Antitrust Defense Bar on Alert with SCOTUS Set to Consider Removal of *Parens Patriae* Cases under CAFA

*By Ralph C. Mayrell and Lindsey Vaala*

The U.S. Supreme Court is poised to examine a question of significant importance to defendants facing antitrust class action litigation. In *Mississippi ex rel. Hood v. AU Optronics Corp.*, the Court will consider whether a state’s *parens patriae* action is removable as a “mass action” under the Class Action Fairness Act (CAFA) when the state is the sole named plaintiff and the claims arise under state law.¹ The decision is anticipated to address a circuit split: in the Second, Fourth, Seventh, and Ninth Circuits, *parens patriae* cases must remain in state court,² while the Fifth Circuit allows removal under CAFA. A decision affirming the Fifth Circuit would be a victory for future defendants of state antitrust and consumer protection *parens patriae* actions as federal forums offer procedural advantages and more restrictive class action rules.

**Parens Patriae and CAFA**

*Parens patriae* suits are cropping up with increasing frequency in antitrust disputes. Derived from the English system, the concept of *parens patriae* descends from the notion that the King, as the “father of the country,”³ had certain duties and powers to act in defense of persons with legal disabilities against acting for themselves.⁴ In the United States, the states assumed and expanded upon this antecedent function of the King.⁵ Today, a “*parens patriae*” suit is one brought by a state to remedy or prevent harm to its sovereign or quasi-sovereign interests,⁶ with the state acting as the sole plaintiff on behalf of its residents. *Parens patriae* cases typically are filed in state court.

Circuit courts have split on whether *parens patriae* cases properly fall under CAFA, which allows removal of suits classified as “class actions” or “mass actions.”⁷ To complicate matters, suits that otherwise meet the criteria to be a mass or class action under CAFA can be ineligible for removal pursuant to the statute’s variety of (often complicated) exceptions. For example, if more than two-thirds of plaintiffs as well as the primary defendants are citizens of the state where the state claim was brought, removal is not acceptable.⁸

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¹ 701 F.3d 796 (5th Cir. 2012), cert. granted, 133 S. Ct. 2736 (U.S. May 28, 2013) (No. 12-1036).
⁴ *Id.*
⁵ *Id.*
⁶ *Id.* at 258–59.
⁷ 28 U.S.C. § 1332(d); see also *AU Optronics*, 701 F.3d at 799 (citing 28 U.S.C. § 1332(d)(11)(A)).
CAFA also contains a “general public interest” exception excluding removability of suits brought “on behalf of the general public” (and not on behalf of individual claimants or purported class members). The general public interest exception was a key issue in *Mississippi ex rel. Hood v. AU Optronics*.

**Fifth Circuit’s “Claim-by-Claim” Approach to “Mass Actions”**

The *AU Optronics* case originated when the Mississippi Attorney General brought suit in Mississippi state court alleging a conspiracy to fix prices of TFT-LCD panels in violation of the state’s consumer protection and antitrust laws. Hoping to ultimately consolidate the Mississippi action with multidistrict litigation pending in the Northern District of California, the defendants removed the suit to federal court in Mississippi under CAFA. In reversing the district court’s decision to remand the matter back to state court, the Fifth Circuit first concluded that Mississippi’s suit was not a class action as it had not been brought under Rule 23 or a corresponding rule of judicial procedure and because Mississippi state law prohibited class actions.

Instead, the Court found that Mississippi’s suit met the requirements of a “mass action,” defined under CAFA as an action in which “(1) monetary relief claims of (2) 100 or more persons (3) are proposed to be tried jointly in a common controversy that is more than $75,000.” The Court’s evaluation turned on the second prong — whether the suit involved claims of 100 or more persons, despite Mississippi being the sole named plaintiff. If the state alone was the real party in interest, then the second prong could not be met.

Employing a claim-by-claim analysis to determine the real party in interest, the Fifth Circuit acknowledged that its approach diverged from that of other circuits, which looked to a state’s complaint “as a whole.” Finding that the state was a party in interest with the more than 100 individual citizens who purchased the products, the Fifth Circuit held that the suit met the requirements for a “mass action.” Having found that the real parties in interest included individual citizens (rather than the public generally), the Court held that the general public interest exception was inapplicable and the suit was eligible for removal.

