

# **Trends in Litigation against Corporations and Directors: *Predictions and Perspectives***

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# Antitrust

# A Changing Landscape: The “Antitrust” Tech Storm

- Technology companies are squarely in the sights of political actors at the state, federal, and international levels who have determined to use antitrust and other legal tools to redress certain wide-ranging social and political issues
- The Issues:
  - Platform access
  - Role of online platforms in the lives of consumers
  - Data stewardship
  - Privacy
- The breathtaking scope of this “antitrust” tech storm is still unfolding

# A Changing Landscape: The “Antitrust” Tech Storm *(cont’d)*

(cont’d)

- State Attorneys General
- Federal authorities
- Scrutiny abroad: EU, Germany, France, Australia, others
- Nothing new — but if past is prologue....

# A Changing Landscape: New Focus Needed

- This heightened scrutiny creates significant legal and business risk (significantly more so than ordinary tort or business litigation)
- **4 areas of particular challenge compared to ordinary litigation:**
  - **Pre-litigation investigations**
  - **Types of litigation**
  - **Settlement issues**
  - **Corporate governance**
- There are certain critical considerations to effectively prepare for and manage such a multifaceted “antitrust” crisis in these four contexts

# Investigation Considerations

- Governing rules & regulations
- Engagement with authorities
- Identifying the right team from the outset
- Protecting commercially sensitive materials and privileged/work product information
- Outsourcing to plaintiffs' bar?

# Litigation Considerations

- Forum
- Capacity in which political actors are suing affects damages, legal defect defenses
- Integrating arguments across geographic markets
- Follow-on private litigation
- Statutes of limitation

# Settlement Considerations

- Settlements in these kind of situations, of course, can be expensive.
- At the same time, they can also present opportunities not just to resolve specific lawsuits, but to manage broader risks.
- Structuring remedies & release
- Because political actors have policy concerns in addition to economic ones, a settlement can present an opportunity for unconventional financial provisions (and conduct restrictions tailored to locales)

# Corporate Governance Considerations

- Boards and management face increased risk and are under increased pressure to oversee operations that may impact these societal issues like privacy and control over data, and to take that impact into account in business decisions.
- Overview of areas for boards to manage this pressure:
  - Specific lines of engagement with management
  - Incorporating “stakeholder” decision-making
  - Director education
  - ESG

# Climate Change

# COVID-19

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**William Savitt is the co-chair of the Litigation Department of Wachtell, Lipton, Rosen & Katz. His practice focuses on representing corporations and directors in litigation involving mergers and acquisitions, proxy contests, corporate governance disputes, class actions involving allegations of breach of fiduciary duty and regulatory enforcement actions relating to corporate transactions. Mr. Savitt writes and speaks extensively on corporate and securities law topics and is an adjunct law professor at Columbia Law School in the field of transactional litigation.**

Mr. Savitt has played a leading role in high-stakes corporate governance and merger-and-acquisitions litigation in the Delaware Court of Chancery and in courts around the country. Among recent examples, Mr. Savitt successfully litigated the landmark case of *Corwin v. KKR Financial* in the Court of Chancery and the Delaware Supreme Court; defended Allergan in response to a hostile bid from Pershing Square and Valeant; defended Sothebys' shareholder rights plan against an activist investor attack; was lead trial counsel in the successful and unprecedented litigation effort of Vulcan Materials Company to obtain a court order enjoining an attempted hostile takeover by an industry rival; has defended corporate bylaw and charter provisions in courts around the country; has tried numerous M&A cases to successful verdict; and was lead attorney in the United States and Canada in Lions Gate Entertainment's successful multi-national defense of Carl Icahn's takeover attempt. Mr. Savitt is a recognized authority on multi-jurisdictional corporate litigation and has defended numerous corporate merger and class action fiduciary challenges in Delaware, New York, California and elsewhere, including recent successful defenses of the New York Stock Exchange's merger with the InterContinental Exchange, the going-private sale of Dell, Inc. and the merger between Saks Fifth Avenue and Hudson's Bay Company.

Mr. Savitt graduated *magna cum laude* from Brown University and received a M.Phil. from Columbia University in European legal history. He graduated from Columbia Law School in 1997, where he was editor-in-chief of the *Columbia Law Review*. Upon graduation from law school, Mr. Savitt served as a law clerk to the Honorable Pierre N. Leval of the United States Court of Appeals for the Second Circuit for the 1997 term and to the Honorable Ruth Bader Ginsburg of the Supreme Court of the United States for the October 1998 term. Among other professional recognitions, Mr. Savitt has been named by *Chambers USA: America's Leading Lawyers for Business* as a leading securities litigator, by *Lawdragon* as one of the 500 leading lawyers in the United States, by Benchmark Litigation as a "litigation star" and as a leading authority in the *International Who's Who of Corporate Governance*. He is a member of the American Law Institute, the Board of Directors of the New York Legal Aid Society and the Board of Trustees of the *Columbia Law Review, Inc.*, and is a past executive director of Interfaith Hunger Appeal, a New York-based international hunger relief organization.

