Roundtable Conference with Enforcement Officials

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ALLAN VAN FLEET: We have with us today, thanks to the inactivity of unpronounceable Icelandic volcanoes, the Vice President of the European Commission and the Commissioner for Competition, Joaquín Almunia. We have, to his left, Jim Donahue, who chairs the National Association of Attorneys General Antitrust Task Force. Continuing down, we have Jon Leibowitz, Chair of the Federal Trade Commission. We are delighted this year to have our NAFTA neighbor from Mexico represented by the President of the Comisión Federal de Competencia, Eduardo Pérez Motta. And last, but of course not least, Christine Varney, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice.

They are going to start by giving some prepared remarks; then questions are going to be posed to them, first by Barry Nigro, who is the Section of Antitrust Law Program Officer. Almost as much as Spring Meeting Program Chairs Deb Garza and John Villafranco, Barry has been responsible for the programming of this absolutely terrific Spring Meeting. Our other interrogator this morning

1 Editor’s Note: This Roundtable has been edited for publication.
is Leslie Overton. She is the Section of Antitrust Law Secretary and Communications Officer and has done a fabulous job, along with a lot of folks, including Anthony Chavez and Joyce Choi, in setting up and expanding the social media, including, as I say, the hundreds of Tweets that have gone out about this Spring Meeting. Thank you, Leslie, for all the social media work you have been doing.

**MR. VAN FLEET:** Christine, why don’t we start with you first?

**CHRISTINE VARNEY:** Thank you so much, Allan. Good morning, everybody.

Let me start with some exciting news, confirming the worst-kept secret around the Spring Meeting. As many of you know, our Deputy Assistant Attorney General for Economics, Carl Shapiro, has been appointed to the Council of Economic Advisers. While we will miss him dearly, it has given us a fabulous opportunity to bring another superstar from the profession to Washington. I am delighted to announce that Fiona Scott Morton will be joining us from Yale and CRA as our new DAAG for Economics. We couldn’t be more delighted to have you. So welcome, Fiona.

I am also delighted to tell you that in our ongoing effort to save trees, our annual newsletter is now up and live at http://www.justice.gov/atr/public/division-update/2011/.

I’d like to talk about what has been going on this year since I last saw you. We have had a couple of big cases.

The first is what we put out Tuesday or so of this week—*Dean Foods*. We settled a case that was a non-reportable merger, an acquisition of Foremost by Dean Foods, affecting three states—Wisconsin, Michigan, and Illinois. We believed that this led to a level of concentration that was actionable and we moved to undo the merger.

We settled and the State of Michigan settled separately from us. We believe that the settlement, which divests a plant and, in Michigan, set certain benchmarks for pricing for school milk, achieves what we needed to maintain a competitive market for liquid milk and school milk in those three states. So we are delighted with that settlement.

We, as you know, this year brought the first case to conclusion where the Antitrust Division sought and was awarded disgorgement. That is the *KeySpan* case filed in New York. We believe that in the unique circumstances of the *KeySpan* case, where the enterprise was no longer engaged in the market activity that led to the underlying action, disgorgement was the right remedy.

Another interesting case that is filed and pending is the *Blue Cross/Blue Shield* case in Michigan, where we allege that Blue Cross/Blue Shield throughout the State of Michigan has anticompetitive agreements, which we are referring to as “cost-plus MFNs” and “equal-to MFNs.” We think that this is inhibiting competition in the various Michigan markets that we cited.

The Antitrust Division has long held the view that we can achieve disgorgement under our authorizing statutes, and we were delighted that the court in the Tunney Act proceeding upheld that view. I think you can look to see disgorgement as a tool in our arsenal, and in the appropriate circumstances we will not hesitate to seek disgorgement.

Another interesting case that is filed and pending is the *Blue Cross/Blue Shield* case in Michigan, where we allege that Blue Cross/Blue Shield throughout the State of Michigan has anticompetitive agreements, which we are referring to as “cost-plus MFNs” and “equal-to MFNs.” We think that this is inhibiting competition in the various Michigan markets that we cited.

It has also been publicly reported that this is a broader investigation of MFNs. We are looking across the country in those markets where there is high concentration in health insurance and where we believe there are anticompetitive agreements that are inhibiting competition, keeping prices high, and keeping access barriers in place. We will be looking at them seriously with our partners in the state Attorneys General offices. We are working closely with them on these matters, as we do on almost all of our matters.
Our first Section 2 case was filed and settled in United Regional Wichita Falls, where a hospital that was the dominant provider was engaging in exclusionary contracts. It was an investigation that had been ongoing, and we reached a point at which we were ready to file the suit, and the hospital said, for whatever reasons, “We think that we are going to drop these exclusionary contracts,” hopefully returning the market to a competitive balance. So we were delighted to see that.

If you look at the competitive impact statement in the United Regional case, you will see a further explanation of why we believe the existing Supreme Court precedents in Aspen Skiing and Lorain Journal, as well the Microsoft case on appeal, provide ample guidance on how Section 2 can be and will be applied.

One of our biggest cases this year was NBCU/Comcast—a very broad-ranging review of the proposed transaction. I leave it to you to look at the particulars of the remedy that was imposed.

But I think one thing that is very important that may not be clear when you look at the papers is that we had unprecedented coordination with the Federal Communications Commission. Pursuant to party waivers and pursuant to all statutory and regulatory prescriptions on confidentiality, we were able to create a joint case team.

We set up the first ever e-room, where documents were provided to the Department of Justice, and they went into the e-room tagged with what we thought would be responsive to FCC requests. So it was your government working efficiently to examine a transaction which had potential anticompetitive effects, and working with the parties who really wanted to address what were the potential anticompetitive effects, and we came up with some interesting solutions.

One thing that I would note in that consent is we have shared jurisdiction with the Federal Communications Commission. They have a lot of expertise in the traditional areas, like programming carriage access. So for any kinds of disputes involving programming carriage access, those disputes in the first instance can be arbitrated under the FCC’s existing procedures.

We have a separate set of requirements for what we call online video distribution (OVD). When there are OVD disputes, we have the opportunity to conduct arbitration under the DOJ procedures. So it’s an interesting split. The Federal Communications Commission and the Department of Justice are very excited to see if we can enhance consumer welfare by really teasing out who has the most appropriate expertise, resource, and ability to enforce this decree. We look forward to working with our partners at the FCC on that one.

On the criminal side, I think there has been a lot of ongoing attention to what we refer to as the municipal bonds investigation. We have alleged that there was price fixing in the municipal bonds industry in the late 1990s and in the first half of the 2000s.

As you probably have noticed, we entered into a global settlement for about $140 million with the Bank of America, which was our leniency applicant. We did that in December. Normally we don’t disclose leniency applicants, but in this case the bank self-identified publicly that it was the leniency applicant. We were able to work with the bank, which was very cooperative once it came forward for leniency.

We worked extremely closely with our colleagues in the states, as the states were very interested in this matter, and we were able to construct a global settlement that involved twenty states, the Securities and Exchange Commission, the IRS, the Federal Reserve, the Office of the Comptroller of the Currency, and the Department of Justice. All entered together into a global resolution of these matters as they pertained to the Bank of America.

It has been publicly reported we have had several indictments of former bank employees. Most recently, in January, I believe, there were three indictments of three former UBS employees. We
have indicted one corporation, CDR out in Los Angeles, which was a broker in this conspiracy. I would tell you to continue to pay attention. That investigation is ongoing, and I think you will see more activity there.

As you know, we have a number of other criminal investigations that have been publicly reported, and I think we’ll talk about that a little bit later.

We have an international investigation into price fixing in auto parts that has been reported on, and we actually confirmed it, I believe, because it was right around the time when the government was looking at Toyota’s problems. There was an internationally coordinated dawn raid, and our friends among the press over here were speculating that the dawn raid had something to do with the Toyota issues. It did not. At that point, the governments and the parties confirmed that it was regarding price fixing in auto parts.

Our ongoing air cargo investigation, very well known to most of you, continues. I think we are in the last chapter of that investigation. I hope we’ll be winding that up relatively soon.

As you know, we have a number of other investigations that have been reported on—liquid crystal display, night vision goggles, etc.

One of the big ones that has just come out in the press is our case involving real estate foreclosure auctions. We went, as we say, “overt” on that a couple of weeks ago, and that was widely reported on, particularly in Northern California, where we have alleged that there was price fixing in that auction market.

We continue to work very collaboratively internationally with our friends and colleagues in Mexico and Canada as well as around the world, and we enjoy a particularly close relationship with the European Commission and its Member States.

I think the highlight so far has been our joint work on Cisco/Tandberg, which was an acquisition that we in the United States, given our markets and the technology involved and the competition involved, did not find problematic. In Europe it was a different set of facts and circumstances and there was some concern. I think we worked very collaboratively with our colleagues at the European Commission and the parties to come up with a solution that is, as we like to say, mindful of every jurisdiction’s own markets and particular market solutions.

The European Commission and the parties crafted a solution that met the needs of their market, and we did not need to do that here in the United States. So it was a very positive, very collaborative work.

We continue to do that wherever possible and, again, with the parties’ consent. I think the interesting thing about Cisco/Tandberg is that both companies concluded it was in their interest to allow us to work together and we got all of the appropriate waivers. I would urge companies again to consider that, because it was quite expeditious. In any matter where we can, as we did in Cisco/Tandberg, we really do think that the joint case team approach has benefits for everyone involved—not just the parties, but also the officials reviewing it.

We were able to exchange ideas in Cisco/Tandberg about the various markets and what the future forces of the markets might look like. It was really very illuminating for us to understand a little bit more about the European market, and I hope we contributed a little bit to the EU’s understanding of our market.

Finally, I think the last thing is yesterday the White House and the Department of Health and Human Services unveiled their proposed regulations for establishing Accountable Care Organizations. Chairman Leibowitz and I were fortunate enough to work very closely with a large group across the government. The agencies included HHS and its component CMS, the IRS, the Treasury, the Department of Justice (our Criminal Division, our Civil Division, our Antitrust Division),
and of course, our colleagues at the Federal Trade Commission: all worked very hard to establish the roadmap for ACOs. In particular, we were able to come up with preliminary antitrust guidance. I think Jon will talk a little bit about it. We were able to yesterday release proposed antitrust guidance; the FTC will be taking comments on the proposed guidance for all of us to take a look at as we go forward.

**MR. VAN FLEET:** Thank you, Christine. That’s a good segue. Jon, do you want to pick up with that?

**JON LEIBOWITZ:** I’d be delighted to.

Let me just start by mentioning that we have two of our esteemed and no longer rookie colleagues here, Julie Brill and Edith Ramirez, who have now almost completed their first year.

For us at the FTC, it has been another year of what we call “balanced activism” and, I think for the most part, continuing consensus.

We are old school. The Antitrust Division puts itself online, and we do that too—as you know we have a lot of educational materials online—but we also have our 2011 Annual Report, which I believe we have copies of outside this room. It documents what we have done well and, actually, some things that we didn’t win on. Nevertheless, we are all about transparency and it will give you a sense of what we have been doing on both the consumer protection and antitrust sides.

On the consumer protection side, we spent a lot of effort over the last year on financial fraud, or what we would call “last-dollar fraud,” because it’s about taking the last dollar from consumers who are already victims of the economic downturn. With our partners, the state Attorneys General, we brought about 450 cases in this area, involving foreclosure rescue scams and debt consolidation scams. About fifty of those cases we brought ourselves. The state Attorneys General brought about another 400 cases. It has been a wonderful partnership. With lots of bad behavior by malefactors in the financial area, the partnership has flourished. It is a good, solid working relationship. We continue to want to work with the state Attorneys General.

The other thing that was probably very important was the settlement we had with Countrywide, which was almost a year ago. We recovered $108 million for people who were victimized by something between negligent loan servicing and deliberate malfeasance in loan servicing. That money will be going back to consumers shortly.

We also continue to be involved in the foreclosure robo-signing mess with the Department of Justice, the banking agencies, and of course, the state Attorneys General.

The other area we spent a lot of time on and devoted a lot of resources to within consumer protection is privacy. There have been a variety of significant cases, including Google Buzz this week. The Google Buzz case was essentially about Google making private information public without consumer consent and indeed contrary to Google’s own representations.

We drafted a major report on privacy that came out at the end of last year. It’s a draft report calling for more privacy by design, more transparency, and more choice. It has really resonated, I think, with stakeholders across the board, including our preliminary recommendation for Do Not Track via the browser. It really has been embraced by many in industry and the browser community, from Microsoft to Mozilla, as well as a variety of ad networks. Now, there are still some questions, and our colleagues Tom Rosch and Bill Kovacic have raised many of them. But it appears that one thing that no longer can be questioned is whether Do Not Track is technologically feasible.

We are moving forward. The industry is doing it through self-regulation, not through government mandate. We are looking forward to continued progress on privacy issues across the board.

On the competition side, let me just start with technology issues.
We obviously had a major case against Intel in which we alleged a variety of unfair methods of competition. We settled, we believe, on good terms for consumers, and I believe good terms for Intel—they get to move on making innovative products and high-quality ones. That was a major undertaking for us.

We brought the Intel case in Part 3 of our Administrative Law Procedures, which gets you to trial within eight months on a conduct case. It was settled a few months before the trial was supposed to begin. We are very, very happy with that. I think you have to read our Intel case also in the context of Google/AdMob. Google was buying AdMob, a competitor in mobile phone advertising. We initially were inclined to bring a case. But it is a very dynamic industry. Apple bought a competitor, Quattro, and it seemed to us that competition was going to be between platforms, not within them. We ended up not bringing that case. I think if you look at those two matters in tandem, what you see is really vigorous antitrust enforcement but also balanced antitrust enforcement.

We devoted lots of time and effort and energy over the last year to health care. We just won a preliminary injunction in the ProMedica case. That was a three-to-two merger of hospitals in Toledo, or arguably four-to-three. It is the first hospital PI that we have won since 1998, and the one we won in 1998 was reversed on appeal. That was Poplar Bluff.

We are very concerned about concentration in health care, and especially hospital concentration. So it is an area where you are going to see us continue to play a role.

We are also continuing our fight against pay-for-delay pharmaceutical settlements, which cost consumers, we estimate, about $3.5 billion each and every year. It is a two-pronged strategy for us. On the legislative front, we came close last Congress, but didn’t get legislation enacted. But again, President Obama is supporting our initiative. We have a lot of bipartisan support. The President’s budget estimates savings for the federal government, which buys about a third of all pharmaceuticals, at $8.7 billion over ten years. So I think we have a shot at getting this done in Congress this year.

On the litigation front, we may see a cert petition from either the Eleventh Circuit in AndroGel, which is our case, or the Third Circuit in K-Dur. We also survived a motion to dismiss in the Cephalon matter. With the Antitrust Division and the Solicitor General on our side, I think that will be helpful should we get a case to the Supreme Court.

