ANTITRUST AND UNFAIR COMPETITION LAW

CALIFORNIA LAWYERS ASSOCIATION

HONORING KATHLEEN FOOTE'S ANTITRUST CAREER IN THE CALIFORNIA ATTORNEY GENERAL'S OFFICE

KATHLEEN FOOTE'S RECOLLECTIONS OF ANTITRUST ENFORCEMENT UNDER SEVEN CALIFORNIA ATTORNEYS GENERAL

Over 34 years, Kathleen Foote worked for and then headed the Antitrust Section of the California Attorney General's Office under seven different Attorneys General. Kathleen's memoirs highlight the impressive accomplishments of the Section through the decades.

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KATHLEEN FOOTE IN CONVERSATION WITH CHERYL JOHNSON

In a free-ranging interview with Cheryl Johnson, another Antitrust Section member and retiree, Kathleen discusses her background and the Antitrust Section's path under her stewardship.

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Edited by Eliot Adelson and Lee Brand

JOHN VAN DE KAMP (JANUARY 1983-JANUARY 1991)

When I joined the Antitrust Section in 1988, the Section had five lawyers in San Francisco, two in Sacramento, and three or four in Los Angeles. Mike Spiegel, Charles Kagay, and Wayne Liao had just left to form their own law firm, taking with them a major petroleum products antitrust case known as MDL-150. Jesse Markham joined the Section shortly before I did. Sandy Gruskin was the Section Chief, with Andrea Ordin as the Chief Assistant for the Public Rights Division.

Attorney General (AG) Van de Kamp had given the "Spiegel shop," as I sometimes heard our Section called, strong support in filing major cases with the purpose of developing both California law and California's stature on the national stage as an antitrust enforcer. Two of the cases went to the U.S. Supreme Court (*California v. American Stores*,[1] affirming the state's power to challenge mergers notwithstanding a federal consent decree, and *California v. ARC America*,[2] affirming the validity of California's indirect purchaser recovery law), and one case went to the California Supreme Court (*State of California ex rel. John Van de Kamp v. Texaco*,[3] rejecting, alas, the premise that mergers could be challenged under the Cartwright Act).

INSURANCE. Insurance was a hot political issue in the late 1980s, and one in which Van de Kamp was deeply interested. The *California v. Hartford Fire* suit was filed in the Northern District of California district court three weeks after I joined the Office and was assigned to Judge Schwarzer. The complaint alleged a 1983–1984 conspiracy by liability insurers and reinsurers, both domestic and foreign, to restrict the terms of commercial general insurance. With 18 states involved, most of them actively so, *Hartford* was the first true multistate case and served as the model for a structure that became the norm for managing multistate litigation, with an executive committee, a cost-share agreement, regular meetings and agendas, and various decision-making protocols. My antitrust knowledge was pretty thin compared with others, but thanks to my city council experience, nobody else knew as much as I did about administrative processes, group decision-making, and committees. When cleaning out my office last fall, I stumbled across a keepsake: a ballot cast for members of the *Hartford* case's Executive Committee. The Committee was quite an Antitrust Hall of Fame, including names like Mike Brockmeyer (MD), Trish Conners (FL), Bob Langer (CT), Kevin O'Connor (WI), Laurel Price (NJ), and Lloyd Constantine (NY), as well as Tom Greene from California.

The issue of jurisdiction over foreign companies in *Hartford* went to the U.S. Supreme Court, where the states suddenly found their case supported by a flock of *amici curiae*, including the U.S. Department of Justice (DOJ).[4] It led to the Court's seminal interpretation of the jurisdictional reach of the U.S. antitrust laws to apply to conduct by foreign defendants (such as Lloyd's of London) outside the United States, but intended to affect markets within the United States. I have seen *Hartford* cited as one of the most important antitrust rulings of the second half of the 20th century.

When the case finally settled in 1995, the remedy was in effect a *cy pres* one, involving the formation and funding of two new nonprofit organizations. This was unquestionably the most ambitious, as well as creative, settlement of which I have ever been a part. For a couple of years, I was the point person getting each of the organizations established, after having conducted the initial discussions of the idea with California public sector risk managers, and later working with the National League of Cities and similar groups. One organization was created to develop a national municipal liability database to give newly formed self-insurance pools and joint powers authorities a solid foundation for future underwriting and reserving. The other new organization, named the Public Entity Risk Institute, was a think tank kind of organization intended to establish best practices, make training grants, and conduct seminars to facilitate self-insurance for both municipal entities and not-for-profits. Eventually the two organizations merged, and in 2013 became part of the Public Risk Management Association.

DANIEL LUNGREN (JANUARY 1991-JANUARY 1999)

Dan Lungren served as AG for eight years starting in January 1991 and was the lone Republican in the AG's Office under whom I worked. On the campaign trail, Lungren was rumored to have signaled a desire to cut back on consumer protection and antitrust. However, once Lungren gained the AG position, he quickly came to appreciate the importance of vigorous enforcement in both areas.

HOSPITAL MERGERS. Perhaps because his father had been Nixon's personal physician, Lungren had grave concerns

over consolidation in the nonprofit healthcare world, especially the acquisition of nonprofit hospital providers by for-profit entities. Under Lungren, the Charitable Trust Section of the AG's Office, which oversaw acquisitions of nonprofits with the assistance of the Antitrust Section, was very active in reviewing any healthcare nonprofit transactions.

AGRICULTURE. When the Wells Fargo/First Interstate merger was announced, Lungren publicly expressed his concerns. I was assigned to the matter and worked with Tony Nanni's banking group at the DOJ. While that U.S. group focused on potential impacts on small business lending, my investigation turned instead to impacts on agricultural lending. At the time, there were very few lenders extending unsecured crop loans, which were vital to California's Central Valley agricultural businesses. Lungren's affinity for agriculture and connections with the Farm Bureau were very helpful. The merger was approved subject to numerous Central Valley branch divestitures, and Lungren sought assurances that priority would be given by the merged entity to agricultural lending. Agriculture has been a focus area for the Section ever since.

MICROSOFT. Also, during the Lungren administration, California joined the multistate monopolization case against Microsoft, which paralleled the suit brought by the DOJ. The New York AG led the litigation for the states, though California moved into a larger lead role after Lungren was no longer the AG.

TOBACCO. During his second term, a much bigger focus for Lungren was the high-profile national tobacco litigation. California, along with several other states, stepped directly into the tobacco cases that had originally been brought by private counsel, seeking redress for states and state agencies that shouldered many of the huge costs of tobacco use and addiction. California opted to handle our case in-house; then-Antitrust Section chief Tom Greene was tapped to put together a team of at least 40 lawyers and paralegals. Although most of the case was built on the Unfair Competition Law theories, I headed a subgroup that pursued antitrust theories, some of which were very interesting.

In the 1950s, after the government issued statements that cigarettes could cause cancer, amidst the public dismay, some tobacco companies rapidly began developing "safer" cigarettes. Those (like me) old enough to remember will recall the television ads by Tareyton promoting its charcoal filter, with cartoon illustrations of how it captured the tars and nicotine as the smoke passed through the filter. With market shares threatening to shift dramatically to the "safer" versions, at least one complaint alleged, the tobacco companies, working through a single advertising agency, apparently agreed to pool and share all health research and agreed not to advertise competing health claims for their brands. I would have loved to have seen this aspect of the case pursued further.

Lungren and the other states eventually reached a Master Settlement Agreement with seven tobacco companies that paid the states $206 billion and agreed to fund a $1.5 billion anti-smoking campaign, signed in November 1998; California was allocated 12.7% of this settlement, and the AG established a permanent Tobacco Section to enforce the complex injunctive terms.

BILL LOCKYER (JANUARY 1999-JANUARY 2007)

Bill Lockyer's stint as AG was a game-changer for the Antitrust Section. He was part of the first wave of career legislators in California who found themselves pushed out of office by newly enacted term limits. Lockyer had spent more than 25 years in the state legislature and was the Senate Majority Leader. Having gone to law school part-time while in the Assembly, he had never practiced law, let alone served as a District Attorney, as most AGs did. His background was policymaking, and he arrived with a policy agenda. He was jovial, informal, and approachable. He went out of his way to connect with rank-and-file employees and made it clear to us that he loved the job, and he loved the work we were doing. He went to bat for an expansion of the Antitrust Section and presided over more key antitrust enforcement decisions than any other AG during my years with the Office.

