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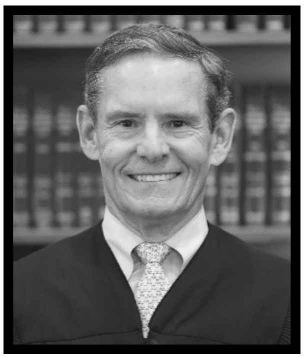
Q&A with Hon. Thomas M. Goethals
By Darrell P. White



[The Hon. Thomas M. Goethals was appointed to the California Court of Appeal, Fourth Appellate District, Division Three, by Governor Jerry Brown, and was confirmed on January 25, 2018. Prior to his appointment to the Court of Appeal, Justice Goethals had served as a judge of the Superior Court in Orange County since 2003. Before joining the bench, Justice Goethals worked for the Orange County District Attorney's office, and also in private practice. During his twenty-five years in practice, Justice Goethals tried nearly 200 jury trials, including both civil and criminal matters. Justice Goethals' responses have been lightly edited for space and style.]

Q: Given the newsworthy cases you presided over at the trial court, I think most folks know about your

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California's New Privacy Law Has Teeth: Civil Penalties, a Private Right of Action for Consumers, Statutory Damages, and Voiding of Consumer Arbitration Agreements
By Travis Brennan and Katie Beaudin

On June 28, 2018, California's legislature passed the California Consumer Privacy Act ("CCPA"), Civil Code § 1798.100, *et seq*., after just one week of debate, and Governor Brown signed the act into law the same day. Despite that rush, the law will not take effect until January 1, 2020. Given the CCPA's broad scope, vague terms, and a generous delegation of rule-making authority to the California Attorney General's Office that has yet to produce any rules, that 18-month delay is not as long as it sounds. While not quite as ambitious as Europe's General Data Protection Regulation ("GDPR") that took effect last spring, the CCPA imposes significant new data protection obligations on a wide swath of businesses. And perhaps most significantly for trial lawyers and their clients, the CCPA creates a new private right of action that may grow in scope before the law takes effect.

Sections 1798.100-1798.125 of the CCPA (broadly defined to include all California residents) establish four basic "privacy" rights to help consumers assert greater control over personal information that businesses collect about them:

- the right to know, through a general privacy policy and with more specifics available upon request,

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The President's Message

By Karla J. Kraft

I am thrilled to serve as our ABTL Orange County chapter's President for 2019, and look forward to an educational, productive, and enjoyable year for our chapter and its members! I am fortunate that our past president, Daniel Sasse, skillfully led ABTL-OC during his tenure and leaves us with a stable and healthy organization. Dan, thank you for your service! As we look forward, I am thankful for the opportunity to work with my colleagues on the Executive Committee: Vice President Todd Friedland, Treasurer Maria Stearns, and Secretary Matt Sonne. I also am thankful for the continued wonderful work by ABTL-OC's Executive Director, Linda Sampson.

A hallmark of ABTL-OC is the active support and involvement of our state and federal judges and appellate justices who provide insight as to how to be better advocates in their courtrooms and better practitioners overall. They give time to our Young Lawyers Division by hosting brown bag lunches and providing practical advice, keep us apprised of changes in the courts, and chat with us over cocktails and dinner at our events. I thank the continuing judicial members of our Board of Governors and Judicial Advisory Council for their dedication to ABTL-OC.

Many of our Board of Governors members previously served in that role, but we have three new attorney board members this year that I would like you all to meet:

Darren Cottriel is a partner at Jones Day where his practice focuses on class action defense work. He leads his firm's California class action defense group and also is the head of litigation in Jones Day's Irvine office.

Khai LeQuang is a partner at Orrick Herrington & Sutcliffe. He is a complex commercial litigator with a specialty in the area of life settlements. Khai also was one of my law school classmates, and I'm thrilled to get to work with him again on our board!

Josh Stowell is a partner at Knobbe Martens Olsen & Bear where his practice is focused on intellectual property litigation. He has a long history with ABTL-OC by association – his wife, Adina Witzling Stowell, served on our board and Josh attended many of our

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A C.C.P. Section 998 Offer Can Make the Difference Between Being the Net Winner or the Net Loser in Your Business Case
By William J. Caplan

The CCP 998 (Section 998 of the California Code of Civil Procedure) process was designed to put pressure on parties to settle. The Supreme Court has recently reaffirmed that its purpose is "'to encourage the settlement of lawsuits prior to trial.' To effectuate this policy, section 998 provides 'a strong financial disincentive to a party—whether it be a plaintiff or a defendant—who fails to achieve a better result than that party could have achieved by accepting his or her opponent's settlement offer.'" *Martinez v. Brownco Construction Co.* (2013) 56 Cal. 4th 1014, 1019 (internal citations omitted). A well-timed 998 offer can make more than a million-dollar difference in the monetary outcome of a business case where attorneys' fees are awarded to the prevailing party under a contract. It can also cause the other side to pay your experts' costs

Careful consideration of whether to make a CCP 998 offer, how to make it, what to include in it, and care in making it in multi-party cases is essential to prudent client representation in business cases. (It can also help your mediator settle your case.) Here are the basics of 998 practice.

1. **<u>What's In The Offer</u>?**

The 998 offer (of judgment, compromise or dismissal) must clearly state the terms of settlement. "This [offer] includes and hereby implements a statutory C.C.P. Section 998 offer by [Plaintiff] Erika Berg to settle this case for $ 225,000. If there is no acceptance of this offer within 30 days, we will, if at trial we receive a greater sum from Dr. Darden, seek the full panoply of 998 awards, including prejudgment interest starting from the date of service and expert costs." *Berg v. Darden* (2004) 120 Cal. App. 4th 721,725. This offer was deemed sufficient by the Court in *Berg*. The 998 must be made in a form where the adverse attorney can accept simply by signing the offer. (See Section 998.) ("I accept this 998 offer, Signed by Attorney for Plaintiff.") A 998 is usually a monetary offer, but it can be a non-monetary. (See *Linthicum v. Butterfield* (2009) 175 Cal. App. 4th 259, where the easement offered by the defendant in its 998 was more favorable to the plaintiff than the easement granted in the judgment, justifying the award of $76,000 in experts costs payable to the defendant.) The

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Conspiring Computers: Algorithmic Price-Setting, Artificial Intelligence, and the Antitrust Laws
By Akhil Sheth

1. Today's Antitrust Landscape.

Taste-makers and trend-setters take note: these days, antitrust is *in*. No longer is it the exclusive domain of economists and competition law attorneys. For seemingly the first time in decades, antitrust has re-entered the mainstream of American society.