We are also, as Christine mentioned, very involved with health care reform implementation, applying antitrust rules to Accountable Care Organizations. We have worked very collaboratively with CMS and a variety of others, to move forward. I note that we made an announcement yesterday about our proposed antitrust guidance. I noticed that we were criticized by the Hospital Association, which said that “Antitrust is still a barrier to Accountable Care Organizations.” Well, we are planning to relax the antitrust rules with respect to accountable care. If you qualify for the Medicare program, we will go from what used to be treated as per se illegal to rule of reason, and we will do these reviews in ninety days. We are committed to doing very fast reviews. But we are not going to roll over and play dead and watch a lot of health care consolidation and more concentration in the industry. We want to make sure that health care costs go down for consumers, not up. So we are going to try to do experiments. We are going to try to make the ACO system work; I believe it can. But we are going to be committed, and I know Assistant Attorney General Varney is too, to vigorous antitrust enforcement.

On the policy front, we just released a report on patents.

I guess the other major matter that I just wanted to mention was we jointly updated with the Department of Justice the Merger Guidelines, and we did it in record time while putting the Guidelines out for comment. I think our changes were generally supported by stakeholders across
the board. We feel like the Guidelines now give everyone—people in this audience, judges, others who observe the antitrust process—a better sense of what we do when we think about mergers. We were very pleased that in the preliminary injunction in the Toledo hospital merger, ProMedica, the judge cited extensively from the Guidelines.

MR. VAN FLEET: Before we ask Jim to give us an update on the states, I would note that those of you who have been here all week know we have been observing the centennial of the breakup of Standard Oil, and the NAAG Task Force really has its origin in the cooperation among states, particularly Texas and Missouri and Ohio, in going after Standard Oil.

Jim?

JIM DONAHUE: Thank you, Allan.

First, let me note that my views expressed today are my own and not the views of Acting Attorney General Bill Ryan of Pennsylvania, the National Association of Attorneys General, or any other attorney general.

My good friend Bob Lande says that “the antitrust laws mean that you are entitled to the benefits of competition.” I think, if you were to talk about what we’ve done over the past year, we’ve focused on this question—are we as states and are our citizens as consumers getting the benefits of competition?

As Assistant Attorney General Varney mentioned, the big case for us this year has been the municipal bond derivative case. That was a case that the Department invited us into a couple years ago. We had a very specific role in that case, and that role was to determine by what amount were the states and the municipalities that had issued municipal bonds denied the benefits of competition on the interest rates or the proceeds of those bonds. We worked very closely with the Department, and we think that collectively we all got an excellent result.

It’s sort of a historic case. As Assistant Attorney General Varney pointed out, you had the states, you had the Department of Justice, you had the Office of the Comptroller of the Currency, the Securities and Exchange Commission, and all these agencies coming together to get a terrific result. Most of that money is going to go back to state and municipal governments, which, as you hear every single day in the paper, are dealing with very significant budget issues. Now, I realize that our enthusiasm for that settlement is not shared by everyone. There has been an objection launched to our distributing our share, the states’ share, of that settlement by a putative but non-certified class in New York. What the states intend to do is fight vigorously to ensure that their clients get the benefits of competition today, not several years from now, as would occur if a class-action process were to play out. We are very committed to getting that money distributed in the short term, because it is important to our clients.

Beyond municipal bonds, we have been very focused on procurement markets, that is, government purchasing, and we have been looking a lot at bid rigging. A number of states, including North Carolina, have brought actions involving bid rigging for mortgage foreclosures and other things. We have a number of leads we have been following up on, typical Section 1-type bid-rigging cases. Some of those cases we are working with the Department of Justice; some of those cases we are working on our own.

We are also looking at bid specifications. We have spent a lot of time on the consequences of restrictive specifications and what that means. That may result either in litigation or may result in some competition advocacy in the near future about using restrictive specifications to limit competition.
The other thing that we are doing is we are looking at a more proactive approach. We are working with the Department of Justice and among ourselves in looking at whether there are some metrics that we can apply to certain markets to determine whether there are indicators of collusion. It is something that we are just starting with, and it may take us a little while to get up and running, but that is another idea where we are trying to ensure that state governments and municipal governments get the benefits of competition.

The states also believe consumers should get the benefits of competition. One area where we are still focused, despite the Supreme Court’s *Leegin* case in 2006 reversing 100 years of precedent, is resale price maintenance. We want to ensure that consumers get the benefit of competition among suppliers of similar goods to consumers.

Now, everybody has been asking: What are the states going to do since that decision? I think this past year has given the answer. California has brought two actions involving cosmetic products; those have both been settled. New York brought an action involving foam mattresses; they lost that action, but they are going to appeal. I think if anybody doubts what is really going on here, it is very important to look at the New York pleadings. You will see dozens and dozens of communications among retailers, all about price, and all about ensuring that everybody is charging the same price. There is very little communication about the quality of the product or ensuring that consumers get good service.

So that’s another area that we have been looking at over the past year and that we are going to continue to look at. Again, the idea is to ensure that the consumers who are our constituents get the benefits of competition.

Now, I want to reiterate my disclaimer at the beginning that these comments are my own and not those of any other attorney general because I am going to talk about health care.

Obviously, there is a tremendous amount of controversy about certain aspects of health care reform. Where I think there doesn’t need to be a lot of controversy is that competition is good for health care. We want to ensure that health care markets are competitive, whether it is eliminating the problem that Chairman Leibowitz was talking about, which is the restrictions on generic drugs and keeping them out of the marketplace, or whether it is consolidation among hospitals.

We are looking at the four major prongs of health care, which are health care financing or health plans, hospitals, physicians, and prescription drugs. Our goal is to ensure that all of those markets are competitive. Health care markets are very difficult, complicated, and intertwined. As was shown in the actions that DOJ brought with Michigan and Texas, you had one case involving a dominant health system; in another case, you had a dominant health plan. There has to be some reason why, in markets that a lot of people think are very competitive, health care costs are still rising at a great rate.

Now, we know that there is an issue with the amount of health care that is consumed or the quantity of health care that is consumed. That is separate from the antitrust focus. As enforcers, our goal is to see that the prices that are charged are the result of competitive markets. That is where we have been devoting our energies and will continue to do so.

Thank you very much, Allan.

**MR. VAN FLEET:** Thank you, Jim.

Vice President Almunia hails originally from Bilbao in northern Spain. When not in Brussels, he maintains his home in Madrid. Joaquín, we are delighted you are here to bring us up to date on what is happening in the European Commission.
JOAQUÍN ALMUNIA: Thank you very much, Allan, and many thanks to the organizers of this Spring Meeting. It is the first time that I participate in your Meeting, just at the end of my first year as Commissioner responsible for competition at the European Commission.

I am very happy to share with you my views on how competition issues have evolved in a period still marked by the economic crisis in Europe. It is indeed a challenge to be responsible for competition during a crisis, because I hear many voices asking us to be lenient and go soft on competition issues. I do not agree with this view. And this is not the view of the European Commission. During these times, we need to use our tools to improve the functioning of our economies, to keep the markets open, to avoid protectionism, to open doors for innovation, and to increase the competitiveness of our companies competing globally with others, not only from the United States but also from other industrialized economies and from the emerging countries.

So we have a lot of work to do. We have been, as always, fighting against cartels. In 2010, we used the new “settlement” procedure for the first time in two cartel cases, the DRAMs (Dynamic Random Access Memory) and Animal Feed Phosphates cases.

We are also continuing with our merger control. Merger activity has slowed down during the crisis, but nevertheless there were a number of important cases to investigate. Some mergers involved complex negotiations in order to receive adequate remedies and commitments from the companies and to be in a position to issue positive decisions.

In cases involving scrutiny on both sides of the Atlantic, we have been cooperating extremely well both with the DOJ and with the FTC. As Christine said, the Cisco/Tandberg case was a paragon of good cooperation between the Commission and the DOJ. We have also worked together extremely well with the FTC and with Jon in another case that we decided recently, the Intel/McAfee case.

Over the last couple of months, we have been celebrating the 20th anniversary of our Merger Regulation. We have introduced improvements in our Merger Guidelines during those years, as you in the U.S. did last year. I think we have a similar approach on how to deal with mergers. This is always a good base for good cooperation between different authorities.

In my first year in office, we only had to adopt one negative decision referring to two Greek airlines, Olympic Air and Aegean Airlines. The merger proposed by the companies would have created very serious problems in the domestic market in Greece. We have cleared all the other merger cases we have looked into, and found good solutions. I hope we will continue to do so in the future.

In antitrust, there is of course a lot of work to do, specifically as regards unilateral conduct issues—what we call “abuse of a dominant position.” As I said before, this is the area in which many ask us to adopt a soft approach. But we cannot afford to do this. We need to enforce our rules to keep the markets open and to make our economies stronger and more competitive.

We have been very active in all those sectors which, traditionally in Europe, were sectors with big State monopolies. I am thinking of the network industries; energy, both electricity and gas; transport, both air transport and railways; postal services; and telecoms. Enforcing our antitrust rules in these sectors is a challenge. This year, we have been deciding cases in the energy and transport sectors. The One World Alliance case was one example of excellent cooperation with the U.S. Department of Transportation. We were very happy with the way we managed to solve competition problems in that case.

Like you do in the States, we are also working on some cases in the financial services sector. It is a crucial sector, albeit not the easiest one. We have to understand well how these markets function, who are the players, where are the problems, how to avoid having our decisions gener-
ate new problems. But we are active and we will become even more active in the coming weeks and months, because we think that after the financial crisis, our citizens and our economies need a more efficient and fair financial system, and this requires, among many other things, active antitrust enforcement.

It goes without saying that we have been and we will continue to be very active in areas involving the new information technologies and the digital economy.

One final remark. We are also trying to clarify our regulatory framework. Last year we updated our guidelines regarding vertical agreements and horizontal agreements. Maybe we will have the opportunity to discuss this later.

Thank you.

MR. VAN FLEET: Next we go to my good friend Eduardo Pérez Motta.

EDUARDO PÉREZ MOTTA: Thank you very much, Allan. Thank you very much for inviting the Mexican Competition Authority to this very important meeting.

I would like to divide my presentation basically into two parts. The first one is a major reform of our law that we have in the Congress at this moment. The second one is an initiative by the Mexican Competition Authority to create a regional Latin American center for competition policy. This is going to make your work simpler because this is going to promote convergence and coherence among different Latin American countries. Many operations of companies that you represent of course go beyond the United States, they go to Latin America in many cases, and this is going to help your everyday work.

In the reform of our law, I have to, very frankly, recognize here that one of the main challenges of the Mexican economy now is growth, how to increase our rate of growth in a permanent way.

I have an impression that the main problem that we are facing in Mexico, besides the proliferation of drug cartels, involves economic cartels and abuse of dominance as a framework of anti-competitive regulation in many regulated sectors, like transport, like telecom, like energy, like financial services. So we need an important instrument to increase the efficiency of our markets. That is precisely the heart of the competition policy and the competition law.

Our reform has three main elements. One is to increase the enforcement powers of the agency that regulates competition, the competition agency. The second is to decrease the regulatory burden for companies that in many cases are created by our agency, to make their lives simpler. The third is an institutional strengthening of our agency.

In the first one, enforcement powers, there is a proposal to increase in a very important way the economic sanctions, the maximum economic sanctions up to 10 percent of turnover, which is basically what you see as the best international practices. Second, to introduce—and this is very important—criminal sanctions. This is something that we do not have at this moment. Third, to make possible the use of dawn raids. The on-site searches that we have are very light, frankly. We need more powers on that.

Those are the main elements of the first area.

The second area is simplifying the regulatory burden imposed by our agency. First of all, we are going to simplify the merger procedures. Many operations that have to go to our Commission will not need to go. Like corporate restructurings, for instance, they do not have any competition problem, and so in most cases they won’t have to be notified anymore. You know, 90 percent of the cases that we have as everyday cases are basically mergers. As Commissioner Almunia said, you were speaking about one case where you had problems recently. We have just one every year,
or two per year. So let’s concentrate our resources in those cases and let’s not spend human resources of our agency, which are taxpayer resources, on the other cases that do not raise a competition problem. So this is going to be important.

Second, the introduction of oral hearings. This is something that we don’t have. We are like those dogs that, once they bite, they never stop. We have to change that. We have to open the possibility to settlements, which is something that happens in the U.S., that happens in the European Union, and this is very, very positive. Of course we want very clear rules so as not to leave the outcome purely to the discretion of the agency.

In the third area, institutional strengthening, we are proposing more powers to get more information for market studies. We are also going to be obliged to produce guidelines. This is very important. This offers transparency. This offers legal certainty to economic agents. And finally in that area, there is a proposal to specialize courts, to specialize the tribunals and the judiciary. This is very important, because having tribunals that are able to understand the economic issues, as well as of course the legal issues, will be integral to the reviews of our decisions at the Commission. I think this is going to be important.

We have a proposed law relating to specialized tribunals in the lower chamber of our Congress at this moment, and I think there is a window of opportunity. It is not a very big window of opportunity. We have had this discussion for most of the year in our Congress. In the next three weeks we will see if this can move forward in our Congress.

Second, the issue of the regional Latin American center. This is an initiative on which we have been working the last year and a half. We just received the announcement from the Inter-American Bank and from the World Bank that there is an approval of the resources to start this project. This is good news. I want to use this opportunity to announce informally the start of this project.

We have common features in Latin America among the competition agencies. We have limited resources. We are relatively young, most of us. We have, in general, similar language. We have relatively poor performance, frankly. We have all that in common. And we have many challenges which are similar—similar regulatory issues and problems, limited investment in capacity building, and limited coordination among different jurisdictions.

That would be the central objective of this regional center: to organize and to make semi-tailor-made guidelines; training for officials and training for the judiciary as well—this is very important; regional market studies. For the judiciary we are going to promote also specialized courts. Those would be the main elements on which this center is going to be basically concentrating.

I would like to thank the main donors, which are the Bank of the Netherlands, the Inter-American Bank, and the Spanish Trust Fund for Latin America and the Caribbean in the World Bank. That is important. I think it would be very important if we can organize a network of law firms in Latin America and the United States to basically be part of this project of the regional center for Latin America.

Thank you very much.

MR. VAN FLEET: Thank you very much, Eduardo.

Let me toss out this first question to all of our panelists and look for very brief answers. There has been a lot of talk lately around the globe about monopolization or abuse-of-dominance investigations, particularly in the high-tech, health care, and energy sectors. Do you have a brief observation or point to share with us on any particular matters, particular industries, or maybe a policy development in your agencies?

Christine, why don’t we start with you and then let anybody else chime in?
MS. VARNEY: Sure. Most significantly, I think about ten days after I came into this job, I withdrew the DOJ’s Section 2 report and aligned ourselves with the views of the Federal Trade Commission. I strongly commend and recommend to you the tremendous amount of work that was put into that report, and it does have a very good analysis of Section 2 case law history and precedent. I simply disagreed with some of the conclusions. I said at that time, and I continue to believe, that in the United States we have very clear Supreme Court precedent, amplified in the Microsoft appeals court decision, on what constitutes action under Section 2.

