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Annual Meeting

of the

ANTITRUST LAW SECTION

January 31, 2008
New York Marriott Marquis

Section Chair
SAUL P. MORGENSTERN, ESQ.
Kaye Scholer LLP
New York City

Program Chair
STACEY ANNE MAHONEY, ESQ.
Constantine Cannon LLP
New York City

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Introductory Remarks

MR. MORGENSTERN: Good morning, everyone, and welcome to the Antitrust program. I am Chair of the Section, and I would like to welcome you to our annual program. We have a very full day planned.

After the morning sessions and just before lunch a representative of the New York Bar Foundation will come to speak to us for a few minutes about what that organization does and those of us out here who would like to help. That will be followed by a very brief business meeting.

We have two very important things on the business meeting agenda today, so we would appreciate everyone sticking around to vote on that. One is a change in the Section's bylaws and of course the nomination of the new EC members and officers for next year.

Then after lunch we have more excellent programming in store for you. So after whatever excellent lunch you have here in the neighborhood, we hope you will be back with more energy for the afternoon sessions.

Without any further ado, I will give you Stacey Mahoney, Section Vice Chair and the Chair of today's program.

MS. MAHONEY: Thank you, Saul.

Good morning, everyone. And thanks for coming for the beginning of what promises to be a great day. My name is Stacey Anne Mahoney, and as Program Chair I welcome you to the Antitrust Law Section's annual program.

We have for you today a fascinating program. And I thank in advance all of the moderators and panelists who have taken time out of their very busy and successful careers to be with us today to share their insights. I also encourage you as audience members to challenge our panelists during the question and answer sessions, to go beyond the positions espoused and the conclusions reached and to delve into what for us antitrust practitioners is often so compelling, the analytical intricacies.

For CLE purposes, please remember you'll need to fill out the requisite forms. Also, as you come into the meeting in that book you'll see the amended bylaws and the Nominating Committee's report that Saul just referred to; that will be addressed during the business meeting at 11:45 today.

Before I introduce our first program, I wish to extend a sincere thanks to Saul Morgenstern as Chair of the Section for his strong leadership throughout this past year. His ability to inspire participation in the section by Executive Committee members and members-at-large has resulted in an extraordinary year, this program being just one of the many events offered under his leadership for the benefit of the membership.

To give you a brief rundown of today's schedule, we will have our fabulous traditional Review of Antitrust Developments which will discuss the important decisions rendered last year, including the four Supreme Court antitrust decisions that came down last year. Then starting at 10:00 a.m. we will have a terrific panel in which recent developments in criminal antitrust enforcement will be discussed. A must for all practitioners with clients having potential or actual criminal exposure.

After the lunch break, starting at 1:15, we will have our Indirect Purchaser Standing Program, which will thoroughly dissect the thorny issues related to indirect purchaser standing. Then, just when you thought you might give your gray matter a bit of a respite, at 3:15 we will have our final program for today; choosing a brilliant hypothetical crafted just for us, we will address the practical implications of one, if not the most controversial Supreme Court decisions of 2007, the *Leegin* decision. For your advance review the hypothetical that will be addressed during that program will be available to you at lunch time. So I commend that you take that up at that point and take a look at it. It is not yet at the back of the room.

Without further ado, allow me to introduce someone who needs no introduction, Molly Boast, a partner at Debevoise & Plimpton and former Director of the Bureau of Competition of the United States Federal Trade Commission. She has graciously agreed yet again to present her traditional program of the day: The Annual Review in Antitrust Investment.

Molly is an extraordinary lawyer with a practice that focuses on antitrust and other complex litigation, merger analysis and extensive antitrust counseling.

At the Commission Molly successfully led the litigation challenges to the BP/Arco and Heinz/Beech-Nut mergers, among numerous other matters. Molly also oversaw several significant litigation challenges to patent settlement agreements in the pharmaceutical industry. And she served as the Agency's representative to the Joint European Union FTC Department of Justice Mergers Working Group.

In 1993 she presented the argument on the extraterritorial application of antitrust laws to the United States Supreme Court in *Hartford Fire v. State of California*.

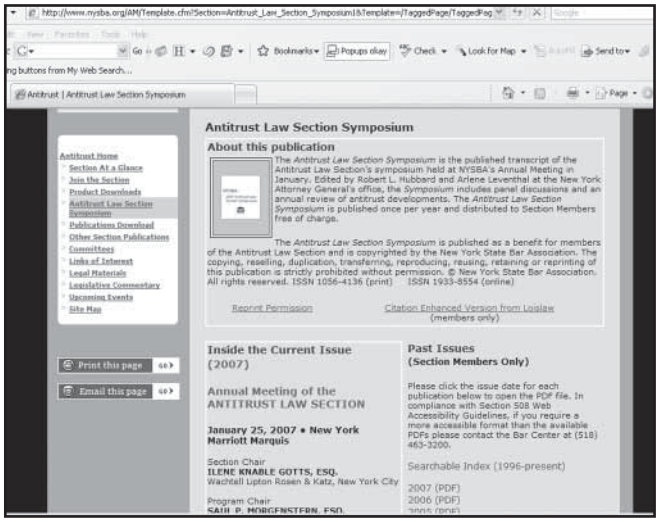
Since returning to private practice, Molly has represented pharmaceutical, credit card, entertainment and other companies in price-fixing investigations and litigation, assisted companies in merger matters and in con-

nection with FTC investigations and proceedings and coordinated international antitrust investigations and transactions.

As if all of that wasn't enough, in addition to her tremendous antitrust expertise, in 1992 Molly was appointed Special Assistant United States Attorney for the independent counsel investigation of Banco National del Lavoro, otherwise known as "Iraqgate" at the United States Department of Justice.

Molly earned her J.D. from Columbia University School of Law, her M.S. from the Columbia University School of Journalism and her B.A. from the College of William and Mary. Please join me in welcoming Molly Boast here today.

The *Antitrust Law Section Symposium* is also available online!



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Annual Review of Antitrust Developments

MS. BOAST: Thank you very much, Stacey.

Listening to that, in addition to embarrassing me, makes me realize that among other things I should do this year is update my resume and perhaps make it a little more current. I can't even remember 1992.

Good morning, everyone. Thank you for dragging yourselves out here so early today. It is always a problem to keep you awake for the better part of an hour at this point in the morning. But I am aided in this effort today by the contributions of my colleague, Joanna Davidson, who is sitting right up here in the front and who prepared the paper you have, along with another colleague who couldn't join us, Brendan Caldon. The paper is in the materials. It is a "just the facts, ma'am" approach to many more cases than those that will be discussed this morning. And, Joanna also prepared the Power Point that we will use to guide us this morning, including the addition of a little bit of humor.

What we will try to cover first of all is our four Supreme Court cases. It's probably the only time in my life where I will have the opportunity to discuss four recent Supreme Court decisions in one talk. We will cover then some of the significant case law from the circuits. We have tried, to the extent we can, to organize this around principal holdings, although that's always a bit of an elusive effort. We will then move to discussion of some of the agencies' nonlitigation output during the year. And then, we have a slide we tucked in on late-breaking news, because there were a number of occurrences this last month that we thought were worth touching on. Finally, my own version of ten recommendations for the next Administration, which I hope will prompt some discussion among all of you.

This slide simply identifies the four cases that we will be discussing. Let's go to the one that is my favorite in terms of watching the Supreme Court become activist, the *Twombly* case.

Twombly basically involved a class action brought by phone and Internet subscribers who sued the"Baby Bells" alleging a price fixing conspiracy on rates and pleading various types of parallel conduct.

The district court dismissed the complaint for failure to state a claim on the grounds that allegations of parallel conduct didn't state a claim for conspiracy.

The Second Circuit, which I have observed before is one of the circuits in which the judges have never seen an antitrust complaint they didn't like, reversed the district court and held that the plea of conspiracy had to be plausible to survive a motion to dismiss, but simply said that plaintiffs had to plead facts that included conspiracy among the realm of plausible possibilities, in order to survive a motion. And they cited in that context *Conley v. Gibson*.

The Supreme Court reversed the Second Circuit and held the plaintiff had to plead the facts that made the finding of the conspiracy plausible and not just speculative.

Now, if you go back to the previous slide you might wonder what is the space between the Second Circuit statement, that the facts had to include conspiracy among the realm of plausible possibilities, and that the whole allegation of conspiracy has to be plausible and not just speculative.

The Supreme Court said it isn't enough to allege parallel conduct that could easily represent independent action. That's our first hint as to where they were heading. And, without explicitly overruling Conley, the Court said the "no set of facts" language that supported the Second Circuit's ruling had earned its retirement as an incomplete negative gloss on an accepted pleading standard. Again, I'm not sure what space exists between a case earning its retirement, or at least part of the case earning its retirement, and overruling it entirely.

The Court then said that the conspiracy pleadings in the underlying complaint didn't satisfy the plausibility test because the parallel conduct that was alleged was equally consistent with both legal and illegal activity. And it went through what I would call an outside the pleadings discussion of what might have made that comparison apt.

My own take on this case is the Court was really saying that the conspiracy alleged has to be the most plausible of the inferences that could be drawn, even though the Court didn't put it in quite those terms. But it is the only way I can rationalize how they took the Second Circuit's language and came up with this standard.

Twombly actually drew a dissent that was quite strong, in part based on the antitrust analysis, but more significantly based on a Rule 8, notice pleading analysis. The dissent said this decision created a pleading standard that was irreconcilable with Federal Rule of Civil Procedure 8, and that the decision would invite lawyers' debates over economic theory to resolve antitrust suits at the pleading stage, when of course many believe that should be left for later.

Our first effort to inject a little bit of humor into this presentation is this slide, directed to what one can take from reading the *Twombly* decision on its face. For those who can't read it, it says: "Say what's on your mind, Harris, the language of dance has always eluded me."

Twombly has already become a very popular decision in the lower courts. As I mentioned, I think essentially

Conley has been overruled. Certainly that's the way many of the commentators have approached it. I think it will be some time before we know how the district courts are going to handle it. There certainly have been decisions coming out both ways. The majority's test is a little bit confusing. I think that if you believe in notice pleadings, if you applied *Twombly* out of the antitrust context and try to hold yourself, if you're a court, to a notice pleading standard, you will find it fairly difficult. And it also seems that, at least from the Supreme Court's discussion and from some of the subsequent cases, that courts will have to absorb some of the defendant's arguments, which may be outside the pleadings, and some of the factual assertions about what are plausible inferences, to determine whether the allegations of a complaint surmount those equally consistent with lawful or unlawful conduct tests.

Twombly also is essentially a negative example. It shows you what will not satisfy the test, but it doesn't give you much help with what you need to satisfy the test. Finally, there is some tension between the heightened pleading bar on antitrust cases and the private attorney's general concept that has always been part of our antitrust regime.

As I mentioned, *Twombly* already has a life of its own in the lower courts. Joanna's research at the time of publication, as they say, showed that this decision had already been cited more than 350 times. And the Second Circuit has already explicitly extended the portion of the discussion of *Twombly* that relates to Rule 8 outside the antitrust case context.

Turning to *Leegin*. This case is one that if we didn't know the outcome a few years ago, we certainly know it in full glory now. In the *Dagher* case we discussed last year, the Supreme Court said the presumptive approach to antitrust analysis is the rule of reason. Following on the heels of that, in *Leegin* the Supreme Court brought minimum resale pricing into the rule of reason world as well.

Leegin involved the manufacturer of women's fashion accessories. It was a company that prided itself on quality of service and therefore didn't want its retailers selling at too deep a discount. Or at least that was the rationale for the minimum resale price policy that it imposed on its dealers. The case actually went to a jury trial, and the jury found that the Leegin policy violated Section 1 of the Sherman Act. The Fifth Circuit affirmed and held that vertical price restraints were per se illegal, following to the letter the ancient decision in *Dr. Miles*.

I actually have a friend who was on this Fifth Circuit panel, and although he is very, very careful about not discussing his cases, he did say, "the Supreme Court threw us a bone when all we were really doing was following their law. "

In this instance, as is usually the case in significant antitrust cases, the United States was invited to submit its views and the FTC and Department of Justice filed a brief urging the Court to abandon the per se approach and overrule *Dr. Miles*. And that, of course, is what the Supreme Court did.

A sort of willingness to look at both sides of the analysis is another feature of the *Leegin* decision. The Court said that a per se rule of illegality was inappropriate because minimum pricing agreements can have either procompetitive or anticompetitive effects. Most of you are familiar with this holding. If you haven't actually read the opinion, it is rife with economic citations. And it was a 5:4 decision, so it was quite controversial. But there was economic authority to support pretty much all the views reflected in the various opinions.

At the same time, since the Court was quite mindful of the fact that it was overruling its precedent and a precedent on which people had relied for a long time, it went to some lengths to stress that taking vertical resale price restraints out of the per se rule did not mean that they were presumptively lawful, and that the courts need to be vigilant to watch for anticompetitive applications of these restraints. The Court did go on to give some examples of the kind of facts, some of the kinds of fact patterns that might raise anticompetitive risks. It identified certain screening factors. These are clearly not part of the holding, but it will surprise no one that some courts will essentially turn them into the law. These included the extent of the manufacturer's market power, whether the use of these policies was widespread in the industry, and whether the restraint was actually initiated at the manufacturer or retail level. This last point is simply if the retailers were colluding to have these restraints imposed, it would be a more garden variety Section 1 violation.

While we have seen little I thought was of interest in the wake of the *Leegin* case, the FTC has an RPM consent with Nine West, a shoe manufacturer, from a few years ago. Within months or weeks of the *Leegin* decision Nine West had approached the FTC requesting that the earlier order be opened and modified, saying *Leegin* was a dramatic change in the law that requires that the order be reexamined. I actually don't know—maybe someone here from the staff knows exactly what the status of that is. It would be an opportunity, if the FTC chose to use it, to try to articulate what the FTC thinks would be an appropriate way of implementing this change in the law.

Credit Suisse is the decision in which the Supreme Court held that the application of the antitrust laws to the practices in the underlying case were precluded by the securities law regime. This is my least favorite case of this quartet, and probably because I actually think it is a little bit sloppy. But it was decided on a 7-1 vote, so I'm clearly in the minority on this one.

In *Credit Suisse*—we talked about this a little bit last year, and I actually think I probably predicted a different outcome—class action investors sued various investment

banks alleging that they formed illegal contracts with buyers of securities when they were distributing IPOs. The contracts contained provisions that were referred to as laddering and tying provisions and committed buyers to pay high commissions on subsequent purchases.

The district court in this case dismissed the complaint on the ground that the securities laws precluded antitrust law application. Again, the Second Circuit, the court that never saw a complaint that it didn't like, reversed. And once again the Second Circuit was reversed by the Supreme Court.

The Court applied the standard that we were all familiar with for preemption or preclusion—a plain repugnancy test between the antitrust claims and the federal securities laws—and the Court found its way to that here. It identified four factors that it thought were sufficient to find this plain repugnancy. First was simply the existence of regulatory authority under the securities laws to supervise the activities in question, obviously satisfied here.

The second was evidence that the responsible regulatory authority actually exercises that authority.

The third, a resulting risk that the securities and antitrust laws would produce conflicting guidance in duties and standards of conduct. There is discussion of chilling effects on participants in the industry if they don't know whether regulated conduct under the securities laws might at the same time run afoul of antitrust law. And finally, whether the possible conflict affects practices lying squarely within an area of financial activity that the securities law seeks to regulate.

The Court spent most of its time on the third of these factors, that is, the risk there would be conflicting guidance and duties and concomitant chilling behavior that could harm the efficient functioning of our capital markets. The Court said that permitting antitrust actions would threaten serious harm to the securities markets because it could alter conduct in undesirable ways. It also noted there was a diminished need for enforcement in this area since the SEC is required in its rule making process to take account of competitive considerations. Some of the SEC's regulation of course does take place through rule making, but there is also enforcement activity, where I have not seen the SEC taking account of competition concerns in enforcement decisions.

We have one example of *Credit Suisse* being applied. This is a district court case, I think Judge Marrero's decision, out of the Southern District. In this particular instance the court again cited this plain repugnance, "clear incompatibility" between the securities laws and antitrust laws in the context of short sales, which were indeed regulated.

The court started with the fourth of the factors that the Supreme Court had identified, which it had described as the pivotal factor, and said that the short sales market lies squarely within an area that SEC regulates, and then found the other factors were satisfied. The court also said that the evidence in the two types of claims overlapped. I thought this was an interesting spin on what the Supreme Court seemed to be saying, which is we don't want standards out there that might alter behavior that could lead to inefficiencies in the securities market. In his decision, Judge Marrero is reciting the evidence, and it goes to the same point. But I think what he means is that proof of what would be illegal under the antitrust law would also be the proof that would be used to show something legal under the securities law. So a nonexpert jury could get it wrong and then lead to the forbidden chilling effect. He spells it out carefully, and says there is no way to confine antitrust claims to one side of the line or the other.

The reason I think this is interesting, and the reason I'm not a fan of the *Credit Suisse* decision, is that I think as applied it cuts a very broad swath. It is not as though we have seen lots of antitrust activity in the regulated securities area, but at the same time the standard that the Court has set out is quite broad, and now you won't see much antitrust activity in this field at all.

The last of our quartet is the predatory pricing variation in the *Weyerhaeuser v. Ross-Simmons* case. These two companies produce finished lumber and had been competitors in the Pacific Northwest. Ross-Simmons alleged that Weyerhaeuser had engaged in predatory bidding by driving up the price of the product and ultimately driving it, Ross-Simmons, out of business. The central legal question before the Ninth Circuit and then the Supreme Court was whether the *Brooke Group* standard, which had established the predatory pricing framework in an output market, should also apply to alleged predatory pricing in an input market.

Both the district court and the Ninth Circuit in this case refused to apply the *Brooke Group* standard to input markets. They said it just didn't make economic sense there. Once again, the Supreme Court reversed the Ninth Circuit and said there was no economic rationale for <u>not</u> applying the *Brooke Group* standards to input markets. It slightly refocused the test for this input analysis, this bidding analysis, to say that the predatory conduct must result in below-cost pricing in the predator's outputs. And plaintiff also had to show the defendant has a dangerous probability of recouping the losses incurred in making up the input prices once its competitors have been eliminated.

The next category of cases we wanted to discuss briefly flow out of one of my favorites. This is the Master Settlement Agreement, which seems to have spawned enough antitrust litigation to have had me discuss it for the last two years at least, and we could probably continue. There are a couple of decisions that have spun off some interesting issues on immunity and preemption that we will go through.

The first is *Sanders v. Brown*, a Ninth Circuit decision. To refresh everyone's recollection, the way the Master Settlement Agreement was ultimately implemented in most of the states was that nonparticipating manufacturers, those that weren't signatories to the Master Settlement Agreement itself, had to deposit a portion of their revenues into an escrow account which they could—at least in the California model—recoup after 25 years. There is another statute that imposes a penalty on nonparticipating manufacturers that don't make these escrow payments.

In this case Sanders argued that this arrangement had in effect spawned an illegal cartel, illegal horizontal output restriction. It said the illegal cartel was implemented through these incentives to preserve market share, meaning nobody wanted to steal market share from anyone else, so just keep your prices high.

There was no question that there was no allegation of direct horizontal conduct in the case. The first issue was that the district court granted a motion to dismiss based on preemption and immunity grounds, and the Ninth Circuit affirmed the district court. It first said the Sherman Act was not preempted by California's implementing standards. California's regime did not require or rise to a level of economic coercion or forcing the nonparticipating manufacturers to peg their prices to those of the participating manufacturers, those that are signatories to the Master Settlement agreement. The language the Court used was that the state statute had to put "irresistible pressure on participants to violate the antitrust laws" in order for preemption to take place. That was the more straightforward issue in the case. When the court reached immunities, it was more interesting and more complicated.

The Court said that the act of negotiating the Master Settlement Agreement qualified for Noerr-Pennington immunity. There is some authority to the contrary, but in this instance the Ninth Circuit followed the rule in the Seventh Circuit. Remember that last year the FTC had published a mega study on Noerr-Pennington. In comparing how much on all fours this standard was with the FTC's own approach, we found that it was close. The FTC approach is a little broader, but clearly the notion that the negotiation, as opposed to the traditional petitioning activity, qualified for Noerr was something that hadn't been squarely addressed other than in the Seventh Circuit.

The court in *Sanders* also said that Noerr provided immunity for damages from the injury, antitrust injury, that followed the super high price increases that were implemented pursuant to the MSA, because the injury resulted directly from an enforcement of the laws. Again, there were no agreements alleged after the implementation of the MSA itself. The court did recognize if there were subsequent agreements among the manufacturers that would be another matter entirely.

So we are now in a situation where the Ninth Circuit has parted company—and it is very clear about this—with the Second Circuit in the *Freedom Holdings* case, which is one we discussed last year, and another case out of the Third Circuit which had actually refused to apply state action immunity to the Master Settlement Agreement. The Ninth Circuit also addressed the state action doctrine in the context of this set of facts and said the restraint flowed from the statutes, the California laws were the act of a sovereign state, and thus there was no need to apply a two-pronged Midcal test.

The second decision coming out of the Master Settlement Agreement is this Sixth Circuit decision, which is a little less interesting; we included it to show that there continues to be a refusal to find the Sherman Act has preempted these statutes. Clearly the courts are almost going out of their way to protect this massive arrangement from antitrust attack.

There were a few decisions last year on standing. Not that the rulings on standing are so fascinating in and of themselves, but they provide a vehicle for discussing a couple of interesting cases. One in the Second Circuit—we always try to make sure we cover the principal Second Circuit cases for this audience—involved a distributor of aggregate, Port Dock. It was supplied by Oldcastle, and Port Dock claimed that it had been forced out of business by Oldcastle. Port Dock alleged that Oldcastle had monopolized the aggregate market at both the manufacturing and distribution levels. It had made an acquisition of a company, and Port Dock alleged that Oldcastle was purchasing the only significant competitor of aggregate manufacturing and raising prices, and then purchasing one of Port Dock's rival distributors and refusing to deal with Port Dock. So it was this two-pronged attack.

The district court dismissed the complaint for lack of standing in this case, and the Second Circuit actually affirmed the dismissal. First, it found that Port Dock lacked standing at the manufacturing level, because the injury alleged, which was the termination or refusal to deal, wasn't caused by the manufacturer's ability to raise prices after it acquired market power through this acquisition. And secondly, it found that anticompetitive behavior at the horizontal level couldn't be used to gain standing in what was essentially a vertical claim.

Another case that ultimately went off on standing grounds, but is very interesting, is the *Nicsand* case. We might have touched on this briefly last year. Nicsand was a manufacturer of sandpaper that was used and sold in automotive supply stores. It had been a very successful supplier to very large chains and to Sears, and had very large market shares itself. Part of the business model in this market was exclusive agreements that were imposed by the retailers themselves.

3M is another major manufacturer of sandpaper, and it had started aggressively pursuing these exclusive

contracts. It had the Wal-Mart contract and then started to compete for some of the retailers with which Nicsand did business. 3M gave very large discounts for these multiyear agreements, clearly sort of reminiscent of some of the conduct in *LePage's*.

In this case the district court had granted the motion to dismiss on grounds that Nicsand had failed to plead antitrust injury, and the Sixth Circuit had reversed. That was where we left the discussion last year.

So we are now at the stage where the case has been heard en banc. In the en banc setting, the court affirmed the district court's dismissal and held that Nicsand had suffered no antitrust injury. The decision is very interesting because it goes back and forth, almost as if the judges wanted to tell you every argument and then settle on one. The court said that 3M is just participating in the existing market conditions. Remember, the history was that Nicsand was actually dominant, to use a term that's probably not quite apt; and ultimately 3M had come in and competed. So these exclusive arrangements weren't imposed by 3M. Rather, the retailers expected them, and 3M thereby satisfied this set of market conditions.

Nicsand had alleged, again I think following some of the *LePage's* learning, that it provided superior products and service, but it didn't allege any facts to support that assertion. That was insufficient to give it standing. And even though it was able to show that there had been increases in retail prices, it didn't link them to the anticompetitive conduct. The Court said this is not a res ipsa loquitur world and especially post-*Twombly*.

One of the things we discussed when we talked about the *Nicsand* case last year was the notion that there was a collective action problem because the retailers were all engaged in requiring these exclusives. The majority in the en banc decision said Nicsand had failed to raise this in district court, so the argument was waived, which is the basis for the disagreement in the minority holding. So it is an interesting decision but probably not of much significant import for most of us.

If I had to choose one decision out of those we are discussing today that I would suggest people read, it is *Cascade Health Solutions v. PeaceHealth*, another Ninth Circuit case. In this instance, Cascade and PeaceHealth were two competing hospital operators in Lane County, Oregon. Cascade claimed that PeaceHealth had monopolized this county market by offering insurers discounts on tertiary care if they made PeaceHealth their sole provider for all hospital services. So it was a form of a bundling in the provision of hospital services. This case went to a jury, and the jury found in Cascade's favor.

The Court of Appeals vacated the jury verdict and said there had been an error of law in the jury instructions about when bundled discounts amounted to anticompetitive behavior. In the Ninth Circuit below-cost pricing for a bundle of goods and services is necessary to establish exclusionary conduct. The court considered the *LePage's* approach, and actually seemed to have thought it viable but rejected it in the context of this case. In *LePage's*, you'll remember, the court said that below-cost pricing isn't required to find that anticompetitive bundling discounts violate Section 2 if the monopolist's behavior will not be constrained by the market after it eliminates its rival.

In the *Cascade-PeaceHealth* case the court said this was too broad a test. It really ignores *Brooke Group*, which is still the law of the land, and the court also said that the *LePage's* test doesn't provide sufficient guidance to firms going forward. The decision is a treatise on the way the courts have approached the Section 2 exclusionary conduct cases, and it makes a distinction between single product cases and multiproduct cases. So whether you agree with it or not, it is a well laid out discussion of the law today.

The Ninth Circuit settled, at least in this case, because it was very eager to draw lines and provide guidance to firms, on what it called the discount attribution test. This is part of a test that was articulated by the Antitrust Modernization Commission. Under this test you allocate the discount given on the entire bundle to the competitive product itself, and then you apply the *Brooke Group* test to the competitive product to see what is below average variable cost. That leads to a focus on whether the bundling practices would have excluded a hypothetical equally efficient rival, and it tends to synthesize all that's out there.

Cascade is now seeking en banc reconsideration. And if you put this case side by side with this long history of the *Nicsand* case and indeed the long history of the *LePage's* case, you see the courts struggling to come up with a test that they think will provide sufficient guidance and will be easy for the courts to apply, which obviously matters to them.

The Section 2 case working its way through the system right now that could be of interest, and is definitely of interest if you work in the telecom area, is the *LinkLine* case. In this case the Ninth Circuit basically held that price squeeze claims in regulated industries survive the *Trinko* decision.

LinkLine was an ISP selling DSL Internet access. It leased its lines from SBC, which was also a competitor in the retail market for retail access. LinkLine claimed there was a price squeeze to drive it out of business. The district court denied a motion to dismiss, and then in an interlocutory appeal, the Ninth Circuit affirmed. The Court said that the *Trinko* decision didn't bar the claim of a price squeeze by a competitor who has no duty to deal with a plaintiff absent statutory compulsion. It looked at its own pre-*Trinko* decision, a case called *Anaheim*. The fact that *Trinko* didn't specifically address price squeezes, and

the fact that Ninth Circuit law itself pre-*Trinko* is circumscribed by a requirement of specific intent allowed the court to differentiate itself from the other circuits. So the status right now is that the Eleventh Circuit and Ninth Circuit have both held that price squeeze claims are still viable, whereas the D.C. Circuit has said as a practical matter they are dead after *Trinko*. A petition for cert is pending.

In one of the late-breaking events just a few days ago, the Court asked the Solicitor General to file a brief expressing the views of the United States on this. This is another way for the agencies to articulate some views on Section 2, although I might say in the price squeeze context it is not totally clear to me that you could articulate a standard that would cut across other types of Section 2 cases.

Let's do one more case on Section 2. This is another case I think is worth discussion. I don't want to spend a lot of time on it, but *Broadcom v. Qualcomm* is a private litigation that flows out of the body of law the FTC was developing on anticompetitive conduct resulting from standard-setting organizations.

In this instance Qualcomm is a member of a standard-setting group that required its members to license their technologies on FRAND terms; that's fair, reasonable and nondiscriminatory. Broadcom alleged that Qualcomm didn't do so and that it engaged in a patent "hold-up." The district court dismissed the complaint but then was reversed. The appellate court said that action by a standard-setting organizations to adopt the standard could be actionable anticompetitive conduct and that deceptive conduct before the standard setting body would be anticompetitive. Then it laid out three conditions: First, it has to be a consensus oriented body. It has to be the expectation of the participants that everyone will agree. Second, there has to be an intentionally false promise to license on FRAND terms. I think the inclusion of the term intentionally is important here. The court meant you really have to show intent, not just someone's mistake. So this will be an evidentiary fight in the Third Circuit at least. The third condition is that the standard-setting body has to rely on the promise when it includes the patentable technology in the standard.

Moving off Section 2, we included this case because it reflects a policy issue that I think is of interest, as you'll see when I get to my ten recommendations. *Stora Enso* was a jury trial, a government price-fixing case where the defendant won. Of course, it was unusual in and of itself to see one of these actually go to trial. In this case the Justice Department had, under its corporate leniency program, given amnesty to an alleged co-conspirator who was one of the government's witnesses at trial. The court instructed the jury about the leniency agreement itself and said that the Government is permitted to enter into these kinds of agreements, but the jury needed to bear in mind that a witness who has a deal like this has an interest in the case that's different from that of the ordinary witness, and that the jury should examine the testimony with caution and weigh it with great care. And then once the jury decides to accept it, it should give it whatever weight it wants.

There was considerable briefing around this as part of the trial. But what I thought was interesting was that clearly the courts, who try lots more cases than most of us, recognize the inherent fallibility of a witness who has been offered a deal and has a strong, strong incentive to tell a story that will give him immunity; and question the inherent lack of reliability of the testimony. But ultimately with that instruction the Court left it to the jury. I think we would have to speak to counsel who were involved in the case to know whether that made any difference in the government's loss. But nonetheless it is of interest.

I want to spend a little time on remedies. The cartoon on this slide has the world's smallest handwriting, but it says: "After the breakup of Bacchus Inc.," and we have five different gods of wine here.