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**Kevin Schwartz is a partner in the Litigation Department of Wachtell, Lipton, Rosen & Katz. He is also Chair of the Judiciary Committee of the New York City Bar Association and a Visiting Lecturer in Law at Yale Law School, where he teaches an advanced Corporate Litigation Seminar.**

Mr. Schwartz's practice includes corporate, commercial, and securities litigation at both the trial and appellate levels, as well as a variety of regulatory and corporate governance matters. He has worked on a number of the firm's high-profile matters, including mergers-and-acquisitions litigation in the courts of Delaware and other complex litigation in courts around the country. Mr. Schwartz was on the trial counsel team in the successful litigation effort, on behalf of Vulcan Materials Company, to enjoin an attempted hostile takeover by an industry rival; he worked on the appeal in Delaware Supreme Court that resulted in the expedited reversal of a lower court injunction blocking Activision Blizzard's \$8 billion stock repurchase; and he represents a variety of other household-name corporations in litigation and strategic counsel, from Uber and eBay to UnitedHealth Group, The J.M. Smucker Company, and XPO Logistics. He helped to lead Chicago Bridge & Iron to victory in Delaware Supreme Court, repelling Westinghouse's more than \$2-billion claim for a post-deal purchase price adjustment, and has represented a number of other companies in high-stakes arbitrations over purchase price adjustment disputes. He also represented several of the nation's leading financial institutions in the resolution of federal regulatory investigations arising out of the financial crisis of 2008.

In addition, Mr. Schwartz has worked on a number of pro bono matters important to New York State. As part of the team led by former White House Counsel Bernard Nussbaum, Mr. Schwartz represented the New York Judiciary in historic constitutional litigation over the State of New York's extended failure to adjust judicial salaries. He represented the Partnership for New York City and the Bar Association of the City of New York as amici curiae before the Court of Appeals and the Supreme Court of the United States, including in the landmark case in which the Supreme Court struck down the Defense of Marriage Act. On a special task force created by the Chief Judge of New York, Mr. Schwartz served as legal advisor to the task force co-chairs Judith Kaye, the former Chief Judge of New York, and Martin Lipton, to reform the Commercial Division of the New York Supreme Court. He was also a Rockefeller Fellow for the Partnership for New York City, and is now a legal advisor to the Partnership Innovation Council, a panel of business leaders committed to ensuring that New York's legal and regulatory environment keeps pace with the technological revolution transforming business and the economy.

As Chair of the 150-year-old Judiciary Committee of the NYC Bar Association, Mr. Schwartz leads a committee of 50 lawyers from across the City in reviewing and interviewing every judicial nominee for all state and federal courts based in NYC, as well as candidates for District Attorney in the five boroughs and nominees for U.S. Attorney for the Southern and Eastern Districts of New York. Mr. Schwartz is a member of the New York State Bar's Task Force on the Evaluation of Candidates for Election to Judicial Office, and also serves on the City Bar's Council on Judicial Administration, which coordinates the work of the City Bar committees addressing issues that concern the state and federal courts. He previously served as secretary of both the Judiciary Committee and the Council on Criminal Justice.

Mr. Schwartz received his B.A. from Harvard College and was awarded the Sophia Freund Prize as the top-ranked *summa cum laude* graduate. He earned his M.B.A. and Ph.D. from Oxford University as a Marshall Scholar, received his J.D. from Yale Law School, and previously served as a Lecturer on the Political Science Department Faculty of Yale University. Mr. Schwartz served as a law clerk to Justice Ruth Bader Ginsburg on the Supreme Court of the United States and to Judge Guido Calabresi on the United States Court of Appeals for the Second Circuit.

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Ms. Reddy is a graduate of Stanford University and Stanford Law School, where she was managing editor of the *Stanford Law Review*. After law school, she served as a law clerk to the Honorable John Gleeson of the U.S. District Court for the Eastern District of New York and to the Honorable Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit. Ms. Reddy served as a law clerk to Justice Ruth Bader Ginsburg of the U.S. Supreme Court for the October 2014 term.

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