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ECONOMISTS INK

The American Innovation and Choice Online Act

The Impact of Zero-Sum Games on Class Certification

DIGITAL MARKETS ACT

REQUIRING INTEROPERABILITY FOR "GATEKEEPER" MESSAGING SERVICE PROVIDERS

Secretariat Economists

ABA's Machine Learning and Antitrust Webinar | CRESSE's International Conference on Competition and Regulation

FROM THE EDITOR-IN-CHIEF

To our readers, I am excited to share the latest edition of *Economists Ink* with you.

The first article discusses the European Union's recent agreement concerning the Digital Markets Act ("DMA"). The second article discusses *The American Innovation and Choice Online Act* ("AICO"), sponsored by Senator Amy Klobuchar. The third article considers zero-sum games and the recent District Court decision denying certification to a subclass of more than two hundred professional swimmers seeking monetary damages from the Fédération Internationale de Natation ("FINA").

In the first article, I discuss the DMA's requirement of interoperability between instant messaging services for "gatekeeper" organizations. I consider the tradeoffs between competition and privacy and note that these tradeoffs will depend on how well "gatekeeper" messaging apps are able to address certain technical issues.

In the second article, Robert Arons discusses the proposed AICO legislation. Dr. Arons considers the proposed law's focus on conduct that materially restricts business users from accessing data generated by the largest online platforms. Dr. Arons discusses data externalities and potential costs associated with unrestricted data access. Dr. Arons also reviews recent economic studies that focus on whether or not markets, unregulated, will ensure consumer data are shared optimally.

In the third article, Stuart Gurrea discusses the impact of zero-sum games on class certification. Dr. Gurrea indicates that certain aspects of athletes' economic interactions can be characterized as zero-sum games. For example, in the FINA litigation, appearance fees and prize money gained by one swimmer comes at the expense of other swimmers. This possible conflict of interest played a central role in the District Court's denial of class certification.

Enjoy!

Dr. Stephanie Mirrow
Director

ECONOMISTS INK

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INFO@SECRETARIAT-INTL.COM
+1.877.732.4685

EDITOR-IN-CHIEF Dr. Stephanie Mirrow

CONTRIBUTORS Dr. Robert Arons
Dr. Stuart Gurrea
Dr. Stephanie Mirrow

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Secretariat Economists

TABLE OF CONTENTS

2Q 2022

FEATURED ARTICLES

NEWS & NOTES

NEWS & NOTES

Jéssica Dutra Joins as Panelist for Machine Learning and Antitrust Webinar

Machine learning and artificial intelligence has rapidly progressed in the last decade and permeated antitrust in thought provoking ways. In March, Associate Director **Dr. Jéssica Dutra** served as a panelist for an American Bar Association (ABA) webinar titled "Machine Learning and Antitrust." This fundamentals program provided a brief introduction on algorithmic collusion, algorithm in mergers, blockchain/smart contracts and computational antitrust.

Panos Dimitrellos Joins Secretariat Economists' DC Office

Dr. Panos Dimitrellos recently joined Secretariat Economists' Washington, DC office as an Associate Director. Dr. Dimitrellos specializes in issues pertaining to online platforms and sponsored search auctions.

Dr. Dimitrellos earned his Ph.D. from the University of Maryland, where he studied Industrial Organization and Applied Econometrics.

Billy Schwartz Rejoins Secretariat Economists' DC Office

Dr. Billy Schwartz rejoins Secretariat Economists' Washington, DC office as an Associate Director. Dr. Schwartz received his Ph.D. in Applied Mathematics at Illinois Institute of Technology. Dr. Schwartz was employed at Secretariat Economists in 2014–2015 before leaving to pursue his doctorate.

Keith Waehrer Joins Panel for the CRESSE 16th International Conference on Competition and Regulation

Managing Director **Dr. Keith Waehrer** joined fellow academic economists, legal experts, policy makers and practitioners as a panelist in the CRESSE—Competition and Regulation European Summer School and Conference 2022 Special Policy Session 3, "Legal Standards: should enforcement in the high-tech digital markets become more presumption (than effects) based?" The CRESSE 16th International Conference on Competition and Regulation focused on the theme "Advances in the Analysis of Competition Policy and Regulation."

Secretariat Economists Hosts Luncheon Reception at the ABA Antitrust Law Spring Meeting

No event in the United States brings together more lawyers, academics, economists, and enforcers from the world of competition and public policy than the American Bar Association's (ABA) Antitrust Law Spring Meeting each April in Washington, DC. This year, with the event back in person for the first time in more than two years, the Secretariat Economists team once again hosted the firm's luncheon reception. It was gratifying to reconnect with old friends and colleagues and to share what is new with the Secretariat Economists team.

