AAI AMERICAN ANTITRUST INSTITUTE

Rapporteur's Report: AAI's 20th Annual Private Antitrust Enforcement Conference

On November 5, 2026, the American Antitrust Institute (AAI) held its 20th Annual Private Antitrust Enforcement Conference. The full-day program brought together nearly 300 antitrust practitioners, economists, and academics to discuss current topics in the private practice of antitrust law, including cross examining economic experts, litigating algorithmic pricing cases, utilizing classic antitrust precedents, and understanding the role of Article III standing in antitrust class litigation.

Crossing the Expert Economist: Winning Strategies for Depositions, Trial, and Arbitration

Joshua P. Davis of Berger Montague moderated a discussion with Joe Goldberg of Freedman Boyd Hollander & Goldberg, Rebecca Kirk Fair of Analysis Group, Belinda S. Lee of Latham & Watkins, and Russell W. Mangum of Cirque Analytics about working with expert economists. The panel began with a discussion of cross-examination as a means of undermining an opposing expert's credibility. Goldberg emphasized the paramount importance of the issue of the credibility, explaining how yes-or-no questions can be used productively both to challenge an opponent's credibility and bolster one's own expert's credibility. Lee agreed with Goldberg's focus on credibility but suggested that substance may be used in a targeted way to attack credibility, such as an expert's failure to account for a particular fact or to use the correct data. Lee also explained that cross-examination is especially important with jurors, who often pay more attention to cross-examination than direct questioning, but the theme must be established in the first five questions; she contrasted this with bench trials, in which there is more leeway to get technical and to move around without a single, unifying story. Responding to an audience question about industry connections that could undermine an expert's credibility, the panelists emphasized the importance of due diligence in selecting an expert, noting that attacks on industry connections can backfire, as deep industry knowledge can be depicted as positive.

One key theme was the importance of preparation and building trust. Goldberg explained that he spends hundreds of hours preparing his experts, often beginning six months in advance. He and Mangum agreed that preparation must take the expert out of their comfort zone. Mangum, who is himself a leading economic expert, emphasized the importance of working closely with the legal team to understand key themes and develop a short list of specific points to work into testimony even when not asked about them. He noted that this is especially important for cross, where the expert does not know what questions will come up, and rebuttal, where a judge might allow only two or three questions. Mangum also noted that he finds it helpful to understand the courtroom setup beforehand, as well as the judge's demeanor and preferences, and panelists agreed that it is a good idea to attend proceedings in the judge's courtroom beforehand. Kirk Fair, also a leading economic expert, explained that trust allows better communication on critical issues like the limits of the report. She encouraged junior lawyers, who often spend more time with experts than their more senior counterparts, to share their insights on the expert—such as feedback styles the expert responds to—to facilitate trust across the entire team.

The panel also discussed concurrent testimony or the "hot tub," in which the judge or the experts themselves ask the questions with little to no lawyer involvement. Kirk Fair described a past experience in which four experts (two on each side) were instructed to produce a joint written statement without lawyers present. Without lawyers directing the conversation, she needed an even deeper grasp of key litigation themes and to avoid crossing into the other expert's territory. The dynamic can also be affected by the number of opposing experts; where there is more than one it may be difficult to agree on particular points, including among the experts on the same side. In response to an audience question about relying on other expert's opinions, Kirk Fair explained that she provides an independent basis for any conclusion that relies on another expert's work so that her conclusions remain valid even if the other expert's testimony is excluded.

The panel also explored deposition testimony, which the panelists agreed can be more unpredictable than trial testimony but which must be consistent with an expert's cross—both in terms of the testimony provided and the expert's overall demeanor. Goldberg noted that he prepares fully for trial cross-examination before the deposition, and conducts a deposition in two parts: open-ended questions to get the expert talking, followed by targeted questions to get specific sound bites. Lee emphasized that, during a deposition, lawyers should learn to put a box around the information sought in order to avoid wandering answers, and encouraged witnesses to be authentic throughout. Mangum agreed with the importance of authenticity, noting that he struggles when a jury consultant pushes for a demeanor that feels inauthentic and thus could be inconsistent with his demeanor during deposition. In response to an audience question about asking questions prepared by experts, Lee explained that she frequently has experts draft questions but converts them to the "lawyer" version, and that she always brings a glossary of expert terminology to depositions.