Examples abound. On the legal front, the U.S. Supreme Court just issued an opinion that may significantly expand the pool of those who can sue certain online retailers under federal antitrust laws. On the political front, a major presidential candidate just held a campaign rally in front of thousands in which she called for the break-up of several of America's largest technology companies. And on the pop culture front, perhaps the biggest sign that antitrust is hip: more than one A-list comedian has done a lengthy televised set on antitrust, corporate consolidation, and Borkian economic analysis.

This re-entry of the antitrust laws into the public spotlight has been accompanied by some calls to re-examine the fundamental purpose of those laws. On one hand, some believe that we should continue to examine antitrust laws and policy with consumer welfare as the principal goal, as we have generally done for the past few decades. On the other hand, some believe we should return to an earlier approach, by primarily focusing on market structures when setting antitrust policy. This debate has thus far focused on some of the largest companies in the world, but the eventual resolution will impact all of us, both as consumers and as counselors to our clients.

New developments in technology have played an important role in driving this debate. These advances have created competitive dynamics that just didn't exist a few years ago. The so-called Fourth Industrial Revolution, or 4IR, is ushering in autonomous vehicles, 3-D printing, all sorts of internet-connected devices, nanotechnology, and a myriad of other innovations that are blurring the lines that previously divided the digital, technological, and biological. The 4IR has brought with it new markets, new business models, and new methods of collaboration. But it has also brought new antitrust questions—questions that regulators and private lawyers will likely

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Young Lawyers Division Update

This year's Young Lawyers Division committee is made up of Katie Beaudin from Stradling Yocca Carlson & Rauth, Ric Fukushima from Orrick, and Sayuri Espinosa from Rutan & Tucker.

Our first event of the year was a brown bag lunch with Magistrate Judge Karen Scott on April 3, 2019, with a focus on discovery issues faced by young attorneys. Judge Scott provided invaluable advice on drafting and responding to discovery, and explained her philosophy on approaching the discovery process. We had an excellent turnout, and the young lawyers in attendance left with guidance on how to participate in the meet and confer process in a meaningful way and prepare winning motions to compel. We are very grateful to Judge Scott for taking the time to meet with us!

Brown bag lunches are a unique opportunity to learn from members of the Orange County bench in a small setting and receive insight and advice that will help you grow as an attorney and become an even greater asset to your firm. There will be two other brown bag lunch events this year with both federal and state court judges. We are also planning a summer happy hour to introduce summer associates to ABTL's YLD community and highlight the great opportunities afforded to members of YLD.

The YLD Committee is looking forward to a fun and educational year. We hope to see you at our events!

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criminal law expertise. But you actually spent a significant part of your career trying civil cases. Do any stand out?

A: Yes, I began my legal career as a prosecutor with the Orange County District Attorney's office. After 12 years trying everything from misdemeanors to capital cases, I decided to make a change. I spent the next 10+ years working with friends and terrific trial attorneys at what would come to be known as Pohlson, Moorhead and Goethals. We handled a variety of cases from criminal defense to business disputes, with an emphasis on trial work.

A few cases come to mind. The first is a wrongful death case involving a fatal car accident on Highway 71. The governmental agency we sued was difficult to deal with. I remember this case because it turned out to be a complex, unsafe-road-design matter. The 71 was designed to handle 2,000 cars per day. At the time of the accident, traffic was estimated at 50,000 cars per day. I was confident in my skills as a trial lawyer, but I was a bit concerned with getting up to speed on a highly technical area of the law. With the help of my partner Gary Pohlson, I was able to learn the substantive law. After trying the case for six weeks, we were able to settle it to the satisfaction of the client. That experience taught me that a competent trial attorney who is willing to devote the time necessary can take on cases that require learning very technical areas of the law. If I can offer a bit of advice to your members: remember, you can do this.

The second case involved equine serology. That one was fun because most people don't have a clue what equine serology is. The case involved a dispute between horse breeders. After several rounds failed to yield the quality foal expected from the mare and stallion bred, my client smelled a rat. It turned out that my client's former business partner was defrauding him. I knew a good deal about DNA from my time at the DA's office, but it was interesting to learn the equine process. After we settled the civil case, law enforcement brought criminal fraud charges against the defendant. This case was memorable in that I had to become an expert in something I never would have thought of. That's another reason I loved practicing - it was a never-ending learning experience.

The last one had to do with a bounty hunter shootout. My client was a bailbondsman who hired bounty hunters to locate a fugitive. When the bounty hunters kicked in the door on the fugitive's location, he ran out the back. They pursued, fired at this man, and struck him in the leg. The fugitive wound up suing the bailbondsman for negligence and related claims. At trial, the jury did not buy it. We obtained a complete defense verdict.

Q: Do you have a judicial philosophy?

A: In my career, I've been a prosecutor, criminal defense attorney, and represented plaintiffs and defendants in civil matters. I've tried numerous felony and capital cases as prosecutor. I've tried business cases, personal injury cases, probate cases, and many others. With 25 years of advocacy under my belt, I enjoy seeing good lawyers do good work. As a trial court judge, I tried my best to let lawyers try their cases as they saw fit. Sometimes, judges have to intervene, but I never liked it when I was a practitioner so I tried to avoid it on the bench.

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On a related note, and knowing full well it's something we hear all the time, I encourage professionalism, collegiality, and civility in our profession. It's so important. No judge enjoys reining in unruly lawyers.

Q: Following up on that, have you seen a decline in civility over the years? If so, what do you think contributed to the decline? How do we turn it around?

A: My father was a public defender and then a successful lawyer in private practice. Growing up, my parents were social and hosted many events at home. Some of my Dad's best friends were deputy DA's he had cases against. It seemed that folks understood that zealous advocates could be friends outside the courthouse. Attorneys understood that no matter which side you represented, you were working to preserve the integrity of the system above all else. Fast forward to today, I think things have changed a bit.

