Roundtable Conference with Enforcement Officials

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PANELISTS

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JAMES WILSON: Welcome to the Enforcers Roundtable. For me, this program is the highlight of a terrific Spring Meeting. We are honored to have the enforcers who are with us this morning. Let me introduce them and our panelists. Then we will launch into our questions.

Chairman Jon Leibowitz became the Chairman of the Federal Trade Commission on March 2nd of this year, appointed by President Obama. Previous to that, he had served as a Commissioner on the Federal Trade Commission since 2004. He has had a distinguished career, both in representing the Motion Picture Association of America and in a variety of positions on Capitol Hill. We are honored to have Chairman Leibowitz with us.

Commissioner Neelie Kroes needs no introduction to this group. She has been, since 2004, the Commissioner for Competition with the European Commission. Prior to that she also had a distinguished career in parliament and in the cabinet in her native Netherlands. We are honored to have you with us, Commissioner.

Bob Hubbard is the Chair of the Multistate Antitrust Task Force of the National Association of Attorneys General. He is also an attorney in the New York Attorney General's Office. We are grateful to have you here, Bob.

Scott Hammond is the Acting Assistant Attorney General for Antitrust, and I think the person most anxious for the confirmation of Christine Varney. For those of you who do not know, yesterday Christine was voted out of the Senate Judiciary Committee, and now awaits a vote on the floor of the Senate. I know that if Scott has any political connections, he is trying to facilitate that.*

Scott has had a distinguished career at the Department of Justice. He has led its criminal enforcement efforts for the last number of years and has been on the criminal side of the Division since he joined it in 1988.

* *Editor's Note:* Christine Varney was confirmed by the Senate as Assistant Attorney General for the Antitrust Division on April 20, 2009.

We are grateful for each of our enforcers being here.

I am also joined by two distinguished members of our Section to help me with the questions that we are going to ask this morning.

Roxane Busey was the Chair of this Section in 2001–2002. She is a partner in the Chicago Office of Baker & McKenzie. She has served the Section in innumerable ways, including chairing the Section's Task Force on the Antitrust Modernization Commission Report.

Bill MacLeod is one of the co-chairs of this Spring Meeting and responsible for the incredible success that we have had this week. He is a partner at Kelley Drye & Warren in both its Washington and Chicago offices and has a practice in both antitrust and consumer protection. He leads the firm's antitrust and trade regulation group.

With that, let's move on to our enforcers, starting with Chairman Leibowitz. One of the highlights of this meeting each year is our ability to hear firsthand from enforcers as to what policy we might expect to see in the future. So, Chairman Leibowitz, can you tell us what we are likely to see under your tenure?

The one area, and perhaps our highest priority going forward, in the health care space is stopping what we call "pay for delay settlements" or "reverse payments," in which brands pay off their generic competitors to stay out of the market.

—Jon Leibowitz

JON LEIBOWITZ: Let me start by expressing my appreciation for the opportunity to speak with all of you. From my perspective, it has been a privilege to have been an FTC Commissioner for the last four years. I look forward to continuing to work with you.

What are our priorities in the years ahead for the Federal Trade Commission? Well, I see two things: continuity and challenge. On the continuity side, we all know that every new administration is about change to some extent, and we certainly will be, but we are also at the FTC about continuity. We are going to build on the many accomplishments of the Commission under Bill Kovacic and Debbie Majoras and Tim Muris, who himself built on some of the accomplishments of Bob Pitofsky. Tim Muris once said famously, or at least famously in antitrust circles, that he agreed with about 95 percent of his predecessor's agenda. I feel exactly the same way about the agendas of Bill Kovacic and Debbie Majoras.

In terms of continuity, let me give you a few areas. One is merger enforcement. Over the past twelve months, the Commission has been incredibly active on the competition side. We've brought more than thirty enforcement actions and added to a very heavy ongoing litigation workload. We've had success in the last few months, and some notable successes. First, *CCC/Mitchell*: we won our first P.I., I think, in six years, certainly since I came to the Commission. We had some success in *Whole Foods*—not at the district court level, but at the appellate level. And even in *Inova/Prince William* we managed to effectively block what we thought was an anticompetitive hospital merger. So, despite the drop that we have seen—and it has been precipitous—in Hart-Scott-Rodino filings, our merger agenda remains very, very full. Two cases we continue to litigate in court, six merger challenges this year.

Another area where you're going to see continuity is our health care agenda. As you know, for many years, going back to Tim Muris and Bob Pitofsky, we have devoted considerable attention to health care issues on the competition side, and also even on the consumer protection side. And, given the central role that health care plays in our economy and the upcoming debate on health care reform, we are going to stay very, very active in this area.

The one area, and perhaps our highest priority going forward, in the health care space is stopping what we call "pay for delay settlements" or "reverse payments," in which brands pay off their generic competitors to stay out of the market. We have a two-pronged approach, as I think many of you know. One prong is litigating cases. We have district court cases now in the Third Circuit and in the Ninth Circuit. We have more investigations in the pipeline.

The other prong is supporting legislation, and legislatively, of course, we have the support of the Chairman of the Antitrust Subcommittee in the Senate, Herb Kohl, and there is a bipartisan bill introduced with Senator Kohl and Chuck Grassley and Senator Durbin and supported by President Obama. We have a lot of support for legislation in the House Energy and Commerce Committee. I think a bill will be introduced next week.

We are very optimistic that, either through litigation, or perhaps even legislation, in the context of health care we will solve this problem for American consumers and let them have access to generic drugs sooner.

Another area where you're going to see us stay active is unilateral conduct. We have a unilateral conduct case in court right now, *Cephalon*. And we are going to continue to stay active in the standards-setting area. Obviously, the *Rambus* case didn't turn out at the D.C. Circuit the way we wish it had, but we are going to continue to be active in that area, whether it's using Section 2 or Section 5.

Let me talk for a minute about some of the challenges that we are going to face. I'll try to be brief because I think we're going to talk about some of these issues in the Q&A.

One challenge over the last few years has been the FTC/Justice Department relationship. It's no secret that, whether it was reverse payments in the pharmaceutical area or views of unilateral conduct, we've had a series of policy disagreements—not personal disagreements at all, but policy disagreements—with the Justice Department. I am very optimistic that under Christine Varney, who is going to be a terrific Assistant Attorney General for Antitrust, that the Division and the Agency will be much, much more in synch. I look forward to her speedy confirmation, as I know Scott does.

We may revisit the Section 2 Report, but I think we'll have to wait until Christine gets onboard before we sit down and talk seriously about that.

We may also want to revisit the Merger Guidelines, which are badly in need of being updated. But again, a lot of this needs to wait until Christine gets settled in at the Antitrust Division.

On the litigation front, we have another challenge. That is the hostility of some courts—not all—to antitrust enforcement. We all know at some level what's driving this. I think it's the toxic combination, perceived or real, of treble-damage lawsuits and class actions. But the problem for the enforcement agencies—and I don't mean to speak for Justice, but certainly for the FTC—is that those restrictions placed on private plaintiffs often very much affect us. So that's one of the reasons that we are exploring as a Commission—and I think the whole Commission wants to do this—using Section 5, our unfair methods of competition authority, that goes beyond the antitrust laws. From our perspective we want to stop anticompetitive behavior, whether it's encompassed by the antitrust laws or not.

And, of course, as we all know, antitrust enforcement has shrunk over the last several decades. Some of that was probably good. Some of it might be a little bit too much.

In the Part 3 area, we recently issued revisions to our Regulations and to our Rules. We are very much committed to making Part 3 an effective tool for antitrust litigation. I think particularly on the conduct side it is going to be very, very interesting. We will be able to litigate a conduct case and have a decision by the ALJ in about eight or nine months and a decision by the Commission—if we follow our own rules, which hopefully we will—just a few months later. Where else can you get antitrust decisions within a year, or close to a year? Certainly not in the courts.

And finally, we are going to look at disgorgement remedies a little more often. We have a case where we're asking for disgorgement, the *Ovation Pharmaceuticals* case, where we think it's justified. There has been some interesting writing on the use of disgorgement by people like Einer

Elhauge. My own sense is that we will be looking at disgorgement as a remedy more often than we have in the past.

So, just to summarize, we are going to use all of the tools that we have in our arsenal, whether it's disgorgement, whether it's Section 5, whether it's Part 3, to try to stop anticompetitive behavior. That's what we're supposed to do. But let me also assure you we are never going to prejudge a matter. We are always going to go where the facts and the law lead us.

My door and the doors of our staff are always open to you. We want to work collaboratively as often as we can.

WILSON: Thank you, Jon.

Commissioner Kroes?

We are going to use all of the tools that we have in our arsenal, whether it's disgorgement, whether it's Section 5, whether it's Part 3, to try to stop anticompetitive behavior. That's what we're supposed to do.

—Jon Leibowitz

NEELIE KROES: Thank you, Jim. I'm delighted to join you again.