GAS PRICES. No sooner had Lockyer gotten elected than he was plunged into one of California's recurring gasoline crises, which always involved public outcries for antitrust investigation of rapidly rising prices. While launching such an investigation, he also convened—legislative-style—a blue-ribbon committee of experts to examine the root causes of the volatility of California gas prices and to come up with a report and recommendations, many of which are still valid today. Tom Greene chaired the committee. I was not deeply involved in gasoline at that time, though I became so later. The Section has performed numerous investigations into the oil industry, usually in collaboration

with the Federal Trade Commission, including several under Lockyer.

SUTTER. Lockyer was strongly opposed to the proposed merger of Summit Hospital with Alta Bates, the nearby Sutter hospital in North Oakland, based on evidence and stakeholder concerns that it would give Sutter significant market power in the East Bay. Lockyer was very proactive, holding two days of public hearings. He concluded that the Office should oppose the merger, even though the FTC, to our surprise, declined to proceed. This was not the first or only time that the California AG pursued enforcement actions after federal antitrust authorities declined to act. California's challenge to the American Stores and Lucky Stores merger in the *California v. American Stores*, 495 U.S. 271 (1990), litigation followed the FTC's approval of the merger. Newly named the Antitrust Section Supervising Deputy in San Francisco, where the case was filed, I found myself frantically trying to line up a trial team. We managed to put on what I thought was a strong case but lost. A few years later, the FTC's Bureau of Economics did a retrospective study of the merger, concluding that Lockyer had been right to challenge it.

VITAMINS CASES. The *Vitamins Indirect Purchaser Antitrust Litigation* was a civil damages case that followed one of the first and largest international cartel prosecutions by the DOJ. State AGs exercising their authority to sue as *parens patriae* could seek damages for their vitamin-buying consumers so long as their state law allowed indirect purchaser recoveries. [NOTE: SCOTUS banned such recoveries under federal law in its 1977 *Illinois Brick* decision, but many states, including California, promptly enacted consumer recovery laws, generically known as "*Brick* repealers."] As settlement discussions began, private counsel started soliciting state AGs to join their cases. Lockyer faced a politically difficult decision whether to band together with a group of fellow AGs in joint negotiations or instead partner with the California consumer class action counsel, who were negotiating a separate settlement. He opted for the separate California-only group, and a swift and favorable settlement of over $80 million for California was reached. Lockyer did work with other states' AGs, however, in launching the 2006 multistate filing in the *DRAM* civil litigation.

CY PRES. Of the $80 million in *Vitamins* settlement money, about $40 million was to be distributed via a *cy pres* process for the benefit of California consumers to not-for-profit organizations to fund programs linked to health and nutrition around the state. This was an astonishing sum to dispose of without clear guidance. My Marin Community Foundation background came in handy, as did my 1999 experience working with AG Lockyer and Consumers Union on spend-down plans for a much earlier settlement that established a healthcare markets research entity at UC Berkeley. (*See* www.petris.org.) Taking advantage of the retirement of Consumers Union's highly respected Senior Advocate Harry Snyder, I persuaded private counsel to engage Mr. Snyder to design and implement a suitable grant-making plan to achieve the objectives of the litigation, and Snyder to accept. The court was extremely happy about the approach Mr. Snyder designed, which included several different Requests for Proposals (direct nutrition services, education and advocacy, and research) and periodic reports on each that were presented for judicial approval. While no subsequent antitrust settlement has resulted in a *cy pres* distribution quite so large, each AG has endorsed the professional grant-making approach initiated in *Vitamins*, and the Section has had the satisfaction of funding dozens of fascinating projects around California from such settlements.

ENERGY TASK FORCE. Not long after California began having major electricity shortages and price spikes, it was discovered they were being caused by market manipulations and capped retail electricity prices. Lockyer, as an activist AG, created an Energy Task Force composed of numerous attorneys borrowed from several Sections within the AG's Office, including from the Antitrust Section, and appointed Tom Greene to lead it. I was to take over as the acting Chief of Antitrust in Tom's absence, a role I kept from 2001 to 2003.

SAFEWAY CASE. In 2003, a major collective bargaining fight arose between three large supermarket chains and the union of supermarket workers. It erupted into a major strike that lasted several months, during which it was rumored that the chains' battle plan included a secret side agreement amongst the competing supermarkets. The rumor grabbed our attention, but we didn't know at first whether the agreement, if it existed, presented an antitrust issue. I had just been confirmed as the official Antitrust Section Chief, after two years in the "acting" role, so I saw this as the first big test of my judgment, both legal and political. Once I got a copy of the secret agreement (its provisions regarding profit sharing during the strike were made public in our federal complaint), it was clear that it did present an antitrust issue and that the biggest legal question would be whether it qualified for antitrust immunity under the implied labor exemption. The exemption issue was an especially juicy

one from a plaintiff's perspective because a fourth chain, not a member of the collective bargaining group, was nevertheless a participant in the agreement.

Our lawsuit to enjoin the profit-sharing agreement as a Sherman Act violation was immediately condemned by the chains as politically motivated, a criticism that was assisted by the fact that Lockyer himself, pro-labor politician that he was, joined one of the picket lines for one day with his baby son on his shoulder. However, vindication came as the Section consistently won rulings in the case—two at the trial court level, and two at the Ninth Circuit, and under three successive AGs—and that the profit-pooling agreement was not insulated from antitrust scrutiny by the implied labor exemption and did state an antitrust claim. The case established an extremely important legal precedent that also ended the likely proliferation of such agreements around the country.

A FUN LOCKYER MOMENT. Turns out the tequila market is highly segmented: high-end tequila is a completely different market than low-end tequila. That might not be such a big surprise to tequila drinkers. But guess what? There are higher end, and even higher end, and higher-higher end levels beyond that: five or six distinct tequila markets well beyond mere classifications into reposados and anejos, according to economic experts who know what competes with what. Lockyer requested a personal briefing on the status of a merger investigation I was doing that included some tequilas. I showed up to brief him about the merger on a day when his staff said he was uncharacteristically cranky and distracted. He was, that is, until I mentioned tequila and its multiple high-end quality levels. With a sudden light of enthusiasm in his eye, he demanded to know all the details. "Well, I have a chart," I said. "Lemme see that!" as he reached for it. "I brought two copies," I told him. "You can keep one." Big grin, as he folded it up and slid it into his jacket pocket.

MICROSOFT. Lockyer was deeply interested in the DOJ-led Microsoft case and believed the states, which had launched the initial investigation, had an important role to play. He and others hired John Roberts, then recognized as a top Washington appellate counsel, to represent the states' interests before the District of Columbia Circuit in Microsoft's appeal from Judge Jackson's adverse rulings. In 2001, after the case was returned to the trial court with its monopolization ruling intact, the case went into mediation. The newly elected Bush administration adopted a proposed settlement that many states criticized, as did many commentators in the Tunney Act proceeding that ensued. Nine states ultimately did join the DOJ in settlement. However, Lockyer and eight other state AGs went through a full-blown bench trial to seek more robust remedial terms to restore pre-violation competition, like those terms adopted in Europe. Most of the remedies that the California-led group sought were not granted, but the final judgment gave us the same powers held by the DOJ group to oversee our almost identical Microsoft judgment, which we did for the next seven years. The judgment, like the settlement, was widely criticized as too weak; however, it did allow some new competitors—and their investors—to push forward notwithstanding their fears about Microsoft. And the states' role in the litigation was particularly important to build credibility as a national-level enforcement presence, notably so in the high-tech arena. That became especially useful later when California's privacy law first went into effect.

CORPORATE FRAUD UNIT. With New York's AG Eliot Spitzer regularly grabbing headlines for his pursuit of securities fraudsters and other corporate wrongdoers, Lockyer lacked the authority to do the same. That power was in the hands of the Department of Corporations. Lockyer pushed the legislature for parallel authority and got it, but there was no budget to go along with it, so he turned to the Antitrust Section to help develop an initial approach to enforcement. Luckily for me, the wonderful Mark Breckler was working in the Antitrust Section at the time, after having spent some 25 years at the Department of Corporations. Mark was both knowledgeable and creative, and he and I had a few memorable discussions about what the best kind of case would be to inaugurate the AG's new authority. Mark filed several corporate fraud cases with a distinct consumer protection flavor, brought in prompt and very large settlements, and quickly became the Chief of a newly created Corporate Fraud Section. My loss, but the Office's gain. Mark later became Chief of the entire Public Rights Division, and in that role was my immediate boss for several years before he retired.

