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Introductory Remarks

MS. ANTHONY: Good morning, everyone. I'm Barbara Anthony, the outgoing Chair of the Antitrust Law Section.

It is my pleasure to welcome all of you on this very brisk New York winter morning to our Annual Meeting. We have a terrific program in store today, with interesting and very timely topics, and a series of very distinguished panelists. Of course, the entire day will be topped off with our traditional cocktail reception followed by our dinner. Judge Lewis Kaplan is our keynote speaker, and our Annual Service Award this evening will be presented to Federal Trade Commissioner Pamela Jones Harbour.

Before I turn the dais over to our Program Chair, Steve Tugander, I want to recognize Steve and commend and praise him in the highest terms for the fabulous program which he and his colleagues have put together today. I know you'll enjoy it. I think you'll get a lot out of it. We've planned an interactive day, again, with exciting topics, excellent speakers. And overall we hope it will be a very, very successful day.

Steve, I want to thank you on behalf of the Section for putting this terrific program together.

At this point I will turn this over to Steve and begin the program. Welcome, everyone.

MR. TUGANDER: Thank you, Barbara.

As Barbara said, we have a very full schedule of events planned for today. We hope you'll enjoy them. In a few minutes we will begin our Antitrust Year in Review segment. At 9:30 we'll move into a discussion of the application of *Noerr-Pennington* to litigation settlements. At 11:15 we will begin our last panel of the morning session with a lively discussion of Supreme Court's 2004 *Empagran* decision. At 12:45 there will be a business meeting for section members to elect officers and Executive Committee members.

We are going to break from practice in years past where we announced all the Executive Committee members at that meeting. We are just going to announce the new members, and if anybody is interested in seeing the entire list of Executive Committee members, it will be placed outside at the table.

When we come back from lunch at two o'clock, we will begin our afternoon session with a discussion of the

procompetitive potential and anticompetitive risks associated with standard-setting groups. And then at 3:45 our final panel will address the current role of antitrust in sports.

As Barbara mentioned, we hope that you also will join us this evening for a cocktail reception and dinner beginning at 5:45 in the Astor Ballroom up on the 7th floor. And as Barbara noted, our dinner speaker will be Judge Lewis Kaplan of the Southern District of New York. And we will present a service award to Pamela Jones Harbour, FTC Commissioner and former past Chair of this Section.

As you can see, we have a lot to do today. Let's get started with our Annual Review of Antitrust Law Developments.

As most people are probably aware, this portion of the program has traditionally been presented by Bill Lifland, a prominent antitrust lawyer at Cahill Gordon. Unfortunately, Bill is a little under the weather this year and couldn't participate. We wish Bill a quick recovery, and we hope he's back up here again in 2006.

But in the meantime, we'll carry on Bill's tradition with two also very prominent antitrust lawyers, Molly Boast and Irv Scher. Molly Boast is a partner at Debevoise & Plimpton in New York. Her practice focuses on antitrust litigation, merger analysis and antitrust counseling. Molly is a former Director of the FTC's Bureau of Competition. She is currently a member of the Executive Committee of this Section, and she's also active in other professional associations, including the ABA. Molly has written and spoken extensively on antitrust law topics, and it is our pleasure to have Molly with us here this morning.

Welcome, Molly.

And also we have Irv Scher, an antitrust partner at Weil, Gotshal here in New York. Irv is also an adjunct professor at NYU Law School in the Antitrust and Trade Regulation Department. Irv has been very active in bar associations throughout the years. Among many other positions, Irv is the past Chair both of this Section and the ABA's Antitrust Law Section. Like Molly, Irv has written and spoken extensively on antitrust law topics. We are honored to have him here with us this morning.

With that I'll turn the floor over to Molly Boast.

Annual Review of Antitrust Developments

MS. BOAST: Thank you, Steven.

Good morning, everyone.

Given the fact that we've lost a little time letting everyone gather and the fact that you have so many riches in front of you for the rest of the day, I'll probably truncate my comments a little bit. But if you didn't pick it up, there is a copy of a paper my colleague Sara Zausmer wrote on the table in front that covers a large number of cases and developments in this year.

Irv and I are each going to cover our favorite hits. Hopefully, we will go through our prepared comments fast enough that he and I can then engage in a little dialogue with you about some of them.

The filter I used for my own selection of the cases that I wanted to cover was: What are the cases I thought I needed to know to go forward in my practice? There were many cases decided this year, but I picked out the eight events that I thought would influence my thinking about matters on behalf of clients. Having said that, I felt compelled to look for themes.

The first theme is: Where are we in the antitrust mainstream? There were some decisions rendered this year that seemed to take on, in one fashion or another, the law and economics approach that we have come to consider mainstream in antitrust analysis today. The second theme, artificial as it is, is: What are the limits today under the Foreign Trade Antitrust Improvements Act? And the third is: Can the government ever win a merger case again?

Under the first topic: Where is the antitrust mainstream? The first case I want to talk about is *Dagher v. Saudi Refining*, a Ninth Circuit decision. This case involved allegations of price fixing within the refining and marketing joint venture that was created some years ago by Shell and Texaco. Shell and Texaco combined their downstream resources: 22,000 gasoline stations and dozens of refineries, to create east coast and west coast consolidated entities.

There was no issue in the case that this was a bonafide joint venture, or two joint ventures. Indeed, the Shell-Texaco arrangements had been heavily scrutinized by the FTC when they were first formed.

The District Court had granted summary judgment on the plaintiff's price-fixing claims. The Ninth Circuit reversed, and it said there was an issue of fact for trial whether per se liability could be applied to the price-fixing allegation.

What was notable about what the parties did was that they retained both the Shell and Texaco brands within the joint ventures. Many of the efficiencies were actually in the refining and related ancillary services end of this. And then they priced the two brands identically. They didn't price them the same in every geography, but within the geographic territory where they each were located, they priced the two brands the same. The court said there was no demonstrated need related to the efficiency-enhancing function of the joint venture to engage in single pricing.

That seems in some respects remarkable, although I think most people aren't surprised that a joint venture structured like that would use a single price for the brands, unless there was some reason to differentiate the brands through the pricing mechanism.

Interestingly enough, I don't know how plaintiffs will go forward with a damage claim here, because in the gasoline marketing area, it's common to engage in what's called zone pricing. You'll see identical prices or very similar prices from zone to zone, and you would expect to see therefore very similar prices even if the brands were separately owned.

The second case in the "Where is the antitrust mainstream?" category is the *Flat Glass Litigation* decision from the Third Circuit, written by none other than present-Judge-soon-to-be-Secretary Mike Chertoff. Again, the court reversed a summary judgment on a price-fixing claim.

In this particular instance the case was a follow-on civil litigation after an amnesty application by a manufacturer of flat glass. It resulted in the indictment of some executives at one of the companies, so it was potentially very serious stuff. The court went through an elaborate discussion of the theory of interdependence of an oligopolistic industry: You need to get past conscious parallelism to prove or to support an inference of an agreement not to compete. The court went through a very detailed discussion of the kinds of "plus factors" required.

PPG was the defendant that remained in the case at the time this decision was rendered and was the party moving for summary judgment. Their argument was there is nothing in all of this evidence that implicates us in the conspiracy. And that's where there is a sort of ships-passing-in-the-night flavor to the decision with the way Judge Chertoff handles the evidence. He says there are three kinds of plus factors that can work: one is motive; one is the action contrary to the parties' interest;

and the third is some evidence implying a traditional conspiracy. Then he says the first two plus factors are really just discussing parallelism. So we are only worrying about the evidence that would apply to showing a traditional conspiracy.

Judge Chertoff went through the evidence in considerable detail, and he found that there was a lot of evidence of industry-wide advance price communications, conversations about prices, a pattern of matching price increases, and documents that talk about overall industry price increases. And as I recall the decision, he didn't really single out those pieces of the evidence that were specific to PPG.

But what was really going on in this case, I think, were a couple of things. There was some evidence, and he cites this in considerable detail, that some of the participants in the industry—again, not necessarily PPG—had knowledge of these price increases before they went into effect. This was described by the parties or by PPG as most likely attributable to an error in time stamping the document, which he found a ludicrous explanation. And I believe it's probably a fair reading of the opinion to say that he was influenced by some pretty inflammatory evidence that had been kept out of the summary judgment motion on a motion *in limine*. Part of the opinion reviews the decisions on the motions *in limine* and sends them back to the District Court for a better analysis of why they were hearsay and shouldn't be considered. But those documents that were theoretically not part of the summary judgment motion record were some of the most interesting and the ones that most revealed person-to-person communications that could have given rise to an inference of conspiracy.

There doesn't seem to be any discussion in the decision whether PPG made efforts to undercut the conspiracy; that PPG wasn't part of it. It seemed to be part of the price increases. It's also a fair reading of the opinion, I think, to say that the judge believed that even if they weren't directly implicated in the agreement, they sure were benefiting from it, and therefore the jury should decide their liability.

I'm going to skip *Empagran* in the interests of time. I wasn't planning to say much about it anyway, but we'll be treated to a full-blown discussion of it later on. It happens to be near and dear to my heart, since I argued *Hartford Fire* in the Supreme Court and lost. So I'm tracking my legacy through all of these discussions. But I'll let others comment on that.

The other FTAIA decision that I think is just completely fascinating and, frankly, in some respects more interesting, although perhaps less far-reaching than *Empagran*, is the case the Justice Department lost, again in the Ninth Circuit, *United States v. LSL Biotechnologies*.

This raises a question in my mind about what types of cases are going to be subject to FTAIA analysis. Is it only going to be useful in cartel-type situations?

This case involved the Justice Department's challenge to a contract between a United States seed developer and an Israeli company. They had some cooperative efforts, but they had a contract restriction in their arrangement that banned the Israeli company from selling long-shelf-life tomato seeds in the United States—one of these very important markets where we wonder how the government gets involved.

In essence, the government's claim was that there was an anti-competitive effect in the United States because the foreign company, the Israeli company, was less likely to innovate to create hardy seeds that were much in demand in the United States, based on this restriction. The court said there was no subject matter jurisdiction, because the clause had no direct effect on U.S. commerce.

You recall that the FTAIA requires a direct, substantial and reasonably foreseeable effect. There is a long debate that is textbook stuff between the majority and the dissent on what "direct" means under the FTAIA. Does it have a special meaning, or is the common law meaning of direct, the dictionary meaning, important? And of course, the majority says it's got a special meaning here. The dissent also notes there is a real circularity of reasoning when the majority says there is no evidence that this Israeli company was likely to enter, but they can't enter because there is a contract restriction preventing them from doing so.

The majority then goes on to define "direct" under the FTAIA as meaning it follows as an immediate consequence of the challenged activity. This has the ring of a temporal definition. The majority says there is no evidence that this firm is ever likely to innovate, or that it ever will seek to sell seeds in this country. Again, we see the circularity that the dissent pointed to. And then, and this is obviously a direct quote: The delay of possible innovations does not have a direct effect on American commerce.

To me there is a whole category of cases that could be affected by that kind of analysis. The dissent raises a very good question. It says how can you square this decision with *Hartford Fire*, where the product in question was reinsurance sold in London to insurers in the United States who then sold their products to the plaintiffs in the case, and finds that the finding in *Hartford Fire* should obviate the conclusion that the majority reached in *LSL Biotech*. But the standard that the majority is importing seems to be immediacy. And I strongly believe that if the case has any traction, if there are categories of cases where this is going to be a debate, it will create

much confusion. If this analysis had taken place under the “reasonably foreseeable” prong of the FTAIA analysis, it might have made a lot more sense.

DOJ is seeking hearing; I don’t know exactly where that stands, but they have filed their brief. But we are in the Ninth Circuit, and it is a kind of never-never land out there.

Let’s turn to government’s recent track record in merger litigation. These decisions, I’m sure, are well known to all of you. In the space of a few months the government lost three merger cases, two at trial and one on a summary judgment motion.

United States v. Oracle was hands down the most heavily publicized of these cases. It was a hostile takeover. It was litigated in the press as much as anywhere else, because it was a hostile takeover.

The principal issue in the case was market definition. These companies both made software for business enterprises, and the government alleged that there was a special high-function version of this software that was the relevant product market. The government lost on that in a very detailed opinion that is worth anyone’s reading.

The Court rejected, first of all, the customer testimony that the government had introduced to support their product market definition because, it said, that the customers were talking about their preferences, what they would prefer to do in the case of a SSNIP or a price increase. They did not address the question whether it was functionally possible for them to substitute, and if not, why not and at what cost? That’s what he was looking for. So the testimony was simply not probative of what he thought it was offered for.

I must say, having strong enforcement bones to this day, that while it is easy to read the decision as a failure of proof over and over again, I felt like I was being pummeled as I read it, because there is a very evident hostility to the government’s case.

Having lost on market definition, the market shares in the case fell very low, and the government then lost the benefit of the *Philadelphia National Bank* presumption of illegality going forward. In addition, this case was a trial on the merits. The preliminary injunction and permanent injunction were combined, I believe, so they, the government, were carrying a heavy burden through the whole case.

The most notable part of the decision to me is the very extended discussion Judge Walker gives to the unilateral effects analysis. There was no contention that coordinated effects were at issue in this case. So it was all about unilateral effects in a differentiated product market. He synthesizes the case law, the economic literature and I think mostly has it right. He says that even if DOJ is able to show that there is globalized competition

between Oracle and PeopleSoft that would be lost by virtue of the merger, they still have to show why that would lead to market power and increased prices, and that they didn’t do. He wanted more econometric analysis. He wistfully points to earlier decisions—and there aren’t many—in which unilateral effects had been argued, and he said, well, those judges had econometrics, and I didn’t get any.

Finally, he says that the third competitor in this market, at least as the Department of Justice would have defined it, was a German company called SAP. It was portrayed as weak and unable to fill the void that would be left by the acquisition of PeopleSoft. But that didn’t comport with facts, because in fact SAP was winning a very substantial number of bids.

What I take from this decision is, first of all, courts want facts. Clearly, the Court thought there was too much reliance on sort of a structural case. That might work sometimes, but it certainly doesn’t work if you don’t have the *Philadelphia National Bank* presumption going in your favor. As I mentioned, the customer testimony has to go over the hurdle of explaining functionally the reason why customers can’t switch in the face of a price increase.

The decision received a lot of attention, combined with the *Arch Coal* decision, for the fact that the government has often used customer testimony to support its cases, and both of these judges discounted that. I think the real impact is that it’s difficult for the government to get complaining customers to cooperate to the extent that might be required to get the proof right. But the reliability of customer testimony has been an issue in government litigation forever. And even in the Baby Food case, *FTC v. Heinz*, which was litigated when I was at the FTC, the Judge said, look, I have customers on both sides of the case telling me what they think of this merger, and I’m not going to listen to any of them.

Finally, credibility was key. The Court found many of the complaining customers to be self-serving. And much of the government’s case was put on through PeopleSoft witnesses. Although he doesn’t say it, their credibility must have been an issue, because they were defending a hostile deal.

The FTC’s case against *Arch Coal* I’ll cover a little more quickly. This was a challenge to an acquisition of coal mines that produced a certain low-sulfur coal that was in high demand. There are some litigation features about this case that I think make it interesting.

First of all, this was a case where in some respects the remedy was litigated. The parties proposed to sell one of the mines being acquired to a third party. After motion practice around that issue the Court decided to acknowledge that sale and treated the acquirer of that mine as a new competitor. Therefore, it was essentially a

five-to-five merger. That, combined with some issues about market definition, led to a case that under the Merger Guidelines was a violation, but at the extremely low end of what usually gets challenged in court.

Then the Court applied the flexible *General Dynamics* standard, *Baker Hughes* standard, to say that this lowers the defendant's evidentiary showing. Again, use Baby Food as an example, a case where there was no dispute that it was a three-to-two merger, and therefore, the efficiencies defense, which was very powerful in that case, didn't have any traction. In *Arch*, the defendant didn't have to show much, because of the weakness of the government's case.

The goal of the government, I believe—and you can ask Geoff Oliver, who will be speaking to you later this afternoon—was to test a theory of coordinated interaction that was based on prospective capacity reductions. The evidence that pointed in this direction, in particular some speeches and comments made by one of the executives, suggested that when prices were low, mines would be shut down. As a footnote, I would observe that in an industry where you've got a wasting asset, you probably do shut down when you can't get what you think the product is worth, because at the end of the day, it will be depleted.

But in any event, that and other evidence tested a price—or rather a capacity-coordination theory. The Court said, well, look, all the cases that have dealt with coordination have been about price coordination, so there is really no legal precedent. There hasn't been any past evidence of coordination on capacity. And there wasn't any real reason to believe that even though there were announcements of closures and there was close monitoring, as shown in the documents, of the competitors' closures, *Arch* didn't act on the information anyway, so it must not mean anything. Again, the Court was discounting the structural case.

There was what I call a sort of heads-I-win, tails-you-lose aspect to this. Usually the government is working hard to get away from a structural case and away from econometrics and go to the parties' documents and have a speaking case. Here the Court discredited the speaking documents and gave a lot of credit to the structural argument that the defendants made.

The other litigation point that I think is interesting about this, and this is perhaps more subtle because it is not articulated in the decision, but the parties stipulated to one definition of the product market. The government argued for an alternative definition, but I think a stipulation is a very compelling thing to put in front of a court: To say, look, your life is easier if you agree to adhere to this stipulated market.

Two minutes on criminal enforcement, which wasn't one of my themes but is part of my litany of what I think

you need to know in practice going forward. You probably are all aware that in the middle of the summer criminal penalties were enhanced by statute. Very substantially. This was in part an effort to allow the government not to have to operate so much under the Sentencing Guidelines, which I think is probably a good thing in wake of the *Booker* decision. But in particular, the statute detrebles damages for the first party in, the recipient of leniency or amnesty under the Justice Department's leniency program. This statute is for five years. It sunsets after that unless reenacted. The glitch is that you have to afford the same satisfactory cooperation to civil litigants that you would afford the government in order to qualify for the detrebbling. So I think the courts should have fun regulating that one.

And lastly, this is an '05 case, but I talked to Steven, and he said we could use material up to the date of the program. Just recently, a really interesting case was decided in Pennsylvania involving Stolt-Nielsen, which was a shipper that had been indicted in a market allocation scheme. Not indicted, but had sought amnesty for its part in a market allocation scheme. Others were indicted.

Without boring you with all the details, the government sought to revoke the amnesty agreement because they said the company had misrepresented when it had stopped participating in the conspiracy. The government was laboring under the misapprehension that the company withdrew from the conspiracy immediately upon seeking leniency. When they found out there had been some continued activity, they yanked the plea agreement. So Nielsen went in to court and sought an injunction against the indictment. Part of the discussion addresses when a court should make this decision. Should it wait until the indictment is rendered and then assess whether the amnesty agreement should be revoked, or should it do it in advance? The Court says for due process reasons, we are going to do this before the indictment. And then it says we will construe this contract like any other immunity agreement, against the draftsman.

The Department of Justice didn't specify the date on which it believed withdrawal had taken place, and therefore it was enjoined from indicting the company. This is not a tactic one would want to use every day. But I think the practical import of it is that you can expect the government to be pressing for very specific representations in these immunity agreements going forward, so they will have some leverage. Because they want to have discretion to revoke immunity. But the court says you don't have discretion. You need a contractual mechanism. So if they can't use prosecutorial discretion, they are going to try to create the contractual lever to control the revocation of amnesty where they think it is appropriate. Thank you.

MR. SCHER: I have been asked to comment on the developments that Molly Boast covered, as well as other antitrust decisions in the past year that I thought might be of interest.

With respect to the cases that Molly discussed, I thought it would be appropriate to focus on the counseling lessons that possibly can be taken away from them. I will start with the recent Ninth Circuit *Dagher* decision involving the Texaco/Shell joint venture.¹ The parties obtained a clearance to form the joint venture from the FTC and State Attorneys' General based in large measure on a showing that the venture would generate \$800 million in savings annually. However, what apparently was not considered was the fact that one individual would determine the prices for the pre-existing brands marketed by the joint venturers, and that in each particular market the brands would be priced identically. The Ninth Circuit ruled that this might constitute horizontal price fixing subject to the per se rule, and sent the case to trial after concluding that the venturers had not shown that pricing the two brands identically would in any way contribute to the efficiencies created by the joint venture.

Disregarding the question whether the Ninth Circuit was correct, there certainly is a counseling lesson to be learned from the decision. Parties to a joint venture marketing brands that were previously marketed independently by each venturer should consider either retaining only one of the competing product lines for the joint venture or, if both brands are to be continued, they should assign responsibility for the pricing of each venturer's pre-existing brand to that venturer. If that is not done, and it is decided to adopt a unified pricing structure for both brands, it is crucial that the reasons for doing so be carefully documented to show that unified pricing will enhance the competitiveness of the venture and will contribute to the efficiencies generated by the venture. Obviously, this is particularly crucial in the Ninth Circuit.

There is another aspect of the *Dagher* decision that merits note. The Ninth Circuit questioned the timing of the challenged pricing decision. According to the Court, there was evidence that the pricing decision was made before the joint venture was finalized. That would be what is called "jumping the gun," and it is something to be avoided whether a consolidation is to be by merger, acquisition, or by joint venture. The consolidating parties must remember that they cannot market jointly until after the consolidation actually takes place.

The next case is *Flat Glass*.² I agree with Molly that the Third Circuit's conclusion that summary judgment dismissal was inappropriate, thereby sending the case to trial, was correct in view of the totality of the inculpatory evidence discussed by the Third Circuit. However, I was concerned about a number of conceptual points made by the Third Circuit which could be quite troublesome for

defendants in future parallel pricing suits under Section 1 of the Sherman Act.

Relying on an earlier Third Circuit decision³ that itself had relied on a Ninth Circuit decision⁴ which was thereafter limited to its facts by the Ninth Circuit itself,⁵ the *Flat Glass* Court declared that the Supreme Court's *Matsushita* rule limiting the range of permissible inferences from ambiguous evidence in a conspiracy case was predicated upon two "important circumstances" present in *Matsushita*, but not in a horizontal *minimum* price fixing case such as *Flat Glass*. First, the plaintiff's theory of conspiracy was implausible. Second, permitting an inference of antitrust conspiracy in the circumstances in that case would have had the effect of deterring significant pro-competitive conduct—low-priced competition. This limitation on the application of the *Matsushita* standard, I believe, has not been adopted by any of the other circuits. While the Third Circuit did accept the fact that the *Matsushita* evidentiary rule could be applied absent the factual circumstances of that case, it appears to have regarded the absence of those circumstances as a reason to be more liberal in drawing conspiratorial inferences from ambiguous evidence.

My next concern is the Third Circuit's view of the nature of the "plus factors" which, when added to parallel pricing, justifies sending a parallel pricing conspiracy case to trial. One of the "plus factors" identified by the Third Circuit is whether the defendant had a motive to enter into a conspiracy. I believe that the law in most circuits is that motive is not a relevant factor. It doesn't tell you one thing or another about whether there is a conspiracy. The motivation for adopting competitors' price increases in a concentrated industry either could be conspiratorial or economically sensible. The same thing can be said about another "plus factor" identified by the Third Circuit: whether the defendant's conduct was contrary to its economic interests. *Flat Glass* involved a six-company industry where five companies had raised their prices. Is it contrary to the economic interests of the sixth company to follow suit? If it keeps its prices down it may gain some market share for a period of time, but in a concentrated industry chances are that the others will then bring their prices back down and the market share gain would disappear. In sum, I do not believe that either of these two factors are "plus factors," and indeed, the Third Circuit concludes by recognizing that they may indicate nothing more than conscious parallelism. Why, therefore, did the Court say that they were plus factors?

Another plus factor that the Court refers to is an amnesty request made by one of the competitors. According to the Third Circuit, the fact that one company sought leniency would indicate that there was a conspiracy. However, I question whether the fact that one competitor seeks leniency means that a conspiracy is in

fact in place. But the Third Circuit then goes even further, stating that when “the six firms act in parallel fashion and there is evidence that five of the firms entered into an agreement, it is reasonable to infer that the sixth firm acted consistent with the other firm’s actions because it was also a party to the agreement.” But if I were the president of the sixth company, and my five competitors had raised their prices, the fact that I followed suit has been looked upon by economists as a natural event, not a conspiratorial act. However, this Third Circuit panel apparently felt otherwise.

I should repeat that there was considerable evidence discussed in the *Flat Glass* decision that appear to support the Court’s conclusion that the case should have been sent to trial. My concern is the Court’s conceptual discussion about the *Matsushita* evidentiary standard and conduct that should be considered plus factors in determining whether a conscious parallelism case should be sent to trial.

I want to make one point concerning the *Empagran* decision.⁶ The defendant in a future case involving plaintiffs residing in foreign countries probably will want to get the issue of whether the injury was independent of what happened in U.S. commerce before the Court early, perhaps through a Rule 12(c) motion or an early Rule 56 motion (supported by appropriate affidavits). In particular, if a Rule 12(c) motion is not made or is unsuccessful, the defendant should try to obtain the right to discovery on the *Empagran* issue at the outset if the Court agrees. I presume that plaintiffs will argue that the *Empagran* issue is imbued in the entire case, and that it should be part of overall discovery.

Molly discussed the two government merger lawsuits against *Arch Coal*⁷ and *Oracle*.⁸ Actually, there was a third case that the government lost about the same time involving the acquisition of a 50% interest in a Kentucky milk processing company by Dairy Farmers of America.

I found two things striking about the *Arch Coal* decision. First, in addition to rejecting the FTC’s proposed narrow product market in the case, the Court found unpersuasive the subjective customer testimony that the merger *might* (rather than *would*) lead to anticompetitive effects. Second, while both federal antitrust enforcement agencies have in the past rejected unilateral attempts by merging parties to divest or otherwise attempt to remedy anticompetitive effects resulting from a merger, in *Arch Coal* the Court nevertheless accepted the merging parties’ unilateral decision to divest assets. The district court’s action might encourage future parties to a merger or acquisition to take similar unilateral steps.

As to the *Oracle* case, here too the Court rejected the government’s proposed relevant market definition, which the Court believed to gerrymander the market in

a manner that did not reflect actual market conditions. Additionally, here too the DOJ might have relied too heavily on customer testimony at the expense of evidence of other factors in defining the product market. While customer testimony can be important in shedding light on market definition, other evidence relevant to the issue should not be ignored.

