competitor receives a license to launch its generic product at some point in the future, but before the plaintiffs' relevant patent(s) expire. Courts have held that this "payment" can take the form of a cash payment, or the transfer of other valuable goods, services, or business arrangements. These are called "reverse" payments because, under these agreements, the plaintiff (i.e., the patent owner) pays the defendant (i.e., the alleged patent infringer) to settle the litigation, rather than the other way around.

Reverse payment agreements have been considered controversial. Assemblymember Wood argues that they harm consumers by delaying the introduction of affordable generic versions of existing brand-name drugs.[9] Pharmaceutical industry professionals generally argue that reverse payment agreements can benefit patients by allowing generic companies to introduce low-cost alternatives before the end of a full twenty-year patent term.

B. HOW ARE REVERSE PAYMENT AGREEMENTS CURRENTLY REVIEWED?

Courts applied varying standards of review to reverse payment agreements until the Supreme Court's 2013 decision in *FTC v. Actavis*.[10] In that decision, the Court rejected the FTC's argument that reverse payment settlements are presumptively unlawful, and instead applied a "rule of reason" analysis. Under the rule of reason, plaintiffs challenging a reverse payment bear the burden of showing that the reverse payment agreement has anticompetitive effects.[11] The burden then shifts to the defendant pharmaceutical companies to show procompetitive justifications for the agreement. If they satisfy that standard, the burden then shifts back to the plaintiffs to show that the restraint at issue is unnecessary or that the defendant's objectives could be achieved by less restrictive means. The *Actavis* Court stressed the need to examine the individual facts of a case to determine whether a settlement harms competition. It encouraged courts to look to the size of the payment, the expected costs of the patent litigation, whether the payment could be considered compensation for unrelated services the generic firm provides the patent holder, and other relevant business justifications.

Two years after *Actavis*, the Supreme Court of California also adopted a rule-of-reason test for alleged reverse payment settlements in *In re Cipro*.[12] The court acknowledged the U.S. Supreme Court's call for other courts to develop the framework by which to analyze reverse payments and crafted a "structured" test designed to be "in harmony with *Actavis*."[13]

II. HOW WOULD AB 824 CHANGE THE CURRENT STATE OF THE LAW?

AB 824 would make it easier for third parties to challenge reverse payment agreements under the antitrust laws by establishing a rebuttable presumption that the agreements "are anticompetitive and that they delay entry of the generic drug into the marketplace." Specifically, under AB 824:[14]

> [A]n agreement resolving or settling, on a final or interim basis, a patent infringement claim, in connection with the sale of a pharmaceutical product, **shall be presumed to have anticompetitive effects** and shall be a violation of this section if both of the following apply:
>
> > (A) A [generic company] **receives anything of value** from another company asserting patent infringement, including, but not limited to, an exclusive license or a promise that the brand company will not launch an authorized generic version of its brand drug.
> >
> > (B) The [generic company] agrees to limit or forego research, development, manufacturing, marketing, or sales of the [generic company]'s product for any period of time.

The bill departs from the burden-shifting rule-of-reason approach set forth by both the U.S. and California Supreme Courts, and instead places the burden of persuasion on the defendant pharmaceutical manufacturers from the outset. The parties to the alleged reverse payment agreement may rebut the presumption by demonstrating by a preponderance of evidence that:[15]

> (A) The value received by the [generic company] . . . (1) is a fair and reasonable compensation solely for other goods or services that the nonreference drug filer has promised to provide.
>
> [or]
>
> (B) The agreement has directly generated procompetitive benefits and the procompetitive benefits of the agreement outweigh the anticompetitive effects of the agreement.

AB 824 also authorizes the California Attorney General to bring a civil suit and recover penalties against "any party to an agreement that violates this section."[16] In addition, the bill states that "[e]ach person that violates *or assists* in the violation of this section" is subject to civil penalties of "up to three times the value" either received by or given to the party "that is reasonably attributable to the violation of this section, or twenty million dollars ($20,000,000), whichever is greater."[17]

AB 824, titled "Preserving Access to Affordable Drugs," may have been inspired by the similarly named "Preserve Access to Affordable Generics and Biosimilars Act" bills, which have been introduced in the U.S. Senate and House of Representatives in recent years. Like AB 824, those bills have proposed adopting a presumption that reverse payment agreements are anticompetitive. Despite recent signs of movement in the Senate Subcommittee on Antitrust, Competition Policy, and Consumer Rights under Senators Amy Klobuchar and Chuck Grassley,[18] these bills have failed to progress further.

III. AAM'S MOTION(S) FOR PRELIMINARY INJUNCTION

Governor Gavin Newsom signed AB 824 into law on October 7, 2019. The following month, AAM brought its first challenge to the bill in a lawsuit accompanied by a motion for a preliminary injunction to prevent the bill from going into effect on January 1, 2020. That motion launched over two years of litigation, with no clear end in sight.

A. PRE-ENFORCEMENT CHALLENGE–*AAM V. BECERRA* (2019)

AAM filed its motion for a preliminary injunction on November 12, 2019. Just over one month later, on December 31, the Eastern District of California denied AAM's motion as premature.[19]

In its opinion, the court briefly questioned AAM's standing *sua sponte*. As AAM is a nonprofit, voluntary association representing generic and biosimilar manufacturers, it asserted representational standing on behalf of its members. The court found that AAM sufficiently alleged the elements of representational standing because AAM stated that its members are either currently defending against patent infringement claims or are developing generics and contemplating filing ANDAs.

1. AAM WAS NOT LIKELY TO SUCCEED ON THE MERITS

AAM alleged that AB 824 violated the Dormant Commerce Clause, was preempted by multiple federal laws, violated the Excessive Fines Clause of the Eighth Amendment, and violated the Due Process Clause. The court held that AAM failed to establish a likelihood of success in showing that AB 824 was unconstitutional under any of these theories.

First, the court held that AAM's Dormant Commerce Clause challenge was not ripe for review. AAM argued that AB 824 violates the Dormant Commerce Clause *per se* because it would directly regulate out-of-state commerce, as it is not limited to agreements entered into in California or between California entities. The State replied that it could conceivably apply the law only to agreements "contained within" California. The court ruled against AAM because, although the State would likely violate the Dormant Commerce Clause if it were to apply AB 824 to agreements that were not negotiated, completed, or entered into in California, it had not yet done so as the law had not yet taken effect. As a result, AAM's "as-applied" challenge to the law was not ripe. Further, the court reasoned that AAM had failed to show that AB 824 was likely to be enforced in an unconstitutional manner, that AAM's members had a plan to violate the law, or that AAM's members received any threats that the law would be enforced against them. Although AAM proffered declarations from its members to support its claims that they feared enforcement of the bill, none of the declarations presented a specific circumstance in which AB 824 would be applied to a member. Instead, the declarations made generalized statements about how AB 824 could hypothetically impact members' businesses.