EDMUND G. ("JERRY") BROWN (JANUARY 2007-JANUARY 2011)

As AG, Jerry Brown was very focused on climate change and lacked Lockyer's energetic approach in antitrust matters. However, he was supportive of the Antitrust Section and its cases, as well as a gasoline investigation begun following the gas-pricing spikes in the wake of Hurricane Katrina. During his tenure, we filed several major civil damages cases, joining the *TFT-LCD* and *CRT* litigations.

Moreover, Brown kept faith with ongoing Section projects, including Microsoft monitoring, the *Safeway* appeal, and Antitrust Section leadership of NAAG's multistate work on pharmaceutical pricing. During his tenure, the Antitrust Section reached settlements in *DRAM*, filed several *amicus* briefs in the federal *Cipro* and *DDAVP* litigations, secured a two-year extension of the Microsoft settlement monitoring authority, and settled the multistate *Ovcon* suit.

WASTE SERVICES. National waste disposal company mergers are ones that ring all the bells for state AG involvement: high state-specific impacts, local markets, areas of state/municipal agency injury, and significant value-added aspects to our participation. The bell is rung even harder when the market is one that falls within the state's traditional police powers regarding public health and safety, like waste disposal. The Republic Services/ Allied Waste merger (announced on June 23, 2008, by the industry's second and third largest waste management companies) was one of those. As a former mayor, Brown appreciated the importance to California's municipalities of cost-effective waste disposal services. He also recognized the merging parties as successors of the very companies that he had dealt with as the Mayor of Oakland before becoming the AG.

HIS INIMITABLE STYLE. My first face-to-face with AG Brown was at a meeting with several well-dressed counsel for a major company; I don't remember the topic. But I do remember that when Jerry arrived (somewhat late as I recall), he was accompanied by his dog, a large and affable old pooch named Dharma. The visiting attorneys promptly stood up and stepped forward to shake hands with Brown, but just as promptly stepped backward as Dharma companionably began licking their high-gloss wingtips. Dharma then settled under the conference table and went to sleep, contributing an occasional snore, or worse, to the proceedings. (As a former small-town mayor myself, I couldn't resist asking Brown afterwards if he ever missed being Mayor of Oakland. He denied it, but then conceded that he did sometimes miss the direct involvement in neighborhood policing and redevelopment.)

RESALE PRICE MAINTENANCE. The 2007 SCOTUS (divided) decision in *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877 (2007), eliminated the traditional *per se* treatment of Retail Price Maintenance, reversing long-established precedent. A question immediately arose as to whether the AG would follow *Leegin* or would continue to treat RPM agreements as *per se* unlawful. My phone lit up with calls from private counsel asking that question. The issue was familiar to Brown because during his first stint as Governor, in 1975, he signed legislation repealing California's Fair Trade Laws that had explicitly allowed RPMs since the 1930s. Those laws had blessed RPMs in certain markets as necessary protections of independent merchants from predatory pricing of the big chains. [Like California, 44 other states had similar laws, which later economic research demonstrated were ineffective.] Brown's position was that *Leegin* did not change California

2010 retirement celebration for Barbara Motz (center), the Antitrust Section's Supervising Deputy AG in Los Angeles.

law, which contains explicit bans on agreements affecting price, so the Section proceeded to sue two companies using RPMs—Dermaquest and BioElements—to underscore the continued *per se* standard, articulating it in subsequent settlement agreements.

PHARMA PAY-FOR-DELAY. The Section's involvement, through NAAG, in multistate cases challenging pay-for-delay agreements and similar patent-manipulation practices by pharmaceutical companies to keep drug prices high had begun as early as 2000. But in 2010, Brown became personally interested and involved after receiving a call from the FTC about joining its lawsuit against Actavis, to be filed in California. He was enthusiastic about doing so, and though that case was soon removed to Georgia on its way to becoming a major Supreme Court decision,[5] he supported the Section's participation in several new multistate pay-for-delay cases as well as a series of *amicus* filings in others.

KAMALA HARRIS (JANUARY 2011-JANUARY 2017)

AG Harris found antitrust issues intellectually engaging. She was a strong supporter of Antitrust Section initiatives, as well as its collaborations with the DOJ. She was deeply interested in the Section's strategic thinking about how to advance certain areas of law. And despite budget issues, she managed to achieve a modest increase in the Section's staffing.

PHARMA. During her very first week in office, AG Harris approved the filing of a California-authored 32-state amicus brief in a leading pay-for-delay matter before the Supreme Court.[6] Later in her tenure, she authorized the filing and/or settling of other pay-for-delay matters. In a step reminiscent of her push for more mortgage fraud relief dollars for California, she rejected one potential pharma multistate settlement as inadequate, opting to have California pursue separate litigation on its own. That California suit settled later, after Harris's election to the U.S. Senate, for a sum that was multiples of the amount from the multistate settlement. Most significantly, perhaps, she filed a letter brief with the California Supreme Court urging it to take up *In re Cipro Cases I & II*,[7] and when the Court did take them up, she filed a merits brief urging a more strenuous liability standard for such cases to apply under the Cartwright Act than what was applied under the federal rule of reason test.

Kathleen and members of the Antitrust Section at the 2013 Golden State Institute Antitrust Lawyer of the Year dinner.

CIVIL DAMAGES. During her tenure, Harris presided over a series of civil damages cases arising from federal criminal cartel prosecutions. Although *DRAM* had been filed in federal court as part of a large multistate case, the Section had filed its next case, *TFT-LCD*, in state court in part to tee up the then-burning question of whether the Class Action Fairness Act (CAFA) would require its removal to federal court. The Washington AG did the same, and both cases were remanded to their respective state courts; remands that defendants promptly and unsuccessfully appealed to the Ninth Circuit. The question of CAFA's applicability to *parens patriae* cases filed by state AGs went to SCOTUS later and was resolved favorably to the states.[8] A global settlement of the *TFT-LCD* litigation yielded over $1 billion for indirect purchasers and very significant civil penalties for California. (As an aside, during my first meeting with Harris to review the antitrust matters in progress, when I mentioned the anticipated scale of the *LCD* settlement, she grinned and murmured "cha-ching.")

OTHER KEY RULINGS. The Ninth Circuit's *en banc* ruling on the implied labor exemption in the *Safeway* case issued in 2011 and posed an immediate decision for Harris whether to seek Supreme Court review of a portion of it. (*See* https://www.antitrustinstitute.org/work-product/ninth-circuit-gets-it-half-right-brunell-commentary-on-california-v-safeway/.) Harris opted not to do so, a strategic choice that preserved intact the important portion of the precedent-setting ruling rejecting the employer group's claim of antitrust immunity. In 2013, the Ninth Circuit adopted the reasoning of an *amicus* brief filed by the AG in *AT&T Mobility LLC v. AU Optronics Corp.*, recognizing the extraterritorial reach of the Cartwright Act and holding it not to be in violation of due process. Harris recognized the importance of this ruling and was excited about its

additional implications for the UCL, even calling me to exchange views on the case.

EBAY. When the DOJ invited the AG to join an action challenging eBay's "no-poach" agreement with Intuit to avoid recruiting or hiring one another's employees, it was a great opportunity to emphasize that California was as eager to prosecute those practices as the feds were. The DOJ had pursued several other Silicon Valley companies that had similar no-poach agreements, and class actions were also being litigated. The complaint Harris filed against eBay paralleled the federal claims, but added Cartwright and Section 16600 claims as well. Our settlement with Intuit was promptly filed in state court. Notwithstanding the similarity of the complaints, the judge separated our two eBay actions, dismissing the AG's complaint and requiring us to amend to allege detailed and specific harms to the state caused by the no-poach agreement. The upshot was that while the DOJ was preparing for trial against eBay, we were on our third amended complaint. The DOJ and California settled roughly contemporaneously, but the California settlement included a monetary component and release of *parens patriae* claims. Those included, for the first time, in addition to restitution funds for affected employees, compensation for harm to California's general economy, or "dead-weight loss." Harris appreciated the opportunity the case presented to pursue that claim and fully endorsed it.