In fact, civility and professionalism were two reasons why I taught law school classes for so long. I wanted the next generation of lawyers to understand how important their reputation would be in their community, and the value of collegiality in our profession.

Q: Do you have any legal mentors or heroes?

A: Mom and Dad were my first legal mentors. Mom was a teacher who also taught her eight kids. She was very smart and reinforced what my Dad taught us about the important things in life. It all started with my parents.

I have been incredibly fortunate to work with and learn from some of the best attorneys and judges. I've known great judges like Carter and Smith since our days as prosecutors. I was assigned to Judge Jim Perez for my first felony trial assignment. He had a tough reputation at the DA's office at that time. I learned a lot from him, including how to deal with everyone in the courtroom: lawyers, parties, jurors, and staff. Judge Briseno was another one, a legend in the DA's office, and a valued mentor to me when I took the bench.

Since taking my position with the Court of Appeals, every Justice has been so helpful. Each one has a unique approach and insight. I am extremely grateful to each of them.

Q: Has anything surprised you about the cases you're seeing on the Appellate Court?

A: I was a bit surprised to see the number of cases involving attorney's fees disputes. Anecdotally speaking, it seems like we have at least one or two each month scheduled for oral argument. That was a bit surprising to me.

The ABTL thanks Justice Goethals for his time.

♦Darrell P. White is a business trial attorney and partner with Kimura London & White LLP. He also serves as an Assistant Editor of the ABTL Report. Darrell can be reached at dwhite@klw-law.com.

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what personal information a business has collected about them, where it was sourced from, what it is being used for, whether it is being disclosed or sold, and to whom it is being disclosed or sold;

- the right to require a business to delete their personal information, with some exceptions;
- the right to "opt out" of allowing a business to sell their personal information to third parties (or, for consumers who are under 16 years old, the right not to have their personal information sold absent their, or their parent's, opt-in); and
- the right to receive equal service and pricing from a business, even if they exercise their privacy rights under the act

Since enactment, the CCPA has already been amended once to correct a handful of drafting errors and clarify certain terms, and bills for further amendments have already been proposed. This article will outline the major changes that the CCPA is introducing into the world of data privacy, offer some observations about compliance, and describe the new and significant legal exposures for compliance failures.

Who Is Subject To The CCPA?

The CCPA applies to any entity that "does business in the State of California" and satisfies one or more of the following thresholds: (1) has annual gross revenues in excess of $25 million; (2) alone, or in combination, annually buys, receives for the business's commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices; or (3) derives 50 percent or more of its annual revenues from selling consumers' personal information.

The statute does not define what "doing business in the State of California" entails. Foreign entities should

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not assume they are exempt, particularly if they have customers, employees or offices in California. Barring official guidance from the Attorney General, the "doing business" test used by California courts to make state tax determinations offers some guidance. Under that test, factors that indicate an entity is "doing business in California" include physical presence in California, employees in California, or holding licenses to conduct business within California. For example, California Revenue and Taxation Code § 23101, provides that a company is doing business in California if it is "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit" in California.

Therefore, it is important for attorneys advising clients that are foreign entities to consider whether they are indeed doing business in California if they believe they satisfy at least one of the three revenue and activity thresholds described above.

Before launching compliance roadmaps, however, businesses and their counsel should carefully examine section 1798.145(c) through (f), which limits application of the CCPA to healthcare providers, financial institutions and other types of businesses that are already covered by federal sector-specific privacy laws. For example, a financial institution covered by the Gramm-Leach-Bliley Act may conclude that it is exempt from the CCPA entirely under subsection (e), depending on the nature and scope of its operations.

What Information Does The CCPA Cover?

The CCPA defines "personal information" much more broadly than previous data privacy statutes to include "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." The CCPA identifies numerous examples such as online identifiers, Internet Protocol addresses, email addresses, browsing history, search history, geolocation data, and information regarding a consumer's interaction with a website or online application or advertisement. Most controversially, the CCPA's definition also includes any "inferences drawn" from any personal information that is used "to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes."

A recently introduced bill, Assembly Bill 1130, would expand the definition of "personal information" under California's data breach notification law, Civ. Code § 1798.140, to include "other government-issued identification numbers[s]" and "[u]nique biometric data generated from measurements or technical analysis of human body characteristics, such as a fingerprint, retina, or iris image, or other unique physical representation or digital representation of biometric data." Government-issued identification numbers would include passport numbers. This revision anticipates a time in the future in which the use and storage of biometric data is more prevalent than it is today.

What Does the CCPA Require Of Covered Businesses?

The CCPA requires business to adopt new policies and procedures with respect to the consumer rights that it establishes. It provides for the Attorney General to create guidance for establishing these rules and procedures that companies should evaluate and use as a guide for creating their own procedures.

Covered businesses should have procedures for the following:

1) Facilitating and governing the submission of a request by a consumer to opt out of the sale of personal information
2) Governing a consumer's request to delete personal information
3) Preparing and responding to consumer requests for information about personal data
4) Governing business compliance with a consumer's opt out request
5) Establishing rules, procedures, and any exceptions necessary to ensure that the notices and information that businesses are required to provide pursuant to this title are provided in a manner that may be easily understood by the average consumer, are accessible to consumers with disabilities, and are available in the language primarily used to interact with the consumer
6) Ensure that opting out or requesting information does not discriminate against the consumer
7) Establishing rules and guidelines regarding financial incentive offerings, including payments to consumers as compensation, for the collection of personal information, the sale of personal information, or the deletion of personal information

As a practical matter, meaningful implementation of these procedures requires that a business first develop a mature "data map" to understand exactly what personal information it has about consumers, why it has that information, and where that information is stored. Therefore, data mapping is a crucial first step to ensure compliance while controlling related costs and disruption to business operations.

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What Is The California Attorney General's Role?

The CCPA authorizes the Attorney General to provide compliance opinions to businesses and third parties, and a business may request such an opinion. However, another recently proposed amendment, Senate Bill 561, contemplates replacing the Attorney General's duty to provide compliance opinions to businesses and third parties with the authority to publish general guidance on how to comply with the CCPA. Attorney General Becerra, who supports the proposed amendment, was quoted as saying that his office's concern is not "giv [ing] out free legal advice" to businesses.