Second, the court rejected AAM's preemption arguments. AAM argued that AB 824 conflicts with the objectives of the Hatch-Waxman Act, and that the federal patent and antitrust laws directly preempt it. The court found that this argument was not persuasive because AB 824 would not require determination of the validity of a patent or create patent-like protections. The court also held that it could not determine whether AB 824 would impact the goals of the Hatch-Waxman Act because AB 824 had not yet taken effect and because no other state had enacted any similar laws. As a result, the court found that it was impossible to know what the impact of the law would be. Citing *Cipro*, the court similarly explained that *Actavis* did not preempt state antitrust laws and did not prevent California law from imposing a presumption against reverse payments under its own antitrust statutes.

Third, the court addressed AAM's argument that AB 824 would levy unconstitutionally excessive fines. Specifically, AAM argued that AB 824 could

be applied to impose a fine against any individual who assists in what is deemed to be a violation of the statute of up to three times the value received by that individual. AAM argued that that upper threshold is excessive in relation to any anticompetitive harms and that a minimum fine of $20 million is excessive as applied to individuals. Under Ninth Circuit case law, the court explained that it must determine whether a penalty is unconstitutional as "grossly disproportionate to the offense" by examining the nature and extent of the violation, whether the violation was related to other illegal activities, whether there are other penalties that may be imposed for the violation, and the extent of the harm caused. The court held that it could not determine whether the law met the standard of "gross disproportionality" at the pre-enforcement stage because the State had not yet imposed any penalties under AB 824. The court then explained that AAM's challenge to the $20 million minimum fine was an as-applied challenge because it argued that the penalty was disproportionate only as to individuals, not as to companies. The court held that this argument was also unripe because AAM did not proffer evidence of any individuals intending to violate AB 824 or of any threats from the State to enforce the law against lower-level employees, including, for example, "a junior associate or legal secretary working at the law firm representing one of the settling parties."

Finally, AAM argued that AB 824 violated due process because it unfairly shifted the burden of persuasion to the defendant to prove procompetitive effects and because the defendants' opportunity to rebut the presumption of anticompetitive effects was meaningless. They argued that, as a practical matter, defendants will be unable to prove that agreements have had procompetitive effects when challenged under the antitrust laws because those effects bear out over time. The court held that this argument was not likely to succeed because AAM did not cite to any authority holding that the burden of persuasion may never be shifted to the defendant. The court also stated that defendants have a meaningful opportunity to disprove liability without showing the procompetitive effects of the agreement by, for example, justifying the size of any payment. Furthermore, while AB 824's presumption that the relevant market is limited to the branded drug and generic substitutes may be difficult to overcome, it is not insurmountable such that it deprives defendants of due process rights.

2. IRREPARABLE INJURY

AAM argued that its members would suffer irreparable injury because (1) violations of constitutional rights are *per se* irreparable; (2) members will be forced to either violate AB 824 or bear the financial burden of litigating every patent dispute to judgment; and (3) members will lose goodwill and suffer damage to reputation because they will have to cease entering the market to avoid the expenses presented by the bill. The court rejected AAM's argument for *per se* injury from a constitutional violation because it failed to show a likelihood of success on the merits. The court rejected the additional arguments because it found that AAM overstated the impact of AB 824, reasoning that the bill does not prohibit patent settlements outright and the alleged resulting expense of patent litigation was based on speculation of how companies will choose to react to AB 824's implementation.

3. BALANCE OF HARDSHIPS AND PUBLIC INTEREST

Finally, the court held that AAM failed to establish that the balance of hardships tipped in its favor for the same reasons addressed in the irreparable injury analysis. The court reasoned that AAM's arguments in support of the burden imposed on it were purely based on speculation as to how its members might react to the new law. The court also held that the public interest factor was neutral as to both parties because both parties argued that AB 824 would have the opposite effect on the cost of prescription drugs, and each side's arguments were purely speculative.

B. THE NINTH CIRCUIT VACATES AND REMANDS

AAM filed its notice of interlocutory appeal on January 2, 2020—only two days after the Eastern District of California denied its motion for a preliminary injunction. The Ninth Circuit accepted review and issued an opinion on July 24, 2020, vacating and remanding the lower court's order, holding that AAM lacked standing to bring its case.[20]

In a two-page opinion, the Ninth Circuit explained that AAM lacked standing to challenge the law because it did not present evidence that there was a "substantial risk" that AB 824 would cause any of its members to suffer "concrete, particularized, and imminent" injury. The court held that AAM had not established a threat of prosecution because none of the AAM member declarations expressed an intent to enter into a reverse payment settlement that would violate AB 824. AAM also did not establish that its members had incurred economic injury because its member declarations merely alleged possible future injury in the form of an expectation of being "forced" to maintain lawsuits without the option of settlement, and a possibility of staying off the market for certain products until the relevant patents expire.

C. POST-ENFORCEMENT CHALLENGE–*AAM V. BONTA* (2021)

Eight months later, on August 25, 2020, AAM filed a new complaint asserting nearly identical theories. As with its initial complaint, AAM alleged that AB 824 violates the Dormant Commerce Clause, is preempted by federal patent law, imposes excessive fines in violation of the Eighth Amendment, and violates due process by improperly shifting the burden to defendants in reverse payment settlement agreements. Unlike its previous complaint, however, AAM came to the case armed with new supporting declarations outlining its members' experiences after AB 824 came into effect.

AAM filed another motion for a preliminary injunction in September 2020, but the court did not rule on that motion until December 2021. Though one might have interpreted the delay as indicating that the court would deny the motion, the Eastern District of California ultimately issued a decision in AAM's favor, finding that it was likely to succeed on the merits of its Dormant Commerce Clause claim without reaching AAM's additional theories.[21]

First, addressing the standing issues raised in the previous cases, the court held that AAM had cured the deficiencies identified by the Ninth Circuit and properly asserted associational standing on behalf of its members. In a declaration, an AAM member stated that it pulled out of a tentative settlement agreement because it feared prosecution under AB 824. The AAM member was forced to continue to litigate a patent infringement lawsuit "at considerable cost in terms of legal fees that it would not be incurring had the settlement proposal . . . been finalized." The court held that this sufficiently established injury-in-fact. Other AAM members claimed to have suffered similar harms, including receiving less favorable settlement agreement terms and increased patent infringement defense legal fees as a result of continued litigation.

1. AAM WAS LIKELY TO SUCCEED ON THE MERITS

Turning to the merits of AAM's Dormant Commerce Clause theory, the court held that AAM was likely to succeed because the practical effect of AB 824 was to control conduct beyond California's borders. The court rejected the State's assertion that drug manufacturers could avoid liability under AB 824 by simply omitting California sales from the scope of conduct addressed by the settlement agreement, reasoning that the statute does not limit its scope to only California sales and therefore, as written, could reach a settlement agreement in which none of the parties, the agreement, nor the pharmaceutical sales have any connection to California. The court also endorsed AAM's hypothetical that "[i]f two parties settle a patent suit in Delaware on terms that AB 824

deems unlawful, the settling parties (and every person who merely assists) would be liable for severe penalties under California law." Further, the court rejected as disingenuous California's characterization of AB 824's civil penalties provision as "simply altering the . . . penalties to conduct that was already illegal under California law," noting that AB 824 could be used to levy significant civil penalties on parties that do not have any connection to California.