**Benefits of Removal**

The Supreme Court’s consideration of *AU Optronics* is of significant interest to the antitrust defense bar. As a practical matter, obtaining removal to federal court offers defendants procedural advantages. For starters, the federal pleading standard under *Twombly* is stricter than traditional notice pleading standards used in some states. Additionally, federal class action procedures are often more defendant-friendly, permitting appeal of class certification grants, for example. Defendants also tend to prefer federal jury procedures, which have a unanimity requirement and generally pull jurors from a larger geographic pool than state courts.

The Court heard the argument in *AU Optronics* on November 6.

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**Antitrust Developments in the Petrochemical Industry: Litigation Highlights 2009 - 2013**

*By Grayson McDaniel*

This article provides a brief overview of antitrust litigation highlights over the last four years in the petrochemical industry. First, in a class action alleging potash price fixing, the Seventh Circuit overturned prior precedent to hold that

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9 Id. § 1332(d)(11)(B)(ii)(III).
10 Id. at 799.
11 Id. at 791.
12 See id. at 804 n.3 (discussing TFT-LCD *parens patriae* actions).
13 A district court’s order to remand usually is not appealable. See 28 U.S.C. § 1447(d). Pursuant to a statutory exception, however, appellate courts have discretionary jurisdiction to remove remand orders in actions removed under CAFA. See 28 U.S.C. § 1453(c); see also *AU Optronics*, 701 F.3d at 798–99.
14 *AU Optronics*, 701 F.3d at 799.
15 Id.
16 Id.
17 Id. at 800.
18 Id. at 802-03.
19 Compare *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (“[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice.”), with *Colby v. Umbrella, Inc.*, 955 A.2d 1082, 1086 n.1 (Vt. 2008) (“We recently reaffirmed our minimal notice pleading standard . . . and are unpersuaded by the dissent’s argument that we should now abandon it for a heightened standard.”), and *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 345 (Ariz. 2008) (“We granted review to dispel any confusion as to whether Arizona has abandoned the notice pleading standard under Rule 8 in favor of the recently articulated standard in . . . *Twombly*.”).
21 Compare Fed. R. Civ. P. 48(b) (requiring unanimous civil verdicts), with Cal. Civ. Proc. § 618 (permitting three-fourths of the jury to determine the verdict).
the Foreign Trade Antitrust Improvements Act (FTAIA) does not act as a bar to federal subject-matter jurisdiction, and interpreted the language of the act in accordance with the view of the Department of Justice (DOJ) and counter to the view of the Ninth Circuit. Next, in a case alleging misappropriation of trade secrets regarding DuPont’s KEVLAR aramid fiber, the Eastern District of Virginia provided important guidance on punitive damages, and the Fourth Circuit remanded the case for reconsideration in light of the Supreme Court’s recent holding on defining markets for the purpose of showing monopoly. Third, a probe into price-fixing in polyurethane foam led to investigations and lawsuits against both foam manufacturers and — as a result — the manufacturers of the chemicals that are used to make the foam. Finally, the North Carolina Court of Appeals established state standing for indirect purchasers in a case involving ethylene propylene diene monomer elastomers, making North Carolina the latest in a line of states to recognize indirect-purchaser standing.

**Minn-Chem, Inc. v. Agrium, Inc.: Seventh Circuit Resolves Circuit Split by Holding that the FTAIA Is Not Jurisdictional**

In Minn-Chem, a class action brought by direct and indirect purchasers of potash, plaintiffs complained of price-fixing by global potash producers in violation of American antitrust laws. Whether American antitrust laws could be applied to price-fixing occurring outside the U.S. required the court to interpret the FTAIA. The FTAIA describes when and in what manner the Sherman Act applies to commerce with foreign nations, and provides:

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —

(1) such conduct has a direct, substantial, and reasonably foreseeable effect —

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations . . .

An important threshold question addressed by the case was whether the FTAIA is jurisdictional — whether, if the conduct at issue did not fall under the FTAIA, the federal court had subject-matter jurisdiction to hear the case. The original panel of the Seventh Circuit, bound by prior *en banc* precedent, *United Phosphorus*, held that the FTAIA was jurisdictional. Rehearing the case *en banc*, however, in *Minn-Chem, Inc. v. Agrium, Inc.*, the court overturned *United Phosphorus*. Judge Wood’s unanimous opinion held that the FTAIA “sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.”

The court reasoned that *Morrison v. National Australia Bank Ltd.*, a post-*United Phosphorus* Supreme Court decision, “provide[d] all the guidance necessary” to show that *United Phosphorus* had been incorrectly decided. *Morrison* held that whether section 10(b), a similar provision to the FTAIA, prevented the extraterritorial application of the Securities and Exchange Act of 1934, was a merits question, without the power to deprive a federal court of subject-matter jurisdiction. *Morrison’s* determination that section 10(b) was not jurisdictional followed the reasoning of the Supreme Court’s opinion in *Arbaugh*, which held that courts should treat a restriction on a statute’s scope as nonjurisdictional, unless Congress “clearly states” that the restriction is jurisdictional. Because section 10(b) did not clearly state that it was jurisdictional, the *Morrison* Court determined that it was not. Because the FTAIA does not clearly state that it is jurisdictional, the *en banc* panel determined that it also is not jurisdictional.

The *Minn-Chem* decision resolves a Circuit split between the Seventh Circuit and the Third Circuit, which held in 2011 that the FTAIA is not jurisdictional. However, though the Seventh and Third Circuit are now in accord, the matter is still not settled. In the Eighth and Ninth Circuits, for example, the FTAIA still poses a jurisdictional bar.

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24 683 F.3d 845 (7th Cir. 2012) (en banc), cert. dismissed, 2013 WL 3790907 (Jul. 22, 2013) (dismissing the petition pursuant to court rule 46.1, which provides for dismissal upon agreement of the parties).

25 Judges Flaum, Rovner, and Williams took no part in the decision.

26 683 F.3d at 852. *Accord Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (holding that when Congress does not “clearly state[] that a threshold limitation on a statute’s scope shall count as jurisdictional . . . courts should treat the restriction as nonjurisdictional in character.”).

27 *United States v. LSL Biotechnologies*, 379 F.3d 672, 678–79 (9th Cir. 2004)).


29 See *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 537 (8th Cir. 2007); *United States v. LSL Biotechnologies*, 379 F.3d 672, 678–79 (9th Cir. 2004)).
Second Circuit recently discussed the holdings of *Animal Science* and *Minn-Chem* with approval, but refrained from overturning its contradictory precedent until it is squarely presented with the issue. Some Circuits have not had, or have chosen not to avail themselves of, the occasion to decide the issue.31

The *en banc* decision of the Seventh Circuit also provided detailed interpretation of the FTAIA’s phrase “direct, substantial, and reasonably foreseeable effect,” in which it adopted the Department of Justice’s reading of “direct” as meaning “a reasonably proximate causal nexus.” The court rejected the Ninth Circuit’s much stricter definition of the term to mean “follows as an immediate consequence of the defendant’s activity” — this is what the term means in the Foreign Services Immunities Act (FSIA). The choice tees up a new Circuit split, as the Seventh Circuit’s reading will allow the U.S. antitrust laws to apply to a wider range of foreign conduct than the Ninth Circuit’s interpretation.

After analyzing the plaintiffs’ complaint according to its interpretation of the FTAIA, the court held that the complaint sufficiently stated a claim. The court affirmed the district court’s order denying the defendants’ motion to dismiss.33 Agrium filed a petition for certiorari, which was dismissed upon agreement of the parties.