The CCPA requires the Attorney General to solicit broad public participation and adopt regulations to further the purposes of the law. The Attorney General must complete that process "on or before July 1, 2020." This means that the CCPA may take effect on January 1, 2020 but lack certain regulations critical to implementation for up to six months following that date. For example, the regulations must include rules "to govern a business's determination that a request for information received by a consumer is a verifiable consumer request." Given that a "verified consumer request" is necessary to trigger many of the business's obligations under the CCPA's privacy provisions, one of the biggest uncertainties facing covered businesses is how to make a "verified consumer request" determination with respect to any particular request before receiving official guidance form the Attorney General. The Attorney General's Office concluded the comment period and preliminary public forums on March 8, 2019 and intends to publish its Notice of Proposed Regulatory Action by fall 2019, so covered businesses should anticipate material changes to the compliance roadmap potentially just a few months before the CCPA takes effect, and possibly after the effective date if the Attorney General's office does not meet its self-imposed deadline.

Finally, the Attorney General may institute enforcement actions against businesses that violate the CCPA. However, a business will have an opportunity to cure before an action is commenced. A business shall be in violation if it fails to cure any alleged violation within 30 days after being notified of alleged noncompliance. If the business is found to have intentionally violated the CCPA, it may be liable for a civil penalty of up to seven thousand five hundred dollars ($7,500) for each violation.

What Does The Private Right Of Action Cover, And How Might It Expand?

Section 1798.150 sets forth a private right of action for consumers whose personal information is the subject of a data breach, which means an incident in which a consumer's "nonencrypted or nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information."

This section further provides for statutory damages of not less than one hundred dollars ($100) and not greater than seven hundred and fifty ($750) per consumer per incident or actual damages, whichever is greater. The availability of statutory damages means that plaintiffs may sue, individually or as a class, and recover up to $750 per person per incident without having to prove they were actually harmed by the data breach.

In assessing the amount of statutory damages, courts are to consider: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth. It remains to be seen how courts will weigh these factors when determining the amount of statutory damages. For example, will the defendant's assets weigh more heavily if the number of violations is higher?

Consumers must meet several requirements before bringing suit. First, the consumer must provide the business with 30 days' written notice identifying the specific provisions of the consumer alleges have been or are being violated. This allows the business an opportunity to cure, but there are likely to be violations that are not amenable to cure. For example, a cure may not be feasible once third-party exfiltration of nonencrypted personal information has been verified. However, if the business cures and provides the consumer a written statement that the violations have been cured and no further violations shall occur, the consumer cannot bring suit. If the business later breaches the express written statement, the law provides a private right of action to enforce the written statement, which includes statutory damages.

The scope of the private right of action will expand dramatically if SB 561 passes. First, it would allow for private enforcement under the CCPA immediately, without prior written notice to the business. This would eliminate a business's ability to cure a violation prior being sued. Second, the amendment would expand the private right of action to cover violations of the CCPA's privacy provisions, not just the data breach provision in section 1798.150. For example, a consumer would be able to sue for a business's failure to respond to "verified con-

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sumer requests," or a business's failure to treat consumers who have exercised their privacy rights under the CCPA equally with consumers who have not exercised those rights. It is unclear whether this bill will pass before the CCPA becomes operative on January 1, 2020, but covered businesses and their counsel should monitor its status to understand the full scope of potential legal exposure.

Notably, subsection (c) of Section 1798.150 states "Nothing in this act shall be interpreted to serve as the basis for a private right of action under any other law." Based on this amendment, it appears to preclude having a violation of the CCPA serve as a basis for a claim under California's Unfair Competition Law, California Business and Professions Code §§ 17200 *et seq.*, which permits a private right of action for claims based on unlawful, unfair, or fraudulent business acts or practices – or under "any other law." However, an aggressive plaintiffs' bar may take the position that because the "nothing in this title shall be interpreted to serve as the basis for a private right of action under any other law" clause is found in the data breach section of the law, it should not be interpreted as applying to UCL actions premised upon violations of the privacy sections of the law. Therefore, covered businesses should be prepared to defend actions under both the CCPA and UCL early on before courts apply the language in the statute.

How Does The CCPA Impact Consumer Agreements To Arbitrate?

Section 1798.192 of the CCPA provides, "Any provision of a contract or agreement of any kind that purports to waive or limit in any way a consumer's rights under this title, including, but not limited to, any right to a remedy or means of enforcement, shall be deemed contrary to public policy and shall be void and unenforceable."

The provision appears to prohibit a business' use of consumer arbitration clauses, but enforcement efforts are likely to trigger preemption challenges under the Federal Arbitration Act. Businesses would be wise to include delegation clauses to minimize the opportunity for judges hostile to consumer arbitration to void arbitration clauses outright. *See, e.g.*, *Henry Schein v. Archer & White Sales*, 139 S. Ct. 524 (2019).

Conclusion

Several months remain before the CCPA takes effect, and there are pending bills that might change the language of the statute before it becomes operative. However, all companies doing business in California who determine that they are covered by the law should begin to prepare policies and procedures for dealing with new and expansive consumer rights and potential litigation over the handling of personal information.

♦ *Travis P. Brennan is a shareholder in the Newport Beach office of Stradling Yocca Carlson & Rauth, where his practice focuses on business litigation, data privacy counseling and security incident response.*

♦ *Katie Beaudin is an associate in the Newport Beach office of Stradling Yocca Carlson & Rauth. Her practice focuses on commercial litigation including business torts, unfair competition, intellectual property, and shareholder disputes, as well as data privacy and employment counseling.*

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events.

We have kicked off 2019 with a series of excellent programs. Our first, on January 16, was presented by Orange County Superior Court Judges James Di Cesare, John Gastelum, and Peter Wilson and U.S. District Court Judge Josephine Staton, and moderated by ABTL-OC past president Mark Erickson. The judges provided insight into their expectations for trial counsel in "Ready for Trial, Your Honor: What Judges Expect From Trial Attorneys Prior to Calling Their First Witness." And on March 13, our members attended "Business Crimes: How the Government Investigates and Remediates Fraud and Illegal Activity Affecting the Business Community" presented by the new Orange County District Attorney Todd Spitzer, Deputy District Attorneys Kelly Ernby and Nick Miller, and Assistant United States Attorney Vib Mittal. And as usual, a highlight of our dinner program calendar is the Robert E. Palmer Wine Tasting Dinner and the opportunity to donate to the Public Law Center.