Jon was mentioning that continuation and change are his leitmotif. Continuation is that you are sitting next to me, on my left. Change is that you are looking different from Debbie. Having said that, I think that our cooperation is excellent and will be excellent. We had our first meeting yesterday. That was a good start.

I am a bit disappointed, on the other hand, that Christine is not yet joining. I am very careful, for I know that the Hill is quite sensitive on all remarks that are made about potential appointments. So I would just say that I am looking forward to Christine's joining as a colleague at the DOJ.

But having said that, I will add that if you have people like Scott in your midst, then it is a pleasure to do the job. I'm sure that we will do the job together, remembering coordination and cooperation is absolutely key.

You were asking me, "Are there specific issues that you could mention about how Europe is dealing with this crisis?" Well, as you are aware, we are in the same boat: the United States, Europe, and the other parts of the world. The financial and economic crisis overshadows everything. Because, as the competition authority, we have a major role in Europe to respond to the crisis, my answer to this question may be a little different from that of my American counterparts. But it is a matter of different contexts, rather than different outlooks, I assure you.

I want to add, even though certain headlines suggest big differences, there is no big difference. We are working hard, as our American colleagues and other colleagues are, to make a decisive and strong international response to the crisis. We are looking forward to your contribution in London with the G20. I think we are all aware that it makes more sense to do it together.

The economic crisis has brought the subsidy control arm of our work—and we call that state aid control in Europe—to center stage. It is remarkable how many issues are connected with state aid control.

But it is hard. We are working like hell, seven days a week, day and night. I am deeply impressed by my people; they are doing an extremely good job. So far so good. We are keeping the line (against protectionism) and we are consistent, and I hope that we are also predictable.

Sometimes I do hear people asking, "Are you predictable?" I am crystal clear, and I am sticking to my line. Sometimes, by the way, European leaders are not enjoying my predictability and my line. Those are necessary but nice discussions. Because even if we disagree at first the fact of the discussion means they are listening to the European Union and to the European Commission.

The Commission—and this is no news for you, but I still want to repeat it—is constitutionally obliged to review state aid applications and to control subsidies that are offered by the European

Union's twenty-seven national governments. Those governments are very aware of that. So they have to notify, and we have to do our job, with both of us acting as quickly as possible. What does that mean? Well, it means in a clear-cut way that the competition rules have had a seat at the table in dealing with the crisis. We were already aware that we are doing a very important job within Europe, but during this crisis it is even more important. Each rescue, each bailout, whether in the financial sector or the real economy—has been tailored to distort competition as little as possible.

I would like to add to that that I am still impressed that the six founding fathers of the European Community in the 1950s—only fathers; the mothers were at home, nowadays it has improved and a third of the Commission is female—were aware of the importance of competition policy. They were quite influenced by Harvard professors, I might add—so you see the way the U.S. can influence thinking in Europe.

A key part of getting out of this crisis is "enforcement as usual." Don't think that we are not alert, for then you are making a big mistake. We are alert. We have learned a lesson from the U.S. experience in the 1930s. We are sticking to the line that competition is essential.

—Neelie Kroes

In the competition chapter in the Treaty of Rome—can you imagine, in the 1950s?—they were writing down in that chapter how important competition is, and the need for fair and level playing fields and the need to limit state aid. That was attracting me when I took over from Mario Monti. I thought: That's great. That is my line. In essence they were saying state aid is only allowed when there is market failure and when state aid could be a medicine for the market failure to recuperate. Even then, the aid must be temporary and, by the way, as least distortive of competition as possible. So we still take that as the line today, and you can't imagine how often I am repeating it when ministers or leaders or bankers are knocking on my door.

So anyhow, we have to take into account that it means that the competition rules are a key instrument of the European Commission to tackle the whole crisis. In financial services we ensured a level playing field by intervening in more than forty cases requiring adjustments to the national proposals. That was a big, big first challenge.

But I am always saying to my people, and they are saying it to me, "This is just one hurdle." The second hurdle is perhaps even more challenging: restructuring. I am always saying, "My shareholders are the taxpayers and I have to take care of their interests." We have to be aware that one day this crisis will be over, and a normal, stable market will return. So we have to think of our line now, to decide: What is that normal market going to look like; with what type of regulation, with what type of supervision, with what type of recapitalization; but also, what type of competition do you want? We are not taking the line that, "Well, they were given a helping hand, but don't worry now—they are just there and nothing has to change or be repaid." So dealing with the restructuring, we are asking for a lot of effort. We cannot let the present crisis prevent the restructuring of banks that were in trouble before the crisis began, and we cannot let the present lack of clarity about toxic and impaired assets continue.

That is one of my main worries, that nowadays some industries, including in the United States—I won't mention the sector, but you are creative enough to imagine which they were—are coming over and asking for money in Europe. Well, they can try it, why not? But it doesn't mean that we will say, "Oh, that's great, we do have a lot of money for you."

My worry is—and now I am very serious—quite a number of those entrepreneurs, those CEOs and board members, are trying to present us with the bill for their past mistakes, thinking that we are idiots and that because there is a crisis we are taking and paying for everything. They are hoping they can pass on the problem when they didn't do their job properly before the crisis. Well, that is not the way we are dealing with that.

Day-to-day work in the competition field is going on. While keeping competition distortions to a minimum is important in the state aid area, it is also as important in all other areas of our activ-

ity. A key part of getting out of this crisis is "enforcement as usual." Don't think that we are not alert, for then you are making a big mistake. We are alert. We have learned a lesson from the U.S. experience in the 1930s. We are sticking to the line that competition is essential. Maintaining competition in our markets in today's circumstances is an active and tangible contribution to recovery. It is one part of the medicine for all the usual reasons: more innovation, more research, more jobs, lower prices, and, as a consequence, greater purchasing power. That is what the people are badly looking for.

Talking about mergers, over the last year we have continued our merger enforcement, with around 400 new cases and a fairly constant intervention rate. We have seen a fall off in merger activity. But the mergers we have now will receive just as intense scrutiny as those we looked at before the crisis began. So it is done like we always did it.

Talking about cartels, we have also continued our cartel enforcement, with the most notable case being car glass, just one of those out of a list. That's a record fine. It is a record fine both for the cartel, for this cartel about $1.7 billion, and for an individual participant in that cartel, nearly $1.2 billion.

I am happy that the level of fines now better reflects the impact that cartels have made on the market. When somebody is addressing me and saying, "Are you aware what the consequence can be?" I say, "Yes, I am aware. My advice to those who are planning to join a cartel is: don't do it, for the fine will be high."

Let me add one other remark, and that is motivating me quite a bit. We are all aware that in the financial sector we are faced with the public sector filling-in responsibilities it is not used to, to use diplomatic wording. I think that mess is inspiring me to be even more aware that also in the industrial sector we should never ever face a situation where we have to say, "We were aware that something was wrong and we weren't acting even though it was judged that the situation was bad."

Going back to antitrust cases, there have been several non-cartel antitrust cases. Notably, using commitment decisions—at the moment quite popular in Europe. We addressed E.ON, a big German/multinational energy company in the German electricity market, through a commitment decision. These commitment decisions have not received the attention they deserve in recent years. They are a new instrument, only available since 2004, but one which we have used effectively in a number of areas to resolve cases. They have an impact on the market more quickly.

In regards to fines, people are sometimes saying, "You must be in a good mood because you collected so much in fines." I say that my best day will be when the fines are zero, because companies have behaved. But I don't believe in heaven on earth, so that will be taking a bit longer yet.

But having said that, we should be aware that fines do make a difference. The goal is that it is a fair, level playing field, protecting consumers. So if that is the goal, protecting the consumer and the good guys in the business world, then when there are other instruments let's use the whole diversity of instruments.

As well as cases, in the last year, we have also been busy with policy reforms. I jump through the list quickly:

- A settlements system.
- Article 82 Guidance.
- A revised Remedies Notice under the Merger Regulation.
- We have started our reviews of the Merger Regulation, Regulation 1, our horizontal and vertical block exemptions, and sectoral regulations in the automotive and insurance sectors.

The big gap that remains was—and I am so delighted to say "was"—the lack of an effective EU-wide private action system. We were successful in securing the European Parliament's support for

our proposal. The day before yesterday, we received cross-border/cross-party support from the European Parliament for our proposals on the White Paper on damages.

It is indeed a great step forward, but not the final step. We will do it the European way, no doubt about that. It makes sense to give the opportunity to those who are victims of harm from cartels to get compensation. So it is absolutely clear, consumers, small and medium-size enterprises, victims of competition breaches, can claim compensation for harm.

We are still busy and thinking over the next step, but I can assure you we are alert, we are in a good mood. We are aware that 500 million citizens in Europe are expecting that we are doing our job properly, and I can assure you we are.

WILSON: Thank you, Commissioner.

Bob Hubbard, can you tell us what's happening in the states?

ROBERT HUBBARD: It has been a very interesting year.

I will try to adjust to the theme of change and continuity. There is plenty of continuity. In the past year, we worked with DOJ with the *JBS/National Beef* merger, with *Google/Yahoo!* I expect those relationships to expand and develop further.