It’s unlikely that the *Arch Coal* and *Oracle* decisions sound the death knell for customer testimony in merger cases. Such testimony should continue to be important in market definitions, as in *Oracle*, and in examining competitive effects, as in *Arch Coal*, but the government may have learned a few lessons in those two cases. For example, with respect to market definition, they may have to ensure that customers testify that they could not (rather than might not) use any other supplier’s product, and the government enforcers may have to obtain more cooperation from customers than they’ve done in the past. It is clear from these recent decisions, however, that merging parties do well when they can persuade customers of the competitive benefits of a proposed deal, and are able to attack opposing customer testimony as lacking antitrust significance.

MS. BOAST: I also think that those cases both reflect a sort of judicial—I’ll use the term hostility. That’s probably an overstatement. But the narrow market definitions that the government tends to use as the fulcrum of its cases, the courts are just not that comfortable with. They have a really hard time supporting them.

MR. SCHER: I will just mention a few other cases of significance. One is the *Stop ‘N Shop Supermarket* decision⁹ in the First Circuit by Chief Judge Boudin, who was a deputy antitrust chief at the DOJ. I think it should be read against the Ninth Circuit’s *Dagher* decision, because Judge Boudin also considered a joint venture involving different brands that continued to be marketed. He concluded that the venturers in that case—drug chains forming a closed consumers pharmaceutical network—lawfully could discuss the prices they were willing to charge for the products covered by the venture. So long as they only discussed those products and not for pricing of products outside of the venture, Judge Boudin concluded that such joint pricing activity was lawful.

The other interesting aspect of *Stop ‘N Shop* involves the discussion about exclusive dealing. That case involved a three-year exclusive dealing arrangement. Judge Boudin concluded that it passed rule of reason examination because there was less than 30-40% market foreclosure and market entry was easy. He added that if an exclusive dealing arrangement has a short term (I never thought that a three-year term is short), even when there is more than 40% market foreclosure, and even if market entry is difficult, the agreement generally should be found to be lawful.

There is a post-*Trinko* case I want to mention—the *Covad* case in the Eleventh Circuit.¹⁰ That Court made it very clear that a monopolist doesn't have to deal with a competitor unless there is a history of voluntary cooperation—not one forced on the monopolist, as in *Trinko*, by some statutory or regulatory requirements. Additionally, in dismissing the suit, the Court indicated that there has to be evidence revealing that a monopolist refused to deal with a competitor was intended to forgo short time profits for future anticompetitive benefits. It appears, therefore, that *Trinko* is making it very difficult for competitors to force monopolists to do business with them if they haven't done so in the past.

Finally, I'd like to say a few words about *Freedom Holdings* in the Second Circuit.¹¹ I should note that I represent a defendant in a similar case in California where the attorney general as well as cigarette manufacturers were sued. With all due respect, I believe Judge Winter, who usually is correct in antitrust matters, got it wrong in this instance. He characterized the tobacco industry Master Settlement Agreement with the states and implementing statutes as "hybrid" arrangements. Because they were hybrids, he concluded that active supervision of the pricing activities of the companies was required in order for the state action doctrine to protect their conduct from antitrust scrutiny.

Actually, a hybrid statute was defined by the Supreme Court in the *City of Berkeley* decision¹² to be one where a state gives private parties the authority to fix prices. Obviously, when private parties are given the authority to fix prices by the state, there has to be active supervision by the state for the state action doctrine to apply. But there was no authority given to the cigarette

companies to fix prices in the Master Settlement Agreement or implementing statutes. In other words, if there is evidence that the companies are fixing prices, they can be sued under the Sherman Act. Nevertheless, Judge Winter decided that there had to be active supervision by the state for the state action doctrine to apply. What's to supervise if the competitors are acting unilaterally? So I obviously have a problem with that decision.

I think we've used up all of our time except for questions.

MR. TUGANDER: Are there any other questions for Molly or Irv? I want to say thank you to Molly and Irv for their fine presentations.

Thank you.

Endnotes

1. *Daghlér v. Saudi Ref. Inc.*, 369 F.3d 1108 (9th Cir. 2004).
2. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350 (3d Cir. 2004), *cert. denied* (3/28/05).
3. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993).
4. *In re Petroleum Prod. Antitrust Litig.*, 906 F.2d 432 (9th Cir. 1990).
5. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1096 (3d Cir. 1999).
6. *Empagran, S.A. v. F. Hoffman-LaRoche, Ltd.*, 124 S. Ct. 2359 (2004).
7. *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).
8. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).
9. *Stop 'N Shop Supermarkets Co. v. Blue Cross & Blue Shield*, 373 F.3d 57 (1st Cir. 2004).
10. *Covad Comms. Co. v. BellSouth Corp.*, 374 F.3d 1044 (11th Cir. 2004).
11. *Freedom Holdings, Inc. v. Spitzer*, 363 F.3d 149 (2d Cir. 2004).
12. *Fisher v. City of Berkeley*, 475 U.S. 260, 268 (1986).

Noerr-Pennington Immunity for Settlements of Litigation

MS. GIFFORD: I am Meg Gifford. I'm the Chair of this panel.

This panel is addressing the question of the status of potentially anti-competitive settlements under *Noerr-Pennington*. It may sound like a very dry subject. However, I have been involved in a number of matters in which this has been a serious issue presettlement, negotiating and structuring how to even approach the question of a potentially anti-competitive settlement in private litigation or in litigation with a government agency, but particularly in private litigation. These days it raises all sorts of questions that probably most of us weren't even thinking about ten or fifteen years ago when the *Noerr-Pennington* doctrine seemed fairly straightforward as applied to litigation.

I think you will hear from today's panel that it is far from straightforward. That if you are involved in or contemplating a private settlement of the sort that we are going to talk about, that there are many, many subsidiary questions that you need to address before you can get into the question of what the substantive outline of your proposed settlement might look like.

I have three panelists who each have real experience in this area from different perspectives, and you will definitely hear some divergence of views and approaches from these three speakers.

Our first speaker is Jay Himes. Jay is Chief of the Antitrust Bureau of the Office of the New York State Attorney General, and he has held that position since April of 2001.

The bios of our speakers are in the materials. I'll refer you to the bios for more information. But Jay was one of the representatives of the states in the long-lasting intense negotiations that led to the settlement among Microsoft, the Department of Justice and nine states, including New York, which settlement, as you know, was approved in November of 2002.

Currently, Jay chairs the settling states' judgment enforcement effort. Jay is a member of the ABA and the Association of the Bar of the City of New York and their antitrust and litigation sections as well as of this Section.

The second speaker is Dave Donohoe. Dave is a partner in the Washington office of Akin Gump Strauss Hauer & Feld. And if you put together me and Dave and John Herfort who is here and Irv Scher who was here earlier, you have about half of the representatives of the group that litigated the infamous *Robinson-Patman* case brought by the FTC against major publishers some years ago. And Dave has enormous antitrust experience in both litigation

and counseling, and has in fact counseled clients and been involved in litigation on these immunity questions. He obtained dismissals of two private cases on the basis of the state action doctrine. I invited Dave on the panel when I came across something that he'd actually written about *Noerr-Pennington's* impact on settlements. There are very few published articles out there on this subject, and Dave has contributed to our understanding of this issue significantly.

And then John Delacourt from the FTC was supposed to be our first speaker and we hope that we get his technology going. John is Chief Antitrust Counsel in the FTC's Office of Policy Planning and previously served as Assistant Director of that office, and also has spent time in private practice on antitrust and IP issues.

John has served as a member of both the FTC *Noerr-Pennington* and state action task forces. So he obviously comes to us with a great deal of expertise. He also was a principal drafter of the Commission's successful amicus brief in *In re Buspirone* and played substantial roles in other significant FTC cases and analytic efforts.

Let me just take one minute before Jay begins speaking and give you some outline of what the issues are that we're looking at this morning.

When competitors sue each other, or when competitors sue a common defendant or are sued by a common plaintiff or group of plaintiffs, whether the lawsuit is entirely private or there is a government agency on one side, the fact that there are competitors involved in the lawsuit may result in a settlement of that lawsuit that may restrain trade in one way or another.

There are various ways you can imagine that a settlement or a settlement process itself can result in restraints of trade. There may be outright agreements not to compete that are embodied in a settlement for various reasons. And by the way, I should add that, obviously, what we're talking about is not restricted to cases which themselves are antitrust cases. IP cases, having nothing to do with antitrust issues, environmental cases, trade secrets cases—you can imagine the variety of commercial cases in which it is possible that a settlement might result in some restraint of trade because of the presence of competitors in that litigation.

An agreement on conditions of sale or how a product performs, for example, in an environmental case, might constitute a restraint on trade in a settlement. And the process of settlement itself, and this is where there are a lot of extremely dicey questions that have not been thor-

oughly explored, even in the literature that is out there—but that process itself may create restraints of trade, whether the process ultimately results in a settlement or not.

In some very difficult cases you may have a standstill agreement between the sides of the cases, and that standstill agreement might itself impact competition for some period of time in the industry at issue.

A difficult settlement may require an exchange of information among one side or both sides that otherwise we would not permit because of the competitive sensitivity of that information. And again, whether that results in a settlement or not, there is clearly a competitive question raised by that process.

You will hear our speakers talk about the parameters, what kinds of settlements and under what conditions might arguably be protected by *Noerr-Pennington*. I think you will hear that there is a general consensus that if you settle a case with anti-competitive restraints, no matter what the case looks like, and you simply embody it in a dismissal of the case and get it so-ordered, *Noerr-Pennington* protection is not going to attach. And my own view, from my experience, is that these days most private counsel who are involved in these sorts of cases understand that that is outside the parameters of *Noerr-Pennington*. Counseling is much more sophisticated these days on where you go next, and how do you get *Noerr-Pennington* protection.

But the panel discussion will address these situations, as well as some recent decisions that have held that an otherwise anti-competitive settlement reached with at least some government litigants is protected under *Noerr-Pennington*. And other cases have at least suggested that that may not be the case—Irv mentioned the *Freedom Holdings* case.

We will have presentations by each of our panelists, and I encourage them to ask questions of each other, and I hope that we will have some time at the end for at least a few questions from the audience.

I came prepared with some hypotheticals, which each of our panelists have looked at. We probably won't have time to address all of them, but we'll try to get at the least a few specific hypotheticals addressed so that you can get some guidance out of this panel as well as some intellectual stimulation.

Jay.

MR. HIMES: Having been shifted from last to first, I hope you will indulge me for just a minute.

Yesterday the Commercial and Federal Litigation Section gave Eliot Spitzer its Stanley Fuld Award for outstanding contributions. And the Attorney General had asked me to make the presentation of that award. So I

took that to be somewhat important, and I really did prepare for that. So I had a nice presentation for him, and as we were sitting down at lunch, Eliot leaned over to me and said be short. And that sort of killed yesterday.

I imagine I could give that presentation very nicely today, but I don't think that's really what this body is for. So you'll forgive me if my remarks are shorter than they otherwise might have been if I had known I was going first . . . be that as it may.

Let me start off by saying that I do have some difficulty with discussion of the notion of settlement agreements as *Noerr*-protected. It does seem to me that much of this discussion is really untethered from or at least peripheral to the considerations that give rise to the *Noerr* doctrine to begin with. Let me see if I can try to illustrate why I say that.

Let's assume for the moment that you have an antitrust settlement involving the DOJ or the FTC. First of all, the case law there is pretty clear that that settlement doesn't preclude non-parties from challenging the underlying conduct that has given rise to the case. That you know, if from no other decision but the Supreme Court's *American Stores* decision where a settlement by the FTC of a merger case was held not to bar in that instance the State of California from also challenging the very same transaction. And even more recently, Microsoft lost that argument when it tried to argue that the DOJ/state settlement barred the Court from considering additional remedies brought by the nonsettling states. So you have that doctrine out there to begin with.

Second, you also have case law that is pretty clear that a federal antitrust settlement doesn't preclude non-parties from challenging restraints arising under the settlement itself. That's because absent express authorization, federal officials simply lack power to immunize persons from the consequences of conduct that otherwise violates the antitrust laws. And that's something you can find if you look in the Supreme Court's BMI case and in other decisions. Likewise, the Supreme Court has said that states can't confer federal antitrust immunity simply by authorizing private parties to undertake what is otherwise unlawful conduct or indeed by declaring that conduct to be lawful. And that kind of case law has developed from the state action doctrine.

So if you add all of this up, it's not really very easy to see how *Noerr* somehow gives an antitrust pass to settlements. And I think it's not easy whether you're talking about settlements between private parties in a litigation or settlements between private parties and government officials.

So let's return to basics for a moment. The Supreme Court has recognized that resort to the court is *Noerr*-protected. And the idea there is that you want to afford an

unburdened access to the judicial branch comparable to that recognized for the legislative and executive branches. And frankly, *Noerr* in the antitrust context isn't very different from the access to the judicial branch that's recognized in a whole body of substantive law in this country. You know, it is considered protected First Amendment activity to have access to the court for redress of grievance, for petitions, that sort of thing. So that really isn't a very controversial proposition in general.

But when you get to the concept of settlement, I mean whatever settling a litigation may involve, it generally isn't driven by a desire to have the court resolve anything, other than whatever it takes to make the litigation go away. So in my view there is not really a great deal of "petitioning" to a government body going on when you settle a case. And I'll be more specific. If there wasn't a law in some contexts requiring approval by the court of a particular settlement, is there any real likelihood that litigants would invoke the authority of the court at all in connection with a settlement? I think rather not.

Now, I appreciate that we do indeed have bodies of law that involve the court in the settlement process. Class actions are the most common circumstance where judicial approval is required for settlement to take effect. But again, what the parties want there is more in the nature of ratification of the deal that they have struck and not really petitioning in the *Noerr* sense of that concept.

Furthermore, the approval process—and I think class actions are a pretty good example—the approval process doesn't really probe either the intent behind the settlement from a competitive point of view or the likely effects of a settlement from a competitive point of view deeply enough to be comfortable that the Court is reaching an informed judgment on whether or not the settlement offered by the parties is likely to have anti-competitive consequences. And that being the case, the argument for somehow making this settlement *Noerr*-protected doesn't seem to be terribly strong. Indeed, though recognizing the fact that the Supreme Court has said access to the courts is *Noerr*-protected, I'm not surprised that parties, and particularly defendants, want to use the fact of judicial involvement to get as much benefit from the settlement as they can. Certainly precluding future claims is a form of benefit, and arguing for *Noerr* protection is a potential means for accomplishing claim preclusion.

Now, when a government official is a party to the lawsuit, the case for affording *Noerr* protection seems stronger, at least at first blush. Resolving a dispute with the government sounds more like what petitioning is all about. On the other hand, it's not really why access to the courts is protected to begin with. Again, we protect that access because the courts are part of the government structure, its authority, that the citizenry is entitled to seek to invoke. And the character of the particular litigant isn't

really material at all to that consideration, be it government or private party.

That said though, at least where you have a settlement with government officials, it may well be appropriate to insulate from antitrust exposure conduct that the settlement requires the private party to take. In my view, something akin to the state action doctrine strikes me as a more direct way at getting at this sort of issue. Exactly how that doctrine is imported into settlements with federal officials is a little more difficult. But you do have an immunity concept there, and I think with refinements of that kind of doctrine, you can probably deal with those cases effectively.

That said, I am going to turn this over. I think today you can't really talk about ideas as being provocative. It's gotten to be sort of a bad word in the last couple of weeks. But I do hope we can have an intellectually liberated discourse.

MS. GIFFORD: Thank you, Jay. I would like to ask you a question before we move on to the next speaker. And I do want to recommend to everyone there are three excellent papers in the materials, papers that Dave and Jay have written and reprints of articles that John has written that delve into these subjects in great depth and I think will be very useful to you in understanding these issues. And I do suggest that you read them.

But Jay, you used the word "probing" I think, and I think you used this in your paper as well. You said settlements aren't driven, for the most part, by anything except the parties' desire to get as much of their deal okayed as possible. And that one of the deficiencies of the process here is that there may not be the right opportunity for the court to ask that probing question and really understand the competitive consequences of a settlement. And it has been asked I think by a number of people who commented on this issue, do we require that for *Noerr-Pennington* immunity to attach in the legislative or executive arenas? And if not, why should the judicial process be subject to any different standard?

MR. HIMES: Certainly, the legislative process is generally thought of as open. And you know, the *Noerr* case came out of a very open petitioning contest. I guess my point really is that courts are doing something different. They are resolving disputes between private parties, and their access to information tends to be limited to that which the parties give them or that which the settlement process creates here. And certainly, if you distinguish the settlement of a typical class action from the settlement of a DOJ civil antitrust case under the Tunney Act, you can see a big, big difference between the level of input that a court gets and the degree of probing that the court undertakes into the competitive impact of the settlement, that I think justifies a different approach to whether or not something becomes *Noerr*-protected.

MR. DONOHUE: Well, I think that you should do kind of a qualitative analysis of how deeply the—let's say the court is approving a settlement of a class action, would you take a look at it and say: Well, it is obvious that in this case the court did consider these various factors such as collateral effect on third parties and so forth. There are three cases at least that I've been able to find where in resolving and approving a class action settlement, the court considered antitrust questions and problems raised by third parties. In one case the court required that they modify the agreement. That was in the *Montgomery Realtors* case. So it looks as though, at least in some cases, the kind of probing or in-depth analysis is present, and in some cases I would quite agree, it's not present.

MR. HIMES: Well, there are also certainly circuit court decisions that establish it is not the responsibility of the settlement court to probe the antitrust consequences of a settlement agreement, except to the extent of determining whether there is an obvious per se violation. And it's going to be a pretty rare settlement agreement that raises that problem. That's number one.

Number two, I think that the settlement of a typical class action isn't likely to elicit the kind of adversarial context that really does contribute to the probing of the consequences of a settlement that I would think is essential, if you're going to try to give it some kind of *Noerr* protection.

And I think it's worth saying this as well. You talk about *Noerr* protection and the absence of *Noerr* protection. If you have *Noerr* protection, you've got an antitrust pass. If you don't have antitrust protection, you just have a claim. I mean, it doesn't mean that there is a violation of the antitrust laws. It just means you don't have a pass. And I think it's important to keep that in mind.

MR. DONOHUE: Well, would you draw a distinction in a situation where there has been an approval and so that now there is a certain course of conduct that the parties have agreed to and the court has placed its stamp of approval on? I can see where someone who didn't know about it when it took place could come in later and intervene and try to have it upset on the ground that it's hurting them competitively or somehow or other violates the antitrust laws. But what about somebody coming in and saying I want treble damages for what you've been doing for the last two years, when you've been basically obeying a court order.

MR. HIMES: I think it depends a great deal on the nature of the restraint. I think it depends on the process by which that case was settled. The party who is not involved in that case has a due process right to a certain claim. And I think it depends on whether the conduct is required by the settlement as opposed to simply consistent with the settlement. So I think there are a lot of factors operating there, and I don't think—let me back up a

second. Because there is a sort of notion here that I think is worth getting out on the table. *Noerr* is important. I mean, it does protect some things that we regard as important. The right to petition is constitutionally based, and I think it is important. At the same time, I don't think whether you confer *Noerr* immunity is sort of like looking at the Internal Revenue Code. And the idea is well, gee whiz, there are a lot of provisions there, and how can I craft my way around those provisions in some way to give my client an antitrust immunity bath. I think that's sort of the wrong way to look at the *Noerr* issue.

MR. DONOHUE: I guess I'm just concerned about a situation where there has been a resolution of a dispute; it is a class action, so that means the court has to look at it, make some evaluation and let's say the court issues an order saying henceforth you shall do this. I then say to my client, okay, that's what you have to do now, because the court has ordered you to do it; even though it is a consent order, you are now required to do that. But I have to tell you also that if somebody else comes along and complains about it, you're going to be liable for treble damages for having complied with something you are required to do. This is a hateful situation, a dilemma: as a private practitioner, telling my client, okay, you're going to have to do this, but by the way, you may very well end up in trouble for doing it.

MR. HIMES: Well, that certainly argues in favor of a lot of caution to begin with. But I've got to say the dilemma between contempt and subsequent liability for treble damages seems to me interesting. I'm not sure how real it is. I don't think there has ever been a case. Were that to arise, it does seem to me that you probably want to ask the question—and I would suspect it would come up in the contempt court—which court was in a better position to assess the antitrust consequences of the conduct: the subsequent court in which treble damages, I gather, are imposed, or the settlement court? And you might really conclude that the settlement court was not in as good a position to assess anti-competitive consequences, and therefore, you could well recognize a defense in the nature of necessity—compliance with the judicial mandate of the treble damage court as a basis for defending contempt. But it has never happened, so we're really off in a very theoretical world.

MS. GIFFORD: Dave, perhaps you could proceed with the rest of your remarks, which you certainly foreshadowed here.

MR. DONOHUE: Yes, I think there is some difference of opinion here, at least on this issue. Because I am looking at it from the standpoint of somebody who is counseling a client as to what you can do and what the relative risks are. Generally, the advice that I give to my clients is that if there is a court order telling you to do something, you probably should do it. And that's certainly I think pretty safe.

I must confess, as I sit up here that a lot of what we are talking about is my own fault, because I was the counsel for the City of Lafayette in the *Lafayette* state action case. And if we had been able to get a couple of votes for, one way or the other, a lot of these questions I think would have gone away.

But I think that what we have been talking about here is probably the essence of this whole issue. And that is, I guess, parties to a lawsuit can reach a settlement between themselves, and as long as they don't hurt anybody else, this issue is not going to come up. But all of these cases that we have been talking about, all of the ones that I have looked at tend to involve the situation where the parties say, okay, I'll give you \$40 million and you go away or whatever it is, and that's okay. But some third party would come along and say, just a second. That now results in price-fixing, and I'm paying the cost of that, and I was not a party to it, and so I should not have to put up with it.

An interesting thing, one of the first cases I really remember looking at was the *New Mexico Natural Gas* case, which is only a district court opinion. But I think a lot of people look at it and say that's a bellwether case. It stands for the proposition that you can't get together and settle a case and then have a ministerial stamp of approval from the court and hope that that's going to give you either a state action or a *Noerr-Pennington* immunity to it. To begin with, they were complaining in that federal court about the settlement of a state court action. If you go back and look at the underlying state court action, you'll see that in fact the major party in that case was on both sides of the dispute. There were a number of parties involved, but basically it was one big party who was on both sides. So it smelled a lot, I think, to the district court in that case as a collusive settlement. So that is a case which I think illustrates that bad cases make really bad law.

On the other hand, I think it is now pretty well established that a mere ministerial act on the part of the court—we can dispute about the class action approval part—but a mere ministerial act of saying “so ordered” or something like that is not going to get you any kind of umbrella of protection.

As I was listening here, a memory came back to me of a plaintiff's case that I had probably about 30 years ago where I represented a ready-mix concrete company that was competing with one very large integrated ready-mix concrete company who decided that they were going to take over all the business. And so at that time I think a cubic yard of concrete sold for about \$14. That shows how long ago it was. And they dropped the price down to about \$8 and started winning the bid on every single job. They were clearly selling below cost. They had gotten to a point where in a three-month period they had about a 45 percent share of the market. So we sued them for predato-

ry pricing and an attempt to monopolize. When we had the first status conference with the judge and the judge looked at the papers and so forth, and he said you know, this seems to me like a situation that could be very easily handled. He turned to the defendant and he says: Wouldn't you be willing to raise your price to about 12 or 13 dollars or something like that? And the defendant's lawyer was aghast. He said Your Honor, I can't do that. He said, if I were to do that, as a way of settling this case, it would be a violation of the antitrust laws. And the district judge said not if I order you to. He changed his mind a couple days later and didn't do it.

But that was the first time. I was a very young lawyer, and I said this is something that probably comes up all the time. And in handling regulatory matters in Washington in rate cases and things like that, it comes up about three or four times a year. There are some special situations that we've referred to in the papers here involving patents, and that's still a very, very unsettled area of the law. I assume that fairly soon the Supreme Court will get a hold of it and straighten that out. But there is at least one circuit that says that if you have a private settlement of a patent infringement litigation which results in a restraint of trade, such as somebody gets out of the market or agrees not to do something for a period of time, that that is still a protected activity, so long as the contours of the settlement lie within, as the court says, the exclusionary potential of the patent.

Some other circuits have said no, you can't do that. It is the same as any other litigation settlement: just because it is litigation doesn't give you any special privileges. But you know, it is kind of an interesting issue, because you have to say well, the whole nature of a patent dispute, and probably of any intellectual property dispute, the whole nature of it is that there is an exclusionary right. And if the whole essence of the dispute is the extent and/or the terms and conditions under which this exclusionary right will be exercised, well, then how in the heck can you settle it? And that would mean then that perhaps all patent litigations would have to be litigated to a final judgment.

As I say, I hope that at some point soon the Supreme Court will take that up and straighten it out. Because with the increasing significance of IP and IP disputes, that kind of issue is going to come up I think more and more often.

To shift gears a little bit, in my paper I also talk about another sort of probably unrelated issue, but one that I think is important. And that is, suppose you have a bunch of defendants in a case, and they get together and they say let's make a settlement. Let's offer a settlement to the plaintiff or to the plaintiff class and say that what we will do in order to fix things in the future is we will do this. Now this may be a problem. But the question, the first question is, is it an antitrust violation for a bunch of competitors to get together and agree to offer a particular par-

allel course of conduct? And there are a number of decisions that say that this type of joint action is an outgrowth or a product of the joint defense privilege, that if you've got a bunch of people who were stuck together on the same level of the caption of the case, that it can't be an antitrust violation for them to get together and say here is how we are going to find our way out of it. Here is a joint settlement proposal that we should put forward. And that's one rationale that's often justified. And I also mention in my paper that it might actually be justified under *Copperweld*. Because the *Copperweld* intra-enterprise conspiracy rationale is that if there is an expectation that people are going to act independently and then that is defeated by a conspiracy, that that creates an actionable conspiracy. It doesn't happen when there is a parent and a subsidiary, because nobody expects that they are going to act independently of one another. And I simply suggest that that may be another basis for justifying the joint action in attempting to settle a case: once the defendants are kind of stuck together by the choice of the plaintiff, that makes them a single entity incapable of conspiring.

MR. HIMES: David, the *Copperweld* idea is intriguing. I thought part of *Copperweld* also turned on the fact that there was economic integration, a single economic actor. Where do you find that in the joint settlement idea?