TECH. Harris was concerned about the growing dominance of Big Tech entities, although reluctant to bring a standalone challenge without an explicit connection to local California markets. When the tech sector expressed concerns about software piracy by foreign companies, she pushed us to see if a local connection existed, and we found one. That resulted in two lawsuits against foreign manufacturers of clothing that imported large quantities of merchandise into California. Their routine use of pirated software allowed them to compete unfairly with small-scale apparel producers in the Los Angeles garment industry and threatened the small L.A.-based tech shops that developed proprietary software to serve them.

XAVIER BECERRA (JANUARY 24, 2017-MARCH 18, 2021)

[Becerra was appointed to Harris's unexpired term when she resigned to go to the Senate, so he did not join the office until January 24, 2017. He served a little over four years, until March 18, 2021, when he left the AG's office to become Secretary of Health and Human Services.]

AG Becerra in March 2018 announcing the filing of his antitrust case against Sutter Health, flanked by lead-deputy Emilio Varanini and Antitrust Section chief Kathleen Foote.

Becerra brought to the AG's Office deep experience in healthcare policy and legislation. As a Congressman, he had been a member of the House Ways and Means Committee, and as a senior member of its Subcommittee on Health, he had been one of the drafters of the Affordable Care Act. Healthcare was a central theme of his tenure as AG with regard to antitrust as well as other areas. However, it was by no means his only interest. Becerra was a very strong supporter of the Section's work, persuading the legislature to expand its size significantly. And he enjoyed trying to explain his antitrust matters to public audiences in ways they could understand. (He liked to do it in Spanish as well, and I thoroughly relished an opportunity he once gave me to supply him with the Spanish word for competition: "competencia.")

SUTTER. In my early conversations about the work of the Antitrust Section with Becerra's chief of staff, he made it clear that Becerra was already deeply concerned by the exercise of market power by large health systems around the country. The Antitrust Section under AG Harris had reviewed economic studies that demonstrated sharply higher cost trends in Northern California and had conducted a broad review of healthcare systems, focusing eventually on market power exercise by Sutter Health. Sutter had in the interim been sued by two groups of private antitrust firms. And the DOJ, with the North Carolina AG, had sued a North Carolina hospital system to address similar issues.

The litigation Becerra brought against Sutter was filed in state court, where we hoped to develop further jurisprudence under the Cartwright Act. The complaint itself contained a detailed description of the injunctive remedies sought by the state and encouraged important discussion within the healthcare community about the effects of the contracting practices, through which Sutter was able to wield its market power. The settlement, a joint one with the state court private plaintiffs' group, was pathbreaking and a major victory for Becerra and the Section. Its terms also served to establish a roadmap for the Office's position on provider consolidation, as well as a new template for working with private litigants in this area.

A 10-year period of monitoring Sutter's compliance with the settlement terms was transferred, along with other healthcare-related and pharma matters, to the newly created Healthcare Rights and Access Section. That Section began as a special strike force created by Becerra to defend the federal Affordable Care Act from being dismantled during the Trump administration, and it now embraces the healthcare work previously done by several other Sections within the DOJ, including the Antitrust Section.

GASOLINE. Shortly after AG Becerra arrived, Valero sought to acquire the only remaining large independent storage terminal for finished gasoline products. With this acquisition, the major oil refiners would have the gasoline supply locked up and, in the event of a shortage, independent suppliers might find themselves blocked from bringing replacement fuels into California. California was working with the FTC and expected the FTC to file an action to stop the acquisition, but at the last minute, with only two FTC Commissioners (and three vacancies), the FTC took no action. This was another last-minute scramble for me to recruit a trial team, when Becerra quickly decided to go ahead with his own suit against Valero because it was the "right thing to do." When I broke the news to him and his executive staff that hiring outside counsel and experts for a merger challenge was an extremely expensive proposition, Becerra did not flinch. And our success in blocking the acquisition was a vindication that he cited again and again.

PHARMA. The Antitrust Section had a 20-year history of supporting multistate actions challenging pharmaceutical companies using patents and agreements to block competition, going back to the *Cardizem* and *Mylan* cases. While Becerra's highest concern was initially healthcare providers, he quickly became a stalwart supporter of enforcement efforts in the pharmaceutical sector. The *Provigil* matter was settled under his watch, though it had begun under Harris's direction. And Becerra actively sponsored and supported AB 824, a legislative limitation of pay-for-delay agreements between competing pharmaceutical companies that effectively extended the California Supreme Court's ruling in the *In re Cipro Cases I & II*.[9]

T-MOBILE/SPRINT. AG Becerra, AG James in New York, and several other state AGs were stunned when the DOJ entered into a consent decree with T-Mobile and Sprint authorizing their merger to proceed on the condition that some Sprint assets be sold to Dish Network, based on the dubious premise that Dish would replace the lost competition. Rather than endorse that settlement, several states, including California and New York, proceeded to take the case to trial, an effort that demanded great resources and one which was hampered by the DOJ's startling effort to scuttle their initiative. While the outcome was a loss for the states and the Antitrust Section, it more firmly established California as an antitrust enforcer to be reckoned with nationally. And someday I expect to read a retrospective study confirming my continued belief that the states were right all along about the anticompetitive effects of this merger.

TECH. Becerra saw the need to become active in the technology space. He approached the antitrust issues in that space methodically, wanting to personally understand all the challenges in this area, and the range of possible actions and remedies to decide where to put any enforcement emphasis and maximize the use of limited resources within the Office. Becerra authorized several investigations, some of which led to cases filed after he left office.

Becerra's decision to join the DOJ lawsuit against Google regarding its search functions and self-preferencing was an important step in restoring the bipartisanship in antitrust enforcement that had frayed during the Trump administration. Becerra became one of the few Democratic AGs to join the DOJ case, although others soon filed a companion case. The case went to trial in late 2023. I hope that the clearly bipartisan group of states assisting the DOJ will help undo some of the harm to the credibility of antitrust enforcement at both state and federal levels that political polarization has occasioned.

ROB BONTA (APRIL 23, 2021-PRESENT)

AG Bonta was appointed by Governor Newsom when AG Becerra resigned to join the Biden administration. Bonta almost immediately saw antitrust as an important part of his administration and legacy. He joined the DOJ and other states' AGs in a challenge to the American Airlines/Jet Blue codeshare agreement and signed onto a Utah-led multistate lawsuit against Google, which has settled in recent weeks. When Bonta arrived, the Antitrust Section was larger and more robust than it had been previously. However, Bonta quickly saw the need to build it further and has fiercely fought for more resources going forward. As of my retirement at the end of 2022, the Section included 27 attorneys and 8 paraprofessionals.

GASOLINE. Bonta recently announced the settlement of the *Vitol/SK Energy* case, involving manipulation by major trading companies of the primary pricing index for gasoline prices. Filed under AG Becerra and based on evidence of trades during gas shortage periods in 2015–2016 intended to influence the index, it is the first gas-pricing lawsuit to emerge from our numerous gasoline investigations since MDL-150. In 2022, it afforded an opportunity for the Section to obtain a significant appellate ruling on personal jurisdiction over a defendant foreign parent company not operating in California, but with a focus on California markets. *SK Trading Int. Co. Ltd v. Superior Court of SF County*, 77 Cal. App. 5th 378, 292 Cal. Rptr. 3d 246 (2022).

AMAZON. The *Amazon* suit, which grew out of a two-year investigation begun by Becerra, was filed by Bonta in September 2022. Like *Sutter* and *Vitol*, it is also brought under state law and in state court. The complaint's allegations describe how Amazon's contractual controls over the prices its third-party sellers charge on other platforms, which are claimed to reduce prices to purchasers, actually raise prices on a vast array of products sold to California's consumers. These contractual controls are also believed to discourage the growth of online markets that would present effective competition for Amazon. Although it is not a monopolization case, it is reminiscent of the federal Microsoft monopolization case of a generation ago. With its Cartwright Act claims extensively documented with citations of material found during the investigation, it is certainly one of the most ambitious and important cases ever undertaken by the Section. It survived a demurrer last year and is being closely watched, as is the case filed in September 2023 by the FTC.