With the FTC, we continue to have day-to-day relationships among staff throughout the country. Many of the litigations that Jon mentioned had state involvement. Minnesota sued along with the FTC in *Ovation*,[1] California in *Solvay Pharmaceuticals*,[2] Virginia in *Inova*.[3] Lots of stuff is going on. We like to add our part to efforts when the laboring oar is with the federal enforcer, but when the states add local perspective and local expertise.

There are plenty of state-specific things going on too. Too many to list here.

We just updated our database.[4] I think we are up to 506 cases now. Just in the past year, just to list a few of them, the states brought a fifty-state enforcement action against Bristol Myers Squibb in *Plavix* for the violation of court injunctions that we had in place.[5] We got a $1.1 million fine. Most of the antitrust compliance actions that you read about are not from the states. That was a rather major development.

We have a trial date set in *TriCor*. Texas settled a hospital boycott case.[6] Pennsylvania keeps doing hospital transactions.

In New York we have successfully convicted some of the *Marsh* defendants who put together that bid rig.[7] We're in our second trial. Emily Ganrud and others have been trying that case, which I hope will reach a similar conclusion.

Connecticut is suing the companies that engage in rating of municipal bonds.[8]

Is it time to talk about *Microsoft* as state-specific? DOJ is still doing some things, but most of the enforcement activity is being carried on by the states.[9]

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1 *See* http://www.ag.state.mn.us/Consumer/PressRelease/081216OvarionPharmaceuticals.asp.

2 *See* http://www.ag.ca.gov/newsalerts/release.php?id=1672&.

3 *See* http://www.ftc.gov/opa/2008/05/inova.shtm.

4 The NAAG State Antitrust Litigation database is available at http://www.naag.org/antitrust/search/.

5 *See* http://www.oag.state.ny.us/bureaus/antitrust/notable_cases.html.

6 *See* http://www.naag.org/antitrust/search/viewCivilLitigation.php?trans_id=552.

7 People v. Gilman, No. 4800/2005 (N.Y. Sup. Ct., N.Y. County).

8 *See* http://www.ct.gov/ag/cwp/view.asp?A=2341&Q=420392.

9 Coordinated State Enforcement of Microsoft Antitrust Judgments, *available at* http://www.microsoft-antitrust.gov/.

This is my fourth Roundtable. I've not said much about consumer protection. I don't have much experience in consumer protection. So I thought maybe this time I would try to make up for that.

There has been lots of talk about predatory lending. The state consumer protection people have been doing a lot to fight predatory lending for a long time. In October of 2002 the states got a $484 million settlement with Household Finance. In October of 2006 the states got a $295 million settlement with Ameriquest, that similarly went to predatory lending claims.[10] So the states tried to outdo themselves, and in October of 2008 got a $6.8 billion settlement with Countrywide Home and Countrywide Financial.

Predatory practices continue to be of significant concern to states, and there were significant successes on that. Unfortunately, those actions didn't prevent the problems, but we're hopeful that we can start turning the corner and fixing some of the worst abuses.

This year I should mention some of the preemption battles that the state consumer protection people have to fight.

—Bob Hubbard

It also makes sense to think about how much we had been fighting a defensive battle within the states. I've mentioned some of the defensive battles among the antitrust enforcers, but I think this year I should mention some of the preemption battles that the state consumer protection people have to fight.

Altria Group, Inc. v. Good[11] was a Supreme Court case in which the claim was under the Maine state unfair trade practices. The claim was that the marketing of light cigarettes was deceptive—that light cigarettes actually did not deliver less tar or nicotine. The preemption argument was that the FTC tests and other things preempted the claim under Maine state law. We got help from the FTC. We were actually surprised that we prevailed in the Supreme Court, that the Maine action wasn't preempted.

I think many of you have also read about *Wyeth v. Levine*.[12] It's another instance in which a defendant looked at some sort of regulation and argued that traditional state law was not appropriate to use. In this case it was a Vermont failure-to-warn claim. The argument was that the labeling that the FDA approved for the drug was adequate and should preempt a state failure to warn claim. We were surprised again to prevail in that.

Another preemption case is on the Supreme Court's agenda: *Cuomo v. Clearing House Association, LLC*.[13] It's set for oral argument on April 28. In that case, a federal agency, instead of joining with us in trying to ensure that consumers are protected, took the formal position that New York State was not allowed to investigate what those entities were doing. The Office of the Controller of the Currency said that it was the only one that had visitation rights, so that the state wasn't allowed to investigate whether racial discrimination was going on in terms of the mortgage policies of those banks. We lost in the Second Circuit, but the Supreme Court granted certiorari.

We're hopeful that those kind of defensive battles are turning around and we're starting to make progress exercising authority without dispute.

As part of the transition to a new administration, NAAG put together an interim briefing memo for the president-elect, now President Obama, and emphasized some of these themes. If you go on NAAG's Web site, you can find the memo.[14] It will give you some of the specifics. We're talking about how to resist preemption, how to enhance cooperation, how to increase enforcement.

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[10] *See* http://www.ameriquestmultistatesettlement.com/.

[11] 129 S. Ct. 538 (2008).

[12] 129 S. Ct. 1187 (2009).

[13] 77 U.S.L.W. 3242 (U.S. Jan. 16, 2009) (No. 08-453) (certiorari granted).

[14] *See* http://www.naag.org/assets/files/pdf/policy/Transition_Team_Briefing_Paper_20090110.pdf.

From a consumer protection perspective, the states emphasize that it's nice to have fifty-six cops on the beat. There are a lot of local things going on. We ought to be working together and try to make sure consumers are protected. We worry about debt collection, counseling scams. Those are far more prevalent when people are more vulnerable, in these difficult economic times.

The interim briefing memo wants the federal government to join together in those efforts, to finance some of them, join states in pushing against the preemption arguments that are being made.

In antitrust, the briefing memo also talks about renewing and prioritizing cooperation. We're hopeful that we'll build on our history of cooperation. Themes explored include resisting the preemption or weakening of state law, be they consumer protection laws that are used for traditional consumer protection or as a way around *Illinois Brick* or otherwise; opposing exemptions, specifically mentioning the railroads and insurance exemptions.

We join the FTC in the fight on pharmaceuticals, to make generic entry occur more quickly.

—*Bob Hubbard*

We are even getting so bold as to think about trying to fix some of the longer-term problems. We still think about *Illinois Brick*, which prohibits a consumer from recovering unless they have a contract with the violator. It's time to have actual injury as the touchstone for recovery. Maybe we'll make some progress on that. We made some progress with the AMC.[15] I don't see any bill offered yet, but that's something in the briefing memo.

We, of course, are pushing for *Leegin* overrule.

We join the FTC in the fight on pharmaceuticals, to make generic entry occur more quickly.

WILSON: Thank you, Bob.

Scott, things certainly have been active under your stewardship at the Department of Justice. Can you share with us what's going on there?

SCOTT HAMMOND: Jim started by joking about my tenure, my very short tenure so far, as Acting. Actually, Jim, I'll tell you it has been somewhat charmed. I haven't had to deal with a single clearance dispute since I've been there. I have heard so much in the past about these clearance disputes, but I haven't had to get involved once. Jon, that has given me a lot of time on my hands.

LEIBOWITZ: In the last two weeks I've been involved in five clearance disputes.

HAMMOND: Well, they haven't brought me in on any. That has given me some time.

I have actually come up with a solution to this clearance dispute problem, and I've also come up with a solution to the controversy surrounding the Division's Section 2 Guidelines, which don't seem to be popular with everybody in the room. Going forward, the Antitrust Division will start looking at all Section 2 conduct criminally, and we will also review all mergers through our criminal enforcement program.

[Laughter]

I don't know, Jon, how you feel about that, but if you have any ties on the Hill, you may want to get Christine confirmed as quickly as you can.

[Laughter]

Transition has been a hot topic, obviously, this week. People want to know what policies are going to be rolled back. Are we returning to the past? Are we starting anew? I'll answer those

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[15] *See* Robert L. Hubbard, *The Antitrust Modernization Commission and the States*, Antitrust, Summer 2007, at 33.

questions with respect to the Division's criminal enforcement program. The blueprint for our criminal enforcement program has been to build on our policies just as we have built on past success.

I would submit that the biggest development this year in cartel enforcement, and the biggest developments that we can foresee on the horizon, all have their roots in policies implemented and achievements obtained more than a decade ago. To give you an example, I want to take you back to October of 1996. That was when Archer-Daniels-Midland Company pled guilty and agreed to pay a $100 million criminal fine for its participation in both the worldwide lysine and citric acid cartels. At that point in time, the Division had never obtained a fine above $10 million for a company convicted of a single antitrust count. The $100 million fine was groundbreaking. In order to obtain the $100 million fine, we relied, for the first time, on the alternative fine statute, Title 18 Section 3571(d), to obtain a fine above the Sherman Act's statutory maximum fine of then $10 million. At that time, the highest aggregate fines that the Division had ever collected in a single year was roughly $42 million. That year we collected $207 million in criminal fines.