MR. DONOHUE: Well, I'm not sure that—to begin with, *Copperweld* depends on economic integration. Under the older cases, the intra-enterprise conspiracy cases that led up to *Copperweld*, frequently the courts were making this evaluation of whether you had directors in common, whether you held them out as being competitors and so forth and so on. I think all of that kind of fact-intensive inquiry into how they carried on their business, I think all that went out the window with *Copperweld*. But even if you did want to do a qualitative analysis, it seems to me that once you have as a plaintiff chosen to treat all these people as members of a single conspiracy, that it's not, as the Supreme Court said, it's not going to be a sudden change from what you would have expected. You would pretty much anticipate that they are going to cooperate in trying to win the case. And that's the joint defense privilege. And as I say, the courts have said that a part of the joint defense privilege is that they have the right to cooperate, even in proposing a resolution of the case.

But I don't really think that post-*Copperweld* that there is any need any more to do an inquiry as to the extent of economic integration and so forth.

Now, I am actually working on an article right now on the subject of the issue about how much ownership do you have to have in order to get a *Copperweld* immunity. Some courts say it is 50.1 percent, and some courts said it has to be everything except perhaps a *de minimis*. Some have said 100 percent. It is a very interesting issue. Because when you look at the way the courts have treated

stock investments in Section 7 context, you don't have to have anything like 50.1 percent or anything like that to trigger the assumption that there is going to be economic influence over the behavior of the company whose stock you own.

MS. GIFFORD: Dave, I would like to ask you a question about the joint defense issue you were discussing a moment ago. I think the logical consequence of your argument on the joint defense privilege as impacted by *Noerr-Pennington* is that a joint refusal to negotiate or a joint proposal—and of course those are not mutually exclusive in a litigation—is going to result in a process, and that process I take it you would say is itself covered by *Noerr-Pennington* as incidental to the petitioning right embodied in litigation. Is that correct?

MR. DONOHUE: Yes, I think that's how the chain of the argument runs.

MS. GIFFORD: Okay, so for example, in that process there might be, as I had mentioned earlier, an exchange of confidential information among parties on one side of a case who need to discuss their product specifications with each other in order to defend against some product liability or environmental or other similar claims from the plaintiff. And is it your argument that that exchange of information, that process is part of those incidental activities and therefore also should be covered by *Noerr-Pennington*?

MR. DONOHUE: Yes, I think it would. Although I think most cautious defense counsel try to avoid that, and they will only go to that extent if it is the only way that you can get the job done. But typically, I think what will happen is that you've got an economist or that you'll have your economist be the funnel through which that kind of information is exchanged. And I would say that most people that I have worked with would say, yes, it's all right, but it is kind of a last resort. And by the way, the businessmen are not particularly crazy about sharing their information with their competitors either. So they join in that belief that you will only do that as a last resort. But I don't see any reason logically why you would not be covered by the joint defense privilege.

MS. GIFFORD: And if that is correct, I also take it that *Noerr-Pennington* privilege continues to apply, even if that settlement process fails and does not result in a successful settlement; isn't that inherent in the concept that we are talking about, which comes from the Columbia Pictures case?

MR. DONOHUE: Yes, I think that that is right. And again, I think it is logical. It basically means that since you're all in the same boat together, that you have a right as part of your—and I think it arises from the petitioning right, you have a right to collaborate because you have this common interest.

MR. HIMES: And so could you exchange all of the cost and marketing information among all of these involuntarily joined defendants and therefore agree to a single price that would be offered to sell a product going forward?

MR. DONOHOE: No.

MR. HIMES: Isn't that logically where we get to?

MR. DONOHOE: No, I don't think so. I think that even the most aggressive lawyer would say that that would be pushing it a little bit.

MR. HIMES: I'm glad to hear that.

MS. GIFFORD: I want to get to John Delacourt. But I just have one more question, Dave, for you.

There is this language in the cases to which you referred and the *Nexis* case is one of them; and the pharmaceutical patent cases use this sort of language too. And that is that *Noerr-Pennington* protection is not available where in litigation what is sought or in the cases of a patent dispute, not in litigation, but in administrative agency action, but where what is sought is just a ministerial act by the government. And in a litigation context, that I think we would all agree means a so-ordered settlement. And dismissal of course is just a ministerial act. But the other language that has been used to illustrate the other end of the spectrum is this concept of genuine approval by the court. Can you give us just a brief summary of what you think would be involved in genuine approval; what's needed for that?

MR. DONOHOE: Well, that's why when Jay and I were discussing before the problem that I have with, for instance, ruling out a class action approval, there are some courts that will approve a class action no matter what it says, just to get rid of the case. And there are others who are extremely meticulous and even insist on a lot of publications to people who are not even members of the class that will be advised that this is what is in the works.

So I think there is a qualitative issue, and I also think that part of the—there is another question, which is if there is an agreement which is made and which is approved, are there teeth in it insofar as being able to go back to the court or to the agency and get some kind of remedy? Because that is what creates what I was talking about before, which is at least the theoretical dilemma, where you have to decide whether you're going to obey the court order or the agency order, or whether you're going to risk some antitrust exposure to third parties.

I would say when you look for example at the *New Mexico* case, A) I think it was a put-up job to begin with, and B) it was all just kind of a so-ordered with no inquiry whatsoever. I guess another area that you could look at would be the DOJ civil injunctive case that's settled and is then subject to the Tunney Act requirements in terms of

being on the table for public comment for a long period of time. And then finally there is some range of discretion on the part of the court in terms of the standards that he has to use in approving it. That is a lot more, in my mind, than a ministerial act. So one end of the spectrum I guess would be perhaps the Tunney Act, and the other would be like the *New Mexico* decision.

MS. GIFFORD: John. We regret that technology has failed, and John is not going to be able to display his slides. I hope, John, that's not going to foul you up too much.

MR. DELACOURT: Well, I'll go with the low-tech version, so I can still proceed.

I was a little concerned that when we shook up the order that I wouldn't have anything left to say, but I think it's fair to say that there is still a lot to be covered.

David has provided me with a nice segue by saying at one end of the spectrum there is the *New Mexico* sort of settlement, when there is no involvement by the court, and at the other end of the spectrum we have a Tunney Act sort of situation. Elaborating on that spectrum is what I want to use my remarks today to do. I want to talk about three particular approaches to *Noerr* treatment of settlements that one might possibly take.

Before I do that I will give the usual disclaimer that my remarks today reflect my own views and not necessarily those of the FTC or any individual Commissioner.

Before I get to the three actual approaches, I wanted to offer some preliminary comments, just to clarify a few things. The first subject I wanted to address is the FTC's *Noerr-Pennington* task force, just to clear up a few misnomers about that. The task force was convened for the purpose of re-examining the *Noerr* doctrine to address concerns that the doctrine had been expanded unduly, and in ways that were no longer consistent with its underlying objectives. But I should clarify that the task force has not advocated repeal of the *Noerr* doctrine. The *Noerr* doctrine protects important interests. I should also emphasize that the proposed clarifications that the task force has come forward with reflect the general rule that exemptions are to be construed narrowly. So whether you're talking about *Noerr-Pennington* or state action or some statutory exemption, the general rule is that they are to be construed narrowly.

Finally, I would like to reiterate a point that Jay made, to put things in perspective. I think there is a notion out there in the Bar that unless settlements are subject to *Noerr-Pennington* protection, then all of a sudden we are going to have a bunch of parties settling who are right away subject to antitrust liability. I think that's not right. I think a finding of no *Noerr* protection does not necessarily equal antitrust liability.

There are two separate steps in the analysis. The first is the exemption analysis, and the second and more important is the finding of the underlying antitrust violation. So we are really only talking about a very small subset of settlements that raise antitrust concerns in the first place, where *Noerr* would even be an issue.

Second, I would like to draw some distinctions between *Noerr* issues that are unique to the context of settlements of litigation, and those that are not, but may nevertheless arise in this context. It's first worth reiterating that when we are talking about *Noerr* in the settlement context, *Noerr* protects petitioning, which is petitioning of the government. So the key portion of the analysis focuses on what the government actor is doing in a situation. How are they involved? In this situation, the relevant government actor is the court. So the *Noerr* analysis is going to focus on the level of involvement of the court.

There are two frequently recurring issues that also raise significant antitrust concerns but are not necessarily related to this *Noerr* analysis. The first, which Jay brought up as well, is when one of the parties to the settlement negotiation is a government actor. Think about the situation in the antitrust context, where you have on one side of the negotiating table the Department of Justice or the Federal Trade Commission, and on the other side you have a private firm. Now, that is definitely going to raise a *Noerr* issue. Those communications may involve petitioning, but that's something that's going to arise whenever you have an agreement between a government actor and a private party. That is not unique to the settlement context, which more appropriately focuses on the involvement of the court.

A second point is that there has been some discussion about whether we need to have a separate and unique *Noerr* analysis when the underlying settlement involves significant intellectual property rights. And I think that's not right. Again, that's blending the two separate steps in the analysis. The first step is the exemption analysis, and then the second step is the finding of an underlying antitrust claim, and that's where the fact that the settlement involved IP rights may come into play. But that doesn't have anything to do with the *Noerr-Pennington* analysis.

So with those kind of disclaimers out of the way, I'll get onto the three potential approaches that I mentioned earlier, which I think do cover the full range of the spectrum that David spoke about. I think when we are talking about potential approaches to *Noerr* in the settlement of litigation context, I don't think any of you will be surprised to learn there are three potential approaches. The ones I'm describing will be self-evident.

The first approach is that *Noerr* applies to *all* settlements of litigation. Approach number two would be that *Noerr* applies to *no* settlements of litigation. And then approach number three would be, of course, the most

complicated potential approach: that there is some subset of settlements that are going to be subject to *Noerr* and the remainder will not.

So let me start with approach number one, which is that all settlements of litigation will be subject to *Noerr* protection. I think this is the easiest approach to address, because it is clear already with existing case law that this is *not* the case. Protected petitioning must be directed to the government. *Noerr* is rooted in the First Amendment right to petition the government. And it's clear that there are vast categories of settlements that don't satisfy this criteria. The most obvious one being the case where two parties are involved in litigation, they enter into a settlement, and then they file a stipulated withdrawal with the court. Now it is clear under the Federal Rules of Civil Procedure that such a stipulated withdrawal does not require an order by the court. As a result, this is just a unilateral action by the parties. It doesn't involve the court in any way. Therefore, there is no petitioning and *Noerr* cannot apply. So that's approach number one.

Approach number two is that *Noerr* does not apply to *any* settlements of litigation. I think it's fair to say that, while this is not the consensus position, we do see some courts moving in this direction. I think the best example right now is perhaps the treatment of the Tobacco Master Settlement Agreement. As all of you are aware, there was major litigation by the state attorneys general in an effort to recover the healthcare costs imposed on the states by the major tobacco manufacturers. Those cases were ultimately resolved by settlement. Subsequently, there was a number of antitrust suits brought challenging the terms of that settlement alleging that, because of the strict market share caps that were contained in the settlement, the settlement promoted and facilitated price-fixing. So far there are two court of appeals decisions that have addressed antitrust exemptions and how they might apply to this settlement, and they both took very different approaches.

The first was the *Bedell* case in the Third Circuit. The question there was whether the *Noerr* doctrine applies to a request for settlement. So, when the tobacco manufacturers went to the court and requested this settlement, was that petitioning activity protected by *Noerr*? More recently, in the Second Circuit, there was the *Freedom Holdings* case, and the question here was slightly different. That court was not focused on the request for the settlement, which involved petitioning, but rather on the price-fixing activity that took place pursuant to the settlement. So not the request for the settlement, but rather conduct pursuant to the settlement. The Court thus held that that issue was more properly addressed by application of the state action doctrine, rather than the *Noerr* doctrine. So we see this important distinction being drawn between the request for the settlement, which is the petitioning, and the conduct pursuant to the settlement, which must be addressed under a separate antitrust exemption.

There are others in the audience and on the panel more familiar with the tobacco litigation than myself who can quickly point out this is a dramatic simplification of what went on. While it is fair to say this is a helpful framework to think about, we probably won't see prospective application of these particular cases in that way, just because there was so much else going on there that had influence on the exemption analysis.

First, there was this dual level of *Noerr* analysis I described earlier. In addition to the fact that this was a settlement of litigation, you had the fact that the negotiations took place between a government actor, in this case the state AGs, and a private firm. So there were two levels to the *Noerr* analysis.

Second, although this was a settlement of litigation, one term of the agreement was that the settlement had to be enacted as state law in all of the affected jurisdictions. So that complicates the analysis quite a bit as well.

I think one way to simplify this analysis and make it clearer would be to analogize settlements of litigation to what happens in the legislative context. It is clear when we are in the legislative context that there are two separate steps. Step number one is requesting legislation, and that involves petitioning, and it is clear that this would either be covered or not covered by *Noerr*, but at least addressed under the *Noerr* doctrine. Step number two is conduct pursuant to that legislation, and it is clear that this would be addressed pursuant to the state action doctrine.

Again, to make this point even clearer, I would use the example of the FTC's recent intrastate movers cases. In those cases, the movers were accused of engaging in collective ratemaking in conformity with state statutes, and the FTC brought suit, asserting that this collective ratemaking was not being actively supervised by the state and therefore was not exempt under the state action doctrine. Again, you can see the distinction being drawn. If the *Noerr* doctrine had been the applicable antitrust exemption, we wouldn't have reached the level of talking about state action. Because, at some point prior to the litigation, the parties must have petitioned the state government and obtained the legislation that authorized them to engage in collective ratemaking.

Therefore I think it is illogical, and inconsistent with principles of federalism, to assume that the exemption analysis ends with step number one, that is the *Noerr* step, in the litigation settlement context. If you apply this approach in the context of settlements of litigation, you would essentially be authorizing a state court to create a restraint of trade and then walk away from it without any obligation to engage in active supervision. In contrast, a state legislature would be prohibited from doing the same thing. So you'd be giving a state court greater authority than a state legislature, which is certainly inconsistent

with our traditional understandings of who represents the state itself for purpose of a federalism analysis.

Now I'll move on quickly to approach number three. Approach number three, of course, involves drawing a line and saying that some settlements of litigation are subject to the *Noerr* doctrine and others are not. I think there is a broad consensus in favor of this approach right now. This is the direction in which most courts seem to be headed. There are really two means that one could use to distinguish those settlements that are subject to *Noerr* from those that are not. One would be a case-by-case determination, and while this would be the most precise approach, there are a number of problems resulting from it. Essentially, this would entail the antitrust court reviewing the work of the settlement court and determining whether that court had been sufficiently involved to trigger *Noerr*. So in certain instances where a court merely signed off on a private agreement, that probably wouldn't be enough. In other instances, where a court pressured the parties to settle or was engaged in drafting settlement language, maybe that would be enough. The problem here is that it really results in what I've termed an *Omni* problem, and that's a reference to the Supreme Court's decision in *City of Columbia v. Omni Outdoor Advertising*, in which the Court cautioned that attempting to deconstruct the governmental process is something that antitrust courts, reviewing courts should avoid. That's essentially what you would be doing here. The antitrust court would be second-guessing a settlement court and trying to evaluate whether that court had done enough work.

A second and more administrable approach would be to adopt a bright-line rule. The problem here is the same problem that always accompanies bright lines: there is no agreement on where to draw it, and depending on where you draw it, you may end up with underinclusiveness or overinclusiveness. Let me quickly suggest one bright line that might be promising and useful. That would be to state a rule that *Noerr* applies only where the court is under an express statutory obligation to review a settlement. I think the two best examples have already been mentioned. One would be in the antitrust consent decree scenario, where a court is required by the Tunney Act to conduct a review to determine whether the settlement is in the public interest. And the second would be the class action context, where a court is under an obligation to review the settlement to determine whether it is "fair, reasonable, and adequate."

So essentially, you would be avoiding the problem of second-guessing the settlement court. Rather than getting into an analysis of how much work that court did, you would instead look to the statute and say: Was the court obligated to do a review of the settlement or was it not?, and determine the *Noerr* issue using that analysis.

That being said, I think there are still two significant problems with this approach. The first is a legal problem.

And that is that this approach does not recognize the legally significant distinction between requesting a settlement and conduct pursuant to a settlement. With respect to that particular legal issue, I think the second approach, which I've described earlier, is a more analytically consistent framework.

Now, in addition to the legal problem, there is a practical or policy problem. The nature of that problem is going to depend on the standard used by the reviewing court. There are really two approaches that a reviewing court can take. One is to conduct a Tunney Act-style antitrust review. This is the approach that will be the most useful in protecting competition. You are going to have input from consumers; you are going to potentially have input from competitors; and a lot of market analysis. All of that is going to be very useful. The problem is that this really deprives both the parties and the court of one of the primary benefits of settlement, which is a quick and inexpensive resolution of litigation. If you've got to go through this expensive Tunney Act review, even in a non-antitrust case, that is going to make settlement an unattractive option. The alternative would be to use a non-antitrust standard. Just for ease of use, I will again use the class action standard of whether settlement is "fair, reasonable, and adequate." Now the analysis here may be quicker than under the Tunney Act and less burdensome, but I think you can see right away the problem with using the class action standard of "fairness, reasonableness and adequacy" is that it focuses on whether the settlement is appropriate for the class members. It doesn't say anything about consumers, and doesn't say anything about competition. So I think by asking the wrong question and applying the wrong standard we really do very little in the way of protecting competition.

To summarize. I think that courts right now are more inclined to move in the direction of option number three, which would be to engage in some sort of analysis of the level of involvement by the court. However, I think that option number two—which provides that *Noerr* is not applicable to any settlement of litigation, given that *Noerr* applies to the request for the settlement but not to conduct pursuant to the settlement—ultimately provides a more analytically consistent framework.

MS. GIFFORD: Thank you, John.

John, you made a point about the application of *Noerr* to the petitioning aspect of the settlement process and the application of the state action doctrine to what you've said in your outline is—to get your language right—conduct pursuant to a settlement. I think Jay asserts in his paper that that dichotomy is not an approach that courts have so far tended to follow. While it has logical appeal and a logical basis, it's not clear how that distinction, which seems to limit the application of *Noerr-Pennington* beyond what courts have so far been willing to do, is based on the underlying rationale for *Noerr* in the first

place, and primarily on the First Amendment basis for *Noerr*. Can you address that issue?

MR. DELACOURT: Well, I think the First Amendment concern is explained by looking at the way that the *Noerr-Pennington* doctrine and the state action doctrine interact with one another. They are really flip sides: *Noerr* protects the right to ask government to enact a restraint of trade, and the state action doctrine authorizes the government to go forward and restrain trade in the manner that the parties have requested. So I think it is completely consistent with that relationship between *Noerr* and state action to hold that, in the settlement context, all that *Noerr* is protecting is the parties' right to ask for a settlement. I think, in that sense, it fully vindicates the parties' First Amendment concerns, in that what the First Amendment is really directed towards is providing access to government. There is no concern here that the parties would be prevented from making their concerns known to the court. The concern would arise, from an antitrust perspective, when there is conduct pursuant to a settlement, and I would submit that's subject to a separate sort of analysis.

MS. GIFFORD: Jay or Dave, do you want to comment on that or anything else that John has said here?

MR. DONOHOE: Let's see if I can get this before Jay gets to the mike. Just listening to all the analysis and some of the hypotheticals, I just have a concern that everybody in this room knows how important, how critical, indeed how essential settlement of litigation is to the litigation process. You could end up, as I suggested before, with a rule that all patent infringement cases have to be tried to a final judgment, because otherwise you are running a risk that any consensual compromise is going to violate the antitrust laws. But if we end up erecting barriers to settlement, then the whole system is going to break down. So I guess I just have a tendency to think as we talk about protecting competition and everything else, as we go through this, obviously the state action doctrine says once the state decides it is going to displace competition to some extent, that's the end of it.

Yes, I think it is important to protect competition. But as a policy matter, I think that one of the principal, one of the very main factors that has to be taken into consideration is that you don't want to make it impossible or hopelessly difficult to resolve disputes by settlement and make them all triable all the way through the Supreme Court.

MR. HIMES: Let me just speak to that on the patent parade of horrors. The patent law has obviously been around since the nation was created. The problem of having to try all patent cases to conclusion hasn't seemed to have interfered seriously with the development of the nation both from an innovative and an economic point of view. I don't think that's a real concern ultimately. The issue of settling patent cases is to be sure a difficult one. And the circuits tend to be split in the Hatch-Waxman

area, but that's a very intensely defined problem. The Hatch-Waxman statute is a difficult one. And the settlement agreements the parties come to there have some very fine points to them. The cases, I think, if you look at the *Cardizem* and compare it to the *Hytrin* case turn on some really very different kinds of provisions. The *Hytrin* case is the one that Meg alluded to earlier, where the Eleventh Circuit held there was no per se violation in that particular case. Very interesting, because you should go back then and look at the District Court's decision of three weeks ago. Because the District Court then on remand decided summary judgment motions and came out saying: Wait, that once it did an analysis, that indeed, the settlement agreement there should be subject to per se treatment, and the District Court thinks that it is proceeding under a framework basically set up by the Eleventh Circuit.

It is a very difficult area. I don't think we should necessarily use that particular problem as driving all of the analysis of where the *Noerr* doctrine protects settlements and where it doesn't. I think that's just a very rarefied problem.

MR. DELACOURT: Well, I would add, with all due respect to David's concern, I think it is a bit of a red herring to state that unless we have greater *Noerr-Pennington* protection for settlements, all patent cases will have to be litigated to conclusion, and we will never be able to have another settlement. I think it's true, again, this is going back to the misnomer that unless you have *Noerr* protection, all settlements are suddenly going to automatically result in antitrust violations, and I just don't think that's right.

I think it is certainly true that if you have a settlement that deals with significant intellectual property rights, that's going to raise antitrust concerns. But I think the antitrust bar and private industry have been able to deal with that concern. Outside of the litigation context, when we are talking about patent licensing taking place not as a settlement of litigation but just as a standard agreement between two rival firms, there is a whole body of law out there regarding how to avoid antitrust concerns when negotiating such an agreement. I think it is a bit of a misnomer to say that unless a court can resolve all these issues and give the blessing of *Noerr-Pennington* protection, we are up a creek. I think, in fact, a more promising approach would be for parties to such settlements to seek the sage antitrust advice of their lawyers at Akin Gump. [Laughter.]

MR. DONOHOE: Well, I'm certainly not going to disagree with that proposition. [Laughter.]

MS. GIFFORD: I would like to wrap this up by proposing the following question. And this is one of the hypotheticals that I asked each of our panelists to take a look at. I'm not going to give it to you in as much detail

as they have. They have some more information that you, the audience, won't have.

Let's take a case where there are a number of firms that manufacture a particular product, and the product is purchased by both government purchasers and private companies, and they use the product in systems that provide some basic services to consumers, to residents of municipalities in various areas. A number of the competitors, three of them, have very large collective market share, about 65 percent, and there are four other firms that have roughly equal shares, smaller competitors. The larger firms have a real technology advantage, or at least they have used technology much more in their product. The four smaller firms are still in the market because they compete on price. And while technology is important to some purchasers, it's not so important as to override the nice price that the four smaller firms continue to offer.

There is a state law that says there is a certain ingredient that's used in the manufacturing of all of these products that is generally recognized at certain levels to be harmful to humans. And there is a state law that says where a product violates state environmental law and causes harm to individuals that anybody can sue. So a private environmental organization has sued all of these firms to say your product violates the law and you have to remove it from the market or do other things to the product.

The AG is not involved here. The defendants offer to negotiate a settlement, and they disclose some information to each other about product technology and related information. The proposed settlement provides that the manufacturers, once one of them introduces a new model of the product that doesn't violate the environmental laws, that doesn't contain the bad substance or doesn't let the bad substance into the system so it gets to consumers, that once that happens, no more than two years from that date, none of the manufacturers will be selling their old products. But it doesn't mean, of course, that every one of these other companies is actually going to have a product by that two-year period. It just means that none of them will sell the old products. All of the sellers are going to create a pool of money based on the sales of their old and new products that will be paid to any sellers who don't have a qualifying product at that point, and it will be continued to be paid to those firms, those non-qualifying firms until each of them develops a new product.

I would like to hear just the brief comments of each of the panelists. The settlement also specifies product performance standards, rather than saying you can't have that ingredient in your product.

Now, I think first we should stipulate that this may not in fact be an antitrust violation. It may not be an unreasonable restraint of trade. It may not. But I think we should also stipulate that the possibility of an antitrust

claim against these manufacturers is a real one, by some purchasers who were, of course, not involved in suing in the first place. And that this is going to raise prices. Who would like to start?

MR. HIMES: I think the answer is yes.

MS. GIFFORD: No, I asked for a comment.

MR. DELACOURT: Well, I guess my comment would be that I feel a bit like I'm rewriting the hypothetical. Anyway, my comment would be that, really, the key to the *Noerr* analysis would be the level to which the court is involved in these various negotiations. You've provided a lot of information about the nature of the agreement and potential antitrust concerns, but I think almost all of the information provided goes to the underlying antitrust claim. So I think determining whether such a situation would warrant *Noerr* protection is pretty much impossible to do without knowing more about how the court was involved.

MR. HIMES: I would say that I don't think that raises a *Noerr* issue. Period. You know, you want to settle it that way, you go settle it that way. I think it's fully exposed to an antitrust review, to an agency or a private party looking at that kind of arrangement, and deciding whether or not it is an antitrust violation. I don't see any petitioning of the government involved there on the hypothetical that you've raised. You want to say go back to the court and get approval of it, I don't think it would change my assessment.

MS. GIFFORD: Let me throw in the possibility that the parties, the defendants decide that they are actually going to submit this, with the plaintiff's agreement, on notice to the court and will actually ask the court to make findings and invite the court to request comment, use an expert or do whatever else the court thinks is necessary to analyze the potential competitive aspects. Would that affect the *Noerr* analysis?

MR. DELACOURT: In my view, I guess that could affect the *Noerr* analysis. But the bigger concern would be whether that's an appropriate role for a court. I mean, you are asking a court to take this in and do some sort of independent antitrust analysis and then ask for comments. I don't think that's what courts are generally in the business of doing. They are generally in the business of adjudicating cases where there are controversies between adversaries, not negotiating whether a particular agreement is in the public interest.

So my comment would be that, if a party wants to have an independent analysis and some sort of determi-

nation by a government entity that will serve as a blessing for their agreement, I would suggest that a more appropriate vehicle might be to seek a business review letter from the Department of Justice.

MS. GIFFORD: Dave.