DIGITAL MARKETS ACT: REQUIRING INTEROPERABILITY FOR "GATEKEEPER" MESSAGING SERVICE PROVIDERS

BY DR. STEPHANIE M. MIRROW

The Council of the European Union ("EU") and the EU Parliament recently reached agreement on the Digital Markets Act ("DMA").

The agreement contains several changes from the European Commission's ("EC") proposed DMA, including changes to the definition of "core platform services" and raising the thresholds for identifying a "gatekeeper," among other modifications. Further, the agreement indicates that the final text of the DMA will require interoperability for messaging services.

The thresholds for identifying a "gatekeeper" will increase from the EC's proposal of €6.5 billion in annual revenue and market capitalization of €65 billion to €7.5 billion in annual revenue and market capitalization of €75 billion. Additionally, a "gatekeeper" will need to have at least 45 million monthly end users and 10,000 yearly business users.

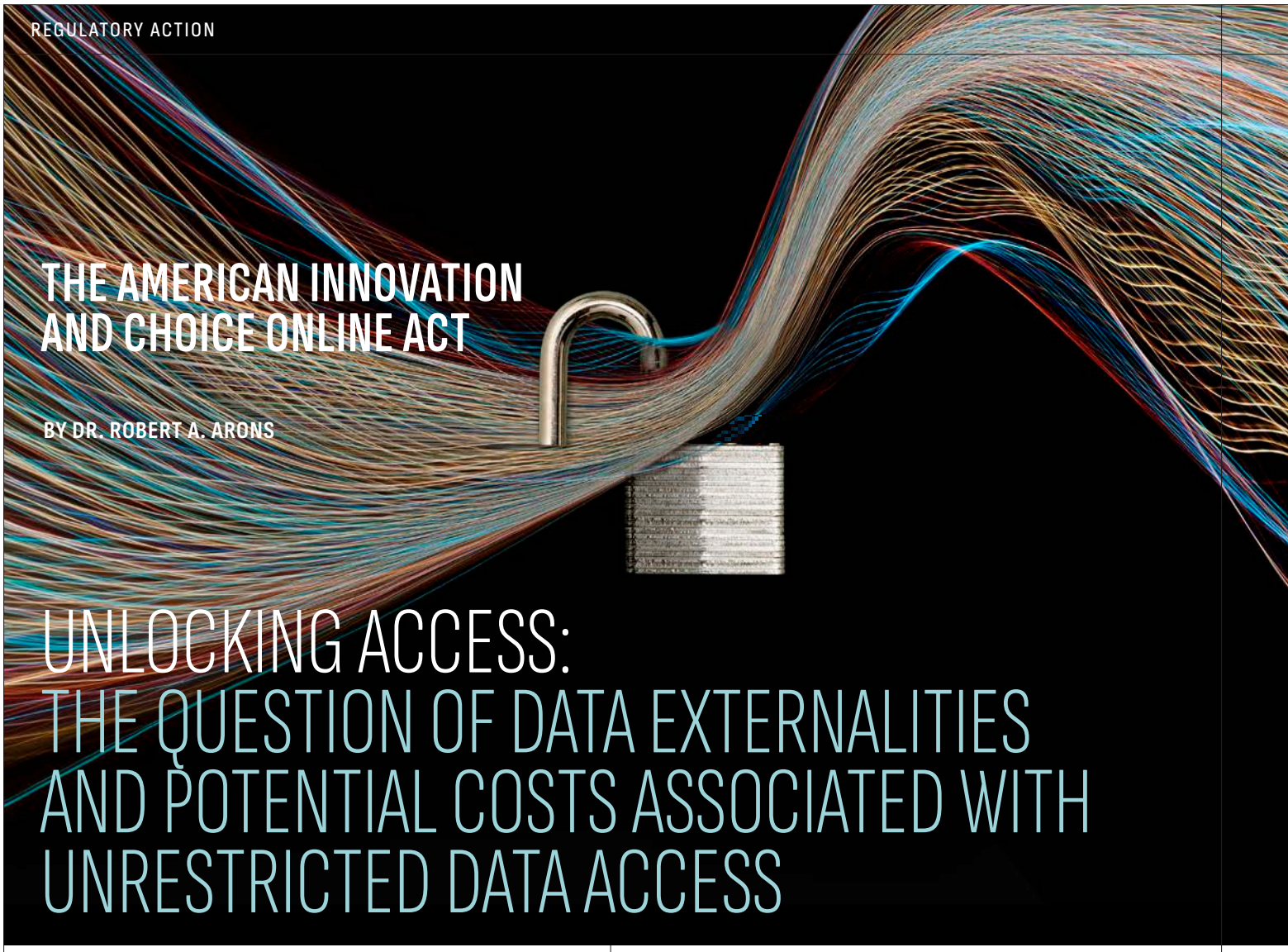
If an organization meets the threshold for a "gatekeeper," it also will be required to enable interoperability between instant messaging services. Specifically, a "gatekeeper" will be required to open up and inter-operate with a smaller messaging app if requested by the smaller app. Interoperability of instant messaging would allow users to send and receive instant messages without regard to which messaging app is being used. For example, a large messaging app such as WhatsApp may be required to open up and allow user-to-user messages to and from a smaller messaging app—thus, not all users will have to have accounts on WhatsApp in order to instant message each other.

