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“Real World” Panel on MFNs

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“Real World” Observation #1

- If you want retail price cuts, then you want input cost cuts, because latter typically come first.
- Competitive firms invest significant effort and creativity trying to reduce their input costs.
- In some circumstances, MFNs may dampen (1) vigor of buyers to reduce input costs and (2) willingness of input suppliers to adopt cost cutting measures:
 - Buyer with MFN may sit back and piggyback other buyers' efforts to reduce costs
 - Buyer whose rivals have MFNs may be deterred from seeking cost reductions that benefit rivals
 - Input seller may be deterred from price cuts that must be shared with all customers

“Real World” Observation #2

- Like cartel cheating, there is a strong temptation to find methods of cutting prices in ways that do not “technically” breach the MFN.
- In competitive firms, much lawyerly creativity goes to distinguish and limit the applicability of MFNs.
- If parties are strictly complying with their MFNs, that may be suspicious.

“Real World” Observation #3

- Agree with Deputy AAG Fiona Scott-Morton’s observation that additional compliance monitoring of MFNs (and CRRs generally) may be warranted under some circumstances.
- Concern re systematic under-investment of ongoing monitoring by counsel who initially bless a contract that is pro-competitive or competitively neutral at the outset only to have the facts and relationships develop badly over time.