You also should save the date for ABTL's 46th Annual Seminar on October 3-6, 2019, at the La Quinta Resort and Spa. California's newest Supreme Court Associate Justice Joshua Groban will deliver the keynote speech, and the seminar will focus on "The Transforming Business of Business Litigation."

There are many other events to look forward to on ABTL-OC's 2019 calendar, including our summer member mixer, the days on which we will be sending teams to volunteer with Habitat for Humanity, our young lawyer members' socials and judicial brown bags, and the holiday giving opportunity at our November member dinner. I look forward to seeing each of you at these and other happenings throughout the year!

♦ *Karla Kraft is a partner at Stradling, Yocca, Carlson & Rauth.*

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offer is usually sent in the form of a pleading. However, a letter signed by the party making the offer will suffice. *Berg v. Darden* (2004) 120 Cal. App. 4th 721.

2. When Can It Be Made?

A 998 offer may be made by either a plaintiff or a defendant at any time until the tenth day before trial. The offer is open for 30 days or until the commencement of trial, whichever is sooner. A 998 can be made as early as with the service of the complaint or answer, but only where the pre-litigation exchange of information makes such an early 998 offer reasonable. If the party receiving the offer has received enough information prior to and with the 998 to make a settlement decision, an early 998 might be enforced. This issue was addressed by the court in *Barba v. Perez,* (2008) 166 Cal. App. 4th 444, 450-45:

> Perez's reliance on *Elrod* (*Elrod v. Oregon Cummins Diesel, Inc.*, 195 Cal. App. 3d 692, (1987)) is misplaced. In *Elrod*, we upheld the trial court's determination that a defendant's low-ball settlement offer to a plaintiff was not reasonable, where the defendant possessed crucial information limiting its exposure that was unknown to the plaintiff. (*Elrod, supra*, 195 Cal.App.3d at pp. 700–702.) Here, Barba was not playing 'hide the ball.' The parties had a close, semi -familial relationship, and there was free flow of information between them. Barba waited eight months after the accident before filing the lawsuit. He wrote a letter before the suit was filed, informing defendant's agent that his medical bills were about $70,000 and requesting that they be paid. The letter fell on deaf ears. Finally, Barba's section 998 offer was served along with a complaint listing medical expenses in excess of $ 70,000 and seeking damages for lost wages.

The Court in *Barba* determined there was sufficient information provided by defendant to make the early 998 offer "reasonable" and enforceable. [See discussion below regarding other factors in the "reasonableness" determination.]

3. Can You Make Multiple Offers Of Compromise?

Yes. The Supreme Court in *Martinez v. Brownco* (2013) 56 Cal. 4th 1014 held that a later offer made on the eve of trial did not extinguish a prior, less generous offer, made months earlier. The court stated:

"Where, as here, a plaintiff serves two statutory offers to compromise, and the defendant fails to obtain a judgment more favorable than either offer, recoverability of expert fees incurred from the date of the first offer is consistent with section 998's language and best promotes the statutory purpose to encourage the settlement of lawsuits before trial." Accordingly, there is no penalty for making multiple offers, and the most favorable offer given by the offeror will be enforced, so long as it is reasonable." *Id*. at p.1027.

4. What Is The Impact Of A 998 Offer?

Effect of Plaintiff's 998 offer: If a plaintiff's 998 offer is refused, and the defendant fails to obtain a more favorable judgment, the court has discretion to award (in addition to the costs that plaintiff will already be eligible to recover as "prevailing party") a "reasonable sum" to cover plaintiff's incurred expenses for expert witnesses. In addition, Civil Code Section 3291 provides that prejudgment interest at 10 percent runs from the date of plaintiff's first valid 998 offer that is more favorable than the amount of the trial judgment.

Effect of Defendant's 998 offer: Where the offer made by a defendant is not accepted, and the defendant subsequently obtains a more favorable judgment than the 998 offer, the plaintiff is not entitled to any post-offer costs and must pay the defendant's costs from the date of offer, which may in the discretion of the court, include pre and post-offer expert costs. CCP 998. The award of expert fees can include fees incurred "in preparation for trial." *Regency Outdoor Adver., Inc. v. City of Los Angeles* (1996) 39 Cal. 4th 507, 532. **Where a contract or a statute provides for attorneys' fees to the prevailing party, the costs shifting also includes attorneys' fees.**

The *Scott v. Blount* Example: In *Scott v. Blount* (1999) 20 Cal. 4th 1103, the plaintiff, subcontractor (Scott) sued a general contractor (Blount) for breach of contract. The contract included an attorneys' fees clause. Before trial, defendant Blount made a Section 998 offer of $900,000 to settle the case. Scott did not accept the offer and made its own 998 offer, demanding $1.5 million. (Both offers were expressly inclusive of attorneys' fees and court costs.) The trial court awarded plaintiff Scott $442,054 in damages. The court then computed the plaintiff's pre-offer attorneys' fees and costs, which it found totaled $226,812. The award plus pre-offer costs totaled $668,866. Therefore, the defendant's 998 offer ($900,000) was more favorable than the plaintiff's award plus pre-offer costs and fees ($668,866). As a result, not only was the plaintiff denied its post-offer attorneys' fees, but the defendant was awarded its post-offer attorneys' fees of $568,925, plus its court costs of $65.058 and $247.652 in expert witness fees.

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The *Scott* 998 Math:

+ $442,054 damage award for plaintiff.
+ $226,812 pre-offer fees and costs (not including experts.)
+<u>$668,866</u> Plaintiff's subtotal **LESS**

- $568,925 Defendant's post-offer fees.
- $65,058 Defendant's post-offer non-expert costs
- $<u>247,652</u> Defendant's expert's costs.

<u>$881,635</u> Defendant's fees and costs recovery

$212,769 Total net award to Defendant Blount.