Ultimately, what we foresee is a time when if you violate the U.S. antitrust laws, all else being equal, the punishment will be the same regardless of whether you are a U.S. citizen or a foreign national.

—*Scott Hammond*

Today, approximately sixty-eight companies have paid fines of $10 million or more, including sixteen companies that have paid fines of $100 million or more. In the first five months of this fiscal year, companies prosecuted by the Division have been fined nearly $750 million.

Also in the lysine investigation, the Division obtained the first criminal conviction of a foreign national for participating in an international cartel aimed at United States businesses and consumers. A number of individuals from the companies that pled guilty agreed to cooperate pursuant to what were called "no-jail" deals. We were thrilled. We had never been able to persuade a foreign national to agree to cooperate and plead guilty to violating the U.S. antitrust laws before that investigation.

At that time, of course, extradition wasn't a credible threat. Moreover, we had not begun using Interpol Red Notices in our cases to obtain jurisdiction over international fugitives. In fact, I think our defendants feared the INS more than they feared the Antitrust Division, because a criminal antitrust conviction at that time would result in the individual being barred from traveling into the United States for personal or business purposes, as well as their removal and deportation. So in 1996, the year before the first foreign national agreed to enter a plea agreement in the lysine investigation, we entered into a novel—still to this day unique—Memorandum of Understanding with the INS, now the Department of Homeland Security, to assure that cooperating alien defendants in our investigation would receive immigration relief after their conviction. This MOU was instrumental in securing the first guilty pleas by foreign nationals and obtaining their cooperation.

By 1999, two years after the first individual pleas in the lysine investigation, we had already begun to build on the momentum of the lysine and citric acid cases. So then, in the Vitamins cartel prosecution, we obtained jail sentences against foreign nationals for violating U.S. antitrust laws for the first time. And boy, did that have a milestone impact on anti-cartel programs here and abroad. Today, I think, over forty-four foreign nationals from ten different jurisdictions have submitted to U.S. jurisdiction and served time in U.S. prisons for violating the U.S. antitrust laws.

The initial jail sentences that were imposed against foreign nationals were relatively short, beginning with about three months. The Division said publicly at that time that it was our plan to slowly but surely ratchet up the incarceration periods. Ultimately, what we foresee is a time when if you violate the U.S. antitrust laws, all else being equal, the punishment will be the same regardless of whether you are a U.S. citizen or a foreign national. Our goal is to ensure fairness and proportionality in antitrust sentencing. If you look at the Division's charts in the Antitrust Division's Newsletter showing the average sentences for U.S. and foreign individual defendants, you will see how successful we have been in moving towards this goal.

Now, if you go back two years before the *ADM* case—and this will probably be the only time that you'll hear me volunteer to talk about *United States v. General Electric*—two years before that case, Division attorneys were in a courtroom in Columbus, Ohio, when Judge Smith ruled in a Rule 29 motion that our case was dismissed on a judgment of acquittal. That was a very tough loss for the Division—a bitter pill made even tougher to swallow because the Division had been unsuccessful in obtaining evidence overseas that we believe existed and could have advanced our case. Not only were we not able to get that evidence from our counterparts abroad, we had trouble back then getting return phone calls in most cases from jurisdictions abroad where we believed evidence existed.

So after the last of the lysine defendants were convicted at trial, we put together a compilation of the FBI covertly recorded meetings and discussions that were played at trial and that vividly showed the international lysine cartel at work. The tape highlights the cartel activity that was targeting not just the United States, but consumers in every single country around the world. We took our show on the road with former Division Deputy Gary Spratling starring as lead vocalist. We toured Europe and Asia. We met not only with competition authorities, but also with members of parliament to promote legislation aimed at combating cartels. We showed the tapes to treasury officials to assist in increasing funding for cartel enforcement abroad. We played it before judges so that they could witness for themselves the harmful nature of cartel crimes.

In 1999, we hosted an international cartel workshop here in Washington that more than twenty-five jurisdictions attended. And this was several years before the ICN was created. We put together the workshop because we knew we had to develop relationships with our counterparts abroad and we had to change attitudes about the harm being caused by cartel offenses. Folks had to see with their own eyes the nature of the criminal activity that was captured on these tapes and understand how the conduct was harming their businesses and consumers. This was not a Gentlemen's Agreement; this was not a case of executives who didn't know where the line was and so accidentally crossed it. This was hard-core fraud, and it was, as I said, not just victimizing businesses and consumers in the United States, but those of every jurisdiction around the world.

Our goal was to develop a global network of enforcers, because we understood that not only did we need to build on our own successes, we could build on the successes of competition authorities abroad.

That is exactly what has happened. And so each year when I appear at the Spring Meeting and I am asked, "What's the biggest development in U.S. anti-cartel enforcement this year?" time and time again I point to a development abroad and predict that it will have the single biggest impact on U.S. antitrust enforcement in the next year.

That was true in 2002, when the European Commission revised their leniency program and brought it into convergence with the Antitrust Division's program. I can't tell you how significant that was. We knew when that was announced that it was not just going to boost the Commission's cartel enforcement program, it was going to boost our program, because companies would respond by simultaneously reporting cartel offenses in both of our jurisdictions. And that's exactly what has happened.

It was also true two years ago, when Japan introduced its leniency program. We knew it would be successful because they had put together all the necessary ingredients for a successful program, and we knew it would result not just in increased deterrence in Japan, deterrence that was sure to benefit U.S. businesses and consumers, but we knew that it would result in simultaneous leniency applications in Asia, Europe, and the United States. That has happened, and it has resulted in a sea change in the way Asian companies and their executives respond to our investigations.

Lastly, it was true again this year because the most significant development in U.S. antitrust enforcement this year, and I submit the most significant development for all of you who represent individuals and companies in international cartel investigations, is the jail sentences that were imposed in the United Kingdom earlier this year against the Marine Hose executives. It serves as proof positive now that if an executive engages in global cartel activity, the executive risks criminal prosecution not just in North America but in Europe.

The most significant development in U.S. antitrust enforcement this year, and I submit the most significant development for all of you who represent individuals and companies in international cartel investigations, is the jail sentences that were imposed in the United Kingdom earlier this year against the Marine Hose executives.

—Scott Hammond

So what will be the next big development? Looking forward, there is going to be a real competition because there are a lot of developments around the world that are contending to fill that slot. For example, Brazil's criminal cartel enforcement program has been tremendously successful, and we are currently running parallel criminal cartel investigations with them. Moreover, their leniency program is firing on all cylinders. In addition, there have been major domestic criminal cartel prosecutions in a number of jurisdictions around the world—in Japan, in Korea, in Israel, in Ireland, in Denmark, in the Czech Republic. All of these jurisdictions are poised to step up in the international cartel enforcement arena. On top of that, jurisdictions like Australia, the Netherlands, Russia, South Africa—all these jurisdictions are in the process of adopting or drafting legislation that will criminalize cartel offenses.

I would just sum up by saying that as you witness this next generation of jurisdictions adopt criminal sanctions, when you read news reports of an unprecedented number of jurisdictions working together and joining in simultaneous coordinated raids on target companies around the world, when you hear about another jurisdiction like Mongolia, which just introduced a leniency program, the DNA for all of those developments dates back to Division policies and practices that were put in place back in the 1990s.

We had to learn some lessons the hard way, like *GE*, but we've learned from our experiences and we're moving forward, and that's what we're going to continue to do, now with the assistance of our sister enforcement authorities abroad.

ROXANE BUSEY: Scott, I have a follow-on question for you. I was going to ask you for a bit more specificity. As more jurisdictions adopt criminal sanctions, how has that affected the Division's enforcement or its procedures?

HAMMOND: In terms of how will the Division's enforcement decisions, its charging practices, its sentencing recommendations, how will they be impacted by a criminal prosecution abroad, the answer to that depends on whether the Division is satisfied that a criminal prosecution abroad meets the deterrent interests of the United States. If we are satisfied that it does, then we would certainly take it into account.

Now, having said that, I think in the near term that it may be rare where we'll see a foreign prosecution of a target of one of our investigations meet that test. I say it's going to be rare for two reasons. Number one is, at least in the short term, I would expect that the United States will remain out in front of other jurisdictions in terms of our ability to put cases together to the point that they are ready to be criminally prosecuted, and I don't think we would defer a prosecution just waiting to see what another jurisdiction might do.

The second reason why it will likely take time before sentences imposed abroad satisfy U.S. deterrence interests is because there is likely to be a maturation process. It may take time before other jurisdictions that are introducing criminal sanctions begin to impose sentences that we would consider to amount to a sufficient deterrent to protect U.S. businesses and consumers.