The court next addressed the State's ripeness arguments, holding that AAM's suit was now timely. The State had argued that AAM's claim was not ripe because the trade organization had not demonstrated that any of its members planned to violate the law or had entered into an agreement that violates AB 824, that statements made by attorneys for the California Attorney General's office during oral arguments before the Ninth Circuit did not constitute a threat of prosecution, and that AAM did not show past prosecution or enforcement of the law. The court rejected this argument, finding it did not need to rely on the ripeness test because "the gravamen of the suit is economic injury rather than threatened prosecution," and the test for Article III standing was applicable for determining constitutional ripeness. Having already determined that AAM had properly asserted associational standing on the basis of its members' economic injuries, the court found that AAM had Article III standing to pursue its claim. The Attorney General similarly challenged the renewed claim's prudential ripeness, arguing that it was not yet factually developed and required the court to speculate about hypothetical cases in which AB 824 might be enforced. The court disagreed, finding that there was sufficient factual development for judicial resolution, citing evidence that one of AAM's member companies decided to pull out of a settlement negotiation and continued litigating a patent infringement claim due to concerns about enforcement of AB 824, at significant cost to the manufacturer.

2. IRREPARABLE HARM

The court held that AAM would suffer irreparable harm because of the economic harm its members face. Although economic harm alone is not itself irreparable, it can become irreparable where parties are unable to recover monetary damages even if successful on the merits. Here, AAM cannot recover damages because California is protected by Eleventh Amendment sovereign immunity.

3. BALANCE OF EQUITIES AND PUBLIC INTEREST

Finally, the court held that the balance of equities tipped in AAM's favor because AB 824 slows the flow of generic and biosimilar drugs into the market. By contrast, any harm to California will be *de minimis* because, according to the court, California can still bring enforcement actions under federal law and can amend AB 824 to ensure it is compliant with the U.S. Constitution.

D. MODIFYING THE PRELIMINARY INJUNCTION

Undeterred by this setback, the State moved to modify the preliminary injunction within a few days of the court's decision. In its motion, the State petitioned the court to allow enforcement of AB 824 against agreements with a "connection" to California. Specifically, the State argued that AB 824 could be constitutionally applied to settlements with "in-state sales" and to settlements "negotiated, completed, or entered into in California."[22] The State also asked the court to clarify whether the injunction applies only to AAM and its institutional members, or whether it was generally applicable. AAM opposed this motion, arguing that the proposed modifications would render the injunction "a practical nullity" because all FDA-approved generics are sold in California and because limiting AB 824's application to "in-state settlements" would not cure the fact that the law still directly regulates out-of-state commerce.[23]

On February 15, 2022, the Eastern District of California modified the injunction.[24] The court issued an opinion granting the State's motion

in part, allowing enforcement of AB 824 as to so-called "in-state settlements" but not as to settlements whose only connection to California is "in-state sales."

The court modified the injunction as to the "in-state settlements" because, it held, California had the authority to regulate conduct occurring "wholly within" its own borders. Further, the court noted that in its filings, AAM did not appear to even contest whether California could enforce AB 824 as to in-state settlements, and implied that AAM may have waived that argument.

The court then considered the additional constitutional arguments that AAM raised in its earlier briefing on the preliminary injunction, but which the court did not reach in its earlier decision. The court rejected each in turn. The court held that AAM was not likely to succeed in showing that AB 824 was preempted by federal patent law because AB 824 does not require a state court to determine the validity of a patent or create patent-like protections. Similarly, the court found no likelihood of success in showing preemption under the Biologics Price Competition and Innovation Act (the "BPCIA") because AB 824 does not create state-law remedies for failure to comply with any provisions of the BPCIA. The court also rejected AAM's excessive fines argument because, as the State had not yet levied a fine against any entity under AB 824, the court reasoned that "it is impossible to know" whether AB 824's fines would be excessive. Finally, the court rejected AAM's due process argument, relying on its opinion from the pre-enforcement case.

As for "in-state sales," the court rejected the State's argument that the court must presume that the statute only applies in-state under the canons of statutory interpretation and under *Chinatown Neighborhood Association v. Harris*.[25] In that case, the Ninth Circuit rejected a Dormant Commerce Clause challenge to a California law banning the sale of shark fins by presuming the law would only apply to sales or possession in California. The court distinguished *Chinatown*, reasoning that the decision did not address the question of whether the "Shark Fin Law" applied to the possession or sale of shark fins in California. By contrast, the court stated that the text of AB 824 directly regulates out-of-state commerce. The court pointed to AAM's hypothetical, which posited that if two parties settle a patent suit in Delaware, they would be liable for penalties under California law because every pharmaceutical patent settlement is made in connection with the sale of pharmaceutical products in California, by virtue of California being the largest market for generic products in the country.

Finally, the court clarified that the preliminary injunction applies only to AAM and its members. AAM sought the preliminary injunction to prevent enforcement against itself and "its member companies, or their agents and licensees." The court characterized AAM's suit as an "as-applied" challenge, and reasoned that, as a result, AAM could not obtain injunctive relief for third parties.

IV. ANALYSIS

Although AB 824's future is uncertain, California appears determined to continue to defend its constitutionality. After the district court issued its ruling in the post-enforcement case, the California Attorney General's Office released a statement saying that, while it was "disappointed in the court's decision to enter a preliminary injunction at the outset of this case," the suit "is still in its early stages."[26] The statement also emphasized that "[t]he attorney general will continue to fight both in this matter and elsewhere for Californians' health care rights." The Eastern District of California's decision to significantly narrow its own injunction within months of issuance rewarded the State's persistence, and is likely to encourage the State to continue with its defense.

AAM v. Bonta is a clear signal that state laws with broad reach that seek to regulate the pharmaceutical industry face an uphill battle. Pharmaceutical manufacturers are likely to remain deeply concerned about such laws

because they implicate patent rights issued by the federal government and because they add an additional layer of scrutiny to an already byzantine regulatory regime imposed by both the federal antitrust laws and the federal Food, Drug, and Cosmetics Act. Furthermore, in the context of California lawmaking, even narrowly tailored laws will likely have extraterritorial effects on the industry because, as California is the largest geographic market for pharmaceutical products in the country, pharmaceutical manufacturers can't afford to opt out of serving California residents. Thus, manufacturers are compelled to comply with California laws, regardless of where they themselves are based, in order to continue to serve patients within the State.