In the remedies area the cases we are looking at are government cases. Of course there's *Rambus*. I don't think we need to revisit all the facts of *Rambus*; it has been much discussed and much written about it. But the Commission had overturned the ALJ's decision in *Rambus*, and there was a second round of briefing and argument on the remedies question itself. Complaint counsel in the case had urged that Rambus be required to license on royalty-free terms. That was the focus of the opinion written on behalf of the Commission by the Chairman. It is a very well written opinion. She goes to great lengths to say that the Commission clearly has the legal authority to order licensing on royalty free terms and goes through all of the relevant authority, but then ultimately concludes that the Commission is not going to do that. Instead, they took what I think is a fairly unusual step of setting a royalty rate. Of course, recognizing that they don't want to be the monitors of pricing in this market for the rest of their careers, they required Rambus to employ a Commission-approved compliance officer to ensure that disclosure was proper, and I suspect also to make sure they don't have to continue to be the monitor of rates over time.

The second FTC matter that has remedies implications was the review of the Evanston and Northwestern Healthcare merger. You may recall that this was a merger that took place in an era when the government believed, based on its experience in court, that there was no point in trying to block hospital mergers any longer. When Chairman Muris came to the FTC, he went back and started a retrospective to see post hoc if one could determine whether there were anticompetitive effects in certain mergers. Out of that review came this case.

The Administrative Law Judge had found that the merger had in fact been anticompetitive and required Evanston to sell off the hospital that it had acquired in the merger. When the case went up on appeal to the Commission, the Commission agreed that the merger was anticompetitive, but reversed the ALJ on the remedy question. What they were concerned about was some new—it wasn't just the integration itself, but there were some improvements that had been made that they thought might be put at risk by requiring a full divestiture. So instead they implemented a pure conduct remedy. The remedy requires Evanston to create separate negotiating teams so that each managed care organization negotiates separately with what used to be the separate hospitals. And it also requires that the contract made with one hospital couldn't be contingent in any way on contractual terms for the other hospital.

If you look at the submissions the hospitals made in response—they were given 30 days to put in a submission—you'll see a chart where they blocked out the units and put little walls to show how this is supposed to work. Again, the Commission went out of its way to say this is not its preferred remedy. They really believe structural remedies are appropriate, so one should not take too much hope from this that they will continue to use conduct remedies in the future.

The third remedies case was actually a Department of Justice case, *U.S. v. Monsanto*. We have talked over the last couple of years about these traited seed cases. In this instance it was an acquisition, and it had both vertical and horizontal elements to it. So the consent decree was an effort by the Department of Justice to create a firm independent of Monsanto but still able to compete in all dimensions. And it is a pretty complicated settlement. Monsanto had to divest its own cottonseed growing company, which was the horizontal overlap. But it also had to give vertical efficiencies to the divestee by giving it certain seed lines, by licensing certain of its intellectual property and then by licensing to a third party other lines. In a different world you would just block this deal instead of trying to come up with this remedy. But it was the first vertical merger with a remedy in quite some time.

Revisiting my all-time favorite case, *Stolt-Nielsen*: You may recall this was a company that obtained conditional leniency for price fixing, and then sought to enjoin the Government. The Government believed that it had violated the leniency agreement by failing to withdraw in a timely fashion from the price-fixing activity. The Government revoked the leniency agreement. Stolt-Nielsen went to court to seek an injunction against an indictment. The case went up to the Third Circuit. The Third Circuit said it is a violation of separation of powers for us to enjoin the Government pre-indictment, but you can raise these arguments post-indictment. That's what happened. The case went back to the district court after the indictment, and the district court dismissed the Government's complaint.

I actually think this might have been a different judge than the judge who had wrote the original decision—somebody is nodding yes—so there's a long recitation of the facts. What's a little bit odd about it is that the district court, who was hearing the case on remand, says there isn't any credible evidence that Stolt-Nielsen didn't effectively comply with the leniency agreement, and there was no credible evidence that it had continued its role in the conspiracy.

Harkening back to the jury instructions in the *Enso* case, where the judge said there is a question about credibility, so you jurors might need to weigh this evidence carefully when it comes with a leniency agreement, this court seemed influenced by the same thing. Again it might be interesting to hear what people who know more about it have to say. But there was testimony, or some evidence at least, as recited in the factual findings, that showed that some believed Stolt-Nielsen had in fact taken part in the conspiracy. The Judge seemed to discount it very heavily, based on immunity grants to these witnesses, and therefore said there wasn't any proof of this. He also pointed out that the leniency agreement itself was essentially to be interpreted as a contract, but given due process concerns, that it should be construed against the Government. The court said that the language in the agreement had required Stolt-Nielsen to effectively—I don't remember the words right now, but effectively withdraw from the conspiracy. The court was fully satisfied by the steps Stolt-Nielsen had taken to implement a compliance program, meet with business directors and put a stop to the conduct it had uncovered.

Obviously, one of the big headlines of this year was unsuccessful efforts to challenge merger cases by the FTC. The first was the *Western Refining-Giant* case, which involved oil refineries in northern New Mexico. Here the court just didn't believe in the case. It is hard to isolate one thing that was wrong there, but the court clearly didn't think there was anything anticompetitive about the merger. And the Tenth Circuit followed the district court's lead. So that one is over.

In a strange way the FTC got a victory in the second one. This was *Equitable Resources*. The purchasing company was called Dominion. This was a public utility merger involving an alleged natural gas monopoly in Pennsylvania. And the district court had dismissed the case on the grounds that the merger qualified for state action immunity because it had been approved by the state public utility commission. Of course this is an issue near and dear to the current Commission's heart, and so the FTC sought a stay of the district court's merger pending appeal and argued the points that they have articulated in their state action study. Under state law, the FTC said, the public utility commission should have rejected this

transaction and wouldn't be actively supervising it; the mere act of approving the merger wasn't the same as active supervision. And the Third Circuit actually granted the stay, so we were all eagerly awaiting what might happen in the Third Circuit's decision, when just a couple of weeks ago the parties announced that they were going to abandon the deal. Time had gone on too long, and of course, markets were completely different when this deal was signed up. They parted company amicably, and the FTC got its desired result.

And lastly, of course, the *Whole Foods-Wild Oats* case in which the FTC argued for a market of natural organic supermarkets in several specified locales around the country where Wild Oats and Whole Foods were direct competitors.

Some of you were in the meeting where we discussed this merger. This was a case where the judge, as I understand it, tried the case in a very truncated fashion. The only testimony he heard live, or at least the vast bulk of the testimony he heard live, was from the expert witnesses. So the industry participants did not testify; it was just the experts. The district court went off and just fell in love with the respondent's expert, David Scheffman, and ran with his analysis and based its decision on that.

This is a really important case for the FTC, not because 20 markets are now going to have only one premium and organic natural foods supermarket. Rather, the question that they raised on appeal is whether the judge misapplied the 13(b) standard that basically says the FTC only has to show there is a fair ground for litigation for the case to go to the Commission itself for adjudication.

There are also other grounds for their appeal. As you know, the Government has long believed that it doesn't have to prove a relevant market in the abstract sense if it can prove direct competitive effects. But the principal issue here is the 13(b) standard. My own view is that the FTC is right about this. The judge applied a standard unlike what other judges have when they have looked at FTC merger cases. It is very difficult to predict what the D.C. Circuit will do. It is usually pretty solicitous of the Government in these cases, but I have to say the underlying decision, given the way the proof came in, is very well done. Even though the only testimony he heard was from the experts, he certainly cites extensively to other parts of the record.

I'm running out of time here, so let me quickly go over this last section of the presentation, addressing innovation incentives, a series of items where one of the mantras seems to be preserving innovation incentives. A second IP report came out of the agencies. You can read it for yourself. It is summarized quickly here, and I'd be happy to send a copy of these slides to anybody if they want them. But it reinforced the notion that most of these IP issues are going to be reviewed under the rule of reason. The reason for that is to do otherwise would dull innovation incentives.

Similarly, there is another very interesting Business Review Letter involving IEEE, the electrical engineering standards setting group, which implemented a policy that would give holders of patents an opportunity to essentially compete on the licensing terms that they would require if their patent were incorporated in the standard. It's a very novel approach. The Government embraced it insofar as they embrace anything in a Business Review Letter, and then of course articulated the circumstances under which the organization could run off track by using it as a cartel-facilitating mechanism.

The FTC commented on a couple of different states' sets of attorney advertising rules. We thought we would simply bring that to everyone's attention, since we had looked at our own attorney advertising rules here in New York.

Just to add one little bit of international context here: you may remember that in the EU, the Court of First Instance in Europe, had affirmed the European Commission's *Microsoft* decision, which led to a statement by Assistant Attorney General Barnett that this might harm innovation. And this provoked a very, very strong response from the Commissioner, who said it is totally unacceptable that a representative of a U.S. organization criticized an independent court of law outside its jurisdiction.

I think I mentioned earlier our late-breaking news slide. I promised at least one person in this room I'd get to this point in the presentation. The Supreme Court has asked the Government for its views of the *LinkLine* case. There is also a very interesting recent decision out of the FTC, a 3-2 split with Commissioner Rosch, a Republican appointee, applying Section 5, not a Sherman Act theory, to another standard setting patent holdup case. Again, the decisions are clearly worth reading. We will clearly look forward to learning whether Section 5 becomes a more active tool for the FTC.

Also the FTC decision in *Chicago Bridge*, a consummated merger challenge, was upheld, including the remedy.

In very late-breaking news, the final *Microsoft* judgments, or certain aspects of them, at the behest of the states but not the Department of Justice, were extended until November of 2009 and perhaps longer. The judge reserved that option for the states, because there was an extreme and unforeseen delay in making technical documentation available to licensees, which the court found under the circumstances of the consent, as she said, given the parties' expectations, constituted a significant change in circumstances.

Finally, I think we are promised a report from the agencies on Section 2.

I'll race through these last slides. If we were writing a memo to the next President:

First: think hard about how you litigate these merger cases. It's not as though losses in these fields are unknown, not as though the agencies haven't thought about them before. It is an ongoing effort. I think part of it is an effort to try to figure out the long-term structural market effect rather than the abstract economic effect. And really think hard about the kind of evidence the courts find persuasive, because some of the ways the agencies and even the parties think about mergers just don't have traction in the courts.

Second: the Government really needs to litigate some vertical price restraint cases. It will be all too easy to ignore the admonition that the Supreme Court left us with, that is to say this is not a per se rule of legality. And there isn't very much guidance out there. Perhaps they will borrow a page from this afternoon's panel.

Third: do we really need a single standard under Section 2 for exclusionary conduct? One of the interesting things about the *Cascade PeaceHealth* case, is that the court basically said no. They make a distinction, as I mentioned, between single product and multiple product standards. So that's the first question. And the second question is if we need a single standard, even though we have this report coming out, it would be nice to litigate some cases and let the courts decide, with the Government leading. I think we could have some interesting results.

Fourth: continue to be vigilant in preserving innovation incentives, but also in making sure that the balance between competition and IP stays where it is. It seems to me ever more important today because we have so many industries moving away from brick and mortar to essentially IP-type products. In the pharmaceutical area the FTC has been very unhappy with the Court's results, but I know they are active and should continue to pursue new approaches for this because of the amount at stake.

Merger procedures: Both agencies have put in place improvements, and I'm not at all critical of them. I think people underestimate how difficult it is for the Government to undertake a merger review, but there is always room for more.

Six: this is really an issue that I don't have a clear answer for, but I think that we are in a world now where we have seen criminal antitrust charges brought side by side with non-criminal charges. We have also seen cases that have started out as criminal antitrust investigations and the antitrust charges have fallen by the wayside, with the result that we have traditional fraud-type charges as all that remain: And we have different parts of the government handling these cases and with different approaches to leniency. So in the Antitrust Division world we have amnesty as the crown jewel of the program and no such parallel outside the Antitrust Division, unless you think of something like deferred prosecution agreements as some form of leniency. It may lead to the conclusion this is right, given the different kinds of laws involved. But I think it is difficult for firms to know what cooperation gets you and what it doesn't when you have essentially two different regimes operating.

No more criticisms of independent courts in foreign jurisdictions. Clearly, international cooperation needs to continue, but I think we have to be realistic. When we look at China's new law, India has a new law, very active enforcement activities in countries like Korea, and many of these countries are not following the U.S. standards. I think it is unrealistic for us to assume the substantial lessening of competition standard will become the world standard. I think that is probably not going to happen. And we need to realize we may never see total convergence and figure out how you operate under those circumstances.

Continue to coordinate with the states. I think of this latest *Microsoft* result, where the states succeeded before the judge and the federal government sort of stepped back or abandoned its efforts—let's say didn't pursue them. It would be a much better for enforcement generally and for competition generally if they could stay on the same page. I'm not faulting anyone here, but I think it is too easy for the federal government to say, "Well, they are just states," and that's inappropriate.

Consumer protection cases. Having some experience there recently myself, I'm now of the view that the threshold for liability under the FTC Act in consumer protection cases is quite low. The consequence of that, and the fact that the remedies are often just forwarding looking consents means, in my view, consumer protection people need to get into court more often and see what actually constitutes a violation. There is not very much guidance in the litigated setting.

Finally, in case it isn't obvious from all of the previous nine recommendations, go to court more often. Sure you can have workshops, speeches and guidelines, but courts make our law.

Thank you very much.

MS. MAHONEY: Thank you all. Molly's presentation was fabulous, as predicted. We now have a break until about 10:00 o'clock. So we will reconvene at 10:00 o'clock with our criminal enforcement panel.

Recent Developments in Criminal Antitrust Enforcement

MS. MAHONEY: For those who are joining us just now, this will be your first panel of the day, welcome.

We have for you next our program "The Recent Developments in Criminal Antitrust Enforcement." Though many of us do not face criminal antitrust enforcement on a daily basis, there are few antitrust practitioners who will not have such a case across their desk at some point in their careers. So it is really imperative to each of us to keep up on the initiatives and perspectives of the criminal antitrust enforcement authority, particularly given the ever-increasing amount of jail time and fines that continue to be imposed on individual and corporate defendants.

In order to provide us with that update, this panel includes representatives from United States Department of Justice, private plaintiff and defense bar litigators and a Supervisory Special Agent from the Federal Bureau of Investigation.

The program will further our understanding of the issues raised by criminal investigations, indictments, sentencing and the potential relevance of criminal proceedings to civil litigation.

Our moderator for this program today is Steven Tugander. Steve is a trial attorney with the New York Field Office of the United States Department of Justice, Antitrust Division, where he has been since 1989. During his tenure with the Department of Justice, Steve has investigated and prosecuted numerous criminal antitrust cases affecting various industries and jurisdictions throughout the northeast.

In addition to being an active Executive Committee member and former chair of this Section, Steve is also an active member of the New York Inn of Courts and the SUNY Stony Brook Attorney Alumnae Group.

He received his undergraduate degree from SUNY Stony Brook and JD from Hofstra Law School. I will ask Steve to introduce his illustrious panel to you this morning.

Steve.

MR. TUGANDER: Thank you, Stacey.

Good morning. The last time the Antitrust Law Section presented a program at the Annual Meeting focusing on criminal antitrust enforcement was in January of '03. At that meeting our panel discussed the then recent investigation and trial of Alfred Taubman, who was convicted for his role in a conspiracy to fix auction house commission rates. During that program we also discussed what were then the recent trends and developments in criminal antitrust enforcement.

Since that program in '03, the practice of criminal antitrust has experienced a number of major developments that significantly impact the way cases are investigated and prosecuted. Included among the developments that we plan to cover today are: the Antitrust Division's increased use of search warrants; legislation that significantly increased the maximum prison sentences and fines applicable to both individuals and corporations; changes to the United States Sentencing Guidelines to reflect the increased penalties; a series of decisions by the Supreme Court holding that the Sentencing Guidelines are now advisory rather than mandatory; detrebling legislation that allows amnesty applicants to pay single rather than treble damages to victims of antitrust conspiracies, and finally, the Antitrust Division's increased efforts to bring fugitive defendants to trial.

Stacey described the make-up of our panel today. It is quite varied and experienced. We are going to engage in a roundtable discussion where we are going to go through various stages of the investigative process and get the perspectives of the different panelists one at a time throughout those different stages.

So let me take a few moments to introduce our distinguished panel. Patricia Jannaco is a Trial Attorney in the Antitrust Division's New York Field Office. Pat has extensive experience investigating and prosecuting criminal antitrust cases and was a key member of trial staff in *U.S. v. Taubman*. Pat is also a member of the Antitrust Law Section and is co-chair with me of this program. Good morning, Pat.

Ralph Giordano is my boss. As many of you know, he is the Chief of the Antitrust Division's New York Field Office. Under Ralph's supervision we are responsible for investigating and prosecuting criminal antitrust cases throughout the northeast region of the U.S. Prior to becoming Chief, Ralph worked at the New York Field Office as a Trial Attorney and handled numerous criminal and civil antitrust matters.

Sitting next to Ralph is Supervisory Special Agent Robert Silveri, who is in charge of Squad C4, of the FBI's New York Office. Special Agent Silveri oversees the investigative work of twelve special agents and two financial analysts. Until March of 2007, one of Squad C4's responsibilities was to investigate criminal antitrust violations. As a result, Special Agent Silveri has worked closely with attorneys from the Antitrust Division and particularly the New York Field Office.

Just so you know, prior to joining the FBI, Bob spent several years in the public accounting field as a CPA.

Sitting next to Bob is Stephen Houck, who most of you know. Right now Steve is of counsel to the New York City law firm Menaker & Hermann, where he focuses on

antitrust law and commercial litigation. In addition, Steve right now is the Executive Director of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. Steve also serves as enforcement counsel to eight states and the District of Columbia in the government lawsuit against Microsoft.

Now, as most of you know from 1995 to 1999 Steve served as the Chief of the Antitrust Bureau of the New York State Attorney General's Office. Steve is currently a member of the Antitrust Law Section Executive Committee and he is also a former chair of this Section. Welcome, Steve.

Nathan Muyskens is a partner in the Washington D.C. law office of Troutman Sanders. A main focus of Nathan's practice is the representation of corporate and individual clients in criminal and grand jury investigations and prosecutions, and he has particular experience in government antitrust investigations. Nathan has also conducted numerous internal investigations, advised on corporate governance issues and has been involved in the implementation of compliance codes. Before entering private practice Nathan was a trial attorney with the Bureau of Competition of the Federal Trade Commission.

Finally, Bernie Persky is the head of the antitrust practice group of the New York law firm Labaton Sucharow. For many years, Bernie's practice has involved complex business litigation and class actions, primarily antitrust, trade regulation, securities fraud and civil RICO. Bernie has played a key role in major antitrust class actions that have resulted in monetary recoveries to class members, including consumers and businesses, of well over $1 billion.

Bernie is a member of the Advisory Board of the American Antitrust Institute and also serves on the Executive Committee of this Antitrust Law Section.

Just a little disclaimer before we begin. Please note that anything that I, Pat or Ralph say today are our own views and do not necessarily represent the views of the Antitrust Division or Department of Justice.

With that, Pat, we will start with you. Pat, there was a time not that long ago when the execution of a search warrant by the Antitrust Division was rare. Today search warrants are considered a main weapon in the Division's arsenal. What has accounted for the change?

MS. JANNACO: Well, I would have to say that the vigor of our amnesty program probably accounts largely for the increased number of search warrants that we are executing. Along with the corporation that seeks amnesty come employees who cooperate. And those cooperators are able to provide us with the facts that we need to support a probable cause determination. They will point us in the direction of documents and the location of documents. So I would say that probably is the main consideration.

MR. TUGANDER: Under what circumstances is the Division likely to proceed by search warrant rather than Grand Jury subpoena?

MS. JANNACO: Of course, if we have probable cause, that's a great thing. We are able to get our documents immediately. As in a subpoena situation we don't have the delays that are built into subpoena compliance negotiations, which can go on for some time. We can zero in on critical documents, and we also get better documents. We are looking to get to the heart of things as quickly as we can. Production is not sanitized. There is no erring on the side of nondisclosure in production. And we also may have a concern about document destruction. So those are some of the factors that weigh in our decision to go by search warrant.

We have logistical concerns as well. We need to have two warrants approved by a court, so we have to manage that. We also have to coordinate multiple searches around the country for different companies. We want to usually do those at the same time. There are technical requirements, imaging hard drives; these are things that don't necessarily come up in the context of a subpoena. The documents that we do get are not screened for privilege typically, obviously. So there are certain considerations that have to be given to that and procedures that have to be followed with respect to that.

MR. TUGANDER: Well, if a decision to proceed by search warrant is made on a company, will document subpoenas serve any function?

MS. JANNACO: Yeah, of course they do serve a function. The Grand Jury subpoena will reach documents that are not at the premises being served. And the subpoena is usually left with the company that is being served. They also gather up other documents that may be at the premises but not gathered in the course of the search. There are other kinds of documents that are not necessarily evidence of the crime but needed in order to conduct our investigation.

We are also using Grand Jury subpoenas to reach subjects for whom we don't have probable cause but who we believe may be involved and have documents that are relevant to our investigation.

MR. TUGANDER: So it is not an either/or proposition?

MS. JANNACO: No, we use both in the same investigation.

MR. TUGANDER: Bob, I want to ask you about the FBI's role in search warrant execution in a minute. But before we get to that, can you briefly describe how the FBI is structured in New York and particularly how do agents get assigned to antitrust cases?

MR. SILVERI: Sure. There are 56 field offices mostly in every state. We have a number of offices around the

world. But in New York, it being the largest, we have about 1,200 agents, 1,200 support personnel. The way it is broken down, because New York is so large, that as opposed to a smaller office, where an agent might do every type of crime, white collar, terrorism, organized crime, you jump. But in New York you're kind of assigned to one specific area.

In New York we have six divisions. It is broken down to the criminal division, counter-terrorism, counter-intelligence, admin, special operations and field intelligence group. That is headed by what we call a SAC. A SAC is a special agent in charge. Within each division, the division is broken down by branches. Could be anywhere from one to five branches. My own experience being in the criminal division there are three branches in the criminal division: White collar, violent crime, organized crime. Each branch is headed by an assistant special agent in charge. Then broken down even further within each branch you can have as many as five to fifteen squads that are headed by a supervisory special agent, like myself. Again, in my case, being on the criminal division white collar crime branch, I am in charge of a public corruption squad. But we have bank fraud, security squad, healthcare fraud, economic, cybercrime and government fraud. So each squad handles a specific violation or violations. Our government fraud squad, for example, is the squad that handles antitrust matters, also environmental crimes and bankruptcy fraud. So it kind of makes it easy when complaints come in or referrals come in from other offices, law enforcement agencies or requests come in from the Antitrust Division, it goes specifically to the government fraud squad, to that supervisor, and they in turn assign it to a specific agent.

MR. TUGANDER: Thanks, Bob. Without getting into any sensitive areas or techniques, can you give us a general sense of the type of work the FBI needs to do to gear up for an Antitrust Division search?

MR. SILVERI: A lot goes into that obviously. Most importantly I can't stress enough that communication is the biggest part when you're dealing with your trial attorneys or Assistant United States Attorneys, that you brief each other on the evidence that you have to date, the interviews you have done, what people have said. If you've wired people up, what are on the tapes. You want to get all that evidence out in the open so that you know what you have and to be sure, and as an agent I want to be sure that you have probable cause to go out and do that search warrant. Once you get all that evidence gathered, it goes into an affidavit, the agent has to swear to that affidavit, and that agent better make sure he can attest to everything that's written in that affidavit. That's why it is so important to work with a trial attorney to make sure what you're swearing to in front of a judge is true.

Simultaneously to working on that affidavit and working with the attorneys to get that done, the agents are determining what can be seized and to make sure that conforms to what the warrant allows you to go get. Usually the case agents are looking into determining where you're going to do that search warrant, whether you're going to need locksmiths, photographers, transportation, maybe you need SWAT. You might need the evidence control unit. The case agents will usually lead that search but only in the event of dealing with crazy owners of the search location that you're conducting, dealing with their attorneys, who I guaranty you are usually going to show up within hours of going into that door, and any interviews that you're hoping you might get to do when you get to that search location. Employees are going to start showing up and wondering what's going on and pretty much panic sets in. It can get a little crazy. So there's usually a second agent there to direct the search, make sure everything gets done, leading the case agents, deal with anything that might crop up.

MR. TUGANDER: What about in this era of electronic evidence, which is usually pretty high on the list of what the Government is coming after. Do you have to make certain technical arrangements?

MR. SILVERI: Absolutely, yes. I failed to mention that. One of the most important things is to get the CART team on board; those are our computer guys, to get in and seize the computers or try to image the hard drives that are there. Just seems to be getting more and more complex, so we have a rather large CART team that just goes in and handles that work. If we can take the hard drives, we prefer to image them, try not to upset the business in any way, but try to make it as easy as possible. But it is vitally important that we get that stuff.

MR. TUGANDER: Are there situations in a large search where you might partner up with another law enforcement agency?

MR. SILVERI: Absolutely. I think it is a great thing. It brings not to mention man hour, brain power and fire power when the FBI and IRS are showing up at your door to execute a search or try to do an interview. It is good perception of the public that we are working together, and we are not messing around. So we are going to get in there and do our thing. And it is kind of like the FBI and IRS agents, we are one team, but also the IRS is looking for things a little more towards the evidence of tax fraud. We are looking for antitrust crimes or bank fraud or whatever it is. So we are a combined team helping each other out. It makes it that much more of a powerful unit.

We have other non-antitrust cases where we work a lot with offices of Inspector General for a lot of other federal agencies, local law enforcement, NYPD, New York City Department of Investigations; we have done a lot of searches with them. It is really good. We try to do them with other agencies.

MR. TUGANDER: Ralph, we are going to get back to the topic of search warrants in a moment, but before we

do, can you give us an overview of the work that's done by the New York field office.

MR. GIORDANO: Good morning. Our office is located in lower Manhattan, Foley Square area. We are one of seven field offices. We have nineteen attorneys, nine paralegals and of course clerical support. The geographic area assigned to us is all of New England, New York State, northern New Jersey and parts of central New Jersey.

We don't, however, just investigate and prosecute local and regional criminal conspiracies. We also have and will look at national conspiracies and international conspiracies; usually where there is some nexus to our area. For example, a victim is located in our area; an overt act has occurred in our area; some of the conspirators are located in our area. But we do look at and prosecute international and national as well as local and regional conspiracies.

At this point essentially the New York office does criminal work. We investigate and prosecute the per se criminal antitrust violations. By that I mean agreements among competitors to rig bids, agreements among competitors to fix prices and agreements among competitors to allocate customers and territories. We also bring related Title 18 offenses: perjury, obstruction of justice, tax counts, conspiracies to commit fraud, et cetera.

As with the other field off offices, we have been busy over the years. If I may I'll give you some statistics, and I promise you I'm not going to do that anymore after these few. Over the past ten years or so we have brought about 160 criminal cases—that's just our office—against over 50 companies and over 175 individuals. Almost all of these defendants have pled guilty or have otherwise been convicted. About 70 of the individual defendants were sentenced to jail for a total jail time of over 95 years. Thirty-seven of these individuals were sentenced to jail for one or more years. On all of these matters, virtually all of them, we have worked with FBI agents, primarily with Bob's office, and we have gotten invaluable assistance from them, and we have a splendid working relationship with the FBI, and we expect that to continue.

MR. TUGANDER: Thanks, Ralph.

Let's get back to the topic of search warrants. Seized documents, both hard copy and electronic, may contain potentially privileged attorney-client materials. What steps has the Division taken to protect that privilege?

MR. GIORDANO: There are a multitude of steps. I'll mention some very broad outlines. The steps will vary with the circumstances of the matter. We at the Division are very mindful of the attorney/client privilege, and we clearly do not wish to intrude upon or violate it.

If, for example, a very small number of documents have been seized from an individual or company, we may assign an attorney in our office not on the investigation in question to review the documents and isolate any documents that may in his or her opinion infringe upon the attorney/client privilege. Documents that are clearly covered by the privilege will be returned by the attorney, to the counsel of the company or individual whose documents have been seized. If there is some question, that attorney will talk to counsel and attempt to resolve the issue.

In situations where we have an awfully large number of documents, electronic or hard copy, what have you, again in this case we'll assign one or more attorneys not involved in the investigation to deal with counsel for the company or individual or companies or individuals involved, in an attempt to try and work with those attorneys and that counsel to identify documents that may come within the privilege. And clearly to the degree they do, return them to counsel.

It's possible that there are issues on particular documents that cannot be resolved with counsel. We may seek the assistance of the court, but that's unusual, but it may happen. Again, we are mindful of the privilege and very interested in protecting it.

MR. TUGANDER: Sometimes you can get an argument from a company that it can't function without access to its documents, both hard copy and electronic. What can be done to provide access to a company while those documents are seized?

MR. GIORDANO: Well, if the company knows specifically what documents are involved, we can arrange to have copies made for the company. If the company or individual isn't sure what documents they need, we can arrange to have them come in and review the documents, electronic or otherwise. They can then identify those documents which they feel they need, and we can arrange to have copies made for them.

MR. TUGANDER: Thanks, Ralph.

Bob, how do your agents get involved in the post-search review process?

MR. SILVERI: It happens every time. We get the documents, and as agents we need to look at them and try to hopefully generate new leads, new angles to look into. We are looking for bank accounts that we are not aware of, assets that may be hidden, any kind of smoking gun that's going to lead us into a new direction or support the evidence that we have. We will look for associations with individuals and companies that we weren't aware of. Any clues, I mean it is vitally important. If we do the search, we need to look at the stuff and look at it hard.

As I mentioned before, the bigger area obviously is the computer evidence. We find a lot more of the computer evidence to be extremely valuable. More times than not there is a gazillion e-mails, files, letter, graphs, Internet

sites that are targets going into. And again, we need to look at it and develop leads to continue our investigation to support the criminal activity that we have. It is good that we do that on our own and with attorneys. Communication is huge. We are looking at it first, then the attorneys might look at it. We look at it together and talk about it. It is an important part of post-search.

MR. TUGANDER: Bob, you've obviously had cases with the United States Attorneys Office and with the Antitrust Division. Are those investigations handled in the same way or are there differences between the two types of investigations? What has been your experience?

MR. SILVERI: Good question. I've been fortunate to do several cases with the U.S. Attorneys Office and with the Antitrust Division. I'll say this from the get-go. In both instances the attorneys that I've worked with are incredibly bright and thoughtful, and they want to learn from you. They make you feel like you are a part of the team. Arguments and differences of opinion do occur at times, but it is all part of the learning process.

In my case I get to learn how to think like a prosecutor. A prosecutor gets to try to think like an investigator and everybody learns from that. It makes the case that much stronger. That said, I've observed differences in the office makeup, personality and styles between both offices. So let me say this, and I hope I don't offend anybody.