**DuPont Wins Record Damages for Trade-Secret Violation, but Punitive Damages Are Capped; Fourth Circuit Remands Antitrust Counterclaim**

In *E.I. Du Pont Nemours & Co. v. Kolon USA, Inc.*, DuPont sued Kolon Industries in the Eastern District of Virginia, alleging that Kolon misappropriated trade secrets and confidential information about DuPont’s KEVLAR aramid fiber.34 A jury eventually returned a verdict for DuPont awarding $920 million in compensatory damages, one of the largest awards in the history of trade-secret litigation.35

In 2011, however, the court, in a matter of first impression, capped DuPont’s punitive damages at $350,000, far short of the $52 million DuPont requested. DuPont argued for the maximum award of punitive damages under the Virginia Uniform Trade Secrets Act’s (the “Act”) — $350,000 — for each of the 149 trade secrets the jury found that Kolon had misappropriated. This award would have given DuPont a total punitive damages award of $52 million.36 The court disagreed. Though the plain language of the Act was not decisive, the court followed the Fourth Circuit’s interpretation of Virginia’s general punitive damages statute,37 which also caps punitive damages at $350,000. The Fourth Circuit has held that the cap applies per lawsuit. The Eastern District adopted this reasoning and held that $350,000 was the per lawsuit cap for punitive damages awardable in a case brought under the Act.

In a counterclaim to DuPont’s trade-secrets action, Kolon argued that DuPont wielded monopoly power over the aramid-fiber market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Kolon argued that DuPont monopolized the market by using contracts that required high-volume customers to purchase 80-100 percent of their supply from DuPont over multiple years. The district court dismissed the counterclaim, reasoning that the Supreme Court in *Tampa Elec. Co. v. Nashville Coal Co.*38 required Kolon to define the relevant market not only as the market that U.S. buyers turned to for their supply of aramid fibers, but also every location where aramid suppliers were located, regardless of whether U.S. consumers can turn to supplies in those places.39 On appeal, the Fourth Circuit stated that the correct reading of *Tampa Electric* was to allow a plaintiff at the motion-to-dismiss stage to make out a relevant market by showing merely that the consumers in

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30 See *In re Vitamin C Antitrust Litig.*, 904 F. Supp. 2d 310, 316 (2d Cir. 2012) (determining that “the Court does not need to decide whether the FTAIA is jurisdictional in order to determine what standard to apply to defendant’s motion.”).
31 See *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438 n.3 (6th Cir. 2012) (declining to decide whether the FTAIA creates a jurisdictional limitation).
32 Id. (citing *U.S. v. LSL Biotechnologies*, 379 F.3d 672, 680–81 (9th Cir. 2004)).
33 Id. at 861.
39 See *E.I. du Pont*, 637 F.3d at 444–45 ("The district court . . . concluded that the market, per *Tampa Electric*, . . . must be expanded to include the areas where the sellers operate, apparently without regard to whether U.S. consumers of para-aramid fibers can practically turn to supplies in those places.") (internal quotation marks and brackets omitted).
an area can predictably only turn to supplies from that market. The Fourth Circuit thus reversed the district court’s decision. On remand, the district court nevertheless granted summary judgment for DuPont on the counterclaim, this time because Kolon failed to support its claim that DuPont controlled over 70 percent of the relevant market during the relevant time period.

Two Tiers of Polyurethane Litigation: Polyurethane Foam Antitrust Litigation and Urethane Chemicals Settlements

A Department of Justice (DOJ) probe into polyurethane foam led to an investigation and a morass of ensuing lawsuits. In February 2010, Vitafoam, a major North American polyurethane foam producer, approached DOJ in a bid for leniency with evidence of price-fixing between itself and its competitors dating back to 1999. In July 2010, the FBI reportedly raided the corporate offices of The Carpenter Company, one of the world’s largest foam producers. Soon after, several other foam manufacturers were reportedly raided by the European Commission — Recticel SA, Eurofoam and European affiliates of The Carpenter Company acknowledged the investigation.

Following Vitafoam’s bid for leniency with the DOJ, direct and indirect purchasers of polyurethane foam sued at least twelve foam manufacturers. On December 10, 2010, the U.S. Judicial Panel on Multidistrict Litigation granted a motion to consolidate six actions pending in North Carolina (with 13 potential tag-alongs) and two in Ohio into one MDL in the Northern District of Ohio.