Now, having said that, in the *Marine Hose* cases brought in the United Kingdom, we did take into

account a foreign sentence imposed by a court abroad in the sentencing of the same defendant in a U.S. court. In the *Marine Hose* case, we entered into plea agreements with three U.K. foreign nationals, where they admitted to fixing prices and agreed to serve lengthy jail sentences here in the United States. Then we put them on an airplane. They were escorted by federal agents back to London, where they also pled guilty to violating the U.K.'s criminal antitrust law, the U.K. Enterprise Act. They provided full cooperation to the U.K. authorities, and were sentenced. Our plea agreements with each of these three U.K. nationals provided that if the defendant was sentenced to a period of incarceration that met or exceeded the sentence called for in his U.S. plea agreement, then he would not have to return to the United States to serve his sentence. Thus, he wouldn't be subject to a consecutive sentence. That's exactly what happened. The sentences imposed in the United Kingdom matched those sentences called for in the U.S. plea agreements. Obviously, that is a new development. These were the first cases that were brought in the United Kingdom, and they were able to obtain some very substantial jail sentences. An extraordinary deterrent that will not only advance anti-cartel enforcement in Europe, but in the United States as well.

I would like to see this scenario repeated in other cases and with other jurisdictions. We are exploring whether it's possible with other jurisdictions, because I believe it is an important step to achieving our goal of creating a strong global network of anti-cartel enforcement.

WILLIAM MACLEOD: Commissioner Kroes, I want to turn to private rights of action. You mentioned in your opening remarks your White Paper. Could you update us on where the jurisdictions are within the European Union on bringing about private rights of action?

KROES: Just last Wednesday, our White Paper was agreed upon in the European Parliament, party-wide. So we are counting our blessings. It has triggered wide debate. But no one has questioned the core premise, that victims of competition infringements deserve the access to justice that our courts have mandated. But there was just the fear that we should import your system. I am just mentioning what is reality. I think that fear is not completely a joke, for you have done the job and you have perhaps just made it a bit too excessive.

Anyhow, I repeat that we will do it in the European way, because it is our commitment to that approach which allowed Parliament to accept it—and more than accept it, it is in favor of it. My belief remains the same. We have to deliver the right to compensation to consumers and law-abiding businesses.

MACLEOD: I have a question for Chairman Leibowitz. I think the bidding is currently at criminal enforcement of Section 2 from DOJ. Do I hear criminal enforcement of Section 5 from the FTC?

LEIBOWITZ: It's so funny, Bill, you raised this. I hadn't really thought about it until today. But on unilateral conduct, at least, we're somewhere between the report that the Justice Department issued, which wanted to use a disproportionality test, and where Scott is today, because he wants to put these people in jail on unilateral conduct.

On Section 5, one of the problems we've found is that it is very difficult—and *Rambus* is a perfect example of this—to win unilateral conduct cases, even when we feel the evidence is strong, in the courts. And so we have to look at all the tools in our arsenal to try to stop anticompetitive behavior that might harm consumers. One of the tools in our arsenal—and it is utterly clear if you read the congressional debate in 1914 about the creation of the FTC Act — is that Congress wanted to give us jurisdiction beyond the antitrust laws. Think of it as a penumbra around the antitrust

laws. Under Section 5, you have limited remedies if you bring a pure Section 5 case. You would use it to make people cease and desist from bad acts.

The antitrust laws have been enormously circumscribed over the past thirty years—and, of course, some of that circumscription and limitation is good. I don't think I want to go back to the days of, say, the *Neal Report* or *Von's Grocery*. But some of it, I think, has gone a little bit too far. Some judges have swallowed a bit too much of the Chicago School elixir. We need to move—to mix metaphors; I apologize—we need to move the pendulum back a bit to stop anticompetitive conduct.

And so I've been talking with my colleagues—I see Commissioner Harbour here—about using Section 5. And again, if we use Section 5, Bill, it won't be the same way that the Commission used it in the late 1970s, when antitrust law was extremely expansive and they wanted to go even beyond that. It would be in a way where we'd try to stop anticompetitive behavior that harms consumers and go outside the somewhat or very circumscribed area of antitrust enforcement.

And so I think, going forward, we're having a discussion with all the Commissioners about trying to find a case, an appropriate one. It might be in the unilateral conduct area. Although I also think there are still plenty of cases where we can use Section 2.

BUSEY: An important question has to do with *Leegin* and resale price maintenance. I think the audience would like to know where you all stand on that.

Bob, I'm going to start with you. The Supreme Court in *Leegin* recognized that there were at least some circumstances where there was no harm to consumers as a result of resale price maintenance. I know that in certain states, including New York, in enforcing their state antitrust laws *Leegin* is not being followed.

My question for you is: Can you envision any circumstances under which there would not be consumer harm under a resale price maintenance scheme?

HUBBARD: I have to admit that I don't look at it as a way to prove a theory, whether resale price fixing is always bad. There are instances in which manufacturers try to put in place a resale price-fixing arrangement and there actually is plenty of competition from other people and they can't implement it. It doesn't work. In that instance there's no consumer harm. In the instances in which it does work, there probably is consumer harm.

But it's more a question of looking at what harm occurs and trying to understand that and going from there, instead of getting stuck in the theoretical mud.

I think that in the past year, and ever since *Leegin* came down, the dynamic has significantly changed. The dispute used to be about whether there was an agreement, instead of what the effect was, how you measure the effect, and how the restraint impacts the market. I think that one of the effects that has had on state enforcers—I know that the FTC is having workshops on this also—is to ask those questions: What is the effect? How does it happen? When does it work and when doesn't it work? When is a brand a sufficiently differentiated product that you really shouldn't be thinking in market definition terms; you should be thinking about the power of that brand and whether a significant group of consumers can be harmed because of that power.

So I think that there is still some work to do to think through all those issues and to make prudent and wise decisions about how to enforce. We are making some progress, I think, on those fronts.

BUSEY: There is legislation pending to reverse *Leegin*. I know, Jon, you said that you would support that legislation. Maybe you would like to articulate your reasons for that.

LEIBOWITZ: Well, look, I would say that reasonable people can disagree about resale price maintenance and about the *Leegin* case. And, of course, at our Commission reasonable people do disagree. I think Bill Kovacic was a supporter of the decision, and I think Commissioner Harbour and I—and Commissioner Harbour has been a leader on this issue—were not.

I do think that one of the things that is very helpful to us is to do this series of workshops under Commissioner Harbour's leadership. We will finish up and we will write a report. I think we can help contribute to the policy debate.

I happen to think that per se treatment is appropriate. That is what the legislation would do. I think there will be a lot of momentum for the legislation going forward. But we are going to try to take a reasoned and balanced approach to our workshop and to our report, and we will see where that goes.

The only other point I wanted to make, just following up on yours, is that even after *Leegin* it is still clear that you can bring RPM cases. You might do it under a rule of reason. I think we suggested in our *Nine West* petition it possibly could be under some sort of intermediate scrutiny.

So if the legislation passes, we will use it as a tool in our arsenal. If it does not, we are still going to be involved and actively engaged in this area.

I worry that RPM disadvantages distributors who want to compete based on a low-price strategy. It may be possible to achieve benefits from RPM, but there may be other, and certainly less harmful, ways to achieve the same benefits.

—Neelie Kroes

BUSEY: My specific question is: Why the per se rule? Given particularly what Bob has indicated, why is the per se rule needed when these factors can be taken into account under a rule of reason?

LEIBOWITZ: Roxane, that is a fair question. But remember, this is an agreement between companies to set prices. One reason was because I think we believe here—I mean I am certainly a strong supporter of stare decisis, and *Dr. Miles* has been on the books since, I think, 1911—and again, is it like horizontal price fixing? I understand the argument that it isn't. But also I think we can do better things for consumers if we have the tool in our arsenal where we can use the per se approach.

BUSEY: Commissioner Kroes, I'd like to ask you as well. Canada, for example, has changed its law in light of our Supreme Court's decision. I don't know where the European Union stands in terms of looking at this issue.

KROES: We don't have a per se approach to resale price maintenance. But you can trust me, be sure that we are very, very skeptical of the concept.

There is, for example, a French case of effective resale price maintenance, the Loi Galland, that hurt consumers a great deal through higher prices, that is proven. To paraphrase Justice Breyer in his dissent in *Leegin*, he said, "We already know that it raises prices, so show me the benefit." So I remain to be convinced about the benefits and I worry that RPM disadvantages distributors who want to compete based on a low-price strategy. It may be possible to achieve benefits from RPM, but there may be other, and certainly less harmful, ways to achieve the same benefits.

WILSON: Not surprisingly, we have questions from our membership about the effect of the economy on antitrust enforcement, one in particular from Bob Langer for Chairman Leibowitz and Commissioner Kroes.

ROBERT LANGER: My question is for Chairman Leibowitz and Commissioner Kroes. What, if any, changes can we expect to merger control in the United States and in the European Union in light of the global recession?

LEIBOWITZ: I actually think you won't see major changes at the Federal Trade Commission. Speaking for myself, not for my colleagues, I think we are going to continue to vigorously enforce the antitrust laws. We will, of course, recognize that sometimes we may be dealing with failing firms and take that into account, as antitrust laws do. But I really do think that the antitrust laws have served us very, very well for many, many years, and they have adapted to boom times and to depression. Even though we are in a very severe economic recession, I think the antitrust laws will continue to be enforced in the manner in which we have, which is continuity.