EPIC v. APPLE AMICUS. UCL lawyers will have noticed that while Apple's defeat of Epic's Sherman Act claims against it were recently upheld by the Ninth Circuit, Epic's UCL claim was also upheld. The opinion's discussion of the UCL issue is not extensive, but it underscores the limited approach needed when a federal court interprets state laws and confirms that the "unfair" prong of the UCL is a viable means of reaching certain conduct in its incipiency that may not yet rise to the level of a provable violation of existing law. Such an interpretation of California precedent had been carefully laid out in an *amicus* brief filed in the case by Bonta, who also noted the vast areas of California consumer protection policies that rely on the UCL as a means for enforcement.

I am looking forward to watching the progress of the *Amazon* case and others, which like *Sutter* incorporate so many of the lessons I learned over the last 20 years. And of course, I want to cheer on the extraordinarily talented attorneys in the Antitrust Section who are carrying them forward under the leadership of AG Bonta and Senior Assistant AG Paula Blizzard, my successor as Chief of the Antitrust Section.

ENDNOTES

1. *California v. American Stores*, 495 U.S. 271 (1990).
2. *California v. ARC America Corp.*, 490 U.S. 93 (1989).
3. *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (1988).
4. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).
5. *FTC v. Actavis*, 570 U.S. 136 (2013).
6. Thirty-two state AGs filed an *amicus* brief in support of *certiorari* before the U.S. Supreme Court in *Louisiana Wholesale Drug Co., Inc., et al. v. Bayer AG, et al.* involving manufacturers of ciprofloxacin HCl ("Cipro").
7. *In re Cipro Cases I & II*, 61 Cal. 4th 116 (2015).
8. *Mississippi ex rel. Jim Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014).
9. *In re Cipro Cases I & II*, 61 Cal. 4th 116 (2015).

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KATHLEEN FOOTE IN CONVERSATION WITH CHERYL JOHNSON

Q. Let's start with a little background. Can you tell us a bit about your family and life before college?

A. I was born in Detroit. My dad taught sociology at Wayne State University, and my mother worked as a secretary for the United Auto Workers. My grade school years were spent near Hyde Park in Chicago. We moved to Tarrytown, New York when my dad left academia to pursue work in market research at General Electric. In Tarrytown, which is about 25 miles north of Manhattan, I attended the public high school whose mascot was a Headless Horseman in tribute to Washington Irving's *The Legend of Sleepy Hollow*. Less famous, but more influential in setting the character of the town, was the Chevrolet plant that employed many town residents. When I rode from Tarrytown to Washington, D.C. in 1963 for the Civil Rights March, it was on one of the buses that the Auto Workers Union provided.

Q. Do you have siblings and what do they do?

A. I had one brother, Jefferson, who unfortunately passed away in 2020 from cancer at the tender age of 64. He graduated from Harvard and then got his Ph.D. from Berkeley in biochemistry and did pioneering work in the study of monoclonal antibodies. He was a thoroughly wonderful person, who started his own biotech company in Seattle, wrote books, played steel drums, studied ballet, and was a loving father and brother.

Q. You went to Radcliffe College back in the 1960s when it was theoretically an all-girls college and before it fully merged with Harvard College. Do you have any thoughts on how the fact that Radcliffe was a women's college as opposed to a coed institution impacted you?

A. Unlike some of the other Seven Sister colleges, Radcliffe was, for all practical purposes, coed when I got there. While the dorms were separate, all of our classes were taken together with the men at Harvard, as had been done for at least a decade. That said, more attention went to the men to the extent that the faculty focused on undergraduates at all. And men outnumbered women by at least four to one. It was an intimidating environment for a young woman, especially one as unprepared as I was for college-level work.

Q. Did any of your professors or fellow students at Radcliffe influence your career ambitions?

A. None of us really grasped how to integrate professional goals into a normal adult life. I recall Radcliffe's President Mary Bunting addressing the question in her first speech to us by advising us that the "answer" was to get a career going first before having children. But we hardly got a manual on how to get a career going, which was left pretty unclear.

Q. You chose to major in economics at Radcliffe. Was this a common major at Radcliffe? And what sparked your decision to major in economics?

A. As it turned out, it was a very uncommon choice. There were only three women among the 60 or so men in the basic microeconomics class for majors. The reason I chose this major was because I had become interested in third-world development issues, especially those in Latin America.

Q. You took a year off during college; why did you do that?

A. After an intense summer in 1964 in Mexico City studying development economics at the university and exploring the countryside on a motorcycle with a Mexican musician and his friends, I wanted to do more traveling. Radcliffe did not offer junior year abroad programs. My college roommate and I decided that studying for a year in Madrid would provide a crash course in Spanish as well as a grand travel adventure around Europe. We ended up doing much more traveling than we expected because student strikes against the Franco regime led to a prompt shutdown of the university in Madrid. As a result, we wound up finishing our studies in Rome.

Q. Any special lessons that you learned from that year off?

A. A ton of them. For me, as for many young Americans then, the variety of food was a revelation. So was the allure of every shop window. And among other things, we discovered that, for Europeans, even those of our own generation, World War II was still a very real and often painful personal memory, even more than 20 years later. I'm not sure how much that has changed even today.

Q. What were your fondest or most memorable experiences from this period?

A. I can recall several priceless moments, not to mention meals. And music. Starting with nights in Mexico City listening to a hot rock and roll band called Los Sinners, anchored by drummer Fito de la Parra—who later emigrated to the United States, joined a blues band called Canned Heat, and played at Woodstock. (Fito became, and has remained, a loyal and beloved friend.) Then later in Europe, from flamenco at Corral de la Morería in Madrid to spontaneous ballads at trattorias in the then working-class Trastevere neighborhood of Rome.

One night in Spain, several of us went to the palace of El Escorial outside Madrid to take in the El Greco-like spookiness of the location, enhanced by listening to Ravel's Bolero. After a surprise encounter with the night watchman, we bought him a drink in the local bar and he then gave us an illicit lantern-light tour inside the palace—with our shoes off so as not to wake the monks sleeping upstairs.

Another time, when hitchhiking to Paris, we somehow managed to snag a ride in an empty tour bus being driven back to Hamburg by some kindly old Germans. They spoke no English, nor we German, but they were delighted to switch on recorded waltzes, and weave the bus back and forth in time to the music as we drove along the Loire River Valley.

POST-COLLEGE (1967-1971)

Q. After graduating from Harvard-Radcliffe in 1967, what did you do?

A. I returned to Italy, where I got a job through the Harvard placement office as an administrator at a girls' finishing school in Florence. I had another job in Rome working in an American bookstore. And in 1969, I made my way to San Francisco.

Q. Why San Francisco?

A. Oh, it was 1969. My whole generation was headed to San Francisco. There was also a boyfriend factor. And North Beach, where I found an apartment, was the closest thing I could find to Italy.

Q. What did you do in San Francisco?

A. You mean apart from exploring the Bay Area, protesting the Vietnam War, and dancing at the Avalon Ballroom and the Fillmore? I looked for a job. Most of the work then available to women was just secretarial. Unfortunately, or maybe fortunately, my typing was not good enough to land a decent-paying secretarial job. In early 1970, however, I was hired as paralegal at the law firm of McCutchen, Doyle, Brown & Enersen (which later became Bingham McCutchen and then Morgan Lewis). There, I worked for Bill Schwarzer, who was an antitrust litigator until 1976, when he was appointed to the federal bench in San Francisco. Tom Rosch, a protégé of Schwarzer, had also just become a partner. (Tom later became an FTC Commissioner, and then a partner at Latham.) I worked with them both on the defense of an engagingly local antitrust case involving Gray Line's boycott of a small business that sold San Francisco nightlife tours by limousine. I summarized depositions of many of the biggest names in San Francisco's tourism and entertainment business of that era: Ben Swig of the Fairmont, Henry Lewin at the St. Francis, Big Al from Big Al's topless club on Broadway, Don Dianda from a very elegant restaurant called Doro's, and several nightclub owners. The case went to trial, where the plaintiff tour company, represented by Michael Khourie and Gene Crew of Broad Khourie & Schultz (later Khourie and Crew), won on liability but lost on damages.

I also worked with Bill Schwarzer and John Reese on an antitrust case involving Greyhound's cancellation of a joint operating agreement with Mt. Hood Stages that ran between San Francisco and Spokane. The disputed agreement was Mt. Hood Stages' primary source of income. Greyhound ultimately lost at trial in Oregon. That case had some colorful characters and interesting antitrust issues.