We did bring our first Section 2 case and settled it, as I mentioned. We do not, as you know, Allan, ever comment on ongoing investigations. But Section 2 is alive and well, and I can assure you in the appropriate circumstances this government will not hesitate to bring a Section 2 case.

We collaborate closely with our colleagues at the Federal Trade Commission and at the European Commission, where there are a wide variety of views as to what constitutes a monopolization or an abuse of dominance, and we continue that collaboration. Our views are not always identical, and that’s fine. But we try to understand each other’s views.

I have talked a lot about international cooperation and the need to be mindful of solutions one imposes that may have a global consequence, and those solutions could be more appropriately tailored to the region in which the problem is defined. So it’s an ongoing conversation, and I think we’ll be having it for many, many years to come.

MR. VAN FLEET: All right. The Tweet: “AAG Varney: Section 2 alive and well.”

MR. LEIBOWITZ: Let me just echo Christine’s comments. Reasonable people can disagree about the extent of Section 2. It is probably not as broad as it was thirty or forty years ago. But one thing that the two of us have talked about is the notion that our Section 5 jurisdiction might complement, because it’s sort of a penumbra around the antitrust laws, the investigations that the Justice Department is doing. There may be some things that cannot be reached by Section 2 but can be reached by Section 5, which really do involve anticompetitive behavior that harms consumers.

So we are going to use our Section 2 authority—and we did, of course, in the Intel case; we are going to use our Section 5 authority where appropriate, although we like to think that we will use it judiciously; and we are going to try to stop—and I think this is true about both of us, and really everyone up here on the panel—anticompetitive behavior where we see it and where it causes harm.

BARRY NIGRO: Jon, I would like to follow up with a question on Section 5. The Commission has been keen to identify opportunities to expand the enforcement of Section 5. Beyond invitations to collude, what specific guidance can we give our clients when counseling them? What standards should we use when explaining to clients how the FTC is going to approach Section 5 enforcement, given, I think you said, your desire for “balanced activism”?

MR. LEIBOWITZ: Well, I would say this—and it’s a really good question—I think no one whom we brought a Section 5 claim against was surprised by the fact that we brought that case against them. Whether it’s Valassis when you were at the agency, or maybe just after you left, or U-Haul, invitations to collude, or N-Data, which was reneging on a standard-setting commitment, or Intel, I think the malefactors—or I should say alleged malefactors because they were settlements—understood that they may have engaged in anticompetitive activities.

And so the advice I think you should give your clients is: Don’t compete by sabotaging your
competitors. Compete by offering great innovative products to your customers and to your consumers.

Congress created the FTC in the wake of the Standard Oil decision because Congress was very unhappy with antitrust enforcement. They thought it was too limited. We have all benefited, I think we understand, by the Chicago School. It has created a focus on efficiencies and on rigorous economic scrutiny of conduct. But it is also true that sometimes the courts, perhaps because of a concern about the toxic combination of treble damages, private sector cases, and class actions, have had a cramped view of the antitrust laws. That has sometimes captured antitrust plaintiffs that are government agencies, whether that’s a state AG, the Federal Trade Commission, or the Antitrust Division.

Of course, Commissioners, the head of the State Attorneys General, the head of the Antitrust Division—we are all temporary custodians of these wonderful institutions. But we are obligated in our time while we are these temporary custodians to stop anticompetitive behavior.

This is a tool in our arsenal, and we’re going to use it only in appropriate circumstances, but we are going to use it. The last time the Supreme Court opined on Section 5, either in Indiana Federation of Dentists in 1986, or in the Green Stamps case in the early 1970s, they reaffirmed our authority here. When our agency was created, they gave us very, very broad jurisdiction and limited remedies—we don’t put people in jail, we don’t fine malefactors—but we do have to stop anticompetitive conduct.

LESLIE OVERTON: I have a question for Christine. Christine, you mentioned in your remarks the Blue Cross/Blue Shield of Michigan litigation and indicated that there were a number of investigations of MFNs underway. There is also the case involving credit and charge cards with American Express. Do you have anything to add about the priority of vertical restraints at the Division right now, and anything else to say regarding what we can expect?

MS. VARNEY: I think that what you can expect in an increasingly networked global world without borders is to see more vertical transactions. Vertical transactions present themselves on facts specific to the proposed transaction, and we will continue to review these transactions in light of the specific facts and market conditions around the transaction.

One of the things I think you are going to see, Leslie, is in looking at vertical transactions that are anticompetitive, oftentimes what you will find is that the parties are willing to cure the anticompetitive nature of the transaction, while maintaining the efficiencies, and in a vertical transaction that, by definition, is often what is referred to as a behavioral remedy. We are not afraid of behavioral remedies. We are in favor of effective remedies, be they structural or behavioral.

So as you continue to see these types of transactions, you will continue to see a very thorough investigation of the transaction, the market, and our willingness to block the transaction should it be anticompetitive, and our willingness to listen to the parties who would propose a cure.

MR. NIGRO: Joaquin, you expressed an interest in being “interrogated” about the recently issued horizontal cooperation agreement guidelines and the vertical agreement guidelines. What has been your experience with those guidelines to date, and in what areas do you expect them to be first tested?

MR. ALMUNIA: As I said before, we updated our guidelines of both vertical and horizontal agreements last year.
On vertical agreements, i.e., the relationship between suppliers and distributors, the update included a clearer treatment of online sales. We had to reconcile two broad opinions. Those who were strongly in favor of e-commerce and online sales wanted us to eliminate any possibility for the suppliers to require from the distributors some physical presence, some brick-and-mortar presence, in the sales network. In contrast, those who wanted to preserve quality brands, which requires a direct and personal contact between the distributor and the customer, wanted us to include these requirements, and not leave much room for competition coming from online sales.

I think we have struck a good balance between these two interests: promoting online sales and accepting the possibility of requirements for physical presence under particular conditions. The new vertical agreement guidelines were adopted in mid-2010 and we have not received any case based on them yet.

We also updated our horizontal agreements guidelines at the end of last year. This work focused on agreements involving exchanges of information between companies, and when they can be compatible with our antitrust rules. We found evidence of positive agreements and exchanges of information that would not lead to the establishment of a cartel or other illegal practices.

Standardization is another important issue. Our new guidelines are designed to ensure an open and competitive process, so as to prevent certain abuses we have encountered in some cases such as patent ambushes and similar infringements. Again, these guidelines came into force only three months ago and we have no practical experience on their implementation, but I believe we have done a very good job especially because we have integrated many contributions from different stakeholders.

As a group, I think we are looking at the situations where the RPM type of conduct is really geared towards creating a cartel, as opposed to providing some of the other consumer services that are noted in the literature and in the Leegin decision.

Mr. Van Fleet: Jim, I’ve got a question about guidance on vertical restraints for you. I’ve got this hypothetical foreign client who has a hypothetical product that he wants to start distributing in the United States. He asks, “Can I put in my contracts with my distributors minimum retail prices?”

Now, I’ve told him: “Very unconcentrated market, you’re a new entrant, there’s vigorous interbrand competition. I don’t think you’ll hear anything from the Department of Justice or the FTC. I don’t think you have a problem under federal laws. But we’ve got these states.” What do I tell him about these states, the state laws, and the RPM clauses he wants to put in his contracts?

Mr. Donahue: I tell him he has a problem. Some states have, either by case law or by statute, law that says that RPM is still per se unlawful within their borders. So do you want to have fifty different policies—what are you going to do there?

Mr. Van Fleet: Yeah, what am I going to do there?

Mr. Donahue: As a group, I think we are looking at the situations where the RPM type of conduct is really geared towards creating a cartel, as opposed to providing some of the other consumer services that are noted in the literature and in the Leegin decision.

Mr. Van Fleet: Sounds like a rule of reason.

Mr. Donahue: Well, you know, it does sound like a rule of reason—except for the fact that some of the states have considered it a per se rule. You’ve got to consider that you have California, New York, and Maryland, which are three fairly large states and account for a large portion of com-
merce, in the per se bucket. And there are probably some others that would also treat it as per se unlawful as well, and again, a lot of those are going to be the larger states.

So it may be that you take the approach that RPM isn’t going to fly in the states, or isn’t going to fly where the majority of the customers are, and advise your clients accordingly.

**MR. VAN FLEET:** So do I advise him, that the States of California, New York, and Maryland, and maybe some others, would rather that he not have any independent distributors in their states—and that would be legal, right?—rather than have independent distributors in those states, providing jobs, but subject to RPM?

**MR. DONAHUE:** Well, I don’t know whether they would; it depends on the product and how many jobs actually would be provided here. The difficulty here is that it depends whether you believe RPM does something procompetitive or not. I think the states have had the view consistently that we don’t necessarily see the benefits.

We have seen over and over again all the literature that says this prevents free riding, this enables people to invest in their product, and that sort of thing. We don’t see that on the ground. Go into any store, and what sort of service do you get in a particular retailer? You have to interrupt the clerk to get off the cell phone having a conversation with somebody else. So we have this system designed to provide money to retailers supposedly to deliver us services. But I’m not sure the states see the services as being there.

If they want to go and make a *Leegin*-type case and litigate it in New York or California on the basis that they’re really providing services and that sort of stuff, that might be a different story. But if you’re going to go down the RPM road just merely to propose a price and really do nothing else, then I think there’s a big risk there. If there actually is going to be some sort of benefit to consumers as a result of the conduct, then maybe you want to take that risk and make that case. But as a practical matter, I’m not sure that we see it in a lot of products.

**MR. VAN FLEET:** All right.

Eduardo, did you have a comment?

**MR. PÉREZ MOTTA:** Yes.

On the subject of guidelines, actually next Monday in Mexico we are going to “celebrate” Competition Day. This is an opportunity more than a celebration. It is an opportunity to offer awareness and to promote the culture of competition.

We are going to present for the first time procedural guidelines for mergers, we are going to present a reference paper on market definition and assessment of market power, and a proposed guideline on fine-setting. I am absolutely sure that to share guidelines and technical bases and methodologies with economic players and lawyers is very important. This is something that we are very much engaged in.

**MR. VAN FLEET:** While I’ve got you on the stage, Eduardo, this Spring Meeting we do recognize the centennial of the breakup of Standard Oil and the attempt to preserve competition in the oil industry in the United States. You don’t have that in Mexico, do you?

**MR. PÉREZ MOTTA:** Yes, absolutely.
MR. VAN FLEET: Not in the oil industry.

MR. PÉREZ MOTTA: Yes, that’s clear. By a constitutional mandate, the oil sector and the energy sector are state monopolies. So that is an issue. But let me tell you that, even though we have state monopolies, we are in some investigations specifically challenging the market power abuse of those companies in their downstream activities. So we are actually conducting an investigation involving Pemex, which is the oil monopoly, to prevent downstream abuse of its power.

MR. VAN FLEET: In contrast to the state monopolies in the oil and energy sectors, the Competition Commission, and I understand from some newspapers, you personally, are very much involved in trying to preserve competition in the telecommunications industry. Tell us about that.

MR. PÉREZ MOTTA: This is a very important issue. It has become a very strong conflict, a very public one in the last few weeks in Mexico. We have not seen in our recent history a conflict so strong among telecom operators, like the one that we are having at this moment.

The main issue is, on the one side, interconnection fees and interconnection access to a very big network, which is a fixed-line network; and, on the other side, abuse of dominance in contents and approved publicity types on open TV broadcasters. So this is a very important issue.

I think this is a historic opportunity in Mexico to take the decisions that we need to take to promote more competition in this market, which is so important to promote productivity in the whole economy. So I expect that this conflict is going to be the origin of procompetitive decisions in interconnection and also in competition in open TV and also restricted TV.

MR. VAN FLEET: You know, we had a great talk last night by historian Richard Norton Smith about the clash between Theodore Roosevelt and John D. Rockefeller. You’ve seen and I’ve seen—I know you haven’t promoted it—but Mexican newspapers see a similar clash between Eduardo Pérez Motta and Carlos Slim.

At its height, Rockefeller’s wealth represented 2 percent of the GDP of America. That’s extraordinary to even contemplate. Do you have an idea of what percentage of the Mexican GDP Carlos Slim has? We all know he’s the richest guy in the world, but in perspective, what percentage of the Mexican economy does his wealth represent?

MR. PÉREZ MOTTA: Actually, the approximate share of the Grupo Carso in GDP is about eight percentage points. So he is important.

But let me tell you this is not a personal issue. This is not a personal issue between Pérez Motta, or whoever is the head of the competition authority, and a very important businessperson like Carlos Slim. It is just an issue of application of the law. It is an issue of increasing the efficiency of markets.

So in many areas where Grupo Carso is playing, like financial services, we are an important promoter of their activities because that means more competition.

We have some very important problems in telecoms and in some other areas, but specifically in telecoms, but this is precisely because we need to promote more efficiency in those regulated sectors. So this is an institutional problem, and this is something that we need to solve in Mexico, because this is going to be the only way to increase the capacity to grow and to generate employment and to increase the welfare of Mexicans.
MR. VAN FLEET: Let me ask one follow-up, and then Jon. You’re not suggesting that Mexico and the Competition Commission are promoting national champions, are you?

MR. PÉREZ MOTTA: No, no, no. Actually, we are suffering from the previous promotion of national champions because my impression is that if you promote national champions, at the same time you are promoting national losers, because the population that is going to lose are consumers. You need to avoid that. You need to promote efficiency so everybody can gain.

MR. VAN FLEET: Okay. The Tweet on that is “Pérez Motta: national champions > national losers = consumers.” Jon?

MR. LEIBOWITZ: I just wanted to add how fortunate we are that we have such strong antitrust enforcers in Mexico City and in Brussels. We all benefit from that, I believe. And then, as you look around at many people from foreign jurisdictions and the many folks who run antitrust authorities in their nations, it’s just extraordinary to see the level of commitment by those folks, particularly those who are starting new regimes, to making it work.

MR. NIGRO: I want to get back to Jon and reverse payment settlements. The Supreme Court recently denied cert in the Cipro case and my impression is that this Congress is less eager to pass legislation on reverse payment settlements than the past Congress. If we were playing chess, do I say “Check. What’s your next move?” In other words, what does the FTC have in store for challenging reverse payment settlements?

MR. LEIBOWITZ: Well, I would say this. We at the FTC knew this was not going to be a sprint, it was going to be a marathon. And also, although many pharmaceutical executives came up to me privately and said, “These pay-for-delay deals are ridiculous. I’m just going to do them because I have to represent my shareholders,” others have said, “We are not going to do them because we think they are unconscionable.” You know, there’s a lot of money invested in their interpretation of the antitrust laws and Hatch-Waxman, which we believe is wrong.

I think I said this in my opening statement, but I’ll just mention it again. In the Eleventh Circuit, we have a case that’s on appeal, the AndroGel case, initially filed with the State of California; and in the Third Circuit the K-Dur case is on appeal. So we think it is entirely possible that a case will go to the Supreme Court. But I have to say, Barry, I have been racking my brain about how to win a case like this, because obviously we have a fine appellate group, but we haven’t done as well as we would have liked to in the circuits.