But for the successful Section 998 offer made by Defendant Blount, not only would Defendant ***not*** have a $881,000 offset against Plaintiff's Scott's award, but Plaintiff would have been awarded its post-offer fees and costs, presumably an additional $634,000 (assuming plaintiff's fees and court costs were roughly the same as defendant's.) So, had the 998 offer not been made, Plaintiff would have recovered $442,054 plus all its attorneys' fees and costs for a total award of $1,076,000. Instead, Plaintiff ended up owing Defendant $212,769, ***for a swing of $1,288,769***. It would certainly take the sting out of a trial loss to point out that you saved your client $1.3 million because of your 998, while handing the client a check for $213,000.

5. <u>Traps for the Unwary</u>

No Extraneous Releases or Extra Clauses. Your 998 must only provide that the other party is released from the claims made in the lawsuit and no claims beyond that. You cannot add a confidentiality clause, a waiver of bad faith claims against your client's insurer, or include an indemnity clause for claims that third parties may make against your client, because such claims are additional to what can be awarded at trial and cannot be valued and compared to the eventual judgment. See *Barella v. Exchange Bank* (2000) 84 Cal. App. 4th 793 and *Valentino v. Elliott Save-On Gas Inc*. (1989) 201 Cal. App. 3rd 692.

The Offer Must Be Reasonable. In *Pineda v. Los Angeles Turf Club, Inc*., (1980) 112 Cal. App. 3d 53, 63, a defendant's 998 for $2500 was held unreasonable where the plaintiff lost on liability but had a $10,000,000 wrongful death claim. Even though there was a defense verdict, the $2500 offer was considered unreasonably low. Similarly, in *Wear v. Calderon* (1981) 121 Cal. App. 3d 818, the Court affirmed refusal to enforce the consequences of a 998 for a $1.00 offer of compromise. "[T]he pretrial offer of settlement required under section 998 must be realistically reasonable under the circumstances of the particular case. Normally, therefore, a token or nominal offer will not satisfy this good faith requirement . . . ." *Wear*, 121 Cal. App. 3d. at 821.

Recently, in *Licudine v. Cedars-Sinai Medical Center*, the court summarized the major considerations in determining whether a 998 offer was reasonable. When viewed in the context of all the facts, the courts are to consider:

> In assessing whether the 998 offeror knew that the offeree had sufficient information to evaluate the offer (the second consideration), the offeree needs information bearing on the issue of liability as well as on the amount of damages because these are the issues upon which a verdict would rest and because the 998 offer, if accepted, would be in lieu of that verdict.
>
> First, how far into the litigation was the 998 offer made? Although section 998 fixes no "minimum period that must elapse following commencement of suit for service of a valid 998 offer", a litigant receiving a 998 offer at the time a lawsuit is filed or soon thereafter is, as a general matter, less likely to have sufficient information upon which to evaluate that offer.
>
> Second, what information bearing on the reasonableness of the 998 offer was available to the offeree prior to the offer's expiration? Information may be obtained (1) by virtue of prior litigation between the parties; (2) through prelitigation exchanges between the parties; (3) through post-complaint discovery in the case; or (4) by virtue of a preexisting relationship between the parties that yields a "free flow of information."
>
> Third, did the party receiving the 998 offer alert the offeror that it lacked sufficient information to evaluate the offer and, if so, how did the offeror respond? An offeree may alert the offeror by (1) requesting discovery, either formally or informally; (2) asking for an extension of the 998 offer's deadline; or (3) otherwise objecting to the offer. If, after hearing the offeree's concerns, the offeror's response is less than forthcoming, "such obstinacy" is "potent evidence that [the] offer was neither reasonable nor made in good faith."

Licudine v. Cedars-Sinai Medical Center (2019) 30 Cal. App. 5th 918, 925-926 (internal citations omitted).

This *Licudine* case adds some pressure on the party

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receiving a 998 to ask for the information it lacks in order to evaluate the 998.

Make Sure Your 998 Expressly States Whether or Not It Includes Attorneys' Fees and Court Costs. If you make a 998 that is silent on fees and costs, if accepted by a plaintiff, the plaintiff can file the 998, enter judgment and then make a motion to recover attorneys' fees and costs. ("[W]hen a section 998 offer is silent as to costs and fees, contractual or statutory attorney fees are recoverable in addition to the amount of the accepted offer"**.** *Calvo, Fisher & Jacob LLP v. Lujan* (2015) 234 Cal. App. 4th 608, 629. *See also*, *Timed Out LLC v. 13359 Corp.* (2018) 21 Cal. App. 5th 933.

Conversely, in *Martinez v. Eatlite One, Inc*. (2018) 27 Cal. App. 5th 1181, 1185-1186, the plaintiff had won an award of $11,490.00 in damages, and the trial court awarded plaintiff $60,000 in pre-offer and post offer attorneys fees. The Fourth District Court of Appeals reversed the trial court's costs determination under 998 which had failed to include pre-offer attorneys' fees in its calculation of defendant's 998 offer. *The offer had been silent on statutory attorneys' fees.* The addition of pre-offer attorneys' fees to the defendant's stated $12,001.00 offer made the offer more favorable to than the trial result obtained by the plaintiff. The case was reversed and remanded to the trial court, requiring the lower court to award "preoffer costs and attorney fees to plaintiff, postoffer costs to defendant, and any expert witness fees the court determines to award in its discretion to defendant." Id. at pp. 1185-1186.

Be Careful If You Make Offers to Multiple Plaintiffs. An offer to multiple plaintiffs in a single 998 will be invalid unless 1) the offer is apportioned among the plaintiffs, and 2) the offer is not conditioned on acceptance by all. A 998 "made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them. A single, lump sum offer to multiple plaintiffs which requires them to agree to apportionment among themselves is not valid." *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal. App. 4th 102, 112. Best practice is to make separate unconditional 998 offers to each plaintiff.