Even assuming such a law's effects could be contained within the geographical boundaries of a state, it is unclear that such regulation would achieve its desired goal. In this context, as a practical matter, if California were to enforce AB 824 only as to reverse payment agreements with a meaningful connection to California, the result would likely be to saddle Californian businesses with additional regulations while their out-of-state competitors conduct business as usual, leaving the status quo largely intact. If AB 824 were to only apply to companies that are either incorporated or headquartered in California, the law would likely just encourage local companies to move their businesses outside of the State in order to compete with their peers on an even playing field. While this approach might technically succeed in ending reverse payment settlements within California's borders, it would do nothing to reduce the number of such settlements as non-Californian companies would continue to enter into the agreements. The end result could be no meaningful increase or decrease in drug prices at the expense of the California economy and Californians' jobs. As a further example, if AB 824 were expressly limited to settlements entered within California's borders as described in the modified injunction, the result would likely be the same. Pharmaceutical companies are sophisticated litigants and could simply elect to bring their cases and prepare their settlements in other jurisdictions, such as Delaware and New Jersey, which are already the most common venues for pharmaceutical patent litigation.

The *AAM v. Bonta* case also demonstrates that industries are highly motivated to vigorously challenge the constitutionality of new regulations from the states. AAM brought its challenge to AB 824 within a few short weeks of its passage. It pursued its claims through to the Ninth Circuit and then undertook the filing of a new complaint supported by additional declarations, despite receiving two adverse judgments. By contrast, the offices of state attorneys general have comparatively fewer resources to maintain challenging and lengthy suits regarding complex constitutional issues. Although Attorney General Bonta appears motivated to pick up where former Attorney General Becerra left off for now, there is also a question of whether AGs' offices will retain the political will to continue to defend laws enacted by their predecessors as individuals cycle out of key roles and as priorities change from administration to administration.

Regardless, it's likely that state legislatures will continue to pass far-reaching legislative reforms. In a sharply divided national political climate, Congress is less likely to take action to drastically alter the landscape of federal law. Where AB 824's federal analog, "Preserving Access to Affordable Generics and Biosimilars," has languished in the U.S. House and Senate, AB 824 advanced relatively quickly at the state level. Given this tension, local legislators are more likely to keep testing the boundaries of their constitutional reach.

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3. Codified as Cal. Health & Safety Code §§ 134000 *et seq*.

4. *Ass'n for Accessible Meds. v. Becerra*, No. 2:19-cv-02281-TLN-DB (E.D. Cal. Nov. 12, 2019).

5. *See About Us*, Ass'n for Accessible Meds., https://accessiblemeds.org/about (last visited Mar. 9, 2022).

6. *Ass'n for Accessible Meds. v. Bonta*, No. 2:20-cv-01708-TLN-DB (E.D. Cal. Dec. 8, 2021).

7. *Rocky Mt. Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019).

8. Press Release, State of Cal. Dep't of Justice, Attorney General Becerra, Assemblymember Wood Announce Bill to Outlaw Collusive Agreements Between Drug Companies that Inflate Drug Prices (Feb. 20, 2019), https://oag.ca.gov/news/press-releases/attorney-general-becerra-assemblymember-wood-announce%C2%A0bill%C2%A0-outlaw-collusive.

9. *See id.*

10. *Fed. Trade Comm'n v. Actavis, Inc.*, 570 U.S. 136 (2013).

11. *See Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2160 (2021).

12. *In re Cipro Cases I & II*, 348 P.3d 845 (Cal. 2015).

13. *Id.* at 871–72.

14. Cal. Health & Safety Code § 134002(a)(1) (emphases added).

15. *Id.* § 134002(a)(3).

16. *Id.* § 134002(e)(1)(B).

17. *Id.* § 134002(e)(1)(A) (emphasis added).

18. S. 124, 115th Cong. (2017).

19. *Ass'n for Accessible Meds. v. Becerra*, No. 2:19-cv-02281-TLN-DB (E.D. Cal. Dec. 31, 2019).

20. *Ass'n for Accessible Meds. v. Becerra*, 822 F. App'x 532 (9th Cir. 2020).

21. *Ass'n for Accessible Meds. v. Becerra*, No. 2:20-cv-01708-TLN-DB (E.D. Cal. Dec. 9, 2021).

22. *Ass'n for Accessible Meds. v. Bonta*, No. 2:20-cv-01708 (E.D. Cal. Jan. 6, 2022).

23. *Ass'n for Accessible Meds. v. Bonta*, No. 2:20-cv-01708 (E.D. Cal. Jan. 12, 2022)..

24. *Ass'n for Accessible Meds. v. Bonta*, No. 2:20-cv-01708 (E.D. Cal. Feb. 15, 2022).

25. *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1145–46 (9th Cir. 2015).

26. Bryan Koenig, *Federal Judge Puts Calif. Pay-For-Delay Ban on Hold*, Law360 (Dec. 9, 2021), https://www.law360.com/articles/1447353/federal-judge-puts-calif-pay-for-delay-ban-on-hold.

NO-POACH AGREEMENTS: INCREASINGLY RISKY

Written by Laura K. Kaufmann[1]

I. INTRODUCTION

Following decades of scarce antitrust enforcement in labor markets, the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") have begun to turn their attention towards so-called "no-poach" agreements: agreements between competitors to not solicit or hire one another's employees. With DOJ prosecuting its first four criminal no-poach cases against employers in 2021, and a recent federal court decision endorsing DOJ's view that some no-poach agreements can constitute *per se* antitrust violations, more aggressive antitrust scrutiny in this area is likely.

In light of this trend, employers must take care to ensure that their conduct, particularly communications with competitors, cannot give rise to an enforcement action. This article surveys the recent focusing of the enforcement agencies' attention on no-poach agreements and provides a set of recommendations for employers to minimize the risk that their employment practices may give rise to antitrust liability.

II. THE RISE OF LABOR ANTITRUST

Labor, just like any other product or service, is bought and sold. There is no intrinsic reason why labor, and labor markets, cannot be the subject of price-fixing or other anticompetitive conduct. Recognizing this, economists and legal practitioners in recent years have spotlighted no-poach and wage-fixing agreements as an antitrust concern. Many have come to observe that low antitrust enforcement in labor markets has exacerbated the problem of stagnating wage growth and rising wealth inequality—particularly for low-wage workers.[2] Labor market collusion and monopsony stand alongside several other potential culprits, including declining unionization, increasing automation, and outsourcing.

Several recent studies suggest that local labor markets tend to be highly concentrated, and that there is a correlation between high concentration and reduced wages.[3] Some studies suggest that the use of no-poach agreements (particularly within franchises), wage-fixing agreements, and non-compete clauses in employment contracts for low-wage workers are the most visible manifestations of concentrated labor market power.[4] This has led a growing chorus of economists, academics, and practitioners to criticize what they perceive as lackluster antitrust enforcement in labor markets, and to advocate for a more robust enforcement and regulatory regime.[5]

III. DOJ AND FTC LABOR ANTITRUST ENFORCEMENT

In the past decade, DOJ and FTC have turned their attention to market power and collusion in labor markets as an antitrust problem. Antitrust enforcement in this area has historically been limited, as the agencies have tended to focus on product markets and have been reticent to tailor their approach to challenging market power and anticompetitive conduct in labor markets.[6] Further, no-poach agreements have not commonly been recognized as one of the three types of anticompetitive conduct traditionally considered *per se* illegal—price-fixing, bid rigging, and market allocation—despite the fact that they essentially amount to buy-side market allocation.