So I got a copy of this book, Making Your Case: The Art of Persuading Judges, by Antonin Scalia and Bryan Garner, because I thought maybe it would give me some insight into how we can most effectively argue that case before the Supreme Court, or even get cert. And then I went up and got Justice Scalia to autograph it because I’m a big fan of his. He says “the plain language of the statute” and we say “unfair methods of competition.” I’ll say that again for those of you who didn’t get it. He believes in the plain language of the statute and we say “unfair methods of competition.”

I have to say when I started reading the book, it really made me much more comfortable that we’re going to do fine at the end of the day.

I’ll just read you his inscription. You can see it right here. It says: “To Johnny”—and that’s his pet name for me—“We’re with you on pay-for-delay settlements. Hugs and kisses, Nino.” [Laughter]
And then I was walking out of his presentation and I happened to run into Paul Clement, who was doing actually a session on pay-for-delay with some others, and he inscribed it too. He added: "Me too. I’m with you on this. Your friend, Paul."

So even though all of that was a joke, I’m feeling a little better on this, and I’m hoping that by the time we come back next year this matter is resolved in favor of consumers.

MR. VAN FLEET: All right. That Tweet goes out: “Justice Scalia no longer funniest guy at Spring Meeting.”

Let’s go to our first Twitter question. From Cartel Blog for Vice President and Commissioner Almunia: “What are your views re EU collective redress consultation process, main issues, goals?” I think what we really want to know is, are the plaintiffs’ lawyers going to take over?

MR. ALMUNIA: Since the beginning of our mandate in the present Commission a year ago, three colleagues—the Commissioner in charge of legal affairs, Viviane Reding, the Commissioner in charge of consumer protection, John Dalli, and myself in charge of competition—have taken a public commitment before the European Parliament to arrive at a common approach on collective redress from our different perspectives in one year’s time.

Months ago, we launched a public consultation based on a series of principles that we think should lead to a European approach to the different collective redress proceedings in the different areas and in the different countries of the EU. The public consultation will soon come to an end. We will analyze the results, and we will come up with a common position of the European Union on collective redress proceedings by year’s end.

It is not an easy issue. Not only do we have different perspectives from consumer protection, competition, environment, and other areas where collective actions can take place; we also have twenty-seven different legal procedures in the EU.

When the European Union takes a position on the protection of the interests of those who cannot, and do not, have the means to pursue individual actions before the courts, we will have to find the way to deal with the possibility of a collective action. This common position on collective redress will come by the end of the year. When it does, I have promised the European Parliament that I will launch a legal initiative for the private enforcement of competition damages through collective actions. This legislative proposal will have to be discussed and adopted by our co-legislators, the European Parliament and the Council formed by representatives of the governments of the twenty-seven Member States.

I think private enforcement is a necessary complement of public enforcement. I know that some people can go to the courts in Europe, because they have the means to ask for compensation of the damages suffered. But many other people—ordinary people, individual citizens, and SMEs—cannot afford the long process to obtain compensation. I want to legislate on this issue, but not if the new legislation opens the door to the same kind of abuses that we know exist in other constituencies.

MR. VAN FLEET: Jon, the Consumer Financial Protection Bureau looks like it’s going to be writing the rules for consumer protection in this area. What’s left for the FTC here?

MR. LEIBOWITZ: We retain our jurisdiction, as I think most of you know, over fraudulent financial practices involving nonbank institutions. We are going to continue to work vigorously to discharge that obligation. At the same time, we see the new agency as another cop on the beat, and I think
pretty much everyone can agree that we needed strong cops on the beat, particularly on the banking side, before 2008. If we had had that, maybe we wouldn’t have had quite so bad a financial meltdown. So we are going to work with them.

They [the CFPB] will take jurisdiction of rulemaking for specific financial statutes and we will be enforcing that, and we will be working with them. We are in the process of working out an MOU with them right now. And again, it’s not certain when their startup date is. It could be as early as, I think, late July. But the Treasury Secretary has the option of pushing back the starting date by, I think, up to another six or eight months.

So we continue to work vigorously in this area, and we are looking forward to having a partner. We think it will make for better consumer protection.

**MR. NIGRO:** We have another Twitter question, so let’s go to that. Jim, this is for you. Translated into plain English, the question is, “Are the states going to be more aggressive or more restrictive than the FTC in their enforcement of the Green Guides?”

**MR. DONAHUE:** I talked to my colleagues about this before. Let me explain how consumer protection works a little bit.

There is every day an onslaught of complaints, thousands of complaints across all the state Attorneys General. They sort through them and they have various processes for dealing with them. As has been noted up here, one of the things that we have been doing on the consumer protection front is dealing with the economic slowdown. That is, as Chairman Leibowitz noted, credit repair scams, foreclosure repair scams—all that stuff. There has been a tremendous amount of effort on that. That effort is directed in many ways to people who are less fortunate, who have gotten themselves into some sort of economic trouble. And we haven’t cleared that backlog of stuff yet.

So the Green Guides, which really deal with representations about whether something is green or environmentally safe and that sort of thing, is something that the states will eventually get to, but it’s something we haven’t really focused a lot on.

Now let me say one other thing here. In talking to my consumer protection colleagues, cooperation between the states and the FTC consumer protection people has never been greater. There is a tremendous amount of communication. It’s very fruitful. As Chairman Leibowitz noted, we have worked together on hundreds of cases. They have done all sorts of sweeps. So I don’t anticipate that there is going to be a real divergence in how they approach these types of representations in the future.

**MR. NIGRO:** Joaquín, you had mentioned in your opening remarks that there had been a couple of settlements in the cartel area. In 2008, the Commission introduced a new “settlement” procedure in cartel cases. But it seems like since the introduction of the procedure, there haven’t been many settlements—in fact relatively few. What were the goals of this change and are those goals being achieved?

**MR. ALMUNIA:** As I said, in 2010 we had the first two settlement decisions in cartel cases: the DRAMs and Animal Feed Phosphates cases. We are satisfied with the experience. Thanks to the settlement procedure, we have avoided long proceedings and we have been able to allocate our resources to other cases. The list of cases is very long, and we need to be as efficient as possible. More settlement cases are in the pipeline, and I believe that this is an extremely useful tool.
MR. VAN FLEET: Christine, let me get you to focus on cartel enforcement at the real behavioral economics level. I first learned about game theory and the prisoner’s dilemma in my psychology class, and you guys get to play with real prisoners.

But as Barry’s question I think intimates, most of the global cartels now originate from outside of the United States. I think U.S. businessmen and women are getting the message, “Don’t do the crime if you’re not prepared to do the time.” Do you think that message is getting out across the world, either with the real possibility that if you commit the crime wherever and it has an impact on U.S. consumers, you could find yourselves in a U.S. jail; or, even with other countries, like the United Kingdom, suddenly getting tough and sending price fixers to their own jails—maybe not as tough as ours—but are they coming around?

MS. VARNEY: I do think that the fact that we have criminal enforcement here in the United States, and so many other jurisdictions are working on it in one form or another, reflects the concluded wisdom that criminal enforcement is probably the best deterrent for business cartel illegal behavior.

I would say that a number of our defendants in jail right now are foreign nationals. We had our first successful extradition from the U.K., under the new treaty, of Ian Norris, who is now in a jail here in the United States and will be for the next couple of years. The appeal was denied, I believe it was about three weeks ago.

There are a lot of factors that go into successful cartel prosecution. Certainly, the threat of jail time is one of them.

The leniency program is very important, and as you referred to it, Allan, a real-time prisoner’s dilemma. I have, since I have come to this job, routinely counseled corporations. Whenever I speak to CEOs and general counsel, it’s one of the things I lead with: Make sure you have a robust compliance program that is spread throughout the company, that you have a culture of compliance, because if you find a wrongdoer in your organization—and we all do; I mean there was an organization in the federal government just this week where we found a potential wrongdoer who has been charged with insider trading.

If you find a wrongdoer in your organization, if your organization or enterprise has engaged in any activity that is prosecutable under the U.S. antitrust laws, you are well served—well served—to be the first one in the door and put down a marker for leniency, because if you are not the first one in, we will get to you and you will go to jail.

So I think it’s a combination of the leniency program, the robust enforcement, and prosecutions. And in the United States we have very substantial corporate fines. There are volume-of-commerce fines that are reflected in the Sentencing Guidelines, and they are very significant.

We do this so seriously because we believe that this is the most pernicious type of anticompetitive behavior. In any particular instance, whether you are fixing the prices of auto parts or you are fixing the price of lysine, that is directly reflected in the price the consumer pays for the good at the end of the day. The corruption of the competitive process at its core is this kind of cartel behavior.

MR. NIGRO: I would like to ask a quick follow-up question. This is directed at all the enforcers with criminal jurisdiction. You talked about a “culture of compliance.” What does that mean? Is that a “one-size-fits-all” culture, or do the agencies take into account whether the company being investigated is a small company, a medium-sized company, or a large company? Large companies obviously have the resources to invest in more robust compliance programs than small companies. Are small companies disadvantaged by the fact that they don’t have the resources to make
these sorts of investments? Is it even appropriate for a small company to have the same type of compliance program that a large company would have?

**MS. VARNEY:** Presumably, if you are a smaller company, you have fewer people to educate and keep on the straight and narrow. So I’m not sure I would agree with the premise.

In the Antitrust Division, we have very clear standards to be in the leniency program. Because we have a leniency program, we are technically not subject to a mandated consideration of what we call the McNulty factors that outline the appropriate circumstances for the exercise of prosecutorial discretion. But we sometimes do look to the McNulty factors as we are making our prosecution decisions. One of the factors in McNulty is pervasiveness. You can make an argument that in a very large corporation, where the conduct involves a very remote subsidiary, the parent corporation may not be suitable for prosecution because of pervasiveness. I’m not sure we would accept that in the Antitrust Division.

Every prosecution is taken very, very seriously, and we will look at unique circumstances when determining, for example, how broad a leniency application to grant. We will look at unique circumstances when we look at whom to carve in and whom to carve out of a leniency agreement. We will look at unique circumstances as we determine the scope of the counts of the indictment. So there are a variety of circumstances that we will take into account as we are making our prosecution decisions, but size of the enterprise is not necessarily one of them.

**MR. NIGRO:** Does anybody else have a view on that?

**MR. ALMUNIA:** I want to add one comment on compliance programs. We have an administrative system in the European Union. The EU—and not only its competition department—has no capacity to pursue anybody for criminal offenses. So we impose economic sanctions, which are administrative by nature, i.e., fines. And the ones who are responsible to pay the fines are the companies involved in the cartel.

When I hear that a company with a compliance program should be given softer treatment, I begin to wonder. Setting up and running compliance programs is commendable. One issue is that large companies can set up these programs and inform their employees on how to respect certain principles and rules, but many medium and small enterprises simply don’t have the means to do so, and I think we should help them in their efforts.

Another issue is the case of a company that is found to be in breach of the law in spite of its compliance program. Why should I reserve a softer treatment to a company that has breached its own program than to the company that has no program in the first place? Let me remind you that we can only launch investigations and decisions against companies, not individuals.

**MR. PÉREZ MOTTA:** I concur that cartel activity is one of the worst activities and the one that affects the most markets. There is international evidence that cartels increase average prices around 25 percent.

In my view, there are four elements which are important:

- Sanctions, economic and also criminal. In Mexico, this is precisely what we have in our law reform.
- You need to be an efficient prosecutor—not only efficient, but you have to be perceived as an efficient prosecutor, which is very important. Otherwise you could have very high sanctions, but if your ability to detect the problems is low, this is not going to work.
• A very efficient leniency program.
• And finally, you need to promote information. You need to convince people that those activities could put you in jail or could really carry very high sanctions.

In Mexico, we are working along those four lines. Actually, we created a specific unit that we didn’t have before to deal with cartels. We have been imposing record fines, with the capacity that our actual law gives to us. We have a guide for describing the application of the leniency program, to inform people how this applies, how they can use it.

And we have been also very much in touch with business associations and chambers of commerce, because we have found that in many cases those chambers become promoters of cartels. In that case we have been very much in touch with them, informing them and promoting compliance programs.

In Mexico . . . we have been also very much in touch with business associations and chambers of commerce, because we have found that in many cases those chambers become promoters of cartels.

**MS. OVERTON:** We are going to move on to mergers. We have our next Twitter question, which is directed to Jon and Christine. Where are we with the Revised Horizontal Merger Guidelines?

**MS. VARNEY:** One of the great mysteries, I think, to many people who are not inside the Beltway and in front of one of our agencies with great regularity was how did we actually evaluate mergers, because often when you had a transaction, it didn’t appear to be exactly what was in the 1992 Guidelines. It was largely assumed that the Guidelines were being applied, but not exactly in the way they were written.

So when I came in, one of the first things that Jon and I talked about was the need to increase transparency. The way the agencies evaluate mergers has been pretty consistent and has evolved since the 1992 Merger Guidelines. I think we both felt that it was in the interest of transparency to update the Guidelines to reflect how we actually evaluate a merger.

So what I find somewhat amusing is lots of the chatter is about “Oh, this is terrible, they’ve completely redone the way they evaluate mergers.” Well, no. In fact, what we have done is told you exactly how we evaluate mergers. Now, you can have a difference with our view as to whether or not it’s the right way to evaluate mergers, and we can argue about that. Should there be a hypothetical monopolist or not? Should there be unilateral effects or not? Should there be diversion analysis or not? We can have that argument. But the fact is we do do that.

So my view, my commitment, was to give practitioners and general counsel and business people outside of the Beltway who don’t interact with us every day, a clear, readable, understandable presentation of the steps we go through when we are undertaking a merger analysis.

The other thing I find quite interesting is there has been a little bit of chatter about how doing an upward price comparison is so troubling to some people, apparently. I think what you miss in that conversation is that we have been doing that for at least a decade. I think those people that did the cruise lines merger can tell you that that was a critical part of the analysis in that merger.

It is not every merger that comes to us that will be (1) subject to a second request; (2) in an industry that could be highly concentrated; and (3) in an industry that lends itself to that type of data analysis of upward price pressure. When you have the data, when the industry is concentrated, and we are deep into a second request, that is a helpful tool, and we are going to use it. So this idea that we are putting more of a burden or creating more analytics is simply not true.

**MS. OVERTON:** Jon?

**MR. LEIBOWITZ:** I only want to add a few small points. I agree entirely with Christine.
The first point is that this is not a major change. It is a modest evolution from the 1992 Guidelines. Now, to some extent we have moved from theory to empiricism. So for example, we look much more at what the effects actually are than what the market definition might be, although we are going to show market definition I think in almost every case.

But, honestly, I actually think that the Guidelines, as they become more frequently used—we are starting to see them used by judges now who are reviewing mergers—will help everyone in the merger community, be they members of the judiciary, members of the bar, or businesses who are interested in trying to figure out whether they can go forward with a deal. It gives them a little more clarity. That's what we are hoping to do.