MR. DONOHOE: Well, that was one thing that occurred to me. To be prudent you would probably want to take something like that and see if you could get a business review letter.

On the other hand, I must say that as I mentioned before, I was able to find three cases where courts in reviewing class action settlements listened to complaints by third parties about the possible anti-competitive effect. In one of the cases—can't remember which one it was—the court refused to approve the settlement. So there are courts who are willing to make those kinds of determinations. You may be right, but I guess the problem that John raised before was that you start getting into a kind of *Omni* problem in terms of doing a qualitative analysis of exactly how good a look the court took at it.

I think if I had a situation like that, the funny thing is, I wouldn't feel nervous at all about making the proposal. Because I think that that is joint defense privilege; that's *Copperweld*. But then my concern would be implementing it afterwards, because that's when the people come out of the woodwork and say you are raising my prices because of this collusive arrangement, and you don't really have any kind of state action or *Copperweld* umbrella to protect you. So that's why I think I would seriously consider taking it to Justice for a business review.

MS. GIFFORD: Are there any questions from the audience?

If not, I want to thank my panelists who have been really terrific.

And Jay, I particularly thank you for jumping in and changing position in the order here.

I hope this has been enlightening, or it may be to some private counsel a little scary. But these are real-world issues that some of us deal with more frequently than you might imagine.

Thank you.

MR. TUGANDER: I just want to say thank you to Meg and the panelists for a great presentation. Thank you.

Empagran and the International Reach of U.S. Antitrust Laws

MR. TUGANDER: Our next panel will be a discussion of the Supreme Court's 2004 decision in *Hoffman-LaRoche v. Empagran* and the international reach of the U.S. antitrust laws.

The panel will be chaired by Bernie Persky, all the way to my left. Bernie is the head of the antitrust group at Goodkind, Labaton, Rudoff & Sucharow here in New York. Bernie's practice focuses on complex business litigation and class actions, primarily including antitrust, securities fraud and trade regulation disputes.

Bernie is currently a member of the Executive Committee of this Section. He's also written and spoken extensively on a number of antitrust law topics. It is our pleasure to have Bernie here today.

I'll turn the floor over to you, Bernie.

MR. PERSKY: Good morning.

As Steve just stated, we are going to spend the next hour and a half or so talking about what I believe is a very interesting and timely topic: The Supreme Court's *Empagran* decision and the international reach of U.S. antitrust laws.

Allow me to introduce our distinguished panel today which we have put together to offer legal, practical and theoretical perspectives on issues raised by the *Empagran* case.

Edward D. Cavanagh is a Professor of Law at St. John's University School of Law where he has taught and written in the fields of antitrust civil procedure and complex procedures since 1982. Prior to entering the academic community, Professor Cavanagh practiced law with the city law firms of Donovan Leisure and Kelley Drye.

In 1986, while on leave from teaching, he served as Assistant Attorney General in the New York State Department of Antitrust Bureau, where he headed up the state's investigation of the Thomson-West merger. In 1997 he became of counsel to Morgan Lewis & Bockius in New York City, concentrating on antitrust litigation and counseling. In 2004 he was named Senior Counsel to the firm.

Harry First is the Charles L. Denison Professor of Law at New York University School of Law and the Director of the law school's Trade Regulation Program. From 1999 to 2001 he served as Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. Professor First's teaching interests include antitrust, regulated industries, international and comparative antitrust, business crime and innovation policy. He's a co-author of

law school casebooks on antitrust and regulated industries, as well as the author of a casebook on business crime, and the author of numerous articles involving antitrust law.

Professor First has twice been a Fulbright Research Fellow in Japan and has served as an Adjunct Professor of Law at the University of Tokyo.

John Shenefield, to my right, is a partner in the antitrust practice group of Morgan, Lewis & Bockius. His practice concentrates on antitrust litigation and counseling. Mr. Shenefield has served as lead counsel in a number of national and regional antitrust litigations. His counseling practice involves issues ranging from mergers and acquisitions to government investigations. Mr. Shenefield is also involved in international antitrust issues and has handled matters before the European Commission and the United Kingdom's Office of Fair Trading. He's also been appointed to the Antitrust Modernization Commission created by Congress.

Before entering private practice, Mr. Shenefield served as Assistant Attorney General in charge of the Antitrust Division from 1977 to 1979 and as the Associate Attorney General of the United States from 1979 to 1981.

Before we turn to our panelists, I would like to provide some brief background information on the *Empagran* case. The case arose out of the DOJ's prosecution of the International Vitamins antitrust conspiracy. The cartel participants were estimated to have earned between nine and thirteen billion dollars in monopoly profits worldwide.

The *Empagran* case was originally brought by domestic and foreign purchasers of vitamins who claim that the implementation of the vitamins cartel resulted in higher prices for buyers, both in the U.S. and abroad. As I'm sure most of you are aware, the Supreme Court granted certiorari in *Empagran* to decide whether foreign purchasers that buy from foreign sellers participating in an international cartel may seek treble damages in U.S. courts under American antitrust laws. Although the Supreme Court held that foreign purchasers could not bring suit in the U.S. for their independent foreign injury, that is the financial injury incurred abroad, independent of the U.S. effects of the international cartel, it remanded the case back to the District of Columbia Court of Appeals. The Court of Appeals will determine whether the allegations of the complaint support the conclusion that the domestic effects of the cartel were inextricably linked to the harm incurred abroad. And if so, whether the suit will then be allowed to go forward.

In *Empagran*, the Supreme Court implied but did not expressly hold that such linkage, namely the interrelationship between the domestic and foreign effects of the cartel's unlawful conduct would bring that conduct within the scope of an exception to the Foreign Trade Antitrust Improvements Act, and thus subject to the treble damages and other remedies provided by U.S. antitrust laws.

We'll lead off today's proceedings with Professor Cavanagh, who will discuss in more detail the *Empagran* case itself, the conflicting case law leading up to it, its holding and rationale, and the current proceedings on remand in the Court of Appeals.

Professor First will then discuss the *Empagran* case from the point of view of the compensatory function of antitrust law, and will offer some suggestions on how to solve the puzzle that *Empagran* presents in a way that's consistent with that function.

Our final panelist, John Shenefield, will offer his insights into the meaning and significance of *Empagran* in a related recent court decision on the business community, and on the advice private counsel should now give in light of that decision. He will also discuss the current proposals before the Antitrust Modernization Commission relating to amending the FTAIA, international antitrust issues and related matters.

We are going to leave about ten to fifteen minutes at the end for questions. I'm not sure with the truncation of time that we will have time for questions, but we'll try. So hold your questions until after everyone speaks.

With that, I will hand over the podium to Professor Cavanagh.

PROFESSOR CAVANAGH: Thank you, Bernie.

The defendants in the Vitamins case were all foreign sellers of vitamins and who pled guilty to criminal violations and paid in excess of \$900 million in fines, which are record fines, up until this time. They also paid substantial fines in Europe and Canada in the civil actions filed by foreign regulators.

The private treble damage cases were consolidated in the District of Columbia before Judge Hogan. There were also some 23 state actions involving the price fixing, which to date have resulted in settlement payments in excess of \$2 billion.

The specific case that went before the Supreme Court, as Bernie mentioned, involved purchasers from four different countries: Australia, Ukraine, Ecuador and Panama. The question before the Court was: Does the United States have jurisdiction over transactions that were made abroad by foreign purchasers who were not otherwise participating in the United States market?

To address that issue, it's necessary to look at the Foreign Trade Antitrust Improvements Act which was enact-

ed by Congress in 1982. Now the FTAIA had two basic purposes. One was to clarify the reach of the United States antitrust laws in matters involving foreign commerce. The second thing was to make clear that activities by United States exporters engaged wholly in foreign commerce, where that conduct had no impact on the United States market, would be immune from the antitrust laws. Indeed, the FTAIA was part of an amendment to the Export Company Trading Act of 1982.

With respect to that second purpose, the FTAIA was designed to meet the concern that export companies had been hindered in their efforts to sell abroad because other companies didn't have their hands tied by the antitrust laws. So the idea here was to make sure that the field, at least with respect to exporters, was level.

The first purpose, the idea that we needed to clarify how far the United States antitrust laws go with respect to foreign commerce, requires a little more explication. We must look back historically as to how United States antitrust laws were applied to foreign commerce. The early cases, which are probably typified by the *American Banana* case, simply held that the Sherman Act has no application to conduct outside the United States. That very narrow view was modified somewhat in the mid-20th century by the *Alcoa* case. *Alcoa* introduced the so-called effects test. And the Court, the Second Circuit in *Alcoa*, held that the Sherman Act would apply to extraterritorial acts where those acts were intended to and did affect United States commerce, and hence the effects, but intended to and did affect United States commerce. Now the Court also said very clearly that the Sherman Act by no means applies to all foreign perpetrators that we could catch. Only to conduct that has effect on United States commerce.

In *Alcoa*, and note here the Supreme Court is staying out of this for a long time—*Alcoa* effects test became the standard that most courts were applying.

Now, in the early '70s, the Ninth Circuit in the *Timberlane* case introduced a gloss on the effects test. It said we can't just look at effects, but we also have to look at comity and suggested that we introduce into the analysis a balancing test involving the importance of the United States law, the importance of foreign law, the degree of effect. All of that made the analysis much more difficult. Whenever you start talking about comity, you've got to balance. There is confusion and uncertainty and lack of predictability and hence, the need to introduce some clarity into the analysis.

There was in that regard another triggering mechanism in the '70s, and that was the Uranium cases. The Uranium cases involved an action brought by Westinghouse against the uranium cartel which had 29 members, most of them foreign. The private action was brought against the foreign defendants, many of which were associated quasi-public corporations. In particular, we are

talking about companies from Canada, Australia, the U.K. and South Africa, all of which were very unhappy about being sued in the U.S. and beat a path very quickly to John Shenefield's door in the late '70s.

John, I'm not sure you told them, but I think the answer was that you couldn't do anything about this because they are private lawsuits. But there was a great deal of unhappiness with these lawsuits amongst foreign companies, and pressure in Congress to make clear that the United States antitrust laws shouldn't apply there.

In 1982 you got the FTAIA with that, the dual purpose that I just outlined. Unfortunately, the FTAIA as a statute is a drafting exercise disaster. It is poorly drafted. It is difficult to read. It is dense. It just doesn't make a lot of sense. Courts have talked about its impenetrable language. I always have fun with my students when I show them the FTAIA and say if you were in a legislative drafting class, what grade would you give the drafters. Most of them say F. My reaction is that F is not good enough. We have got to go lower in the alphabet. If we got down to the Q, or R, range that would probably be the right place for us to be in terms of how poorly this statute is drafted. It is drafted as an exception to the antitrust laws. It carves out foreign commerce not involving imports. It carves that out from antitrust liability, but then carves that back into the statute where there is direct, substantial and reasonably foreseeable effects on domestic commerce, and where that effect gives rise to a claim under the antitrust laws. So you are talking here about exception to exception. It is a very difficult statute to read and to parse. Take two Advil before you do it, because that's the only way that it can make any sense.

Fortunately, for about a decade the statute was largely dormant. Not a lot going on in the antitrust area in the '80s, and it was just out there. But in the '90s, as we began to pick up antitrust enforcement and started to pay attention to the international arena, the FTAIA then became an issue and experienced somewhat of a renaissance. But then all of a sudden you have a statute that's been around almost ten years, and there are almost no cases on it. Much of the private litigation that was spawned as a result of the recommitting to international antitrust enforcement—I'm talking about *ADM*, *Auction House*, *Vitamins*, *Bank Austria*, *Statoil*—raised issues as to the application of the Sherman Act in foreign commerce and whether or not the activity was outside of the Sherman Act by virtue of the FTAIA or whether it was within an FTAIA exception.

Two issues that we have to focus on with respect to the FTAIA: Is there a direct, substantial and reasonably foreseeable effect on domestic commerce? Direct, substantial and reasonably foreseeable effect on domestic commerce. The second thing we have to focus on is whether or not that direct, substantial and reasonably foreseeable effect on domestic commerce that creates the jurisdiction

has to be the same effect that also gives rise to this particular claim, of this foreign claim. Or on the other hand, whether once the requisite domestic effect has been shown by some plaintiff, the court has subject matter jurisdiction, irrespective of whether or not that particular domestic effect cited gives rise to this particular claim.

Now, courts have had less trouble with the first. There are a lot of cases around historically that you can borrow from in terms of direct, substantial and reasonably foreseeable effect. The real problem with the FTAIA is that second part, the "giving rise" part; whether that effect has to give rise to "a" claim (a claim by anyone), or "the" claim (a claim by this particular plaintiff). And Justice Scalia on oral argument actually made that point very, very clearly.

In those cases that I mentioned, there seemed to be a consensus at the District Court level in *Bank Austria*, *Statoil* and also in *Vitamins*. There was no jurisdiction there; subject matter jurisdiction was lacking under the FTAIA. Indeed, some courts said that irrespective of whether or not there is a jurisdiction under the FTAIA, these foreign claimants have no standing. Judge Motz's decision in the *Microsoft* cases and the decision in the *ADM* cases (the *Galavan* case in Northern District of California) went off on standing. Standing did not come up. It is one of those issues that the Court did not deal with in this case.

The issue began to percolate up to the circuit level; the Fifth Circuit in *Statoil* took a restricted view of the FTAIA. *Statoil* involved conspiracy to fix prices of heavy lift services in the Gulf of Mexico used by a number of companies. The Court said there was clearly an effect on the United States in those cases for United States consumers and users of those heavy lift services. The foreign users in that case were users in the North Sea. Their basic argument was there was an effect on United States commerce by virtue of this conspiracy in the Gulf, therefore we should be able to sue. Fifth Circuit said no, no jurisdiction here, because the injury to United States commerce arose from what happened in the Gulf of Mexico. It didn't arise from what happened in the North Sea. Cert was denied.

And then in the *Kruman* case in the Second Circuit, and the *Empagran* case itself in the D.C. Circuit, two courts came to an opposite conclusion. *Kruman*, as you know, was eventually settled so that the petition for cert in that case was eventually moot. But the *Empagran* petition for cert was accepted. What the Court basically said in the D.C. Circuit in the *Empagran* case, is if there is an impact on United States commerce and there is a plaintiff who can bring an action, then under the FTAIA a foreign plaintiff is not barred.

So the case comes to the United States Supreme Court. And those of us who had been toiling with this statute had hoped that the Court would give us a defini-

tive construction of the FTAIA, particularly Section 6a(2), dealing with whether or not the language should be read as “a” claim, literally, or “the” claim to effectively exclude many of the foreign cases. We were hoping for a definitive construction. We were sorely disappointed by the decision. Although obviously the Supreme Court did render a decision, they did not spend a lot of time parsing this statute. And maybe that’s because it may be one task that’s just not worth undertaking.

But the key to understanding the *Empagran* case is not in the prior history of this case or in the other cases. The key is oral argument. If you were at oral argument or you had an opportunity to read the transcript, you would see how the Supreme Court decision took shape. For people who think that oral argument in appellate cases is not important, this is one that just clearly belies that contention. You can see how the decision flows right from what happened in the colloquy of the court.

Now, the Supreme Court vacated the decision below. It held that the FTAIA precluded exercise of subject matter jurisdiction over the antitrust claims of these foreign plaintiffs. Because even though the unlawful conduct significantly and adversely affected both customers in the United States and customers outside the United States, the adverse foreign effect (on these plaintiffs) was independent of any domestic effect. Thus the Court held that where the foreign effect is independent of any domestic effect, there is no subject matter jurisdiction. So the Court looked at the record very, very narrowly and said what we are presented with here is a discrete question. For purposes of this appeal we are looking at this in the context of injury to foreign buyers; this is independent of injury that occurred in the United States. So the Court really left open and in fact sent back for remand for consideration the question of what happens when the domestic injury and foreign injury are inextricably intertwined. But still, the Court here held on this record there was no subject matter jurisdiction under the Sherman Act.

Now, how did the Court get there? Well, the Court’s rationale was two-pronged. First, the Court acknowledged that the wording of the statute was ambiguous. And indeed, on oral argument, early on in oral argument, Justice Souter said to petitioner’s counsel, let’s assume that as we may have to, that the construction argument is a draw as between the broader interpretation and the narrower interpretation of the FTAIA. Let’s assume that’s a draw. We have to look at something else to break the tie, so to speak, and so how about looking at comity. Now, think about that. I had two reactions to that approach. First, we pay the Supreme Court to construe statutes. That’s their job, whether it is hard or not. We don’t want them to go off and find an easier way out of the enterprise. Secondly, the FTAIA was drafted and enacted specifically to take comity out of the mix. And the answer of petitioner’s counsel, Mr. Shapiro, was very clever. After

a moment’s hesitation, he said: Maybe comity does apply in the sense where a statute is ambiguous then we should be reluctant to construe it broadly, and in particular in this case where there might be some concern about impinging on foreign sovereigns that we should narrowly construe that statute. And the Court picked up on that in its decision and said that where a broader interpretation could potentially interfere with a foreign nation’s ability to regulate its own commerce, then under the doctrine of prescriptive comity, we should be reluctant to interpret United States statutes broadly.

And Mr. Shapiro also noted, as the Court goes on to note, that in fact foreign governments as well as the United States Department of Justice, submitted amicus briefs that suggested that in fact a broad reading of the application of the Sherman Act here would result in some interference with the antitrust regimes of foreign countries. In particular, because we have treble damages, and usually the foreign remedies are much less generous to private parties, you could end up inviting a lot of foreign plaintiffs to the party in the United States. And of course, when Justice Rehnquist hears something like that, that we are going to have an increase in case load, his ears perk up very, very quickly, and he gets very interested in the argument.

So there were amicus briefs from both the United States and foreign governments which said the result, if we find jurisdiction here, would be a flood of cases, foreign cases in the United States seeking treble damages, and we are going to have some very, very unhappy colleagues in the antitrust world. But again, all of this concept, this prescriptive comity concept comes about in the colloquy of oral argument.

An alternative basis for saying that there was no jurisdiction, the Court says, comes from the language and the history of the FTAIA.

Now how the Court got there is very, very interesting. Because again on oral argument, they ask counsel: “Counsel, are you aware of any cases prior to 1982, prior to the enactment of the FTAIA with factual similarities here where jurisdiction was upheld?” The government said no. Mr. Shapiro said no. Counsel for *Empagran* made some arguments from cases which the others said were distinguishable. But basically, as far as the Court was concerned, prior to the time of the FTAIA there would be no jurisdiction here.

Then the Court used that as the basis for its alternative holding: If there was no jurisdiction prior to the FTAIA, and the purpose of the FTAIA was to limit the reach of the United States antitrust laws, not to extend it, then there can be no jurisdiction here. In other words, for us to interpret this case as one expanding Sherman Act jurisdiction in the foreign arenas would do a serious violence to Congressional intent in enacting this statute.

In so stating, the Court noted some of the ambiguity in the legislative history, and that you can make arguments for or against jurisdiction from the legislative history. Indeed, a literal reading of the statute, when you look at Section 6a(2), may well support plaintiff's position here. But the Court said ultimately, when we look at the legislative history and we look at the language of the statute, we can't say that the FTAIA was designed to expand jurisdiction. It just wasn't. And if we give it that reading, we are going to be expanding jurisdiction. So they kind of backed in. We didn't get the nice parsing of a statute that we wanted. They kind of backed in with this alternative argument to say that there would be no subject matter jurisdiction.

Now, where does that leave us here? What was Justice Breyer trying to do in reaching this decision? We can speculate, and we are probably all going to speculate about this. My sense is this. I think Justice Breyer was looking to get a decision that would get as many people on board as possible. Again, it's a little dicey to try to make conclusions based on the colloquy, but it seemed to me, sitting there watching the argument, Justice Stevens seemed to think there was probably jurisdiction here, and I thought Souter might have thought that too, and maybe Justice Ginsberg. The others, I think, were very much in the other camp. And Justice O'Connor wasn't sitting, so I figured it was at least going to be a five-to-three decision. But I think Breyer was crafty in the way that he articulated the issue, saying that we have got a situation where the foreign harm is independent of the domestic harm. I think because he articulated that issue very, very narrowly, he was able to get the other three shakier people to sign on. So what we ended up with was unanimous opinion, and of course, the door left open for the situation where the foreign injury is inextricably intertwined with the domestic injury.

Thinking about that for a minute, I mean the Court had to know that that was going to happen, number one. And number two, the cure for that seems to be very obvious. If you are the plaintiff, one of the things you are going to plead immediately is that your foreign injury is inextricably bound up with domestic injury. And if that's the case, we are going to have to go back to the Court again very, very soon.

The case was remanded in early November. The D.C. Circuit came down with an interesting opinion that basically said that as we want you to know we are working on this case, and we'll have a decision sometime. But that decision is still pending. I've been worried, I've been watching LEXIS every day, because two years ago I think I spoke here and the *Empagran* decision came down on the date of this panel. But we are now before the D.C. Circuit. The D.C. Circuit is going to have to decide whether or not the case can go forward. They have said that the parties have alleged, properly alleged the inextricable intertwining,

and now they have to decide whether or not that is going to give jurisdiction. That's where we are sitting, waiting for that right now.

Another interesting note here on standing: I think all of these cases could be decided on standing. The courts have judiciously, with the exceptions of the ones I've just mentioned, have judiciously avoided reaching these decisions on standing grounds.

And now I will turn it over to Harry.

PROFESSOR FIRST: Ned has given us I think a really good overview of the prior case law under the FTAIA, as well as under Section 1 and 2 relating to the Foreign Commerce Power of the Sherman Act, and of the issues presented in *Empagran*.

I am going to repeat—since law teachers always repeat things, particularly that other teachers do—I will repeat a little bit of it, but maybe with a little different approach.

As Ned pointed out, this is your textbook example of a poorly drafted law. The decision in *Empagran* did give the Supreme Court its first opportunity to construe this law, passed more than twenty years ago. But I think in looking at the Court's decision, the importance of its decision actually extends far beyond the technical question of statutory interpretation, which was the question presented to the Court. I think that the Court took *Empagran* as an opportunity to give us its view of the proper jurisdictional scope of the antitrust laws, as well as their purposes.

Again, as Ned pointed out, *Empagran* is just one of many cases that were brought against the vitamins cartel by antitrust enforcement authorities from around the world, by the plaintiffs in the U.S., and by the state attorneys general. And of course, *Empagran* involves one set of these potential plaintiffs: Non-U.S. purchasers of vitamins suing for the amount by which they were overcharged by the cartel.

Now, actually, a fair amount of the Court's decision in *Empagran* and much of the discussion about *Empagran* I think is also focused on the question of deterrence. And certainly from the point of view of the Justice Department, which cares not for comity, believe me, but cares for deterrence, this was a very important point. Little attention though has been paid to the other important function of antitrust law, hence the title of my talk, which is: "The Compensatory Function of Antitrust Law: Compensating Those Harmed by Anti-competitive Conduct."

So my first rhetorical question is: Why haven't we paid attention to compensation? Just to remind us of the importance of compensation, I have two quotes from Supreme Court decisions. The first, by Chief Justice Berger in *Reiter v. Sonotone*: "Congress designed the Sherman

Act as a consumer welfare prescription.” *Reiter* was a class action case brought by consumers, where it was argued that somehow Section 4 of the Clayton Act didn’t cover them. The Court said yes, it does. It is consumer welfare we are concerned about. And the second is a quote from *Brunswick*, quoting from House debate on Section 4 of the Clayton Act in 1914. And I like the rhetoric of this quote: “Private damages actions . . . were conceived primarily as opening the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giving the injured party ample damages for the wrong suffered.”

I’m going to divide my remarks into these five parts: first, the past as prologue—two great cases plus one; the second, applying antitrust in today’s world; third, trying to understand *Empagran* itself; fourth, some possible solutions to what I view as the puzzle of *Empagran*; and fifth, a conclusion.

So, the past as prologue. The jurisdictional language in Section 1 and Section 2 reflects the foreign commerce power of the United States. The Sherman Act applies to agreements in restraint of “trade or commerce . . . with foreign nations.” What did Congress mean by that? What’s the scope of the foreign commerce power generally?

The first great case, a case that Ned mentioned of course, is the *Alcoa* case, which in part involved a cartel of non-U.S. producers of aluminum ingot, including Aluminum Limited, which was a Canadian company and a defendant in the case. This was a civil suit brought by the Justice Department seeking equitable relief. Judge Hand, as we know, upheld jurisdiction over Limited’s activities, over the Canadian company. Although he recognized the power of the United States to reprehend conduct that occurs outside its borders if the effects are felt within, Hand still narrowed the scope of the Act a bit by holding that Congress did not intend to cover any act abroad that might affect the U.S., just those that were intended to affect imports or exports and which actually had some effect on them. This is the basic effects test from *Alcoa*.

The second great case is the *Hartford Fire* case, decided in 1993 by the Supreme Court. *Hartford Fire* was a suit brought by nineteen states as well as numerous private plaintiffs, which alleged, among other things, that reinsurance companies in London had conspired to coerce primary insurers in the United States to restrict the coverage they offered for commercial general liability insurance, as well as for certain forms of pollution liability insurance.

Justice Souter wrote the jurisdictional part of the opinion for a closely divided 5-4 court. Souter wrote: “It is well established by now the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.” Pretty much the *Alcoa* effects test, except for the minor word “substantial,” but pretty close to *Alcoa*. Justice

Souter also took the view that comity played almost no role in the exercise of that jurisdiction. Viewing the question to be whether comity should lead U.S. courts to decline to exercise U.S. jurisdiction, the majority held that principles of international comity would require a declination of jurisdiction only if there were a conflict between U.S. and U.K. law. And there was no real conflict, said the majority, because British law didn’t require the defendants to act in a way contrary to U.S. law, nor was it impossible for the English defendants to comply with the laws of both countries.

The dissent was written by Justice Scalia, and he analyzed the case quite differently. For Justice Scalia it wasn’t so much a question of the scope of Congress’s jurisdictional power as it was a question of how Congress had intended to exercise that jurisdiction over acts affecting commerce. He called it “prescriptive jurisdiction,” which he said depends on principles of international law, which Congress presumably intended to follow in enacting the Sherman Act. Comity, he said, becomes prescriptive comity: the respect sovereign nations afford each other by limiting the reach of their laws.