The plaintiffs divided into direct purchasers and indirect purchasers. In 2011, both classes largely survived a motion to dismiss, with the court holding that they sufficiently alleged a conspiracy to fix prices and allocate customers. After the MDL court denied the subsequent motion for reconsideration, the Vitafoam defendants proposed a settlement guaranteeing class members $9 million in damages with the option of additional recovery of up to $15 million total, dependent on Vitafoam’s recovery of damages in the In re Urethane litigation against polyurethane-chemical producers. The district court preliminarily approved the settlement in March 2012.

Separately, foam producers had filed a class-action suit against the manufacturers of the urethane chemicals used to make polyurethane foam (BASF, Dow, Bayer, LyondellBasell, and Huntsman), accusing these chemical manufacturers of price-fixing. In 2006, defendant Bayer settled, reportedly for $55.3 million. In 2008, the United States District Court for the District of Kansas granted plaintiffs’ motion for class certification. After the class certification, three other defendants settled out of the litigation and were dismissed from the case.

The matter went to trial against Dow, the remaining non-settling defendant in the case, and plaintiffs were awarded $400 million in February 2013, which was then trebled to $1.2 billion in May and later reduced to $1.06 billion. Dow has appealed the judgment to the Tenth Circuit.

North Carolina: Indirect Purchasers Have Standing to Bring Antitrust Suits in State-Law Claims

In a 2009 appeal, the North Carolina Court of Appeals reversed the state’s Business Court decision that antitrust plaintiffs did not have standing to make indirect purchaser claims. Plaintiffs purchased products containing ethylene propylene diene monomer elastomers (EPDM) sold by defendant companies (Bayer) to the manufacturers of the items. The indirect purchaser sued for price fixing. The claim could not be made under federal antitrust laws, but the North Carolina Court of Appeals reversed the Business Court, holding that the indirect purchasers did have standing under applicable state antitrust laws. The holding has since been followed in a Sixth Circuit case involving the


application of North Carolina law to indirect-purchaser standing.50

This makes North Carolina the latest in a line of states that have rejected Illinois Brick’s prohibition on indirect-purchaser standing with regard to their state antitrust laws. Other states that allow indirect-purchaser standing include Arizona, 51 California, 52 the District of Columbia, 53 Illinois, 54 Iowa, 55 Kansas, 56 Maine, 57 Michigan, 58 Minnesota, 59 Nebraska, 60 New Mexico, 61 New York, 62 North Dakota, 63 South Dakota, 64 Tennessee, 65 and Wisconsin. 66

Recent Appointments at the DOJ and FTC

By Jim Reeder

Several top Department of Justice (DOJ) and Federal Trade Commission (FTC) posts have been filled over the past year. The appointments reflect the Obama Administration’s assertive approach to antitrust enforcement, as well as its continued emphasis on competition in the health care

Industry. The appointees include William Baer, Assistant Attorney General for the Antitrust Division; David Gelfand, Deputy Assistant Attorney General for Litigation at the Antitrust Division; Deborah Feinstein, Director of the FTC’s Bureau of Competition; Stephen Weissman, Deputy Director of the FTC’s Bureau of Competition; and Martin Gaynor, Director of the FTC’s Bureau of Economics. The five appointees have a mix of public and private sector experience. William Baer has a reputation for taking and urging an active role by the enforcement agencies in investigating and, where appropriate, challenging mergers that raise competitive concerns. But Baer and several other appointees have articulated the need to ease unnecessary burdens on companies facing investigation or litigation and to use innovative options that can ameliorate competitive concerns without unduly disrupting otherwise beneficial transactions. Dr. Gaynor, an economist, has focused his academic research on the health care industry, reflecting the Administration’s continued focus on the health care industry in antitrust enforcement.

William Baer

William Baer was sworn in as Assistant Attorney General for the Antitrust Division on January 3, 2013, replacing Christine Varney. He previously was the head of Arnold & Porter’s antitrust group, where he had been a partner since 2000 and had worked from 1980 - 1995. Baer also served as Director of the Bureau of Competition at the FTC, where he served from 1995 - 1999, and also worked in the FTC from 1975 - 1980.