KROES: Just to start with saying that the single market for Europe is the crown jewel. We are proud and we are aware that it is a great, great advantage to have a single market. It means that we are the biggest economic market on earth. We should be aware that a single market is only functioning if there is competition, and that it is not only linked to mergers, to cartels, but it is also linked to state aid. I was already mentioning that. So you can be absolutely sure that we are determined to be the referee for all those activities and for all those possible attacks on the single market.

I think we are, indeed, stimulated by the Treaty and the founders warning about how to deal with state aids.

We should also take a lesson out of the experience you have had in the United States during the Great Depression. I think there is an interesting research project done by a couple of faculty members of the UCLA University where they have proven that the recovery took several years longer because, with all respect, at that time they took competition away. Well, why should you make a mistake twice?

Even though we are in a very severe economic recession, I think the antitrust laws will continue to be enforced in the manner in which we have, which is continuity.

—Jon Leibowitz

BUSEY: Jim, I have a follow-up question. It actually comes from your Chair's Showcase Program yesterday, where there was a lot of discussion about the concept of a failing economy exception in the Merger Guidelines, or the concept of "too big to fail."

My question, starting with you, Jon, again, would be: Is this something that the antitrust laws should be taking into account, and, if so, how?

LEIBOWITZ: I would say this. We've heard a lot of chatter and discussion, I think, about the "too big to fail" doctrine. From my own perspective, the antitrust laws don't really ask whether a merged entity is too big to fail; they ask whether a firm would be able to exercise market power, raise prices for consumers, and lessen competition or substantially lessen competition.

I do think at the FTC, at least in my four-plus years on the Commission, I have yet to see a merger that we've cleared that in any way invoked the "too big to fail" doctrine. You know, in the banking area, where we don't have jurisdiction, that might be a very legitimate issue, and I defer to Commissioner Kroes on this, because she has far more jurisdiction than we have at the moment.

So I think it's interesting. The Commissioners' minds are always open to new arguments. I hope we never get to the point where we have to deal with the failing economy problem in the context of a merger or an investigation. I think we all feel that way.

BUSEY: Okay. But you did mention there might be some revisions to the Merger Guidelines, and this was proposed as a possible revision.

LEIBOWITZ: I think that's a great point. Again, I think I need to talk to my colleagues. We have started to talk. We need to wait until Christine Varney is firmly ensconced in the Justice Department, which hopefully will be soon. But if we proceed down the road of Merger Guidelines revisions,

I think we're going to want to talk to all stakeholders. We are going to keep our mind open. That's the way you should approach new Guidelines and really approach new issues. But again, I hope we don't get to the failing economy doctrine any time soon.

BUSEY: Commissioner Kroes, it has been deferred to you.

KROES: I saw that there was again one member of your audience that was addressing me.

Too big to fail. Okay, maybe, but don't say it too easily. Always thinking a bank or a company is too big to fail is a problem for the system. In this case it made sense to save the banks, but it is also true that no bank is too big to restructure, and that is my lesson now.

BUSEY: That's a good answer.

WILSON: One of our videotape questioners asks about consumer protection in a recession.

STEVE COLE: I'm Steve Cole, President and CEO of the Council of Better Business Bureaus, and my question is for Chairman Leibowitz. Mr. Chairman, will the economic problems have any effect on the consumer protection mission of the Commission? If so, where might we expect to see more consumer protection activity?

LEIBOWITZ: That's a great question, because just as I think we'll be approaching antitrust from the same perspective that we have in the past, I think in the consumer protection area we are going to in some ways emphasize certain areas.

One is clearly subprime and predatory mortgages. In the financial services area, over the last five years we've brought sixty-eight cases, about a third of them in the last year. In the last ten years, we've gotten in consumer redress—and I know it's not about the money, but when it involves consumers getting redress it can be about the money—$465 million. We are going to make this a huge area because consumers are hurting, and we know that there are advertisements out there, because we've done sweeps, by companies that are patently, clearly misstating or clearly being deceptive in the terms and conditions they're offering. We did an Internet sweep and we found 200 different companies that had ads that were facially invalid. You know, "one percent mortgage"—it didn't say anything about where the mortgage would be six months later. So that's going to be an area where we focus.

We have been putting more resources into the consumer protection financial practices group—we are moving from about thirty attorneys who were working on this to about sixty, including the regional offices.

The other thing that will be enormously helpful to us is the Omnibus Appropriation Act. Senator Dorgan and Senator Rockefeller got us the ability to do APA rule making in this area. So we are going to look at the entire life cycle of mortgages. As some of you know, when we do rule making on the consumer protection side, we're under a kind of medieval form of rule making called the Magnuson-Moss Act. It takes six or eight years generally to do consumer protection regulations, which is a reason why we don't do very many of them. But when we have APA notice-and-comment rule making, we can be much more agile and swift in helping consumers. So this is going to be an area we focus on and an area where I think we can really help consumers who have been victims of predatory mortgages.

Just one other quick point and then I'll stop. We brought a case against a Bear Stearns subsidiary, EMC Mortgage, for deceptive practices. We settled the case for $28 million, which is a lot

of money for us, last fall. It was deceptive mortgage servicing, which is one of the areas where I think we are going to do a rule making. We ended up writing 86,000 redress checks to American consumers. It is one of the things recently we are most proud of. I think there are more cases to bring in this area, and we're going to try to do our best.

MACLEOD: Bob, you mentioned in your opening remarks the increasing consumer protection emphasis as well. Do you see new things for the states to be doing on that side of your mission?

HUBBARD: Yes. There are lots. I just mentioned three of the biggest cases on predatory lending. There are lots of smaller-scale things going on.

In troubled economic times, credit scams and all sorts of debt collection abuses and other things are increasingly a problem. Many AG offices are redoubling efforts to make sure that people have access to good information, that they're not victimized. It's particularly important in these economic times. It has taken plenty of resources. It is retail work that makes a lot of sense to do.

LEIBOWITZ: Yes. And if I could add one more thing, just as we're going to continue to work with our international partners on conduct and merger investigations—and we do—we are going to ramp up our involvement with the state attorneys general on a lot of predatory financial practices and deceptive financial practices because, as all of us know, our resources are limited. We have to leverage our resources in the most effective way. Partnering with the state AGs, who also have somewhat limited resources, is one of the best ways to get the most bang for your buck in helping consumers.

HUBBARD: Right. We have done sweeps together and other things. Some of them have been very helpful in figuring out what the landscape is, where the problems are, how to get rid of the worst problems, and then focusing on how best to proceed.

WILSON: We never get too far from questions about the money. Our next question actually is another question about fines.

ANITA STORK: I'm Anita Stork with Covington & Burling in San Francisco. I have a question for Commissioner Kroes. Recently the fines in Commission cases have exceeded a billion euros a year. No matter what the exchange rate, that's a lot of money. Why are the fines imposed by the Commission so high? Are they too high? Do you think they will stay at these levels?

KROES: They are certainly not too high. But you are not surprised to hear me say that. And there are still cartels, so perhaps they are not high enough. Very seriously, we have to take into account in our calculations that at the end of the day we can defend our decisions in the court in Luxembourg. I can assure you that nearly everyone is going to court to argue that our calculations are too high! But if you are acting against the law you have to face the consequences.

By the way—I think that I touched upon the same issue last year—it is not only a matter of money. Nowadays it is also a matter that CEOs are coming over for a cup of coffee and they are saying to me, "We don't want to be on the front page of the *Wall Street Journal* or of the *FT* or whatever. We would love to be on the front pages with good news and not that you caught us." So now it's not just the fines that the company worries about, but the reaction of the outside world. Shareholders don't want to be involved in companies that are not following the rules.

Sometimes it is said that the fine is only for the benefit of consumers. But it is also for other businesses, for most businesses are acting in a correct way but can suffer harm from cartels. Sometimes we forget that. When a couple of businesses are not acting in a correct way, they should absolutely be fined.

In our calculations we take into account the size of the market affected, the duration of the cartel, and of course if you are a repeat offender, then we are really tough, I can assure you.

LEIBOWITZ: If I could add a word of support for Commissioner Kroes, we are an agency, the Federal Trade Commission, for the most part, without fining authority. From my perspective—if we had fining authority for consumer protection violations, and maybe for antitrust violations, although I would say not for pure Section 5 cases, we would be able to more effectively stop anticompetitive behavior and stop consumer harm. Forty-seven state attorneys general have fining authority. If you don't have fining authority—and it is particularly true on the consumer protection side—it is very hard to have an effective deterrent.

WILSON: Let me at least play the devil's advocate here for a moment. A lot of industries are distressed today. Scott, is there any point at which the financial distress of an industry facing these fines plays any role in the calculus, where you consider their financial condition in setting the level of the fines?