Scalia then returned to the Restatement for the relevant principles of international law, which he felt should guide the decision. He took away the Restatement’s overall view that a nation shouldn’t exercise jurisdiction with respect to persons or conduct outside the United States “when the exercise of such jurisdiction is unreasonable.” So this is the reasonableness test from the Restatement. And although the Restatement lists a number of factors relative to the question of reasonableness, I think one is of particular importance in *Empagran*: as Justice Scalia pointed out, the United Kingdom has a “comprehensive regulatory scheme governing the London reinsurance markets where the London reinsurers work.”

The third case, we can call it great or not, is *Trinko*, which is a case with which I think most of us are familiar. *Trinko* was a consumer action alleging that Verizon engaged in monopoly maintenance in the way it carried out its interconnection obligations under the Telecommunications Act of 1996.

The Supreme Court in an opinion by Justice Scalia held that *Trinko* failed to state a claim under the antitrust laws. There were a number of reasons that the Court gave, but one of them involved the existence of a fully functioning regulatory scheme under which both state and federal regulators had the authority to deter and remedy anti-competitive behavior. In other words, the problem was best remedied by the FCC and the New York Public Service Commission, not by an antitrust court.

Now for the second part of my talk: How do we apply antitrust in today’s world? As a good law school teacher, I will start with a hypothetical. Suppose that there had been a litigation, let’s say after Judge Hand’s decision in *Alcoa*, in which a Canadian fabricator that had pur-

chased aluminum from Aluminum Limited, the Canadian company, in Canada, had sued Limited in the United States for treble damages. Would such a suit have been allowed under Judge Hand's opinion? How would that have looked? I think if you look at the decision that Hand wrote, you would say Hand would not likely have distinguished the private plaintiff from the United States government as plaintiff, at least in terms of whether there was jurisdiction under the Sherman Act. In other words, the cartel's conduct had intended effects in the United States which was sufficient, he said, to allow for jurisdiction over the Canadian company under Section 1.

Now, whether the purchaser had a good claim under Section 4 of the Clayton Act for treble damages, whether it was injured in its business or property as a result of any violation of the antitrust laws, is another and separate issue about which he wasn't writing, and which is in a sense not involved when we are thinking about foreign commerce jurisdiction.

Of course, we don't know the answer to my hypothetical. As with all good hypotheticals, there is no real answer, because nobody brought that suit. But what do we take away from the fact that no one brought such a suit? You would think, gee, wouldn't someone do this? Well, of course, in 1938, when *Alcoa* was filed, private treble-damage litigation was quite rare. There was a paucity of private suits. So it's not surprising that when the Supreme Court in *Empagran* turned around and said, tell me what cases like this have been filed, that no one could find any. It would have been quite surprising if there had been any cases to find.

What we have to recognize is that much has happened since *Alcoa*, both in terms of the internationalization of economic transactions and of antitrust. We are in a much more globalized world today, not only in terms of economic transactions, but also in terms of political concerns. In fact, I would suggest that globalization has come to have not only an economic aspect but a political one as well. Globalization, as we know, has its discontents, but it also has led to a spread of antitrust principles, indeed to an extent that I suspect would have been unimaginable to Judge Hand writing his opinion at the end of World War II.

An important aspect of this diffusion of antitrust has been the increase in the importance of multiple enforcers of antitrust laws, and the vitamins cartel is a good example of that sort of enforcement, but not the only one. Multiple enforcement, as we know, increases the opportunity for conflicting decisions, but it also increases the diversity of antitrust enforcement approaches and increases the types of resources available for antitrust enforcement. In a sense, what we are moving to is a more competitive market for antitrust enforcement that will deal with global economic problems.

One of the important assets, I would suggest, employed by enforcers in this market is a national court system. One might argue in fact that, at least to the extent that we can, we should allow these competitive forces to function, allocating enforcement responsibility to those enforcers—and to those courts—best able to carry them out.

In the context of today's world, I would suggest we also need to consider the impact on the functions of antitrust of a decision on whether to allow monetary recovery by plaintiffs in a case like *Empagran*. One function, as we know, is to deter anticompetitive behavior. The Court in *Empagran*, in weighing the arguments—and many arguments were made as to the effect that the decision would have one way or the other—basically said the arguments are a draw. At least from what we know, the Court wrote, it is an empirical question whose answer we do not now know. We can't say what the impact on deterrence would be in allowing the plaintiffs to proceed.

But it is the other function of antitrust law, the compensation of victims, for which it is far easier to draw conclusions. Denying recovery to plaintiffs, like those in *Empagran*, either leaves them completely or likely uncompensated: completely, for those in jurisdictions without antitrust law or without a private right of action; and likely uncompensated for those in jurisdictions without an effective private right of action—which today, as we know, is almost everywhere else in the world.

So the question, I think, is why should we not provide a forum for compensation in the United States, if we can?

So let's move to understanding *Empagran*. First of all, *Empagran's* concerns. *Empagran* perhaps might be viewed as an effort to close the courthouse door to these plaintiffs. But of course, as Ned pointed out, it didn't do so definitively. If anything, I think actually the Court in *Empagran* was more concerned with stylizing the facts of the case so that it could revisit *Hartford Fire*, and the methodology employed by Justice Scalia in his dissent, than with actually deciding the *Empagran* case in front of it. I take this from the question that Justice Breyer posited in his opinion. You recall Justice Breyer had a former life as a law teacher, so I think he likes hypotheticals too. And this was his hypothetical: "Why is it reasonable to apply this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?" Of course we know this was an international cartel. So what is Breyer talking about when he focuses on "independent foreign harm"? But these are the facts Justice Breyer wanted to pose. Then he goes on to interpret the FTAIA in accord with—surprise—principles of "prescriptive comity," pointing out that although Congress might have hoped that foreign countries would adopt systems like our own, "if America's antitrust policies could not win their own

way in the international marketplace for ideas, Congress, we must assume, would not have tried to impose them in an act of legal imperialism, through legislative fiat.” Of all the ways we are engaging in imperialism, I never thought that it was through the Sherman Act! But this is the language that Justice Breyer uses.

More importantly, Breyer’s approach draws straight from Scalia’s dissent in *Hartford*. The Court now states the antitrust laws should be interpreted under principles of prescriptive comity, the exact position Justice Scalia argued for. The Court then approaches that question by asking whether interpretation of the statute is reasonable when foreign interests are involved. That the Court knew it was not deciding the case in front of it can be seen in the concluding paragraphs of its opinion. And you have the opinion in your materials. I urge you to read it and see if you understand it. Recognizing that the plaintiffs argued that the foreign injury was not independent of the domestic injury—this was an international cartel setting prices and output across countries and selling an easily transportable product—the Court remanded the case to the Court of Appeals so that it might consider whether the plaintiffs, after all, might actually have a good claim under the FTAIA.

So how are we to interpret this concluding directive? The statutory argument that I think the Court now sets out at the end of its opinion is that the “direct, substantial, and reasonably foreseeable effect” must give rise to the claim. That is, the domestic effects have to link to foreign harm. This is what Breyer says in the end, this is the possibility that the Court holds out for recovery by non-U.S. plaintiffs purchasing outside the United States.

However the Court doesn’t tell us whether, if this is the case, it is a good legal theory under the FTAIA. That’s part of the remand. On the *Empagran* remand, the DOJ—actually the DOJ and FTC as amicus—in the D.C. Circuit argued that this is not a good legal theory, that it does not matter under the FTAIA whether the effects are linked or not linked. Because according to the government’s view, whether the foreign harm is independent or dependent doesn’t matter in terms of the policy considerations which it said underlie *Empagran*. In either event, allowing recovery would be an unreasonable interference with foreign sovereign authority and would adversely affect the deterrent enforcement policies of foreign jurisdictions and the United States, because allowing recovery would undercut that deterrence. So that’s the argument that the government has made in the Court of Appeals.

I think there is another policy that we can look at. That is to go back and take consumer welfare seriously, and interpret the statute in a way that carries out the compensatory function of the antitrust laws. As for the concerns of foreign jurisdiction and this alleged comity, one must wonder about whose interests those foreign sovereigns are actually protecting. Why do they want to bar

their own citizens from using our courts to obtain compensation? If prescriptive comity—the phrase used in *Empagran*—does not stop the U.S. from criminally prosecuting their corporations, imposing on them massive fines and putting their executives in our jails, why should it stop us from opening our own courts to their citizens or to the citizens of other countries who actually have been harmed by the actions of these companies? To use Justice Breyer’s terminology, why would the assertion of *criminal* jurisdiction be reasonable, but the assertion of *civil* jurisdiction not be?

A final argument relating to the problem in *Empagran* that I will just put in front of you comes from the thread that runs through Justice Scalia’s dissent in *Hartford* and his majority opinion in *Trinko*. In both cases the argument was that antitrust should hold back, at least in part, because there was some other effective remedy. But for non-U.S. buyers in *Empagran*, this is not the case. Compensation of those victimized by antitrust violations is not readily available to those plaintiffs outside the United States. If it were, *Empagran* wouldn’t have been filed in our courts. So long as we do have jurisdiction over the cartel, even under the narrow linkage theory suggested in *Empagran*, I would argue there is no one else to provide as good a forum as we can, where victims can seek compensation for injury they have suffered. This argument would support a decision to exercise jurisdiction, rather than to abstain from its exercise.

So, some possible solutions to interpreting *Empagran* which you can think about. For cartel cases I offer two suggestions for how to deal with that final paragraph. A familiar way to tell whether there are links between one geographic area and another is to see if they are in the same geographic market. Because the linkage in *Empagran* runs from the U.S. to the foreign country, (we’ll call it F1), one could ask: if a hypothetical monopolist in F1 raised its price, would consumers in F1 have purchased in the U.S. or would U.S. sellers have shipped in? If the answer is yes, buyers would have purchased or sellers would have shipped in but this didn’t happen because the cartel had set high prices in the U.S., then there is a link between those U.S. domestic effects and the foreign harm. That is, but for the cartel’s effect in the U.S., purchasers in F1 would not have been harmed by the cartel agreement in F1. They would have been able to buy in the U.S. The “direct, substantial, and reasonably foreseeable effects” in the U.S. are thus directly linked to harm in F1.

Now, the second approach that might also work is to use a behavioral test. We could ask whether the cartelists have run their cartel to include both the U.S. and F1. And I think this shows us, if that’s the case, that the cartel has thought the two geographic areas were economically linked and that they needed to be addressed together. Applying the assumption of economic rationality to cartelists seems both warranted and familiar. They know

what they are doing. And again the “direct, substantial and reasonable foreseeable effects” in the U.S. would be directly linked to harm in F1.

The distribution cases raising FTAIA cases turn out to be a little harder. You can try to work through a geographic market test, but it makes recovery in those sorts of cases a little less likely.

Finally, a point that Ned mentioned, which is that the jurisdictional issue is not the end of the game. There are other doctrines which we appropriately use to manage antitrust litigation in our courts, particularly standing and causation; and, of course, for foreign parties and foreign conduct, forum *non conveniens*. So we have other tools that can handle these other kinds of normal problems of antitrust litigation.

In conclusion, I would like to channel the words of Learned Hand from *Alcoa* and use them to think about today’s jurisdictional issues: “We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States [my emphasis].”

Transactions over which we exercise jurisdiction become part of the economic justice that goes on in the world. What we decide does have consequences for the United States. We can increase economic justice in the world if we are willing to extend antitrust’s compensatory function to include those injured outside the United States, so long as we have, even under that narrowed approach that the Court uses in *Empagran*, some degree of jurisdiction.

I leave you with that great quote with which I started, using the great rhetoric of the last century, updated today. We should construe the FTAIA and the Sherman Act to open the door of justice to every man, wherever he may be injured by those who violate the antitrust laws, and give the injured party ample damages for the wrong suffered.

Thank you.

MR. SHENEFIELD: Bernie, on the assumption that the program means what it says, I have about eight minutes.

First, a word of disclosure. My firm is involved in several of the cases that I’ll mention, including *Empagran*, so be advised.

The question arises: What are we to make of this mess that we have in front of us? Because it is truly a mess. We don’t know the answer to the simplest question about this statute: how does the Sherman Act apply to worldwide cartels in global markets? We just simply don’t know. We don’t know even after the Congress tried its best in 1982. I won’t go through the laborious story of how the act came to be enacted. I will agree with Ned that the statute is full

of what I’ll call demonic intricacy. It is routinely cited as one of the worst statutes drafted in the last twenty-five years. What’s interesting about it is that almost every court that has construed it has relied on the “plain language of the statute,” and then come to diametrically opposed conclusions. The act contains not just exceptions to exceptions, but double negatives, carve-ins and carve-outs and a proviso that’s an exception to one of the exceptions. It is a nightmare. So we don’t know the answer to the central question, after Congress did its best.

We also don’t know the answer to the question after the Supreme Court allegedly did its best. In a decision that was supposed to open the curtains and reveal all, virtually nothing has been shown. Unless you agree with my conclusion, which is that, like the *DaVinci Code*, embedded in the language of this opinion is the clue as to how this is all going to come out. More of that in a moment.

Since *Empagran* came down, the courts have been struggling all around the country trying to deal with the puzzle. In a case here in the Second Circuit, *Bank Austria, Sniado v. Bank Austria*, the Second Circuit took *Empagran* and applied it to the complaint in front of it and concluded rather summarily, I suggest, that the alternative theory that *Empagran* spawned simply wasn’t to be found in the complaint. The complaint in fact did say something about a worldwide cartel. It did say that there was a domestic component to that cartel that was required to be effective in order for the conspiracy to be an overall success. Notwithstanding that, the Court simply failed to find in this rather broad complaint, even liberally construed as it said, the factual predicate for federal jurisdiction. And then in what must be a very unusual declination of the power to act, it said it wasn’t inclined—I think that was the word—wasn’t inclined to let the plaintiffs reword their complaint to see whether they could come within the *Empagran* rule.

On the other hand, in Connecticut, in *Dow*, Judge Covello was far more forgiving on facts that seemed far less promising, from my point of view. There the complaint alleged at least that there was a vertical restraint in the United States that damaged competition in the United States, and as a result, a distributor in India was injured. The facts of the case don’t happen to line up very well with that description, but that was the way the Court looked at the complaint. And in light of that characterization of the complaint, the Judge refused to dismiss that case. So now you have the twin pillars on each side.

In the middle is the Third Circuit in *BHP New Zealand*, where Judge Sloviter sent back to the trial court this whole issue and invited, rather casually, the court to consider evidence—probably involving discovery—on the degree of linkage between the cartel’s U.S. domestic effects on the one hand and the plaintiff’s harm abroad, and indeed on any other issue that the court might think helpful, which is a surefire recipe for never getting to any

results. Since you'll have to do discovery on conduct, on the market, on injury, you might as well try the whole antitrust case and be done with it.

Other than those cases, there is very, very little. There is a drib and a drab here and there. *Skidmore* is a case involving a dismissal on *Empagran* grounds, with no discussion whatsoever. Another case, *OS Recovery*, here in the Southern District, is a dismissal based on *Empagran* without real analysis. And meanwhile, the briefing continues in *Empagran* in the D.C. Circuit.

There, not surprisingly, the *Empagran* plaintiffs have found that their plaintiffs do in fact satisfy this new linkage theory that the Supreme Court has left open. There is an essential economic reality that they have discovered, and that is that vitamins are fungible. The market is global. Therefore, unless the cartel were effective in the United States, it could not have harmed anybody abroad. That establishes jurisdiction, they say, because of the language of the statute, because of the deterrence scheme that's in effect, and finally, because it's fully consistent, so they say, with the decision in *Empagran*. But none of that can be right. None of this, none of that makes much sense at all.

First, and this is the point, if you look past the technical holding in *Empagran 1*, hasn't the Supreme Court really already decided this whole issue? Does anyone really think that it went through the entire exercise in *Empagran 1* only to leave this gaping exception unfilled and unaddressed, which would by definition encompass every worldwide conspiracy case ever tried, as Justice Breyer surely recognized, and would have encompassed the facts in *Empagran* itself.

Sure, the Supreme Court is deferring to the D.C. Circuit. That's judicial good manners. But don't we already know, from the language in *Empagran* and the weight that it accorded comity and all the other factors, how the Court expects the D.C. Circuit to resolve this question?

In short, it is my view that the *Empagran* saga is really over, and it is going to come out very much as Justice Breyer has suggested. It must be the case—contrary to Professor First's view—that mere but-for linkage simply is not going to be enough. Federal jurisdiction cannot depend on whether there is some incidental connection, or on whether there was a forbearance, for instance, of a U.S. seller from cutting his price and not selling abroad. But if that's true, there is going to be that linkage in every single worldwide cartel case. If that's enough, there is no question remaining to be decided.

If linkage alone is enough, Justice Breyer has, as they say, labored and brought forth a mouse. So it must mean there is something more that he's looking for. Deep in the opinion, I suggest, there is a clue as to what he has in mind. As Ned suggested, he discusses pre-FTAIA law, and one of the cases he discusses is *Industria Siciliana Asfalti* out of the Southern District. That case permits an Italian

plaintiff to proceed against an American defendant based on a purely foreign injury. What's important about that case is that the conduct in that case operated to injure both the domestic plaintiffs and the Italian plaintiffs equally. But here's the point. Tellingly, in quoting the lower court opinion, Justice Breyer himself takes language and then italicizes portions of it, and the words he italicizes are the words that Ned picked up, quote, "inextricably bound up with domestic restraints of trade." Later, he quotes, "was injured by reason of an alleged restraint of our domestic trade." Now that language points in the direction, I would say, of much more than simple but-for linkage. If only but-for linkage is sufficient, you are still going to have the comity concerns on which the vast weight of this opinion is placed. You are still going to trigger worries about the deterrence scheme that the U.S. government is properly concerned about. You are still going to trigger the concerns about international enforcement cooperation that the Solicitor General mentioned. None of those concerns is dealt with at all by a rule that is based on simple linkage.

Remember, in *Empagran*, the transactions in which the plaintiff participated are purely foreign transactions. The plaintiffs bought a product abroad from a foreign seller. Who thinks the German government or the Italian government will be any less put out if those plaintiffs all rush into our courts based on the concept of linkage? If the effects in the United States do—and this is the language of the statute—give rise to the claims of say an Ecuadorian plaintiff in the but-for sense, don't the effects in, say, Mexico or Japan or Argentina also give rise to the same claim? Where does it end? There is just simply no limiting principle.

It seems to me there are three possible solutions. The first, and the certain one, is *Empagran 2*. This case is coming back. Justice Breyer or one of his colleague justices will be given the chance to pull the plug on but-for linkage as the basis. And he will do it explicitly. I think he's already done it implicitly.

Second—I think this is highly probable—is the standing doctrine. As Ned has suggested, even though there may be technically subject matter jurisdiction, foreign plaintiffs injured in a foreign transaction can be viewed, it seems to me, as simply too remote, their injury too indirectly linked to the U.S. effects, their role too attenuated to confer antitrust standing. That's the reasoning in *Associated General Contractors*. It is the reasoning in *Brunswick*. It is the reasoning in *Illinois Brick*, and it fits this like a glove.

The third possibility, and I think it is only a possibility, is to rewrite the FTAIA itself. You undoubtedly know, as Ned said, that the Antitrust Modernization Commission has unanimously resolved to study this with a view toward making a recommendation to the President and the Congress. But then when you actually begin putting pencil to paper, as they say in my part of the country, it

ain't that easy. Perhaps something elegant like this would do: "In a case in order for a foreign plaintiff to have a claim that is within U.S. jurisdiction, U.S. effects must be the proximate cause of the foreign plaintiff's claimed injury. But-for linkage is not enough, *and we mean it.*" Maybe that would be a good amendment.

The AMC report will not be made available until the spring of 2007. A lot of things are going to happen between now and then. If the Supreme Court resolves the issue one way or another in *Empagran 2*, I think it highly likely the AMC will look elsewhere for things to do. But if the legal landscape is still uncertain in a little more than two years from now, I think a "fix" solution will be forthcoming. And I'm fascinated to hear what the other panelists suggest that it might be. Thank you.

MR. PERSKY: Do we have any time for some questions?

MR. TUGANDER: Yes.

MR. PERSKY: Any questions from the audience?

AUDIENCE MEMBER: I'm curious whether Professor First would like to respond to the last speaker.

PROFESSOR FIRST: I always think John Shenefield has excellent points. Oh, you want more than that?

As I said, you know, I frankly think that the Court was not all that interested in *Empagran* itself. I think they are frying bigger fish. This is not the first case in which they are doing it, and that's ultimate jurisdiction. So you know, I still think that there is a way to read the language in *Empagran* in a way that's consistent with economic principles by drawing on market definition, and not necessarily throw the *Empagran* plaintiffs out of court.

As for the question: Does the Court not mean but-for causation, I think the concluding paragraphs talk in those terms, but proximate cause will then come in. Because there is still the standing issue—and standing in antitrust is proximate cause—I'm not sure how those two things are going to work, but it may be on the facts of *Empagran* the plaintiffs would actually satisfy both. Because after all, this was a worldwide cartel. The thing that concerns me about *Empagran* is really the sort of spill-over effects to other cases where the Justice Department may find itself starting to get bitten on what the scope of jurisdiction now is under the foreign commerce power.

I think John is quite right, and Ned as well, in implying that this has been a really difficult interpretive problem and rendered more difficult by having not so many cases. But now we have an international economy, international cartels and lots of enforcement. So these cases are coming forward.

Now, my proposal would be just to repeal the FTAIA and go back to Section 1 and let the courts do what courts

do, which is to handle these cases on a case-by-case basis. Do what Learned Hand did, interpret the statute back to the fundamental principles, and not to that really hard-to-understand statute which we have got now.

MR. PERSKY: I wanted to make a comment. As primarily a plaintiff's antitrust lawyer, I think the *Empagran* decision really hasn't solved the basic problem. It shouldn't be that difficult with respect to most international cartels to plead the kind of effect that would at least fit the words of the *Empagran* decision. I mean international cartels often involve fungible products, easily transportable with the possibility arbitrage from the U.S. to Europe and vice versa. So it really shouldn't be that hard to plead yourself into that test.

As to what the courts do afterwards, perhaps they would use standing or some other concept to limit the reach of the statute. But the *Empagran* decision itself hasn't solved the problem.

Does anybody else want to make a comment?

MR. SHENEFIELD: Well, I agree. You have excellent points as well, but those are basically wrong-headed points. It seems to me that just reciting that this is a worldwide cartel doesn't get the job of analysis done. The question is what plaintiffs have sufficient connection with U.S. courts to entitle them to come to U.S. courts and file their cases. It isn't fair I think to say that they have no alternatives, that otherwise they go uncompensated.

I haven't seen an empirical study of it, but in my own limited practice I'm aware there is a fair number of countries that actually don't all have contingent fees, and they don't all have treble damages. But I don't think any principle of fairness suggests that everybody ought to get to come to a U.S. court if they can't get treble damages on the basis of contingent fees. So it seems to me, with respect, I think that you are headed in the wrong direction. And what we ought to be thinking about is what is a sensible rule of allocation of jurisdiction between U.S. courts and courts of other countries, and equally entitled to their prerogatives, and what words give effect to that notion.

MR. PERSKY: But allowing such suits would tend to increase deterrence and prevent the cartelists from profiting from their worldwide profits, even though they might have to pay U.S. damages. So I think it does carry out for purposes of the statute where there is this linkage between the domestic and foreign harm.

For example, a worldwide market division agreement where, for example, American companies agree not to sell in Asia or Japan and Japanese companies won't come into the U.S. The folks in Japan who purchase at an inflated price because American companies wouldn't be selling there are just as injured as Americans.

MR. SHENEFIELD: Fine, let them go to Japanese courts. In any event, the Department of Justice, which is at least as interested in deterrence as the rest of us, says that this decision harms deterrence. And I'm quite persuaded by that, because I've advised companies that are considering whether to avail themselves of the amnesty program. The amnesty program calculation equation that goes on in the decision-maker's mind is what is the penalty if I go into the program, all things considered. And up to this point, it has been damages. Now, after the statute that was enacted last year, single damages for American plaintiffs or those closely connected to the U.S. economy. Now the equation must contain damages from all around the world. And the question for debate I guess, the question for judgment is: What's the net of that? Does it reduce or increase deterrence to allow all those foreign plaintiffs to come into federal court? And I don't know again of any empirical study, and maybe the law professors amongst us could do something about that, but it is not to be trivialized.

PROFESSOR FIRST: Just a couple of responses. First of all, in terms of allowing plaintiffs into our courts, as opposed to saying they can only go—if they are from Japan, they can only go into Japanese courts, I frankly think that what we should be moving to is a system that does not have necessarily that single forum. That courts compete, and if certain courts have comparative advantages and do things better, we in the antitrust community ought to say we like that sort of competition. U.S. courts are pretty good at this. And we've learned a lot, ever since the State of India brought its suit against Pfizer for its damages. We have learned a lot about how to do these cases. I don't see any reason why we can't take advantage of it.

MR. SHENEFIELD: It is not a bad practice development idea. I agree with that part.

PROFESSOR FIRST: Particularly if one is admitted here, but anyway. The idea of private damages cause of action actually is spreading, much in the same way that the idea of going after cartels spread once the U.S. began enforcing it, enforcing the anti-cartel provisions really strongly against non-U.S. companies. So that idea has spread, and private actions have spread. But we're at a point today where I think no one would argue that private suits in Europe or in Japan are anywhere near as developed. The EC wants to develop it, but there is just not a remedy like we have. So I don't see a reason to stay a hand when the other remedies are ineffective, or not as effective let's say.

The deterrent point is an interesting one which I stayed away from. But just to suggest the complexity of this, and I think it is complex, we know on an empirical basis precious little about deterrence actually. But the question is not whether we deter people from snitching on cartels and seeking amnesty. The question is whether we deter firms from forming cartels, and that's a little different. Obviously, detection is important, so to the extent snitching increases, you are going to be more hesitant to form a cartel. On the other hand, to the extent that amnesty has increased, you'll also be less hesitant to form a cartel. What the net is, is a good question.

The Justice Department doesn't quite put it this way because they want to control the amnesty process, but I don't think there is an empirical answer to the question. And that is why in the end I think that Breyer punted on the deterrence point, because he did have amicus briefs from economists and so forth. But everyone is doing this somewhat theoretically, and no one really knows for sure. That's why thinking about compensation here makes some sense. And I still can't get it through my mind why the government of Japan, which has done zipo against the vitamins cartel, in which three of the major participants were Japanese firms, now comes into our courts and says, sorry, you shouldn't allow our citizens to come to your courts for their damages. Well, you know, I just don't get the comity issue, the comity argument there. And in *Hartford*, the U.K. came in and said oh, no, you can't take our people; and the Court said forget about it, there are effects in the U.S. I think the Court should have said that here.