With the U.S. Attorney's Office, my experience is they tend to be younger, right out of school, three years experience, that kind of thing. That's not a bad thing. That's not to say they are not good at what they do, but they are younger and usually have about 80,000 cases assigned to them. So I probably have to say they have very little time to really strategize with the agents in terms of how to take a case further. Basically, they want you to bring an airtight case to them, and that's fine, and then they are ready to jump in and do everything that needs to get done to get the case prosecuted. I'll tell you that some FBI agents prefer that. They want to run the case, and they want to run it by themselves, how they think it should be done. And that is fine.

With the Antitrust Division, equally intelligent and I would say usually far more experienced in prosecuting cases, specifically in antitrust crimes. There is no question about that. So I would say that as a result antitrust attorneys, in essence, to me become partners from the get-go with agents. Thoughts and ideas are shared amongst the entire team, among agents, analysts, trial attorneys, paralegals. You're discussing who to approach first, who to approach next, the types of techniques that you might want to use. What to do two, three, four steps ahead of the game. As I said, I think that's a benefit, because it helps me to think like a prosecutor, and prosecutors kind of get to think like us.

We can investigate a case till the cows come home, but if we can't prosecute it and know what evidence to get from the beginning, we are wasting time.

MR. TUGANDER: We have a lot of meetings?

MR. SILVERI: A lot of meetings. Communication.

MR. TUGANDER: Ralph, what type of interaction does the New York field office have with the United States Attorney's Office during the course of an antitrust investigation?

MR. GIORDANO: Bob, I think after all these years I'm starting to think like an FBI agent.

The Antitrust Division is authorized to investigate and prosecute criminal violations of the federal antitrust laws, and that's what we do. We do, however, keep contact with the U.S. Attorney Offices in our area. Any investigation, even a preliminary investigation, that we begin we will notify the pertinent U.S. Attorney's Office. We will keep that office abreast of the progress of the investigation. We will seek their counsel as appropriate. We will try and become aware of their particular practices and policies. Any plea agreement, information or indictment that we file, before we file it we will show the U.S. Attorney's Office in the pertinent district the pleadings to be filed.

Also we have made outreach presentations to the U.S. Attorney Offices in our area. By that I mean we talk to their attorneys, tell them what we do, tell them what to look for in terms of their Title 18 investigations as possible leads or suggestions or indications that an antitrust criminal violation might also be occurring. And from time to time we get leads from U.S. Attorney Offices as to possible antitrust conspiracies.

In short, we try and I think we do achieve a good working relationship with the various U.S. Attorney Offices in our area.

MR. TUGANDER: Thanks, Ralph.

Nate, I want to turn to you. In the written materials that accompany this program you submitted a handout that relates to training that your firm provides to corporate clients to be prepared in the event the Government makes an approach by way of either search, subpoena, or interview. Could you describe the advice that is given?

MR. MUYSKENS: Yes. In this day and age it seems that in a lot of companies it is almost a certainty at some point a search warrant is going to come or some sort of government investigation. So what we try to do in a lot of our compliance efforts is we add a little section on what do you do if Bob shows up. The reason we do that is just basically because the liability for obstructing an investigation or destroying a document or any of the things that often can happen when something like this occurs is a lot

greater than the actual underlying offense in most situations.

For example, a Sherman Act offense, it is a ten-year hit. 18 U.S.C. 1519, destroying a document, is a 20 year hit. The intent requirement is such that you want to be a lot more careful.

So what we do is during any kind of compliance presentation give a little 30-second spiel about if the Government comes knocking, you certainly can talk to them if you like. You're more than welcome to do that, but you don't have to. There is a card we give out. It is a little card that outlines just what you should basically be doing and what rights you have. We think that's a good thing.

Bob made an interesting comment, that they always bring another agent, because when the employees show up panic sets in. And that is absolutely right. When you get a call from the plant manager or the office manager or a place that is being searched, it is generally a pretty irrational call. People do freak out when guys with guns show up. They are always very polite, but it still is disconcerting. So again, we lay out some ground rules. The card is actually laminated, and that's how hokey it actually is. But we have found that people do keep it. We only give the cards out when we have some reason to think there is a good reason we should.

If we get a whistleblower phone call, and if we've been looking into what's been going on, we will make sure the general counsel will have a few of these cards available. If we have gotten wind there are other competitors in the industry that have been questioned by the FBI, we will give out the card. We don't always do it. You obviously get some interesting questions when you hand out a laminated card that says what do you do if the Government knocks on my door. But this day and age I think a little bit of training is necessary.

MR. TUGANDER: So you want to be prepared. Nate, how widely is that information disseminated throughout the company?

MR. MUYSKENS: We keep it as narrow as possible. We wouldn't give it to every employee of General Motors. Again, if you use the whistleblower example, we would give it to the sales folks in the area we think might be investigated.

Actually, we have a different laminated card for directors and officers that's a little more detailed, things you would want to know if you have more responsibility in a publically traded company. So it is limited. Again, you get a lot of questions when you hand out a card that says what do you do when the Government comes knocking, so you don't want to create undue panic.

MR. TUGANDER: So Nate, when you get that nervous call from the client, he tells you a search warrant was executed by the FBI as part of an Antitrust Division investigation, what action do you take?

MR. MUYSKENS: The first thing we do, if he doesn't have my handy card, is go through the rules again. But you want the person who is on the ground to not interfere with the search warrant but to try to learn as much as possible. The agents are pretty good at taking a useful inventory of items, but often they will call an item something different than you call the item. So you want to have somebody who is on the ground who can really let you know at the end of the search what has been taken so you can begin to try to figure out what your problems actually are.

The other thing you can do almost immediately after that is start putting in place systems and other things to make sure no other documents get destroyed. While the search warrant may have been carried out at plant A, we want to make sure that all e-mails are frozen company wide. Because again, your obstruction hit is always going to be a lot greater than the underlying offense in these situations and certainly something that can be avoided.

MR. TUGANDER: Nate, if possible, will you actually visit the search site?

MR. MUYSKENS: I've never actually visited a search site because it has never been practical. The way these antitrust cases seem to work is you never have someone five miles from your house, so it is sort of an impractical thing. Would it be good? Yes. Is it nice if you at least have your general counsel or someone with legal training to sort of keep track of what's going on? Yes, that's great. But it tends to be an impossibility in antitrust cases, unfortunately.

MR. TUGANDER: If you can't visit the site, will you try to contact either the agents or prosecuting attorneys by phone immediately?

MR. MUYSKENS: I'll always ask to talk to whoever is on the site immediately. The worst they can say is no, I'm busy. But you can learn some fairly useful things. You want to get on as soon as you possibly can, figure out what's going on. Try to determine what conduct is at stake, what the facts might be, anything you need to know. And if some polite FBI agent is willing to tell you a little bit, that's great. After the search is over, yes, I would call whoever is listed on the warrant to say hi, I represent company X, how can we cooperate with you, how can we further help you. So yes, you really want to get in contact immediately.

MR. TUGANDER: Steve, let's turn to you. Let's say you happen to represent an individual who is involved in the conduct under investigation, and he happens to be employed by the searched company. The client informs you the agents on the site want to interview him. How would you advise him?

MR. HOUCK: My general philosophy is to be very, very nice to prosecutors and to cooperate with them to the maximum extent possible. As you look up here and you look at these four people, they all look to be very nice, decent, well-meaning, well-intentioned people, but don't let appearances deceive you. You'd be guilty of the grossest malpractice if you let an unrepresented client in a room with a couple of sharks like these people.

So the advice always would be to have a lawyer present during interrogation. There are a lot of good reasons for this. Antitrust investigations can be very, very complicated. And sometimes the facts aren't very clear. A witness really may benefit from having his or her recollection refreshed before going on record with the prosecutors. It is not unknown in antitrust investigations, in particular that sometimes things are proven through inference, rather than overtly. So exact words witnesses say are important. And it wouldn't be unheard of that somebody would try to put words in a witness's mouth.

It is also very important in terms of your representation of the client to know what the client has told the prosecutors. You can't really give sound legal advice unless you know what the individual has said. So it is very important to be there for that reason.

Finally, I want to point out the scenario was clearly written by Pat and Steve, because it assumes when somebody like Bob shows up at the door of a witness that he's somebody like Tony Soprano with a criminal antitrust lawyer on retainer and picks up the phone and calls you. The reality, as Nate said, is that this is a very disconcerting experience for most people. And, if you're lucky, they will have heeded Nate's advice and called up the person's company, not you directly as a lawyer. So you will be retained down the line somewhere.

As I'm sure we'll discuss more here, it is always very important for corporations or your individuals to make clear exactly whose interest they are representing. So that's something you want to make clear at the outset.

MR. TUGANDER: Well, Bob, let's say you're on site and you get a call from an attorney representing the company or individual. How much information will you give him about what you're doing on the premises?

MR. SILVERI: This is a great question, and I think it is why I love my job so much. To answer the question, it really depends on who the lawyer is. Who is he representing? Is he representing the target, the subject? Is he representing a victim—not a victim, but maybe a witness who I don't believe really has anything to do with the alleged crime? But the short answer is absolutely, I will talk to them. I'm probably not going to say much. I'm going to want to know what they are interested in learning, and based on what Nate said, you try to be as cooperative as possible. I'm not going to get into the details of the case. I'm there to do a job; I want to get in, get out with the documents we need. We can talk in more detail at a later point.

That being said, depending on who they are representing, if there's somebody I really want to talk to, we'll try to make some time right there and then to ask some questions, and we will try to make it work. I think communication is only the best way to get the evidence that we need, and we will do it.

MR. TUGANDER: Thanks, Bob.

Nate, I want to turn the attention back to you and talk about internal investigations. Let's assume a search warrant is executed on your corporate client, and you've learned that amnesty is no longer available; however, there is still an opportunity for a company to be second in the door.

Let's assume a company is interested in being second in the door. Two questions: Do you immediately begin an internal investigation? And if so, how is that investigation conducted?

MR. MUYSKENS: Well, the availability of amnesty doesn't really drive my decision on whether to push the company to start an internal investigation. It is basically the fact that the search warrant came that's going to get it rolling full steam ahead. You get a search warrant. You know there's probable cause there. There's an affidavit sworn out, so you've got a problem, and you need to start looking immediately. If amnesty plus is still available that's all well and good, but we have probably at that point into the internal investigation for sure.

I think these days really need to start as soon as you possibly can. The one thing you want to make sure you've done is make sure the conduct has stopped. You guys don't look very kindly on companies that once they are being investigated keep fixing prices, so you want to make sure that's ended. And to be honest, that's easier said than done. You need to actually figure out who is doing what, if there are mechanisms in place that maintain a price at a certain level that you need to figure out kind of a different way to stop.

The second reason you want to get this internal investigation moving is you've got a lot of audiences here who you are kind of playing with. One is the Government, but you've also got shareholders, customers, suppliers. People want to see the company act as a responsible corporate citizen. In order to do that you need to get on these things immediately. Even other government agencies where you may do work, when they later decide whether to bar you or not, they'll look at what you did in terms of compliance and after the search warrant went out and whether the company is responsible.

So to answer your question, the key to when to start the internal investigation doesn't have much to do with

amnesty at all, but has to do with whenever you think there might be an issue.

In terms of how the investigation is conducted, going along the same lines as trying to be a responsible corporate citizen or at least creating that appearance, you want to create an independent review of things. It has to be a real internal investigation. You want to bring outside counsel in. Your clients always want to try to do these things on their own at times, and you have to dissuade them from that. There is nothing worse than when your general counsel and your AGC then become the third witnesses at trial. You want to make sure the internal investigation is somewhat removed to give it that unbiased, clean appearance. That's how we generally try to conduct them, but sometimes your client has other ideas.

MR. TUGANDER: Now, how do you go about informing employees? If we are in this plan of trying to cooperate with the government, do you inform employees that what they tell you may be disclosed to the government?

MR. MUYSKENS: One of the first things you do with any internal investigation is you start interviewing the folks who probably screwed up. When you do that there is an interesting dynamic that goes along. You want to learn as much as you possibly can, but you want to make sure you're not just completely running roughshod through the rights of the employee. We always give a warning, if you will. You explain to the employee first that I represent the company; I don't represent you. Everything we are discussing here is something we consider privileged, and I am conducting this interview to assess the case for the company and to prepare for litigation. But you do also need to know as the employee that this privilege does belong to the company and the company can decide whether to waive it. It's the company's owning, not yours. Then we move on from there.

Actually, the follow-up question you always get from people after you've said that is well, do I need a lawyer? And that's a little bit more difficult. Especially considering these initial interviews during an internal investigation, you don't really know who has done what. You have some ideas, but you're talking to people, and we haven't gotten target or subject letters from you guys, so we don't know where everybody fits. So if you know full well that somebody is going to be a target, you would debate whether to even interview them. Try to get him his own counsel.

Where people are in that gray area and ask you if they need a lawyer, I always cop out and go well, I can't answer that question, but we can certainly find somebody you can talk to about it. That seems to work. All the model rules about that in the case, it is all over the board. So there is no real bright answer. But we always try to be very honest with people.

There are some people that think you should give these sort of mini Miranda warnings, you have the right to remain silent, and that I will or may turn this over to the government. I don't view myself as an agent of the government and I don't think I'm a special assistant attorney when I'm doing an internal investigation, so I don't think that's quite necessary. But that is something that a lot of people that are better at this stuff do, so it is another thing to think about.

MR. TUGANDER: What happens to employees who refuse to cooperate?

MR. MUYSKENS: They are seldom seen again.

I would view that as two classes of employees. There are the ones who clearly think they have a problem, so I don't really view that as not cooperating. Those are people we would probably get counsel for. If they have an issue, you want to get them lawyered up separately. You don't want to create ethical issues.

In terms of employees who are a problem, that just come in and try to lie to you or trick you, that does happen. Usually it is somebody who thinks they are pretty slick. I always consult with my employment partners first, people in HR, because I don't understand employment law very well. Depending on what their contract says or if there's a union involved, there are all kinds of issues there. Again, as part of our antitrust training—and we do this in our FCPA training—you sign something that says you've read it and understand it. And you also sign something that says it is part of my responsibility as employee that I will assist and cooperate truthfully and fully in any sort of internal investigation. These folks know that going into it.

MR. TUGANDER: Can you tell us what usually goes into the company's thinking as to whether or not to pay legal fees for either a current employee or former employee?

MR. MUYSKENS: Well, I'm always a big believer that you should just pay them, even though it could be a bitter pill to swallow. These fees are obviously pretty high. But at the end of the day for your employees who need counsel, you want to make sure that they have good counsel. There is nothing worse than having the government's main target, who happens to be one of your employees, get upset with you and go hire a guy who does mostly DUIs. I'm not trying to be flippant, but I've seen that happen. You want to make sure your employees have lawyers that are going to cooperate with the government and work with the government well. They are going to make sure the employee tells the truth and don't do anything else wrong. So I always push to pay.

There are certainly situations where you wouldn't. But in a matter like this, it's usually good. And to be really practical about it, usually you don't even have a choice. Based on the articles of incorporation or the employment agreement, you're paying.

That is one of those things that in all these white-collar conferences everybody gets upset about indemnification and paying legal fees. Maybe I sort of missed out, but I've never found it to be a real big issue with the government. I've never had a prosecutor be a nay sayer or anybody get angry at me for paying the fees. I've had guys get very angry with people employed, but the fee thing, I guess post-McNulty memo, I don't view it as much of an issue anymore.

MR. TUGANDER: Steve, let's turn to you. Suppose you represent somebody who has a problem; they independently retain you, outside of whatever lawyer the company wants to refer them to. From your point of view what are the pros and cons of asking the company to pay for your legal fees?

MR. HOUCK: This is a very important practice pointer. Your fees are much likelier to be paid if they are footed by a big corporation and not an individual. So that's a definite plus.

Also, from the perspective of the individual, he or she is being asked to incur legal fees for something done on the job, so I think there is a perception that it's fair to ask the company to pay those fees. And the reality is, an antitrust investigation is often very complex, and doing a really good job, as you should for your client, can be expensive. It takes time and money to try to figure out what's going on. There are lots of witnesses, and it can get quite expensive to be able to give your client the representation he or she ought to have.

So my experience is it is not really that much of a question if the company is willing to pay the bill. The downside is although you clearly have to provide an independent representation to your individual client—that's your first and highest obligation, you nevertheless feel some responsibility towards the company that's paying the bill, and that may present some issues as you go forward. Notwithstanding the fact that at the end of the day you really have to do what's in your client's best interest.

MR. TUGANDER: Let's envision a situation where the client begins to cooperate with the government, and the corporation is paying your legal fees, and for whatever reason he doesn't want the company to know that he's cooperating. Is there a way that you can continue to bill the company without disclosing the fact that all this time and effort in cooperation is being made?

MR. HOUCK: I think practically, certainly, you can do the work and just not send the bill for a while. I'm not sure that's the best way to proceed. As you say, maybe circumstances are such that's in the best interests of the client. My general philosophy is I try to be honest and forthright not only with you folks, which is the most critical thing, but also with the company. And the company itself, notwithstanding what you guys sometimes think, really wants the individual to cooperate. They don't want to continue to employ somebody who unbeknownst to them has done something illegal. So they have their own interests in that regard. In fact, the condition of continuing to pay legal fees is probably that the individual continue to cooperate with the government investigation. So certainly there are ways not to let the company know what's going on for a period of time. But overall, I would try to be above the board with everybody involved, if that's possible.

MR. TUGANDER: Nate, let's turn back to you. Suppose there's an employee or even a former employee where the company is paying his legal fees, and it turns out the company finds out he's cooperating against the company. Does that have any effect on the company's continued payment of his legal fees?

MR. MUYSKENS: You know, it really doesn't. Although I would add, if you do send the bill for the individual three or four months late, you get paid about nine or ten months late. In a white-collar case, you know the individual is going to try to work a deal out with the Government. Nobody ever says screw you guys, I'm not working, let's take it to trial. So you kind of know going into it that you're going to be paying for some cooperation that potentially harms the company. But that's going to happen whether you pay it or not. I would rather have a good lawyer helping cooperate, knowing it is being done properly than just have an employee going in there by themselves or with the lawyer who takes on a full cooperation in an antitrust case for 500 bucks flat. So I don't think I would particularly let that dissuade me from paying fees.

Often your client will get a little annoyed if an employee is dimeing out the company, but what are you going to do, cut him off and have him go somewhere else? It is just not a practical thing.

The other thing to, just getting back to it, with most employment agreements and articles of incorporation, like Delaware, you're not really going to be able to pull it anyway. So that's where I am on the issue.

MR. TUGANDER: Turning to a bit different topic. In the written materials we have provided you is a sample joint defense agreement, which I recommend everybody take a look at. Nate, at what point in the investigation is such an agreement likely to be entered into by the parties?

MR. MUYSKENS: Well, I think as early as you can. Once the search warrant has been carried out and we have gotten some idea of who the other coconspirators might be, I'm going to reach out to counsel for those other companies, because I'm going to want to know what's going on. You want to do that very quickly in the internal investigation to get as much information as you can. Generally the other coconspirators are fairly willing to cooperate. Frankly, when you start doing that you always

enter into some form of oral joint defense agreement right off the bat.

When does the agreement get written down? That can vary. I don't know if it is always a good idea to have a written joint defense agreement. There are certainly times when it is. If you're exchanging a huge number of documents, there is probably a greater need for a written joint defense agreement than if you're just sort of talking in generalities. So it is really quite fact-specific.

MR. TUGANDER: Generally, what are the key terms to the joint defense agreement; what are you most interested in?

MR. MUYSKENS: I don't know if there are really key terms. I would argue that any agreement you write you try to make it as simple as possible. There are two key things you need to remember. The first one is you don't need to produce everything you have. You've got to keep in mind you're going to have some documents that you're just not going to turn over. Because in the back of your head you always have to remember that it is a joint defense agreement. Think things might go out, and you could maybe argue it is not admissible later, but you can't get the toothpaste back into the tube. So don't be lulled into a false sense of security with the joint defense agreement.

The second thing to always keep in mind is you can get out of these things any time you want, but so can everybody else. So while your interests may be aligned at the time, that can change really quickly. You never want to be the first guy to get out of a joint defense agreement, because you feel like you're the one the mob would shoot. But if it is in the best interest of your client, you should do it. And everyone else would do it to you in a second. So those are things you need to keep thinking.

MR. TUGANDER: So you're not completely trusting of your partners in this agreement?

MR. MUYSKENS: Well, if it's Steve, I certainly am. But it varies. You're trying to do the best for your client, but there are times when it just doesn't go along with the interest of everybody else.

MR. TUGANDER: Steve, do you have a preference for oral versus written joint defense agreements?

MR. HOUCK: I agree with Nate. It is a somewhat controversial subject. I've heard some lawyers say they absolutely insist on a written agreement, and others say they would never sign one. I guess I would say I'm somewhat agnostic. In some jurisdictions there may be some case law that requires a written agreement. I think that's the minority rule. Really, the key thing is to have a common interest in jointly defending a case. So if you're all representing clients that have been told by you folks that they are subjects of investigation, that's probably common interest enough to establish the agreement. And as Nate said, it is a very Hobbesian world out there. I was saying in jest with regard to the prosecutors that appearances can be deceiving, but the same goes with defense counsel. Everyone looks nice, but everyone has their interests and client's interest first. When you're in the middle of an investigation, it is a delicate dance.

Clearly, there is reason to share information. You guys have a tremendous advantage in a lot of cases, because you've got all the documents from everybody else. You've talked to the victims; you have some testimony, and the rest of the defendants are on the outside looking in and just seeing a small piece of this and don't really know what happened. So it can be useful to collect materials so that the defendants are in the same position you are in terms of knowing what the facts are.

On the other hand, if you have a client or individual in the company who has done something he shouldn't have, that's probably not something you want to publicize to the group as a whole. It may be something you want to talk about with another company. Let's say there are five subjects of the investigation and a meeting just two of them attended. You may want to talk with counsel for the other party who attended a meeting to see if you can understand what happened and confirm what your client is telling you is correct. As a good lawyer you always need to have some skepticism about what your client is telling you. So as Nate said, it is a very complicated situation, and you really have to play it by ear a lot.

MR. PERSKY: The joint defense agreement, if it is oral, are you fully protecting yourself against the privilege waiver arguments? If you start handing out privileged material to somebody who is not your client, somebody, like a plaintiff's lawyer, might argue you've waived your privilege. But if it is not in writing, that could be contested.

MR. HOUCK: As I said, the one reason for writing is it removes some of the doubt. Still, with an oral agreement, it is possible to establish in the court that there is such a relationship, because there is a common interest and there's usually at least a writing, an exchange of letters to that effect.

Also as I said, you want to be very careful, and Nate said the same thing, what you share with other people. It is one thing to share factual information, and put in a depository all the documents that were produced to Ralph's folks. It is another thing when you think about sharing your perceptions about whether your client is telling the truth about something. You probably wouldn't want to do that even though you had a joint defense agreement.

MR. TUGANDER: Well, Bernie, let's get you involved now. DOJ's investigation is underway, volume of commerce appears to be high, damages appear to be major. As an antitrust class action attorney you may be

interested in this case. How do you go about getting your client?

MR. PERSKY: Well, we have relationships with clients in various industries to whom we provide antitrust advice, and they would come to us. We have relationships with counsel in various industries who would come to us on behalf of their clients.

In addition, if it is an industry that we are familiar with and we know counsel in that industry, we could bring to the attention of that counsel that their clients may have an interest in pursuing the matter, authorizing an investigation, hiring of economists to see if they have any rights to pursue. So there are various ways in which we get involved. Sometimes we get called. Sometimes we reach out to people. Sometimes the clients themselves call us.

MR. TUGANDER: Do you ever face a situation where a potential client is fearful of bringing a case because he fears some sort of retaliation from a defendant?

MR. PERSKY: That's the constant refrain with respect to direct purchaser cases, which are the vast majority of antitrust cases. You're suing your supplier, you're suing the company, or you're thinking about suing the company that supplies you or who was your customer.

If for example, there's an announced criminal investigation or a grand jury, one of the things we have told potential clients is it is not likely that a company under criminal investigation would compound its criminal conduct, possible criminal conduct, by retaliating. But we also disclose the fact that it is conceivable that the supplier of the company with whom the potential plaintiff does business would take adverse action. We think that would be an example of unlawful conduct and would compound the antitrust violation and would be part of a civil suit. But it is something that plaintiffs in antitrust cases do take into account.

One client that was negotiating a deal with a potential defendant, said let me finish this deal first, then bring the suit. So it does come into play. They are concerned, but I think that to retaliate against a company for enforcing its congressionally secured rights is illegal.

MR. TUGANDER: Let's assume that you're successful in getting your client, and this government investigation is going forward. How likely are you to approach the Antitrust Division and offer to provide some help by way of documents, evidence, witnesses?

MR. PERSKY: Well, if they have already brought the action, they sometimes contact us as part of their investigation. They would want to know more about the market, more about the pricing. On occasion where they haven't contacted us but we know where the investigation is, we are quite happy to call up the office conducting the investigation to provide our client's cooperation. Because we feel it is in our mutual interest for the government to be successful in its investigation and prosecution.

MR. TUGANDER: So if the government makes its case, it makes your life a lot easier?

MR. PERSKY: You bet.

MR. TUGANDER: Ralph, how interested are you in sitting down with Bernie and hearing him out to see if he can help your case along?

MR. GIORDANO: Well, Bernie is right. On occasion we will call private plaintiff's counsel to see if there is any information that he may wish to share with us that he has and which is not otherwise covered by a protective order under seal in that case. In that situation of course we'd have to get a court order to examine that information.

But we are always interested in listening to private plaintiffs as to any information they feel we ought to be considering. We are aware that our interests and those of the private plaintiff may not always be the same. We don't use the private plaintiff in a private action as our stalking horse. That is we don't rely on them to acquire information for us. To the degree we have an investigation, we will keep it separate from the private action, and we are not likely to share information that we get in our investigation with the private plaintiff. But to the degree there is information that a private plaintiff wishes to bring to our attention, they ought to do so.

MR. TUGANDER: And how much information are you going to share with him?

MR. GIORDANO: It is not likely that we are going to share much of our investigation with the private plaintiff. As I say 1) our interests may not be the same; 2) the information that we have as a result of a Grand Jury investigation is likely covered by the prohibitions of Rule 6E, confidential. So the short answer is not much.

MR. TUGANDER: So basically a one-way street.

So Bernie, getting back to you, let's assume you have a client, and you file your private suit while the Division's case is pending. You then seek discovery by way of interrogatories, depositions. Are you anticipating the government might have some problems with your discovery requests?

MR. PERSKY: Well, they will probably object to any depositions we want to take if they have an ongoing Grand Jury investigation. Any witnesses they have spoken to or want to call before the Grand Jury, they would probably be quite loath to allow us to depose. So it would be unlikely in the face of a Grand Jury investigation of antitrust violations, where we have a parallel civil proceeding, that we would be able to take depositions, unless they would for some reason allow us to do it.

On the other hand, there have been times where we can get the documents provided to the Grand Jury, other written materials. We can take third-party discovery sometimes. So yes, we can get some stuff. We probably can't take depositions. It may slow us down if there is a Grand Jury, but ultimately if the Grand Jury ends up indicting and there's a guilty plea, it is to the civil plaintiff's benefit.

MR. TUGANDER: Pat, are you likely to move to stay Bernie's requests?

MS. JANNACO: Yes, I'm afraid so, we are going to move to stay.

MR. PERSKY: Well, in the National Gas commodity manipulation case—it is not an antitrust case, but quite similar, in the Southern District of New York, we had a working relationship with the U.S. Attorney's Office, because we would tell them what witnesses we want to depose. They usually said no, but they often didn't care, because we had 22 defendants, and they had pending investigations on some but not all.

So we worked out a protocol with them. But yes, normally if there's a Grand Jury, no, we can't take deposition.

MS. JANNACO: And we would move to stay. Sometimes the defendant wants to take the depositions, and that creates other problems for us as well.

Our goal in moving to stay is not to thwart the civil plaintiffs in getting the relief they want, but we feel they can wait until we continue our investigation, and it may do them some good. Our main goal is to preserve the integrity and secrecy of our Grand Jury investigation. We don't want to be broadcasting a road map of our investigation.

The potential criminal defendants don't have a right to any kind of discovery while our investigation is going on, and we don't want them to be able to circumvent the criminal discovery rules by using more liberal civil discovery rules.

With respect to documents, sometimes there are documents which are really key, and we just don't want them to be out prematurely. We don't want them to be known. Because we don't want the witnesses to tailor their testimony to what they think we already know. We are still bringing people before the Grand Jury to get their recollections as broadly as they can give it to us.

We also have worries about manufacturing evidence. And we are also concerned about some possible witness intimidation in some cases.

MR. PERSKY: Well, sometimes we have found if we phrase a document request as to all the documents you provided to the Grand Jury that might be objectionable. But if you can figure out another way of describing the documents you want and not key it to Grand Jury production, you can still get it.

MS. JANNACO: In the auction house matter, while our investigation was still going on, we did move to stay discovery of about fifteen documents, which we considered to be a reasonable request, and they were key documents in our case. Will we get the stay? We will probably get the stay. Will we get everything we want? Probably not. We did get protection for those fifteen documents, but we will not necessarily get as much time as we want with that. I think we got two months where we had asked for three and a half.

We also moved in that case to stay depositions, and we got the depositions stayed. Again not as much time as we wanted, but as it turned out, by the time our stay would have expired, before then they had already settled the class action, and that pretty much cut off some of the discovery anyway.

MR. PERSKY: One of the issues that's come up when a company is under criminal or government investigation is that the company sometimes puts together a report, analyzes the material evidence and tries to persuade the government not to pursue it. They submit it to the government and then enter into a privilege agreement claiming it is not a waiver. We have litigated that point. So far we haven't been successful, but there's a split in authority--even though you say that you've reserved your privilege, you're still voluntarily giving material to a third party. I think the D.C. Circuit allows the plaintiffs to get it. But in Natural Gas commodity manipulation litigation we never succeeded in getting the materials that were put together by the defendants to persuade the government not to go forward. We think that's good stuff to try to get.

MR. TUGANDER: Bernie, you've recently filed a motion in the Southern District of Ohio seeking to compel the FBI to produce tape recordings and transcripts of a cooperating witness. Can you talk about that a little bit?

MR. PERSKY: It was not a typical situation. We had been in contact with a whistleblower who had brought a civil lawsuit against his former employer who were retaliating against him, because, he says, he disclosed an antitrust violation. The U.S. Attorney's Office started a Grand Jury investigation, and as part of that investigation they got the whistleblower's father, who had been a former employee of one of the companies under investigation, to make surreptitious tape recording of telephone conversations. Thereafter the Grand Jury dissolved and there was no indictment. But we had a civil class action pending against these companies. So after the Grand Jury dissolved, but we knew about these tape recordings, we wrote a letter to the FBI informing them that we expected them, notwithstanding the dissolution of the criminal investigation, to preserve these documents.