Requiring interoperability may result in further entry and competition from smaller messaging apps. However, there are some concerns on how interoperability will work and whether it will affect user privacy. Messaging apps use end-to-end encryption for security and privacy. Different messaging apps use different forms of encryption, and current forms of end-to-end encryption generally expect users to be using the same messaging app. Additionally, some features, such as spam detection software, may not function properly if messages are shared across different apps. "Gatekeeper" messaging apps will need to address these concerns as they move forward with meeting interoperability requirements.

> **"Requiring interoperability may result in further entry and competition from smaller messaging apps."**

The EU appears to recognize these technical difficulties and expects interoperability to begin first with basic individual messaging. Group messaging will follow later, and there currently is no requirement for interoperability for social media services. The tradeoffs between competition and privacy will depend on how well "gatekeeper" messaging apps are able to address the technical difficulties of bridging the different forms of encryption used by smaller messaging apps.

DIRECTOR DR. STEPHANIE MIRROW *has worked on numerous antitrust matters, including matters involving technology and claims of monopolization.*
smirrow@secretariat-intl.com



THE AMERICAN INNOVATION AND CHOICE ONLINE ACT

BY DR. ROBERT A. ARONS

UNLOCKING ACCESS: THE QUESTION OF DATA EXTERNALITIES AND POTENTIAL COSTS ASSOCIATED WITH UNRESTRICTED DATA ACCESS

The American Innovation and Choice Online Act ("AICO"), sponsored by Senator Amy Klobuchar and Senator Chuck Grassley, and co-sponsored by additional bipartisan senators, advanced to the Senate Floor earlier this year.

However, several members of both parties have expressed concerns about the bill and it has yet to be enacted into law. AICO covers the largest online platforms, such as Amazon and Facebook, and makes certain discriminatory conduct by these platforms unlawful—including conduct that materially restricts business users from accessing data generated by the platform. The platform's use of data to offer competing services also is at issue. However, mandating that platforms cannot restrict business users from accessing data and restricting platforms from using data may lead to less efficient outcomes than those determined by the market.

AICO defines the largest online platforms as those with at least 500,000 monthly consumers or 100,000 business users, market capitalization greater than $600 billion dollars, and that are "a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform."

AICO proposes to ban actions by platforms that "preference," "limit," or "discriminate" in ways that would "materially harm competition," conduct that would "materially restrict," "impede," or "unreasonably delay" business users from accessing data generated by the platform regardless of whether harm to competition could be shown; and using non-public data that preferences a platform's own products that compete with a business user's products regardless of whether harm could be shown. AICO also includes several affirmative defenses. These defenses include showing that the conduct is necessary to comply with other laws, or that the conduct was necessary to protect user safety and privacy or to maintain the core functionality of the platform. For an affirmative defense, the covered platform must also show that the conduct was either "narrowly tailored" or did not result in material harm as shown by the preponderance of the evidence.

AICO does not define "data." Data likely at issue are data generated or used on the platform, such as consumer identifying information, past purchase history, and other characteristics that would help businesses better design and market products. Data are generated when consumers interact with the platform or one of the businesses on the platform. The data generated through platform interactions may create externalities. Externalities are indirect costs or benefits to third parties who are not directly involved in the economic activity. For example, consumers make shopping decisions that reveal their demand patterns. Online platforms can match these demand patterns to consumer characteristics using machine learning and other business intelligence tools to learn about consumer preferences. This additional learned information is the externality at issue—the platform can now better understand the preferences of new consumers. Because both firms and consumers benefit from a better understanding of shopping patterns, this externality is a positive externality.