Now, maybe in the end I just don't like the decision in *Empagran*, I confess. But like anyone who doesn't like one decision, you say, well, wait a second, maybe there is something in here that we can use. And I think there still is, although it may be in the end, John, that the D.C. Circuit is going to reject these arguments. But that's yet to be seen.

MR. PERSKY: Any other comments? I think that concludes our session.

Thank you to our fine panelists.

MR. TUGANDER: I want to thank Bernie and the panel for a spirited debate. It sounds like we have enough material that we might have to revisit this at next year's conference.

Thank you.

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

MR. TUGANDER: At this point the Business Meeting will come to order, and I will turn the floor over to Meg Gifford.

MS. GIFFORD: This will take just a moment. For members of the Section, we are proposing a list of members of the Executive Committee, current members for re-election. Their names are on the report of the Committee which is on the table outside, and you can examine it at your leisure.

The Committee also proposes the following individuals for election as new members of the Executive Committee for two-year terms: Lauren Albert, Rita Sinkfield Belin, Kelly Hnatt, Patricia Jannaco, Stacey Mahoney, Eric Queen, Lori Sherman, Elliot Wales, and James Yoon.

Could I have a motion and second to elect all those individuals as members of the Executive Committee?

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MS. GIFFORD: Thank you. All in favor.

(Ayes voted.)

MS. GIFFORD: The Nominating Committee nominates the following members to the Executive Committee for election to one-year terms in the offices that I will identify: Steven Tugander as Chair; Ilene Gotts as Vice Chair and Program Chair; Saul Morgenstern as Secretary.

May I have a motion and second?

AUDIENCE MEMBER: I make the motion.

AUDIENCE MEMBER: Second the motion.

MS. GIFFORD: All in favor.

(Ayes respond.)

MS. GIFFORD: Thank you. That's it.

Standard Setting: Procompetitive Potential and Anticompetitive Risks

MR. TUGANDER: We will move onto our first panel of the afternoon, chaired by Alan Weinschel, and we will explore the procompetitive potential and anticompetitive risks associated with standard-setting groups.

Alan Weinschel is a partner at Weil, Gotshal & Manges in New York, and a member of the firm's antitrust, and technology and proprietary rights practices. Alan's antitrust practice covers virtually all aspects of antitrust counseling and litigation, including mergers, licensing, distribution, pricing, promotional allowances and monopoly power issues.

Alan is a past Chair of this Section and a current member of its Executive Committee. Alan has also been very active as a member of the ABA's Antitrust Law Section, and has written and lectured extensively on antitrust and intellectual property issues.

With that, I'll turn the floor over to Alan.

MR. WEINSCHTEL: Thank you, Steve.

Yesterday's newspapers contained an article about an effort on the part of eight major companies, including Microsoft, IBM and Oracle, among other things, to develop a way, with some government involvement, to standardize the way that healthcare information is organized and stored and transmitted and retrieved in this country. The cost savings at all levels of the economy would be considerable. And there may be some other salutary effects on patient care. We also are all aware that there are cases pending that heavily involve standard setting, including *Rambus* and *Unocal*, which have not seen their conclusion yet.

The purpose of the session today is to explore what analytical framework should be used to address standard setting to assess its impact on competition.

We have titled today's session "Procompetitive Potential and Anticompetitive Risks." One might characterize that as simply another way of describing a Rule of Reason analysis. And in fact the Department of Justice in a business review letter characterized it this way: "Standards can promote consumer welfare by reducing costs and facilitating competitive entry into high-tech markets. As a result, the antitrust legality of private standards is determined under a Rule of Reason analysis in which the potentially anticompetitive effects of a standard are balanced against its potentially beneficial effects. Antitrust enforcement concerns arise only when the former outweigh the latter." What the government said in its guide-

lines is no more than a restatement of the Rule of Reason, in its barest form.

Now of course, we don't know exactly how to do the balancing, but we know what the framework is. Hopefully, we'll try to put some flesh on the bones of the balancing act today.

Now, finding the standard is difficult, and each of our panelists will address it from a slightly different viewpoint. Why is it so difficult? First of all, standards can be created by joint action or unilateral action. The standard can be purely private, or it can have governmental involvement. It can be voluntary or mandatory. It can be imposed by will by a dominant company or by consensus, and can involve or not involve intellectual property. The variables are many, and the cases have arisen in disparate fact contexts.

Finding the right place to draw the line has also been difficult because the courts have sometimes focused on notions of fairness and due process within a standard-setting organization, which doesn't necessarily have any impact on the competitive effect of the standard that's adopted. That may be an element that we're all comfortable with, but from an antitrust standpoint it may not make a difference. We are going to talk about that, hopefully, in the Q and A. Many standards also have international dimensions, and we are going to address that as well, because they cut across borders quite easily.

Is there any consensus here? Yes. The procompetitive potential in standard setting is clear, and we've seen that.

Think of telephone systems, both wired and wireless without standards; think of modems, broadcasting, even nuts and bolts that need to fit together. So we need to have standards of some kind in order to make the economy function. Standard setting can also provide safety benchmarks for consumers. Standard setting also carries the potential for anticompetitive effects that outweigh any procompetitive effects, by impairing competition by reducing the number of players or by facilitating unwanted price trends.

If you look at it in its broadest sense, the Supreme Court's *Professional Engineers* case was a standard-setting case. The organization set a standard that happened to affect price. That may have been standard-setting going awry, but it started off as standard setting. So getting the balance right here is particularly difficult. It is particularly difficult with the intellectual property component that's become more and more a part of standard setting, and the different organizations and the different proce-

dures that organizations use to arrive at standards. So it's difficult, but most standard setting is probably pro-competitive. We have to find the ones that are troublesome, and that's what we are going to talk about today.

We have a very distinguished panel that will share their experience from four different viewpoints. I'll introduce them all now and ask them each to come up in order.

The first speaker is going to be Geoff Oliver. Geoff's experience includes clerking in the District of Massachusetts, some time with O'Melveny & Meyers in Washington and also in Brussels. Afterwards, he went to the Federal Trade Commission, and he is now the Assistant Director of the Anticompetitive Practices Division of the Bureau of Competition. His experience has included work on the *Rambus* case.

After Geoff will be Jim Kobak. Jim is a partner in the Hughes, Hubbard firm and heads the antitrust practice at Hughes, Hubbard. He is a frequent speaker on antitrust and intellectual property issues. Jim has taught several law school antitrust and antitrust intellectual property courses. He's a frequent speaker and writer. He testified at the IP Antitrust Hearings last year, and he's the editor of the ABA Antitrust Section Handbook on *Intellectual Property Misuse: Licensing and Litigation*.

The next speaker is a wonderful pinch hitter. We were going to have Maurits Dolmans from the Cleary Gottlieb firm, and unfortunately, the EC had other ideas for Maurits today. His partner, Mario Siragusa, has very graciously agreed to step in and provide his own viewpoint. He will be providing the European viewpoint, which is modestly different than the U.S. viewpoint on standard setting. We all need to take that into account when we are dealing with a standard that cuts across borders.

Mario is a partner at Cleary Gottlieb, with offices in both Brussels and Rome. He has practiced before the European Court of Justice (the "ECJ"), the Court of First Instance (the "CFI"), frequently in front of the EC, and the Italian Antitrust Authority. He is a professor at the College of Europe in Bruges, widely published in U.S. and European publications on antitrust issues, and has law degrees from Harvard and also degrees from Belgium and Italy. So Mario brings to us a unique viewpoint.

Then we are going to have a slightly different viewpoint from John Hayes. Dr. John Hayes is a Vice President of Charles River Associates, with an office in Berkeley. John has spent time as a staff economist at the Antitrust Division, a consultant to the FTC in the Unocal proceeding. John is going to tell us how economists look at standard setting and the tools that economists use to analyze standard setting.

Without further ado, I will turn the podium over to Geoff.

MR. OLIVER: Well, thank you very much, and thank you for the invitation to speak here today. It is a pleasure.

Let me begin, if I could, with the standard disclaimer. The views that I express here today are mine alone and do not necessarily reflect the views of the Federal Trade Commission or of any Commissioner or of anyone else on FTC staff.

Let me also mention before I start that among the matters I will be referring to today are the *Rambus* and *Unocal* matters. Those are both still under litigation, and so as a result I am constrained as to what I can say about those two cases. I will try to restrict my remarks about those two cases today to materials that are in the public record.

Also before I begin, I would like to start by mentioning briefly four matters that I will be referring to consistently throughout my remarks this afternoon. Many of you are probably familiar with some, if not all of these. But for those of you who aren't, let me give a quick overview. First of all, it is the Dell matter. This is a consent dating from 1996. The allegation there was that Dell participated in the Visa standard-setting plotting, setting a standard for the fee L-plus. That in the course of that standard-setting work, Dell voted on a ballot for the standard, and in doing so certified that to the best of the Dell representatives' knowledge, Dell did not have any patents that were relevant to that standard. Sometime after the standard was adopted it turned out that Dell in fact did have a patent predating the standard, which Dell started to assert against other members of the industry. Dell settled FTC staff's proposed complaint in the form of consent. That consent led to a 4:1 opinion with four Commissioners writing the majority opinion accepting the consent and one Commissioner writing a dissenting opinion in that matter.

Second is the *Rambus* matter. The allegation here, as set forth in the complaint, is that Rambus joined a standard-setting organization by the name of JEDIC that had rules requiring participants to disclose relative patents and applications in the context of ongoing standard setting work. The allegation is that Rambus had relevant patent applications that it did not disclose, and in fact it used the organization's information to further amend its patent applications to ensure that they would cover the resulting standards.

During the course of the standard-setting work, Rambus withdrew from the organization, but once the standards were finalized and adopted by the industry, the allegation is that Rambus then started asserting its patents against the industry.

That case was litigated last year. In early 2004 the Administrative Law Judge issued an opinion finding against complaint counsel and for *Rambus* in that matter. Complaint counsel has appealed that decision to the full Commission. That was argued in December and is now in front of the Commission for a decision.

The third matter is the *Unocal* matter. The allegation here is that Unocal participated in regulatory process by the California Air Resources Board. The California Air Resources Board, known as CARB, was setting regulations for reformulating gasoline for the purpose of reducing automobile emissions in California. The allegation is that in the context of its participation, Unocal made certain misrepresentations with respect to certain data and certain research, misrepresenting that it would be nonproprietary and available for public use. Once CARB issued its regulations, and again, the industry started adopting its refineries to start producing that type of gasoline, Unocal then began to assert its patents against companies producing the CARB-required gasoline.

The complaint in this matter was dismissed by ALJ on *Noerr-Pennington* grounds. That was appealed by complaint counsel to the full Commission. The full Commission overturned the ALJ decision and reinstated the complaint. That matter is now in trial. After three months of trial—we expect that tomorrow will be the last day of trial, and following a one-and-a-half to two-month briefing process, we expect that to be ripe for decision by the Administrative Law Judge.

Finally, I refer to the Federal Trade Commission and Department of Justice Intellectual Property Hearings held in the course of 2002. In particular days ten through twelve held on April 9th through 11th of 2002 focused specifically on standard-setting. There were approximately 29 panel members who addressed this topic. Their papers are all up on the FTC web site. In fact, all of these matters, all public materials relating to these four matters are all available on the FTC web site.

Let me begin by stressing that the Federal Trade Commission does recognize procompetitive benefits of standard setting. Standard setting can offer many benefits, including insuring interoperability of components, promoting rapid adoption of new technologies, promoting new entry and promoting price competition. And procompetitive benefits of standard setting have been recognized by a number of authorities as summarized in the slide here. Indeed, I think that the appropriate way to look at the FTC's *Dell* matter and similar types of matters is actually reaffirming the potential procompetitive benefits of standard setting.

But the issue in *Dell*, for example, was that the anticipation was that that private standard setting was going to result in procompetitive benefits. But the anticipated

procompetitive benefits were hijacked by the activities of one company seeking to counter the power for its own individual gain, and therefore, the complaint in *Dell* and in similar matters really is addressed towards trying to prevent one company or a small number of companies from capturing the standard that should be going to procompetitive benefits for the industry as a whole and indirectly for consumers.

At the same time, standard setting can also have anticompetitive effects. Among the possible anticompetitive effects are misuse of standards to restrict entry or misuse of standard setting to gain monopoly power. Misuse of standards to restrict entry to competitors has been explored previously, and I think it is a matter that Jim is likely to address further in his comments. This afternoon I intend to skip over that and focus on the second issue: Misuse of standard setting to obtain monopoly power. And that is an area that has attracted quite a bit of attention at the Federal Trade Commission recently.

Standard setting can lead to monopoly power through the so-called hold-up problem. And I assume this is something that John is going to address in more detail this afternoon. The concern is based on a difference in potential economic power before and after a standard is adopted, before a patent technology may compete with other technologies. As a result the patent holder faces competition from other technologies such that industry members can avoid the patent by using an alternative technology, or can negotiate down in price on the patent technology by threatening to use alternative technologies.

After the standard is adopted, however, it's possible that industry might become locked into using a standard and thereby locked in to use the technology in the standard. And as a result, the industry may no longer have the power to switch to an alternative technology, and that may in turn allow the patent holder to exercise monopoly power.

The IP hold-up problem has been discussed in a number of different contexts. The common theme, though, is hold-up is opportunistic conduct and does not further procompetitive efficiencies; rather, it results in a misallocation of resources. Specifically, it results in a different allocation of resources than would have taken place from ex-ante bargaining based on full information.

Well, with that background and with my remaining time, I would like to touch very briefly on several issues that have arisen in the context of this IP hold-up problem. I will run through these fairly quickly, but will be happy to address any of them in more detail during the question and answer period.

First, does antitrust law apply to single-firm misconduct in connection with standard setting? I think most

people have assumed that antitrust law does apply to single-firm conduct in the standard-setting context. With the one exception is the initial decision in the *Rambus* matter. The case that it does apply is set forth probably most specifically in complaint counsel's appeal brief for the *Rambus* matter. I think I will leave it at that. If there are questions on that topic, I can address it in more detail.

Second issue. What is the source of a patent-holder's affirmative duty to disclose? I think it is fair to say at this point there probably is no consensus as to when a patent-holder must disclose the existence of patents relating to standard-setting work. The possibilities range from there is no duty, if the company has an individual business interest in not doing so. And that position was set forth in *Rambus* respondent's answering brief. Perhaps slightly broader than that there would be a duty to disclose if required by a standard-setting organization's clear and unambiguous mandatory rules. This is the alternative holding set forth in the *Rambus* initial decision.

Now, perhaps a somewhat broader approach than that was the one set forth in complaint counsel's appeal brief of *Rambus* as well as in the two standard-setting organizations' amicus briefs filed in that matter. And that would be that one would look not only to the standard-setting organization specific rules, but somewhat more generally to the standard-setting organization's purpose and procedures as well as to duties and obligations of good faith to determine the existence of an obligation to disclose.

And perhaps the broadest position was set forth in two other amicus briefs filed in that matter by the American Antitrust Institute and a group of economists arguing that there should be a duty to disclose relevant patents in the standard-setting context regardless of the standard-setting rules arising directly out of antitrust law.

Again, we'll see what position, if any, the commission takes in the *Rambus* litigation.

The next issue is, absent specific disclosure rules, may a patent-holder be liable for an affirmative misrepresentation? For example, if a patent holder were to falsely assert it had no relativity relative to the proposed standard, could it be liable even at the outset of disclosure? I think the complaint in *Unocal* stands for the proposition that yes, it can be. Once again, we'll have to wait and see what the outcome of the *Unocal* litigation is.

The next issue is whether a patent-holder can be liable for a negligent misstatement or a negligent failure to disclose. And here again, I think it is fair to say there is no consensus at this time. I think if one were to look at the staff complaint in the *Dell* matter, that complaint made no mention of whether Dell's conduct was inten-

tional, negligent or otherwise. Therefore, I think that complaint could stand for the proposition that under certain circumstances a patent holder might be liable for negligent conduct. If one were to look at the majority opinion there, it rested on its finding that the conduct of Dell was not inadvertent, not necessarily intentional, but perhaps pretty close. And so I think that one could interpret that majority opinion as saying that, well, it's possible that one might be negligent—one might be liable for negligent conduct. But it looks as though the majority opinion on *Dell* left a fairly narrow opening there.

Then for the proposition that intentional conduct is required and that a negligent misstatement or negligent failure to disclose would not be sufficient, I would refer you to both the initial decision in *Rambus* as well as the *Dell* dissenting opinion. I think particularly with respect to the *Dell* dissenting opinion there was a concern that negligent liability for negligent misstatements could lead to greater costs of avoidance, in particular a potential need to search patent portfolios or potential need to hire an analyst to undertake review of scope of patents. And that that in turn could discourage participation in standard-setting organizations. I think the result is that in opposition, there is perhaps an acknowledgment that liability for any negligent conduct, if at all, should be fairly narrowly defined. Nevertheless, that is to say at this time an undecided issue.

The next issue is whether a patent holder can be excused from disclosure if it charges so-called RAND or reasonable and non-discriminatory royalty. The argument would be if a standard-setting organization's ultimate goal is simply to assure reasonable and non-discriminatory rates available to everybody, a member need not disclose individual patents or applications so long as it commits to make all of its patents or applications available on RAND terms. The opposite view is that RAND is not necessarily the same as patent-free or no royalties, and therefore, there is in fact an additional benefit above and beyond RAND to the disclosure.

Again, the positions have been taken on both sides of this issue in the *Rambus* litigation, and we'll see, if the Commission reaches this issue, what the Commission decides.

The next issue is how a RAND rate is calculated. I think the theory is actually not that controversial. I think in theory most people agree that it should be based on the parties' prelock-in bargaining position. There have, however, been certain people who advocated that it is sufficient to examine it ex-post and compare the royalty rate with other rates charged for different technologies in the industry. Again, I think it is an area in which we need more experience before developing consensus.

Perhaps beyond this issue, though there is also a subsidiary issue, even if there is agreement on theory,

there may be insufficient information to permit implementation of RAND in practice on an ex-post basis. In other words, if a party commits to RAND terms in a standard-setting context, and the organization adopts that technology sometime down the road, the patent holder starts demanding certain royalty rates, how does one determine whether the royalty rate then being demanded does in fact comport to RAND terms? Speaking personally, I can say that I certainly understand these concerns, and I think I would have some sympathy for the argument that a standard-setting organization that requires solely a RAND commitment in order to use patent technology without anything more might not be doing as much as it could to ensure that it is avoiding hold-up problems down the road.

That then leads to the question: If the standard-setting organization wants to do more, are standard-setting organization members permitted to negotiate royalty rates collectively? Some people have expressed concern that any discussion of specific royalty rates in the standard-setting context could be per se price fixing. Others, however, have pointed out that there could be efficiencies relating to such discussions, particularly to the extent that they help to avoid the hold-up problem that we have been talking to.

This again is an issue that we have relatively little experience with at the Federal Trade Commission, apart from the IP hearings. Let me say my personal view—and I emphasize this is my own personal view—I think that there are a fair number of parallels here with BMI, and I personally am sympathetic to implying a Rule of Reason analysis in this area.

Next question: Must a patent holder offer identical terms to companies that do not participate in the standard-setting organization? The concern here would be a patent holder could agree with other members of a standard-setting organization whereby the patent holder gets its technology incorporated in the standard and other organization members get preferential terms to use of the technology. The result being, however, that new entrants are disadvantaged. I personally would have significant concerns about such an agreement. Having said that, there are times and there might be justification, especially if there were to be an integration of effort and know-how among the participants to a standard-setting organization. But in such a case, I would want to examine any such justification.

Finally, if a patent-holder promises RAND terms, can it later withdraw its offer? Obviously, it is a concern if an organization adopts a patent technology and it becomes available on RAND terms, the patent becomes locked in and it revokes its RAND commitment, it may be able to thereby increase its leveraging power and hold-up ability over the industry. I think the issue here is whether the patent holder's earlier promise contributed to its later

ability to demand high royalties. I think that is a fairly fact-intensive question. It would depend, among other things, on how long the promise was pending, and what happened during that period. However, if the facts showed that a patent holder were able to increase his market power by making and then later withdrawing a RAND commitment, at least as I stand here today, I can't think of any procompetitive justification for doing that.

That completes my very, very quick overview of some of the issues that have surfaced during recent patent-related matters at the Federal Trade Commission. And I apologize if I've whetted your appetite without providing any serious answers here. All I can do is urge you to stay tuned, because I think we will continue to address these issues, and I think that we will have more guidance and informed decisions and other precedent forthcoming in the coming years. Thank you very much.

MR. KOBAK: Good afternoon. I'm Jim Kobak. It is a pleasure to be here.

I took a slightly different approach to this, as opposed to some of the other panelists. I tried to look at this question from the point of view of a U.S. antitrust lawyer being asked by clients about the propriety of getting involved in a standard-setting organization, or perhaps a group of people coming at a preliminary stage thinking about doing something. So I'm going to talk briefly about the legal framework, in addition to talking about some of these disclosure/non-disclosure, royalty and licensing issues and so forth that I think are going to be gone into in a lot more detail by the other speakers. I'm kind of an old-fashioned guy, so I'm going to talk about some of the old-fashioned issues that also arise in these issues and that one would want to consider.

As Alan mentioned at the outset, there is a tremendous spectrum of things that, broadly speaking, could be considered standard setting. There are standards that are set by governmental bodies or approved by governmental bodies, and I'll have a little bit to say about that later on. What I'm going to chiefly focus on are collaborative or consensus standard-setting operation, where a group of primarily private entities get together and either in a formal or informal sense come up with standards. There are also de facto standards, such as in the Microsoft case, where one company or a group of companies, because of network effects and other things, may be able to come up with something that becomes an industry standard, even though there hasn't really been a collaborative effort to get there. I took that part of the topic as a huge subject in itself, and beyond the purview of what I should talk about. So I don't really intend to address that.

One of the first questions I ask is: What kinds of standards are we talking about? First of all, as Alan mentioned, I didn't put on the slide, and I probably should

have, are they voluntary, or are they mandatory? Because that obviously can have a big impact on what exclusionary effect, anticompetitive effect might be deemed to be. There are different formulations that you can use to characterize standards. I tried to simplify it into four areas in descending order of where you might have potential problems.

First would be an organization that approves or disapproves very specific individual products or type of products. Where obviously somebody whose product is not approved may have a very strong claim of exclusion, and that may have a very significant competitive impact, depending on what the structure of the market is.

Maybe one step down from that would be a standard that required certain characteristics that products have, without examining things on a product-by-product basis.

One step down from that, and probably more easy to justify, would be a standard that required certain results or that it be inter-operative with other products or services, but maybe wouldn't specify exactly how that was done.

Then fourth, I would put a standard or a certification body that certifies that a product meets certain quality characteristics or performance standards.

The legal framework, as we have already discussed, is generally these questions are looked at under the Rule of Reason. There are, I think, some occasions when you might be concerned about the per se approach or something approaching a per se approach: Any time you have arbitrary exclusion of competitors, something that looks like a boycott of competitors; or a standard-setting body, which gets into putting limitations on price, price advertising, bidding and so forth. And one of the things to be aware of in this area, and again I'm very old-fashioned, is that a program may have a lot of competitors getting together, and although what they are discussing isn't really price or marketing, it is very easy to get into discussions that might have some implications for those things. So it is very important to guard against spill-over effects.

There is a statute that Congress passed that creates Rule of Reason treatment for voluntary consensus standards. But that really only applies to the standard-setting body itself, not to the participants.

So where have problems arisen in the past? And again I'm looking broadly over maybe the last ten or twenty years, not necessarily just at the recent cases before the FTC and so forth. You know, first and foremost, I think any kind of organization that appears to be boycotting competitors, there are a lot of ways that can happen. And to take a familiar example, you can have a Bar Association that passes rules that limit certain kinds

of activity to lawyers when there doesn't seem to be a terribly good rationale for doing that and perhaps tells lawyers you can't deal with title companies, you can't deal with paralegals, you can't deal with some other kind of entity in certain transactions, because that would be a violation of the attorney's rules of ethics. Now, a lot of times that kind of activity will be protected by the State Action Doctrine, depending on what the status of the bar association is by local law. But I just use that as an example of the kind of thing that could well be deemed a boycott by competitors, if you didn't have some kind of state imprimatur on it.

A variation of that is approving certain products or certain types of products but not others, without having a reasonable basis for doing that, or any reasonable or apparently reasonable procedure for making that decision. For instance, one example of that would be forbidding or failing to approve any product that's patented which years ago the FTC held was something that should not be done. I think that is probably still good law today. You shouldn't just arbitrarily exclude something because it is patented, particularly since you could require licensing on reasonable terms or disclosure and so forth in order to protect people in the venture. Another example would be arbitrarily denying certification or approval to low-cost competitors or to new ways of doing things that might lower costs. The *Radiant Burners* case from years ago in the Supreme Court is a good example of that. Limiting participants or access to standards without a good reason for doing so is an area that could get one in trouble.

I think one thing to consider is not letting vested interests capture the organization. An example of this is the case a few years ago involving the ABA in its standards for certifying law schools, where at least part of their underlying theory was that the law professors had begun to play a huge role in the certification and review process. And it seemed, at least to the Department of Justice, as if a lot of the rules that went into the factors as to whether a law school complied or not had a lot to do with what life was like for law professors, whether they had sabbaticals, what the class size was, whether there was adequate compensation and so forth. Part of the theory there was that you shouldn't just let the industry that's most affected be the only players. You ought to include some members of the public, some of the constituents, law students and so forth so that you don't let the vested interests start dictating what the rules are in a way that serves their purposes but may not serve the public interest anymore.

Members gaming the system. We have already heard about that, and we'll hear more about it. The patent nondisclosure IP ambush type issue, which is very prevalent today. You also have earlier cases where companies rigged the vote or otherwise rigged the process,

manipulated the process in order to achieve an anticompetitive outcome.

As I mentioned before, another thing I would look for is spill-over effects: Whether there is discussion of price, sharing of information about price, about marketing, about customers and so forth among the competitors who may be in one of these organizations, even though that may not be the stated purpose of the organization. Also, sometimes, particularly in professional certification and standardization type activities, there may be bans on competitive advertising, bans on competitive bidding. Obviously, these things pose severe anticompetitive risks. There may be reasons of course that you need to have truthful advertising and prohibit certain types of advertising. But it is very easy to go over the line. So again those are things that I would advise a client to be careful of.