And I briefly worked under Mr. Doyle on the gypsum wallboard litigation, in which my task was to compare the prices on invoices to distributors for gypsum wallboard with those on their own invoices to applicators, something I later realized must have been offered as a first iteration of a pass-on defense.

LAW SCHOOL (1972-1975)

Q. Who or what influenced your choice to go to law school in the 1970s?

A. I had been out of college and working for several years before the women's liberation movement gained traction. It was not until then that it began to dawn on me that I might be working for the rest of my life, and I needed to upgrade my professional aspirations. And in 1969, when driving across the country to San Francisco, a friend and I stopped off in Chicago to watch a day of the Chicago 8 trial. The sight of Bobby Seale in shackles while the seven white guys pranced freely around the courtroom in tie dye t-shirts was shocking, and the important role of their lawyers made a big impression on me.

Q. Did you have any professors in college or law school that were helpful in guiding or mentoring you?

A. In law school I did, but not in antitrust. My focus in law school had turned to environmental issues, zoning, and habitat preservation. CEQA (the California Environmental Quality Act) was brand new, and so were the federal Clean Air and Clean Water Acts. I did take antitrust law in law school, and during my last semester, I externed for the senior Judge Orrick, who had led the U.S. DOJ Antitrust Division in the early 1960s. My more memorable experiences at Orrick's court included several non-antitrust trials: a housing discrimination lawsuit, a marijuana prosecution, and a case of semi-first impression concerning union pension fund rules, in which the judge adopted a "fundamental fairness" test used in the D.C. Circuit that, as affirmed by the Ninth Circuit became an important labor law case.

Q. How did you spend your summers during law school?

A. During both first and second years, I worked part-time at McCutchen, and full-time there over the first summer. After my second year of law school, I got a summer job at a small San Francisco firm called Goldstein, Barceloux & Goldstein that combined land use and class action work. While I liked this firm a lot and got an offer to return as an attorney after the bar exam, I accepted the McCutchen offer instead.

Q. The 1970s were a time when women first started entering law schools in anything but token numbers. What was your experience at USF Law School?

A. I started law school in 1972. My entering class was 23% women, but only 9% of that year's graduates were women—quite a striking contrast. The rapid change had led to very visible discrimination at every class break, when long lines would form outside the one women's bathroom, which had only two stalls. The reason those numbers have stayed with me is because of the lawsuit that the women eventually brought to remedy the bathroom issue.

EARLY POST-LAW SCHOOL CAREER AND LIFE (1975-1988)

Q. What kind of work did you do at McCutchen when you returned for three years following your law school graduation?

A. As an associate there, I mostly worked on non-antitrust cases, including a couple of securities cases under partner Graham Moody, and the first wave of asbestos cases before they were all consolidated. I remember attending depositions of some very sick insulation workers struggling to remember what corporate logos were on the asbestos-containing materials they had used. One of them, Blackie Kendall, had a colorful life story and near-perfect recall of the products and their manufacturers, as well as great humor and personal charm. We all lined up to shake his hand when the deposition was over. He died just a few weeks later.

Q. Didn't you get married and have a baby somewhere in this time period?

A. Yes. I married my first husband, Don Rubenstein, while we were both in law school. A dedicated environmentalist, Don worked first at the Nature Conservancy and then for the California Coastal Conservancy. In 1976, we moved to Mill Valley, and our daughter Grace was born in 1979. I had left McCutchen by then and kept myself busy as a Mill Valley Planning Commissioner. Grace would come along with me in the stroller for some of the on-site inspections I was doing as a commissioner and later on campaign walks when I ran for City Council.

Q. Your resume indicates that you were the Associate Dean of USF from 1981 to 1987. How did that come about?

A. In 1981, the Dean of USF Law School, who had been one of my law school professors, urged me to apply for the Associate Dean position just vacated by future California

Supreme Court Justice Kathryn Werdegar. It was a 9-to-5 schedule with a teaching component that was more friendly to raising children than a litigation practice. I got the job and began teaching land use, environmental law, and municipal law classes. Don and I divorced not long afterward, and in 1984, I married Tyson Underwood, a Sausalito artist and art festival producer, who died in 2015. Our son, Tyson, was born just at the end of the fall 1986 semester.

Q. What changes in USF Law School did you observe from the time that you attended law school there?

A. By the 1980s, 40% or more of the students were women, and the young liberals on the law school faculty I had known as a student were now in charge. Community service clinics, affirmative action, and a stab at John Dewey's "mastery" learning style were all part of the changes. I also remember meeting Arkansas Governor Bill Clinton around 1985, when he gave the keynote law school graduation speech. After the speech, Clinton, instead of disappearing as most speakers do, stayed and shook hands, making his famous 30-second personal connections with everyone in the room.

Q. Before and during your USF associate deanship, you were also active in local politics in Mill Valley. What inspired this engagement?

A. Mill Valley's location, so close to San Francisco and its laid-back counterculture ambience, put it under huge development pressure in the late 1970s. I joined a citizens group pushing for environmental protection, and at their urging, applied for an appointment to the Planning Commission. In 1984, after several years as a commissioner, I was elected to the Mill Valley City Council, which proved to be one of the most absorbing things I've ever done. The Council has five council persons and one is selected to be the Mayor for each year. I served two four-year terms on the Council, including two stints as the Mayor of Mill Valley. Mill Valley had a full-time staff, so being on the City Council was essentially a part-time volunteer gig—maybe eight hours a week, mostly during the evening hours.

Q. What kind of issues were there in Mill Valley that you dealt with as the Mayor and on the local commissions?

A. The Council had the opportunity to deal with a wide variety of interesting issues, from budget choices to development permits and even social policy. For instance, with regard to affordable housing, we did approve some private condos that included a percentage of "affordable" units, but more importantly, in my view, we actually developed and built two rental projects ourselves—both of them 100% affordable, one with 32 units and the other with 17 family-sized units. The city bought the land, hired a nonprofit entity to plan and design each project, and then worked with local banks and grantors to pull together the funding to get them built. They remain fully occupied and an enduring community asset. Given the crucial importance of rental housing, I wish more communities would do that.

One of the most controversial issues erupted after an arts organization proposed a sculpture/fountain for the Mill Valley downtown plaza that was a 10-foot cube of glass bricks with metal strips on top from which water would spout into a 20-foot square pool. When it came to the Council for approval, hundreds protested it as "corporate art" that had no place in redwood-forested Mill Valley. Local artists were enraged that it was designed by a New York artist who had never been to Mill Valley. Local architects criticized each other's architectural taste. Speeches were made about due process, and about the purposes of town squares—and even the ancient Greek concept of Agora (marketplace and town center) was invoked. After a split vote, a citizens' petition, a motion for reconsideration, another hearing, and another split vote, the proposal was rejected amidst a lot of public discourse about famous and appropriate city plazas around the world.


ficials dedicate Alto Station Housing project

officials gathered last week for the groundbreaking of the 17-unit Alto Station affordable housing project. From Councilwoman Kathleen Foote, Councilwoman Betsey Cutler, BRIDGE housing official Don Terner, Mayor Spotswood, vice-mayor Warren Levinson and councilwoman Alison Ruedy. Photo by Privette.

Councilwoman Foote breaks ground!

CALIFORNIA ATTORNEY GENERAL ANTITRUST SECTION (1988-2022)

Q. And the rest of your history is at the California Attorney General's Antitrust Section from 1988 on. What prompted this pivot in your career?

A. USF periodically experienced money problems and, in 1987, untenured employees were being cut back or let go altogether. I was offered a severance package that gave me 12 months at half pay with full health benefits—quite a boon for a mom with a newborn and an eight-year-old. The same day I got that news, I happened to see a notice of an upcoming civil service exam for the Attorney General's office and took it as a sign I should apply. During the succeeding year, there were no openings in the AG's Land Use Section, but just before my eligibility period expired, I was offered a job in the AG's Antitrust Section. The work was compelling, and I never looked back.


Mayor's son makes his debut

Young Tyson Underwood Jr. — pictured here with parents Mayor Kathleen Foote and Tyson Underwood Sr. — made his first big social appearance on Sunday afternoon during a party in his honor at the Artisans Gallery in Mill Valley. The excitement appears to have been a bit too much for him. It's just as well, he missed the Super Bowl anyway. *Photo by Ed Smith*

Mayor Foote delivers!