**MS. VARNEY:** Yes. And I can assure you that in ten or fifteen years, when it's time to update it again, Jon and I will say they got it totally wrong. [laughter in audience]

**MR. LEIBOWITZ:** In fairness, Jim Rill was one of the biggest supporters.

**MS. VARNEY:** That's right.

**MR. LEIBOWITZ:** Jim Rill, who was really the principal author of the 1992 Guidelines, was a major supporter of updating it with the understanding that we have developed over the last eighteen or nineteen years.

**MS. VARNEY:** And, Jon, remember there was also the 2006 Commentary. We also incorporated quite a bit of the 2006 Commentary. So I do think it has just been a continual evolution. And again, our commitment is to reflect where we are. That's what I think we tried to do. We should have an argument about whether or not we are right, but it is where we are.

**MS. OVERTON:** There is a perception of a dramatic escalation in challenges of non-reportable and consummated transactions. Christine mentioned the recent *Dean Foods* litigation and settlement with the DOJ and several states. So how should lawyers counsel clients about risk with respect to non-reportable transactions, and are we going to see as much focus on them as the economy recovers and there are more reportable filings?

**MS. VARNEY:** I think the counseling of your clients is “proceed at your own peril.” If you have a transaction that would likely be challenged by one of us if it were reportable, then you ought to counsel your clients accordingly.

We don’t do at the Department of Justice unofficial reviews. We do do things like business review letters. We are happy to have you come in and sit down and talk with us about what you’re thinking about and what our reaction would be.

As a department we do “fix it first.” So if it’s a non-reportable transaction and it is a transaction that is problematic in some regards but not others, we can work with you on that.

I don’t think, Leslie, that you will see an increase in the number of non-reportable mergers. You know, we play the hand we’re dealt. When we find a transaction that has been consummated, if it was not reportable and we believe it violates Clayton 7, we will prosecute it. We always have and we will continue to.

**MR. LEIBOWITZ:** I would just say it’s the same with us. We have had a few merger challenges to
consummated transactions—a hospital case on the North Shore of Chicago, Evanston; and Polypore, which is coursing through the courts now.

But part of the reason, I think, that you see more non-reportable and post-consummated challenges, particularly the non-reportable challenges, is because we raised the threshold. In 1999, when we raised the threshold—it’s now about $65 million—we raised it from $15 million, which is what it was when Hart-Scott-Rodino was enacted in the mid-1970s, to $50 million. So, not surprisingly, you capture fewer transactions. But there might be some that are right below the threshold that could be anticompetitive.

Plus, there are still a few glitches in Hart-Scott-Rodino. For example, if you assume debt, it doesn’t count. I’ve asked some people who were involved in the drafting of Hart-Scott-Rodino why that is and they don’t remember. So perhaps when they do the next round of Hart-Scott-Rodino updates, that could be one small tweak. I think most people would agree it’s the right thing to do.

**MR. VAN FLEET:** Let me follow up on something Christine mentioned. One of the issues our clients have is that if their transaction is reportable under HSR, there are some time limits in which the agencies have to act—go file your lawsuit or your 13(b) complaint or what have you. But if you announce “We’re investigating your already-consummated merger, or maybe your about-to-be-consummated merger,” where you don’t have to file an HSR, but you’ve got this Damoclean sword over you. My understanding, Christine, is that if I were to file an HSR on a non-reportable merger, your folks would say, “I can’t take your money on that.” Mine would say, “If I can pay her to give me some certainty within a time limit, I would do it, but my understanding is I can’t do it.”

What can parties do to hurry up the process and get some certainty whether they can close this deal or not?

**MS. VARNEY:** Everybody knows Patty Brink, our Director of Civil Enforcement. Patty.

**MR. VAN FLEET:** Come on up here.

**PATRICIA BRINK [Director of Civil Enforcement, U.S. Department of Justice, Antitrust Division]:** Basically, we are willing, and we have in the past, to talk to parties before they consummate a transaction that they know is problematic but doesn’t reach the HSR threshold, and enter into a timing agreement. This timing agreement will essentially give the parties the certainty of the timeframes in the HSR process and set out a process that is very HSR-like. So parties can, without filing, if the merger is under the threshold, get the same timing provisions and certainty that you would have under the HSR process.

**MR. VAN FLEET:** So the Tweet is: “DOJ will agree to virtual HSR.”

**MS. BRINK:** Essentially, yes.

**MS. OVERTON:** I have a question for Patty. Patty, it’s like a free HSR, right?

**MS. BRINK:** That’s exactly right.

**MS. VARNEY:** Allan, I think the point that we want to leave everybody with is you can come to us—and I do want to correct one thing you said. We do not announce investigations ever. We will not
confirm investigations unless a party to the investigation has itself announced.

**MR. VAN FLEET:** Yes. That was my sloppy wording.

**MS. VARNEY:** I really want everyone to understand we will not ever announce an investigation. So as Patty has pointed out, if it is non-reportable, come to us and for free you can get an HSR review.

**MR. LEIBOWITZ:** Can I just say this is, some might say, one of the rare instances where Patty speaks for the FTC. For those of you who are cognoscenti of the interagency process, we will also offer the same terms and conditions, but we’ll charge.

**MR. VAN FLEET:** That sounds like competition at work.

Jim?

**MR. DONAHUE:** If I could just add one thing here, we’ve done a lot of work with non-reportable mergers, sometimes with the FTC in particular, all in health care.

One thing that everybody needs to understand is physician mergers are something we are focused on, and I’m not aware of a single physician practice in the country that would ever trigger the HSR threshold. But there could be a physician merger that would raise our ire.

**MR. VAN FLEET:** I understand.

While folks in the audience are thinking about their questions, I want to switch to the international arena and open it up to all of you. As you know, earlier this week the International Competition Network held a roundtable discussion on international enforcement cooperation. All of your agencies participated. The ICN will hold its Tenth Annual Conference in the Hague in June 2011.

Let me say on behalf of the Section and me personally this year, we very much appreciate the invitations you send for us to participate in those proceedings. It brings great satisfaction to see how frequently Section publications and programs and positions are cited in the international arena. We appreciate the opportunity to contribute to that dialogue.

What are your thoughts about the state today of international cooperation, areas where it could be improved, and the role you see for the private sector in international cooperation, whether at the ICN, the OECD, or maybe the new Latin American cooperation regional center?

Christine, Jon, and then perhaps Eduardo?

**MS. VARNEY:** We enjoy all of the work that we do with our international colleagues. The organizations and the bodies all, I think, have a different and valuable role to pay.

The ICN, under the leadership of John Fingleton, has been a terrific asset to us in the United States to work with our colleagues around the world, particularly in emerging antitrust regimes, and to really understand the different legal and historical and economic cultures that the antitrust enforcers operate in, to bring to the table our experience.

The FTC—I know Jon will talk about it—runs an absolutely first-rate technical assistance program around the world, and we are happy to support that when we can.

We do a lot of work in the OECD at the Competition Committee, under the leadership of Frédéric Jenny, which has been very critical in a lot of our bilateral relationships that are fostered in that forum, as well as the direct relationship we have with the European Commission and with our NAFTA partners. Those are the areas where we are most often collaborating.
But again—it’s a constant theme with us—as you see an increasingly global networked economy, we have to have mechanisms whereby we can both coordinate, facilitate, and foster understandings of each other’s legal and economic systems, so that when we are confronted with problematic behavior, whether it’s unilateral behavior or potential mergers, we can coordinate the remedies that best suit the needs of our individual markets. That is an increasingly difficult challenge, but one that we can meet if we continue the excellent dialogue and working relationships that we already have.

**The ICN might be one of the most efficient international organizations that I have ever seen. . . .**

**MR. LEIBOWITZ:** I would pretty much echo what Christine said. The ICN has really surpassed even its most optimistic expectations at its inception. John Fingleton has done a wonderful job. My colleague Bill Kovacic was very involved in the founding, and folks from the Federal Trade Commission and from the Antitrust Division have all been committed to it, regardless of party, regardless of affiliation. It has really worked to develop relationships and ensure complementary procedures.

**I think without any doubt this is one of the best instruments that we have in order to really have a more efficient mechanism of competition law application and policy among developing and developed countries.**

**MR. VAN FLEET:** Joaquín, how do you see it from your end?

**MR. ALMUNIA:** I fully agree with the very important job that has been done at the ICN over the last decade. Most jurisdictions are dealing with international cases involving companies that span several world regions.

I can see that our analyses follow converging paths; more and more often we adopt the same approach on the same kinds of problems. But we need to intensify our work on international cooperation, because we will continue to live in a global economy. Good collaboration between all enforcement authorities is a condition for the legitimacy and efficiency of each authority.

**MR. VAN FLEET:** Eduardo?

**MR. PÉREZ MOTTA:** Mexico has been one of the most important beneficiaries of this cooperation mechanism through the ICN and the OECD. I have to say that there are two key words here. One is cooperation. The other is convergence. They go hand in hand. Let me just give you an example. With the DOJ and with the FTC, with Christine and Jon, we have a very efficient exchange of information and cooperation in many cases. But given that we do not have criminal sanctions, we do not have that convergence in that part of our law.

We are more active in mergers, we are more active in abuse of dominance, in our discussions. These discussions go also with the European Union. But of course, in the case of NAFTA, in many cases, in many examples, we have the relevant market as a NAFTA market. So it makes a lot of sense to have a good exchange and a good coordination mechanism.

I have to recognize, along with Christine, that John Fingleton has done a great job in the ICN. The ICN might be one of the most efficient international organizations that I have ever seen. I used to be an ambassador to the WTO. The WTO is one of the good international organizations. But the ICN does not spend resources in a specific secretariat. The ICN works on conference calls, a lot of convergence, a lot of discussion, a lot of exchange of views on methodologies, on guidelines, on best international practices. I think without any doubt this is one of the best instruments that we have in order to really have a more efficient mechanism of competition law application and policy among developing and developed countries.

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**Commission President**

**Eduardo Pérez Motta**
MR. VAN FLEET: Let me finish up with a question on an area of convergence that was the subject of the Chair’s Showcase program, in which Commissioner Brill participated and former Commissioner Harbour played a huge role. That deals with privacy.

Jon, in light of the FTC’s *Preliminary Report on Protecting Consumer Privacy* that was published back in December, and the European Commission’s *Communication on Modernizing the European Data Protection Framework* issued last November, do you think that the European and American models on privacy are now converging? And of course I’m going to ask Joaquin if he wishes to comment afterwards.

MR. LEIBOWITZ: I think we are seeing a fair amount of convergence in consumer protection, and particularly in privacy. If you look at the most recent guidance put out by Joaquin’s colleague Viviane Reding, it looks at the same issues that our privacy report does. It looks at transparency, choice, and I think the critical notion of privacy by design. And again, they look a little bit more at each regime’s laws. We look more at the compliance of each company. But I think there is certainly a will to get to the same place, which is privacy protection for consumers.

This came home to me to some extent this week when we brought our *Google Buzz* case, because one of the counts in *Google Buzz* was violating—and Christine knows this because she was in the Commission when it was created—was violating the safe harbor provision. It was the first case where there was a clear failure to register. We’ve had some safe-harbor cases before, but this was the first case in which there was a clear violation.

So I think we will continue to work together more often and we are moving closer to some of the same goals.

MR. ALMUNIA: Just one word, because this really is not under my direct responsibility. As Jon said, it is under Viviane’s responsibility. But indeed it is a very important issue. We know there are some economic activities and companies that own a lot of private data on all of us, and this requires much more attention than in the past.

We are seeking to increase our international cooperation on these issues and we are working in this direction. At the same time, we have a very important challenge within the European Union, because the twenty-seven Member States do not have the same legal threshold for this. So we are working both inwards and outwards.

MR. VAN FLEET: Let’s give a big hand to our enforcers, a big hand to yourselves for making this the best Spring Meeting I’ve ever been to.
Fiona M. Scott Morton: Letting the Data Speak

Fei Deng

Fiona Scott Morton, a Professor of Economics at Yale School of Management, was recently appointed as the Deputy Assistant Attorney General for Economic Analysis at the U.S. Department of Justice. During her twenty years of teaching and conducting empirical research, Scott Morton has specialized in competitive strategies and dynamics. She has performed extensive research on the economics of the pharmaceutical industry, with two main areas of focus: the effect of government-sponsored insurance plans—Medicaid and Medicare Part D—on prices and competition in the pharmaceutical industry, and entry strategies of generic drug manufacturers and the resulting industry dynamics.

Antitrust practitioners may be less familiar with Scott Morton’s work beyond health care, but her other published research spans a wide range of areas relevant to antitrust. These areas include cartels, bundling, the competition-enhancing effect of the Internet, and behavioral economics, plus a wide range of industries, such as shipping, automobile, supermarket, magazines, and funeral goods and services. The overriding impression left by a review of her work is that she is pragmatic, non-doctrinaire, and lets the data speak.

Medicare and Medicaid

Given that “Medicare Part D enrollees combined with Medicaid enrollees generate close to 50% of prescription drug spending in the United States,” empirical studies can play an important role in assessing the success of health care policies on the cost and quality of pharmaceuticals delivered to participants in these programs. Scott Morton’s research indicates that good mechanism design, as in the case of Medicare Part D, can provide appropriate incentives, while poor mechanism design, as in the case of Medicaid, can have adverse, unintended consequences on incentives.

In a series of papers, Scott Morton studied the effect of Medicaid’s procurement rules, such as the most-favored-customer (MFC) clause, on pharmaceutical prices. The Medicaid MFC clause was established by the Omnibus Budget Reconciliation Act of 1990, under which Medicaid reimburses a pharmaceutical manufacturer only at the lowest price the manufacturer offered to any


buyer of the product, if the manufacturer chooses to enroll in the Medicaid program. On its face, an MFC clause would seem to ensure lower prices for Medicaid, but Scott Morton’s research casts doubt on this presumption.

Using data from 1989 to 1991, before and after the time when the MFC clause took effect, Scott Morton found that the MFC clause resulted in a price increase of 4 percent on average for branded drugs facing generic competition.\(^3\) She also found that the extent of price dispersion declined in the hospital channel.\(^4\) The size of these effects for a given drug was positively correlated to the share of the drug covered by Medicaid and the level of price dispersion before the MFC clause took effect.\(^5\) Her later study, using drug utilization and expenditure data for the top 200 drugs in 1997 and 2002, confirmed her earlier findings, indicating that “a 10-percentage-point increase in the MMS [(Medicaid market share)] is associated with a 7 to 10 percent increase in the average price of a prescription.”\(^6\)

The government might not have considered the possibility of these price-increasing effects when designing the MFC clause. Scott Morton concluded that the MFC clause gave pharmaceutical manufacturers disincentives to provide discounts to customers in the commercial market because the price to Medicaid recipients would be lowered as well. Private insurers and their customers were also negatively affected because they had to pay more for some prescription drugs than they otherwise would have, especially those drugs for which a large share of sales is to Medicaid recipients.