Under AICO, these data, and the learning that accrues from the data, must be shared with businesses without restrictions, and the use of these data by the platform would be limited. What this means, for example, is that platforms like Amazon would be unable to use a customer's past purchasing decisions to offer similar Amazon products to customers. Additionally, platforms like Amazon would not be able to sell customer data to firms or stop firms from accessing their customer data. Instead, Amazon's customer data would have to be provided to firms free of charge. Additionally, if a platform cannot sell data to businesses or use data to generate its own products, the platform may choose to not collect or generate data. This may result in less efficient service by platforms, because they no longer will generate the learning associated with consumer demand patterns and preferences. Alternatively, if platforms continue to collect and generate data, consumers may be less willing to share the personal data needed for the platform to learn (since the platform, under AICO, must allow unrestricted access to its data).

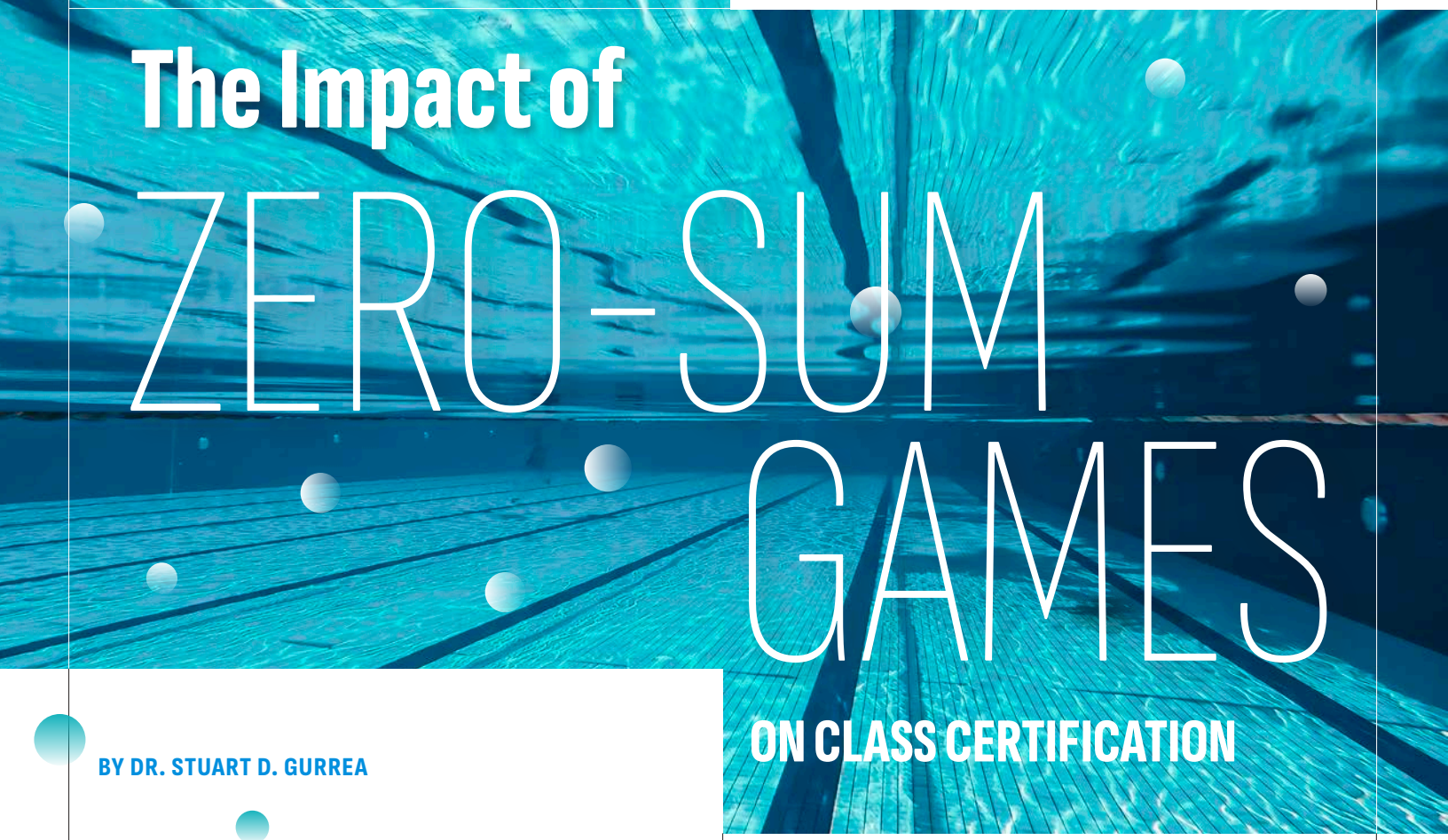
An alternative to regulatory bills like AICO is to let markets determine how data are shared among consumers and business users. Whether or not markets on their own will ensure consumer data are shared optimally is the focus of several recent economic studies. Rosella Argenziano and Allesandro Bonatti ("Data Linkages and Privacy Regulation," 2021 working paper) find that consumers and firms benefit when firms share information on past purchases by consumers. Firms benefit because they are able to use that information to offer products and prices in the future that better match the marketplace. Consumers benefit because the new products and prices offered by firms better match their tastes and budgets. Additionally, Dirk Bergemann, Allesandra Bonatti and Alex Smolin ("The Design and Price of Information," *American Economic Review*, January 2018) find that different firms want different amounts of data from platforms. Well-informed firms do not need every byte of data, whereas less informed firms desire more information. In equilibrium, a platform will optimally offer a menu of data to firms. Finally, Dirk Bergemann, Allesandro Bonatti, and Tan Gan ("The Economics of Social Data," *RAND Journal of Economics*, April 2022) show that platforms will optimally sell information to businesses when it is socially beneficial to consumers and firms to do so, and will not sell consumer's data when the net benefit to consumers and firms is negative. That is, if consumers value their privacy for some data more than businesses value this data, the online platform will not share these more sensitive consumer information with business users.