Q. Before we focus on your work and life in the Antitrust Section, it appears you also continued your community involvement while in that Section, yes?

A. Yes. When I first joined the Antitrust Section, I was still on the Mill Valley City Council, and that needed clearance from the AG. Some poor soul in the AG's office had to hit the books to decide whether there was a conflict with my new day job. Later on, for eight years, I served as a trustee of the Marin Community Foundation, two of them as Board Chair. Since the AG oversees charitable trusts, that too required clearance, and there was a lot of ink spilled on legal memos. In any event, I secured the clearances and thereby learned a great deal about the risks and responsibilities, as well as the benefits, of charitable grant-making. (The Marin Community Foundation Board made discretionary grants totaling about $30 million per year.) When, at the AG's office, the *Vitamins Indirect Purchaser Antitrust* case was settled, with $38 million of the settlement monies slated for *cy pres* style distribution in California, I leaned hard on my co-counsel to agree to a formal and transparent competitive grant-making process conducted by an independent grant-making professional.

Q. So, from 1988 through December 2022, you were in the Antitrust Section of the California Attorney General's Office, serving under seven different Attorneys General. Rather than posing scores of questions about your experiences under each of these AGs, we will simply refer readers to your memoirs about your experiences under each of them. But, let me now ask a few broader and more general questions about your experience in the Antitrust Section. First, what were the greatest challenges that you had as leader of the Section?

A. State antitrust enforcement was still pretty new and not well understood by the antitrust world or even by the AGs themselves in some respects. Resources were a perennial issue, and still are. Even with AGs who were supportive of growth in the Antitrust Section, budget cuts and salaries that hovered well below private and even below other government salaries added to hiring challenges. That being said, we have been very successful in attracting talented attorneys despite the salary challenges. Yet there always remains a huge asymmetry between our staff and the resources of those being investigated or challenged. The asymmetry increased after the federal Class Action Fairness Act (CAFA) went into effect in 2006, forcing most private litigation of state Cartwright Act antitrust claims into federal court. Accordingly, the opportunities are now far fewer for our state courts to develop our Cartwright

case law, unless the AG brings his own lawsuits in state court—with all the staffing and monetary burdens that major antitrust litigation inevitably entails, but without the private, multistate, or U.S. government co-counsel that we might have in federal court.

Q. What do you consider your most significant contributions to the Section or its directions?

A. The AG, himself or herself, makes a lot of the decisions about the emphases of the Section, some of which may be dictated by larger events, from gasoline price spikes to telecom mergers. But as Section Chief I was in a good position to develop areas of longer-term emphasis and staff expertise through hiring, investigative assignments, professional development opportunities, and relationship building. You yourself [Cheryl Johnson] brought your patent litigation background to the Section at a time when a long-term focus on pharma patent manipulations and pay-for-delay seemed to me like an important direction to take. Emilio Varanini's background in healthcare and Paula Blizzard's in telecom and tech are other examples of that kind of enrichment of the Section's capabilities. And I was in a good position to initiate certain directions and policy choices myself. The robust capabilities of the Cartwright Act always greatly interested me, and developing more law around them seemed at least as important as our participation in Sherman Act cases. Early examples of this Cartwright focus included a tying case involving traffic signal equipment sales to local governments (*California v. Econolite*). When the *Leegin* decision came down, and I began getting calls from practitioners asking if California would follow SCOTUS in abandoning the *per se* standard for resale price maintenance, I made it clear that the answer was no, and we felt the importance of following up with a couple of illustrative lawsuits involving "cosmeceuticals" (*DermaQuest* and *Bioelements*) to underscore California's RPM position. Later and larger Cartwright Act cases, of course, include *Sutter*, *Vitol*, and *Amazon*. *Amazon* in particular offers some wonderful opportunities for the California Supreme Court, if it ever gets to it, to continue the kinds of elucidation of Cartwright Act policy that appear in its *Clayworth* and *Cipro I & II* opinions. I like to think that my prioritization of Cartwright Act work in state court venues, notwithstanding the resource commitment that goes along with it, is moving the Act itself and the AG's Office in an important direction on the national policy stage.

All of that said, I also like to think of my biggest personal contribution as creating an environment that brought people into the Section who have a passion for antitrust work and then were encouraged by me to have at it, pursuing investigations and litigating cases that they deeply care about. Their many volunteer hours editing the Treatise and speaking at Cal. Bar and ABA events, I also viewed as important components of our mission, though not all of my managerial counterparts would agree. Even with the split-off of healthcare matters to a separate unit, the Section is bigger and more capable than it has ever been, its members have a clear sense of mission and direction, and its portfolio is both original and highly germane to California's consumer needs.

Q. What were your most fulfilling matters that you worked on?

A. I would have to say the *Hartford* and *Safeway* cases were the most fulfilling personally. I was deeply involved in both, both were novel and ambitious when filed, and both ultimately set important legal precedents: jurisdiction over foreign entities in the case of *Hartford*, and implied labor exemption limitation in the case of *Safeway*. They were quite different in that *Hartford* was a multistate case about the conduct of an entire industry, while *Safeway* was a solo challenge to a local situation. But each one provided multiple opportunities to think creatively and make strategic choices. *Safeway* in particular was an important win for us. It was one of the first ventures into labor issues by any antitrust enforcer, and demonstrated vividly that California is a force to be reckoned with. It was also, I think, an important factor in at least two of the honors I have received: the American Antitrust Institute Award in 2013 and the earlier *Daily Journal* Attorney of the Year recognition.

Q. Did any of the cases that the Section tried on your watch pose particular challenges and how did you overcome them?

A. Taking a case to trial is always a challenge. The resource commitment alone demands tough choices about what other work has to be deferred or let go entirely. And the AG as well as budget-keepers need to be convinced that those choices are the right ones. Co-counsel partnerships, including cost sharing, has helped in some cases, like *Sutter*. And hiring outside counsel has proven to be a crucial, if sometimes expensive, solution in others, like *Valero* and *T-Mobile/Sprint*. A challenge of a different type, at least in merger cases where U.S. DOJ or the FTC has investigated

but not acted, has been overcoming the suggestion, always vigorously advanced by opposing counsel, that their absence means that our case lacks merit. I have sometimes thought that may have influenced the disappointing outcome of our challenge to the Sutter/Summit merger in 1999. In the 2017 *Valero* case, we addressed it head-on, and to his credit, so did Judge Alsup. In the 2019 *T-Mobile/Sprint* case, the DOJ's astonishing intervention and argument that the states should defer to its judgment was unsuccessful on paper; however, it's hard not to wonder if it played an implicit role in the court's subsequent denial of relief, despite finding that the states had indeed met our burden of proof as to anticompetitive effects in local markets.

Q. Sadly, we have seen some antitrust issues become red or blue state issues. What is your perspective on how and when antitrust issues became more partisan, and any solutions on the horizon?

A. The Chicago School of thought has always had a political tinge because of its antipathy to governmental regulation, so in that sense, antitrust enforcement has always oscillated somewhat between red and blue administrations. But that's different from some recent uses of baseless antitrust claims as a political wedge issue, which I think must be as galling to every antitrust practitioner as they are to me. One example was the Trump administration's antitrust lawsuit against the auto industry's compliance with California's strict air pollution controls—appropriately bounced by the court at the first opportunity. Another was the weird antitrust investigation into ostensible monopolization in the legalized marijuana market, as dispersed, diverse, and highly state regulated as it is. I hope those kinds of uses of antitrust law are now behind us. In terms of serious solutions to the longstanding problem of Chicago School-influenced underenforcement, it's hard to know when or if we will get them. The bipartisan antitrust bills and debate in Congress are hopeful developments, despite their failure so far to pass legislation.

Q. The Biden administration has brought with it a more-expansive view of the role of antitrust law and is advocating for broader antitrust laws. Do you share this vision, and do you think there is an appetite, need, or willingness to broaden our antitrust laws?

A. I see a distinct need for greater antitrust enforcement, both merger and non-merger. I'm not entirely sure legislation will be a panacea, but there is certainly a need for more policy guidance than presently exists. I see the courts as crying out for it and the markets as well. Most of the bright lines that had once shaped business conduct and simplified lawsuits have now been replaced with a rule of reason balancing process that at best occasionally relieves a company of liability, but at worst leaves markets without some fairly fundamental guidance and sense of uniform expectations. The problem was exacerbated by Justice Scalia's articulation of an explicit preference for underenforcement over overenforcement, a breathtakingly sweeping policy *dictum* that has been taken seriously by many lower courts. Even without more explicit reforms, rejecting that view might be a principle that our legislators could agree on and codify, at least with regard to mergers. But I would frankly like to see both federal and state antitrust laws modified to incorporate some of the European approaches, most particularly their *ex ante* rules for the largest companies and something akin to the "abuse of dominance" standard.