Scott Morton’s studies on the Medicare Part D program show a much brighter picture.\(^7\) Scott Morton found that the Medicare Part D program lowers branded drug prices by approximately 20 percent on average, which in turn lowers out-of-pocket costs for Medicare recipients, especially for those who did not have insurance before Part D.\(^8\) This is due to the successful design of the Medicare Part D program, which uses a formulary to encourage competition among branded drugs for market share.\(^9\) As Scott Morton described, this mechanism gives the program strong buyer power because “Part D plans could exclude certain treatments from their formulary or steer their enrollees away from certain treatments in response to the prices of those treatments, which a cash-paying individual could not typically do on her own.”\(^10\)

**Generic Drug Entry**

Entry has long been a favorite subject for industrial organization economists due to the challenges and opportunities posed by the dynamics and strategic interaction involved in entry decisions.\(^11\)

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\(^6\) Duggan & Scott Morton, supra note 2, at 1.

\(^7\) Mark Duggan et al., *Providing Prescription Drug Coverage to the Elderly: America’s Experiment with Medicare Part D*, 22 J. ECON. PERSP. 69 (Fall 2008); Mark Duggan & Fiona Scott Morton, *The Effect of Medicare Part D on Pharmaceutical Prices and Utilization*, 100 AM. ECON. REV. 590 (2010).

\(^8\) See Duggan & Scott Morton, supra note 7, at 592, 605.

\(^9\) Id. at 590.

\(^10\) Id. at 591.

Scott Morton has published several articles on entry dynamics in the generic pharmaceutical industry.\textsuperscript{12}

She studied generic drug entrants between 1984 and 1994 and found that markets with “larger prepatent expiration brand revenue, larger shares to hospitals, and drugs that treat chronic conditions” attracted more entry.\textsuperscript{13} She also found that firms with prior experience in similar drugs or therapies would be more likely to enter a particular market, perhaps due to “economies of scope in distribution channels and sales relationships.”\textsuperscript{14}

As for interaction between branded drugs and generic drugs, Scott Morton found that pre-expiration brand advertising, although endogenous with respect to generic entry because both depend on the expectation of profits in the post-entry market, is not effective in deterring generic entry.\textsuperscript{15} Scott Morton also found that a company’s ownership of both a branded drug and a corresponding generic drug application does not facilitate generic entry.\textsuperscript{16} This finding is consistent with the general attitude the DOJ and FTC have taken with respect to merging of firms specializing in generic and branded drugs and their stance against pay-for-delay agreements.

### Retail Pricing and Retailer-Manufacturer Negotiations

In the retail industry, Scott Morton has studied the effect of the Internet on new car pricing, and retailers’ use of store brands in their negotiations with branded manufacturers.

The invention and development of the Internet not only revolutionized the information technology industry, but also affected pricing and competition in traditional industries, such as the automobile industry. Scott Morton conducted a series of empirical studies on this subject and found that customers who bought cars online (i.e., used Internet car referral services) paid 1.5 to 2.2 percent less than they would have if buying offline.\textsuperscript{17} Another interesting finding of her studies is that African-American and Hispanic buyers pay on average 2.1 percent more than white buyers for identical cars when buying offline, 35 percent of which is not attributable to observable factors such as income, education, and search costs.\textsuperscript{18} However, this “minority price premium” disappears almost entirely when buying online, indicating that minority buyers benefit the most from buying online.\textsuperscript{19}

In the supermarket industry, Scott Morton studied retailers’ strategic use of store brands and found that “retailers are more likely to carry a store brand in a category if the share of the leading national brand is higher,” indicating that store brands are used by retailers as a tool in negotia-


\textsuperscript{13} Scott Morton, \textit{Entry Decisions}, supra note 12, at 422.

\textsuperscript{14} Id.

\textsuperscript{15} See Scott Morton, \textit{Barriers to Entry}, supra note 12.


\textsuperscript{18} Fiona Scott Morton et al., \textit{Consumer Information and Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities}, 1 QUANTITATIVE MKTG. & ECON. 65, 67 (2003).

\textsuperscript{19} Id. at 86–87.
tions with branded manufacturers over supply terms.\textsuperscript{20} She ruled out an alternative explanation for retailers’ use of store brands, namely that the retailer seeks to maximize sales by imitating the national brand’s positioning. She tested this alternative explanation by examining the correlation between the market share of the store brand and the market share of the leading national brand (controlling for other factors as well).\textsuperscript{21} If maximizing sales through imitation were the explanation for store brands, one would expect to see that this correlation is positive. Instead, she found a small, negative correlation.\textsuperscript{22} Her conclusion regarding retailers’ motivation for introducing store brands suggests that the economic relationship between retailers and national brands can be quite complex. Her findings also have implications for the analysis of mergers between national brands. For example, a merger between two competing national brands may induce retailers to introduce a store brand as a counter-measure to increase their buyer power.

**Scott Morton’s studies**

of British shipping cartels link the social characteristics of the market players with the competitive strategies employed. This fits into the new trend in economic studies, where social or psychological factors are studied and considered in economic modeling.

**Entry, Predation, and Behavioral Economics**

Scott Morton studied the attempted entry by various merchant shipping lines and the reactions of incumbent cartel members during the British shipping cartel period of 1879–1929.\textsuperscript{23} She found that entrants with “fewer financial resources, less experience, smaller size, or poor trade conditions” were more likely to be met by incumbents with a price war.\textsuperscript{24} This is consistent with the “long-purse” theory of predation, which points to the significance of financial resources of an entrant for its ability to survive incumbents’ attempts to drive it out of the market.\textsuperscript{25}

In addition, Scott Morton found that the social status and regional affiliation of the entrant impacted whether the incumbents would engage in predation. She found that “high social status entrants are significantly less likely (40 percent) to be preyed upon than the low social status entrants.”\textsuperscript{26} She also found that an entrant being located at the same port as one of the incumbents increased the probability of predation, but being British lowered the probability of predation, which implies that the community-enhancing effects of similar origin outweighs the competitive effects at the national level but not at the local level.\textsuperscript{27}

Scott Morton’s studies of British shipping cartels link the social characteristics of the market players with the competitive strategies employed. This fits into the new trend in economic studies, where social or psychological factors are studied and considered in economic modeling. Another example of Scott Morton’s behavioral economics work is her study linking consumers’ time-inconsistent preferences with magazine prices.\textsuperscript{28} She found that “magazine publishers


\textsuperscript{21} Id. at 188–90.

\textsuperscript{22} Id. at 189.


\textsuperscript{24} Scott Morton, supra note 23, at 679.


\textsuperscript{26} Podolny & Scott Morton, supra note 23, at 41.

\textsuperscript{27} Id. at 62.

\textsuperscript{28} Sharon M. Oster & Fiona M. Scott Morton, Behavioral Biases Meet the Market: The Case of Magazine Subscription Prices, 5 ADVANCES ECON. ANALYSIS & POL’Y 1 (2005).
appear to be setting subscription prices to take advantage of time-inconsistency on the part of consumers.” Magazines, such as investment magazines that are more “worthy” purchases that will benefit the reader in the future, have a lower ratio of newsstand price to subscription price than leisure magazines that provide more immediate gratification.29

**Bundling and One-Monopoly Rent**

Bundling is another favorite subject of both industrial organization economists and antitrust practitioners. The classic Chicago School theory of “one monopoly rent” argues that if a firm has market power in market A, it cannot achieve more market power by bundling its product in market A with its product in competitive market B. Others have noted several situations in which the one-monopoly-rent theory does not hold, including when the product in market B can be used as an effective tool for price discrimination.30 Thus, it is left to empirical tests to determine whether the one-monopoly-rent theory applies to a particular bundling situation.

Scott Morton examined whether the one-monopoly-rent theory applies to the funeral goods and services industry, where funeral goods like caskets can be purchased together with funeral services through funeral homes, or separately from retailers such as Costco.31 The latter option is only available in certain states where no regulations restrict the sales of funeral goods to licensed funeral homes only. She found that “when courts lift funeral goods sales restrictions, the prices of funeral goods fall but the prices of funeral services rise by nearly as much,” thus indicating that the one-monopoly-rent theory holds in this industry.32

**Conclusion**

Scott Morton’s research touches on various areas in antitrust law. Her approach has been empirically oriented, and the emphasis has been on competitive strategies and dynamics.33 These features of her research may have been what led to the DOJ to appoint her to her present position. Scott Morton seems to be a good fit with the emphasis of the new Merger Guidelines on empirical evidence. Based on her published research, she can be expected to continue to let the data speak in her new role as an antitrust enforcer.

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29 Id. at 23.
32 Id. at 1.
33 In addition to the empirical studies reviewed above, Scott Morton also coauthored an econometrics paper, applying alternative approaches in addressing the issue of misclassification of a dependent variable in a discrete-response model. See Jerry A. Hausman et al., *Misclassification of the Dependent Variable in a Discrete-response Setting*, 87 J. ECONOMETRICS 239 (1998).
Omnicare: Seventh Circuit Gives Judicial Guidance on Premerger Information Exchanges

Noah Brumfield, Rebecca Farrington, and Herbert Allen

Merging parties typically engage in a wide variety of information sharing and coordination, ranging from initial due diligence to transition planning. But before a merger is consummated, antitrust laws limit the merging parties’ ability to share competitively sensitive information. Section 1 of the Sherman Act prohibits premerger activities that constitute a contract, combination, or conspiracy that unreasonably restrains trade. Meanwhile, Section 7A of the Clayton Act, also known as the Hart-Scott-Rodino Act, prohibits the transfer of operational control or beneficial ownership over the target company before the expiration of a statutory waiting period, which begins when the government is notified of the transaction.

Antitrust counselors have long relied on agency consent decrees and speeches for guidance in counseling clients through the perils of premerger discussions. With the Omnicare decision from the Seventh Circuit1 (affirming an instructive opinion from the district court), counselors now have federal court precedent affirming the advice commonly given to merging parties on the bounds of lawful information exchange and prudent safeguards to minimize risk.

Before Omnicare: Consent Decrees and Speeches

Before the recent Omnicare decisions, the best guidance on the legality of premerger information sharing and transition planning came from Department of Justice and Federal Trade Commission enforcement actions and speeches. But because DOJ and FTC enforcement has focused on “egregious conduct” on the part of merging entities,2 these enforcement actions and speeches do little to clarify the legality of lesser premerger coordination and information exchanges. Meanwhile, the courts have provided little guidance on how much information sharing and transition planning is allowed.

In the 2002 consent decree in United States v. Computer Associates International, Inc.,3 for example, the acquiring entity, Computer Associates, imposed an “extraordinary” set of premerger restrictions on the target company, which was also alleged to be a competitor.4 These restrictions gave an employee of Computer Associates the authority to review and approve the target company’s customer contracts and provided access to the specific prices and discounts the target company offered to individual customers, both on a prospective basis. The government

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1 Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697 (7th Cir. 2011).
alleged violations of Section 1 of the Sherman Act and Section 7A of the Clayton Act, arguing that the actions of Computer Associates allowed it to prematurely take control of the target company, elevate the target company’s prices, and restrict competitive activity of a direct rival. The government’s settlement with Computer Associates required payment of a $638,000 civil penalty and prohibited the company from accessing pricing information or requiring approval of customer contracts in any future merger.

In *United States v. Gemstar-TV Guide International, Inc.*, the merging entities allegedly shared customer-specific pricing information and coordinated price-setting and marketing efforts prior to the close of the transaction. The merging parties allegedly went so far as to agree, before the close of the transaction, that Gemstar would exclusively deal with certain customers, while TV Guide would deal with others. The government settled its charged violations of Section 1 of the Sherman Act and Section 7A of the Clayton Act for payment of the maximum civil charges under Section 7A, for a combined total of $5,676,000.

While enforcement by the agencies has focused on only the most egregious conduct, speeches by officials at the FTC and DOJ have identified useful principles for merging parties. For example, in 2005, William Blumenthal, then the FTC general counsel and one of the first scholarly commentators on premerger coordination and information exchange, advised that the risk of premerger coordination or information sharing is greatest where it is “not reasonably necessary to protect the integrity of the merger transaction and where the merging firms are competitors.”

But because such statements do not carry the force of law, at most they indicate the likely exercise of prosecutorial discretion by those officials while they remain in office, leaving the legality of less extreme premerger conduct unclear.

While antitrust counselors have long understood that merging parties must conduct due diligence and plan for eventual integration, until *Omnicare* no federal court had spoken on when the exchange of competitive information by merging competitors runs afoul of Section 1 of the Sherman Act (*Omnicare* did not include claims for violation of the HSR Act waiting period) and what steps antitrust counsel should take to mitigate the antitrust risk in the premerger context. In the absence of specific judicial guidance, antitrust counsel have developed best practices to avoid liability under Section 1 and related antitrust laws. The *Omnicare* decisions reaffirm this commonly given advice, including:

- Companies should consult with antitrust counsel to manage risks when obtaining necessary information for diligence and integration purposes. Careful planning and process documentation can reduce the risk of an allegation of improper information sharing.
- Companies should avoid exchanging any information beyond what is necessary for valuing the transaction and setting the stage for post-merger integration. Detailed, current competitive information presents the highest risk.
- Confidential information acquired during premerger due diligence should be shared only with counsel and with business people who have a demonstrated need to know, and not with those individuals who could use it for competitive purposes.
- For necessary but extremely sensitive information, aggregation or using third-party vendors to review and summarize the information should be considered.
- Negative covenants (e.g., providing the acquiring party a right to review high-threshold, material assumptions of liability) have legitimate purposes. But care should be exercised in

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6 Blumenthal, supra note 2, at 7.
determining their scope and potential carve-outs. Counsel should be involved in both drafting and implementing such provisions.

**Omnicare Background**

The Seventh Circuit’s *Omnicare* decision arose out of a merger in 2005 between two health insurers, UnitedHealth Group, Inc. and PacifiCare Health Systems, Inc. The insurers began merger discussions in January 2005, signed a merger agreement in July 2005, and closed the transaction in December 20, 2005, after agreeing to certain asset divestitures required by the Department of Justice.

With the deal cleared by the DOJ, the transaction might not have resulted in bitter multi-year litigation over the merging parties’ premerger conduct if not for federal legislation that was about to take effect. On January 1, 2006, just as the merger was coming to a close, the country’s new Medicare prescription drug benefit for seniors, called Medicare Part D, was set to “go live.” In 2005, while UnitedHealth and PacifiCare were engaged in premerger due diligence and information sharing, both insurance companies were developing Medicare Part D plan proposals showing that they could provide drugs to residents of long-term care facilities under the new Medicare program. As part of this effort, both UnitedHealth and PacifiCare were separately negotiating with Omnicare, the largest U.S. institutional pharmacy, over prescription reimbursement contracts.

UnitedHealth and Omnicare had little trouble reaching agreement. By contrast, PacifiCare took a hard-line bargaining position in its negotiations with Omnicare. PacifiCare broke off discussions with Omnicare after signing the merger agreement and obtained Part D Medicare certification without having Omnicare in its network. PacifiCare and Omnicare later resumed negotiations and eventually negotiated an agreement more favorable to PacifiCare than the one UnitedHealth had earlier negotiated. Once the merger was consummated, the merged entity abandoned the UnitedHealth contract with Omnicare to take advantage of the better PacifiCare terms.