Reflecting a newfound concern for anticompetitive conduct in labor markets, the agencies in the past few years have brought several civil actions against companies for their alleged use of no-poach agreements. In 2010, for instance, DOJ brought a series of cases against tech companies—Adobe, Apple, Google, Intel, Intuit, Pixar, and Lucasfilm—alleging no-poach agreements with respect to highly skilled employees.[7] According to DOJ, alleged agreements between Apple and Google, Apple and Adobe, Apple and Pixar, and Google and Intel prevented the companies from directly soliciting each other's employees, and an alleged agreement between Google and Intuit prevented Google from directly soliciting Intuit employees.[8] Similarly, DOJ claimed that "Lucasfilm and Pixar agreed not to cold call each other's employees; agreed to notify each other when making an offer to an employee of the other company; and agreed, when offering a position to the other company's employee, not to counteroffer with compensation above the initial offer."[9]

DOJ reached settlements with each of these companies, under which the defendants agreed to refrain "from entering, maintaining, or enforcing any agreement that in any way prevents any person from soliciting, cold calling, recruiting, or otherwise competing for employees," and to implement compliance measures. DOJ's complaints were followed by private class actions (and hefty settlements) for the same alleged conduct, underscoring that attracting the attention of government enforcers can also result in costly follow-on suits.[10]

Then in 2012, DOJ filed a civil antitrust lawsuit against eBay, alleging that the company had agreed with Intuit to not recruit or hire Intuit's employees.[11] DOJ alleged that Meg Whitman (then-CEO of eBay) and Scott Cook (Inuit's founder and executive committee chair) were closely involved in forming, monitoring, and enforcing this no-poach agreement, and argued that the agreement eroded competition to the detriment of employees who likely were denied access to greater job opportunities and salaries.[12] As part of a settlement agreement with DOJ, eBay agreed to pay $3.75 million in compensation to affected workers and to end its use of no-poach agreements.[13]

DOJ's enforcement efforts in labor markets have not solely targeted employer collusion. In late 2021, DOJ challenged a proposed merger between the publishing companies Penguin and Simon & Schuster under Section 7 of the Clayton Act.[14] In a press release, Attorney General Merrick Garland stated that "American authors and consumers will pay the price of this anticompetitive merger—lower advances for authors and ultimately fewer books and less variety for consumers."[15] The agency's complaint alleges that the merger "would likely result in substantial harm to authors of anticipated top-selling books"—essentially, workers—because the merged entity "would control close to half of the market for the acquisition of publishing rights to anticipated top-selling books," and the two largest publishers post-merger "would collectively control more than two-thirds of this market, leaving hundreds of authors with fewer alternatives and less leverage."[16] DOJ further asserted that the merger would "reduc[e] author pay" and "make it harder for authors to earn a living by writing books."[17]

State attorneys general are also active in this space. The Washington State Attorney General, for example, has made it a priority to end the use of no-poach agreements, particularly in the franchise context. Over the past few years, Washington's Attorney General has signed hundreds of agreements with corporate chains to eliminate no-poach agreements from all of their franchise agreements.[18] The Washington Attorney General's Office is even more aggressive than DOJ when it comes to no-poach agreements, as the Office views no-poach agreements in the franchise context as *per se* illegal.[19]

In addition, DOJ has filed Statements of Interest in a number of civil cases to emphasize that DOJ views no-poach agreements as a form of illegal market allocation subject to *per se* treatment. In one of these Statements, DOJ wrote that "no-poach agreements among competing employers have almost identical anticompetitive effects to wage-fixing agreements: they enable the employers to avoid competing over wages and other terms of employment offered to the affected employees."[20] DOJ further argued that no-poach agreements should be subject to the *per se* rule unless the ancillary restraints doctrine[21] or core venture doctrine[22] applies, meaning that, in most cases, these agreements are so clearly anticompetitive that the court does not need to ask whether any procompetitive benefits might outweigh the anticompetitive effects.[23] DOJ has collected these and other recent Statements of Interest in no-poach cases on a webpage called the "No-Poach Approach," signaling that it intends to put employers on notice of heightened scrutiny in this area.[24]

Courts have found DOJ's Statements of Interest persuasive. In *In re Railway Industry Employee No-Poach Antitrust Litigation*, for instance, the district court referenced DOJ's Statement of Interest directly, writing that it supported the court's refusal to dismiss the plaintiffs' complaint because it "explained that the federal agencies charged with enforcing the antitrust laws consider naked no-poach agreements per se violations of the Sherman Act and DOJ will proceed criminally against those who enter into those kinds of agreements."[25]

IV. DOJ'S SHIFT TO CRIMINAL ANTITRUST ENFORCEMENT AGAINST NO-POACH AGREEMENTS

Over the past few years, DOJ has shifted its focus from civil enforcement to criminal enforcement. Beginning in 2016, DOJ repeatedly avowed that it would crack down on no-poach agreements, including specifically through criminal prosecution. In October 2016, DOJ and FTC published *Antitrust Guidance for Human Resources Personnel*, which warned HR professionals that the agencies would prosecute "naked" no-poach agreements as *per se* violations of Section 1 of the Sherman Act.[26] At that time, Acting Assistant Attorney General Renata Hesse said, "HR professionals need to understand that these violations can lead to severe consequences, including criminal prosecution."[27] And in early 2018, Assistant Attorney General Makan Delrahim reiterated that DOJ intended to criminally prosecute no-poach agreements.[28] Shortly after the start of the COVID-19 pandemic, DOJ and FTC issued a joint statement that they were closely monitoring anticompetitive conduct in labor markets, particularly for front-line workers, and that DOJ "may criminally prosecute companies and individuals who enter into naked wage-fixing and no-poach agreements."[29]

Despite these public warnings, DOJ had never criminally prosecuted an employer for participating in a no-poach agreement. That changed in 2021, when DOJ brought no fewer than four criminal cases challenging companies' alleged use of no-poach agreements. First, in January 2021, DOJ announced its first criminal indictment in this area. A federal grand jury in the Northern District of Texas returned a two-count indictment charging defendants Surgical Care Affiliates LLC and its related entity (collectively, "SCA"), which own and operate outpatient medical care centers across the United States,

with violating the Sherman Act by agreeing with competitors not to solicit each other's employees.[30] Count 1 alleged that SCA and an unnamed competitor agreed not to solicit specific senior-level employees, expressly instructed their employees to abide by the agreement, and refrained from soliciting each other's employees in accordance with the agreement. The indictment describes multiple communications referencing the alleged agreement, including an email from the CEO of the unnamed competitor to employees stating, "I had a conversation w [the CEO of SCA] re people and we reached agreement that we would not approach each other's proactively."[31] Count 2 made similar allegations about an agreement between SCA and a different competitor, relying on a number of communications that evidenced the alleged agreement.[32]