At what point does a standard-setting organization, particularly when intellectual property is involved, become a licensing cartel or monopoly? If it starts requiring that people deal with its standards, which include a lot of patented technology and take licenses from a pool of patents, or if the group of competitors get together and say we'll pool our patents that are necessary to meet the standard. There are obviously very procompetitive aspects to doing that, making it easy for people to meet the standard. But if the idea of doing that is to get people to adopt your technology, rather than alternative technologies, one could see that as an antitrust problem. If in the course of doing that, you require people to grant very broad rights to their technologies—to require licenses of patents or other intellectual property that might be nice to have, but it isn't really essential for the standard—you could run into antitrust problems.

And finally, the licensing monopsony issue, which is one that some of the other speakers have touched on or will touch on, which is basically saying, yes, we will deal with the you, but only if you agree to license your intellectual property on certain terms. We'll approve your product, specifically, but only if you agree to certain things. And you obviously have a potential to look at that as a group of competitors agreeing on the terms that they will deal with somebody, when ordinarily you would expect them to deal individually.

I'm not saying that there are not certain things that people can do in a standard-setting organization to achieve some of this, and some of the other speakers will talk about that balance, but there is, I think, a very serious issue there.

The IP ambush, again, other speakers will talk about this. It is really failing to disclose intellectual property and then enforcing it when it becomes essential to the standard. It is a classical hold-up problem. We think about this in antitrust terms, but you also ought to be aware that, in addition to potential antitrust liability,

there are also doctrines of patent misuse, patent law, equitable doctrines like laches and estoppel, breach of contract and fraud theories that can also apply. And of course, some of those theories don't necessarily require you to show a substantial effect on competition the way an antitrust theory would.

Usually these cases boil down to what is it that the rules of the standard-setting body actually require? How clear is it that they require disclosure? And what is the standard of knowledge that they impose on a company that's alleged to have failed to have disclosed something?

In a lot of the cases that have come up to date, as I'm sure you are well aware, there has been a real question as to what the standard was or what the rule was that the standard-setting body imposed. Did it really require disclosure? Did it require disclosure of pending patent applications? How far did the disclosure go? Did the disclosure go to the fact that you might have decided there was nothing to disclose previously, but does a rule mean if you subsequently acquired IP you have to disclose that? Obviously, a lot depends in this area on what the rules of the standard-setting body are.

I think probably one of the most important things from a counseling standpoint—and I might get to it later if I have time—is to advise your clients that it is very important to look at those rules to really figure out what your position is and how comfortable you feel with those rules. And if there is some lack of clarification, as there often is, maybe try to do something to get it clarified.

Again, I'm not going to go into this for reasons of time and because it will be touched on by other speakers, but reasonable nondiscriminatory royalties, royalty-free license or strong disclosure are all different ways or variations that standard-setting bodies can use to deal with this question. But all of them impose potentially an antitrust risk, both for the organization and for people who fail to make disclosures.

One thing we ought to touch on is the effect of government involvement; because sometimes the government is the standard-setting body. Sometimes it approves the standards that have been reached in conjunction with the government or even by private parties. There are few statutes where Congress has granted express immunity for standard-setting activities and compliance with standards. More often than not, that's not the case. There is the implied immunity doctrine, but that's a very hard standard to me. I think essentially what you have to show is that there is a repugnancy between what the government is requiring in the standard-setting situation and what your antitrust law duties would be. And the immunity is only going to be as broad as the narrowest way of achieving those conflicting goals. So there are circumstances when you may have an implied immunity

defense, when the federal government is involved. But you really have to analyze that carefully, and I don't think you can necessarily count on it.

When you have a state action, you have state action immunity, so there are a lot of cases where probably there is something anticompetitive or potentially anticompetitive, or at least an argument that something a standard-setting body, like a bar association, is doing is anticompetitive. But probably the result is protected by state action. Other agencies don't have state action immunity per se, unless other standards are met. For instance, local bodies may be entitled to state action immunity if they have to show that they are acting pursuant to a clearly articulated policy of the state to displace competition. And private bodies that may be mandated by the state may have immunity, but they have to show not only clear articulation of a policy to displace competition, but also that there is active supervision by the state. So often one is asked questions, and to the extent that one's advice is influenced by whether there would be immunity or not from any anticompetitive activity that might be involved, I think one has to ask some very searching questions sometimes as to exactly what the scope of activity is, exactly who supervises it, how actively and so forth.

If the government sets or approves the standard, on top of everything else, you have the question of *Noerr-Pennington* immunity, which of course was a big question in the *Unocal* case. What does it mean? Does *Noerr-Pennington* apply to all the conduct that's related to the standard-setting activity, or only to the things that are very, very closely related to the interaction of the government itself?

What about corrupt activity? If you look at the *Omni* case involving dealing with legislative bodies, the Supreme Court said it really wasn't an antitrust issue, even if corruption or improper conduct is involved. Whereas, the *Allied Tube* case involving private standard setting, but where the standard was ultimately adopted by a lot of state governments, said you clearly could look beyond, you clearly could look for fraudulent conduct and so forth.

Is there a sham exception for nondisclosure or misrepresentation? I put on the slide about IP, but it could be about any subject. Is there a broader misrepresentation exception? The kind of thing that was talked about in the *Unocal* case, between political activity and nonpolitical activity. And finally, there is an argument that there is no exception at all; that the *Omni* case, which after all has been applied in the litigation context by the Supreme Court, said that corrupt activity, there are statutes and so forth that sanction that, but it's not really an antitrust question.

Thank you very much.

MR. SIRAGUSA: Thank you, Mr. Chairman, for letting me substitute for Maurits Dolmans, my partner, who apologizes but was stuck in Brussels and could not come today. And I could not resist the temptation to step in his shoes and come talk to you. It is always a pleasure to address such a prestigious audience in New York. I hope you will not be disappointed by this change.

I am going to dwell upon the recent developments in EU competition law concerning standard setting, in particular *de facto* standards, i.e., standards that have been unilaterally created by companies on their own and may or may not be covered by intellectual or industrial property rights.

I will discuss and contrast the recent decisions in the *IMS* and *Microsoft* cases. The former is a ruling adopted by the ECJ in April of 2004, and the latter is the order issued by the President of the CFI on the 22nd of December 2004. You may be familiar with the *IMS* case. *IMS* is the leading supplier of information on sales and prescriptions of pharmaceutical specialties. Until 1999 *IMS* was the only supplier of such services in Germany, where it had developed a format called "1860 brick structure," which divides German pharmacies into small geographical units. Reports of pharmaceutical sales were provided by *IMS* to the subscribers of the services on the basis of this regional structure, which was covered by a copyright under German law. The format had been developed in the industry. Major pharmaceutical producers in the industry were consulted by *IMS*. And an important element is that the sales data on the products were freely available to anybody.

NDC, a new entrant into the German the market, tried to adopt *IMS*'s format. The argument was that pharmaceutical companies, which used the data collection structure in order to supervise their marketing and sales people, would have found it too costly and difficult to switch to a new format; they were used to the 1860 brick structure. And so the argument advanced by *NDC* was that the format had become the *de facto* standard and, as such, was indispensable in order to compete in the industry. *IMS* sued *NDC* for copyright infringement and obtained interim orders prohibiting *NDC* from using the 1860 brick format. When *NDC* later requested a license from *IMS* in order to compete with it in Germany, *IMS* refused. *NDC* then complained to the European Commission in Brussels that *IMS*'s refusal amounted to an abuse of a dominant position under Article 82 EC.

The entrant's argument was picked up by the Commission, which agreed and in July 2001 issued its famous decision, holding that that copyrighted format was an essential facility, that it was indispensable in order to compete, and that a refusal to grant the license was tantamount to an abuse, because it basically monopolized the market for the information to the pharmaceutical

companies. Therefore, the Commission ordered IMS to license its brick structure system to NDC.

As mentioned, the Commission based its decision on the essential facility doctrine, on the grounds that IMS' brick structure was the standard derived from input from the industry—the companies had to participate in its development—and thus had become a *de facto* standard. As I said, it was difficult for customers to switch, and the effect of IMS's refusal was the monopolization of the market.

The point of whether the format was a *de facto* standard, and thus an essential facility, was much debated because some of the typical characteristics of standards were not present. This was not really a question of interoperability or exchange of information between competitors. The standard did not result from any agreement. The pharmaceutical companies were consulted by IMS. There was no agreement to use that standard, and there was no agreement either between the participants to the consultation nor with IMS to use a particular standard. So it was something developed completely *de facto*.

Comparison between actual and historical sales data by drug manufacturers was an issue in this matter. So if a pharmaceutical company switched to a different system, to a different format, it would have to reconfigure the historical data in the new format in order to be able to compare them with the new data. There was some cost involved, but switching did not really seem to be an insurmountable obstacle.

The other aspect was customer involvement, although the Commission never really openly argued that IMS had taken possession of something which was really a standard agreed by the industry. I think that this could be construed as the normal involvement of a customer taking on a new product. Moreover, as I mentioned before, nothing prevented new entrants from consulting themselves the other market participants.

In respect of the issue in question, the decision of the Commission departed from previous case-law. Until then in this area there were two very important decisions, rendered in the *Volvo-Renault* and *Magill* cases. In *Volvo-Renault*, a case concerning exclusive design rights on spare parts for cars and the refusal by the right-holder to grant a license to independent spare part manufacturers, the ECJ clearly stated that a refusal to license is not in itself an abuse. You need additional abusive conduct in order for there to be really a violation of Article 82 EC, and gave a number of examples, such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation. Where such additional abusive conduct is present, refusing to grant a license may be anticompeti-

tive and unlawful because, by refusing to license the IPR, the right holder in essence attempts to leverage existing power in one market to another (in that case, to extend exclusivity from the design of the spare parts to the market for car maintenance services).

The other important precedent was the famous *Magill* case, concerning the listing of television programs, in which the Commission's decision adopted in 1988 was upheld by the CFI in 1991 and the ECJ in 1995. The Luxembourg Courts held that in order for a dominant company to have an obligation to grant a license, exceptional circumstances must be shown, including in particular the existence of a secondary market in which the refusal to deal results in monopolization. In the *Magill* case, three broadcasters refused to license their individual advance weekly program listings in order to avoid new entrants into the market for the publishing of a comprehensive weekly television guide. In the Commission's view, the broadcasters abused their market power by using the copyright in the market for the listing of the television programs to exclude competition in the downstream secondary market for weekly television guides.

As mentioned, the EC Courts held that there was no substitute for the weekly television listings published by the broadcasters, that their refusal to provide the information prevented the appearance of a new product (i.e., the comprehensive guide which was going to be offered by the new entrant) and was unjustified, and that it was necessary to have monopolization of the secondary market in order for the refusal in the upstream market to be abusive. Please note that in *IMS* these requirements were not met because the service which was being offered by the new entrants was a clone of the service offered by IMS, sharing the same format and responding to exactly the same demand, so it was not a new product which did not exist on the market. So when the Commission decided that IMS had violated Article 82 EC, it ignored these differences with the previous EC case law.

Then we come to the ruling of 2001, in which the CFI affirmed its case law and suspended the Commission decision by way of two subsequent reasoned orders, after which—pending the Court's decision on the substance of the case—withdrawed its decision in 2003. The Court's rulings were founded on two grounds: first, in order for the refusal to grant an IPR to be abusive, the new entrant has to offer a product which is not available or for which there is a demand which is not satisfied (a "new" product). Secondly, the Court held that one of the requirements for establishing an abuse of dominance is the existence of an upstream and a separate downstream market, whereas this was not the case in *IMS*. The market affected by IMS's refusal to license was only one: the market for services and statistical data in the pharmaceutical industry, and there was no such difference between the input market and the downstream market.

Let us now move to the *Microsoft* case, in which the President of the CFI issued an order rejecting Microsoft's application for interim measures. The complaint filed in 1999 was based on two conducts, namely on Microsoft's restricting interoperability between Windows PCs and non-Microsoft work group servers, and by tying its Windows Media Player (WMP) with its ubiquitous Windows operating system. I will dwell only on the former because it is relevant to our discussion. The Commission decided in March 2004 that Microsoft's conduct was abusive. It found that Microsoft was dominant in the PC Windows market, and that non-Microsoft servers had to inter-operate with Windows in light of the dominance of Windows. The refusal to supply interoperability information extended Microsoft dominance from the operating system from PC to servers, and therefore there was an abuse. The remedy imposed on the company pursuant to Article 82 EC was an order to disclose complete and accurate interface documentation which would allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers. To the extent that any of this interface information might be protected by intellectual property in the European Economic Area, Microsoft would be entitled to reasonable remuneration. So this is a case of compulsory licensing for interoperability.

The Commission tried to bring this case in the mold of the case law which I discussed earlier, arguing that the interface information was indispensable in order to ensure parity of competition in the server market between the Microsoft servers and the other servers. Therefore, the effect of Microsoft's refusal to provide interface information was an extension of its dominance from the PC market to the server market, resulting in a reduction of information prejudicial to consumers. Moreover, there was no objective justification for the refusal.

The Commission decision was appealed and Microsoft also requested that operation of the decision be suspended by way of an interim ruling by the President of the CFI.

In his order dismissing Microsoft's request, the President held that he had to decide first if the applicant had a *prima facie* case and, secondly, whether the operation of the decision would result in causing Microsoft serious and irreparable damage. On the *prima facie* case, the President recognized that that the main action raised a number of questions of principle relating to the conditions on which the Commission is entitled to conclude that a refusal to disclose information constitutes abuse of a dominant position contrary to Article 82 EC. Therefore, Microsoft's application for annulment was not at first sight unfounded and the *prima facie* case requirement was satisfied. However, the President found that the requirement relating to urgency was not satisfied since

Microsoft has not adduced evidence that disclosure of the information previously kept secret would cause serious and irreparable damage, and rejected the suspension request.

The President's remarks on the *prima facie* case were extremely interesting. Microsoft submitted that a refusal to supply can be found to be abusive only where the conditions laid down by the EC Courts are satisfied, whereas the Commission's decision was based on the idea that the existence of exceptional circumstances must be assessed on a case-by-case basis and, therefore, it cannot be excluded as a matter of principle that a refusal may be abusive, even though the conditions hitherto laid down by the EC judicature are not satisfied. The President took the view that that question could not be resolved at the interim relief stage.

He added that an important element in *Microsoft* was the difference in the nature of the protected information. In *Magill* and *IMS* the information was not secret and, as Microsoft argued, not valuable, whereas Microsoft's information was valuable and secret. The President seemed to reason that the relevance of secrecy must be assessed by the full Court "because account must be taken more generally of parameters such as the value of the underlying investment, the value of the information concerned for the organization of the dominant undertaking and the value transferred to competitors in the event of disclosure."

The President of the CFI also left it to the Court dealing with the substance of the case to resolve the disputes in respect of the indispensability of the information in issue, the barrier to the emergence of a new product for which there was claimed to be an unsatisfied demand, the risk of eliminating competition on the secondary market and the objectively justified nature of the refusal.

And in doing that the President brought to the fore the "contradiction" within IP rights and competition rights, and the balancing of interests that you have to take into account in this field. So how do you square it all? What is the practical balance between the incentive to innovate for Microsoft, and innovation in the entire information technology industry? These are the issues on clear guidelines and answers are expected of the EC Courts.

My presentation could continue, but we have to respect timing, so I will stop here. As a final remark, I will simply note that the contrast between the cases that I discussed today raises some very interesting and crucial issues of the relationship between antitrust law and IP rights. The further developments in this area deserve close attention.

Thank you, Mr. Chairman.

DR. HAYES: Thank you for inviting me here to speak today about these very interesting and important cases. We have already covered a great deal of ground in this space generally, standard-setting organizations and how that process might be inherently dangerous in terms of antitrust laws and more narrowly on some particular practices that I would characterize as abuse of the standard-setting process.

I am going to limit my remarks to a couple of cases that we have already heard a little bit about, the *Dell* litigation, the *Rambus* litigation and the *Unocal* litigation. All of these cases involve a particular kind of conduct—deception or misrepresentation regarding intellectual property necessary to comply with the standard—that’s really the core conduct at issue. What I would like to do is talk about how economists evaluate the economic effects of that misrepresentation, and in particular how that misrepresentation contributes to market power.

I’m going to try to be careful in my remarks to talk about an increment to market power as opposed to simply the possession of market power. Because as we all know, patents often can confer some market power on the patent holder. So we are going to set aside any question as to whether the patents create market power independent of the deception and the related activities of the standard-setting organization, and focus instead on what additional market power may have been created by the alleged misrepresentations.

To get started I want to go through a couple of basic building blocks. I think these are largely familiar to everyone, but I’d like to make sure we are all starting from the same place. In a market economy, when things are working well, the maximum, or potential, market value of a patent—and I’m going to use the term “patent” because these cases involved patents, but the core issues regarding deception could apply to any form of intellectual property—is equal to the incremental profit the patented technology offers relative to other technologies. One can determine that by looking at the profit that could be earned by using the patented technology as compared to using the next-best technology. So that’s what happens if the market is working well.

As we will see, the standard-setting process can create a gap between the potential value of the patented technology before, as compared to after, the standard is set. In particular, the potential value of the technology chosen by the standard-setting process can increase because of subsequent specific investments, learning, complementary investments, and network effects. We are going to talk about how specific investments or complementary investments and so forth can contribute to the gap between the relative values of the potential technologies that could be used in the standard and discuss some

implications for the acquisition of market power through deceptive conduct in this context.

The issue that arose in the *Unocal* and *Rambus* litigation is that after the standard was selected, the patent owner engaged in what economists call opportunism. Opportunism means the patent holder recognized that after the standard was selected and specific investments were undertaken to comply with the standard, there was some additional potential value there in the patented technology. And there was an opportunity then to engage in guile, misrepresentation, or deceit in order to capitalize on that additional value.

The hold-up works because the buyer of the technology, the decision-maker—in the case of *Rambus* we are talking then about JEDEC, the standard setting organization; in the case of *Unocal* we are talking about CARB, the government agency that sets standards for gasoline in California—the decision-maker faces a less desirable set of alternatives after the standard is set, and that’s what prepares the ground for the hold-up.

So what I would like to do is walk through a couple of examples to illustrate the economics of opportunism. And since I’m the only economist on the panel today, I feel obligated to put up some numbers. So please bear with me for a moment, let me set these examples up, and we’ll see how deception coupled with opportunism can create incremental market power.

I’m going to develop the examples in terms of a couple of apartments. If you prefer you can think in terms of technology number one and technology number two. The principles we will be discussing are quite general; they are equally appropriate for apartments and technologies. The object of the example is to determine the increment to market power that results from the deception coupled with a commitment to a particular technology, or in this case a particular apartment.

In this example, you can think of Apartment 1 as the analog to the patented technology in the sense that we’re trying to determine how much I’d be willing to pay for Apartment 1 given what I’d have to pay for Apartment 2. And what we are going to do is add up the costs associated with each apartment choice. And then we will see how those costs change over after I make an initial decision to move into Apartment 1 and how those changes affect my willingness to pay for Apartment 1.

There are moving costs required to get to Apartment 2. Those are a specific investment. I would have to spend \$1,500 to move into Apartment 2. I would have to spend \$2,500 to move into Apartment 1. Those investments are sunk once my decision is made. I can’t get them back after I’ve moved into the new apartment.

There is rent associated with Apartment 2 of \$1,000 per month. Adding up the rent plus the moving costs gives a total cost of \$13,500 for one year.

I've introduced here one issue in my valuation of Apartment 1, which is often relevant in the context of evaluating patents. I think Apartment 1 is a nicer place. It is worth \$6,000 more per year to me than Apartment 2. Since this is a benefit of Apartment 1 as compared to Apartment 2, it enters in as a negative in my calculation of the total costs of Apartment 1. So we add the costs and benefits of Apartment 1 up, and the result is that the total cost of Apartment 1 is the annual rent—which at this point is unknown, so I'll label it *X*—plus the \$6,000 benefit and minus the \$2,500 moving cost for a net benefit of *X*—\$3,500. Setting this expression equal to the \$13,500 cost for Apartment 2 yields the result that I'm willing to pay as much as \$17,000 in annual rent for Apartment 1.

Now we need to figure out which of these two apartments I choose. I'm willing to pay as much as \$17,000 for Apartment 1. So that's setting up the initial negotiations or bargaining with the landlord for Apartment 1. If Apartment 1 is offered for less than \$17,000, I'm going to take Apartment 1. If it is offered for more than that, I'm going to take Apartment 2.

One other thing I want to mention here. I've labeled some of these costs expected costs. We are talking about decisions made before specific investments are sunk and what happens after those investments are sunk. So we need to keep track of what I expected things to cost and what kinds of benefits I'm expecting to get and what I actually got after I put the money in the ground. We'll come back to this later.

OK, let's suppose the landlord for Apartment 1 wants my business and offers the apartment for \$15,000. So after I move, what has changed? Well, one important thing that's changed is that I spent \$2,500 to move into Apartment 1. That money is sunk; I cannot get it back by leaving Apartment 1 for Apartment 2. So when I total up the costs of Apartment 1, after I've moved, and again compare those to the cost of selecting Apartment 2, I find that I'm now willing to pay as much as \$19,500 to stay in Apartment 1, rather than to pick up and move to Apartment 2. So if the landlord comes to me after I've moved and says, gee, I want to charge you more than the \$15,000 we had agreed to earlier, I might be stuck. I'm certainly in a worse bargaining position. I'm willing to pay more than I was before I moved, and the reason I'm willing to pay more is that I have already made a specific investment of \$2,500 to move into Apartment 1.

Notice that the increment to my willingness to pay is precisely \$2,500, exactly the amount I sunk. This illustrates a general principle. The increment to the decision-maker's willingness to pay is equal to the specific invest-

ments sunk in the selected technology. The magnitude of the specific investments will affect the potential value of the selected technology after the standard is set as compared to before the standard is set.

How that \$2,500 or that specific investment gets divided in a particular negotiation depends on certain details of the negotiation. If the owner of the technology can make what we call a take-it-or-leave-it offer, the owner will capture the full \$2,500. So in that situation we could say that the increment to market power that results from the hold-up is exactly \$2,500. In other situations, where there are more balanced bargaining positions, that \$2,500 might be split evenly between the parties. But the lesson to take away from this is that the increment to market power from the deception depends on the size of the specific investments.

There was no dispute, so far as I know, about this basic economic reasoning in the *Unocal* case. I am less familiar with the *Rambus* litigation, but I would be very surprised if there was any real dispute about this basic economic reasoning in that litigation either.

In the *Unocal* litigation there was evidence introduced on the size of the investments made by refineries that were specific to the CARB standard for gasoline. The FTC submitted evidence that the specific investments amounted to at least five cents per gallon. Five cents per gallon on the roughly ten billion gallons of reformulated gasoline sold in California every year adds up to many hundreds of millions of dollars very quickly. Unocal asserted that the specific investments were very small, on the order of thousandths of a penny. So there was no real dispute about the economic theory of opportunism, but there was considerable disagreement about the magnitude of the investments undertaken to comply with the CARB standard, and therefore, there was considerable disagreement about the increment to Unocal's market power that was attributable to the alleged deception.

I have some additional permutations on these basic economic themes that I want to introduce, but before we go to those, I would like to address a couple of misconceptions or myths that I have heard in the context of these cases. The first myth is that market power implies a different technology choice with full information. Well, this is just wrong. I think it is relatively easy to see why it is wrong in the context of the example that we were just talking about. Suppose the landlord had offered Apartment 1 initially for \$14,000. After I move in and sink my \$2,500 in moving expenses, the landlord demands \$16,500. Well, \$16,500 is below the \$17,000 I was willing to pay before I moved in, so I would have been willing to pay it. I would have selected Apartment 1 if the landlord had initially offered it at \$16,500. But the landlord didn't know that, and that's why he offered the

apartment at \$14,000. Before I moved in, there was competition, I had alternative apartments to choose from, the landlord didn't know what I thought of my alternatives, and the landlord was trying to secure my business. The presence of Apartment 2 was important to driving down the price offered for Apartment 1 even though I didn't select Apartment 2. And because Apartment 2 is a less attractive alternative after I've moved into Apartment 1, it provides less discipline on the price of Apartment 1. Nonetheless, the fact that I would have chosen Apartment 1 if it initially had been offered at \$16,500 doesn't change the inference that there has been an increment to market power that resulted from deception.

Myth number two is that sunk costs don't matter, but switching costs do. This is an issue that received a considerable amount of discussion and debate in the *Unocal* trial. It is one where I think there was a great deal of agreement on the underlying economic principles, and at the end of the day I think it wouldn't be unfair to characterize this as largely a semantic dispute. But it is a dispute where a judge or jury could easily get confused and misunderstand the economic conversation.

In the context of our apartment example, I think most people would be comfortable calling the \$2,500 a sunk cost. These moving costs are monies spent and forfeited if you end up switching apartments and moving to Apartment 2. And as we just saw in the example, the increment to my willingness to pay or the increment to market power depends on that \$2,500, that sunk cost. I think many people would also be comfortable calling the \$1,500, the moving cost for Apartment 2, a switching cost because I would pay that \$1,500 to move to Apartment 2 if I decided to switch. And as we saw in the example, the increment to market power didn't depend on that \$1,500 at all. It depends on the \$2,500. So again, this is largely a terminology issue, but it is one that is easily confusing, especially for people who are familiar with the so-called fallacy of sunk costs. There is no fallacy of sunk costs here. The \$2,500 is what matters to the increment to market power.

I mentioned that complementary investments, learning and network effects coupled with deception in the context of standard-setting, can also lead to hold-up problems. This next extension to the initial apartment example illustrates how that works. What I have done here is introduce a friends and family benefit: some friends and family who have told me they are going to move to whichever building I choose. They don't care whether I choose Apartment 1 or Apartment 2. It doesn't matter; they are going to go where I go. The benefit of having my friends and family move with me is \$2,000. Before I make my decision about which apartment to select, I could have the \$2,000 benefit at Apartment 1 or Apartment 2. So before I move, the friends and family benefits at Apartment 1 and 2 cancel out. They offset

each other and do not affect my willingness to pay for either apartment.

After I move, I will lose that \$2,000 benefit if I decide to switch and go into Apartment 2. So now there is an additional cost to me of going to Apartment 2. How does that affect my willingness to pay after I move? Well, it turns out my willingness to pay is now increased by the \$2,500 moving cost for Apartment 1, plus the \$2,000 friends and family adjustment. The landlord potentially could hold me up for the entire \$4,500.