Within months of learning that UnitedHealth planned to switch to the PacifiCare contract, Omnicare sued, claiming the insurers had formed a buyers’ cartel in violation of Section 1 of the Sherman Act to obtain below-market reimbursement rates. In addition to the antitrust claim, Omnicare alleged a violation of state consumer protection statutes and brought claims under theories of fraud and unjust enrichment.

**Allegations that UnitedHealth and PacifiCare Improperly Shared Sensitive Information**

Omnicare argued that sharing pricing information during due diligence in the summer of 2005 allowed the insurers to coordinate their negotiations with Omnicare—using PacifiCare to negotiate aggressively to obtain the lowest possible rate—thereby depressing reimbursement rates below competitive levels. In the words of the Seventh Circuit, these information exchanges formed the “backbone” of the alleged collusion.

Specifically, Omnicare pointed to several meetings and exchanges of information regarding Part D that took place during the due diligence process:

- In one meeting, a PacifiCare executive gave a presentation to UnitedHealth entitled “Part D Prescription Drug Program,” which included general information about PacifiCare’s Part D

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7 Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697 (7th Cir. 2011).
8 Id. at 720.
program but did not include any pricing information, except an assertion that PacifiCare would follow “an aggressive pricing strategy.” UnitedHealth requested follow-up information and in its response, PacifiCare divulged its expected average discount for pharmaceuticals off the average wholesale price, which turned out to be the same as the rate PacifiCare ultimately negotiated with Omnicare later that year.

- At another meeting, PacifiCare provided additional product and distribution strategies, benefit plan designs, and financial assumptions for its Part D business, including “low and average high plan pricing information from a sampling of regions.” PacifiCare also disclosed—to an outside auditor retained by UnitedHealth—the profit margin PacifiCare expected in its Part D bids. The auditor gave the profit margin information to UnitedHealth but emphasized that “no information on regional bids or on distribution of expected enrollment by region is available.” UnitedHealth did not see the individual contracts.

In assessing whether the merging parties formed an unlawful agreement to depress reimbursement rates, the district court and the Seventh Circuit analyzed several arguments by Omnicare related to information sharing and integration planning.

**Information Sharing**

**Early Discussions with Relevant Business Executives.** As they began merger talks, UnitedHealth and PacifiCare executives exchanged strategic information, including Part D average pricing. Omnicare claimed that these exchanges allowed the companies to depress reimbursement rates to below-competitive levels. The merging parties argued that the exchanges only included average prices and did not mention specific prices offered to Omnicare, and that discussions were between high-level executives, not the individuals most directly involved in the negotiations with Omnicare. The district court noted that the individuals who attended the due diligence meetings in question were senior executives who may have overseen aspects of Part D, which “can hardly be surprising.” The court found that the presence of these senior executives did not support Omnicare’s cartel theory because “high-level executives are less likely to be directly involved in developing the Part D proposals and less directly able to use any of the competitively sensitive information.”

**Information Shared Outside the Bounds of the Confidentiality Agreement.** Omnicare argued that UnitedHealth personnel acquired sensitive information beyond what was permitted by the confidentiality agreements, thus supporting the inference of an illegal conspiracy. For example, UnitedHealth personnel who were excluded from the due diligence team were consulted about matters learned in due diligence. The district court noted that although the reasons for sharing the information were benign (to better assess the relevance of the information received), the consultations did “create concerns that competitively sensitive information was leaked outside of the parameters set by the confidentiality agreement covering such information.” The risk remained that “these officials could have used the information they obtained in anticompetitive ways to ben-

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10 Id. at 951.
11 Id.
12 Id. at 969.
13 Id.
14 Id.
efit their own businesses.”\textsuperscript{15} However, the court refused to deny the motion for summary judgment on this basis, reasoning that the exchange of information outside the bounds of the confidentiality agreement, without further evidence of concerted action, is not enough to support an inference of conspiracy.

**Detail of Due Diligence Pricing Information.** During the due diligence process, UnitedHealth asked for and received PacifiCare’s expected average brand discount off its average wholesale price. That discount turned out to be the precise rate PacifiCare ultimately paid in the Omnicare contract it later negotiated. The question the district court asked was “was this information exchange necessary for the due diligence process?\textsuperscript{16}” Here, the pricing information that was exchanged was provided late in the process—less than one month before the signing of the Merger Agreement—at a point when negotiations were serious, not exploratory, and was conveyed in the form of “generalized and averaged high-level pricing data”\textsuperscript{17} rather than specific “bargained-for rates.”\textsuperscript{18} The district court recognized that pricing information “had some importance to consummating the Merger Agreement” and that by requesting averages and ranges, and not all information about all markets, the parties were “appropriately circumspect.”\textsuperscript{19} The information was “as general as possible to enable UnitedHealth to evaluate PacifiCare’s Part D readiness and its level of business risk.”\textsuperscript{20} Importantly, the Seventh Circuit noted, the UnitedHealth manager in charge of Part D pharmaceutical contracting was not among the recipients of the pricing information.\textsuperscript{21} On the whole, the exchange was “necessary to due diligence and was performed in a reasonably sensitive manner.”\textsuperscript{22}

**Reciprocal Sharing of Price Information by the Seller.** Omnicare argued that since PacifiCare was the target company, PacifiCare had no need to review any information about UnitedHealth’s average prices and that doing so was circumstantial evidence of a conspiracy to depress prices. While the district court agreed that the rationale for the acquiring party’s providing price information to the target is weaker, it recognized that “just as the acquirer wants to know that it is not making a dangerous investment in acquiring the target, the target wants to have some assurance that the entity that is acquiring it is well-run and has a strong strategic vision for the future.”\textsuperscript{23}

**Integration Planning**

**Communications After Signing and Before Closing.** Omnicare did not limit its allegations to pre-signing conduct, but also challenged post-signing integration planning exchanges of information and discussions. For example, one challenged document described a series of strategic options for the companies, including the use of PacifiCare as a “stalking horse” to get the best service and contracts. Despite the “conspiratorial connotation” of this language, the court concluded that the focus of the document was “long-term strategic planning” and it was written “with an eye towards

\textsuperscript{15} Id. 
\textsuperscript{16} Id. at 970. 
\textsuperscript{17} Omnicare, 629 F.3d at 720. 
\textsuperscript{18} Omnicare, 594 F. Supp. 2d at 970. 
\textsuperscript{19} Id. 
\textsuperscript{20} Id. at 971. 
\textsuperscript{21} Omnicare, 629 F.3d at 710. 
\textsuperscript{22} Omnicare, 594 F. Supp. 2d at 971. 
\textsuperscript{23} Id.
integration of services after the merger is completed.”24 With specific regard to Part D pricing and Omnicare, there were virtually no communications between UnitedHealth and PacifiCare in the period between signing the merger agreement and closing. The court noted that their silence was “consistent with Defendants’ denials of concerted activity,” and that further information exchanges after signing are difficult to justify.25 Documents describing integration planning during this time were “clearly written prospectively.”26 The Seventh Circuit agreed that the “stalking horse” memorandum described options for future consideration, not actions the companies had already undertaken.27

**Negative Covenants.** Although overshadowed by evidence developed later during the discovery phase, the merger agreement between UnitedHealth and PacifiCare formed an important part of the early case.28 One key clause in the agreement prohibited PacifiCare from incurring any contract liability of $3 million or more without United Health’s written approval. In denying UnitedHealth’s early motion to dismiss, the district court concluded that this clause could constitute a “contract, combination, or conspiracy” in violation of Section 1.29 The court reasoned “that UnitedHealth and PacifiCare entered into an explicit merger agreement which restricted PacifiCare’s ability to enter into contracts.”30 At the summary judgment stage, however, the district court found that the clause did not support the inference of a conspiracy.

While the PacifiCare/Omnicare agreement was valued at approximately $130 million and would normally have fallen within this restrictive clause, the merger agreement also contained a carve out in a side letter that permitted PacifiCare to enter into any contracts relating to the Part D business without preapproval from UnitedHealth. The defendants argued that the carve out demonstrated the parties’ desire to ensure the independence of the merging companies’ Part D negotiations. The district court emphasized the legitimate reasons for negative covenants. “The provision in the Merger Agreement between UnitedHealth and PacifiCare is a relatively common feature in merger agreements intended to insure that the acquired company (PacifiCare) does not assume any major liabilities for which the acquiring company (UnitedHealth) would be responsible after the merger.”31 These preapproval requirements are “common practice in mergers, and the presence of one here does not constitute evidence of conspiracy.”32 Importantly, because the merger agreement did not require UnitedHealth to approve PacifiCare’s Part D contracts (as a result of the carve out), the district court held that it could not provide the basis for Omnicare’s antitrust claim, and the Seventh Circuit agreed.33

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24 Id. at 973.
25 Id. at 972 (citing William Blumenthal, *The Scope of Permissible Coordination Between Merging Entities Prior to Consummation*, 63 Antitrust L.J. 1, 55–56 (1994)).
26 Id. at 973.
27 Omnicare, 629 F.3d at 708.
28 The district court relied on the negative covenant provision to deny the defendants motion to dismiss. Omnicare, 594 F. Supp. 2d at 960.
29 Id.
31 Omnicare, 594 F. Supp. 2d at 963–64.
32 Id. at 964.
33 Id.; Omnicare, 629 F.3d at 712.
Safeguards Employed by the Merging Parties

In dismissing the case at the summary judgment stage, both the trial and appellate courts focused on the numerous safeguards UnitedHealth and PacifiCare adopted to mitigate antitrust risk during the due diligence. Confidentiality agreements dictated how information deemed “confidential” or “highly confidential” was to be exchanged during due diligence. Before sharing any information with UnitedHealth, PacifiCare’s outside counsel developed a “clean room” and reviewed all PacifiCare documents before they were put in the room to determine the propriety of sharing them with UnitedHealth.34

Perhaps more importantly, the courts noted that no specific pricing information was exchanged. Rather, the parties exchanged only pricing “averages and ranges,” supervised by outside antitrust counsel, to evaluate general Part D readiness and general business risk.35 Indeed, the defendants showed that the UnitedHealth manager responsible for pharmaceutical contracting had not received the pricing information. The Seventh Circuit concluded that such “circulation of generalized and averaged high-level pricing data, policed by outside counsel . . . is more consistent with independent than collusive action.”36 In the end, these safeguards, including active involvement of outside antitrust counsel, may have saved UnitedHealth and PacifiCare from a costly and uncertain trial.

Striking a “Sensitive” Balance

Both the district court and the Seventh Circuit recognized the challenge of identifying unlawful antitrust conduct during premerger information sharing, particularly where there is no “smoking gun” evidence showing unlawful coordination or collusion. The balance “is a sensitive one.”37 On the one hand, an overly restrictive standard “could chill business activity by companies that would merge but for a concern over potential litigation.”38 On the other hand, the possibility of a merger should not allow for the unbounded exchange of competitively sensitive information. In the words of the district court, “that could lead to ‘sham’ merger negotiations, or allow for periods of cartel behavior between signing and closing.”39

In the end, the Seventh Circuit observed that although Omnicare had crafted a “complex and compelling” narrative to show a violation of the antitrust laws, Omnicare’s circumstantial evidence was insufficient to permit a jury to dismiss the inference that UnitedHealth and PacifiCare were acting independently.40

Taken together, the Seventh Circuit and the district court decisions in Omnicare provide support for one overriding principle on which antitrust counselors have long relied—that information may be shared between merging parties where it is reasonable and necessary to achieving the legitimate objectives of the merging firms. Merging companies should take precautions to limit improper use or spillover effects. One area of frequent concern not addressed in detail by Omnicare, however, is the extent to which negative covenants can result in violations of the HSR Act or
Section 1 of the Sherman Act. Indeed, the district court in *Omnicare* relied on the $3 million preapproval clause in the UnitedHealth-PacifiCare merger agreement to deny the initial motion to dismiss, finding that the clause could constitute a “contract, combination, or conspiracy” in violation of Section 1 of the Sherman Act.41 This, ultimately, was not a focus in disposing of Omnicare’s suit, leaving counselors to continue to provide advice based on broad, generally applicable principles relevant to premerger conduct.

Acquisition agreements typically contain restrictions on the target’s conduct during the period between signing and closing for the legitimate purpose of preserving the value of the bargained-for purchase price. While the cautious approach often taken is to limit any negative covenants to activities outside the ordinary course of business, issues still arise—as this case vividly demonstrates. The challenges could be even more substantial if, for example, a multiple-year contract with a major customer or supplier came up for renewal during the pre-closing period. While balancing these issues has been the subject of excellent discussion in speeches, articles, and treatises,42 antitrust counselors still lack clear judicial guidance on the application of such clauses. In the meantime, the *Omnicare* decisions affirm that certain information exchanges among merging parties are legitimate and permissible because justifications exist for sharing that information. ●

41 *Omnicare*, 524 F. Supp. 2d at 1037.

Defending Class Actions in the “Wild West”: The Changing Landscape of California’s Consumer Protection Laws

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California provides a lucrative market of opportunities for companies—as the world’s eighth largest economy, it boasts a population larger than all but thirty-four countries and is also home to numerous industries and companies. However, this opportunity comes with a challenge, namely a heavily regulated, litigious, and costly climate for doing business. This in part results from California’s unique and strict set of consumer protection laws. The application of these laws is driven by a series of underlying structural factors, including a vigorous ballot initiative process, a sophisticated plaintiff’s bar, ardent regulators and prosecutors, and frequently changing case law. Together, they make doing business in California not only difficult and costly, but often also unpredictable.

A state ballot initiative, Proposition 64, adopted in 2004 offered some promise of easing the burden of doing business in California by tightening the standing requirements under California’s consumer protection laws. Recent California Supreme Court decisions under the state’s consumer protection laws indicate, however, that the situation remains challenging for businesses. The effect of Proposition 64, as construed in those decisions, suggests that some of the oddities of California’s standing requirements may remain. At the same time, these recent decisions under the Unfair Competition Law (UCL) and False Advertising Law (FAL), while widely perceived to be plaintiff-friendly, may actually contain benefits for businesses by reaffirming strict restrictions on remedies.

The Evolution of California’s Consumer Protection Laws Before and After Proposition 64

The UCL has been called “notoriously broad” by the Ninth Circuit. Both elected officials and private parties can enforce the statute against any business that sells products or services to consumers in California. The UCL prohibits any unfair, unlawful, or fraudulent business practice or act. A unique element of the UCL is that it creates a universal private right of action by treating violations of state, federal, or common law as a violation of the statute. Thus, even where a violated statute does not provide for a private cause of action—like many antitrust, environmental, or labor statutes—plaintiffs can seek to impose liability through the UCL.