A Plaintiff's Unapportioned Offer to Multiple Defendants Is Also Problematic Unless the Defendants Have Joint and Several Liability for All Damages, Including Non-Economic Loss. *Burch v. Children's Hospital of Orange County Thrift Stores, Inc*. (2003) 109 Cal. App. 4th 537 is a Fourth District opinion that summarizes the multiple party 998 rules. That case involved a 998 made by plaintiff to all defendants without apportionment. At the time the 998 was given, the defendants had not stipulated to joint and several liability (although such a stipulation was later made.) The trial result was greater than the $50 million 998 offer made by the plaintiff, and the plaintiff moved to collect $68,000 in expert witness fees and $4,000,000 in interest (over and above the gigantic award.) The court relied on Rutter Group authority to state the rules for offers to multiple defendants. "'In multidefendant cases, the rule barring comparative indemnity claims against a 'good faith' settling defendant [citation] and the Prop[osition] 51 elimination of joint and several liability for noneconomic damages [citations] play a significant role in the determination of each defendant's ultimate liability. Consequently, a plaintiff who makes a §998 offer to joint defendants having *potentially varying liability* must specify the amount plaintiff seeks from *each defendant*. Otherwise, there is no way to determine whether a subsequent judgment against a particular nonsettling defendant is 'more favorable' than the offer. Thus, a lump-sum settlement offer made to several defendants whose liability may be apportioned (i.e., *not* jointly liable) must state [plaintiff's] position as to each defendant's share or percentage of the settlement demand.' *Id.* at p. 547 (internal citations omitted) (emphasis in original).

The court in *Burch* held that the 998 served in that case was invalid, because it did not apportion the 998 among the parties defendant where, at the time of the offer, the defendants had differing potential exposure to non-economic damages.

Conclusion

Making a 998 offer can have such a dramatic impact on the outcome of your case, that a prudent attorney must consider whether to make such an offer in almost every case. Making the offer requires careful analysis of your case, an evaluation of what the adverse party might do in response to the offer, and consideration of what a court might determine is the amount of pre-offer fees and costs to which the opponent may be entitled as of the date of the offer. There is also a minefield of nuances that require careful analysis in making the offer. Ultimately, it is worthwhile to sift through the rules and make a realistic 998 offer. Sometimes, the best time to make one is a few weeks before a mediation session (allowing the mediator to discuss the consequences of the 998 process at the mediation) and then again after you have made your final offer at the end of a mediation session (an offer that has included the client in the process and is your best estimate of value or exposure). The benefits of such offers could be worth a million.

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need to address and that courts will likely eventually have to answer.

One of these new questions is whether and how society should and will control the use of software by companies to adjust their prices in response to consumers' or competitors' actions, a practice sometimes referred to as algorithmic price-setting.

2. Algorithmic Price-Setting Generally.

First, some background. In this context, an algorithm essentially refers to a mathematical formula that determines the price of a particular product or service based on specified variables—for example, time of year or geographic location. Using these variables, an algorithm can set price for all of a company's customers, or in more sophisticated scenarios, a subset of those customers. While the data put into the algorithm to generate pricing could in theory be manually entered, it is typically entered through an automated, computer-based process.

Algorithmic pricing itself is not new—the practice has existed for decades. And relatedly, the question of how to address antitrust issues raised by algorithm-generated pricing has some history as well. For example, nearly three decades ago the U.S. Department of Justice sued several airlines under the antitrust laws in *United States v. Airline Tariff Publishing Co.*, No. 92-2854 (D.D.C. 1992). The DOJ pursed the airlines for allegedly using a shared online reservation system to improperly provide pricing information to each other.

What is new, however, is the degrees of use and sophistication of algorithmic pricing. Today, more and more companies can afford to implement systems that alter price in response to a myriad of granular variables, such as customer neighborhood, internet browsing history, time of day, current demand in the market, and—perhaps most relevantly here—competitor pricing. These days, it is easier than ever for companies to monitor consumer and competitor activity and adjust pricing accordingly, often in real-time, and often out of the immediate sight of both consumers and regulators. It thus is important that companies understand what conduct is appropriate in this context.

3. The Antitrust Implications of Algorithmic Price Setting.

3.1 The Unilateral Use of Algorithmic Pricing.

The unilateral, uncoordinated use of algorithmic pricing by a company typically does not itself create antitrust concerns. While these days the rate at which data can be cheaply and rapidly collected, compiled, and analyzed is higher than ever before, a company likely will not face antitrust liability for more efficiently and effectively doing the same things it could have done in the past. This is true even where use of algorithmic pricing leads to higher prices or price uniformity among competitors. Courts have historically not imposed antitrust liability for so-called "conscious parallelism"—the phenomenon by where one competitor's independent pricing decisions lead to other competitors adopting similar pricing. Conduct generally only becomes an issue when it crosses from conscious parallelism into concerted action, as discussed below.

One caveat, however. Just as in the past, the unilateral use of algorithmic pricing by a company could still be used as evidence of the existence and impact of other conduct that is problematic under antitrust laws such as Section 2 of the Sherman Act, which makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize." 15 U.S.C. § 2. So, for example, if a company is using software to ensure that it is consistently selling goods below cost and engaging in predatory pricing, that practice could draw antitrust scrutiny even though the use of the software is not inherently problematic.

3.2 The Use of Algorithms to Directly Set Prices Among Competitors.

The most clear-cut cause for concern is the use of algorithmic price-setting to directly conspire with competitors about pricing. Section 1 of the Sherman Act bars "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Courts have interpreted this language to bar virtually any naked agreement among competitors to fix prices, regardless of the reasonableness of the agreement or its impact on the marketplace or consumers, and price-fixing by competitors can lead to both civil and criminal prosecution. Thus far, there is little reason to think that algorithmic price-setting would be an exception to this general rule.

This principle was highlighted in *United States v. Topkins*, No. 15-cr-00419-WHO (N.D. Cal. 2015), a 2015 criminal case involving the sale of posters on Amazon Marketplace. In its first algorithmic price-setting prosecution, the Department of Justice indicted several individuals and corporate entities who discussed poster pricing with other poster sellers. The defendants agreed to set, maintain, and stabilize prices for posters on Amazon Marketplace. To implement this agreement, the defendants designed a pricing algorithm that monitored and set their prices. After being extradited from Spain (where he had been arrested while on honeymoon), the

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final defendant was sentenced earlier this year to six months in prison, with credit for time he had already served. The corporate defendant had been previously fined $50,000. These relatively light sentences—the maximum sentence for an individual was 10 years in prison and a fine of $1 million and the maximum criminal fine for a corporation was $100 million—may have been a function of the small volume of commerce involved here.