The panelists concluded with anecdotes illustrating the importance of keeping things simple, understanding the material, and avoiding trying to outsmart experts in their area of expertise. Davis once advised an expert facing scripted questions to ask for clarification, which undermined the questioner's ability to get the testimony they wanted. Goldberg described a trial strategy in which he explicitly avoided use of the term "oligopolistic interdependence" as too theoretical and complicated, and was pleased when opposing counsel used the exact term in their closing statement. Kirk Fair recalled a lawyer who kept repeating similar questions when he did not get the answers sought; unable to ask follow-ups that would elicit different answers, the lawyer declared there was no point continuing. Mangum recalled a lawyer who made basic errors when drawing supply and demand curves during a deposition, illustrating the importance of understanding the fundamentals.

Algorithms, AI, and Agreement: Proving Collusion in the Digital Age

AAI's David O. Fisher moderated a discussion with Greg Asciolla of DiCello Levitt, Swathi Bojedla of Hausfeld, and Giovanna Massarotto of Penn Carey School of Law on Section

1 algorithmic pricing litigation. Fisher began by defining two concepts central to the discussion: AI and collusion. He described an artificial intelligence system as a machine-based system that infers from inputs how to generate outputs such as recommendations or decisions, in pursuit of explicit or implicit objectives.[1] He then turned to collusion, invoking *Copperweld* and its focus on independent centers of economic decision-making.[2] These definitions framed the panel's discussion of how traditional agreement principles apply when competing firms use the same algorithmic pricing model.

Beginning with a bird's eye view of existing opinions, the panel highlighted plaintiffs' differing characterizations of the relevant agreement as horizontal, vertical, or hub-and-spoke; the evidence as direct or circumstantial (including parallel conduct and plus factors); and courts' differing views as to whether to apply per se or rule-of-reason scrutiny. Bojedla, co-lead counsel in the *RealPage* litigation, contrasted that case—in which the court found the alleged agreement plausible but declined to apply the per se rule on a motion to dismiss[3]—with *Yardi*, in which the court applied per se treatment to a similar set of allegations.[4] Asciolla discussed *In re Construction Equipment Antitrust Litigation*, in which plaintiffs survived a motion to dismiss by plausibly alleging a horizontal hub-and-spoke conspiracy through parallel conduct and plus factors.[5] As the best precedent for this approach, Asciolla pointed to *Cornish*, in which the Third Circuit examined as relevant plus factors the exchange of private information, correlated pricing and algorithmic outputs, common motive to conspire, and conduct contrary to independent self-interest.[6] Massarotto contrasted *Cornish* with *Gibson*, in which the Ninth Circuit affirmed dismissal of virtually the same allegations in a different market based on defendants' staggered adoption of the technology and the lack of obligation on the part of the casino-hotels to adopt the pricing model's recommendations.[7]

Examining how litigants can benefit from *Cornish* while avoiding application of *Gibson*, Bojedla argued that *Gibson* was limited by the lack of connection between nonpublic information and price recommendations, less adherence to the algorithm's recommendations compared to the 80 to 90 percent adherence in *RealPage* and *Cornish*, and plaintiffs' decision to abandon their horizontal theory on appeal. Asciolla urged plaintiffs to continue pursuing per se treatment and direct-evidence theories, pointing to agreements with a common technology provider and the provider's own descriptions of its services as direct evidence, while recognizing that successful

[1] *See* European Union Artificial Intelligence Act, Regulation 2024/1689, art. 3(1), 2024 O.J. (L 1689) 1 (EU).
[2] *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).
[3] *In re RealPage, Inc., Rental Software Antitrust Litigation (No. II)*, 709 F. Supp. 3d 478 (M.D. Tenn. 2023).
[4] *Duffy v. Yardi Sys., Inc.*, 758 F. Supp. 3d 1283 (W.D. Wash. 2024).
[5] *In re Constr. Equip. Rental Antitrust Litig.*, No. 25 C 3487, 2026 U.S. Dist. LEXIS 221956 (N.D. Ill. Sep. 28, 2026).
[6] *Cornish-Adebiyi v. Caesars Ent., Inc.*, 184 F.4th 172 (3d Cir. 2026).
[7] *Gibson v. Cendyn Grp., LLC*, 148 F.4th 1069 (9th Cir. 2025).

motions-to-dismiss outcomes had relied on circumstantial allegations as well. Bojedla argued that an agreement to fix prices does not disappear simply because participants can disregard recommendations or occasionally deviate from them.