HAMMOND: Yes. Under the U.S. Sentencing Guidelines if the imposition of a Guidelines fine would jeopardize the viability of a company, then it must be reduced. However, we would reach that same conclusion regardless of whatever the Guidelines said. After all, we are the Antitrust Division, and we cannot be in the business of putting competitors out of business. So I can assure you we would take it into consideration.

When we're determining an appropriate fine for a company, we look at what a company can pay immediately. If they can't pay the appropriate fine immediately, then we consider an installment schedule of up to five years with interest. If we determine that the company cannot pay the determined fine over time, then we would determine whether the company could make the installment payments if the interest was waived. If we determine that the company is still not capable of paying the fine over five years, even without interest, only then would we drop the fine.

There are a number of defendants whose fines have been lowered based on an inability to pay. I can tell you, however, that it is a very rigorous review process that we put companies through in terms of determining the company's true ability to pay.

In the present economy, with credit markets drying up, it adds a new wrinkle to this analysis. It is more difficult to determine what a company can pay over time or to forecast what the company's financial situation is going to be over time.

Bottom line, however, is that when we make a determination of what we think is the appropriate fine, the Division will not settle for a penny less. I would hope, since so many of you represent businesses that are victims of cartel crimes, that that's exactly what you would want us to do. As the Commissioner said, businesses are usually the first victims of cartel activity.

And of course everybody knows what happens in desperate times. Sending a signal that we were going to be soft with respect to fining companies in these times would be absolutely the wrong message.

Finally, I want to give a shout out to General Counsel in the audience and other members of the business community here, who are obviously having to tighten their belts and make decisions on

where to put scarce resources, that you not shortchange your corporate compliance programs. I don't think I'll get a lot of disagreement from the rest of the folks in the audience on this. This is not the time to divert money away from corporate compliance, in all seriousness. Unfortunately, we expect to see an up-tick in cartel activity as competitors facing hard times look to alternatives to true competition.

WILSON: Commissioner, does the European Commission take the same approach?

KROES: Slightly the same. But I want to add to that that, in general terms—the fine limit of 10 percent of turnover, already put in the legislation in 1962, is in most cases far from reached. So we are well within our legal limits and the circumstances of today won't change our approach.

Then I am coming back to my earlier remark. What we were facing in the management of the financial world is a need for some people to blame. But we should stop blaming and start taking responsibility. I don't want to be blamed by my granddaughter in a couple of years. I don't want to be blamed by her, when I was aware of what was going wrong in the business world, that I didn't act.

Having said that, I think sometimes it is difficult. I still remember a letter I got, a personal letter from a fourteen-year-old girl. She wrote me: "I asked for an explanation of your policy as Competition Commissioner and I got it. I think you are doing a great job. But in the case that is quite close to our own family business, I have to add to that that sometimes you are just the cause of big sadness in a family. My grandfather started the company, now my father was involved in a cartel, and now we are facing a big misery."

So I think that taking into account that even a girl of fourteen took the line that you have to be consistent, you have to be aware that ignoring the rules of the game doesn't fix any problems.

This is not the time to divert money away from corporate compliance, in all seriousness. Unfortunately, we expect to see an up-tick in cartel activity as competitors facing hard times look to alternatives to true competition.

—Scott Hammond

WILSON: I am encouraged to know that our antitrust policy will survive these difficult economic times. I do wonder whether perhaps here in the United States we'll be seeking technical assistance from the European Commission on the issue of state aid.

But let's move on to some of those issues that we as antitrust lawyers see in boom and bust times.

RICHARD GILBERT: I'm Rich Gilbert from Competition Policy Associates, California-Berkeley. I'll direct my question to Chairman Leibowitz, although I'm happy to hear from others as well. My question is on patents. Patent assertion is one of the few growth industries we have these days. In some situations, though, patent awards and settlements appear to reflect business strategy more than the technical merits of the patent. Holdup in standard setting is one example. Other examples relate to products that are covered by lots of intellectual property, as in the *Alcatel/Lucent* MP3 case. Will strategic patent assertion continue to be a priority for enforcement by the Commission, particularly in the post-*Rambus* legal environment? Also, will the Commission and the Division support patent reform legislation that will address, hopefully, strategic patent assertion?

LEIBOWITZ: I'd start by saying that we don't like to admit at the FTC that we're in the post-*Rambus* era. But I suppose we all but are.

I would say this. I'll make a couple of points. We are going to stay very, very actively involved in this area, the area of holdup and anticompetitive behavior involving the intersection of patents and antitrust. I'm not quite sure exactly—and I think it's going to require consultation among our

colleagues—exactly where we are going to go, but we obviously have more standard-setting cases that we are looking at in the pipeline. We have used Section 5, I think, effectively in the context of *N-Data* to go after problematic and anticompetitive conduct relating to standard setting.

The other thing that we're doing on intellectual property is holding a series of workshops on intellectual property and patent matters that will result in a report. It's a follow-up to our 2003 report that was done under Tim Muris. I think that will help inform where we will be going in the future.

In terms of patent reform legislation, I'd say this. To some extent, it depends what's in this year's newest iteration of patent reform legislation. Obviously, some of the things we were very, very concerned about in 2003 have been addressed by the Supreme Court. Other things have not. The issue of patent ambush and patent trolls are ones that we will be thinking about going forward.

WILSON: Let me ask you, Jon, and Bob you may want to follow up, about another intellectual property issue. I think you alluded to this in your opening remarks, Jon. The issue of reverse payments has been a significant one for the Commission, but you haven't done well in the courts. Do you see any way to reconcile the position the Commission has taken with those decisions? Is Supreme Court review your only avenue, or is legislation the way out of this?

LEIBOWITZ: Well, it's a good question. We have not done terrifically well in the courts, it is true. Our position has only been vindicated in the *Cardizem* case, which is the case in the Sixth Circuit.

I do think that we are moving forward in this area for a variety of reasons.

First of all, if you listened to Christine Varney's testimony at her hearing, I think she is clearly supportive of the FTC position. Obviously, when we tried to get the *Schering* case to the Supreme Court, the Justice Department came out against us. Although it modified its position a little bit later in the *Tamoxifen* case, it clearly was on the other side. I don't think that's the case going forward because, of course, President Obama has said as recently as two weeks ago in his budget that he supports ending these pay-for-delay deals that harm consumers and prevent them from getting generic drugs in a timely manner.

So I think there is a case that is on appeal to the Supreme Court now out of the Federal Circuit. We have cases in the Third and Ninth Circuits, which are considered to be fairly progressive on antitrust issues, along with, I might now say, the Sixth Circuit.

And then there's a whole other avenue, which might be the cleaner and better approach, and that's the legislative approach. We have a lot of support for legislation. The Commission is firmly behind this legislation. Every Commissioner and every Chairman, going back through Tim Muris and Bob Pitofsky and Debbie Majoras and Bill Kovacic, supports legislation to ban these anticompetitive deals in which brands pay generics literally to stay out of the marketplace.

It is somewhat more complex, but not that much more complex than if I own a gas station and you want to build a gas station across the street. I can't say, "Here's $200,000. Go away for five years." Now, when you're dealing with patents it's a little bit different. But the concept should be, at least from the perspective of all of the FTC Commissioners and the FTC staff, that these deals are anticompetitive.

So whether we solve it through the courts or whether we solve it legislatively, I think we are agnostic on that. I do think in some ways, if we get legislation in the context of health care that bans these deals, that is a cleaner solution, and actually would give the business community more certainty sooner, and that would be valuable, I think.

WILSON: And more predictable.

Bob?

HUBBARD: Certainly the states have supported the FTC in this effort. I mentioned the interim briefing memo to President-elect Obama in which this was one of the few items that was listed as important.

You know, I am an undying optimist—every so often I recognize that patent law developments are occurring and I wonder for example whether the restraint in *Cardizem* might have never been possible because the patent would have failed the Supreme Court's recent test for obviousness.[16] And there are other things going on. Maybe part of the problem is that so much money is sloshing around that the patent system really has to be fixed. Maybe that will have the unintended benefit of getting rid of some of these problems.

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—*Bob Hubbard*

WILSON: The Section's Transition Task Force endorsed the use of retrospective analysis by the agencies as they are examining their enforcement policies. On that issue, we have a question from one of our videotape questioners.

DAVID ALTSCHULER: I'm David Altschuler from Akin Gump. This question is for Chairman Leibowitz. The FTC's Bureau of Economics recently published a retrospective study on a pair of consummated hospital mergers in Chicago and found that in one of the mergers prices increased significantly due to the combined firm's market power. President Obama has promised increased antitrust enforcement in health care. My question is: Should we expect more retrospective studies, and do you expect that they might lead to more enforcement actions?

LEIBOWITZ: I'd start with this point. When President Obama said that he wanted increased antitrust enforcement in health care, I'm not sure he was saying to us "do more retrospectives."

Anyway, I do think that we will continue to do retrospectives. They have been enormously helpful to us. Our hospital retrospective, which was begun under Tim Muris, informed our thinking in terms of our *Evanston* case. It was one of the few hospital merger cases that the Commission has won in recent—I would say years, but it's probably decades.