In March 2021, DOJ returned yet another criminal indictment for the use of no-poach agreements, this time against healthcare staffing company VDA OC, LLC, formerly Advantage on Call, LLC ("AOC"), as well as a regional manager of AOC.[33] The one-count indictment charged the defendants with engaging in a *per se* unlawful no-poach agreement in violation of Section 1 of the Sherman Act.[34] Specifically, DOJ alleged that from around October 2016 through July 2017, the defendants and others entered into a conspiracy "to suppress and eliminate competition for the services of nurses by agreeing to allocate nurses and to fix the wages of those nurses."[35] DOJ further alleged that "[t]he charged conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and their co-conspirators, the substantial terms of which were that AOC and Company A would allocate nurse employees but not recruiting or hiring certain nurses from each other and would refrain from raising the wages of those nurses."[36]

In July 2021, DOJ announced yet another indictment for a no-poach agreement, this time against DaVita, Inc. and its former CEO Kent Thiry.[37] The three-count superseding indictment[38] charged the defendants with violating Section 1 of the Sherman Act by participating in market allocation agreements from February 2012 through July 2019.[39] DOJ alleged that DaVita and Thiry participated in an agreement among owners and operators of outpatient medical facilities throughout the country, including SCA, to not solicit the employees of co-conspirators. In particular, the indictment pointed to communications and meetings among the conspirators, including an email from Thiry to the CEO of SCA indicating that "[s]omeone called me to suggest they reach out to your senior biz dev guy for our corresponding spot. I explained I do not do proactive recruiting into your ranks."[40] DOJ cited several other allegedly collusive communications, among them an email from an SCA human resources executive to a recruiter stating that certain of SCA's competitors were "off limits to SCA."[41]

Finally, in December 2021, DOJ announced a criminal indictment alleging that six former aerospace executives participated in an agreement spanning 2011 to 2019 with managers and executives of several outsource engineering suppliers to restrict the hiring and recruiting of engineers and other skilled workers.[42] The one-count indictment charged the defendants with engaging in a no-poach agreement in violation of Section 1 of the Sherman Act.[43] DOJ alleged that the defendants "attended meetings and engaged in discussions . . . concerning restricting the hiring and recruiting of engineers and other skilled-labor employees in the United States," agreed to restrict the hiring and recruitment of engineers and other skilled workers, took steps to effectuate the agreement, encouraged compliance with the agreement, monitored and enforced compliance with the agreement, and took steps to conceal the existence of the agreement.[44]

V. THE *DAVITA* ORDER DENYING DEFENDANTS' MOTION TO DISMISS IS LIKELY TO USHER IN FURTHER CRIMINAL PROSECUTIONS OF NO-POACH AGREEMENTS

In the *DaVita* case, Davita, Inc. and its former CEO Kent Thiry moved to dismiss DOJ's indictment on the ground that no-poach agreements cannot constitute criminal antitrust violations. On January 28, 2022, Senior Judge R. Brooke Jackson of the U.S. District Court for the District of Colorado denied that motion.[45] In so doing, Judge Jackson became the first federal district judge to endorse DOJ's view that no-poach agreements can give rise to criminal liability.

Judge Jackson held that DOJ's indictment sufficiently alleged that the defendants' conspiracy fell under an existing category of conduct subject to *per se* treatment—horizontal market allocation agreements—and that it should accordingly be analyzed as a potential *per se* violation of Section 1.[46] The order rejected the defendants' argument that relevant precedent does not treat non-solicitation agreements as subject to *per se* treatment.[47] Judge Jackson did, however, disagree with DOJ's "apparent assertion that all non-solicitation agreements and all no-hire agreements are horizontal market allocations and thus per se unreasonable."[48] Judge Jackson concluded "that if naked non-solicitation agreements or no-hire agreements allocate the market, they are per se unreasonable," but refused to adopt DOJ's proposed categorical rule.[49]

Taking a victory lap, DOJ filed quickly notices of supplemental authority in two other pending criminal no-poach cases (*SCA* and *Hee*) in early February 2022, seeking to leverage Judge Jackson's *DaVita* order to defeat other pending motions to dismiss.[50] In its notice of supplemental authority in *SCA*, DOJ cited the *DaVita* order for its conclusions that "each count of the indictment alleged a horizontal market allocation conspiracy carried out by a non-solicitation sufficient to state a per se violation of Section 1 . . . and . . . defendants had 'ample notice' for purposes of the Due Process Clause's fair warning requirement that the charged conspiracies 'to allocate the market would expose them to criminal liability.'"[51]

VI. RECOMMENDATIONS FOR EMPLOYERS TO MINIMIZE ANTITRUST RISK

Following the *DaVita* ruling, more aggressive criminal enforcement in the no-poach context seems likely, and employers should take care to minimize antitrust risk. First, employers should ensure that if they must communicate with competitors for legitimate business purposes—and they should not communicate with competitors for any other reason—those communications do not form the basis of a potential antitrust case. Specifically, employers should document the business reasons for any communications with competitors and retain that documentation. They should be very careful about the phrasing of any written communications, avoiding any language, euphemisms, or jokes that could be construed as suggesting any kind of agreement related to employment practices (*e.g.*, hiring, wages, benefits). In addition, if a competitor initiates any discussion or agreement regarding hiring, wages, or benefits, employers should not engage in that discussion and should promptly report the communication to legal counsel.

Second, employers must take steps to avoid antitrust risk when meeting with competitors—which, again, should only be done when necessary to accomplish legitimate, specifically identifiable business purposes. Before any meeting with competitors (for example, at industry conferences), employers should prepare a written agenda—ensuring that it does not, of course, contain any discussion of topics that could arouse antitrust suspicions like compensation or territorial allocation across companies—and circulate it in advance. During the meeting, employers should make sure that the meeting participants stick to the agenda. Ideally, counsel should be present to help ensure that the conversation does not veer into prohibited territory. Employers should also make

sure to take accurate notes of the proceedings, review those notes before they are finalized, and circulate the notes to ensure that nothing could be misinterpreted as suggesting an agreement regarding employment practices. These notes should identify the legitimate business purposes served by the meeting.