1 CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2008). The UCL is modeled on the federal FTC Act of 1914, 15 U.S.C. §§ 41–58, and is also known as the Unfair Business Practices Act or, more simply, as Section 17200.
2 CAL. BUS. & PROF. CODE §§ 17500–17509 (West 2008).
4 CAL. BUS. & PROF. CODE § 17500 (West 2008).
For years, California courts allowed attorneys to bring “private attorney general” claims under the UCL, even if the plaintiffs they represented had never purchased or used the products or services at issue. In fact, the UCL’s statutory language provided that “any person” could sue on behalf of the “interests of . . . the general public.” The statute’s unique and permissive procedural requirements enabled plaintiffs not only to circumvent traditional standing, but also class action doctrine. Plaintiffs could bring “non-class” or “representative” class actions, meaning that a plaintiff, without any connection or injury related to the challenged conduct, could sue on behalf of absent parties without meeting the standard requirements for a class action.

The statute’s permissive provisions earned the ire of the business community and criticism from the bench. One California court asserted that some plaintiff-side attorneys were abusing the UCL, creating “a kind of legal shakedown scheme.” Justice Stephen Breyer questioned whether the type of “universal standing” under the UCL and its corollary in the advertising context—the FAL—was consistent with the First Amendment.

The backlash from the business community to perceived abuses of the UCL and FAL took the form of Proposition 64, a ballot initiative that passed in 2004. The proponents of Proposition 64 intended to conform the requirements for lawsuits under the UCL and FAL with traditional standing and class action doctrine. Under Proposition 64, in order to sue, plaintiffs must have “suffered injury in fact and [have] lost money or property as a result” of defendants’ challenged conduct.

Further, to represent other, absent parties, Proposition 64 requires named plaintiffs to meet the traditional requirements for a class action under the California Code of Civil Procedure.

Proposition 64 Interpreted: Key Issues in Recent California Consumer Protection Cases

The impact of Proposition 64 could not be measured until the results of litigation construing the UCL’s and FAL’s new terms and requirements—particularly the “lost money or property” and “as a result of” language added by Proposition 64—were taken into account. Recent California Supreme Court decisions have, to some extent, clarified the meaning of those terms but left the standing requirements under the UCL and FAL very liberally construed. Thus, the bar to file suit under the UCL and FAL does not appear to be much higher than it was before Proposition 64’s passage. Nonetheless, the California Supreme Court simultaneously has reaffirmed stricter requirements for monetary recovery under these statutes.

Standing

Tobacco II: Proposition 64 Applied Only to Named Plaintiffs. In the Tobacco II Cases, the California Supreme Court resolved an issue that had received much play in the lower appellate courts. The court held that only the named plaintiffs in a class action lawsuit under the UCL and FAL need have suffered “injury in fact” and “lost money or property” as a result of a UCL violation to sue.


10 In re Tobacco II Cases, 207 P.3d 20, 12 (Cal. 2009) (holding that only named plaintiffs must meet UCL standing requirements because “the references in [the UCL] to one who wishes to pursue UCL claims on behalf of others are in the singular; that is, the ‘person’ and the ‘claimant’ who pursues such claims must meet the standing requirements”).
In other words, plaintiffs need not allege that absent class members meet these standing requirements. This ruling arguably allows persons to be class members in an action even though they would not have standing to sue in their own name. The dissenters in Tobacco II characterized this unique form of class action—where absent class members are not required to show an injury—as a “no-injury class action[]” that “turns class action law upside down.”

The Tobacco II court also held that the “as a result of” language of Proposition 64 “imposes an actual reliance requirement.” Yet the court permissively defined “actual reliance” by stating that “a plaintiff need [not] demonstrate individualized reliance on specific misrepresentations to satisfy the reliance requirement,” at least in cases “where, as [in Tobacco II], those misrepresentations and false statements were part of an extensive and long-term advertising campaign.” In such cases, “a presumption, or at least an inference, of reliance arises whenever there is a showing that a misrepresentation was material.”

This ruling arguably waters down the traditional requirements of reliance by allowing plaintiffs to allege reliance—and thus, maintain standing—in cases where they cannot establish that they even witnessed the alleged misrepresentations. In other contexts, such as cases involving common law fraud, the California Supreme Court has ruled that plaintiffs could only claim to have relied on a misrepresentation if they had at least seen or heard it. It remains to be seen how lower courts will interpret the court’s ruling in Tobacco II in an area of some doctrinal uncertainty.

Clayworth and Kwikset: “Lost Money or Property” Requirement. Since the passage of Proposition 64, courts have also grappled with the meaning of the requirement that plaintiffs—even if only the named ones—must have “lost money or property” before having standing to bring an action under the UCL and FAL.

Several lower courts—beginning with Buckland v. Threshold Enterprises, Ltd.—initially interpreted the “lost money or property” requirement to limit standing under the UCL and FAL “to individuals who suffer losses . . . that are eligible for restitution.” However, in Clayworth v. Pfizer, Inc., the California Supreme Court did not follow that line of cases, instead holding that the “lost money or property” element does not require an entitlement to restitution.

In Clayworth, the court considered allegations from pharmacies that drug manufacturers had fixed the prices of their brand-name drugs, resulting in overcharges. The Court of Appeal had ruled that the pharmacies could not show any loss because they had passed on the cost of the overcharge to their customers. The California Supreme Court reversed that ruling, instead hold-

11 Id. at 32.
12 Id. at 42, 45. However, not all California lower courts have read Tobacco II to broaden the standards for class certification. See infra (discussing class certification).
13 Id. at 39. The court stated that its discussion of causation was limited to “cases where, as [in Tobacco II], a UCL action is based on a fraud theory . . . . There are doubtless many types of unfair business practices in which the concept of reliance, as discussed [in Tobacco II], has no application.” Id. at 39 n.17.
14 Id. at 40.
15 Id. at 41.
16 Id. at 39 (citations omitted).
17 Mirkin v. Wasserman, 858 P.2d 568, 575 (Cal. 1993) (denying a common law fraud claim because plaintiffs could not have relied on alleged misrepresentations if they did not see or hear them).
ing that the “lost money or property” requirement can be satisfied by simply showing a monetary loss caused by an unfair practice that results in the plaintiffs paying more than they otherwise would have.21 Equating “lost money or property” with the right to restitution, the court held, wrongfully conflates standing with remedies: “That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them.”22 That plaintiffs ultimately passed on the overcharge to their customers is relevant only to the question of whether the plaintiffs suffered a compensable loss, not whether they had standing to bring the suit.23

The California Supreme Court’s most recent ruling on this issue, Kwikset Corp. v. Superior Court, was released in January 2011, so the effects of the court’s holdings are not yet evident in the lower courts.24 In Kwikset, the plaintiffs had purchased locksets in reliance on representations that they were “made in the USA.” Although the purchased products were fully functional, the defendants had used foreign parts and manufacturing. The Court of Appeal had found the plaintiffs lacked standing because, though the products they purchased did not meet their expectation, they had purchased functional products and thus had “received the benefit of their bargain.”25

The California Supreme Court reversed the Court of Appeal’s decision. Following its prior ruling in Clayworth, the California Supreme Court instead held that the issue of standing and eligibility for restitution are “wholly distinct” issues as “ineligibility for restitution is not a basis for denying standing . . . and [the Court] disapprove[s] those cases that have concluded otherwise.”26 Kwikset provides the most definitive guidance to date about the contours of the “lost money or property” requirement. The California Supreme Court held that this requirement was satisfied by a showing of “economic injury” and stated:

There are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary.27

The California Supreme Court’s reversal makes clear that the “lost money or property” requirement is satisfied when a consumer buys a product in reliance on a misrepresentation about some feature or characteristic of the product, regardless of whether the consumer received a product that was functional and free of defects. As a result, this ruling has expanded the range of injury that can be said to satisfy the “lost money and property” requirement.

Restitution: Limiting the Amount of Recovery

The California Supreme Court’s recent cases leave standing broadly available to plaintiffs but limit the amounts subject to restitution. Restitution is the only form of monetary relief that is available

21 Clayworth, 233 P.3d at 1087 (“They lost money: the overcharges they paid” and “[plaintiffs] paid more than they otherwise would have because of [the UCL violation].”).
22 Id. at 1087.
23 Id.
26 Kwikset, 246 P.3d at 895.
27 Id. at 885–86.
to plaintiffs under the UCL and FAL. The court, in *Kwikset*, made clear that the standard for restitution is not only different than the criteria for standing, but also significantly higher. Eligibility for restitution requires “both that money or property have been lost by a plaintiff . . . and that it have been *acquired* by a defendant” as a result of a UCL violation.28 This holding affirms that restitution requires proof that a defendant has actually obtained money from a plaintiff, not just diminished the value of the product purchased by plaintiff through a violation of the UCL or FAL. This higher bar to restitution is important to defendants who, though finding it more difficult to challenge the standing of plaintiffs, can limit their ultimate monetary liability.

The *Kwikset* court’s ruling on restitution helps clarify doctrinal uncertainty that had existed since *Tobacco II*. Prior to *Tobacco II*, the California Supreme Court’s doctrine on the UCL’s remedial scheme was clear: restitution was the only monetary remedy authorized by the UCL, and other monetary remedies—including nonrestitutionary disgorgement of money or property—were accordingly unavailable.29

In *Tobacco II*, however, a sentence of the court’s opinion injected uncertainty and confusion regarding the treatment of nonrestitutionary disgorgement. The court stated: “[R]estitution may be ordered ‘without individualized proof of deception, reliance, and injury if necessary to prevent the use or employment of an unfair practice.’”30 Although this sentence was in dicta and ran counter to the court’s prior holdings in *Korea Supply* and *Kraus*, the plaintiffs were able to interpret this as enabling consumers who had not actually been injured to seek restitution as relief.

The court’s opinion in *Kwikset* has restored the UCL’s traditional balance between “broad liability and limited relief”31 by clarifying the standard for a monetary remedy. This not only resolves the doctrinal uncertainty that *Tobacco II* left in its wake but limits defendants’ financial exposure.

**Class Certification**

California appellate courts have confirmed that *Tobacco II*’s softened requirements are limited to the issue of standing, and do not apply to class certification.32 For example, in *Cohen v. DIRECTV, Inc.*, the court held that *Tobacco II*’s holding that “class members need not be assessed for the elements of reliance” was limited to the “purposes of standing.”33 The *Cohen* court went on to state it found *Tobacco II*’s holding to be “irrelevant” with regard to class certification because “‘standing’ is not the same thing as the issue of ‘commonality’ . . . . We see no language in *Tobacco II*

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28 Id. at 895.

29 See, e.g., *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 946 (Cal. 2003) (“Our previous cases discussing the UCL indicate our understanding that the Legislature did not intend to authorize courts to order monetary remedies other than restitution in an individual action. This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL. While prior cases discussing the UCL may have characterized some of the relief available as ‘disgorgement,’ we were referring to the restitutionary form of disgorgement, and not to the nonrestitutionary type sought here by plaintiff.”); *Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 732 (Cal. 2000) (“In sum, the Legislature has not expressly authorized monetary relief other than restitution in UCL actions.”).


31 *Korea Supply*, 63 P.3d at 949 (holding that the language and history of the UCL strikes a balance between “broad liability and limited relief”; in other words, the breadth of standing allows *any* consumer to combat unfair competition by seeking injunctive relief; however monetary relief in the form of restitution is *only* available to actual direct victims of unfair competition).

32 See, e.g., *Sevidal v. Target Corp.*, 117 Cal. Rptr. 3d 66, 85 (Cal. Ct. App. 2010) (affirming denial of class certification because allegedly false statement was not made to most buyers); *Pfizer Inc. v. Super. Ct.*, 105 Cal. Rptr. 3d 795, 804 (Cal. Ct. App. 2010) (reversing grant of certification because not every buyer saw the allegedly misleading advertising); *Kaldenbach v. Mut. Omaha Life Ins. Co.*, 100 Cal. Rptr. 3d 637, 652 (Cal. Ct. App. 2009) (affirming denial of class certification where there was “no . . . uniformity” in the alleged misrepresentations targeted at the purported class).

which suggests to us that the Supreme Court intended our state’s trial courts to dispatch with an examination of commonality when addressing a motion for class certification.” 34 More recently, a federal district court, in declining to certify a class, also ruled that the inference of reliance established in Tobacco II applies only to issues of standing, and not to class certification. 35

However, not all cases conform to this trend. At least one California court has disagreed with Cohen, holding that “individualized proof of reliance and injury is not required for non-representative class members.” 36

Although recent decisions may have lowered the bar for alleging reliance, and thus standing, defendants will likely continue to invoke traditional standards and analysis to oppose class certification. The California Supreme Court’s unique doctrine—in Tobacco II or otherwise—has not yet definitively further opened the gateway to class certification and the increased potential liability that comes with it. 37

**Conclusion**

The California Supreme Court’s recent decisions in Tobacco II, Clayworth, and Kwikset place the bar for standing to sue under California’s very liberal consumer protection laws far below where many thought Proposition 64 had raised it. Nonetheless, the court’s decisions make it clear that monetary relief under the UCL and FAL still requires that plaintiffs be eligible for restitution under the court’s traditional analysis, and the class certification inquiry continues to place significant limits upon the exposure of defendants.

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34 Id.

35 Campion v. Old Republic Home Prot. Co., 272 F.R.D. 517, 535 (S.D. Cal. 2011) (“Plaintiff argues the class here is entitled to an inference of common reliance on the alleged omissions and misrepresentations because [of Tobacco II’s holding that] ‘relief under the UCL is available without individualized proof of deception, reliance, and injury.’ . . . [however that argument] overstates the holding of Tobacco II . . . [which was limited to] ‘purposes of standing’” (citation omitted)).

36 McAdams v. Monier, Inc., 105 Cal. Rptr. 3d 704, 717 (Cal. Ct. App. 2010); see also id. at 715 (vacating trial court’s denial of class certification and remanding case for reconsideration under the UCL standing requirements set forth in Tobacco II).

37 California’s relatively open standards for statewide class certification do not necessarily translate into making California a welcome jurisdiction for certifying a nationwide class under the UCL or FAL. For example, it is fairly well established that the application of California law to the claims of nonresident plaintiffs against nonresident defendants raises due process concerns. See, e.g., Norwest Mortgage, Inc. v. Superior Ct., 85 Cal. Rptr. 2d 18, 25 (Cal. Ct. App. 1999) (reversing lower court’s certification of a class, in part because applying the UCL to nonresident defendants raises “significant due process problems”). The Ninth Circuit has also affirmed the denial of nationwide classes on different grounds—where variances in state consumer laws preclude meeting the predominance requirement for class certification. See Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001) (affirming lower court ruling that variances in state negligence and products liability laws overwhelm common issues of fact and that predominance is destroyed by the application of the law of multiple jurisdictions); amended, 273 F.3d 1266 (9th Cir. 2001); see also Kennedy v. Natural Balance Pet Foods, Inc., 361 F. App’x 785, 786–87 (9th Cir. 2010) (relying on Zinser in affirming denial of class certification because plaintiff failed to satisfy the predominance requirement of Rule 23 due to variances in the applicable state consumer protection laws). Finally, the U.S. Supreme Court’s recent decision in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (upholding mandatory arbitration provisions that prohibit class litigation or class-wide arbitration), barring Congressional amendments to the Federal Arbitration Act, may substantially limit the use of class actions in consumer litigation due to increasingly widespread use of arbitration clauses in consumer contracts.