Baer was nominated to succeed Sharis A. Pozen on February 6, 2012. Prior to his nomination, Baer criticized the planned AT&T and T-Mobile merger and is seen as a strict enforcer of the antitrust laws. As Director of the Bureau of Competition at the FTC, Baer oversaw challenges to a number of mergers, including the Staples-Office Depot merger. In private practice, he defended General Electric against the government’s allegations of price-fixing in the 1990s.

Since taking his position at the DOJ, Baer has overseen a challenge to Anheuser-Busch’s acquisition of Grupo Modelo, as well as the settlement of the dispute, in which Anheuser-Busch agreed to divest Modelo’s U.S. business and certain beer brands, selling them to Constellation Brands, Inc. The divestiture is one of the largest ever in a merger case. The settlement contained an unusual proviso where Constellation committed to increasing the capacity of a particular brewery. According to Baer, this commitment would ensure that Constellation was...
a sufficiently strong competitor of Anheuser-Busch. The challenge and the resolution suggests that the Antitrust Division will continue to be active in challenging mergers, and that it will explore innovative solutions to eliminate problematic aspects of otherwise non-objectionable mergers.

David Gelfand

David Gelfand was appointed as the Deputy Assistant Attorney General for Litigation in DOJ’s Antitrust Division, effective August 26, replacing Joseph Wayland who left the DOJ in November 2012. Gelfand was previously a partner at Cleary Gottlieb Steen & Hamilton LLP, and had been in private practice his entire career. Prior to joining Cleary Gottlieb in 1991, he was an associate at Miller, Cassidy, Larroca & Lewin for four years. He spent several years in Cleary Gottlieb’s Brussels office, handling matters before the European Commission and national competition authorities.

Gelfand represented Google before the FTC in the company’s acquisition of AdMob and represented GlaxoS Matthwe when it acquired Stiefel. While in private practice, Gelfand has stated that he thinks the Robinson-Patman Act should be repealed because it is antiquated and can lead to double recovery. He also stated that treble damages should be eliminated in rule of reason cases due to the difficulty in determining the legality of certain conduct. Gelfand also indicated interest in reforming the second-request process to make it more efficient and in reviewing the horizontal merger guidelines.

Deborah Feinstein

Deborah Feinstein was appointed as Director of the Bureau of Competition on June 17, having previously been a partner at Arnold & Porter. Feinstein replaces Richard Feinstein. Prior to joining Arnold & Porter, Feinstein worked at the FTC as Assistant to former Bureau of Competition Director Kevin Arquit and Attorney-Advisor to Commissioner Dennis Yao. At Arnold & Porter, Feinstein represented BP in the FTC’s investigation of BP’s sale to Tesoro of BP assets in Southern California.

After her appointment, Feinstein delivered a speech describing the benefits of consent orders in mergers and acquisitions, emphasizing their flexibility and that they do not represent a zero-sum negotiation, but instead an opportunity to remedy problematic aspects of a merger.

Stephen Weissman

Stephen Weissman was appointed Deputy Director of the FTC’s Bureau of Competition. Weissman replaces Peter Levitas and his appointment is effective as of October 7. Previously, Weissman worked as a partner at Baker Botts. Before joining Baker Botts, Weissman was at Howery LLP and Collier Shannon Rill & Scott. He has represented clients in FTC and DOJ investigations, as well as antitrust and commercial litigation. His representations include Whirlpool’s acquisition of Maytag and Arch’s acquisition of Triton.

Martin Gaynor

Martin Gaynor was appointed Director of the FTC’s Bureau of Economics, as of October 1. Gaynor replaces Pauline Ippolito in the post. He was previously a professor of economics and public policy at Heinz College at Carnegie Mellon University, where he has served as a faculty member since 1995. He is also the Chair of the Health Care Cost Institute and a Research Associate at the National Bureau of Economic Research. He is also a Distinguished Fellow at the Bing Center for Health Economics and a Member of the Cooperation and Competition Panel for NHS-Funded Services. Prior to his appointment, Gaynor provided consulting advice to the FTC and DOJ on health care matters. A critic of rising health care costs, Dr. Gaynor has done extensive research on health care in the United Kingdom and has advised the National Health Service in the UK on competition issues. He earned his doctoral degree from Northwestern, and his research has focused on health care economics, particularly the incentive structure within health care markets.

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