This led to a discussion of whether arrangements involving a common software provider should be characterized as horizontal or vertical. Bojedla emphasized that contracts between individual firms and a provider do not necessarily rule out a horizontal agreement facilitated by that provider. Fisher cautioned against treating the horizontal/vertical distinction as a rigid binary, arguing that the distinction matters only insofar as it helps the court understand the directness of the agreement's effects. Massarotto noted that she favors a hub-and-spoke approach but questioned whether Section 1, with its focus on agreement, fully captures every form of algorithmic coordination.

This led to a discussion of Massarotto's research on how Section 1 analysis should be informed by the way that agreement algorithms work. Massarotto urged the adoption of certain algorithmic characteristics as plus factors, including private channels of communication and evidence of a common pricing scheme.[8] In response to an audience question about why the model's internal operation matters, she explained that the way an algorithm uses information may be relevant to whether it facilitates coordination. When asked whether algorithmic conduct fits comfortably within the Supreme Court's characterization in *Monsanto*,[9] Massarotto cautioned against an approach that turns solely on terminology, particularly where automated systems may produce coordination without ordinary human involvement. Instead, Massarotto proposed an evidentiary approach that would allow an inference of collusion based on supracompetitive prices and whether an algorithm had learned techniques capable of generating collusive outcomes, while permitting defendants to rebut the inference.

2026 Private Antitrust Enforcement Hall of Fame Inductee: Daniel Gustafson

During the gala luncheon, AAI honored Daniel Gustafson, a founding member of Gustafson Gluek PLLC, as its 2026 inductee into the Private Antitrust Enforcement Hall of Fame. Joe Goldberg delivered remarks recognizing Gustafson's career and presented the award. Goldberg highlighted Gustafson's unconventional path to the legal profession, from dropping out of high school to attending Michigan State University and later the University of Minnesota Law School. Throughout his more than four-decade career, Gustafson has fought to vindicate the rights of individuals and small businesses through antitrust and consumer protection litigation. His contributions also include more than 20 years of service on AAI's Advisory Board and extensive pro bono work, including helping establish the Minnesota Federal Bar Association's Pro Se Project. The award recognized Gustafson's longstanding commitment to private enforcement, public service, and ensuring access to justice for all.

[8] *See* Giovanna Massarotto, *Detecting Algorithmic Collusion*, 86 Ohio St. L.J. 817 (2025).
[9] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

Everything Old Is New Again: Reviving Classic Antitrust Precedent for Modern Litigation

After lunch, Dan Gustafson moderated a discussion with Kellie Lerner of Shinder Cantor Lerner, Catherine Simonsen of Simonsen Sussman, and AAI's Randy Stutz about the continued relevance of classic decisions in modern antitrust litigation. Many older Supreme Court precedents remain good law and the panel considered how litigators may use them appropriately and effectively to prove Section 1 cases with circumstantial evidence, avoid application of the rule of reason, invite courts to view defendants' conduct holistically, demonstrate market power, and more.

Panelists discussed how litigants can rely on classic case law to push back on the false dichotomy between, on the one hand, direct evidence, and, on the other hand, parallel conduct with "plus factors" to prove the existence of an agreement. Stutz noted that the Supreme Court's opinion in *Matsushita* permits a third category—strong circumstantial evidence—which may be sufficient on its own[10], and that many older Supreme Court decisions—including *Monsanto* and *General Motors*[11]—allow agreement to be inferred based on indirect evidence. Moreover, contrary to common assumptions, *Twombly* does not require direct evidence.[12] Lerner agreed, pointing to *Interstate Circuit* as one of the cases in which circumstantial evidence was sufficient to infer agreement.[13] The Second Circuit's decision in *U.S. v. Apple Inc.* is instructive on this point.[14]

Panelists also discussed classic precedents that impose liability for "combinations" under Section 1, which may require only some meeting of the minds to distinguish it from tacit coordination, rather than requiring a full-fledged agreement. Simonsen pointed to *Indiana Federation of Dentists*, in which competitors collectively decided not to provide information to insurers, as an example of a combination that violated Section 1.[15] She argued that this allows for the possibility that certain conduct—such as exclusive dealing in which a manufacturer forces the arrangement or a dealer reluctantly accepts it—need not require a full-blown market analysis. Simonsen argued that, outside the manufacturer–dealer context, defendants lack many of the Chicago School-era procompetitive justifications for exclusive dealing; she urged practitioners to look for recent decisions citing older precedents and consider the D.C. Circuit's opinion in *Polygram Holding*, which describes not a dichotomy between per se or rule of reason treatment, or even a trichotomy with quick look, but a continuum.[16] She also explained that cases viewed as

[10] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
[11] *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966).
[12] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).
[13] *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).
[14] *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015).
[15] *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986).
[16] *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

unfavorable to plaintiffs in this regard, such as *Monsanto*, *Colgate*[17], and *Leegin*[18] can be limited to the manufacturer-dealer context.