Then it just so happened that the Cincinnati office of the FBI was within a hundred miles of the Columbus courthouse, so we issued a subpoena to the FBI for the tape recordings of this whistleblower's father with these two former employees who, we understood, disclosed relevant and material information that would be of assistance to us in the civil litigation. The FBI initially said it would violate the privacy statute to give it to us. And we pointed out that the privacy statute has an exception that would allow the FBI or the government to produce materials, notwithstanding the privacy statute, in accordance with a Court order. That's what we are seeking. We have got a motion to enforce the subpoena. The FBI took the position the subpoena was not a court order. We said the motion sought a protective order. Then the FBI said you don't have the consent of the parties to the conversation. And we then produced an affidavit from the father who was on the call consenting to the production. And as to the two witnesses whom he spoke with, we said we didn't need their consent because they are executives of the defendant and their names are already known so no privacy interests were involved. So the FBI took the position that we hadn't gotten the consent and hadn't sufficiently demonstrated relevance.

It just so happens there's a split in authority as to what standard would govern the obligation of the FBI to turn this over. There's a case called Laxalt in the D.C. Circuit that says all you have to show is that it is relevant under Rule 26. There is no Privacy Act privilege at all. So we argued that.

There is another case that takes a slightly different approach, the *Perry* case in the Second Circuit that talks about balancing the privacy interests against the relevance to the litigation. Then we also cited the *Archer Daniels Midland* litigation where in fact the FBI did produce the tape recordings, but under a court order saying that it would be produced to the limited extent necessary to move forward with litigation.

We also finally, in our motion papers, said if the Court thought it was appropriate we could have the materials produced under seal. Now, before the motion was decided, the case was settled, so I don't know what the answer is. But it was interesting, because I'm not sure how many people have subpoenaed the FBI for criminal tapes.

MR. TUGANDER: I assume that's not something you face regularly. Bob, do you have anything to add to the discussion about confidential sources?

MR. SILVERI: Sure, and I understand Bernie and Nate and Steve in any given case would want to have evidence like that. My big problem is that we have cooperating witnesses that we treat like gold. They are giving us information, and we are working very closely with them under controlled operations. My obligation to them is to try to keep their identity hidden until absolutely necessary. Our sources know that they are going to have to testify at some point and tapes would be turned over. I just don't want to do it sooner than legally necessary, because it could create some very serious situations, potentially harmful. So when I hear somebody putting in motions for tapes, there goes the identity of my source, and that's not a good thing for me. I understand where you're coming from, but it's just a very difficult thing because it creates a lot of issues.

MR. PERSKY: This confidential witness was also a moving party. He gave us an affidavit that he gave to the FBI saying that he didn't have any confidentiality interests. He had put in an affidavit in his son's litigation describing his conversations with them, but the best evidence of those conversations was the tape recordings.

MR. SILVERI: And that's an excellent exception. More times than not our cooperating witnesses are not just cooperating in our case; they have terrorism information, they have organized crime information. So when we divulge any of our source, I'm kind of cutting off what they are doing for other squads and other terrorism, things of that sort. Those are our issues.

MR. TUGANDER: Thanks, Bob.

Ralph, let's say we are at the point of investigation that is well advanced and staff is recommending an indictment. We provide opportunities to defense counsel to make a presentation both at your level and sometimes above your level to discuss the reasons why the client should not be indicted. Can you tell us from the presentations that were made to you what types of presentations you find to be most useful. What are you looking to take away from those presentations?

MR. GIORDANO: Let me just backtrack a bit. Any indictment, plea agreement or information that's filed by our office or any field office or any section in the Antitrust Division has to be finally approved by the Assistant Attorney General in charge of the Antitrust Division. So what normally happens if the staff investigating the matter is inclined to recommend individuals and companies be indicted in connection with their investigation, that staff will prepare a memorandum, submit it to me and our assistant chief. We will review it, and we will in turn prepare a short memorandum on top of that memorandum giving our recommendations, stating whether we agree with staff, disagree, agree in part, disagree in part.

At that point we make available to counsel for the involved individuals and companies an opportunity to be heard by myself and our assistant chief. They can come in and make a presentation to us as to why they feel their clients ought not be indicted.

I think, Steve, you asked what factors ought a counsel coming in to be heard present. The short answer to that is anything that counsel feels might be relevant to our decision. Anything they feel that might convince us not to indict. It could be evidence or information they feel we

may not be aware of. Trial tactic questions; they might come in and say look, if you indict this individual it is so minor and so insignificant that you're going to hurt yourself with your major defendants at trial. And we probably have considered that, but we may not have. So anything that counsel feels is important or relevant to convincing us not to indict, that's what you ought to present. It is better to err on the side of including as opposed to excluding. Tell us anything you feel we ought to be considering.

Now, these presentations are made to myself, and our assistant chief and the staff involved in the matter will also sit in on the presentation. It is an opportunity for us to hear you or to hear defense counsel. We don't view it as an opportunity for defense counsel to learn every ounce of our evidence. It is an opportunity for you to come in and tell us why we ought not indict a particular client.

MR. TUGANDER: Ralph, would you say there have been occasions where these presentations have swayed you?

MR. GIORDANO: There have been some situations.

MR. HOUCK: Three in the last 20 years.

MR. GIORDANO: There have been some situations where we have been persuaded not to recommend that a particular individual or particular corporation be indicted. It doesn't happen often, but it has happened. And sometimes the staff itself is persuaded.

My advice to any defense counsel out there is if you're given the opportunity I would take advantage of it.

MR. TUGANDER: Thanks, Ralph.

Nate, from a defense attorney's perspective, is there anything that you think the Division should do differently in these pre-indictment presentations?

MR. MUYSKENS: Well, yes, lots of things. Realistically, I'm going to answer this a little differently, because I'm always told I focus too much on the negative. So I'll focus on the positive here. One thing the Division has been pretty good at in the last couple of years, and this isn't as blatant sucking up, but when I go in pre-indictment I don't have to hand over every bit of privileged material I have. I don't have to hand over written things. I don't have to essentially explain my legal theories, like other U.S. Attorney's Offices will do. And I think that creates a much more constructive environment for settling a case, and it certainly is appreciated.

On the downside, the one thing I'll quickly differ is the other U.S. Attorney's Offices and fraud section, criminal section down in D.C. generally tell you a lot more about their case early on, so completely contradicting what Ralph just said, that he doesn't view it his job to provide every fact. But it is a lot more helpful when you're representing a company to know more about the government's case. We are not asking for all the details right off the bat, but there are times I've gotten an answer to this question or statement from folks in other field offices, not this one: You know what you did. Well, you know, no, sometimes we actually don't know what we did. So sometimes it would be helpful to have a little bit more facts.

On the other hand, I certainly understand you have informants you want to keep safe. I would argue that most of our antitrust cases we don't have that many ties to al-Qaeda. So I think you folks understand the difference between the U.S. Attorney's Office cases and the ones at the Division. They do have a lot of cases. A lot of the cases do seem to be pretty neatly tied up in a bow. So I'll grant them the ability to give you more facts. But I would guess that you think about providing a little more guidance to your actual case plan so we know where we should be going with our offer to get rid of the case.

MS. JANNACO: Nate, really it hasn't been unknown for attorneys to come in and talk to us, maybe even before this stage, and say I really don't know what my client did. Well then, we'll point you in some direction.

MR. MUYSKENS: I guess you could ask some of your colleagues in D.C. I think I'm pretty annoying, I call a lot. If I have questions, I don't hesitate to get on the phone and say hey, we are having trouble seeing where you're going. We want to do the right thing and get to the bottom of what happened. I have an audit committee and shareholders to answer to. This may sound hokey, but in the initial parts of an internal investigation, I don't view it as being that adversarial a process with the government. My interest at the end is to not be indicted. But we all have an interest to learn the facts and figure out what happened. That is something that you guys—I could be wrong, but you do it a little differently than other offices.

MR. TUGANDER: Steve, do you think it worthwhile for defense counsel to coordinate their presentations?

MR. HOUCK: Yes, before I answer that directly, let me reiterate some of the things that Pat and Nate said. I think you'd be derelict in representing your client if you waited until the last minute to talk with Ralph. You certainly shouldn't pass up that opportunity. But you really ought to be in there talking with Pat and Steve, if they are running the investigation, to find out their thinking and to tell them what you're thinking. I think that's probably in everyone's mutual interest. In my experience at least they have been very good in terms of talking with defense counsel about what their theory of the case is once they have one. Often times the initial phase of the investigation is just collecting facts. But at some point they have some working theory about what happened. I think it is in their interests early on to tell you we think this is what happened, and to find out from you if you thing they're going to have a problem here or a problem there. So before they

get to Ralph, they have thought about that and tried to shore up the case.

I think it is a mutually advantageous process, and you really should be proactive in going to Steve and Pat and talking about the case.

When it does come time to make a pitch to Ralph, I certainly do think it makes a lot of sense to confer with your colleagues. I'm a humble guy, and there may be many things I haven't thought of that other people have thought about. You want to have your stories, to the extent possible, consistent. You always want to emphasize what's best for your own client. But you don't want to go in there and say things that are going to be contradicted by other people or inconsistent with what the prosecutors know the facts to be.

Your biggest asset throughout this is your reputation for credibility and truthfulness. So you want to be very careful about that. Also, I think it probably helps to have some repetition. If three or four or five defense lawyers are all telling Ralph the same thing, that you have this problem, maybe he'll finally believe it after the third or fourth time he hears it. So I would definitely recommend at the final stage sitting down with your colleagues and talking about what kind of pitch you're going to make.

MR. TUGANDER: Thanks, Steve.

Pat, real quick, this decision just a few weeks ago, Gall, in a real nutshell could you tell us how that would affect antitrust defendants being sentenced?

MS. JANNACO: Well, *Gall* followed *Booker* and *Rita*, both of which basically set the guidelines for the guidelines. Sentencing decisions have to be reasonable. Guidelines are no longer mandatory.

The specific question with *Gall* was whether the Court of Appeals could apply a proportionality test and require that a sentence that substantially varies from the guidelines be justified by extraordinary circumstances, and the Court said no, that's not going to happen. It is the same rule. You have to look at a sentence to see if it is reasonable.

But what *Gall* did which the other cases didn't do and has brought together the jurisprudence is they have provided procedure, the Court provided a procedure for doing calculations for sentences. The guidelines are still a factor in 3553, which sets forth sentencing factors to punish and deter. But first thing you do is calculate a proper guideline sentence; that's your benchmark. It is a matter of administration, nationwide consistency, in order to continue with some of the goals of the guidelines. The sentencing court has to give the parties an opportunity to argue for the sentence they deem appropriate. The sentencing judge must consider 3553 factors and make an individualized sentence based upon the facts before him or her.

If there is a deviation from the guidelines, that deviation must be supported by sufficient justification, whatever that means. I'm sure that's something that's going to be litigated from time to time again. And the sentencing judge must adequately explain the sentence that's been imposed sufficiently to allow for meaningful appellate review.

On appellate review the Court takes into account the totality of the circumstances, including the extent of any variance from the guidelines range.

Under Rita an appellate court is not required to apply a presumption of reasonableness to a sentence that falls within the guidelines but must give due deference to the sentencing judge's decision that the sentencing factors justify the extent of any variance.

The appellate court, as in any abuse of discretion standard in any case, the appellate court cannot substitute its own judgment for that of the judge who was on the bench when the sentence was imposed.

I guess a lot of people had thought that this sort of makes the guidelines absolutely irrelevant. I'm not sure that that's the case. In the cases, Justice Breyer in *Rita* I believe made it very plain that the guidelines still play a very important role because the Sentencing Commission, like the sentencing judge, is required to take into account the 3553(a) factors and apply them. And in fashioning their sentences, they have come up with appropriate sentences that take all those factors into account. They studied thousands upon thousands of sentences and basically have a database and a basis for determining what is reasonable and what reflects the achievement of the goals of sentencing. The Sentencing Commission's work continues, so they are continuing to gather data about sentences in cases all over the place.

With respect specifically to antitrust cases, I think that the landscape has changed. In 2004 there were major changes to Section 1, which more than tripled the maximum jail terms and increased the fines from $350,000 for an individual to a million and for corporations from $10 million to $100 million. So we are working in a different environment than we did in the bad old days when courts decided that this is really a victimless crime. The atmosphere reflects that it is not; it is not a victimless crime, especially given globalization of cartel activity and billions of dollars that are affected by antitrust conspiracies. So that's the quick and fast.

MR. TUGANDER: Nate, the fact that the guidelines are now advisory rather than mandatory, how does that affect the way you approach your plea negotiations or sentencing arguments?

MR. MUYSKENS: It changes them actually a fair amount. Because now I get to go in and argue a bunch of the 3553 factors. I get to argue things that under the actual guidelines would never have been something a judge

should look at. For an individual, for example, I can start arguing family circumstance. I can argue my reputation is hurt so I should get a lower sentence because my reputation comes in. Those are factors under the guidelines the Judge could never look at.

One other thing I'm actually going to start arguing in antitrust cases—you just reminded me of this a second ago—there's been a recent spate of cases post-*Gall Kimbrough*, which has only been six weeks or so now, that have looked at how the Sentencing Commission has actually established a penalty. The *Baird* case which actually came out in Nebraska is the one that best describes this. What the *Baird* case says is a criminal penalty that's a Congressional directive, like the antitrust penalty is now—it changed in 2004, should be given less weight than a penalty that the Sentencing Commission has actually run the numbers on and looked at the statistics for. The antitrust penalties were promulgated pursuant to a Congressional directive, time frame is shorter and that sort of thing. So in some ways you could even argue the weight of these Congressional directives for something to look at as favorable. So those are things I would argue. You can be a lot more creative now would be the long and short.

MS. JANNACO: That sounds terribly unreasonable.

MR. TUGANDER: We are getting close to the end of our time, but I would like to ask if there are any questions? We could take one or two.

Yes, Barry.

MR. BRETT: Barry Brett. I would like to ask Ralph, at what point, whether it is in connection with a subpoena or otherwise, will you advise counsel as to whether or not the person to whom the request was made is a target, subject, witness or fall into some other category, whether you view that as a policy of your office or something done overall by the Division?

MR. GIORDANO: Well, I can tell you what we do. We do issue target letters late in the investigation to individuals against whom we have substantial evidence and are likely to recommend a case against. We don't issue target letters for corporations, but we will tell counsel that their company is either a target or we have substantial evidence against them. We also rather early in the investigation will tell counsel whether their company or individual is a subject of the investigation.

Again, that's what we do. I don't want to speak for the entire Antitrust Division at this point. I hope that answers your question.

MR. TUGANDER: Yes.

AUDIENCE MEMBER: Making your list of what to do when the government comes knocking, the person seated to your left made the comment that he thought it could almost be malpractice basically for somebody to go into an interview. But I noted in there you say you don't have to be in a review, but you don't go the next step and say the better course is to call your lawyer or the company lawyer or whomever it might be. I wondered why you don't have that in your list of what you might do?

MR. MUYSKENS: I don't think you can tell someone they can't be interviewed. There is a sort of a fine line to walk between basically obstruction and just sort of—you want to make sure people know their options, and you hope they put two and two together.

AUDIENCE MEMBER: Is the obstruction fear, that's what—

MR. MUYSKENS: Yes, it is the obstruction fear.

MR. HOUCK: Also he was speaking with his hat on as the lawyer for the corporation. So what he advises an individual might be a little bit different. The question I got is I already have the client, and the client is asking me whether he should go in and talk without me being there. So I say no; I recommend against it.

MR. TUGANDER: Yes.

AUDIENCE MEMBER: How do you distinguish between clients you give your laminated card to and the clients you don't give your laminated card to?

MR. MUYSKENS: Whether I like them or not.

It varies. Recently with one of my clients we got a very detailed whistleblower complaint that outlined activity that would lead you to think there may be some reason to do an internal investigation into bid rigging. And moreover, the parties involved—they were ones these guys would probably be thinking about already just because where they did business, in Iraq. That's a hotbed of bid rigging activity. So we decided, I'm not the government, I can profile. So we thought that these people were probably ones who should have the card.

It is a case by case thing. If there is some possibility of it, with the obstruction penalties and all of that being so incredibly severe, we will err on the side of giving them out. And lots of time we will give 50 to general counsel and say hold onto them, and if you feel the need, give them out. I'd love to tell you it is rocket science and we put a huge amount of thought into it, but we really haven't.

MS. MAHONEY: I'm sure some of us are sitting on our questions, but in order to keep ourselves on schedule, I would like us all to give a big round of applause to our panel. Thank you very much.

Now I'm going to turn over the meeting to Saul, our Chair, to handle the business meeting. So please, for those of you interested in voting on the issues, the bylaws and the Nominations Committee report, sit tight for a few more minutes. Saul.

Section Business Meeting: Election of Officers and Members of the Executive Committee

MR. MORGENSTERN: Thank you. I appreciate your sitting around for the business meeting.

I wanted to quickly report that we have had I think a very busy and productive year this year. The Section in 2007 presented a first-rate program for summer associates; sponsored, along with others, the fourth annual Spivack Symposium and Kay Murray Award Luncheon this week; participated in the Association's diversity programs; presented several programs at our EC meetings which are open to all, with private counsel, government counsel and economists speaking about current developments in antitrust; co-sponsored programs with the Trade Associations Committee of The Association of the Bar of the City of New York on the work of the Antitrust Modernization Commission and on European antitrust developments; co-sponsored a series of brown bag lunches with the ABA Young Lawyers Section and began work on a new edition of the Association's book on New York Antitrust Law which we anticipate to be published in the 2008 calendar year.

This year was the work of many people on the Executive Committee, and this year I think for the first time in a long time many people not on the Executive Committee. And we are seeking to branch out and get more people who are not on the Executive Committee and who are not able to devote the time and effort on the committee itself, but would like to be more involved in the work of the Section, work on individual projects or help out with things, to do one-shot deals. We encourage anybody here to do that.

In particular, obviously Stacey Mahoney, who managed meetings when I was not around, who made projects move forward and made today happen, deserves an enormous amount of credit for that.

And Paul Braunsdorf, who was our first upstate officer in a very long time and came down to New York City for EC meetings to make sure they worked, has done a fabulous job this year. We thank both of them for that.

The panelists and the panel chairs today obviously deserve an enormous amount of credit.

We have two short business items on our agenda today. We have proposed an amendment for amended bylaws for the section. The amendments, the version we were able to hand out today is clean and doesn't show the precise amendments, but the amendments basically do three things. First, most importantly, they add to the leadership of the section a finance officer. The current leadership of the section consists of the chair, vice chair and secretary who generally move up to the through the chairs, if you will, to become chair over a period of three years. The finance officer will be outside that cycle and is a multiyear position, a position that the person can stay in over and over and over again, because we thought that finance was something that would require some continuity and expertise. So we plan to pick finance officers who have an interest in the area and who may want to move into the leadership of the association of the Section later on but not necessarily.

The first person who has stepped up to do that is Eric Stock from Hogan & Hartson, because he has an interest in it and he anticipates doing that over several years.

We have created several standing committees of the EC this year toward the goal of getting greater involvement of the section members and the activities of the EC in this Section. The committees will be chaired by members of the Executive Committee but we hope to get more and more members of the section to be members of those committees and work on the individual projects of those committees to have a more vibrant role in the section while not necessarily having to come to Executive Committee meetings on a regular basis.

Finally, in part because of the way the bylaws had been assembled over the years and redrafted and revised, we thought that the specific terms and term limits and the way people get elected just needed to be clarified. And Meg Gifford, who took her pen to these this time around, did a fabulous job of really cleaning them up. So we have a new and better set of bylaws. I would like a motion from the floor, if possible, that we adopt them.

AUDIENCE MEMBER: So moved.

MR. MORGENSTERN: Second.

AUDIENCE MEMBER: Second.

MR. MORGENSTERN: All in favor? 11

(Members voted aye.) 13

MR. MORGENSTERN: The next and most important order of business is the Nominations Committee report. And I will ask Meg to come up and do that.

MS. GIFFORD: Hello everyone. This will take just a minute.

The Nominations Committee has issued a written report which was in the materials that was circulated this morning. There is a very long list of current members of the Executive Committee who will be continuing in their

terms as members of the committee for their second year. I will not read that list.

The committee proposes a shorter list of members whose terms are expiring for re-election to a two-year term beginning today and ending at the annual meeting in 2010. Those individuals are: Paul Bartel, Paul Braunsdorf, Beau Buffier, Leslie Harris, Barbara Hart, Eamon O'Kelly, J. Douglas Richards, Bill Rooney, Fiona Schaeffer and April Tabor.

In addition, the Nominations Committee proposes individuals who are not currently members of the Executive Committee for election to a new two-year term ending at the annual meeting in 2010. Those individuals are: James Bailey of Baker & McKenzie; Tom Cohn, who is the Regional Director of the Federal Trade Commission; Kevin Hart of the New York Field Office of the Antitrust Division; Colin Underwood of Proskauer Rose; Suzanne Wachsstock at American Express; and Philip Wellner at Fried, Frank.

If I may have a motion from the floor to elect those individuals to terms.

AUDIENCE MEMBER: So moved.

MS. GIFFORD: And a second.

AUDIENCE MEMBER: Second.

MS. GIFFORD: All in favor.

14

(Members voted aye.) 16

MS. GIFFORD: Thank you. The last piece of business, the Nominating Committee nominates members of the Executive Committee for election to one-year terms as officers. We are really pleased to once again have tremendous talent and people who are willing to give the time to serve as officers.

We nominate: Stacey Mahoney as Chair; Bruce Prager as Vice Chair; Steven Madsen as Secretary, and Eric Stock as Finance Officer. If I may have a motion and second for that election.

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MS. GIFFORD: Thank you. All in favor.

12

(Members vote aye.) 14

MS. GIFFORD: And that concludes the Nominating Committee business. Thank you.

MR. MORGENSTERN: Thanks, Meg. Thank you all. We now break for lunch. We will see you all here at 1:15.

Indirect Purchaser Standing: The Current Answer, the Proposed Answer, the Right Answer

MS. MAHONEY: Welcome back to the afternoon of our Antitrust Law Section Annual Program.

We have for our first program this afternoon "Indirect Purchaser Standing: The Current Answer, the Proposed Answer, the Right Answer." The issues addressed in this program date back to the 1968 and 1977 Supreme Court decisions of *Hanover Shoe* and *Illinois Brick*, which we are all familiar with to some degree or another. Sometimes more than we ever really wanted to be. And then add to that the various state subsequent *Illinois Brick* repealer statutes and the Class Action Fairness Act of 2005, and we have a dilemma.

What is the law on indirect purchaser standing? What should it be? And are the answers to those two questions the same? And if they are not, what should be done? This program addresses those issues, including the various non-unanimous recommendations regarding indirect purchaser standing contained in the 2007 Antitrust Modernization Commission report.

This panel includes plaintiffs and defense practitioners who regularly struggle with the practical and aspirational implications of these complicated and arguably inconsistent authorities.

Our moderator today for this program is Barbara J. Hart. Barbara is a partner at Lowey, Dannenberg, Cohen & Hart, PC in White Plains, where she focuses her practice on securities and antitrust class action. Barbara served as counsel to the office of the treasurer of the state of Connecticut, whom she represented in the *In re Waste Management Securities Litigation*, which settled for $457 million. She is presently co-lead counsel prosecuting the *In re Air Cargo Shipping Services Antitrust Litigation*.

During her career Barbara has represented plaintiffs in many successful antitrust class actions including *In re Warfarin Sodium Antitrust Litigation*, and she also currently serves as lead counsel in the *In re Amgen Corporation Securities Litigation*.

In addition to her litigation successes, Barbara has made time to found a Labaton Sucharow's Women's Initiative, which brings professional women together to advance women's influence in business. In addition to that, she is also a member of the Executive Committee of this Section.

Barbara earned her B.A. from Vanderbilt University, her M.A. from the university of the North Carolina and received her J.D. from Fordham University School of Law.

Barbara, as they say on BBC America, over to you.

MS. HART: Thanks so much, Stacey.

I find myself hardly recognizable when you talk like that. I think of myself as a mother of two. In any event, my father used to say that we are in some part measured by the people with whom we surround ourselves. And of course, that's when he was concerned that I was hanging out with the wrong crowd. So today I've tried to surround myself by people who are more accomplished and more intelligent and that have a lot to bring to the table in terms of our discussion.

Peggy, I think you're going to chronologically go first in our discussion, if you want to come down here.

Peggy Wedgworth is a partner at Lovell Stewart and Halebian. Prior to that she was an Assistant District Attorney in Brooklyn, New York. She has litigated class actions on behalf of plaintiffs since 1989, including all aspects of price-fixing cases.

Notably, but by no means exhaustively, Peggy prosecuted on behalf of drug store pharmacies and chains, the *In re Brand Name Prescription Drugs Antitrust Litigation*, which resolved itself at that level for $351 million, a tremendous settlement at that point in time. And Bernie and Hollis and I at Labaton litigated that on behalf of consumers before I was blond, before I was gray. So some time ago we prosecuted that case.

Peggy also did the *In re NASDAQ Market Makers Litigation* as a partner at Lovell Stewart and Halebian, and that obviously was a blockbuster mega case at the time, over a billion dollars were recovered.

She also brings to the table some commodities experience in terms of the *In re Sumitomo Copper Litigation* and is currently involved in the *Air Cargo Shipping Services Antitrust Litigation*.

A graduate of the Alabama University School of Law, and I think you'll hear that resume in her lovely lilty voice.

James Warnot is with us, a partner at Linklaters. Jim and I met first at the MDL in the *Air Cargo Litigation* where he represents Air France.

Jim is a commercial litigator with both trial and arbitration experience. He has considerable expertise in terms of coordinating both regulatory proceedings and federal and state class actions and a lot of antitrust experience in terms of coordination of these cases. He is a member of the New York and Connecticut bars, and admitted to the Second, Third, Fifth, Seventh, Eleventh Federal Circuits.

He is a summa cum laude graduate of Pace University School of Law, and he has a mechanical engineer degree from Cornell University and Rensselaer Polytechnic Institute.

Linda Nussbaum is a partner at Kaplan, Fox & Kilsheimer where she focuses on plaintiff's antitrust class action. She has lectured extensively about various aspects of the antitrust laws, including at the ABA Antitrust Litigation Course recently in Philadelphia and participating in the mock summation program earlier in 2007.

Miss Nussbaum has served as sole or co-lead counsel in many antitrust cases, including the *Microcrystalline Cellulose Antitrust Litigation* and the *Oncology & Radiation Associates v. Bristol-Myers Squibb* litigation and *North Shore Hematology-Oncology Associates v. Bristol-Myers Squibb* litigation.

To the envy of her peers in the plaintiff's bar, Linda is often counsel to many significant corporate entities, including in the *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation* and in *Neurontin Marketing, Sales Practices, and Products Liability Litigation*. Of course, the significance of the large clients is not only that they seek her counsel, but also that migration of kind of the PSLRA lead plaintiff concept into some of the antitrust dynamics. And also of course in opt-outs where it is desirable to represent significant clients.

Debra Pearlstein, our other panelist, focuses on antitrust litigation and counseling as a partner at Weil Gotshal. She has extensive experience in complex, private antitrust litigation brought in the class action federal and state level as well as brought by federal antitrust agencies.

She is also often called upon by clients subject to merger investigations. Ms. Pearlstein has litigated on behalf of clients such as American Airlines, United Healthcare, MasterCard, Northern American Tobacco, and Matsushita.

Debra Pearlstein has been named by *Global Competition Review* as one of the top 100 women lawyers in the world specializing in competition law. She has been named among the leading competition lawyers in New York in the Chamber's USA 2005 American Leading Business Lawyers, and she has been named by *Euromoney Legal Media Group's Guide to the World's Leading Competition and Antitrust Lawyers*.

In any event, we are very, very pleased to have our panelists here. I have surrounded myself with, as I said, people that bring a lot to the table and hopefully will make me look good.

I think that the title of the program is a slight misnomer—and it is my misnomer, because Peggy already attributed it to me. This is the current answer, proposed answer and the right answer. In part Peggy is going to start off with talking about the indirect purchaser law and *Illinois Brick* and just lay some foundational background for us so that we can use that as a point of departure for the rest of the discussion.

For white to show up you need a black background. So in this context, we felt that it was important in terms of discussing indirect purchaser laws and the policy, ramifications and coordination of indirect purchaser law to not talk about it in terms the of the direct purchase proceedings that are often coordinated or at least are ongoing, in tandem, if not in the same courtroom; it would almost be not putting them in contrast. We wouldn't understand why certain issues are problematic in the indirect purchaser arena from, for instance, the defense bar's viewpoint or what are the ramifications of having dual proceedings go on.

So while this is about the indirect purchaser laws and the prosecution of indirect purchaser cases, for context we are obviously going to have to discuss it in terms of the world in which it goes forward, which is within the context of both the direct purchaser action and frequently in governmental proceedings.

I think Stacey used the word aspirational, and as we have had discussions in preparing for today's panel one of the things that I find fascinating about being on the Executive Committee of the Antitrust Committee and just in taking part in a day like today is that while we are coming here as both plaintiffs' lawyers and defense lawyers and some of us as prosecutors, regulators, part of what should be happening, in my view, in this discussion is what should the law be? How best should this happen? So while you're going to hear everybody talk about their vantage point, their clients and what goes on from a practical standpoint, part of what I hope we can have as the discussion and ultimately include the audience is what would be the best outcome? And of course, the Modernization Commission, which is where we are going to end up with Debra's overview and comments and then comments from the other panelists. That is where we should ideally end up.

I know Bernie has some thoughts from the AAI's commentary on the Modernization Commission. But ideally, we are trying to get this right and get this better in light of the complexities of indirect purchaser, direct purchaser and the federal prosecutions. I feel this discussion today hopefully will help us all to understand the complexity these issues present, but maybe to further our thinking and further the dialogue in terms of what would be the best state of the law for competition law.

So Peggy, if could help us in terms of the foundational issues on *Illinois Brick*, *Hanover Shoe* and that predicate law in terms of us understanding the indirect purchaser issues.

MS. WEDGWORTH: If we are going to go forward, we need to look back and see where we started in this process. And the Sherman Antitrust Act was enacted in 1890, which basically prohibited any agreement among competitors to restrain trade, as well as prohibiting monopolists from fixing artificially high prices.