It also gave us enormous evidence going forward in other hospital merger cases, because what we found is six years after the *Evanston* hospital merger was consummated, that payers were paying two and three times the price they had paid before. I think that was probably helpful in the context of *Inova/Prince William*, another successful hospital challenge because the A-side company pulled out, and will be helpful and useful to us going forward.

So I think retrospectives can be enormously important. They can be enormously important in developing cases. They can also be enormously important in telling you you shouldn't develop cases. My immediate past predecessor, Bill Kovacic, is a strong supporter of retrospectives, and I see Commissioner Harbour nodding. So I think we'll continue to do this. I think it's a good thing.

Again, we're not about just bringing cases whimsically. We're about trying to figure out whether to bring cases that harm consumers and that violate the antitrust laws. That is a good way to go back and look at what we've done right and what we've done wrong.

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[16] *See* KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398 (2007).

HUBBARD: On behalf of my colleagues in California, I particularly appreciated the retrospective on the *Sutter Summit Hospital* transaction.[17] California lost the case challenging the transaction,[18] but they were intrigued to see that the transaction may have been anticompetitive.

BUSEY: We all know that President Obama has health care reform on his agenda. My question for you is: What role do you expect competition/antitrust enforcement to play and, in particular, do you have a position with respect to single payer or price regulation?

LEIBOWITZ: I hate to dodge yet another one of your questions, Roxane, but I don't think we have a position on single payer or price regulation. I think that's a little bit out of our ambit.

I do believe that as health care reform goes forward, of course, we'd like to solve the reverse-payment/pay-for-delay/settlement problem in that context, that it's an opportunity to do that legislatively.

I think beyond that, on the competition side, to the extent that Congress wants our policy views, we are always happy to provide them. And indeed, under Bill Kovacic we started to think a little bit about biologics, and we are writing a report on generic biologics and what should be the pathway going forward, and some other health care issues.

On the consumer protection side, the Stimulus bill gave us rule-making authority to issue a rule on data security breaches relating to health entities not covered by HIPAA. So we're going to stay involved in this area, and we will see where health care goes and where our issues go with it.

MACLEOD: Commissioner Kroes, inquiries by the European Commission and the UK antitrust agencies into whether markets are working well have claimed to identify some significant competition issues. Can you tell us about them?

KROES: One, I'm delighted to have this instrument, for it is useful to find out if a market is functioning, and not only in one Member State, but that we are allowed to do it all over the whole single market, so to say.

We started with energy and financial services. I assure you that was an absolutely great experience. We were already aware of competition issues in these markets, but there is a difference when you are just thinking, feeling, having the impression that the market isn't optimally functioning, but finding out at that level in the inquiry that it indeed wasn't functioning. And we could take a couple of initiatives, for example, for energy policy. We did make a great step forward, for in Europe it was very much focused on the national markets. It was the incumbent who was playing the music. It was not making the investments that were absolutely a must for, for example, the infrastructure.

And by the way, when we were finding out, we in the meantime could also find out that there should be a couple of enforcement actions. Combining that, and then just to prove that it is not about money but it is about the goal that the market should function, the incumbents when they were aware that we had them on our screen and it was really big fines that we were talking of, then they came in, even against their own government, so to say. They came to us and they offered to make decisions that were in line with our goals in the energy market.

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[17] *See* FTC Bureau of Economics Working Paper No. 293, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction*, *available at* http://www.ssrn.com/abstract=1301575.

[18] California v. Sutter Health Sys., 84 F. Supp. 2d 1057 (N.D. Cal. 2000).

The same in financial services. And we are close to the final report of the sector inquiry into pharma. We were inspired by you in the United States to do an inquiry in that field. I think that, anyhow, with the draft we already found a couple of interesting things in the market.

So I would advise you, if you are aware that there is something rotten in the state, just find out via a sector inquiry.

BUSEY: Jon, our program wouldn't be complete unless we had a merger question for you. We know that the FTC has been very successful lately in enjoining Whole Foods and in *CCC/Mitchell*. We had an excellent program yesterday that talked about the cases. I'm not sure that many of us are concerned about the results in the cases, but there is a concern whether the standard for obtaining a preliminary injunction is different for the FTC and the Department of Justice.

So my question for you is: What is your position on that? Would you consider legislation that might change that?

The notion that a merging entity by having to go into Part 3 is going to have to pull its merger is one that we need to think about going forward, because I think that the business community has some points that are legitimate.

—Jon Leibowitz

LEIBOWITZ: I would say this. If you look at Section 7, the standard is absolutely identical for both the Justice Department and for the Federal Trade Commission.

Having said that, clearly procedurally it is a different standard. We have to show, if we want to get into Part 3, that the questions are so serious and so substantial that they need to go to Part 3. I know members of the bar have been concerned about this, and I don't think it's an illegitimate concern actually.

But having said that, I am hopeful that our reforms in Part 3, and really truncating the process of doing a Part 3 determination in a merger, will diminish any differences in procedures and any perceived differences in outcome.

So I think at this point the best approach isn't to look for legislation. I think it's to work through the Federal Trade Commission process. We should do our job, too, in trying to make Part 3 as fast as we possibly can. We have even had some discussions about speeding up the merger review, which is now very, very fast track in Part 3, somewhat more if companies want to do that.

I totally agree and believe that we shouldn't have different standards as a practical matter—I don't believe we have them—and also that companies deserve a—I wouldn't call it an up-or-down vote, but they deserve a determination by the agencies as quickly as we possibly can.

The notion that a merging entity by having to go into Part 3 is going to have to pull its merger is one that we need to think about going forward, because I think that the business community has some points that are legitimate. I think we are going to work very, very hard to diminish any concerns they have going forward.

MACLEOD: Competition concerns arise with intellectual property beyond patents. As a matter of fact, copyrights have been an issue recently on the other side of the ocean. Our next video question goes to Commissioner Kroes.

PATRICK THOMPSON: I'm Patrick Thompson from Goodwin Procter in San Francisco. My question is for Commissioner Kroes.

You've been involved in a few difficult copyright issues during your time as Commissioner, with *iTunes* and collecting societies cases, and perhaps most famously last fall, the roundtable with Mick Jagger. My question is: Why is this area important to you and what do you want to achieve?

KROES: The EU single market is based on a relatively straightforward premise: the fewer the barriers between markets, the more efficiency.

It was not only Mick, by the way, but it was also Steve Jobs and it was also the number one of eBay and of the consumer organization in Europe. We had an interesting meeting. It was all about, indeed, copyright issues and about *iTunes* and collecting societies cases.

What is really difficult to explain to the consumer—and that was one of my difficulties at that time, and it still is, is that in Europe distributors may need separate licenses from dozens of different collecting societies if they want to operate throughout the European Union, and that customers in one Member State may not be able to buy from an online store in another. Well, I can't explain that if you are talking about a single market.

The online market is more fragmented than the market for physical CDs, for example. So we have to come through and, so I started the discussion with top industry and consumer representatives about how those barriers can be eliminated.

This roundtable, by the way, did give a positive conclusion, some of the participants who were fighting each other before courts at the end of this online roundtable session said, "Why shouldn't we sit together, and can we use your office, Neelie, and just try to find a solution for what we should have in mind?"

I think that type of attitude makes sense. But, anyhow, we should make the single market more workable, and certainly for online issues.

WILSON: We have one final video question. This goes to Assistant Attorney General Hubbard.

PATRICIA CONNERS: This is Trish Conners from the Florida Attorney General's Office and the immediate past Chair of the NAAG Multistate Antitrust Task Force. My question is for Assistant Attorney General Bob Hubbard.

Bob, this will be your last year as the current Task Force Chair. Looking back over your period of service, would you say yours was a great term as the states' antitrust leader or perhaps the greatest term? What would you say have been your most significant accomplishments during your term?

HUBBARD: I'm speechless, Trish.

I've had the pleasure and the honor of being the Task Force Chair for four years. A lot of my time has been spent trying to prevent disasters.

The initial press release announcing the Antitrust Modernization Commission questioned the value of state enforcement.[19] We were thinking about reinvigorating enforcement against vertical restraints, and then, shockingly, a pro forma decision out of the Fifth Circuit attracts the attention of the Supreme Court. All of a sudden there's going to be a decision on resale price maintenance. Everyone expected the Supreme Court to reject the per se rule decisively. I felt as if I were swimming up a waterfall. I think that now I'm only swimming upstream, and getting to that point is what I take pride in.

WILSON: One of my goals as the Chair of the Section was to actually hear Bob Hubbard say that he was speechless.

We have used our allotted time. Let's thank these enforcers for what I think has been a terrific way to end this Spring Meeting. ●

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[19] Robert L. Hubbard, *States and the Antitrust Modernization Commission*, ANTITRUST SOURCE, May 2005, http://www.abanet.org/antitrust/atsource/05/05/may05-hubbard.pdf.