Third, employers must be careful to avoid missteps that could result in actual or perceived collusion. For instance, employers should never discuss with competitors where each company should operate or what types of business each organization will handle. Similarly, employers should never discuss wages or benefits and policies with competitors. This applies even if those topics are discussed in passing or in generalities. If a competitor does attempt to discuss employee compensation, benefits, or territorial allocation, employers should refuse to engage in that discussion—and in so doing, must be careful avoid language or gestures that might convey agreement (*e.g.*, "mutual understanding," "collaboration," or "level the playing field"). Employers finding themselves in this situation should protest that the discussions may violate the antitrust laws and make a "noisy" withdrawal from the discussion (stating that they are withdrawing from the discussion and explaining why), and promptly consult with legal counsel.

More generally, employers should consult with legal counsel experienced in labor antitrust issues to develop an internal compliance program with respect to their employment practices that ensures ongoing adherence to the antitrust laws. This program should include antitrust compliance training for management and employees, as well as internal mechanisms for reporting antitrust concerns to in-house counsel.

VII. CONCLUSION

Given DOJ and FTC's increased focus on enforcing the antitrust laws against employers for their use of no-poach agreements, particularly the uptick in criminal indictments in the past year, it is crucial for employers to ensure that they avoid antitrust scrutiny of their employment practices. Taking steps to avoid unnecessary competitor contacts, to properly document and conduct any communications with rivals that are necessary for legitimate business purposes, to avoid common but dangerous missteps, and to engender a culture of antitrust compliance are vital to minimizing antitrust risk in employment practices. Consulting with legal counsel experienced in labor market antitrust should also form a critical part of employers' compliance strategy.

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2. *See, e.g.*, *6 Reasons that Pay Has Lagged Behind U.S. Job Growth*, N.Y. Times (Feb. 1, 2018), https://www.nytimes.com/interactive/2018/02/01/business/economy/wages-salaries-job-market.html (discussing several potential reasons for the problem); Gillian B. White, *The Workers Whose Paychecks Are Shrinking*, The Atlantic (Sept. 4, 2015), https://www.theatlantic.com/business/archive/2015/09/low-income-worker-wage-decline/403840 (discussing the problem that low-wage workers faced a decrease in real wages notwithstanding a growth in employment after the recession ended in 2009).

3. *See, e.g.*, Elena Prager & Matt Schmitt, *Employer Consolidation and Wages: Evidence from Hospitals*, 111 Am. Econ. R. 397 (Feb. 2021); José Azar, Ioana Marinescu, Marshall I. Steinbaum, & Bledi Taska, *Concentration in US Labor Markets: Evidence From Online Vacancy Data* (National Bureau of Economic Research, Working Paper No. 24395, Feb. 2019), https://www.nber.org/papers/w24395; Efraim Benmelech, Nittai Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages* (National Bureau of Economic Research, Working Paper No. 24037, Feb. 2018), https://www.nber.org/papers/w24307; Ioana Marinescu, José Azar, & Marshall

Steinbaum, *Labor Market Concentration* (National Bureau of Economic Research, Working Paper No. 24147, Dec. 2017), https://www.nber.org/papers/w24147.

4. *See*, *e.g.*, Benmelech et al., *supra* note 3, at 1–2.

5. *See*, *e.g.*, Eric A. Posner, How Antitrust Failed Workers (2021); Hiba Hafiz, *Why a "Whole-of-Government" Approach is the Solution to Antitrust's Current Labor Problem*, Promarket (Nov. 18, 2021), https://promarket.org/2021/11/18/antitrust-monopsony-government-labor.

6. *See*, *e.g.*, Posner *supra* note 5, at 36–38.

7. Press Release, U.S. Dep't of Justice, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee; Press Release, U.S. Dep't of Justice, Justice Department Requires Lucasfilm to Stop Entering into Anticompetitive Employee Solicitation Agreements (Dec. 21, 2010), https://www.justice.gov/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation.

8. *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements*, *supra* note 7.

9. *Justice Department Requires Lucasfilm to Stop Entering into Anticompetitive Employee Solicitation Agreements*, *supra* note 7.

10. Ted Johnson, *Animation Workers Reach $100 Million Settlement With Disney in Wage-Fixing Suit*, Variety (Jan. 31, 2017), https://variety.com/2017/biz/news/disney-settlement-wage-fixing-anti-poaching-animation-1201975084.

11. *See United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013).

12. *Id.* at 1032–34.

13. Press Release, U.S. Dep't of Justice, Justice Department Requires eBay to End Anticompetitive "No Poach" Hiring Agreements (May 1, 2014), https://www.justice.gov/opa/pr/justice-department-requires-ebay-end-anticompetitive-no-poach-hiring-agreements.

14. Press Release, U.S. Dep't of Justice, Justice Department Sues to Block Penguin Random House's Acquisition of Rival Publisher Simon & Schuster (Nov. 2, 2021), https://www.justice.gov/opa/pr/justice-department-sues-block-penguin-random-house-s-acquisition-rival-publisher-simon.

15. *Id.*

16. Compl. at 4, *United States v. Bertelsmann SE & CO.*, No. 1:21-cv-02886 (D.D.C. Nov. 2, 2021), ECF No. 1.

17. *Id.* at 6.

18. Press Release, Wash. Att'y Gen., AG Report: Ferguson's Initiative Ends No-Poach Practices Nationally at 237 Corporate Franchise Chains (June 16, 2020), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate.

19. *See* Amicus Curiae Br. by the Att'y Gen. of Wash. at 6–7, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 11, 2019), ECF No. 36 (arguing that no-poach agreements in the franchise context are *per se* illegal under the antitrust laws of Washington state; "[T]o the extent a franchise agreement restricts solicitation and hiring among franchisees and a corporate-owned store—which is indisputably a horizontal competitor of a franchisee for labor—the agreement must properly be analyzed as a *per se* restraint.").

20. Statement of Interest of the United States at 8, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 8, 2019), ECF No. 158; *see also* Statement of Interest of the United States at 22, *Seaman v. Duke University*, No. 1:15-CV-462 (M.D.N.C. Feb. 1, 2018), ECF No. 325 ("Just as an agreement between competitors to allocate customers eliminates competition for those customers, an agreement between them to allocate employees eliminates competition for those employees.").

21. The ancillary restraint doctrine states that a potentially anticompetitive agreement may be subject to rule-of-reason analysis rather than the *per se* rule if the agreement is ancillary to a legitimate business purpose that could have procompetitive effects. *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021).

22. The core venture doctrine invokes rule-of-reason analysis for qualifying agreements, and applies where the agreement at issue involves the core activity of a joint venture. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 23 (1979) ("Joint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing

schemes, where the agreement is necessary to market the product at all.").

23. Statement of Interest of the United States, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, *supra* note 20, at 9.

24. *No-Poach Approach*, U.S. Dep't of Justice (Sept. 30, 2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

25. *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 485 (W.D. Pa. 2019).

26. U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

27. Press Release, U.S. Dep't of Justice, Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation (Oct. 20, 2016), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professional.

28. Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are In The Works*, Law360 (Jan. 19, 2018), https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works.

29. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Issue Joint Statement Announcing They Are on Alert for Collusion in U.S. Labor Markets (Apr. 13, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/federal-trade-commission-justice-department-issue-joint-statement.