Q. Who was your favorite Attorney General?

A. Ha! That's impossible to answer, and it's kind of like asking a mother about her favorite kid. Certainly, none of the Attorneys General got to office by being ogrish, and they all were serious people and supportive of antitrust enforcement. If I were to create my own Attorney General, I guess the traits I would certainly choose include Lockyer's enthusiasm, Harris's diversity commitment, and Becerra's depth. AG Bonta, though still new, seems to offer a lot in all those respects.

Q. While leading the Antitrust Section of the California Attorney General, you also led the NAAG Antitrust Task Force from 2012 through 2015. Can you explain what the Antitrust Task Force is and your role as chair during that period?

A. The National Association of Attorneys General (NAAG) has been in existence for over a century, but its Antitrust Task Force was not formed until the 1970s. The Task Force is made up of antitrust attorneys in the state Attorneys General Offices across the country and is responsible for coordinating multistate antitrust litigation efforts, offering training, incubating studies of new issues, and showcasing the states' antitrust accomplishments. My role as the Task Force Chair was to pursue those goals and help all of the states participate in and reap the benefits of them. That included an active role in the leadership of the ABA's Section of Antitrust Law, representing the Task Force as a speaker at ABA programs to advocate for state concerns and to highlight and explain the many achievements of state antitrust enforcers to sometimes skeptical ABA members—a task I particularly enjoyed.

Q. While you were Chair of the NAAG Antitrust Task Force, what were the challenges that state antitrust enforcers encountered?

A. During my tenure as Chair, the greatest challenge to the states collectively came from an unexpected source: the Supreme Court's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494, 135 S. Ct. 1101 (2015). The Court sharply limited the conditions under which state-established occupational licensing boards could claim exemption from antitrust challenges under the state action doctrine. Many states found themselves and their licensing boards suddenly the targets of antitrust lawsuits, and since AGs are often required to defend their state agencies' conduct, many states' antitrust attorneys abruptly found themselves on both sides of the issue. The Task Force began tracking the lawsuits and the legislative reforms that soon began unfolding in each state in response to *NC Dental*, and I formed a committee within the Task Force to compile and evaluate them and keep the states fully briefed.

In California, AG Harris designated an internal committee, which I chaired, to develop recommendations to deal with

2014 ABA Spring Meeting "Enforcers Roundtable." L to R: Antitrust Division chief Bill Baer, FTC chair Edith Ramirez, EU Commissioner Margrethe Vestager, UK's CMA chair Lord David Currie, NAAG Antitrust Task Force chair Kathleen Foote.

the *NC Dental* opinion. The committee drew upon numerous sections within the Attorney General's Office whose work and client agencies were potentially impacted by the decision. Much of that committee's thinking was ultimately reflected in a formal AG Opinion (Ops. CAAG 2015-402) regarding compliance with the *NC Dental* mandate.

The Task Force continues to be a vital link for states in collaboration with each other as well as with federal enforcers, in merger cases explicitly under a state-federal protocol regarding document sharing, but also in studying and sharing information on anticompetitive practices in several key sectors, including pharmaceuticals, airlines, healthcare, and agriculture.

FAMILY AND RETIREMENT

Q. Let's switch gears from your work in the Section. We've mentioned in passing some of your family moments as they occasionally bumped up against your career. Can you discuss your family in a bit more detail?

A. Sure. During my younger days, I had two nine-year marriages, and each produced a smashingly great child. My first marriage was to Don Rubenstein, an environmental lawyer at the forefront of the conservation movement in the 1970s at the Nature Conservancy and later the California Coastal Conservancy. My daughter from this marriage, Grace Rubenstein, is now a busy freelance writer with two sons, aged four and six, who live close by me in the Bay Area.

My second marriage was to Tyson Underwood, a Duke-educated artist who revitalized the Sausalito Art Festival, created the Marin Art Festival, and was on the founding board of the Headlands Center for the Arts. Together we had a son, also named Tyson Underwood, who is a professional actor, but is now also back in school studying theology and classics.

Kathleen with her kids, Grace and Tyson.

After being single for more than 20 years, late in life I married Tom Silk, an attorney who specialized in charitable trust law. Tom had started his career in the tax division of the Department of Justice in Washington, D.C., where he developed an interest in nonprofits. He then worked at the Brobeck firm in San Francisco for several years, before starting a solo practice that became the boutique law firm of Silk, Adler and Colvin, which has provided legal services to the nonprofit and philanthropic sector for over four decades. During that time, Tom established and defended nonprofit status for hundreds of arts, environmental, and human rights organizations, including the Trust for Public Lands, Mother Jones, the San Francisco Zen Center, the Tides Foundation, Glide Memorial Methodist Church, and the SF SafeHouse. When I first met Tom in the early 1970s, we each had our own lives and did not meet again until 2016, when we promptly got together, married, and I moved into his house in Stinson Beach. To all of our great sorrow, especially mine, Tom died in 2022, and I have recently returned to my home in Mill Valley.

Q. So, what prompted you to retire from the AG's Office?

A. I had been thinking about it for some time, and Tom's death was certainly a wake-up call. With the pandemic mostly behind us, I finally felt the time was right, and that the augmented Antitrust Section had great depth of talent and was in good hands. Certainly, a big motivation for my retirement is also the opportunity to spend more time with my children and grandchildren and do all the things the pandemic had suspended for so long.

Q. So how is being a grandmother serving you?

A. Well, I am working on it, but I may have a way to go to perfect my grandmothering. A few weeks ago, I had my two small grandsons for several hours and decided to stop with them at a local greeting card/novelty store. The six-year-old, who can read, instantly spotted a box labeled "Fart Machine" and began lobbying. "Grandma, you need to buy me this." And even more persuasively, "Look, Grandma, it's remote controlled!" The four-year-old also discovered a book about animal farts (rabbits, mice, and elephants) with button-activated audio illustrations. Like any good grandma, I naturally purchased these items for the grandkids. Needless to say, my daughter suggested it raised serious questions about my judgment. But I did score some

2022 retirement luncheon for Kathleen with Los Angeles branch of the Antitrust Section.

points with the little guys, which should hold me in good stead for a while.

Q. And is any antitrust work on your retirement agenda?

A. I think so. Since retiring in December 2022, I have presented to a bar association group on consumer protection and privacy enforcement and at the ABA Antitrust Section Spring Meeting. I am a vice-chair of the ABA's U.S. Comments Committee, which last year reviewed sports exemptions and noncompete bans. I am also informally assisting in a study of possible reforms to California's antitrust laws, a study mandated by the California legislature in ACR 95.

Q. What kind of hobbies and sports are on your agenda?

A. I played tennis as a kid and have remained an active tennis player for the last 30 or more years. I was a regular member of my tennis club team until COVID-19 hit, and while I am now a strictly social player, I'd like to think I am still close to a 4.0 level of play.

Active travel has always been a passion. Just before retirement, I joined an alumni tour to Vietnam and Cambodia, and since then, I also visited Bhutan and Ireland. I took a 10-day trip with my daughter to hike the Cinque Terre in Italy, the five scenic coastal hillside towns just south of the Italian Riviera. Upcoming is a wintertime cruise to Norway to see the northern lights, and a visit to South Africa and Namibia. More travel to Mexico and elsewhere in Latin America is also high on my future agenda. Fingers crossed that I get to do it all!

And a hearty thank you for sharing your story with our readers!

USTA Sectionals, Sacramento (2015).

Halong Bay, Vietnam (2022).

Cartagena, Colombia (2015).

Tigers Nest, Bhutan (2023).

Agra, India (2015).

Backwaters, Kerala, India (2012).

Siem Reap, Cambodia (2022).

Tres Marias, outside Mexico City (1964).

Mezcal warehouse outside Tlacolula, Oaxaca, Mexico (2014).

Thar Desert, Rajasthan, India (2015).

Alchi, Ladakh, India (2013).

Rome (2014).