The panel also discussed precedents allowing plaintiffs' allegations to be viewed holistically. Lerner noted that *Continental Ore*, which instructs courts to view evidence as a whole, remains good law.[19] Courts should not conclude that because, for example, attending an industry conference is lawful, and firms selling at different prices to different sets of customers is lawful, that the combination of that conduct is lawful; even Judge Posner has warned that evaluating each piece of evidence separately in this way is a trap. But Lerner noted that Circuits differ in their approach: Seventh Circuit procedure, for example, examines each piece individually before considering them collectively. Stutz added that there's no real controversy over the proposition that facts should be evaluated holistically rather than in isolation; the fights tend to break out because Section 2 law has been carved up into distinct doctrinal boxes and both sides want to marshal facts to show that the case fits into their preferred box. The defendants in *linkLine*[20] succeeded in attacking a holistic approach because they convinced the Court to be skeptical that the plaintiffs were attempting to get around the doctrinal limits on a particular legal claim by pleading it as part of something bigger.

The panelists also discussed how classic precedents make clear that plaintiffs need not demonstrate an actual price effect, and that demonstrating market power need not always be a math problem. Gustafson observed that the Chicago School led courts to think that antitrust claims require a demonstrated price effect, though the law has never required one. Simonsen added that *Brown Shoe Co* is alive and well, allowing a market to be defined using practical indicia.[21] Lerner countered that market definition has nonetheless become a math problem in most cases, focused on substitutability as a quantitative question. She argued that plaintiffs should approach this by discussing qualitative factors through the lens of substitutability and pairing them with a SSNIP or HMT test. Simonsen responded that it can defy common sense to ignore the competitors a firm clearly cares about because the math points elsewhere. She recommended citing recent decisions that use *Brown Shoe* qualitative factors—such as the Southern District of New York's 2024 opinion in *FTC v. Tapestry*[22] and the District of Oregon's 2024 opinion in *FTC v. Kroger*[23]—and noted that in a Section 1 case, counsel should cite a Section 1 decision so judges understand the framework is not limited to mergers.

---

[17] *United States v. Colgate & Co.*, 250 U.S. 300 (1919).
[18] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).
[19] *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).
[20] *Pac. Bell Co. v. linkLine Commc'ns.*, 555 U.S. 438 (2009).
[21] *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).
[22] *Fed. Trade Comm'n v. Tapestry, Inc.*, 755 F. Supp. 3d 386 (S.D.N.Y. 2024)
[23] *Fed. Trade Comm'n v. Kroger Co.*, No. 3:24-cv-00347-AN, 2024 U.S. Dist. LEXIS 223077 (D. Or. Dec. 10, 2024).

Classic cases also establish that market power can be established through direct evidence of price effects. Stutz argued that the goalposts for direct evidence of anticompetitive effects have shifted outward. He described *Ohio v. American Express* as a particularly egregious example, in which the Court required a two-sided market analysis despite direct evidence of fee increases attributable to anti-steering rules.[24] He urged plaintiffs not to give up on using direct evidence to prove market power. *Indiana Federation of Dentists* and *NCAA v. Board of Regents of the University of Oklahoma*[25] offer examples of direct evidence courts might accept. He noted that AAI filed an amicus brief on direct evidence in *Innovative Health*,[26] though the court did not reach the issue. Simonsen pointed to *GTE Sylvania* as a reminder that a price may rise for many reasons that must be untangled.[27]

Panelists also discussed how older cases may support plaintiffs in merger cases, including with respect to market share. Lerner noted that the 30% market share threshold in *Philadelphia National Bank*[28] is cited regularly, including by the 2023 Merger Guidelines, but that defendants often argue it is not good law nor grounded in economics. She emphasized that Congress's choice to prevent conduct which "may" substantially lessen competition in Section 7 of the Clayton Act was intentional, and noted that the private bar has been hesitant to rely on older cases even as the government has relied on them recently.