The Clayton Act followed in 1914, giving the district courts jurisdiction to prevent and restrain violations of the Sherman Act, and Section 4 in particular provides a private cause of action for trebled damages for parties injured by antitrust violations.

Things were going well for many years until we come to 1968, when the real action starts. In 1968 you had a company called Hanover Shoe sue a shoe machine manufacturer, basically alleging that the shoe machine manufacturer would not sell the best machines but would only lease the machines. Plaintiff sued saying there was an overcharge. Defendant responded by saying that you passed the overcharge onto your clients; therefore, you have no claim. And the Supreme Court, by Justice Byron White, in a unanimous opinion ruled that under Section 4 of the Clayton Act that an injury occurs when an illegally high price is paid, regardless of what the buyer does. So basically Justice White said that even though plaintiff in this case had either definitely passed the cost along or more than likely passed the cost along, there was still was a claim, and in fact the plaintiffs recovered.

In this case Justice White went on to say there was an exception to this rule. As a defense if you could show there was a cost-plus contract between the indirect purchasers and the middle men, without a fixed quantity, that that would be an exception to this rule. Justice White stated it is easy to prove that the direct purchaser has not been damaged, thus eliminating the Court's concern of complex damage calculations.

So one of the overriding factors in *Hanover Shoe* was it is hard to calculate damages; why don't we just not just deal with the whole pass-on theory. The fact that somebody is injured, once the injury occurs, you've got a claim.

And that was the law, and things were fine until roughly nine years later, we had *Illinois Brick*, where the indirect purchaser, who was in the State of Illinois, I think a bunch of governmental entities in Illinois also joined the case. They sued the concrete block manufacturers for basically conspiracy in fixing prices. During that time the defendant responded well, you're an indirect purchaser and you have no claim. The Court agreed. Justice White in a 6–3 opinion held that the principles of *Hanover Shoe* barred indirect purchasers from bringing Sherman Act antitrust claims in Federal Court even if 100 percent of the overcharge was passed onto the indirect purchaser. So basically in *Illinois Brick* standing was denied for indirect purchasers.

In that opinion Justice White stated: Whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants. I think we'll hear a little more about whether or not the pass-on should apply equally to plaintiffs and defendants. But Justice White certainly thought it should.

In this opinion, just to note, the 6–3 opinion there were two very strong dissent opinions written, one by Justice Brennan, the main dissent. Justice Blackmun also joined that, but he added two or three sentences which I'll read, because it foretells what's coming in the future. "If *Hanover Shoe* had not preceded this case and were it not on the books, I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals. The policy behind the antitrust acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who can demonstrate injury would almost be compelled."

So Justice Blackmun sort of foretells what happens in the coming years, and we will see that indirect purchaser rule, which is often called the *Illinois Brick* rule, Justice White basically said three reasons for this rule: You avoid multiple liability, in apportioning damages it is complex and uncertain and burdensome. If you try to figure out where in the chain who got what, it would be too confusing. And third, antitrust laws are more effectively enforced by direct purchasers and not through diluted indirect purchaser claims. I think since this opinion Judge Posner and some others have written articles supporting this position. I think there have been esteemed academics as well as practitioners on the other side, and I think we'll see more of that later.

With regard to the indirect purchaser rule, there are three exceptions. And I don't want to get into this, mainly because they are so rare and in the cases where the exceptions actually apply are few and far between. Where we have a cost-plus contract, a situation we spoke about briefly in the *Hanover Shoe* situation. The ownership or control exception, where the indirect purchaser owns or controls the direct purchaser, and then the co-conspirator exception.

With regard to indirect purchaser actions, pretty much after *Illinois Brick* there were no more. The one exception to that, other than the three I just told you about, is if you the wanted injunctive relief. So if indirect purchasers would like to pursue injunctive relief, can you pursue it under the Clayton and Sherman Act. The cite for that is the *Warfarin* opinion, which Barbara, I think you were involved with add as well.

So since *Illinois Brick* is the law in 1977, one year later in the State of California they passed the first repealer statute, which basically allows the state antitrust laws to be enforced by consumers in that state. In 1989 the Supreme Court again and Justice White again, writing

for in this case a unanimous Court, held that states had the right to enact and enforce laws permitting indirect purchasers to recover for antitrust violations. A key point here is when Justice White stated: Congress intended the federal antitrust laws to supplement, not displace state antitrust remedies. You'll see that going forward.

So since *Illinois Brick* the states have been busy drafting, passing and sometimes not successfully passing repealer statutes. And repealer statutes are state laws which explicitly permit damage actions by or on behalf of indirect purchasers, including consumers.

Right now, if my count is right—I could be off a little, 25 states as well as the District of Columbia have antitrust acts with repealer statutes permitting either states' consumers or attorneys general to pursue indirect purchaser price-fixing claims. The total count when I break this down, I've read literature that has a number slightly different than what I use. I suggest maybe some have not tried to actually pursue these statutes. It is a little harder than it sounds. 33 states as well as the District of Columbia have some form of claim for indirect purchasers, be it a repealer statute, some states are consumer protection statutes as a whole. Eight state courts in this country have ruled against indirect purchaser standing for antitrust claims totally. And my count is there are about nine states that are still untested, undecided and in some cases opinions going both ways within one state. You may have comments as to the count on that.

So where we are at the moment or as of 2004, because this will lead us into the Class Action Fairness Act of 2005. But prior to that act, as of 2004 the repealer statutes enabled parallel litigation in numerous states and federal court. As you heard earlier, that presents all sorts of problems. Federal courts have been created; they have been in contact with state courts to try to coordinate so there won't be duplication, overlapping. The laws as a whole allow for patchwork recovery by both direct and indirect purchasers, and there's been a pretty much universal response that this cannot stand. We need a change, and we need to do something.

Prior to the passage of the CAFA, the Class Action Fairness Act, there were more courts throughout the country dealing with the same issue, same facts, same discovery. It became more complex and was a discovery nightmare. There is inadequate deterrence and uncertain litigation outcomes, which cries for something better.

MS. HART: Thanks very much, Peggy, for getting us started.

What strikes me in the discussion is that the policy, the three basic policy rationale underscoring *Illinois Brick* seems to be so completely part of the dialogue to this day in terms of goals, deterrence, motivating the best plaintiff, seeing to it that the complexities of damages and apportionment, seeing that the defendants are not overburdened with sextuple damages or what have you. Those issues, those lines of analysis still so much bear upon the discussion today.

Debra is going to speak on the CAFA issues. And I wanted to go back to a remark that Peggy made.

Many moons ago in the *Brand Name Drug Litigation* that Peggy was involved in on a federal level, Bernie and I took a bus around the country and litigated it in many, many state courts, each state's *Illinois Brick* repealers in some instances making the law of first impression in those states in terms of those *Illinois Brick* repealers not having been litigated. At that point in time it was state by state by state. And then the idea was a better mousetrap was you could simply prosecute it in one forum, a federal forum, if the state claims were supplemental or pendent to an injunctive claim brought in federal court. Of course, injunctive relief is obviously available to indirect purchasers in federal court, as Peggy observed. So therefore, you could go into the federal courts, and that gave you the ability to present a more global potential resolution to the defendants, and ideally was a more efficient way to prosecute the claims.

It still is extremely complicated. While CAFA is aspirational, harkening back to Stacey's remark, I don't see CAFA as having cleared the decks in terms of solving the problems. But maybe, Debra, you could speak to the fundamentals of CAFA and how you see CAFA playing out at this point.

MS. PEARLSTEIN: CAFA came about in 2005. It was prompted clearly by a Congressional distaste with the state of state court class action litigation. It was not aimed at antitrust cases particularly, certainly not indirect purchaser cases, but a perceived problem with multiplicity of state class actions, also some direct hostility to what was happening in certain districts where plaintiffs' lawsuits seemed to be congregating. I believe there was a phrase used either in debate or in the Senate report basically calling certain places "judicial hell holes," which I thought was pretty vivid for Congress. But the point being that they wanted to do something about this. And they also wanted to address settlements.

But let me talk first about the question of what changes CAFA has brought. The objective of the statute is to get more cases into federal court. Congress did this by a few means: one is reducing the diversity jurisdiction requirements--now just one party must be different from another party. The amount in controversy, another major obstacle to getting cases removed in the old days: It used to be $75,000 for each named plaintiff; now $5 million total for the class, which is met in many of these class actions obviously. Under CAFA, any defendant can seek removal instead of all the defendants seeking removal.

Time limits on removal were eliminated. It isn't quite clear in the law, but potentially Congress created a shift

in who bears the burden of establishing whether removal is appropriate. Under the traditional removal cases, the party seeking removal has the burden. There is some suggestion in the legislative history that CAFA intended to shift it to the party objecting to removal. It is a little controversial. Also, there is an odd legislative history. The only report that exists is a Senate report, which was issued after the law was passed and after it was signed by President Bush. It is a funny time to put out a Senate report, unless you're just trying to get something out there with an agenda.

There are a couple of exceptions to CAFA removal based on the parties or the dispute being very locally based. So does CAFA, as you say, clear the decks? I agree with Barbara that it does not clear them completely. There are a couple of reasons for that. One is the Supreme Court precedent in *Lexecon* which suggests once the cases are removed to federal court and under federal process are put in a single federal court litigation, when it comes to trial they apparently must go back to their original district courts. So you are not really achieving the efficiency of having a single federal court adjudicate these cases in their entirety. That's something I will flag again later when we talk about the Antitrust Modernization Commission recommendation.

CAFA only applies to class actions. In reference to some of Linda's clients being opt-outs, it means if an individual large indirect purchaser chooses to bring its case in state court, there is no basis under CAFA for removal. So you could have class actions in federal court but opt out for individual claims in state court. Also, CAFA doesn't cover state *parens patriae* cases. And you have these home state local controversy exceptions which could leave some cases in state court. So CAFA has not completely brought all of the indirect purchaser cases together with direct purchaser cases into a single federal court, at least not for all purposes.

One question I had about this when we were thinking about today's program is well, how has it worked and perhaps we will have a chance to get feedback later. The Federal Judicial Center has been issuing annual reports on CAFA; the last report was April of 2007, so that's almost a year old. At least as of the first half of '06, which would be basically the end of the first year of CAFA, it wasn't clear what change it had brought in the federal courts. There were clearly a number of cases removed under CAFA, but they seemed to be state fraud and contract claims, not necessarily antitrust claims that were in the federal court. So no clear statistical evidence that I've seen on this issue.

Let me talk a little about settlement. One of the things Congress clearly wanted to do was tackle what they perceived to be settlements that awarded too little value to the class and too much value to class counsel. They addressed that by writing some rules for the courts when they are awarding fees to class counsel. If a settlement involves a coupon, has a coupon component, the statute says that the class counsel attorneys' fees cannot be based on the total hypothetical value of those coupons but must be based on the value of the coupons redeemed. Which as you probably all know is usually a small fraction of the total possible coupons that could be redeemed. Also, the court cannot base attorneys' fees on awards to charity in *cy pres* remedies. And even more significant is that settlements of these cases must be notified to the appropriate federal and state officials. They weren't very clear as to who that would be. I think the default is the state AGs. And after notice is given the court must wait 90 days to issue its final approval of the settlement, which is to give the federal/state officials time to evaluate the settlement. A failure to notify can have a significant penalty, because a member of the settlement class can reject the release, and without release the settlement would become valueless to the defendant.

I called Bob Hubbard the other day to ask him what's been going on from the standpoint of the state AGs. If you don't know Bob, he is the coordinator of the New York State antitrust efforts. He said that he has calls every two weeks with his colleagues in various states, and frequently on his agenda is what's new? Has anybody gotten notice of a CAFA settlement that you want to talk about? There is a listserv that the states use for state employees, so if you are on the listserv, you could see what's going on with CAFA notices. If some states said "hey, did you see this?" they keep each other informed.

He says there has been some settlement objections filed by the states but not in the antitrust areas, just the consumer protection area, on issues of the scope of release and even the value to the class of the total relief. But he couldn't think of any objections in the last almost three years now that had related to antitrust cases. There are a few instances pre-CAFA when states weighed in somewhat late in the process, but not under CAFA. So that's the picture of CAFA and my view as to whether it has cleared the decks.

MS. HART: Thanks, Debra.

A couple of housekeeping matters. I couldn't live with myself. I need to acknowledge Vicki Ku and Greg Asciolla who helped put together the CLE materials in your book and without whom we wouldn't be able to come together to do the presentation. So Vicky and Greg, thank you very much.

Additionally, I wanted to establish somewhat of a friction, which is Peggy, who is a plaintiff's class action lawyer, generally does both direct and indirect purchaser work, for today's purposes is going to be speaking as advocate for indirect purchasers. And Linda, from a plaintiff's point of view, is going to be giving the lens of the direct purchasers. And obviously a stretch, but Debra

and Jim will be doing the defense bar on these issues. But while both practitioners represent both sets of clients in different instances, for purposes of the dialogue going forward, this is the way in which we have carved it up.

I would say one of the things that jumps out to me, Debra, on CAFA is the resolution with the final provisions on settlement resolution really isn't resolution. Because in essence you're now notifying a whole set of other regulators. It strikes me as the law of intended consequences in that you really don't have resolution when you're going to be notifying people that may have separate agendas, very legitimate in some instances but unknown agendas. But let's say defendant or consumer antitrust class action may be a defendant that's involved in a labor dispute for instance or an environmental dispute, one does not know going into the resolution of a class action about a particular issue then notifying and we don't even know who the appropriate people to notify are necessarily, since it is so vague. But then endeavoring to notify, one doesn't know that one has reached certainty at all because those people will comment, object, and they have a bully pulpit to do so and may have their own reasons for doing so. I'm not sure that the business counsel or whomever grafted on that provision really fully evaluated the ramifications of that. And I don't know whether there's been any rethinking.

MS. PEARLSTEIN: I don't know what the thinking was, but I don't see this as a pro-defendant approach at all, so I don't see it as being a business counsel issue. I think this was a reaction of people thinking that there's something about the settlement dynamic which smelled. And being on the defense side of the settlements, I can say defense lawyers don't typically see it as their job to worry about how much of the value gets delivered to the class. They are concerned about getting approved and released. It is the plaintiff lawyer's job who represents that class to deliver the value to the class. So I think the concern was that plaintiff lawyers might be more interested in their fees than in how many coupons were redeemed, which was what created this question of who is speaking for the public. So I think that is why parties now must notify public officials and let them speak. If in fact they are not speaking, then I don't know there's any value to this particular aspect of CAFA, other than now creating uncertainty for defendants about whether if notice isn't proper, is there somebody that's going to claim no release down the line.

My sense from colleagues is you send them notice to everybody and her/his brother, anybody you think might possibly want it, to avoid a later claim of insufficient notice.

MS. HART: Make it look like junk mail.

MS. PEARLSTEIN: No, this is to the states. Actually Bob said that the states are sufficiently attuned to this now, so there is somebody who gets these, sorts them, and figures out the right attorney in the state to read them.

Now, New York has a much more functional Antitrust Bureau than probably some of the states that are very underfunded. But at least in New York it sounds like there is a system that makes a lot of sense. I'm not aware of any challenge for failure to make notice by somebody that's seeking to nullify a release. We couldn't find an example of that. Bob did mention on the listserv somebody will say "I got notice" but somebody else will say "I didn't." States so far have not chosen to complain about a lack of notice if they felt they weren't getting it right. Obviously states could publish a directory: Here is the person to whom CAFA notice should be sent.

MS. HART: It is an idea.

Linda, did you want to comment on that?

MS. NUSSBAUM: I'm thinking in terms of antitrust cases in CAFA, and I think the only area in some of the pharmaceutical cases, the states attorneys general generally do monitor those cases very, very closely particularly when they get to a settlement stage and have some input or back and forth of class counsel, so that by the time it's actually going to final approval, by the time notices do go out the hope is there will be no surprises. And whatever issues there might possibly be or issues where the government might have an issue, those have been discussed and hopefully taken care of.

MS. HART: Of course historically in the *Buspar* and *Mylan* litigation where we were litigating in tandem with the various regulators, that kind of ongoing dialogue was part of the process.

MS. NUSSBAUM: And even in some other cases, I'm thinking specifically of *Remeron* right now where the states actually did not bring a case, but they knew about the cases and that the states monitor the pharmaceutical cases fairly closely.

When it came to mediation they sent somebody, they participated, so that they were well aware of what's going on. And my thought is that in particularly the pharmaceutical area the states do stay abreast and ordinarily do have some kind of communication with class counsel so that there are no unpleasant surprises for anybody at the end of the case, either for the defendants or for the class.

MS. HART: And I'm not sure that in my view—I'm not a scholar obviously of anything, but including CAFA, that the antitrust laws were what was intended to be captured by CAFA. But so often in these cases you have unjust enrichment claims or deceptive acts and practices, little FTC Act claims as part and parcel of the proceedings as an alternate theory of liability, even if you were doing indirect Illinois repealer statutes, you are going to have in certain instances these other claims brought under the

umbrella of the complaint. So you would trigger CAFA even if you didn't think you had an obligation under the *Illinois Brick* repealers in certain instances.

Should we move onto coordination and MDL proceedings. Jim obviously is involved in complex federal and regulatory proceedings and is going to speak to us to set some foundation for the ways in which direct and indirect purchaser proceedings tend to be coordinated, if you want to call it that. Sometimes coordination doesn't capture the meshuga that exists when these proceedings go forward. But Jim can talk about the inception and how it plays out.

MR. WARNOT: Thanks, Barbara.

Before I get to that I just want to elaborate a little bit more on some of the problems that the defense side sees from the current state of play. Clearly, we can all argue about what the right solution to the problem is, and some of the problems are mitigated by CAFA and things like informal coordination between state and federal judges. But here are some of the basic problems—and maybe they are obvious to everybody but maybe not. First of all is the problem of having multiple proceedings in which a defendant may be subject to discovery that is completely duplicative in every one of those proceedings if you don't have proper coordination. So the same witnesses can potentially be giving depositions in cases all over the country, including potentially a federal MDL. In addition to that you have the also perhaps obvious problem that the defendant could ultimately be liable for the overcharge times three in federal court. And then in addition to that, whatever the overcharge is on the indirect purchaser level, assuming pass-on can be proved and if that's enhanced by whatever multiple that would be in the state court.

MS. HART: If only.

MR. WARNOT: Yes. And then on top of that there is a potential collateral estoppel problem, where by and large the same conduct on the defense side is going to be at issue in both the direct and indirect purchaser cases, and the defendant could be litigating that in multiple proceedings. If defendant loses in one of those proceedings, after having had a full and fair opportunity to litigate the issue, that's going to have collateral estoppel effect in every other proceeding.

Conversely, of course if a plaintiff loses, the next plaintiff can try it again, et cetera, et cetera, et cetera. So it is not an ideal situation from a defense standpoint.

What I want to talk about briefly is more or less how these cases work in practice today under CAFA. The case will start by something happened in the press where the matter comes to the attention of the plaintiff's bar and you get class actions filed, typically in federal court. It could be raised here in the U.S.; it could be raised here in the U.S. combined with being raised somewhere else in the world. The antitrust enforcers around the world are more and more coordinated as the years go by. It could be and very often these days is the announcement of something that happens at the European Commission, whether it be the actual commencement of proceedings through a statement of objections or the fact that a recent case is filed. In the flat glass area that followed actually the completion of proceedings and announcement of fines. Something will happen and cases tend to get filed all over the place. And we are talking about the MDL. There is a tendency on the part of some plaintiff's firms to file multiple cases for multiple clients to kind of run up the numbers, so that when it comes time to decide where the case should be or who should be lead plaintiff, those types of things count. I know we don't know anyone who does things like that, but it does happen from time to time.

MS. HART: Tell us about a better way. We are looking for a better way.

MR. WARNOT: The complaints don't all read the same. In fact, they can be very different in terms of the type of class that is alleged and the breadth of class. So you could potentially have a class that's written in such a way that it encompasses all purchasers, both direct and indirect. From a defense standpoint the indirect piece of that would be subject to attack on *Illinois Brick* grounds, but those cases still get filed. You may have a purely direct case, which probably wouldn't be subject to attack on *Illinois Brick* grounds. And you could have separate actions filed by the indirects. So you have a whole bunch of different things. Possibly even have cases improperly filed in state court subject to removal under CAFA.

So when that's all sorted out, and what usually happens, this typically happens in a relatively short period of time and plaintiffs and defendants are reasonably cooperative in agreeing on filing these things, then somebody files an application for coordinated pretrial proceedings with the judicial panel for multi-district litigation. It may or may not be the defendant. A case Barbara and I were working on it was actually plaintiffs who filed the first application. It could be plaintiffs or defendants.

So the first bullet point on this next slide really paraphrases the words of the statute. What that says is you could put all these cases together, all the way up to after summary judgment and just before trial, and then theoretically they are supposed to be split up and sent back under the Supreme Court decision in *Lexecon* a few years ago. It doesn't always happen that way.

If you have an MDL, say in a different area—I've had MDLs that are very distinct cases, arose out of a common set of events, completely different theories, some common parties, there it makes a lot of sense to send them back to the original court. But let's just say you had a case of all direct purchasers where the plaintiffs form a committee and they get together and they file a consolidated

amended complaint and that will have a particular class specified, and that case goes all the way through trial. It is a little unclear to me what is left to go back to the individual district courts, but that's the debate that we have. And plaintiffs may have a different view.

The transfer standard, common issues of fact are usually not something that's really debated because it is pretty clear. If you've got a case that arises out of allegations of price fixing in a cartel, you can state those allegations in various ways. But common issues of fact are usually not disputed.

The contest usually revolves around where the case should be. What the fight is about, is where should the case be. I know this happens from the defense side, and I assume it happens from the plaintiff's side as well. What the parties are thinking about is where do we want to be, which judges have these cases, is that a judge we want to be in front of. Of course, there's no guarantee that a judge in a particular district that we file who it is in front of will actually get the MDL if everything is transferred to that district. But by and large that's what happens. In addition to that, federal laws are supposed to be uniform, but we all know that it isn't amongst circuits. So both sides, while all this is going on, are looking at the law in the different circuits to decide where you want to be as well. Then you go in and frame your papers before the panel as to the various factors that the panel considers. And those factors don't include we don't like Judge X, but we like Judge Y. In fact then you argue all these factors, and very important factors are as to what the parties want. Usually but not always the defendants will be in common on this issue, and there is a significant chance that the plaintiffs won't. In fact, maybe the only time—Barbara didn't mention this when she said we met at the MDL, but perhaps the only time we will be agreeing on this case, unless we ultimately resolve it, is that we both want it to be in Brooklyn. And that's where the MDL ended up being assigned.

The MDL, the panel will retain jurisdiction over the case, because there are tag along cases that get filed over time, even a couple years after the original MDL order. We are still getting them on the cargo case. Those typically get assigned to the same judge that has the rest of the MDL.

After consolidation there are a number of preliminary matters, one of which is very important from the plaintiff's side, unless really defendants have nothing to say about it. That's who plaintiff's lead counsel should be, which is a matter that's often hotly contested, and defendants more or less just sit back and watch. But ultimately plaintiff's lead counsel will be appointed. There may be and there usually is in a big case co-lead counsel and there may be several co-lead counsel. At the same time typically there will be some sort of defense lead counsel, appointed by defense group. In most MDLs you'll get an initial scheduling order which says that's what is going to be followed.

The next step, after the selection of lead counsel, is lead counsel get together and they file a consolidated amended complaint. That complaint could have multiple classes and subclasses. Where you have both direct and indirect purchasers, you invariably will have separate classes of directs and indirects, and they will be asserting different types of claims. Assuming that they are doing it right, the directs will be asserting Sherman Act claims and the indirects will be asserting various state law claims.

MS. HART: If I may, Jim, this is clearly an issue of tremendous importance to the plaintiff's bar as to whether or not these claims can be prosecuted. And of course for efficiency purposes and who to talk to purposes, the defense bar by corollary, whether these claims can be prosecuted under an umbrella complaint, under an umbrella organization, or whether they should be separately prosecuted, conflicts of interest questions abound in terms of trying to resolve that. Obligations that—there was an article kind of touching upon a similar issue regarding the ethical issues in *Vioxx* and the master settlement in *Vioxx*. If you have several clients in a case, some of whom are direct and some of whom are indirect, are you therefore counsel in one group or another, or can you be part of an overall, overarching organization, what are your ethical obligations, what can be structured and dealt with through appointments and some type of committee counsel, subcounsel committee structures. Or does it need separate prosecution and it can't be done under an umbrella organization. All of these issues play out differently depending upon the dynamics of the counsel, the clients and specific facts and how events unfold. But it's not susceptible to easy or pat answers.

I think Peggy or Linda if you want to comment from the plaintiff's point of view.

MS. NUSSBAUM: From my point of view, and I think I have never, except for once when a court absolutely insisted on a joint complaint, separated classes to direct and indirect. And I really would not do that. Because when you become class counsel, you're a fiduciary to the class that you're representing. If I'm class counsel for the directs, that's strictly where my fiduciary obligation is, to the direct class. And I might strategically have very different issues that I need to deal with not only on damages, which I think we are going to get to later, but there could be different discovery. There could be different factual issues. There are times when the indirects want to take discovery of the directs in these cases. So I really think it is very, very important to have that separation and not to have the two.

Then there is this other concept of a limited fund and depending upon the defendant, depending upon how

large the damages are, the direct purchasers have the treble damage theory. And when you're going into a case you always have a preliminary damage analysis, but that is often not what your damages model is as you continue and you get discovery. So that's another very real issue that can arise if you have one group of counsel. If one firm is representing both directs and indirects, my personal view is that's really a conflict.

MS. HART: Peggy, did you want to comment?

MS. WEDGWORTH: I agree totally, especially at representing indirect counsel. I see conflicts in many cases with direct purchasers right away, and at class certification stage you're all at the same stage that you want to get a class certified, and you all want a valid damages model. At some point there becomes conflict.

We have talked about subpoenas to get different data, indirects subpoenaing directs and the issues that come up. Though you would want to work together in reality, it is a different position.

MS. PEARLSTEIN: I assume there would also be a problem because the indirect group is not necessarily one group. You may have many levels of distribution which are indirect. So do you really then have to divide it with "I'm indirect—a retailer," "I'm indirect--a customer," a second level customer, etc. Especially these ingredient cases where it starts with the manufacturer, and by the time someone consumes that product at the end there can could be five or six or ten or fifteen levels of distribution.

MS. WEDGWORTH: That's been an issue in *Air Cargo*. I don't know the details, but the *Visa* litigation as well has dealt with that issue. If you've got an antitrust claim, how far down do you go? Do you go all the way? If it's passed on, how do you allocate, and you need counsel actually at some point for each one.

MS. PEARLSTEIN: I guess the question I have as a policy matter is can Rule 23 handle this or will it explode? At some point are subclasses going to solve this?

MS. HART: I don't know whether Rule 23 is going to explode, but some days my head is going to explode for sure.

One of the things that the discussions internally—and obviously the antitrust laws don't exist in isolation in terms of dealing with multiparty litigation. You had situations—you have it in *Vioxx* currently where there's a plaintiff steering committee and the parties are differently situated and the courts are looking to do some type of efficient coordination of both the discovery process, the prosecution process and not have just tremendous duplication of effort at trying to create point people whom the defendants can coordinate through.

You had this fifteen years ago in the *Exxon Valdez* case, where you had the villages, you had the villagers, you had the incorporated entities, you had the businesses, you had the tribes. I'm not really going to get it right, but essentially you had an overarching organizational committee that coordinated those in some instances competing for some—and Exxon was one defendant, as opposed to Air Cargo where one might argue the limited fund doesn't seem to readily come into play. At the outset you're not thinking this is going to be a limited fund issue. There is a limitation on how much anyone is willing to pay is the ultimate limitation, but it doesn't smack of a limited fund in the *Air Cargo* litigation at the outset. So coordination of these cases is not unique to the antitrust concerns. This is something that you see in mass tort, in toxic situations and product liability situations. And so these coordination issues under an umbrella organization are seen in all kinds of prosecutions. So I completely understand and depending on the day could wake up and agree wholeheartedly with Linda and Peggy, but yet who does Jim come to talk to. How does he as liaison counsel in the *Air Cargo* case, how does he try to speak to someone in terms of—not even getting to the issue of ultimate resolution, but the baby steps in between that in terms of discovery or the one deposition issue that he's talked about. How many times should his witnesses have to appear for deposition.

Linda.

MS. NUSSBAUM: I think it is two separate issues. I think in terms of coordination the defendants are going to scream at every judge. I mean I know discovery is generally going to be coordinated, and there frequently will be a steering committee or liaison counsel for purposes of discovery that the defendants deal with on terms of scheduling and who will be the deponent. And you have these very, very complicated protocols as to how many hours you're going to get and who is going to go first and are the directs going first or will the indirects go first. Then frequently you have opt-outs, direct opt-outs, indirect opt-outs. Frequently direct opt-outs are people that are operating with assignments; that's why they are direct, but otherwise they are indirect. You see, you have all of these complications on the plaintiff's side that you need to deal with. Because from the defendant's perspective they are going to tell the judge they want to know who can they call to schedule the deposition. Who can they call to tell if these are the first ten witnesses. It becomes very difficult.

I've sat in on depositions when all the plaintiffs are done you're thinking who needs defense counsel here. You've accomplished whatever, and then the other plaintiffs who have different issues who want to spin things in different ways or who ask facts that you totally wanted to ignore, and then you really totally eat away at whatever you felt you accomplished. And that's one of the frustrations and difficulties on a plaintiff's side.

But these antitrust cases become more and more complex, and you have many more constituencies, direct, in-

direct, different subclasses and different opt-out groups. That's just something that you really need to deal with.

MS. HART: And we are going to get back to this when we get to the modernization issues, the recommendations of that Commission. So maybe we should allow Jim. So thank you for this dialogue. That's part of what I want to have happen.

MR. WARNOT: Clearly, when you think of a complaint and you have direct and indirects in the case you have a conflict issue. The only way around it is to have separate lead counsel for indirects from directs.

So once the consolidated amended complaint is filed there invariably will be a motion to dismiss, and those can be broken into issues that are common to all the defendants and those issues common to specific defendants.

Hot issue right now of course is what is the impact of the Supreme Court's decision in *Twombly* earlier this year. My whole career, every time I filed a motion to dismiss for failure to state a claim, I always see *Conley v. Gibson* come back in the first line of the opposition to the motion. Thankfully, we won't be seeing that much anymore.

But the question is: What does *Twombly* really mean? First of all, is it only parallel conduct cases from a defense standpoint? Certainly no. By overruling *Conley v. Gibson* the Court changed the standards. I think that's relatively clear.