"AN ALTERNATIVE TO REGULATORY BILLS LIKE AICO IS TO LET MARKETS DETERMINE HOW DATA IS SHARED AMONG CONSUMERS AND BUSINESS USERS."

Consumer data is a valuable input for the machine learning algorithms that power online commerce. AICO proposes to level the playing field by regulating data access and data use by large online platforms. However, the proposed regulations in AICO also may result in unintended costs, such as a reduction in competition and less efficient online services. Recent economic studies suggest that letting the market determine how online data are shared may result in consumer data being shared optimally in ways that benefit both consumers and businesses.

ASSOCIATE DIRECTOR DR. ROBERT ARONS *has provided econometric and theoretical analysis in support of market definition and competitive effects in a range of industries, including online platforms.* rarons@secretariat-intl.com

The Impact of ZERO-SUM GAMES ON CLASS CERTIFICATION



BY DR. STUART D. GURREA

In a recent decision, Magistrate Judge Jacqueline Scott Corley of the United States District Court for the Northern District of California denied certification to a subclass of more than 200 professional swimmers seeking monetary damages.

District Judge Claudia Wilken of the same court also denied class certification of subclasses seeking monetary relief in the *O'Bannon v. NCAA* student-athlete name and likeness licensing litigation. In both of these cases, certain aspects of the athletes' economic interactions can be characterized as zero-sum games, and this characterization played a central role in the denial of class certification.

Three champion swimmers sued the Fédération Internationale de Natation ("FINA")—swimming's international governing body—for antitrust violations related to FINA's control over international swimming competitions. The swimmers claimed to have suffered economic damages in lost prize money and appearance fees as a result of anti-competitive conduct by FINA. In a parallel lawsuit, the International Swimming League, Ltd. ("ISL") also sued FINA for the same conduct. Plaintiff swimmers alleged that FINA abused its dominant market position by pressuring national swimming federations to prevent athletes from participating in ISL events. With some exceptions, the proposed class included "[a]ll natural persons who are eligible to compete in swimming world championship and Olympic Game competitions." Among these, a proposed subclass of 200 swimmers also claimed they suffered economic damages in the form of lost prize money and lost appearance fees, because FINA allegedly precluded them from participating in ISL competitions since 2018. All members of the subclass had a common goal of obtaining injunctive and monetary relief.

Participation in ISL events offered swimmer class members the opportunity to earn appearance fees and prize money. However, from the perspective of individual class members, the monetary rewards offered by the ISL are a "zero-sum game." In its purest form, participants in a zero-sum game share no common interests, and any monetary gain of one participant comes at the expense of the monetary gains of other participants. Here, selected participants in an ISL event would earn appearance fees that otherwise would be earned by other

eligible swimmers not invited to participate. Similarly, prize money that would be awarded to top performers would come at the expense of swimmers that would not perform as well. Within this framework, for an individual swimmer to claim economic harm equal to the appearance fees from an ISL competition requires proving that a swimmer would be selected to participate in an event, which in turn implies that at least some other class members would not. Analogously, claiming damages equal to a particular prize from an ISL competition would require proving that a swimmer's performance would be sufficiently better than other participating class members to qualify for that prize.