Stutz closed by recommending the Ninth Circuit's August 2026 decision in *Intuitive Surgical*.[29] He noted that tying law has suffered from readings of *Eastman Kodak*[30] that impose strict requirements on aftermarket tying claims; in *Intuitive*, the Ninth Circuit drew a clear distinction between traditional tying claims based on foremarket power and *Kodak*-style claims, finding persuasive reasoning in the Supreme Court's 1936 *IBM* opinion. [31]

The New Battleground: Article III Standing in Antitrust Class Action Litigation

Shana Scarlett of Hagens Berman Sobol Shapiro moderated a discussion with Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein, Josh Davis of Berger Montague, Chris Dusseault of Gibson, Dunn & Crutcher, and Deepak Gupta of Gupta Wessler on whether the presence of uninjured members in a proposed class raises an Article III problem or a question for Rule 23. The discussion centered on *Labcorp*, in which the Supreme Court dismissed the writ of certiorari as improvidently granted, leaving the question unresolved.

---

[24] *Ohio v. Am. Express Co.*, 585 U.S. 529 (2018).
[25] *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).
[26] Brief for Am. Antitrust Inst. as Amicus Curiae Supporting Plaintiff-Appellant, *Innovative Health, LLC v. Biosense Webster, Inc.*, No. 22-55413 (9th Cir. Oct. 7, 2022).
[27] *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).
[28] *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963).
[29] *Surgical Instrument Serv. Co. v. Intuitive Surgical, Inc.*, 187 F.4th 1092 (9th Cir. 2026).
[30] *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992).
[31] *IBM v. United States*, 298 U.S. 131 (1936).

Gupta, who argued *Labcorp* at the Supreme Court, explained the Court's prior holding in *TransUnion* that class members without Article III injury cannot recover damages, while leaving unresolved the showing required at certification.[32] Gupta was concerned that an issue traditionally analyzed under Rule 23 predominance was being reframed as a constitutional limitation. Gupta described the historical argument he presented in *Labcorp*, which drew on representative proceedings involving pirate bounties to distinguish standing—which is relevant to a court's authority to decide a case—from the subsequent question of allocation.

Davis echoed AAI's amicus brief in *Labcorp*,[33] arguing that the concerns raised in *Labcorp* do not translate neatly to antitrust class actions. Unlike statutory-damages claims, antitrust cases typically rely on econometric and regression evidence to establish common impact and measure economic harm. Addressing Justice Kavanaugh's dissent in *Labcorp*,[34] he disputed the suggestion that including potentially uninjured members necessarily increases damages or requires individualized proceedings. In Davis's view, when a named plaintiff has suffered monetary injury, the treatment of potentially uninjured class members should generally remain a Rule 23 question rather than become an independent Article III barrier.

The panel also discussed what standards courts should apply to potentially uninjured class members. Cabraser warned against conflating standing with the requirements of class certification, emphasizing that Rule 23 was designed as a flexible, trans-substantive procedure rather than an all-or-nothing test. She noted that standards vary and change across circuits, while multidistrict litigation can move cases to forums the parties did not choose. Class definitions must nevertheless be objective: defining a class solely as those who prove injury can create a disfavored fail-safe class. Cabraser also pointed to ascertainability and other certification requirements as existing checks on overly broad classes.

The panel disagreed about whether claims administration adequately addresses uninjured members. Cabraser explained that a certified class does not automatically entitle every member to payment; claims procedures can require proof of entitlement and amounts attributable to invalid claims need not be paid. Dusseault, a defense-side practitioner, responded that the presence of uninjured members may affect aggregate damages calculations tied to class transactions even before claims are processed. He emphasized that Article III and Rule 23 protect plaintiffs as well as defendants. Cabraser agreed that defendants have due process rights but stressed that plaintiffs also have a right to pursue remedies and may be harmed by years of delay.

Finally, the panel examined preclusion and timing as additional practical problems. Gupta warned that discovering a jurisdictional defect after substantial litigation could jeopardize the

[32] *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021).
[33] Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondents, *Lab'y Corp. of Am. Holdings v. Davis*, No. 24-304 (U.S. Apr. 7, 2025).
[34] *Lab'y Corp. of Am. Holdings v. Davis*, 145 S. Ct. 1608 (2025) (Kavanaugh, J., dissenting).

finality of the proceedings. Davis discussed one-way intervention, including how the sequence of certification and summary judgment can affect who is bound by an unfavorable judgment. Cabraser noted that Rule 23 once contemplated certification as soon as practicable, whereas certification today may occur much later, even after significant merits proceedings. Dusseault emphasized the practical consequences of prolonged uncertainty for litigants trying to resolve cases efficiently.

American Antitrust Institute
November 5, 2026