30. Indictment, *United States v. Surgical Care Affiliates*, No. 3:21-CR-011-L (N.D. Tex. Jan. 5, 2021), ECF No. 1. On July 8, 2021, DOJ filed a superseding indictment. *See* Superseding Indictment, *United States v. Surgical Care Affiliates*, No. 3:21-CR-011-L (N.D. Tex. July 8, 2021), ECF No. 48.

31. Superseding Indictment, *United States v. Surgical Care Affiliates*, *supra* note 30, at 3–5.

32. *Id.* at 7–10.

33. Indictment, *United States v. Hee*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Mar. 26, 2021), ECF No. 1.

34. *Id.*

35. *Id.* at 4.

36. *Id.*

37. Indictment, *United States v. DaVita, Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. July 14, 2021), ECF No. 1.

38. DOJ filed a Superseding Indictment on November 3, 2021.

39. *See* Superseding Indictment, *DaVita*, No. 1:21-cr-00229-RBJ (D. Colo. Nov. 3, 2021), ECF No. 74.

40. *Id.* at 3.

41. *Id.* at 3–4.

42. Indictment, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021), ECF No. 20; Press Release, U.S. Dep't of Justice, Former Aerospace Outsourcing Executive Charged for Key Role in a Long-Running Antitrust Conspiracy (Dec. 9, 2021), https://www.justice.gov/opa/pr/former-aerospace-outsourcing-executive-charged-key-role-long-running-antitrust-conspiracy.

43. Indictment, *Patel*, *supra* note 42, at 4–5.

44. *Id.* at 5–13.

45. Order Denying Defs.' Mot. to Dismiss, *DaVita*, No. 1:21-cr-00229-RBJ (D. Colo. Jan. 28, 2022), ECF No. 132.

46. *Id.* at 9–14.

47. *Id.* at 14–16.

48. *Id.* at 16.

49. *Id.* at 17.

50. United States' Notice of Additional Authority, *Surgical Care Affiliates*, No. 3:21-CR-011-L (N.D. Tex. Feb. 1, 2022), ECF No. 96; United States' Notice of Suppl. Authority, *Hee*, No. 2:21-cr-00098-RFB-BNW (D. Nev. Feb. 3, 2022), ECF 69. DOJ will likely also file a notice of supplemental authority in *Patel* once defendants have filed a motion to dismiss.

51. United States' Notice of Additional Authority, Surgical Care Affiliates, supra note 50, at 1.

High-Stakes Issues in Antitrust Litigation

Allegations of harm to competition often give rise to complex litigation and regulatory inquiries. To address the high-stakes issues in these matters—including emerging issues such as scrutiny of large tech platforms, no poach agreements, and "killer" acquisitions—experience is crucial. Cornerstone Research staff and experts bring deep expertise, insightful approaches, and advanced data analytics capabilities to every matter.

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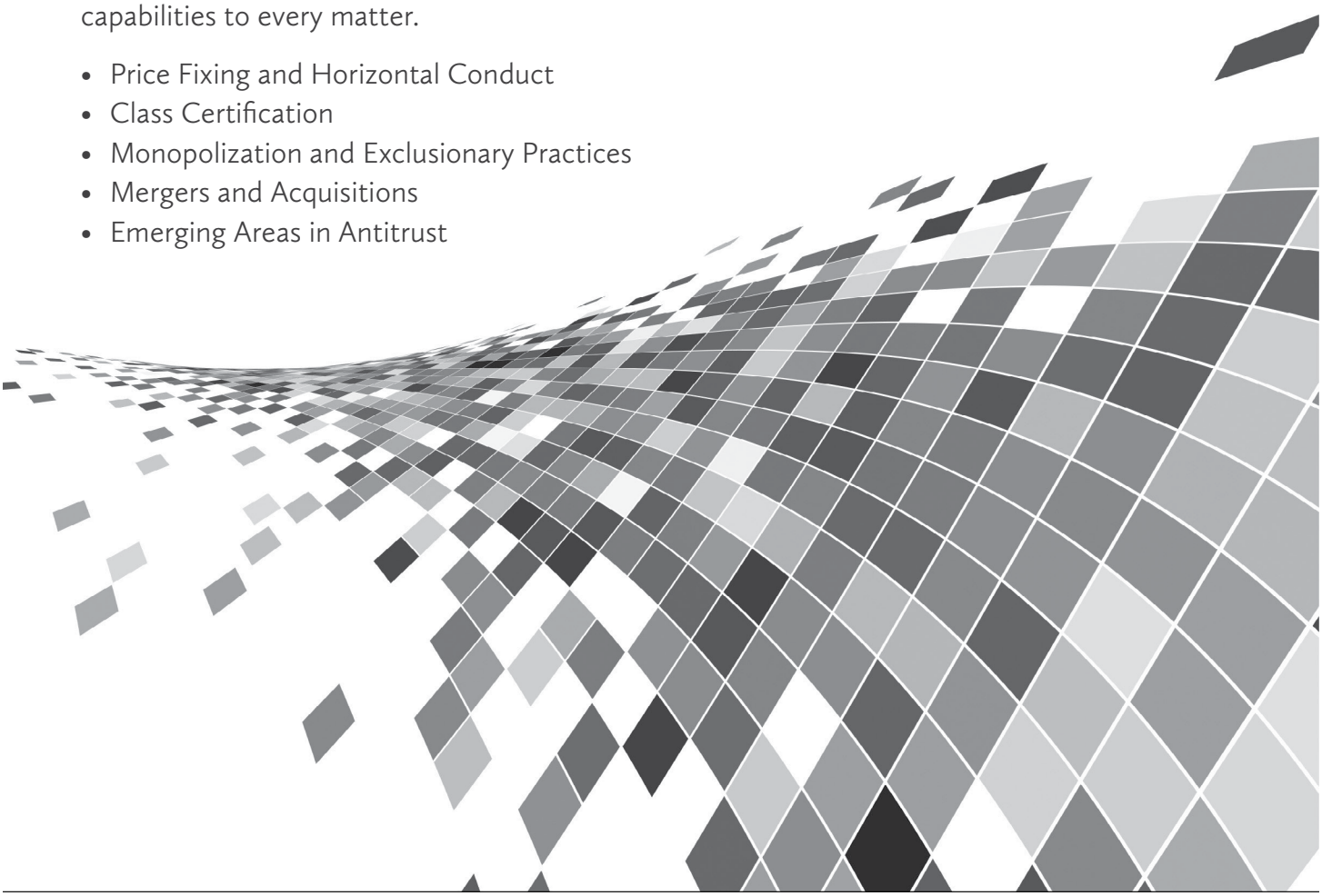
- Class Certification
- Monopolization and Exclusionary Practices
- Mergers and Acquisitions
- Emerging Areas in Antitrust



ANTITRUST AND UNFAIR COMPETITION LAW

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