The real issue under *Twombly* is the Court said you don't have to have detailed factual pleadings, but you've got to have enough facts the defense can't just say pure speculation based on conclusory allegations but in fact the allegations are plausible. And how far is enough is a question that's going to take some time for the courts to answer.

MS. HART: I always thought guilty pleas meant plausibility.

MR. WARNOT: Depends on the allegations in the complaint and what the plea is for.

Then there are a number of other issues. On the indirect side, if in fact you've got indirects asserting Sherman Act claims, you have an *Illinois Brick* defense. In addition to that, depending on the words of the repealer statute or whatever types of allegations are brought, you can in fact have substantive attacks to those claims. Then you could also potentially—depending on the industry, you could have a federal preemption argument on the state law claims. For example, in the cargo case right now we are asserting the Airline Deregulation Act preempts all the state law claims in the case, which we think is a very powerful argument.

MS. HART: Bernie, didn't we have the opposite in the *Options* case, where it was the federal laws were going to be preempted by the securities laws and the state laws weren't? Wasn't that one of the arguments?

MR. PERSKY: In the *Options* case the securities laws were held to impliedly repeal the antitrust laws. In the *Options* case there was implied repeal.

MS. HART: But there was a possibility that it didn't preempt the state law claims. So you could have the reverse also. But preemption is obviously one of the basic stop, look, wonder whether or not preemption comes into play, at least from the plaintiff's bar. I think that it is clear that this issue of the preemption by the Airlines Regulation Act was not anticipated. It didn't jump out at plaintiffs from the get-go.

MR. WARNOT: Then an additional wrinkle may come up if part of the class or separate subclass or separate class, however it is denominated, is composed of foreign purchasers. There are a couple of different potential issues there. One is the issue addressed by the Supreme Court in *Empagran*, as to whether in fact the foreign conduct had an effect on U.S. commerce. And there's been a fair bit of law since *Empagran* on that issue, which we think it is pretty helpful from a defense standpoint.

Going back to the *Vitamins* case. There is an attempt to bring claims under Article 81 of the European Community Treaty, which is analogous to but not the same as Section 1 of the Sherman Act. The question then comes as to whether those types of claims ought to be brought in U.S. federal court when the courts of Europe are still trying to sort all of that out and the European Commission is making all kinds of efforts to in fact promote private enforcement in the European community. I won't say anything more about that because that's a live issue right now, and I don't want to tip my hand anymore.

MS. WEDGWORTH: Jim, I don't know how it worked out in *Vitamins*, but my understanding on the European side, indirect purchaser versus direct purchaser has really not come to the forefront yet.

MR. WARNOT: Well, as I understand it, the pass-on issue under Article 81 is very much an open issue. Because that's an issue that's not determined by Article 81 itself, but it is going to be determined by the individual laws of the member states. So the answer might be different in Italy from Germany from France. So that's very much a live issue.

MS. HART: We should certainly resolve that here.

MR. WARNOT: Then particular defendants may have individual issues such as *in personam* jurisdiction or Foreign Sovereign Immunities Act. So the question is how do you put this all together in a reasonably intelligent way and put it to the Court for decision. And that's not something on which the plaintiffs and defendants always agree. But some of the issues are do you have one big om-

nibus brief, or do you chop it up into little sets of issues and brief about different schedules and argue them differently. And a lot of that really depends on the preference of the judge.

In addition to that, if you are going to have issues of foreign law, such as you have if you have Article 81 claims, you're going to probably need expert declarations on that foreign law. From the defense side you'll have to coordinate and from the plaintiffs side as well.

While the motion to dismiss is going on, which can take some time, depending on the issues and the judge and the facts, you've got the question of whether there should be discovery. And the number one issue is always should discovery be stayed pending full briefing, argument, disposition of the motion to dismiss. And as you might imagine, the defense and plaintiff's side have very different views on this. Again, defendants believe that *Twombly* is very helpful in that regard. While it was strictly a pleading case, the underlying rationale for the Court's decision in large part, in my view, was based upon an opinion that until we see if we've got a real claim here, we shouldn't be undertaking the expense and burdens and task of discovery.

However, if there are jurisdictional defenses asserted on motion to dismiss, it is very common for there to be jurisdictional discovery, although sometimes the parties can work out disposition of the motion without that.

Then once you get past the motion, you've got the whole issue as to class certification discovery versus merits discovery, and sometimes there's a lot of overlap between the two. But that is always a live issue.

Now, the next point has already been alluded to. When you get into discovery you've got potential conflicts amongst the class members in that you can have the class representatives on the indirect side will need discovery from the direct side, but that may or may not be the class representatives on the direct side. That would only be by happenstance I would think. The indirect is going to need discovery from its seller to determine the issue of pass-on. But in terms of the discovery requests that are propounded by the plaintiffs to the defendants, the plaintiffs will have to get together to determine what is common discovery, presumably discovery on the alleged offense conduct versus what discovery do particular classes of plaintiffs need from the defendants.

MS. HART: Linda.

MS. NUSSBAUM: Sure, I think that in terms of discovery, first I think as plaintiffs in general you never want discovery bifurcated. You never want the court to say well you get class discovery first. Frequently defendants will try to get some kind of bifurcated discovery. It then becomes so difficult and you wind up with so many issues as to what's class, and the two are ordinarily so commingled, that you always want discovery in general, not class or ordinary discovery. But then going forward in terms of what your actual requests are and you are coordinating among plaintiff groups, that again poses a lot of thorny issues when you have direct and indirect cases.

When you're dealing with the merits, many liability issues will be in common. But even how the product is sold, the various chains of distribution, things of that nature may be very different as to what you're interested in on a direct or indirect end. Then frequently, named plaintiffs who otherwise might not be subject to discovery on anything more than that they purchased, in the interest of the case you may want or the defendants may want to assert additional discovery because there are indirects in the case.

If you're representing a direct purchaser of pharmaceuticals and you would have previously in the case or the only relevant discovery is did they purchase and their transactional data with respect to the purchase, you may get discovery requests for all sorts of retail pharmaceutical information, did they sell this to customers, what did they charge? The argument is that the indirects want this or that, the defendants need this. So I think the discovery with respect to class becomes much, much more complicated, and the defendants get the benefits of that complication. And you have the direct and indirect purchasers really seeking very different discovery from the defendants and possibly third parties.

MS. HART: I think that a true plaintiff's perspective is sometimes also that the discovery directed at the plaintiffs, while the plaintiffs obviously have an obligation to submit themselves to discovery, it is the kind of quiet retaliation, not the overt cutting off of a distribution chain or some type of overt retaliation for bringing the claim, but kind of the inconvenience factor where the client has come forward to act as a class rep with some upside, but not tremendous upside, and then the burdens on the discovery side becoming very onerous. And what's the proper balance between the appropriate discovery of a plaintiff and somewhere that it becomes an effort to cause a person to drop out. So that's somewhat of a cynical view of these issues of discovery.

Of course, while I agree wholeheartedly that we never want to see bifurcation of the merits versus the class discovery, part of it is class discovery and where the directs and indirects comes in is in terms of class certification and after the ascertainability of a damages formulation. On the indirect side, for instance, one in essence wants to be able to say that damages are ascertainable on a class-wide methodology. What do you say is the data set available in order to establish that class-wide methodology, and how what would you point to as part of that data set.

One of the issues that is brought up in the outline—I don't know if we'll delve deeply into it, but on a class cert we might talk what kind of benchmark or temporal dam-

ages theory we would be coming forward with in order to tell the court that class is certifiable.

MS. WEDGWORTH: I may be jumping ahead, but my experience is in the class certification process it has become much more sophisticated and complicated than in years past. Meaning that at the class certification stage experts are brought in to say that a methodology can be used and it is common for all class members and the data is available that will allow me to calculate damages for whatever class is retaining me.

With that in mind, you have to know the data that's there and the expert has to know that. And the indirects are much more attuned to that at class certification stage than anyone else.

MS. HART: Did you want to continue?

MR. WARNOT: I shall. Let's move onto class certification. This usually turns around B(3) issues because it is usually a huge class and there are some common issues. But I believe that certifying class does become more difficult when you have indirects in the case.

First of all, the indirects will want to be certifying a nationwide class based upon state laws. And you've got a number of issues there. I would say the trend in the appellate courts is to not certify nationwide classes on state law claims. I think the turning point was the *Castano* case, tobacco companies back in the Fifth Circuit 1996. I think this is particularly true with these Illinois repealer statutes that vary quite a bit. But the same thing can be true with common law claims. Certainly in the tobacco case there were common law claims at issue. That's one point on class certification.

In addition, from an economic analysis standpoint, really the point that Peggy just touched on, it can be much more difficult to show that any particular indirect has in fact sustained any damage at all, not just a question of how much damage, because there you can argue economic value and can sort through that as to what the proper damages ought to be. But if you've suffered no damage, then you don't have a claim. Certainly there is a view that this is something that's not susceptible of class-wide proof. That's an argument that you see defendants asserting in most of these cases. I refer you to the Law Review article cited for a good discussion of that.

MS. HART: So if I understand what you're saying, the fact of an individual injury is not subject to class-wide proof?

MR. WARNOT: May not be.

MS. HART: Of course, if one believes that pass-on occurs, which is kind of economically a no-brainer to my way of thinking, then what we have is you can't certify the class without a remedy because the claim is typically too small to prosecute on an individual basis.

MR. WARNOT: Your assumption begs the question as to whether or not the pass-on has occurred. I don't necessarily view that as a no-brainer. It is a complicated analysis as to whether or not it is a pass-on. That is the issue in which you get some complications about certification discovery, and I think that it is an issue why classes are not being certified in many case.

MS. HART: Peggy, harkening back to the original Supreme Court decisions, it wasn't acknowledged that the Supreme Court viewed the interim purchasers as but of course injured by nature of the overcharge and that it was passed on but didn't create a legal fiction.

MS. WEDGWORTH: Yes, Judge White was worried about complications, but Justice Brennan and others handle complicated issues. I do see courts willing to take that on and in some cases certify. I grant you the overriding quantity of opinions will not certify classes of different state laws. But there are judges who are willing to take this on because the thought is without this certification there will be no remedy, there will be a wrong for which there is no remedy.

MR. WARNOT: Yes, there are cases going both ways and lots of them. If you look at comments to the Modernization Committee there are lots of them going both ways.

MS. HART: Did you want to conclude?

MR. WARNOT: Well, I think at this juncture maybe we ought to turn to talk about the Modernization Committee.

MS. HART: I didn't want to cut Linda off. Did you want to say anything in regard to class cert or on the damages issues?

MS. NUSSBAUM: No, I'm happy to go forward.

MS. HART: Okay.

Now Debra is going to give us an overview of the Modernization Commission's recommendations, and then we are going to have lively input, I'm sure. And also I will invite input or hands up from the audience once Debra gets through the foundational issues on what the Commission's analysis and recommendations were.

MS. PEARLSTEIN: The AMC came into existence in 2002, fairly politically. I think this was Senator Sensenbrenner's dream in some sense that maybe the antitrust laws haven't kept up! We are in the new millennium and maybe we need to look at the antitrust laws again and see if they need to be modernized. So he pushed and got Congress to enact this law. Under the law they would go out, establish a good group of experts who would study, solicit views of the community, and prepare a report to Congress. Congress and the President selected a bipartisan committee, twelve members chosen through a

group majority and minority parties. It is a diverse group: economists, government lawyers, people associated with the defense bar, some associated with the plaintiff's bar. It didn't actually get going for almost two years because Congress enacted the law with great fanfare, but didn't get around to funding it until 2004. It then had two and a half or so years to figure out what was its agenda, solicit views and then issue a report, which it did last April.

I find the soliciting of views to have been an interesting process. I sort of imagine this as kind of open-mic night for antitrust lawyers, a little bit of karaoke. (A little joke.) There were 17 parties who made submissions on civil remedies generally. Some of them were on this indirect purchaser issue. Linda was among the group of what I would call primarily plaintiff's counsel who submitted comments. The ABA and the AAI submitted comments, 46 states submitted comments together, some states separately. The U.S. Chamber of Commerce, the Business Roundtable, various individuals and Congressmen were among the 17. So it was a fairly diverse group, and the quality of the comments were generally considered to be very high level.

It was a chance for the people, if you will, to sound off on antitrust. Of course most people don't know what that is, but you get the idea.

So there were various points of view on this particular issue. There was one group that believes no reform is needed. What we have now, the situation that we have been describing, works just fine, thank you very much. Indirect purchaser actions are complementary to direct purchaser actions, particularly given the hesitation of direct purchasers to bring cases if it will jeopardize their business relationships with the alleged price fixers. We need indirect purchasers who don't bear that risk. One example, if you want to look at it, would be who sues Microsoft? Mostly indirect purchasers; not the people who actually buy products from Microsoft. This group challenges others to point to the empirical evidence of over-deterrence, and because you can't find it, it must not be there. And this group also said, let's give CAFA a few years to work before we decide what we are going to do if we have a further problem.

Who thought there was change needed? Needless to say, the change agents come from all over the spectrum. The 46 state attorneys general said we do need change. We need to overrule *Illinois Brick*, because it weakens federal *parens patriae* authority. But don't overrule *Hanover Shoe*: it is okay to have different policies whether you're using the doctrine offensively or defensively. Make sure that the AMC doesn't do anything to undermine the ability of states to pass *Illinois Brick* repealers.

To illustrate the other side, I refer to the Business Roundtable position that we should preempt state laws, not allow them to pass *Illinois Brick* repealers. Alternatively, The Business Roundtable supported sort of an ABA type of compromise, and in fact the ABA compromise was sort of interesting. The ABA brought together people and said "how can we fix this mess?" And they came up with essentially a draft piece of legislation, echoed in the AMC report. It was intended to give something to everybody, so everybody would buy into it. And you needed to have every piece of it in order to work. Otherwise, someone was going to get a benefit and other people would not. But the idea was to make some sort of compromise.

So where did the AMC come out? I thought it was interesting. Philosophically, six of the twelve commissioners said look if we could start this from scratch we would just say no to indirect purchaser recovery. And five said no, we think indirect purchaser recovery is a good thing. But in fact we are not starting from scratch; there is no clean slate here. So ultimately nine of them endorsed a policy statement that basically says we need to make this more efficient and more fair. It would be more efficient and more fair if it all took place in a single trial in federal court, if it did not result in duplicative recoveries, denial of anybody recovering something, and also no windfalls. They have suggested legislation that would overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to bring both kinds of cases to a single federal action.

They have suggested that to protect defendants that the damages should not exceed the overcharges incurred by direct purchasers times three. So that would cap the ultimate liability of defendants at treble damages as measured by sales to direct purchasers. But then once that number is determined, through litigation or possibly settlement, it would be apportioned among all the purchasers, direct and indirect, in an attempt to give each full satisfaction.

The AMC also had to address the fact that there are still many states, as you've heard, that have no *Illinois Brick* repealers and some plaintiffs might choose, even though they were entitled to sue in federal court, some might choose to sue in state court. There would be removal to the fullest extent the constitution allowed. There would be consolidation of all of them for a specific trial. So this would specifically change *Lexecon* for antitrust and direct purchaser cases. And the AMC made it clear they weren't intending to make it harder to get class cert. Basically, their rationale is to address exactly the things we talked about on this panel: Recovery, complex costly cases.

CAFA may not work for some of the reasons I mentioned before. It doesn't solve this all by itself. And politically there is no way to go back and tell 30 some states that have allowed indirect purchasers to recover under some theory, well, forget it, we are taking it away. There is an aspect of federalism; you have to follow what states do. So the AMC proposed to find a way to work for everyone.

What has happened in almost ten months since the AMC report came out, if you haven't noticed, this is an election year, and the answer is nothing has happened. Congress has changed rather dramatically since 2002 when Sensenbrenner got this whole thing created.

Conyers, who is the Democrat from Michigan, held hearings shortly after the report came out last spring on this issue. He expressed some concerns; he didn't like where the AMC report was going. The fact is the people I talk to in Washington tell me this is going absolutely nowhere through the election, and where it goes after that undoubtedly will depend on who is elected and what his or her agenda may be.

MS. HART: Thank you.

I'm going to back up to the recommendations, but I want to share with you my next Law Review article, which is going to be titled "The Myth of Duplicative Recovery," because I'm always fascinated to hear about this idea of duplicative recovery. I don't think I've ever seen a situation where I've seen such a remarkable deterrent, other than where the government proceedings have been so punitive or jail sentences—the Christie's-Sotheby's situation, where you have a deterrent effect by the sentencing. But in terms of the civil damages resulting in duplicative recovery, it just does not jump out at me that in terms of my understanding of the damages calculations that we see that we really end up in a situation where we have sextuple settlement values imposed. Nor do I believe that the deterrent effects are such that we see an end to price fixing, because the actors don't see a short-term reward and the possibility of a long-term that they are going to have to pay more than their short-term money in the door based on the conduct. But maybe that's just because I've been a plaintiff's lawyer for sixteen years that's the way I view it.

In any event, I think in terms of the damages and actions for violations of federal antitrust law should not exceed the overcharges for indirect purchasers, which was the first recommendation.

I think Linda, Peggy and Jim, this is open mic night. Sing if you wish.

MS. NUSSBAUM: Clearly, the deterrent effect is so important here. And not only from the perspective of a plaintiff's lawyer, but frankly the perspective of corporate America. Sitting here as plaintiffs' lawyers we see very confidential documents, many from major corporations. We have seen board minutes, we have seen documents where it is clear what the wrongdoer is doing. They know what they are doing. In pharmaceutical generic entry cases, they know what that calculation is. They know that the dollars will be going forward for delays of six months, nine months, twelve months. And they run out all these numbers, and have the numbers done, and they take that calculated risk that even if this gets disclosed we will be able to settle the case for a lot less than what the profit is going to be.

For us to now adopt a situation whereas only treble damages and everybody, all the plaintiffs, all the people harmed get to share within that treble damages, I think would be a huge, huge step backwards. The *Microsoft* case is actually a very interesting case, because there one direct purchaser actually did bring a case, Ivax, and my client, and they ultimately withdrew their case. And part of that was they had to renegotiate their contract with Microsoft, and how could their business continue without that. And clearly there was retribution or threatened retribution, and a judge that wasn't going to step in and do anything about it.

So I think people on the defense side do not recognize particularly the direct purchaser actions, and particularly when the class representative—when the plaintiff is a significant business entity dealing with a major supplier, the risk that one has coming forward. And so to take a situation where the damages then would be less and would be significantly less, I think would create a real problem in terms of getting these cases to go forward. And the government, incredibly rarely, I think the FTC in the last ten years has sought any kind of restitution in only two cases and maybe only one of those, where it was less than single damages. You had private plaintiffs then come in in the ibuprofen case, also a case that we prosecuted, where we wound up then getting more as a recovery than the FTC had gotten, and even assuming there would have been a setoff for what they had recovered for the class.

So we as plaintiffs' lawyers think that that really would be a very, very dangerous proposal to go forward in limiting the pot of damages potentially available. It would be just a huge step backwards in enforcement of the antitrust laws.

MS. HART: What strikes me is that Brennan was extremely prescient in terms of observing the possibility of the direct purchasers being subject to harassment and being disinclined to come forward against their supplier. And as plaintiffs' lawyers I thought that was a very theoretical thing upon first reading earlier in my career and over time in working with clients have had those quite vivid phone calls where clients have had cold feet because they have been on the receiving end of various conduct that I thought was the object of the *Sopranos* on HBO. And it was really quite surprising to me.

Additionally, I think that one of the things that's interesting is if really the predicate on the antitrust laws is the idea that competition is good for consumer welfare, and therefore deterrence is a very worthy objective if the goal is consumer welfare, because competition brings about consumer welfare, then if that's the driving force that consumer welfare is what we want to benefit, then the deterrence effect should be palpable and real. And anything

that undermines that that makes it profitable to engage in price fixing is quite troubling and anti-consumer welfare.

Jim or Peggy?

MR. WARNOT: I'll weigh in on that. A principal reason for damages is just compensation; in the case of antitrust that's the overcharge that a plaintiff suffers whether direct or indirect. Congress has imposed treble damages under the Sherman Act. So to the extent that an aggregation of plaintiffs can get more than treble damages, you've not only exceeded the compensatory rationale for damages, you've also exceeded the punitive and deterrent limits that have been imposed by Congress. So in fact the maximum benefit that the defendant is going to get is the amount of the overcharge and the maximum loss that plaintiffs are going to suffer is that same amount. However, it is split up between directs and indirects. Once they get single damages, they are compensated. Anything above that is deterrence and punishment, and it shouldn't be more than Congress dictated.

MS. HART: Peggy.

MS. WEDGWORTH: On the Ivax-Microsoft situation, on a personal experience I have, a company sells black powder, and there are only so many suppliers of that in the world, they were price fixing. He called me, he didn't want to sue them but could I do something, could I just call them and get them to quit price fixing.

MS. HART: Black powder explosives?

MS. WEDGWORTH: Which actually did turn into a lawsuit, and fortunately I was not in it. So it definitely happens.

There was no way he would put his name on a document that was going to sue the few suppliers he would be dealing with the rest of his life. There again, just to get where you are in that business, you've worked too hard, and you've done too much to put the company that you've built up at risk. I'm sure the Ivax situation was very similar. And it was very real to him, that if I put his name on anything that would be the last day he would sell black powder.

The other thing—and Debra, I'd be curious to hear what you say on this—I thought I read in the Modernization Committee report that everyone is concerned about multiple overcharges or multiple damages being recovered, that no one could think of an instance where that had happened.

MS. PEARLSTEIN: There clearly is—well, I think the answer to that is how many of these cases go to trial. The fact is that 90 some odd percent of these cases settle. So that's why you're not going to see an over-deterrence calculation rate.

What you're not going to see is sitting there when trying to figure out what to do with these cases—and I know plaintiffs tend to view settlements as proof there was a violation. Of course, from the defense perspective settlements are part of that risk, and that is any liability or multiple liability and the cost of litigation and all the other intangibles, like what is it going to say about my company if I settle this case, will I be sued again, and a number of other things. But you're going to see that as part of the settlement negotiation, you're at risk for this, so you should pay us more. Can you quantify it? No. But I know it happens, where people worry about the FTC is going to hit me for this or the DOJ is going to hit me for this. It is absolutely part of what companies are thinking about when faced with these cases. Even if and perhaps more if they didn't violate the law.

MS. NUSSBAUM: If they didn't violate the law, I doubt very much that the DOJ and the FTC as well as private counsel would be involved in the litigation.

MS. HART: Okay, what do you think about the apportionment of damages between different classes of purchasers? Because I don't think we are going to resolve that one.

MS. NUSSBAUM: The apportionment issue is a very difficult issue, and I think there are three different ways to look at this.

The first is that there is a trend in general I have seen in the last several years of either one defendant or groups of defendants wanting to do a global settlement, where the defendants in a particular case will say we have X number of dollars and we want to settle all of our liability. Our client doesn't want to settle the one group and continue the litigation, so we want to put up a pot of money, and then you guys just fight it out, get a mediator, do whatever and just do something for which none of us will then be at risk. That's one possibility.

A second possibility that happened recently in the chemicals cases, where you had a number of defendants that were defendants in several cases within the same industry and where at least one of those defendants came forward and said we want to settle a number of cases so we want to put up X number of dollars, and then we want to get total releases not only from directs and indirects but in multiple cases. So you, the plaintiff groups, should figure out a way of mediating this and of getting different counsel from the different cases and then representing the different constituencies, and let's see if we can get all of this done for X number of dollars.

And then a last way of looking at it is whenever a court sends you to mediation—and I think another case we are involved in is a competitor case, a direct case, an indirect case and a direct opt-out case, and the judge says you all go to GMs for one day and be with this mediator and get rid of this case. You say how can you possibly have that happen? So from that perspective that's always very difficult, because then it is plaintiff against plaintiff.

I'm representing the directs, I'm then in the position of really trashing the indirect case, saying you're not going to get a class certified or poking holes in their damage model. That's really not something you necessarily want to do, but you're being forced to do that because you're fighting for who you're representing and trying to not only maximize what their recovery will be, but you're an advocate for a position that you're taking. And clearly the damage models are ordinarily not the same. The risks on class certifications, and assuming a class has not yet been certified, are not the same.

So I personally think that having a global settlement, having the plaintiffs somehow apportion and come up with these formulations is really very, very difficult. We as plaintiffs' lawyers I think much prefer and frequently want to resolve all of the outstanding litigation at once, but our preference is to do some kind of mediation but not to have one. Have the defendants go from room to room and have each case decided and valued. Otherwise this is a very difficult situation.

MS. HART: We have some constraints due to time. Does anyone from the audience have anything they want to ask? Bernie.

MR. PERSKY: Yes, I was looking at the Antitrust Modernization Committee's recommendation, and I was trying to understand it. It sounds reasonable to try to limit the defendant's liability to the first level of overcharge, and it also sounds reasonable to apportion the overcharges to all the people who are injured. But unless you make it easier for indirect purchasers to get certified, as I read the recommendations, all you're doing is resuscitating the *Hanover Shoe* pass-on defense, limiting the damages payable by the defendants to the direct purchasers. Because there will be an overcharge, and the defense will be that it was passed onto the indirects. So the direct purchasers will have less incentive to sue, because the damages they can recover will be much less since they are reduced by the pass-on, and the indirects won't get certified or still have much of the same difficulties in getting certified.

I do recognize under the new federal law they wouldn't have 50 state laws to rely on. They'd be relying on the Sherman Act as it has been amended, but they'd still have to overcome all the economic difficulties that you've been so eloquent in describing. So if it is true that you don't make indirect purchaser certifications easier, all you're doing is giving a windfall to price fixers by resuscitating the pass-on. That's a thought.

AUDIENCE MEMBER: I heard two things from the panel in the last 20 minutes. One was that the risk of over deterrence or under deterrence is cut two ways, the *Ivax* scenario. I guess my question or comment on that would be: Hasn't the world changed a little bit to the extent it no longer seems like the direct purchasers of the world are inhibited from suing merely because of the customers. Rite-Aid has become an extremely aggressive plaintiff, and I wonder if the concern was raised in the Ivax situation doesn't reside with the kind of plaintiff who is uniquely vulnerable, as *Ivax* was, taking your facts and the case law which stands unchallenged and has been around for 25 years which says that a company can refuse to do business with somebody it is in litigation with.

Your *Sopranos* comment is embedded in case law. Maybe that ought to be looked at as well. On the risk of over-compensation and the question about whether the damages together should be totaled a hundred percent, do people think that the AMC was right to drop out, as I believe they did—I could be wrong about this—prejudgment interest entirely? It doesn't exist under the antitrust laws unless you meet an almost impossible set of hurdles to prove dilatory conduct. Posner and others have explained if you've properly calculated pre-judgment interest and you have eight to ten-year litigation, and we have certainly all seen those, that believe it or not treble damages might not even satisfy the compensation part.

MS. HART: I can't speak to the latter comment, but I can speak to the irresponsibility of my *Sopranos* comment. Sometimes I err on the side of trying to be entertaining. But I would say that I've been shocked at the concerns of clients and the idea that we could go to DOJ or we'll bring it to the AG's attention or write a letter to defense counsel is truly cold comfort to people who, as Peggy observes, are in business, have built a business and really are not looking to be cut off by their major supplier, major transportation or ingredient supplier, something indispensable to their business.

I don't think that *Ivax* is *sui generis*. Whether *Rite-Aid* stands for the proposition that retaliation is alive and well directed against direct purchasers. In my personal view that's one of the reasons or that's one reason why the indirect purchaser laws are very important, so that we continue to have a vibrant deterrent force of some kind when the indirect purchasers have cold feet.

Do you want to speak to the issue of the pre-judgment interest?

MS. PEARLSTEIN: Actually, I can't answer to what the AMC did. I do remember the ABA in its recommendations said it should be pre-judgment interest. It has nothing to do with indirect purchaser. It is giving the plaintiffs something to sweeten the pot in what is going to work here. I think the AMC was trying to find a balance in this particular recommendation.

MS. HART: Stacey is telling me that we are out of time. Thank you all very much.

MS. MAHONEY: I don't think any of us is sorry that Barbara errs on the side of entertaining, just for the record.

Thank you all to our panelists.

Resale Price Maintenance Post-*Leegin*

MS. MAHONEY: Our final program for the day is entitled "Resale Price Maintenance Post-*Leegin*."

As we all discussed earlier today, and we probably knew it before we walked in here, in 2007 the century old precedent of *Dr. Miles* that prohibited resale price maintenance was overturned by the Supreme Court in the *Leegin* decision. What the new law is with regard to resale price maintenance is the subject of this panel's discussion today. The *Leegin* case has left it less than clear.

In order to flesh out the practical implications of the *Leegin* decision, this program will address the hypothetical that was made available to you during this break, including whether and how the federal law can now be applied consistently with the various applicable states laws.

In addition to analyzing the practical application of *Leegin*, the panel will also discuss the implication of the continued significant theoretical debate about whether the *Leegin* decision is economically sound. Indeed, there have been legislative efforts at the federal level to nullify *Leegin*.

To address these issues today our panel includes a Senior Fellow of the American Antitrust Institute, an economist, an in-house counsel, as well as attorneys from the New York State Office of the Attorney General and private practice.

Our moderator for this program today is Elai Katz. Elai is a partner with Cahill Gordon & Reindel. His practice focuses principally on mergers and acquisitions and antitrust litigation counseling and government investigations.

Elai has represented clients in a variety of antitrust litigation matters, including complex class actions alleging price-fixing and monopolization and disputes involving distribution arrangements and price discrimination.

He regularly advises clients on the formation of joint ventures, developing of distribution and marketing arrangements, pricing policies, participation in trade associations and interactions with competitors.

Elai has also successfully guided a broad range of transactions through the antitrust regulatory review process in the United States and abroad. In addition, Elai contributes his valuable time as a member of the Executive Committee of this section.

He received his B.A. from Yale University and his J.D. from Columbia University.

Elai, if you would do the honor of introducing your distinguished panelists.

MR. KATZ: It is my pleasure.

Thank you everyone. I'll start by introducing everyone, and I'll let you see their names up on the screen.

Our first person to introduce is Rick Brunell. Rick is the Director of Legal Advocacy and Senior Fellow of the American Antitrust Institute, as Stacey said. He is the author of AAI's amicus brief in the *Leegin* case and also the author of a forthcoming article in the *Antitrust Bulletin* entitled "Overruling Dr. Miles, The Supreme Trade Commission in Action."

In addition, more recently he wrote a letter memorandum to the FTC on behalf of AAI, urging that it deny Nine West's petition to have the RPM decree against them modified. I should also note that when he was in private practice he counseled manufacturers frequently on vertical restraint issues.

