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SYMPOSIUM ON ANTITRUST AND SILICON VALLEY: NEW THEMES AND DIRECTION IN COMPETITION LAW AND POLICY

By Donald J. Polden*

On March 1, 2019, Santa Clara University School of Law and *Santa Clara Law Review* hosted a national symposium on antitrust law and Silicon Valley. The symposium, held on the campus of Santa Clara University, attracted about 100 attendees, including leading U.S. antitrust professors as well as antitrust lawyers from government and the private sector. The leadership and staff of *Santa Clara Law Review* were extraordinarily successful in putting together this excellent occasion for leading thinkers and practitioners in the areas of antitrust law, competition policy and technology. This symposium issue of *Santa Clara Law Review* is a product of that symposium and we are pleased to share the insights, wisdom, and scholarship of our participants.

The symposium featured presentations on issues with government enforcement of the antitrust laws in employment or talent markets, competition-related issues in pharmaceutical products and “attention” markets, and cutting edge issues in areas of antitrust compliance and corporate director liability for antitrust law violations. It also featured discussions of the application of antitrust laws to patented products and on the positive and negative implications of the courts’ use of the consumer welfare standard in interpreting the meaning of federal antitrust law. Symposium attendees also viewed an early showing of a new documentary film, produced by experienced filmmakers in San Francisco, on the Steve Jobs led conspiracy among major Silicon Valley tech firms. This film describes the firms conspiracy to not poach or hire each other’s employees. This led to an important government action to enforce the antitrust laws in markets for employees.¹ The one-day symposium covered a wide range of current issues in antitrust and technology and was

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1. To view the film, go to WHEN RULES DON’T APPLY, <https://www.whenrulesdontapply.com/> (last visited Jan. 1, 2020). The site includes a guide to antitrust law issues in no-poach agreement enforcement actions. <https://www.whenrulesdontapply.com/>.

particularly timely given the increased concern regarding competition related problems in technology markets.

In recent years, the U.S. Department of Justice has dramatically increased antitrust enforcement in markets for talent and employment. Notably, the Justice Department's Antitrust Division issued an important guidance memorandum in Oct. 2016 that alerted human resource professionals about areas of particular antitrust concern in the areas of hiring and compensation.² The symposium issue features several articles in this area. An article by Michael Murray, Deputy Assistant Attorney General, provides information and guidance for U.S. antitrust and trade regulation lawyers on these new policy efforts³ following his major agency pronouncement at the symposium of the Justice Department's enforcement policy in this area.⁴ Murray's thoughtful exploration of government enforcement of antitrust laws in a key input market—labor, or talent, or employment—provides an insightful introduction to the topic of antitrust enforcement in labor markets. Professor Orly Lobel of University of San Diego delivers a powerful analysis of the importance of competition in labor markets, noting that competition spurs innovation, worker mobility, and workforce diversity.⁵ She argues that various employment agreements, such as non-disclosure agreements, covenants not to compete, and horizontal agreements among competitors to refrain from hiring each other's employees, exert a pernicious effect on employee mobility that perpetuates wage gaps and related inequities among workers. In this area of antitrust jurisprudence, I add an article on the importance of rigorous government enforcement of antitrust law in labor markets. This article highlights the importance of the government's recent interventions in pending no-poach agreement private civil cases through governmental statements of interest.⁶

Joseph Coniglio of Sidley Austin LLP in Washington, D.C., emphasizes the continuing importance and significance of the consumer welfare standard in antitrust policy-making, including judicial decision-

2. U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, *Antitrust Guidance for HR Professionals* (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.

3. Michael Murray, *Antitrust Enforcement in Labor Markets: The Department of Justice's Efforts*, 59 SANTA CLARA L. REV. 561 (2020).

4. See Michael Murray, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Presentation at the Santa Clara University Law Review Symposium: Antitrust Enforcement in Labor Markets: The Department of Justice's Effort (Mar. 1, 2019), <https://www.justice.gov/opa/speech/file/1142111/download>

5. Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663 (2020).

6. Donald J. Polden, *Restraints on Workers' Wages and Mobility: No-Poach Agreements and the Antitrust Law*, 59 SANTA CLARA L. REV. 579 (2020).

making.⁷ The recent public concern about anti-competitive effects in technology markets and products has generated concerns that the consumer welfare standard has actually retarded effective antitrust enforcement and that a broader standard for interpreting the reach of the antitrust laws is appropriate.⁸

Several leading scholars assess antitrust issues related to the patenting, manufacturing, and marketing of pharmaceutical drug products. Professor Michael Carrier of Rutgers Law School discusses several major challenges for pharmaceutical antitrust enforcement and coverage.⁹ He identifies challenges to judicial enforcement of the antitrust laws including significant judicial mistakes resulting from complexity, simplicity and Sisyphus.¹⁰ While Silicon Valley is best known for industries and firms that produce technology products and services, there is a significant pharmaceutical industry as well. Professor Robin Feldman of the University of California, Hastings, identifies problems raised for research universities by many of the competition-related problems in drug development and proposes suggestions for addressing these problems.¹¹

Professor John M. Newman of the University of Miami presents an interesting and creative article on the lack of antitrust enforcement in “attention markets,” in which individuals pay attention to advertisements in exchange for access to desired products and services.¹² He argues that these markets represent the largest sector of our modern, technology-driven economy and that effective antitrust enforcement is woefully lacking.¹³

Professor Barak Orbach of the University of Arizona College of Law delves into the issue of liability of corporate directors and officers for antitrust violations committed by their firms.¹⁴ His article explores reasons why federal antitrust laws, rather than state corporate and federal securities laws, should be a source of potential liability for anti-competitive acts of commission or omission by directors and officers.¹⁵

7. Joseph V. Coniglio, *Economizing the Totalitarian Temptation: A Risk-Averse Liberal Realism for Political Economy and Competition Policy in a Post-Neoliberal Society*, 59 SANTA CLARA L. REV. 703 (2020).

8. *Id.*

9. Michael A. Carrier, *Three Challenges for Pharmaceutical Antitrust*, 59 SANTA CLARA L. REV. 615 (2020).

10. *Id.*

11. Robin C. Feldman, Betty Chang Rowe, & Rabiah Oral, *Viral Licensing: Ensuring the Public Interest When Taxpayers Fund Pharmaceutical Research*, 59 SANTA CLARA L. REV. 641 (2020).

12. John M. Newman, *Antitrust in Attention Markets: Objections and Responses*, 59 SANTA CLARA L. REV. 743 (2020).

13. *Id.*

14. Barak Orbach, *D&O Liability for Antitrust Violations*, 59 SANTA CLARA L. REV. 527 (2020).

15. *Id.*

The faculty at the Santa Clara University School of Law and the staff of the *Santa Clara Law Review* hope that you, our readers, will find these articles interesting, important to your work, and a valuable contribution to competition enhancement in many markets, including the technology industries of Silicon Valley.