Another 2015 case, *Meyer v. Kalanick*, No. 15-9796-JSR (S.D.N.Y. 2015), shows how algorithmic price-setting can also arise in the civil context. An Uber user filed a putative class action against the ridesharing company's then-CEO, alleging that the app itself was actually an illegal algorithmic price-setting tool. The plaintiff's argument was that the Uber pricing algorithm allowed Uber drivers to fix a set, uniform pricing system for Uber rides, instead of competing with each other. This argument raises interesting questions about so-called two-sided markets—a term that refers to the online platforms we use every day that facilitate interaction between suppliers and customers—as well as questions about the ability of Uber to conspire with its own drivers under Section 1 of the Sherman Act. But these questions won't be answered publicly in this case: after a little over two years of litigation, the case was ordered into private arbitration in March 2018.

3.3 The Use of Algorithms to Foster Non-Pricing Cooperation Among Competitors.

There are grayer areas when it comes to algorithmic price-setting, however. Unlike naked agreements between competitors to fix prices—which are generally per se illegal—agreements between competitors to affect price in other ways are often analyzed under a so-called "rule of reason" standard that is not black-and-white, but that instead evaluates the pro- and anti-competitive effects of the agreement. Thus far, there has been little reason to think antitrust laws will operate differently from how they usually operate in relation to such agreements.

4. The Regulatory Response Thus Far.

Domestic antitrust regulators—namely, the Federal Trade Commission and Department of Justice—are aware of algorithmic price-setting. But so far, they have not seen a need to change their general approach to price-fixing. Broadly speaking, regulators have said that while algorithms that set price are a tool that can facilitate illegal collusion more easily than in the past, the use of price-setting algorithms is not inherently improper. In 2017, then-FTC Chairperson Maureen Ohlhausen expressed a seemingly common view among regulators:

> [S]ome of the concerns about algorithms are a bit alarmist. From an antitrust perspective, the expanding use of algorithms raises familiar issues that are well within the existing canon. An algorithm is a tool, and like any other tool, it can be put to either useful purposes or nefarious ends. There is nothing inherently wrong with using mathematics and computers to engage more effectively in commercial activity, regardless of whether that activity is participation in the financial markets or the selling of goods and services.

Maureen K. Ohlhausen, Acting Chairperson, U.S. Federal Trade Commission, *Should We Fear the Things That Go Beep in the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing* 2–3 (May 23, 2017), https://www.ftc.gov/system/files/documents/public_statements/1220893/ohlhausen_-_concurrences_5-23-17.pdf. Thus, while new technologies have required novel applications of antitrust principles, those principles themselves have not changed in the face of algorithmic pricing—yet. So, in this context, unless there are least two people behind an algorithm that are conspiring to engage in traditionally improper anticompetitive activity (such as fixing prices) there is unlikely to be any antitrust liability for use of the algorithm.

5. The Rise of A.I.

Developments in artificial intelligence may change all of this. We are reaching an age where A.I. may be able to write and administer algorithmic pricing software that could fix prices without human intervention.

What would such A.I. look like? Two law professors, Maurice Stucke (a former DOJ antitrust enforcer) and Ariel Ezrachi, have imagined four different models where algorithmic pricing could promote collusion.

The first two models are familiar. The Amazon Marketplace example described above fits what Ezrachi and Stucke describe as the "messenger" model, where humans use a pricing algorithm to assist with their human-initiated collusion. And the Uber argument described above is an example of what Ezrachi and Stucke call the "hub and spoke" model, where a pricing algorithm coordinates market prices charged by numerous sellers based on directions provided by its human programmer. At least arguably, existing antitrust laws are able to address these scenarios, although there are variations that will require

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knowledgeable and creative lawyering (one example: competitors knowingly buying the same third-party price-setting algorithm that will then coordinate their prices).

The third and fourth models are less familiar and more futuristic. In the "predictable agent" model, each competitor implements its own algorithmic pricing software, which then continually monitors competitor pricing and adjusts its own pricing accordingly. And the "digital eye" model involves real artificial intelligence—A.I. that processes high volumes of data, engages in autonomous decision-making, and learns from its experiences. Ezrachi and Stucke describe these last two examples as "troubling." Among other things, they note that such collusion may be more difficult to detect and control—"[u]nlike humans, computers do not fear detection, possible financial penalties, or incarceration, and they do not respond in anger." Ariel Ezrachi & Maurice E. Stucke, *How Pricing Bots Could Form Cartels and Make Things More Expensive*, Harv. Bus. Rev. (Oct. 27, 2016); *see also* Ariel Ezrachi & Maurice E. Stucke, *Virtual Competition: The Promise And Perils Of The Algorithm-Driven Economy* (Harvard Univ. Press 2016).

Up until now, U.S. regulators have largely been dismissive of the potential impact of A.I., consistent with their concerns about algorithmic pricing generally. For example, in a paper jointly submitted by the DOJ and FTC in 2017, the agencies noted that "[a]lthough computers equipped with artificial intelligence (AI) or machine learning could in theory make decisions that were not dictated or allowed for in the programming, these scenarios seem too speculative to consider at this time." Algorithms and Collusion – Note by the United States, *Organisation for Economic Co-development* 2 n.2 (May 26, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/algorithms.pdf.

But recent research shows that there may be empirical evidence that could fuel future regulatory concern. Consistent with Ezrachi and Stucke's digital eye model, in one recent Italian study researchers found that A.I. pricing agents created in an artificial environment learned to engage in collusive pricing behavior. While the simulation only partially reached the level of high pricing one would anticipate in a collusive market, the researchers noted several concerns about the A.I. pricing agents: namely, "they learn[ed] to collude purely by trial and error, with no prior knowledge of the environment in which they operate[d], without communicating with one another, and without being specifically designed or instructed to collude." Emilio Calvano et al., *Artificial Intelligence, Algorithmic Pricing, and Collusion* (Feb. 3, 2019), https://voxeu.org/article/artificial-intelligence-algorithmic-pricing-and-collusion. What may be most troubling to regulators in the future was that, as anticipated by Ezrachi and Stucke, the A.I. pricing agents left little evidence of their collusion.

So can machines conspire with each other to violate antitrust laws? Will they write algorithmic pricing software to do so? And if so, who should be held liable? These are questions that have yet to be addressed by regulators and private lawyers, and have yet to be answered by courts and legislators. In this brave new world, new antitrust tools will likely be created where the old ones fail. As more and more companies engage in algorithmic price-setting and as A.I. advances, lawyers will need to advise their clients on these new developments.

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