Next is Dan Garrett, sitting right here to Rick's right. Dan is Vice President at Cornerstone Research in the Menlo Park, California office. He got his Ph.D. at Stanford and his undergraduate degree at the University of Virginia. He specializes in applying economic and econometric analyses in antitrust, IP, securities and other kinds of cases.

One of the things I want to let you know about him is that he was involved in the *Leegin* case as an economic consultant. As we will see in a minute, it turns out to be quite well how the case went along and the economic analysis that was excluded from that case.

Next I would like to introduce Mike Sibarium. Mike Sibarium is a partner at Winston & Strawn in their Washington office. He's practiced antitrust trade regulations for many years, both in private practice and in government. He is involved in investigations conducted by the Department of Justice, the FTC, State Attorneys General.

He counsels companies as well on antitrust compliance. He counsels clients and defendants in investigations related to vertical price-fixing allegations and recently he was involved in blocking the FTC's efforts to unwind a hospital merger in northern Chicago, the Evanston-Northwest Healthcare case.

Mike was a graduate of George Washington University Law School and he was an undergraduate at the University of Connecticut.

Next I would like to introduce Suzanne Wachsstock. She recently became the Chief Antitrust Counsel for the American Express Company, which is based here in New York.

Before joining American Express, she was a partner in the Stamford, Connecticut office of Wiggin and Dana. She spent nine years there focusing on antitrust litigation counseling and compliance matters. While she was at Wiggin and Dana she was one of the coauthors of the amicus brief of PING to the United States Supreme Court

in the *Leegin* case in an amicus brief which the Court cited favorably.

Before joining Wiggin and Dana she was a litigator and practiced antitrust law at Davis Polk in New York and Finn Dixon & Herling in Connecticut. She is a graduate of Harvard Law School and Harvard College.

And right here to my left is James Yoon. He's an Assistant Attorney General at the Antitrust Bureau of the New York State Attorney General's Office. He investigates and prosecutes a wide variety of antitrust matters, including merger review and several vertical price-fixing investigations.

I also want to take this opportunity to thank Lauren Rackow who helped us in gathering the materials on the issues that we'll be presenting to you today.

So I would like to start, before we get into our hypothetical and I know everyone is eagerly awaiting the hypothetical, and I hope you all have a copy. I want to talk just a little bit about what is RPM, what is resale price maintenance and just a little bit about the case. Resale price maintenance agreement is a vertical agreement between parties that buy and sell from each other; not parties who compete with one another. And the main term of the agreement is that the reseller won't sell for a price below the price that is determined by the manufacturer, or below a predetermined price.

This kind of agreement has been unlawful per se in this country since 1911, at least under the *Dr. Miles* decision of the Supreme Court. That case was based at least in part on an older rule, a common law rule against restraints on alienation. The sense that when someone takes possession of an article or a good, it is their right to determine the price at which they will resell it. But that decision was the decision interpreting Section 1 of the Sherman Act.

Now we come to the *Leegin* case from the Supreme Court's past term, which overruled *Dr. Miles*. For those of you who were here this morning, Molly Boast described it and explained it quite nicely. I don't know if I could do as good a job, but I'll try. The case involves the sale of leather goods, ladies bags and belts and the like. The case arose when a discounter, a discounting retailer was terminated, and the retailer brought suit.

One of the things that took place before trial was that the economic evidence that the defendant wanted to introduce showing that this conduct was not anti-competitive was excluded. The reason that it was excluded was that this was a per se case and there was no reason to explain whether or not it was anti-competitive. It was just a matter of proving that there was an agreement as the district court saw it. The Fifth Circuit said Dr. Miles required affirmance. The Supreme Court looked at the case and reversed in a 5–4 decision.

The Court basically said that since sometimes, maybe even often RPM can be a pro-competitive type of agreement—and we will hear pretty soon where that could be the case—per se just simply isn't appropriate. Because the way the Court saw per se is something that is always or almost always anti-competitive, and the Court felt that that was just not appropriate for RPM agreements.

The Court came up with a number of factors to enable or to help lower courts as well as practitioners in businesses try to determine under the rule of reason whether a particular agreement is or is not unlawful. The Court went out of its way to make clear by saying that RPM is no longer per se unlawful, they were not saying that it was per se lawful; merely that it was to be judged under the rule of reason.

I should note that the dissenting opinion was authored by Justice Breyer, and he said that even though he did not disagree that sometimes RPM agreements may be procompetitive or they are not always anticompetitive, he didn't think the rule of *stare decisis* should be abandoned in this particular case. And he went through a thorough discussion, particularly of *stare decisis*, and he said all the things that the Court is saying today as to why an RPM agreement should be judged under the rule of reason and not as per se; those reasons existed many years ago, and under our system it is not for us to change the rule. In any event, the majority's rule is the rule, and we will try to work through what lawyers are to do with it now.

I just want to mention, this may not be the last word from the courts or legislatures on this particular topic, because of state statutes—there have been a number of arguments made that under state law, RPM is still per se unlawful. In addition, there is some legislation introduced in Congress to overrule the *Leegin* case.

The factors that I would like to point out, and there are a variety of factors that one might consider a rule of reason case, but ones I would like to point out that the Court described are: First, the number of manufacturers that make use of RPM in a given industry. Next, the source of their restraint, meaning was it the retailer or manufacturer who initiated an RPM agreement. And third, the market power of the relevant entity; by relevant entity we mean either the manufacturer or retailer.

I would like to turn it over now to James, the creator of our hypothetical, to describe it, and then we'll try to work our way through it.

James.

MR. YOON: Thank you. I just want to thank the panelists also who have given me comments on the hypothetical.

Before I begin I want to say that the views expressed in this presentation are my own and do not necessarily reflect the New York Attorney General's Office or the Antitrust Bureau.

With that I'll begin the hypothetical. Write-On Corporation is a New York corporation. It is engaged in the business of developing, manufacturing and selling at wholesale to retailers its product called Pen-Pal. A private equity firm recently acquired Write-On, and it is now a private company.

Pen-Pal is an electronic pen that automatically converts whatever is written by hand with it into text and saves it in the pen's computer memory chip, and this can later be downloaded onto any computer or hand-held device.

Pen-Pal is a technologically advanced product. A small segment of consumers rely on retail sales people who are knowledgeable about Pen-Pal to determine whether it is the right product for them. Some consumers may require assistance using Pen-Pal after purchasing the product. A retailer offering these services may be more desirable to some consumers and to Write-On, the manufacturer.

UpStartPen is a rival electronic pen manufacturer, a device similar to the Pen-Pal. The main difference between the two rival pens, besides the price, is that Write-On's pens only require a simple battery change, but UpStartPens may need some technical assistance when recharging the battery.

Write-On and UpStartPen are the two major manufacturers of these two devices. Each has a 40 percent share of the electronic pen sales. There are a number of smaller manufacturers with similar devices which are not as popular or as successful. Write-On's manufacturer's suggested retail price for Pen-Pal is $299, and some retailers follow this and others do not. UpStartPen's MSRP is $349 for its pens. $50 more expensive than Pen-Pal.

Write-On's internal documents from last year show Write-On competes with UpStartPen and other smaller manufacturers. This year, Write-On's regional sales managers report that Pen-Pal has lost a small amount of sales to a new computer. This new computer automatically converts whatever is written on the surface of the computer and saves it as text directly into the computer.

Write-On's wholesale price to retailers for Pen-Pal is $150, and last year's sales of Pen-Pal to the following retailers were as follows:

PensRuS and OfficeBox, office supply retailers in all 50 states as well as the Internet. PensRuS purchased 40 percent of all of Write-On Pen-Pal sales and OfficeBox purchased 35 percent of all of Write-On's Pen-Pal sales.

Blarney's is a retailer of high-end electronic accessories with limited retail stores in a few states; they purchased 5 percent.

Burgduff's is another retailer of high-end electronic accessories with limited stores in a few states, and they purchased 5 percent.

CheaPens X, Y, and Z are all Internet retailers with no physical store locations; they purchased 10 percent, 3 percent, 1 percent, and 1 percent respectively.

The vice president of Write-On comes to you, outside antitrust counsel, to can ask for advice and solutions to the following issues:

MR. KATZ: I would like to start by asking Dan, our economist here at the table, how would you explain the economic rationale, Write-On's concerns about the retail margins. The reason I'm asking for an economic rationale first is I always thought as an antitrust lawyer who talks to economists from time to time that the assumption as a manufacturer would prefer for the retailers to have as low a margin as possible and have the lowest price possible, so as much of their product as possible is sold. So the thought that a manufacturer would want to have higher prices in retail seems to be at odds with the little bit that I know about economics.

MR. GARRETT: Well, you're showing more wisdom than you attest to.

First of all, the usual caveats: The opinions are my own. Cornerstone has six offices, three on the east coast, including one in New York. They are all staffed with perfectly capable economists who could have come and sat in this chair. We didn't have to fly one out from California. The reason I am here is that I worked on the *Leegin* case, so I'm my firm's evangelist for the *Leegin* opinion. I'm a *Leegin*-aire.

You're right, when an economist thinks about retail price maintenance, the focus isn't on the retail price. Obviously, manufacturers want to get the highest wholesale price they can for the product and want to pay the lowest markup or have the stores that carry their product earn the lowest markup possible.

So resale price maintenance, when an economist thinks about it, gives the retailer—it could be distributor of course, but I'm going to say retailer, because it is more standard—more of the final sales price. Why do that? When RPM is pro-competitively initiated, it is done because there are services that retailers under-provide in its absence. The manufacturer wants to compensate the retailers or has to compensate the retailers to get them to perform some kind of services valuable either to the manufacturer or its customer or both. So I'm going to show you a picture. I'm an economist and that's what we do. And this picture is simplified to illustrate the idea here. On the vertical axis is price. On the horizontal axis is the quantity of pens. The demand curve is the diagonal line, downward sloping as demand curves are. We are assuming just for simplicity there is a single unit cost. It is not changing in the level of output. This was the cost faced by the manufacturer to make the product and the downstream distributors to distribute it and retail it. We are assuming for simplicity purposes that it is constant.

The light-blue shaded area then in a very light blue is the consumer surplus. So at the equilibrium price and quantity, as you see P and the quantity is labeled Q and equilibrium is at point E. Consumer surplus is measured by the blue area. This is before the manufacturer implements an appropriate RPM policy.

In the next slide, there's been a change. The change is that, under the RPM policy, the retailers—by assumption here, because this is a procompetitive instance of RPM—add more services to the product. It makes the product more valuable to consumers. So the demand curve shifts out. That's the shift from the dotted line, which was the old demand curve, to the new solid line, D. The unit cost goes up. It is more costly to provide these services, so the cost goes from the dotted line that's horizontal up to the solid line, and then the price goes from P to P star. The consumer surplus changes. Before it was the slightly blue shaded region. Now it is the reddish, hatched region. And under the illustration here, the increase in consumer surplus is greater than the loss from the higher price. So the area of the trapezoid is larger than the area of the light blue consumer surplus that was lost due to the higher price. Output increases. Economists generally view an increase in output as a favorable signal that the RPM is procompetitive.

Let me say one other thing about the price. People often look at the price and say the prices will be higher. If the RPM is procompetitively motivated and initiated and has procompetitive effects, then the good being delivered is a different good. So before it was a plain old handbag or plain old pen with a certain level of services attached to it. Now, there is more love in the message. The retailer is doing more things that consumers value. So the good is no longer the plain old pre-RPM product; it is the product with additional services. So yes, the price is higher because it is the price of a different good.

MR. KATZ: We now have a few more facts that we are learning here from our client, and James is going to tell us a little bit about it. This is something we need to think through.

MR. YOON: Write-On has been receiving complaints from its retailers. Apparently, some of the retailers like CheaPens, X, Y, and Z are selling Pen-Pals at $249 instead of the $299 MSRP. Complaining retailers have informed Write-On they are considering taking the following steps: A) not carrying Pen-Pal any more; B) reducing counter space for Pen-Pal; C) matching or meeting CheaPens' resale price of $249 and; D) providing little or no customer service. This is coming from the retailers that do offer any level of customer service.

MR. KATZ: Now, our client at least at first says I'm pretty risk averse, and I heard you say in the beginning that even though it is no longer per se illegal, it is still not per se legal to have an RPM policy. So first question from the client is do we really need an RPM policy here, or are there any other options that we can take?

I would like Rick to start and address that.

MR. BRUNELL: Sure. Certainly in the pre-*Leegin* per se world clients would be interested in alternative ways to maintain resale prices without having committed a per se violation. So the methods that were available pre-*Leegin* are certainly still available post-*Leegin*, and there may be less risk involved in some of these other methods as well as less risk in having RPM. So what are those methods?

Of course Write-On could simply cut off the discounters, just terminate them. It's perhaps not an attractive option because these discounters make up about 15 percent of Write-On's sales. They might have contracts that would be breached by terminating them. There could be in some state dealer protection laws that might limit the ability to just cut off the discounters, but that's always one possible option. Another option would be restricting Internet distribution to the established distributors, those with the physical locations. Announce such a policy, that's the way you're going to handle Internet distribution. It would have the effect of cutting off these Internet only distributors. The advantage of such a policy in a pre-*Leegin* world would certainly be it looks like it's less about price, it looks like it's more a unilateral and less likely to get in trouble under *Dr. Miles* certainly. In the post-*Leegin* world you still face the difficulty terminating some significant part of your distribution force, and so business-wise it may not be an attractive option.

There is always the *Colgate* so-called unilateral resale price maintenance policy option, and that's still an option after *Leegin*. I think Suzanne will talk a little bit more about that and some of the difficulties that such a policy entails, which arguably drove the Supreme Court to reverse *Dr. Miles*.

There is always the minimum advertised price policies, which if they were simply involving cooperative advertising funds have always been basically per se legal. In this hypothetical dealing with Internet distributors, you're not going to have an option of using co-op advertising funds. You want to prevent Internet retailers from posting the discount price on the web sites. And we've certainly seen examples of Internet sellers with web sites that say click here for price. And whether those agreements, minimum advertised pricing agreements that don't involve co-op ad funds pre-*Leegin* were risky--which I think they probably were in many instances, because they could be considered to be equivalent to resale price maintenance--after *Leegin* one must certainly expect those policies to be analyzed under the rule of reason, and a question might be whether such a policy would be analyzed any differently than a resale price maintenance policy. I don't know the answer to that.

And then fifth, my favorite alternative to resale price maintenance, functional discounts, charging your full-service distributors less than your Internet distributors, based on the additional services that they provide. Now, there is the Robinson-Patman issue in charging your dis-

tributors different wholesale prices, but I think that risk of Robinson-Patman violation is a fairly minimal risk as long as the prices that are charged or the discount that's provided are reasonably related to the cost of the services that the retailers are providing. So let me just turn over to the *Colgate* option to Suzanne.

MS. WACHSSTOCK: We have had a couple of disclaimers, and I'm going to put in my own, which is to say that while I have now been at American Express for a few months, certainly nothing I say should be or could be attributed to my current employer. I am here because I do provide some diversity as in-house counsel.

MR. KATZ: Gender diversity as well.

MS. WACHSSTOCK: Yes, I do provide gender diversity. But I think I am primarily on this panel because I was one of the authors the PING brief, and it has been noted that it is unusual for the Supreme Court to specifically cite amicus briefs. I think part of the reason is it was an unusual brief, and we thought it was a very important one to write. It is a good read I think. It is very factual. That's what makes it interesting. We cited very few cases but made the point. We wanted to tell the story of PING and their efforts to comply with *Colgate* doctrine. I hope the brief conveys really how ludicrous this loophole was in the pre-*Leegin* per se world. But the question I want to address now is whether it was a feasible option before and whether it is feasible now and what's changed post-*Leegin*. I hope the brief makes this point.

But in terms of whether *Colgate* solved the problem for manufacturers pre-*Leegin* who felt they needed to in some way control resale price, in the brief we tell PING's story which reflects some of the procompetitive reasons why manufacturers might want to implement a resale price maintenance policy.

I'm not a golf player, but I know a lot about it now. There are a lot of manufacturers of drivers and golf clubs. And PING's big thing, their novelty, is they really try to custom tailor their drivers to the player. So they really encourage their resellers, especially golf pros, to take the potential customer out to the golf course driving range or somewhere, and watch how they swing. They take a large number of measurements and then draw up a list of the specific components of the driver that best fits the customer. That's how they built their reputation. They are higher in price than many other drivers, but not the most expensive out there. One of the reasons people are willing to pay more money is they have this benefit. At some point PING found out that while their retailer pros out there were investing time, money, and effort to go look at the swing and draw up this list of components, certain people would take the list and find a golf retailer that discounted and know exactly what to order, and they would order the club. And that created a very explicit, clear free-rider problem. The pros who had invested all this time and effort were losing the sales and PING actually saw an effect on their revenues.

They needed to do something, and they decided that a *Colgate* policy was the way to go. Again, the brief tells the story of how hard it is to comply or was to comply with the law pre-*Leegin* under *Colgate*. PING had to jump through crazy hoops and contort themselves to make sure there was no argument that they entered into an agreement with their retailers on price. Some of these issues will come up as we go, but in terms of what the alternatives are, just note that while PING does it and they've been successful, they have lost significant business because of the policy. They had to terminate—the stories are amazing—they had to terminate at the golf club where their executives played, because they sold a club at the wrong price, so they had to terminate them. They had to terminate a golf course on military base, which caused terrible publicity, but they decided they couldn't make exceptions. There are great letters from retailers about how ludicrous this is. But they feel they have to be so careful not to have an agreement.

So the point to make is that it is true that *Colgate* was an option before *Leegin*, but it's a very difficult one to do properly. And as the Supreme Court noted, it created a lot of inefficiencies. It forced rational manufacturers to do irrational things not to violate the law.

MR. KATZ: So it was the hope I suppose of the Court, the majority of the Court, that firms like PING wouldn't have to do that anymore, and yet we are sitting here and I've spoken to other people, some of them in this crowd, who aren't so certain that you can just rush ahead and enter into an RPM agreement, especially as James described to us a company that has 40 percent of the sales of that given product without saying whether or not that's the market, that they do have 40 percent of something.

One thing that the Court did guide us as to how we would analyze whether or not this is a problem has to do with who instigated the RPM policy. Surprisingly, we have more facts from James that might help us work through that.

MR. YOON: Write-On is considering setting up a resale price maintenance policy. Write-On has heard its rival, UpStartPen, currently has a resale price policy with a retail price of $349.

After further inquiry, we learned it may have been Write-On's retailers, OfficeBox and/or PensRuS, who told Write-On about UpStartPen's RPM policy and may have suggested Write-On implement such a policy also.

MR. KATZ: Rick, I would like to go back to you. And the first thing I want to understand is why is it that we should care who started it? Does who started it really make a difference on the effects on competition?

MR. BRUNELL: I would say that who started it really is not the issue. And what the Supreme Court was talking about was the source of the restraint. Let me just quote from the decision. The Court said if there's evidence that retailers were the impetus for vertical price restraint, there

is a greater likelihood the restraint facilitates a dealer cartel or supports a dominant efficient retailer. If by contrast a manufacturer adopted a policy independent of retailer pressure, the restraint is less likely to promote anti-competitive conduct. And later on the Court—or maybe earlier actually, the Court noted that RPM can be abused by a powerful retailer. A dominant retailer might request RPM to forestall innovation and distribution that decreases cost. A manufacturer might consider it had little choice but to accommodate the retailer's demands.

So the economists look at this issue, and really to some extent the issue of the source of the restraint is one way of considering whether this is a procompetitive restraint. To the extent it is foisted upon the manufacturer, then it would appear it is reasonable to presume there is no procompetitive justification. On the other hand, if there is a procompetitive justification, then one doesn't expect that the manufacturer has to be dragooned into adopting it.

But this factor kind of puts the manufacturer between a rock and a hard place in terms of doctrine, because the more powerful the retailers are who are demanding RPM, the less choice the manufacturer has as a business matter to resist that pressure. But under the Court's decision, the more risky that RPM would become as a legal matter.

So here you have two distributors, one comprising 40 percent of your sales and one 35 percent. If either one of them tells the manufacturer, look, we think you need to do something about these discounters—RPM is a nice thing to do—if you don't we are going to cut you off or you're going to get reduced shelf space. The manufacturer probably isn't going to have a lot of choice even if there isn't any good procompetitive rationale for RPM.

Now, it's possible that this product is so nifty that Write-On has the upper hand, and these implicit threats aren't that strong. One would have to talk seriously with a client about how realistic these threats are and what happens if the manufacturer does nothing. So I think the issue of the fact that it might have been raised first by even powerful retailers shouldn't be dispositive. Because if there is a good procompetitive rationale, then the fact that it comes from the retailers shouldn't be disqualifying, as *Monsanto* made clear. Sometimes the manufacturer learns about these distribution issues from the distributor.

So the bottom line is in advising my client I really want to know what the procompetitive rationale is here. PING had a very nice story.

MS. WACHSSTOCK: It's all true.

MR. BRUNELL: I might ask the client whether there was some reason that the distributors couldn't be paid for providing the services as an alternative to having RPM. So this issue of dealer power and pressure seems to me to be part of one side of the coin, where the other side is the procompetitive rationale. And the courts are struggling with the ultimate question being--is it procompetitive—and are using dealer pressure as kind of a surrogate.

On the issue of procompetitive rationale, I just wanted to chime in on that. I think it's important to look at what the Court said about potential procompetitive rationales and whether the dealer services rationale has to be based on free riding or not. Because the free-riding theory might not apply in a lot of circumstances, but the services argument in general might apply. The Supreme Court I think was kind of vague on what kind of nonfree-riding services rationale would pass muster. Maybe when we get into the further elements of the hypo we'll pick up additional rationales.

MR. SIBARIUM: Can I jump in for a second?

MR. KATZ: Sure.

MR. SIBARIUM: I agree with obviously the source of this is not dispositive. It is who initiates it and so on and so forth.

If you want to work with just the hypo, I think it gives us good real-life opportunities to think about what those other questions are going to be with the client. In this case one thing that struck me was in the hypo this product has been around for a while. Some retailers follow it, some do not. So whatever rationale we come up with we are going to have to deal with the fact that we didn't have the RPM for a while and yet we have a good product and it is out there and being sold. So we sort of have to explore the history to deal with the hypo.

MR. KATZ: But, Mike, would it be a good response to say we just read the Supreme Court decision, we didn't have RPM because it was illegal. And now it is legal. Do you think that would be strong enough notion to change the distribution practice?

MR. SIBARIUM: That could be an approach, but I don't know if it answers it all by itself.

The other thing that's said in here that I think is pretty important, the two retailers, while they tout 70 percent of the sales, they look like very similar types of retailers. They are the two biggest office box stores. When you're approached by a little office box store and a little bit pen store, we are approached by two types of stores that are close up to one another at a retail level, very similar type stores accounting for a large amount of sales.

We also don't know, for example, what the facts were about how we were approached. Did they recently approach us through totally two different sales reps, approached by different people? Were they approached at the exact same time? Were they high-level contacts from senior people in management? There are a lot of things we'd want to know that would color the advice.

To go to one last thing, on this issue of the Internet sales, one of the interesting questions that isn't addressed in the hypo either is whether the bricks and mortar guys

have been following the RPM on the Internet sales also or not. And that's going to get into the question of whatever rationales you adopt are really going to be working. If you take an approach with Internet only sellers, you're allowing the bricks and mortar sellers to sell at their prices, it's going to raise questions.

MS. WACHSSTOCK: If I could just jump in. Thinking now as in-house lawyer, we also need to know what the documents say. What has the company been saying to itself on emails and everything else about pricing, about complaints, about why they are concerned about this. Because those documents are going to end up being very important in the end if whatever steps we take are challenged.

That raises the question about what you tell your clients about how and what to write, especially now that we have a rule of reason analysis, at least under the federal law. What do we tell our clients about what to put on paper? Do we coach them to make sure you're talking about procompetitive implications or tell me why you're doing this, assuming the reasons are good, write those down and have them in your file? Those documents are going to be very important.

MR. KATZ: I think we have a question from Stacey.

MS. MAHONEY: I just wondered if the analysis would change if it were one retailer with the 75 percent versus the two retailers with a combined 75 percent. Would any of your thinking as to how you would go about it or change your analysis?

MR. KATZ: Rick, why don't you start.

MR. BRUNELL: To some extent of course, the two retailers scenario could be more problematic if you have reason to believe that the retailers are acting in cahoots. And if you did have such reason, as the antitrust counsel I would advise the client to instruct me to call the antitrust counsel for the retailers to call off the dogs, or else we'll call Bob Hubbard.

MR. KATZ: Or James.

MR. BRUNELL: Or James. On the other hand, in the absence of collusion, then the 75 percent retailer creates an obviously greater likelihood of a dominant retailer, which makes it harder to resist, but also makes it more risky.

MR. KATZ: Dan, do you have a reaction to that?

MR. GARRETT: Actually, I like what Rick said. So yes, a 75 percent retailer could be a big bad retailer. Facts matter a lot here. The rule of reason makes facts more important, and makes the economists more important.

MR. KATZ: So going back to the hypothetical, the facts are I think what the hypothetical is telling us that we have two competitors and each is a little bit different, though the pen does a generally similar thing. The pen that UpStartPen sells is a pen that requires a certain amount of assistance at the retail level. Pen-Pal doesn't need as much help when you buy it, but apparently after you buy it some people do need to come back and get help to either replace the battery or the chip that connects to your computer. Some people can figure it out at home and others can't.

How do you start analyzing that if you say that for some portion of your customers as Write-On Corporation they really do need help but another portion of your customers don't need help. So there are some you want to make sure the retailers are properly paid and others are happy to buy it from CheaPens on the Internet?

MR. GARRETT: So this touches on one of the criticisms of RPM. Suppose there are two kinds of customers: some that need store assistance and some that don't. If a manufacturer that doesn't have RPM then imposes it, the nominal price goes up. Some of the customers value that extra service, but some don't. It is logically possible there could be a reduction in consumer welfare. The challenge actually is to write out a model where it is both profit maximizing and consumer welfare reducing, and that's not so easy.

But again, facts matter a lot here. It could be the case that homogeneous policy in terms of resale price is not in the manufacturer's best interest. But in situations where manufacturers have competition, competitive forces help them or incentivize them to figure out what is the best strategy for them to sell their product, high service, higher price, low service, lower price, or some way to have a little bit of both.

MR. KATZ: I would like to turn to a question.

AUDIENCE MEMBER: I'm listening to everybody say the facts matter. And this would be a fascinating conversation along those lines if all you were dealing with was the federal antitrust regime. But we are not. We are dealing with the reality that's already been alluded to, that we not only have applicable antitrust laws here, but we obviously have a highly motivated group of antitrust lawyers; we also have statutes. Jay Himes' piece in the *New York Law Journal*, which seem on its face to prohibit the conduct. And if we have that kind of regime and I'm a client I can say if I have a high market share, I'd better stay away from RPM. I could say if a retailer has a high market share I'd better stay away from RPM. But unless I've written a brilliant Supreme Court amicus brief, that sets out unique facts so that no one will ever come near me, how can I possibly feel safe in recreating and maintaining a retail price policy in the current course?

MR. KATZ: I think it is definitely a hard question to answer, and we'll try to answer that.

But beforehand we touched upon the market share question, and I think people often sort of say that and then move on. I'm not sure it is as easy as that. Because just in our facts we have here we know that of these electronic pens, Write-On has 40 percent and UpStartPen also has 40 percent. But we also learned of this new computer.

I guess from the client what we're hearing is they are a little bit concerned about how their sales are going to be taken away, how their share of some market might be taken away by these new computers. But when we look at their old documents, old strategic plans, we see these pie charts with 40 percent each.

Suzanne, would you like to start addressing how you would start as in-house counsel figuring out what the relevant market is and how would that impact whether we should proceed or not with our RPM policy?

MS. WACHSSTOCK: I'm not sure that I would really think about it so differently as in-house counsel than I used to as outside counsel. My first question would be: Is there any difference in terms of defining the market and figuring out market shares for this new regime under *Leegin* than there is for anything, for mergers or for any other kind of antitrust market concept? I guess my feeling is there probably isn't.

The hypo assumes certain things. The internal documents show that Write-On competes with UpStartPen and a few other smaller manufacturers, then mentions this other computer thing. But the first question I would have is, are those really the only products out there competing. I mean Blackberry is competing and even laptops. There is probably a spectrum of products that compete at some extent. I think you apply the same standards of substitutability and demand side and supply side that you would apply to any case.

In talking to the client I would want to gather as much information as I could about pricing, about what influences prices. I'd want to know what their documents say in terms of strategic plans, but that's not the only thing. Certainly as outside counsel, when clients prepare business documents they often don't understand what markets are and would use the term market and say we have got 90 percent of the market when they don't mean market in an antitrust sense. So I would want to really talk to people who are involved in pricing decisions, and also technologically, what the products are and to think about what products might compete.

I have a sense that when you figure out the real relevant market these guys aren't going to have a 40 percent share of any relevant market. Even if you have a novel product, that does not create market power.

MR. KATZ: And when we are advising our client who has called us, they might say to us, well, what is it that I should do, you're now telling me I'm not part of a very large market and I shouldn't worry that much. No rule of reason case is likely to be brought against me, and even if it is, I'd probably win without too much trouble. But then you learn about these other documents, so you go back again to what do you advise.

I think one of the questions the Court asked us to think about and is part of the rationale of thinking about RPM matters, not only what is the market share of our client but how the rest of the market lays out, how concentrated or unconcentrated the market is.

Mike, could you talk a little bit to that or Suzanne, whichever of you want to start.

MR. SIBARIUM: Sure. Let me take that.

The first piece is that we are going to see something very interesting here if we end up seeing more litigation under RPM. And I think that we probably will. We are going to see real-world evidence of what happens with RPM. There's a couple of possibilities here. Either no one is going to change what they are doing, which answers the gentleman's question over here, which everyone says the state is too aggressive, no one wants to take a chance, it is per se illegal. Or what's probably more likely, even if everyone is conservative, the ball will get moved slightly in another direction, then there will be other opportunities for more agreements to come up. If that happens there will be more litigation. If there's more litigation, we're going to have all kinds of RPM litigation. If prices went up, if an RPM agreement was found to have occurred, even if it was not an explicit agreement, even if a company adopts a *Colgate* policy and as a result the jury finds there was an RPM agreement and prices went up, they will be able to look at the changes, so on and so forth.

So the first question on this market power to think about is you're not necessarily going to have market definition. You may have market definition or direct effects case, and just go right to direct effects. That's one thing to think about.