Judge Corley considered the zero-sum game perspective and the possible conflict of interest between named plaintiffs and other prospective class members. According to Judge Corley, to prove damages assuming no FINA interference "would necessarily involve arguing that other swimmers in her club would not have been selected to swim, that she would have beaten the swimmers she raced against, and that other clubs would not have performed as well as her club over the course of the season." Judge Corley concluded that "[t]hus, each class member's interest in maximizing her own damages is antagonistic to the same interest on the part of other class members." Judge Corley highlighted the inherent conflict of interest class representatives face and rejected certifying the proposed class, because named plaintiffs could not provide an adequate representation of all other class members' interests.

> "However, from the perspective of individual class members, the monetary rewards offered by the ISL are a 'zero-sum game.'"

This type of conflict sometimes may be resolved by further breaking the proposed classes or subclasses into narrower subclasses in which members do not face conflicts of interest. However, in the FINA litigation, the creation of narrower subclasses would not eliminate the conflicts of interest—each individual member of the proposed swimmer class still would have antagonistic interests with respect to all other rival swimmers.

Judge Wilken in the *O'Bannon v. NCAA* student-athlete name and likeness licensing litigation also denied class certification to a class seeking monetary damages. Judge Wilken certified the class for antitrust injunctive relief, because plaintiffs' allegation of anticompetitive harm was with respect to a group licensing market and not individual licensing markets. Judge Wilken, however, denied the certification of a class for back-pay monetary damages.

Consistent with their theory of a group licensing market, plaintiffs in *O'Bannon v. NCAA* proposed a damages model of equal sharing. In this case, Judge Wilken did not deny class certification due to antagonistic interests in calculating damages. Rather, class certification of the proposed class for monetary damages required identifying class members that suffered economic harm as a consequence of the NCAA's conduct. In considering the composition of the class, Judge Wilken recognized that substitution effects were present, because the availability of a fixed number of scholarships creates a zero-sum game where participation by one athlete comes at the expense of another. Absent the alleged misconduct, greater financial incentives would change certain athletes' decisions to turn professional–some of these athletes would remain in college and earn roster spots at the expense of other class members. Because plaintiffs failed to propose a methodology for determining the composition of the class for back-pay monetary damages, the proposed damages class was denied.

Zero-sum games were central to the denial of class certification in both of these cases. In the FINA litigation, swimmers faced fundamental conflicts of interest to advance their damages claims. In the *O'Bannon v. NCAA* litigation, the zero-sum nature of scholarship awards did not undermine plaintiffs' damages theory or the validity of plaintiffs' proposed equal allocation rule to distribute an eventual monetary award. However, Judge Wilken found that the zero-sum nature of scholarship awards introduced uncertainty about the actual composition of the class through substitution effects that were not resolved by plaintiffs in that case. These cases not only highlight the impact of zero-sum games on class certification, but that there may be different reasons for the zero-sum games' impact on class certification.

MANAGING DIRECTOR DR. STUART GURREA *has submitted expert witness testimony on the quantification of economic harm on a class-wide basis.*
sgurrea@secretariat-intl.com

ABOUT SECRETARIAT

SECRETARIAT IS AN EXPERT SERVICES, LITIGATION CONSULTING, AND ECONOMIC ADVISORY FIRM working with the world's leading law firms, corporations, and governmental agencies to **RESOLVE CONFLICTS** and **MITIGATE COMPLEX RISKS**.

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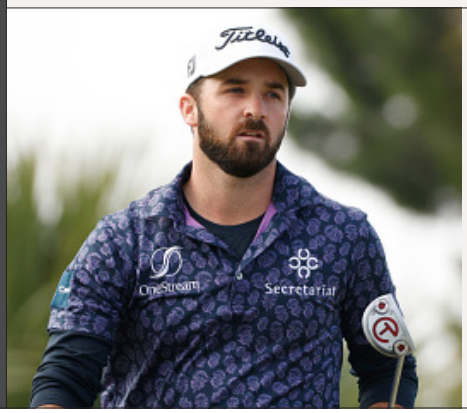

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Secretariat is proud to sponsor emerging PGA star, Denny McCarthy. Denny exemplifies the same commitment and tenacity we bring to every client issue, no matter what the challenge requires.

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