The second thing in terms of concentration that was just raised in the question is the answer may be different depending on where you're doing business. Remember, even in market definition you've got local geographic markets, not just product markets. You could have situations where you have a stronger manufacturer and stronger retail in some parts of the country than other parts of the country. I suppose in theory you could actually, if you didn't have a per se rule to worry about, you may have a different outcome on rule of reason analysis in the east coast and the west coast. It could be very difficult to implement. It could be complicated internally for a company. Whether or not it is practical, but I think that's something which has to be considered.

Two other points on that: Is your company market share of customers changing? You represent a company that acquires a lot of other companies and you're going to have to reevaluate this. Similarly, what if you don't do anything with competitors very acquisition minded. You could be sitting there with a 35 percent share, thinking about you're the leading guy in the industry and tomorrow maybe the industry consists of somebody with a 60 percent share.

MR. KATZ: So let's imagine that it turned out that we learned that our client's product is very successful and they have an 85 percent market share now, as they under-

stand the market, as they hope the market is. Would you think differently when you get to that kind of a number? Does that make it easier, Suzanne, or Mike?

MS. WACHSSTOCK: I want to offer a caveat to what I said before, which is to say what I'm looking for are arguments or facts that would suggest the market is broader. So in putting together my own arguments if this was challenged, that's different from the advice I would give a client.

In advising a client, I think you want to assume worst case or at least think about the worst case. Certainly if I have reason to believe that there's a strong argument that my client had an 85 percent market share, I think under *Leegin*, as it is written and with all the vagueness and certainly keeping in mind the states out there and these other issues, I would want to advise them to think very carefully before they implement any kind of RPM agreement.

MR. GARRETT: I have an opinion about how market shares intersects with whether RPM is procompetitive or anticompetitive. It seems to me that if your market share in an appropriately defined market is small, that RPM is unlikely to cause consumer harm. I could be persuaded otherwise, but very unlikely. If your market share is 100 percent, the other extreme. I think RPM is similarly unlikely to cause consumer harm. In what state of the world is it to that monopolist's advantage to give it to others with a markup? Only if the retailers are doing something that's helpful to it and the consumers it is selling. I'm not actually worried about RPM with 100 percent share. It is somewhere in the higher numbers for market share, but less than a hundred percent, where I think further scrutiny is warranted.

MR. KATZ: So really, maybe what you're saying is if your market share percentage, assuming you could figure it out, and I know we have all these factors, but if we come up with a number and say under 50 maybe we are not as worried. If you come up with a number above 80, you go back to not being all that worried again? It makes sense to me that's what would happen. But it seems as a matter of counseling and litigation risk that I'd be worried about that.

MR. SIBARIUM: Let me offer a different take on that 100 percent thing. One of the concerns mentioned in *Leegin* was that a dominant manufacturer could use RPM to increase entry barriers and keep out competition. So from a counseling perspective I think I have some very serious reservations about raising an RPM at that point. Because I don't know how you'd ever sort of know up front that it wasn't going to have that effect. I mean the circumstances that would lead to it having that effect, if that's a theoretical possibility, is something you as a company, a manufacturer are not going to know is happening when it starts happening. But by the time you find out about them, it may be too late. So I would be very cautious about doing that.

MR. GARRETT: That's why you're paid to give advice, and I'm not. I think it is a good point. RPM in principle can be used as a foreclosure mechanism, and that could be anti-competitive. And if it were a foreclosure mechanism—I'm not an expert in antitrust law, but I think that's Section 2 and not Section 1, which is normally where we would be thinking about RPM.

MR. BRUNELL: I would throw out the caveat I don't think market share would ever be the end of this story. Even if you've got a relatively small manufacturer, if the other manufacturers in the market are using RPM, it is a risky proposition even for a small market share manufacturer. Also, if the small market share manufacturer is being muscled into it by a dominant retailer, I would think that's risky as well. So I would think all three factors the Court talked about would have to be considered at the same time.

MR. KATZ: There are some new facts that we'd like to tell you about.

MR. YOON: Lately Write-On's sales from Blarney's and Burgduff's are decreasing, but its rival, UpStartPen, seems to have increased sales even though its pens are more expensive. Write-On wants to maintain Pen-Pal's image as a high-end / status symbol accessory that it feels is now being cheapened into just another consumer electronic product. Write-On wants to introduce a new high-end pen called Pen-Ultimate with an MSRP of $399.

Blarney's and Burgduff's may not carry Pen-Ultimate without some assurance from Write-On that its other retailers will not undercut them.

Unlike Pen-Pal, Write-On believes that Pen-Ultimate may need some technical assistance when recharging the battery.

Can Write-On set up an RPM policy for Pen-Ultimate?

MR. KATZ: This goes back to something that maybe, Dan, you were starting to talk about. I think two things come out of this that I would like to ask the panel about. The first is that the rationale here may be not only having to do with services that the retailer provides. I wonder if you could talk about it a little bit.

Later I would like to also talk about what this new product has to do with relevant markets, since it is at a different price point. And one of the suggestions was we would look at price to determine what the market is.

MR. GARRETT: Free riding is a term in the economics literature on RPM. The classic RPM free-rider situation is one where a customer goes to a high service store, learns about the product there, gets excited about the product, decides to buy it, but then goes next door to the discounter and buys it there. That discounting store is free riding on the instructional efforts and sales efforts of the higher-priced store. That's a classic RPM free rider.

That's not the only explanation or procompetitive explanation for resale price maintenance. It is one of a

family, in my view, of explanations. The broader family includes any reason why the retailers or downstream distributors are not offering the level of services the manufacturer would like.

One of the specific examples of this is validation. So there are some retailers who carefully scrutinize new products and find new products and bring them to the public's attention. I think of Sharper Image as one of these. So 25 years ago Sharper Image—Hammacher Schlemmer is another one—found a device called a nose hair trimmer. And they scoured the world and found the best nose hair trimmer. I know that because it said that in its advertisement. And I imagine that one could, if one were in the market for such a device, go to Target and buy the second best nose hair trimmer. But the stamp of approval from a Sharper Image or a Hammacher Schlemmer is valuable and provides valuable information to consumers. Manufacturers might impose an RPM policy so that those validating retailers get a higher rent from selling that product than they otherwise would. I hope I've addressed your question.

MS. WACHSSTOCK: I want to add a point there. Originally, Rich had made the point that the Internet sellers here happen to be the discounters. If we think the brick and mortar stores are investing in sales and marketing or other services and the internet sellers are free riding on those investments, one solution would be to create a functional discount and essentially give a discount to the brick and mortar folks who are doing something that is valuable. There is a presumption that people will shop in the brick and mortar stores, figure out what they want, and then go on the Internet and find the cheapest price and get it there. But there is also a reverse argument, that actually many people shop on the Internet, learn all the information they can, and then they go to the brick and mortar store.

So it is not obvious that the Internet providers are not providing a service and are free riding. They may well be providing a valuable service or information or something. I think that needs to be taken into account.

MR. KATZ: Rick.

MR. BRUNELL: The issue of luxury high-end goods I think might be further elaborated. Because the argument is frequently made that discounting cheapens the brand image of the high-end good. And this is sort of suggested by the hypothetical. The issue as far as the manufacturer is concerned is not about free riding. It's just that the manufacturer thinks that a higher price is going to sell more goods. And that brand image argument sort of based on an upward sloping demand curve was I thought suggested by *Leegin*—maybe not by their economists, and the Supreme Court didn't address it.

In the literature on resale price maintenance, you don't see much of that argument about upward sloping demand curves as a justification for RPM. But the brand image justification I think is important to a lot of manufacturers, and this seems to be something of a disconnect in my view between what the business people are saying and what the economists may be saying about the likelihood of upward sloping demand curves.

MR. GARRETT: Very unlikely.

The possibility that a product becomes more valuable to consumers simply because it is priced higher always makes an economist feel a little funny, and I guess I'm no exception there.

But the issue for RPM is, first of all, a manufacturer has a chance to just unilaterally raise its wholesale price, and that will have consequences on retail prices. If people really want to buy more of the product at a higher price point, then happy days for the manufacturer.

Manufacturers have different strategies about how the products are discounted. Some manufacturers have pulsing discounts. I think of Coke and Pepsi; sometimes they are cheap and sometimes Coke and Pepsi are expensive. Other manufacturers like a standard price to be out there. To me, I don't wince at the prospect of what RPM might do in terms of that price element of brand cachet.

One thing in the *Leegin* case, the *Leegin* documents and people there said that it was important to them that someone could go to a *Leegin* store when they are on vacation or in a different city working, for example, and know that the price that's offered in that store is the same as if they really looked around to find the best price. In my way of thinking, if a handbag is a little bit of a whimsical item, then it is comforting to know that the price that you get at the airport store is the same as you might get at home. So that's another strategic aspect of an RPM policy that I don't necessarily see as bad.

MR. KATZ: Before we get into elaborating further on how you use these kinds of analyses as evidence in litigation and how that would influence your decision when advising your client, we want to throw a ratchet in here.

I would like James to describe a little bit to us how state law might interact with the *Leegin* decision.

MR. YOON: After the *Leegin* decision, resale price maintenance is now judged under the rule of reason, but now you have to look at the different state laws that may not follow *Leegin* and others may still be per se. I think what you want to do first is to look at each individual state's antitrust laws. First, you'd want to look at the language of the statute. Many of the state statutes have the same, if not substantially the same, language of the Sherman Act. For example, in New Jersey and Connecticut, you have language similar to the Sherman Act. In New Jersey the statute says, "every contract combination in the form of trust or otherwise, conspiracy in restraint of trade or commerce in this state shall be unlawful." And there are other states with similar language. But that doesn't necessarily mean that these states follow *Leegin*. So you should also look at the case law for any

state law precedent on how they deal with their individual state antitrust laws. Many states, including New York used federal law to find RPM per se legal. So you may not find a lot of case law under state law.

Also, the degree of deference that the state courts give to federal antitrust precedent is something you should look at also. Many of the state statutes say the courts shall construe the state antitrust statute in harmony with federal precedents or shall be guided by federal precedents. New York, for example, has no statutory requirement that the courts follow federal law as precedent. Courts generally have interpreted the Donnelly Act in light of federal antitrust law, unless there is state policy, differences in statutory language or legislative history that would justify a different interpretation.

And we have in New York, besides the Donnelly Act, and I think David Copeland mentioned General Business Law 369-a, and I know it's on the screen, so I'll just read it to you. It is entitled "price-fixing prohibited: Any contract provision that purports to restrain a vendee of a commodity from reselling such a commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law."

Many of you may have seen the article Jay Himes wrote this week in the *New York Law Journal* concerning 369-a. Basically because the courts in New York don't have to follow federal precedent if there's a state policy, in which case 369-a clearly shows state policy that vertical price fixing is illegal in New York, and also the legislative history of 369-a clearly shows the legislature had decided that vertical price-fixing should be illegal in New York. Not only the title of 369-a but also when 369-a was enacted in 1975. New York also repealed the fair trade laws, which actually passed in 1937 and allowed states to have resale price maintenance. But in 1975 New York repealed the fair trade laws and also passed at the same time 369-a. So from the legislative history and state policy, it's very clear that this would justify the New York courts construing to construe vertical price-fixing as per se illegal in New York.

Also, I want to mention California. California has very strong statutory language that it may also be per se illegal for price-fixing prior to *Leegin* and after *Leegin*. Some people commented that California did not join the *Leegin* amicus because, and this is just speculation, but maybe because they felt vertical price-fixing is still per se illegal in California.

Other states, like Illinois, for example have construed vertical price-fixing under the rule of reason pre-*Leegin* and after *Leegin* they still do. This is according to the Bureau Chief from the Illinois AG's office.

Besides the state laws, you should also be aware of how the other jurisdictions, such as the EC and Canada treat resale price maintenance. I know that in Canada resale price maintenance is criminal under the provisions of the Canadian Competition Act.

I think there was a case against John Deere a few years ago that resulted in a $119 million rebate settlement against John Deere tractors, where John Deere had discouraged its dealers from selling below suggested prices.

MR. KATZ: So now we have gone back to the client, and we have told him all these very clever things about economics and all the jurisdictions in the world where this might be rule of reason or not, and what the Supreme Court said. The first thing the client says to me, you know, before *Leegin* this was easy. I'd call you on a vertical price-fixing question, and I would get a very small bill or no bill at all because you would tell me I can't do it. Now this turned out to be very expensive. You've looked at documents, analyzed the relevant market, and I just don't know what to do.

Let's look at this another way. Tell me what do you think is the chance of me being sued and how complicated would this lawsuit be?

Mike, would you try to answer the client?

MR. SIBARIUM: Sure. Presumably I would go where my client does business, but I don't know where Write-On does business. I only know it is incorporated in New York, But I don't know whether that's where its main source of business is.

You know, the only persons or the only firms that would immediately benefit with no risk from this is going to be probably a local firm or regional firm that happens to be in a state where there is no per se rule and where it is clearly rule of reason, or where it has always been rule of reason I should say.

MS. WACHSSTOCK: And their products aren't sold on the Internet.

MR. SIBARIUM: And their products aren't sold out of that state, right. That's the only place where you'd have a clear benefit. You can immediately go forward and not be too worried. Even then you'd have to be worried. If you expand you'd have to revisit it. If you open a new store somewhere else, if somebody wants to place an order outside of state, so even there it is not so simple.

The approach that I think companies would have to take, assuming they are doing business in places where there is per se rule is going to be sort of do their risk analysis. I think unless a firm is very, very aggressive, there is going to be substantial risk in marching forward with RPM agreements before we know what's going on in the states. I don't know if there's anyone on that panel that has sort of said that publicly, but I think a lot of people might be reassessing whether or not they can do something more aggressive than they were doing before. Whether they could go forward with their *Colgate* rule or not, or three strikes and you're out. Because they are basically saying if you moved the line and it is found there was an agreement and we really didn't want to have an agreement, okay, fine we will fall back on this rule of rea-

son notion. Now, that's assuming the states don't get aggressive on the per se side.

So I think the most important thing from counseling perspective and what the bottom line is going to be, it is going to be what are the states going to do; and second, what are the damages likely to look like if you get nabbed. I think those are the two biggest issues. Those are going to be the two driving issues up front. Then a third issue is going to be how lower courts create presumptions or the administration of the rule of reason in trials dealing with resale price maintenance. Those three things are going to dictate the largest risks.

More specifically again, where do you do business? How much do you do business in states that are rule of reason and per se? How much risk are you willing to take? Even if you didn't have a per se rule to deal with, how dominant are you? And you have to think about how often are you going to revisit it. Are you acquisition minded? Are your competitors acquisition minded? Will that change concentration?

Even assuming there is no per se rule, there is no per se rule of legality either in *Leegin*. Because it was per se illegal for so long, we got very accustomed to theory. We got very accustomed to talking about free rider and very accustomed to talking about the various elements involved that we discussed today. When we see how they play out in the market, it is very different. Even in the hypothetical that we have there are questions about people who might need service of a product after it is sold to an end user. Well, the *Leegin* case specifically talks about service before the time sale. They don't give any talk at all to a rationale of post-sale service at all. Maybe someone will come up with one, but it is not there. Those services presumably could be sold, paid for, and you could bundle the pricing. There are a lot of things that could go on which shows there is alternative goals to accomplishing that goal. If you don't have that goal clear up front, it is going to be very hard to advise.

You have to be mindful of changes in policy. Mindful of different policies for different products that the same company sells. Internet sales that we talked about before. Because you can't set forward now theoretical rationale if you don't have real world evidence to show it is not working. Obviously you can deal with some limitation of exposure to your immediate customers, like arbitration clauses and things like that, choice of law clauses; that will help you if you have a class action.

So I guess I should talk about who might sue. The obvious candidates are terminated dealers of course; they are always the ones who historically sue. You also have another category of what I call dealer wannabes that you might see more suits from. You can unilaterally refuse to deal with anybody you want. But if you have an environment where there actually were resale price maintenance agreements in an industry, I think it is going to be more likely that someone is going to then initiate litigation and on the sense of boycott, because you wouldn't agree to resale price maintenance, you collectively agreed with your competitors to boycott. It is still rule of reason, but it is going to be a second thing.

Class actions have not been very common in this area in the past, which is per se illegal. I understand there were a couple in *Leegin*. I'm not following them, but I'm told there a couple in *Leegin* right now that are pending. And that's probably indirect class actions in particular, especially states where there may still be a per se rule.

Finally, whether you could ever have a scenario where a competitor might actually have standing. In this scenario where RPM is opposed by a dominant firm to exclude competitors specifically, maybe there would be a standing argument in our hypothetical by sort of a new entry coming in. So there are a number of different sources.

Of course the states and feds can't be forgotten. I say the feds and everyone is probably shaking their head saying the administration has not exactly involved in vertical theories of any type, but things change. Who knows what might happen two years from now. So especially if there are economically rational cases to bring. If people get more aggressive, firms get more aggressive, then it is more likely the states and feds could do some cases.

So from a counseling perspective those are the things I would focus on. One more that I want to mention is dual distribution. It used to be a lot more common; a manufacturer is also a wholesaler or also a retailer. The issues get much more tricky with dual distribution, and you have to be careful because you don't want the inference to be made there is a horizontal agreement here. That could get very dicey. When we look at what damages could be, even if there are a lot of class actions on the vertical side, if you get that vertical/horizontal mix, that could change the equation.

MS. WACHSSTOCK: On that point, that was an issue that PSKS raised apparently only at the Supreme Court level, that *Leegin*'s president had an ownership interest in some stores, so that the pricing policy represented a horizontal cartel. The Supreme Court refused to consider it because they said it hadn't been raised in the lower courts. It was out there too late. But I agree, that's probably one of the ways plaintiffs could go.

MR. SIBARIUM: In terms of how this will play out, lets say we have rule of reason trials at some point in time. The courts already acknowledged there could be presumptions created, leave for lower courts to see how rule of reason gets played out. It may not be a full-blown rule of reason analysis, may look to the FTC's model in the Polygram competitors case, shifting burdens in production, depending on what the facts are.

But there's one particular rule of reason factor I would like to talk about, quality. It is all over the place, and it is a very difficult one to deal with at trial.

In the recent Evanston hospital merger case that I was involved in, we tried to put on a quality of care defense to a merger, saying we want to actually improve the quality at the other hospital, which forced the FTC or hoped to force the FTC to grapple with the issue. But one thing we argued was quantity expanded, output expanded, and if output is expanding that can't be anti-competitive effect. The problem with that argument is it assumes everything is static, and if you don't prove a change in demand and other changes in the industry, it could be rejected out of hand without serious consideration.

Another issue with quality is if you're looking at policies that have been implemented, RPM policies that have been implemented. Many a quality argument is that at point of service you get a better service. It will be interesting to see what the evidence says. Will there be lower return rates from customers where they get more service? Will there be lower warranty problems if they know how to use the product right? Will there be less defect claims if they are trained correctly by salesmen versus if they buy them at a low-cost dealer? I think a whole world of empirical evidence is going to come up in these rule of reason cases that we never had to grapple with before. It will be very interesting.

MR. KATZ: When you think about this as a rule of reason case, and I know there is this concern, or hope depending on who we are talking to, that really this remains per se under state law. But let's imagine that the five justices of the Supreme Court are as powerful as they thought they were when they wrote their decision and there really is a rule of reason regime. I think a lot of questions are difficult. One of them is: Often when you go into a rule of reason case the plaintiff tries to show that the prices went up. And if prices went up, that must mean there is some kind of anti-competitive effect. But I imagine in this kind of circumstance as prices are going up, especially as we think about the demand curves that Dan showed us in the beginning, it doesn't necessarily get you there—I don't know how exactly a court (or maybe if you get to a jury) would deal with those kinds of issues and how they would balance the increased quality or service against the rise in price. I do think that the Supreme Court spoke somewhat to it, but I don't know how that would be dealt with by the courts.

MR. SIBARIUM: We argued in *Evanston* that once you look at quality you adjust the prices, and you could actually have an increase in price but quality went up. Quality adjusted price may not have gone up. There's very little that's been done, very little literature in quality and prices, and it is very difficult to work with empirically.

So what I think that is going to mean is the burden of proof and rules come up with the presumption and who has to carry the day with certain kinds of evidence are going to become very critical.

MR. KATZ: I would have thought another thing that might tell us that would be something we want to look at. Even though price went up, that possibly the price went up as the output increased. Looking at the demand curve that's evidence one could come up with in a rule of reason case. I think when we are trying to advise the Write-On Corporation today about this, we don't know for sure whether their policies will end up increasing output or not. It makes it difficult.

So that leads the clients to say well, okay, how would you start figuring out how much this might cost if I lose the case? What would the damages be and how would you start thinking about them in this particular circumstance?

MR. GARRETT: Mike laid out the types of customers or types of entities that might bring cases, and that's going to organize my few words about how to calculate damages at a high level in those things.

If you have a disgruntled retailer, damages are the forgone profits. Instead of selling the Pen-Pal, they sold other products and presumably made a slightly lower markup on those, and damages are the sum of the forgoing markups. Of course, there are issues about thinking about that going forward that make it a little more challenging.

As far as the wannabe retailers, that's a new category for me. I think the calculation would be the same; it is just much more speculative. I'm a wannabe retailer, I only sold how many units at what kind of a markup. It is obviously very speculative.

When a competitor brings a suit, damages would likely be based on the lost profits of the competitor. You often see lost profits damages in a Section 2 case. That's all I'm going to say about that. If consumers bring a suit, then you're going to think about the loss of consumer surplus or more particularly the price they paid. The price focus should be on the quality-adjusted price. Back to my slide and the price; if there's more services offered, the price will be higher. The person is buying a good and getting more services, so those services have some value. So you wouldn't simply take the difference between P prime and P. You would take P prime minus the consumer's value of the service. It might bring up interesting class certification issues.

There is economics is literature on quality-adjusted prices. Only, it is probably a pretty thin literature for services and healthcare. How can you tell if your heart transplant was a better quality heart transplant.

MR. SIBARIUM: That's one of the easier ones you can tell.

MR. KATZ: I think that raises an interesting point, Dan. Which is when you think about a class, even let's assume this could be a per se violation, but someone wanted to bring a class and that usually you would be able to show injury on a class-wide basis, but if you're saying

some people when they travel they like to know that the bag costs the same everywhere else, but there's another person that's terribly upset and they wish they could buy this bag for less on the Internet. How could we go through that? I don't know if anyone has thought through that at this point. But I think the questions on class are complex, and I think in my view more complex than the typical price-fixing case.

MR. GARRETT: I think that's right. Because those issues are unknowable—very important, but hard to know. Those are the ideal ones if you're defending a class certification case against your client.

One take-away here to think about is what's the but-for world. If you had litigated cases and thought about damages and know this term of art, what's the world like but for the conduct at issue. If you have a resale price maintenance policy that is challenged, and I think you could argue potentially that the but-for world is *Colgate*. So instead of having agreements, you have a suggested retail pricing policy that you've already implemented. And if the but-for world is *Colgate*, it is arguable that no harm, no foul. I'd have the same price; it would be a suggested resale price instead of a resale price maintenance agreement. But having the same price means no harm no foul.

MS. WACHSSTOCK: You might actually argue that the but-for world would have been worse because the manufacturer would have expended all the additional funds to survive under *Colgate*, which may increase the price downstream. That's one way to look at *Colgate*.

MR. KATZ: One thing I wanted to touch on which I've seen a lot of literature and we didn't touch that much on today is the notion that there is a distinction between interbrand and intrabrand competition. And at least the five justices in the majority of the Supreme Court seemed to suggest that we care a lot more about interbrand competition, this is competition between two different manufacturers' products, rather than competition between retailers selling the same manufacturer's products. I don't know if anyone would like to touch on that, whether as a matter of policy we should care about one more than the other.

Rick, do you want to speak to that?

MR. BRUNELL: I would consider the discussion of interbrand competition as just a shorthand for pro-competitive justifications, like free rider and whatever else the Court said.

MR. GARRETT: Again, I'm not an expert on the law, but I think the interbrand idea gained prominence in *GTE-Sylvania*. When you're thinking about the intrabrand competition, in the general case retailers are pretty competitive. It is a pretty low-margin business, with easy entry. The manufacturer has interests that generally align with consumers in terms of how its brand is sold. I think as a policy matter we can rely on markets and competition to help discipline interbrand competition.

MR. YOON: I never really understood why sometimes the manufacturer and the consumer wouldn't have the same interests, be aligned. Usually when there is interbrand competition prices to consumers are usually lower, and some people argue that the interbrand competition helps consumer welfare by different products, services, etc. But it seems sometimes the consumer is subsidizing the interbrand competition, and so sometimes I don't really know if it is necessarily that a manufacturer and consumer would have the same interests.

MS. WACHSSTOCK: If I could make one other point on the interbrand versus intrabrand issue. One of the factors the Court talks about is prevalence of RPM in the marketplace. Just thinking about that, it almost seems unfair if you're the second player in the market or the third and others have an RPM policy. It creates incentive to be the first adopter, all other things being equal, because you have a policy, then somebody else comes along and they may have a harder time getting an RPM policy in place. Again, all things being equal, if there are others in the market who have a policy, so it becomes an interbrand issue rather than intrabrand.

MR. KATZ: So you could foresee asking our client the question: Is there anybody else who does it? If all the other answers are good, it is procompetitive, if you're the last one in a relatively concentrated market, then maybe more dangerous and more risky than if you were the first. But as you said, it doesn't seem right. And also I suppose as a matter of litigation, once you get to court or once you get to trial, by then the situation may be different and it may not matter whether you were first or last. Perhaps if you were first and everyone else has joined in, maybe you should stop, which would be a pretty odd result, but it sounds like that's a little bit of where that notion of how prevalent it is in the market gets you to. I could imagine a market where the products really do require additional services and that many people in this room would agree it might be procompetitive, and yet you'd have this factor that would go against you.

I want to give the opportunity for people to ask questions, since we have a few minutes left and we have questions for each other. But I wanted to let the audience participate.

AUDIENCE MEMBER: In that kind of exact scenario you were talking about, we talked about going to trial and this is our fact intensive analysis. What impact, if any, do you see in the Supreme Court's *Twombly* decision if you have a complaint where it is alleged that there are three or four manufacturers and just one adopted the policy after another, nothing more than that, and it is not a commodity type product, but a specialized product that does require services. Is that plausible? Does that factor into the analysis at all? Or do you think *Twombly* would not have an impact in this area at all?

MR. BRUNELL: That raises the question of what the plaintiff has to allege to a *prima facie* case. And I would think simply alleging certainly the existence of RPM may not be sufficient. I would think that at a minimum the plaintiff has to allege that it is effective RPM, that is that it does cause prices to go up. That may not be enough without talking about the idea that this is not justified by any legitimate procompetitive rationale.

MR. KATZ: Could it be a defense in New York? As we saw in New York even if you had an agreement, an RPM agreement and the plaintiff attached it as Exhibit A to their complaint, could you say well, yeah, there is this document, but it is actually unenforceable and therefore what's the harm you're complaining about?

MS. WACHSSTOCK: I think you raise an important point about *Twombly* and what it says about pleading, what has to be in the complaint. But I think the suggestion is that we don't know really, because the burdens haven't been defined so we don't know what is sufficient to allege in the complaint to get past the motion to dismiss. There is a lot of uncertainty right now as to what that is.

MR. YOON: Right. And Elai's question in New York, if you attach the RPM agreement to the complaint, definitely under 369-a it is unenforceable. But as I said, our position would be that it is a violation of the Donnelly Act, so you'd be entitled to treble damages.

MR. KATZ: I'm getting signals we have just a few minutes. But please go ahead.

AUDIENCE MEMBER: Mr. Brunell made a comment about functional discounts, that that might be a way to deal with a retailer who does provide a service. I was curious what some of the other panelists might think about that?

MR. SIBARIUM: Well, I'll make one quick comment on that. Functional discounts, if you've ever litigated a functional discount case, they are an absolute nightmare. I haven't looked at the nuance of this issue in a few years, but last time I looked at it a few years ago the case law was still unclear whether the proper measure of functional discount was the value of the services performed by the retailer or was it really the value of the services the retailer performed, the value saved the manufacturer. It was debated in a trade commission case called *Mueller* and a case called *Doubleday* going back to the '60s and '50s, which was still unresolved, then *Boise-Cascade*. So you're left basically with this uncertainty even as to what your stance is to what you're proving. I suppose it is theoretically possible you could prove a whole bunch of services that a retailer provided but none of them had to do with the manufacturer. I guess it is a risk of functional discount. It is a hard one. I think it would be a hard one to practice. It is a right one if we could get it to work.

MS. WACHSSTOCK: Maybe a simpler way is sort of an availability defense.--say to all your retailers if you do X, you'll get a discount.

MR. SIBARIUM: That's a much easier way to do it. Functional availability. Of course, the point was made earlier that Robinson-Patman litigation is not that common. So you can factor that into the risk too, not to overplay it.

MR. KATZ: So we are soon to be thrown out of here, but if there's one last question, I might take it.

AUDIENCE MEMBER: I have a question, not to the panel but really to the group at large. Nonprice vertical restraints, which have been subject to the rule of reason for the past 30 years, I'm curious how many practitioners in this room have tried a rule of reason case on a vertical restraints theory?

MS. WACHSSTOCK: Does tying count?

AUDIENCE MEMBER: No, that's a modified per se. I mean an exclusive dealing arrangement, territorial restraints, something like that. How many people have gone to trial? There must be thousands of years of practitioner experience in this room.

MR. KATZ: Does it have to be trial or motion practice?

AUDIENCE MEMBER: Trial. Trial, to the jury, I don't care, or to the judge, with witnesses. Why do we think that RPM cases are going to go to trial, if we can't in this room over 30 years find a single rule of reason case tried?

MR. BRUNELL: Let me just suggest that the folks I think anticipated that the Supreme Court decision overruling *Dr. Miles* wouldn't say anything about the rule of reason, but would just say the *Sylvania* rule of reason for all vertical restraints. And if the Court had done that, we would have been safe to assume that vertical restraints in the price area would be effectively per se legal as nonprice restraints are. And surprisingly the Court thought that RPM was a little bit more pernicious than nonprice restraints and they suggested that the rule of reason shouldn't just be a toothless rule of reason. I think that's why we are here today.

MR. SIBARIUM: Also, one other thing. Every RPM case was litigated on the fact that there wasn't an agreement basically. Historically that was the way they were all litigated. The notion here is that people would actually now enter into new agreements they would never have entered into before, RPM agreements. Now they may not because of the states. But that was a good question. If they did that, now you're looking at a whole bunch of factors that are going to play out.

MR. KATZ: Thank you everyone. I really appreciate your attention.

MS. MAHONEY: Before you run, thank you so much for coming. And I appreciate James' and Elai's work on this hypothetical in putting together this panel, and our panelists' time.