The friends and family benefit illustrates how complementary investments can contribute to market power gained through deception. My friends and family made the investments, but those investments also provided benefits to me. Those benefits affect my willingness to pay, and that affects the increment to market power that results after I move.

The role of complementary investments is particularly important in the *Rambus* case. People often talk about the computer industry ecosystem, where there are a lot of related manufacturers all producing components used together in a system. In *Rambus*, the alleged deception involved a standard for DRAM, but there are many other participants in addition to DRAM manufacturers, such as computer manufacturers, module makers, and board makers, that also rely on the DRAM standard. In addition to the specific investments made to produce DRAM compliant with the standard adopted by JEDEC, there were complementary investments made in products that are used in a system with the DRAM, and those are relevant to a decision-maker's thinking about whether or not to switch from the adopted DRAM standard into some other technology.

The last topic I would like to discuss is what happens when actual costs or benefits differ from the expected costs or benefits. And I'll do this again in the context of our apartment example by showing what happens if Apartment 1 turns out to be nicer than I anticipated. Suppose I move in and discover that Apartment 1 is much nicer than I thought. With this new information, I now value Apartment 1 \$8,000 more than Apartment 2, or \$2,000 more than it was initially worth to me. Given the additional value I place on Apartment 1, I'm now willing to pay as much as \$21,500 to stay in Apartment 1. \$21,500 is \$4,500 more than I was willing to pay for Apartment 1 before I had moved in. The \$4,500 consists of the \$2,500 that I spent to move plus the unexpected benefits of \$2,000 that I received. The increment to market power attributable to the deception depends on the additional \$4,500 I'm willing to pay for Apartment 1 after I have already moved.

The principle that is being illustrated here is quite general. The increment to my willingness to pay—and therefore the increment to market power attributable to

the deception—is equal to the sunk investments plus any unexpected changes in costs or benefits associated with the technology choice that I made.

Unexpected costs and benefits associated with the selected technology were relevant in *Unocal*. A number of months after CARB had selected a gasoline standard, it determined the gas was cleaner than originally anticipated. So there were some unexpected benefits from adopting that regulation. And the theory tells us that those unexpected benefits are relevant to the increment to market power attributable to misrepresentation or deception.

Let me conclude by reiterating some of points I've made here. The economics of opportunism demonstrates that market power can arise from deceptive conduct in the context of efforts to establish market-wide standards. The expected increment to market power depends upon the specific investments undertaken to comply with the standard, plus any benefits caused by complementary investments. The expected increment to market power could differ from the realized market power, but it will do so in ways that we potentially can understand, explain, and measure. And finally, the increment to market power will be greatest where specific investments, complementary investments, learning economies, and/or network effects are large.

Thank you Mr. Chairman.

MR. WEINSCHTEL: We are going to take a couple of minutes for questions. I know there is another panel that's starting. The Chair's prerogative is to ask a question.

After listening to John talk about effects, the takeaway I have is that a hold-up is a hold-up is a hold-up. The question that I have for anybody on the panel is: Does the nature of the hold-up and the effects of the hold-up have anything to do—and we'll get back to standard-setting organizations here—with whether the rules of the standard-setting organization were complied with or not?

There has been lots of focus in the cases on whether the rules were complied with. But if there was a hold-up, we may have anticompetitive effects; thus, why do we continue to focus on the rules of the organization? Anybody want to answer?

MR. OLIVER: Well, I'll volunteer to leap into the abyss. It is something that I address tangentially in one of my slides and something that we did consider in certain of our activities.

I think that while I would agree completely that the economic effects of hold-up can be identical, regardless of whether the organization has rules or not. On the other hand, if one looks to potential benefits, if you will, standard setting or alternatively potential costs of enforcement, there is a potential concern with wanting to ensure maximum participation in standard setting and trying not to deter companies from participating in standard setting. And I think there is a concern that if one were to impose too strict requirements of disclosure, or particularly if one were to impose liability after the fact for failure to disclose when there were no rules in place to start with, that that could have a deterrent effect with respect to companies participating in the standard setting.

In addition, I think that there is—I again speak for my own personal point of view—I think that we probably don't have enough experience at this time in order to be able to impose a one-rule-fits-all type of approach. And I think that the potential effects of failure to disclose, if you will, or conversely the benefits of disclosing may vary from one industry to another and one situation to another. And as a result, I think I personally would recommend paying at least some deference to a standard-setting organization that understands the specific industry it is involved in, understands the specific members, understands its own goals and purposes, and presumably can at least in the first instance assess the benefits from disclosure versus the potential cost of deterring participation if its rules are too strict.

I don't think that the organization's rules should be the be all and end all. And indeed, in the *Rambus* appeal brief we took great pains to rely not only on the rules but the purpose of the organization, the general procedures and good faith. But at the same time, my personal view is that the organization's position deserves at least some deference in determining what the liability position should be.

MR. WEINSCHTEL: I think we have time for maybe one or two questions before we have to go. Anybody out there?

Hearing no one, I thank you all for attending. And I want to thank the panel.

MR. TUGANDER: I just want to thank Alan for the panel also. Thank you.

Clarett v. NFL and the Current Role of Antitrust in Professional Sports

MR. TUGANDER: Let's start. With the Super Bowl less than two weeks away, we will discuss the litigation between Maurice Clarett and the NFL. This panel will be co-chaired by Barry Brett and Steve Houck.

Now earlier in the day we heard a lot about the *Noerr-Pennington* doctrine. Now we are going to hear about the Chad Pennington doctrine, starting with Barry. Barry is an antitrust partner at Troutman Sanders here in New York City. His practice includes the handling of a variety of complex litigation and counseling matters in areas such as mergers, product distribution, dealer termination and patents. Barry is a past Chair of this Section and a current member of our Executive Committee. Barry is also the past Chair of a number of ABA Antitrust Law Section committees, including the Sports, Labor and Entertainment Committee. Barry has also spoken and written extensively on antitrust topics.

To my immediate right is Steve Houck. Steve is currently of counsel at Menaker & Herrmann here in New York, where he concentrates his practice on antitrust and commercial litigation. Steve was also formerly a partner at Donovan Leisure.

On the government side, Steve is a former Chief of the Antitrust Bureau of the New York AG's Office and acted as lead trial counsel for the plaintiffs in the government lawsuit against Microsoft. And I believe Steve had the opportunity to depose Bill Gates, who may be watching us.

Among other professional affiliations, Steve is past Chair of this Section and a current member of its Executive Committee. He has also lectured and written extensively on a variety of antitrust law topics.

With that I'll turn the floor over to Steve and Barry.

MR. HOUCK: Thank you, Steve.

Welcome to our panel discussion today. As Steve indicated, Barry, my co-Chair, has long been active in Section affairs, and as such is an astute observer of the intellectual capacity of the Section's membership. And Barry suggested, especially with the approach of the cocktail hour, instead of focusing on the niceties of the development of case law in this area, we will talk more about its ramifications than the actual practice of professional sports. So that's what we are going to do.

It is my real privilege today to introduce what truly is an all-star team of panelists representing diverse viewpoints on the issues that we are going to talk about.

On my extreme left, I guess appropriately so, is Dick Berthelsen, who has a wonderful background to give you the perspective from the players' point of view. Dick began work as a full-time legal counsel and principal assistant to the National Football League Players Association in 1972, and has been its general counsel since 1983. Prior to that he worked as general counsel to several professional soccer leagues, as well as the United States Football League Players Association and the Soccer Leagues Player Associations. Dick is a Badger born and bred. He was born in Wisconsin. He has undergraduate law degrees from the University of Wisconsin at Madison, where he was a member of the *Law Review* and Order of the Coif.

Sitting next to Dick is somebody whose name should be familiar if you read the sports pages. Not for his recent athletic accomplishments, but because he was the Major League Baseball point person negotiating the very recent landmark agreement with respect to steroids with the baseball players. So he's been much in the news, and we appreciate his taking the time from his very busy schedule to be with us today. Rob Manfred is Executive Vice President of Major League Baseball. He reports directly to the President and the Commissioner, and his areas of responsibilities include labor relations and human resources. Prior to joining Major League Baseball, Rob was a partner in Morgan Lewis & Bockius in Washington D.C. He's particularly capable of articulating the management viewpoint here, because as everyone knows, since 1922, the antitrust laws have had virtually no play in Major League Baseball, the Supreme Court in its wisdom, having concluded that Major League Baseball is not something in interstate commerce.

Many folks have observed that of the four major professional sports franchises, three, excluding Major League Baseball, are headed by lawyers who used to practice antitrust law. One of the things I learned in putting together the panel is that lawyers are not absent from Major League Baseball, although the Commissioner himself is not a lawyer. There are six people in the executive office, including Rob, five of whom are lawyers. So this entire business is, for better or worse, thick with lawyers.

To my immediate right is Scott Rosner. And he will present the view from the ivy tower. It is not an ordinary ivy tower. It is an ivory tower in the Ivy League. So he's very well qualified to do that. Scott is a lecturer at the Wharton School at the University of Pennsylvania. He teaches courses in the sports industry to undergraduates,

to MBA students and to budding law students. He teaches a course at Penn Law School that wasn't available to me when I was in law school—Advanced Sports Law. He's also the lead author of *The Business of Sports*, one of the leading textbooks in this area. He has written on various aspects of the subject, and in a number of learned journals. Scott is also a principal of the Hudson Sports Consulting Group, a sports advisory firm. He has taught at Seton Hall University as well. He holds a lot of degrees from the University of Pennsylvania Law School, a graduate degree in Sports Management from the University of Massachusetts at Amherst, and he has an undergraduate degree from the University of Michigan.

Very typically, including so far today at these sessions, we have panels composed of lawyers and economists. And we often forget what the antitrust law is really about is the consumer. And with this panel we have supplied the deficit, because we have a very knowledgeable and articulate spokesman who will be a stand-in for the consumer, known in the sports world as a fan.

MR. SCHAAP: I haven't paid for a ticket in years though.

MR. HOUCK: A free-riding fan. I'm referring of course to Jeremy Schaap. Jeremy is an ESPN anchor and national correspondent. He is one of two hosts of *Outside the Lines*, an ESPN show. He's a frequent guest and panelist on ESPN and is co-host of ESPN's acclaimed *Sports Century Series*. Jeremy has won five Emmy Awards for his sports reporting. And he is a graduate of Cornell University.

I want to thank him especially because, although he often addresses millions of people over television, it must be somewhat a daunting experience for a non-lawyer to appear here in front of a bunch of mean-looking nasty antitrust lawyers.

MR. SCHAAP: I agree.

MR. HOUCK: He agrees. But he's nevertheless agreed to do that. Although probably it isn't actually all that daunting for him because Jeremy is perhaps best known for conducting a live interview with Bobby Knight immediately after Coach Knight was canned by the University of Indiana. So I expect he'll be able to deal with Barry and our other panelists.

With that I will turn the proceedings over to Barry, who is going to moderate the discussion.

MR. BRETT: I am going to try to introduce it, and I think it will moderate itself.

Steve mentioned the fact that three of the four Commissioners in major league sports are antitrust lawyers by trade, the Executive Director of the Union of Major League Soccer is an antitrust lawyer. And the Commissioner of baseball, as you know, is a used car salesman.

Certainly we have a biased group, as a result of which many of the people in this room would attribute that circumstance to the innate wisdom and acumen of antitrust lawyers. Others will conclude, in more mundane manner, that antitrust issues have played such a major role in determining the structure and functioning of the leagues, that knowledge of antitrust is a key skill set that the leagues have sought out in selecting their commissioners, and it is a key skill set to use in determining policy as to how the leagues function.

Clearly, much of the movement of players and franchises over the years, and what happens on the field of play, is directly related to judicial opinions on antitrust issues and related developments. The historical importance of antitrust in determining the functioning of professional sports is illustrated by the way Major League Soccer tried to establish its franchise as a single entity. To avoid having a group of competitors functioning and trying to avoid antitrust scrutiny, the league theoretically owns all of the franchises. And they are hoping to avoid the strictures of the antitrust laws in that manner.

In the news today the National Hockey League is on lockout, as many of you know, and it is following the script which appears designed to permit the unilateral implementation of salary restriction by the league after they go through the process, some would say the charade, of collective bargaining negotiation. But the National Hockey League is not being represented, so we have a little more freedom to talk about them. But the strategy appears to be based on the *Brown* decision, which arguably will provide antitrust exemption for a sports league to engage in conduct which would be otherwise unlawful.

The long and short of it is, the application of antitrust principles to competitive professional sports has been a terribly influential force in driving the decisions about how the leagues function and determining the structure of the leagues.

In the program today I'm going to take a few minutes and just summarize how we got to where we are, why it may be that antitrust has had its run in determining the functioning of sports and will no longer be a force, and try to discuss what the future holds. But perhaps most significantly, we'd like to address whether the likely future is good or bad and how these various impacts, various functions have and will impact on the world of professional sports. We may even touch a little bit on amateur sports, which may be an oxymoron.

In order to address those issues, the panel that we've brought to you today is not the typical panel that we would normally assemble for an antitrust program. It is not the lawyers who have litigated the cases, who have studied and written on the cases and can evaluate the various decisions, right and wrong, and how do you

counsel based on these opinions. We are going to generally stay away from the opinions, and talk about the impact of antitrust and collective bargaining from the point of view of people who have to live with these problems each day. We have some people who do live with them each day, and how it impacts on their functioning. And the ultimate question is how antitrust and the demise of antitrust in sports does and should affect what's going on.

Now, my summary of my views is clearly colored by my background as a sports junkie and a Brooklyn Dodger fan. Some of you will recall the days when antitrust issues were totally irrelevant to sports. Steve alluded to the 1922 decision of the Supreme Court which said that baseball is exempt from antitrust because it's not in interstate commerce. And that continued years later, when the *Curt Flood* case came and even though antitrust principles had been applied to pro football, pro basketball, National Hockey League, the Supreme Court said even though it makes no sense, we are not going to touch it. It is for Congress to do it. They continued the baseball antitrust exemption.

But before those days, when baseball was the leading sport and when we functioned without antitrust, the impact and the functioning and relationship between players and teams and fans was very different. One of the greatest sports books ever written was *The Boys of Summer* by a fellow by the name of Roger Kahn. And the premise of that was the relationship between the Brooklyn Dodgers and the community and how they were part of the community, and the inter-relationship between them and the people. Fans cared about the families, they cared about the players, the players cared about them, and they stayed there and played their entire career there.

Today I think the book which typifies what goes on in sports is probably *Jerry Maguire* and the mantra is "Show Me the Money." The players are, and largely as a result of antitrust principles, itinerant mercenaries. And what really happens when you root for a team, you are rooting for laundry, you are not rooting for players anymore. I expect that line to probably turn up somewhere in one of Jeremy's pieces down the road.

MR. SCHAAP: Never heard it before.

MR. BRETT: The way that's come about is going back, looking about twenty years ago, it was in the Eighth Circuit, the *Mackey* case, which decided that there were antitrust principles applicable which limited the leagues in their functioning. It found that some of the manner of rules imposed by the leagues were unlawful, and it created a framework for the determination of relationships between the players and the leagues. At that time baseball still had its exemption, but a new line of principles was emerging. And that was coming out of

the collective bargaining agreements where there were rulings by arbitrators, and Andy Messersmith creating some of the early free agents in baseball. That's come down to the point where today the Curt Flood statute in Congress, implemented essentially by agreement between the Players Association and the League, is removing a large part of the antitrust exemption from baseball and making it subject to the same rules. It doesn't apply. It doesn't remove the restriction totally, and it certainly doesn't remove it in the case of franchise movement. But what we have seen is that, based on the collective bargaining principles emerging in baseball and several developments in the courts we will talk about in a moment, is that we're probably in a position where the world in which Richard Berthelsen and Rob Manfred function are largely the same.

What's happened in the courts is what came to be highlighted by the *Clarett* decision, and with that focus is some of the impetus for the program today.

In *Brown v. NFL*, about ten years ago, the Supreme Court was dealing with a situation where the NFL had imposed a rule which provided for all of the teams to pay the same weekly salary to players on their development squads. So the teams wouldn't bid for development players. After a jury verdict—there was a \$30 million verdict—it went up to the D.C. Circuit, and the D.C. Circuit overturned that decision. It held that the subject was one that was or could have been or should have been the subject of collective bargaining; therefore, the antitrust exemption, based on the collective bargaining exemption, applied. Antitrust laws were not applicable. The Supreme Court upheld the Court of Appeals rejection of the verdict, and the verdict went away, the \$30 million award went away.

Similarly, in *Clarett*, as many of you know, and certainly the sports junkies know, more recently, Maurice Clarett was not entirely happy with the situation at Ohio State. After leading the team to a national championship as a freshman, he wanted to turn pro. The NFL has a rule which states that a player may not be drafted until three years have passed since his high school graduation. Interestingly, the NBA does not have a similar rule. And as many of you know, players come directly out of high school right into the NBA. Clarett challenged the NFL rule.

Now *Brown*, interestingly, had followed a series of Second Circuit opinions which had eaten away at the application of antitrust principles to antitrust and subordinated them to collective bargaining circumstance. When the *Clarett* case was decided in the District Court by Judge Scheindlin, it was found to be a violation and there was an order that Clarett could participate in the draft. It came to the Second Circuit, the Second Circuit went back to *Brown* and the decisions in the Second Circuit leading up to *Brown*, and again said this was, could

have been, a subject of collective bargaining; therefore the antitrust exemption applies. It is not for the courts to deal with. They overturned it. *Clarett* has not played for two years.

As a sidelight, there was a wide receiver named Williams out of USC who had followed along and, after Judge Scheindlin's decision, opted to go into the draft. He was not allowed to play pro football and not allowed to play college football last year. It is interesting that both of these young men were found to have lost a cause of action as a result of actions or possible actions by a union of which they were neither members of nor eligible to join. So that it may very well be that we have reached a point where antitrust will no longer have a major role or even a minor role in determining what's going on in sports. And the courts seem very much inclined to throw all of these issues into the collective bargaining context.

That's where I think we are today. *Mackey* has morphed into *Clarett* with the emphasis on collective bargaining. *Flood* is not particularly significant. And Major League Baseball has got to negotiate with the union on steroid policy and everything else. If you want a more detailed or scholarly review of the law, I commend to you an article in the University of Pennsylvania Journal of Labor Employment in the spring of 1998 with the catchy title of "Players Versus Owners: Collective Bargaining and Antitrust After *Brown v. Pro Football Inc.*" But it does a good job of reciting the cases.

At the risk of perpetuating the sports metaphors, the batting order for the rest of the program in terms of initial presentations will be Richard Berthelsen, Rob Manfred, Scott Rosner and then Jeremy Schaap as our cleanup hitter, followed by panel discussion and Q and A.

With that, I'll ask Richard to address the point of view from the National Football League Players Association.

MR. BERTHELSEN: Thank you very much, Barry. It is kind of interesting to hear your adult professional life summarized in about a six-minute summary.

Thanks for the opportunity to be with you today. A room full of antitrust lawyers. I always feel comfortable with antitrust lawyers, because I've been with them a lot. And I guess maybe about a third of me is as an antitrust lawyer, because I've had to learn on the job in your profession.

When I was asked to speak about the impact of antitrust laws on professional sports and was told I'd only have about ten or fifteen minutes, I figured, well, I can't really say much. But what I can say is that the antitrust laws have been a very, very meaningful part of our success as a Players Association. Notice I didn't say

union, because there have been times in our history where we decertified as a union in order to get what we thought was right for the players.

Although you leave us with the conclusion, Barry, that perhaps antitrust laws will no longer be applying because collective bargaining is the way to go, I would beg to differ with you, and I'll touch on that before I finish.

I started my job back in 1972. It was a week before the NFLPA in the name of John Mackey filed a major antitrust suit. The suit was filed on a Friday. The entire board of player reps and my boss, Ed Garvey, left on a Saturday to Europe to do a charity thing for the American hospital in Paris. So I'm left as the only guy in the office to explain to the whole world, what are the players doing with this lawsuit? I had to become a quick learner about antitrust laws.

What the players were doing then was protesting something called the Rozelle Rule, which said when a player's contract was over he couldn't go to another team unless the new team would agree with his old team for compensation for that player. And lacking such an agreement, the Commissioner, who was then of course Pete Rozelle, would step in to name the compensation. He had named such historically high or punitive compensation in the past that the rule had the same effect that the reserve rule had in Major League Baseball and no players moved. So the players challenged that.

In my having to learn about antitrust law very quickly, I also happened upon a *Yale Law Journal* article that was written by two individuals, Jacobs and Winter. The article basically said that the existence of a union for a professional athlete meant that he should have no antitrust rights; that his only choice would be to pursue whatever remedies he would have under the labor laws. In other words, the existence of a union gave a blanket exemption to the employer for the antitrust laws for any restrictions that would be imposed upon the players.

That was a scary, scary thought to us. Because if that kind of thinking was adopted by the courts, we would have no antitrust rights. And when you are dealing with a monopoly, and when you are dealing with employees who have very short careers, it's not easy to shut them down and gain what you feel you should have in collective bargaining. Given the fact that we only have sixteen games a season—then it was fourteen, it is very, very tough. So antitrust was an important thing to us, but it's availability to us was severely threatened by that article, and any court that would adopt the same rationale. Fast forward about twenty years, and that's exactly what has happened.

But we ultimately won the *Mackey* case. The Eighth Circuit though said, unlike the District Court below—the

District Court had said it was a per se violation of the antitrust laws, and just because it was in the league rules, which the owners forced upon the players, that didn't mean that it couldn't be challenged in antitrust. The Eighth Circuit said, well, we don't agree with the court below, but we do say that if the subject involved the rule of restriction, involves a mandatory subject of collective bargaining, if it has impact only upon the parties to the bargaining agreement, and it is the product of arm's-length negotiation, then it will be exempt. And the Eighth Circuit found that a third of those three elements was not satisfied in this case. Because the League had never bargained the Rozell Rule with us. It was in the constitution, but it was never the subject of bargaining; therefore, it couldn't have been a product of it.

Well, that ruling eventually led to a settlement in 1974, after three years of labor strike, going through the courts, us going without a CBA, without union dues coming in; we had a settlement. And so in that sense antitrust played a valuable role, because it did bring labor peace to the NFL, and we had a five-year agreement after that.

The next time we bargained antitrust wasn't an issue. The next time we bargained it was 1982, when the issue was the players striking for a percentage of the gross revenues, dividing it up in a way that they would see fit. And that was a long struggle, but that was a strike, and there was no resort to or no resort needed to the antitrust laws.

Then we got to 1987, when Gene Upshaw came in and very democratically polled the players and had a convention of the players to decide what was their issue. And to a man, the players were saying: Well, we really should have and don't have this free agency, and that is our issue, and we will strike if we need to. We went on strike for about four weeks. The networks and the League got together. The League had replacement players; we called them scalps. The network put on the games and called it real football. And we concluded that labor laws couldn't work in that context. Because if you had someone as strong and as resourceful as the networks combining with something as monopolistic and resourceful as the NFL and putting replacements on the field and calling them real players, with sponsors still paying the money for it, we thought this just is not the way to go. We thought they discredited the product in the process. We think if it had gone on much longer, a lot of destruction of the product would have occurred.

But we ended up instead saying we are going back to work. We are not accepting the owner's terms. We are not accepting the new collective bargaining agreement, but we are going to sue like we did in *Mackey*. Because without a new CBA the NFL's plan to continue the restriction from the past meant to us that they would be

violating the antitrust laws. And again, getting back to that *Mackey* test, the restrictions that they would keep in place, were they or were they not the product of arm's-length collective bargaining or negotiation. We believed that meant that you had to have an agreement by the union and the players to the rule. What we didn't know is whether the courts would either agree or disagree with that proposition.

So we filed another lawsuit. This time it was Marvin Powell, who was then the President of our organizations. We won at the first level with the Judge, saying the labor exemption ended when we reached an impasse in collective bargaining. But the Eighth Circuit disagreed with that. The Eighth Circuit said so long as the players are union, they don't have antitrust rights.

Remember those days back in the early 70s when I was worried about that *Yale Law Journal* article written by Winter and Jacobs, well, it had come into reality. The Eighth Circuit essentially adopted that notion. So it didn't take the players long to decide, look, we didn't form this union to be of benefit to the owners. We formed it to be of benefit to ourselves. And when it ends up being more to our detriment and more to the owner's benefit, there is no reason to keep it in existence. So we basically blew ourselves up. We said we are not a union anymore. We sent a letter to the league, and we said we relinquish our rights under the National Labor Relations Act to act as a union. We are no longer in the collective bargaining business. We did a lot of things. We changed our identity under the tax exemption laws, the 501(c) categories. We became a professional association, adopted a new constitution and filed a new lawsuit in the name of Freeman McNeil of the New York Jets.

So we went back to the same court and said, all right, the boss upstairs here in the Eighth Circuit said we couldn't be a union and still have antitrust. Well, now, Judge Doty, the same Judge who ruled before for us, we are not a union anymore. They gave us a blueprint to follow, and we followed it. Judge Doty, after a favorable ruling from the NLRB that said we weren't in the business any more, ruled for us and said the exemption is over. We proceeded to trial and we won.

That's basically what paved the way to the settlement that we made in 1993, a settlement which has been extended on three separate occasions and which results in there now having been twelve years of labor peace in the NFL, and the promise of at least three more under the agreement we have. So I think you can see the impact of antitrust on us.

One of the positives that people kind of took for granted all through this, we were fighting for three years with the *Mackey* suit, fighting six years with *Powell* and then the *McNeil* suits from 1987 to 1993, and other than

those three or four games missed because of the strike in 1987, there was not a single NFL game missed from 1987 to 1993.

I would think, Jeremy, from the fan's standpoint, that's a good thing. No labor wars as such. No lockouts. No strikes. We were fighting it out in courtrooms. Now the lawyers think that's good, and we certainly thought that was good. And since the settlement that we reached resulted from a lawsuit, I think everybody in the NFL had to admit that in the long run that was good. Because we now have labor peace, and some say that we are the envy of professional sports because of that.

But I would disagree with the notion that antitrust now would no longer have a role, because we decertified as a union in 1989, when we had the adverse ruling and pursued our antitrust rights. We will do it again if necessary. Antitrust will come very much into play, and in fact, the antitrust that came into play after 1989 for us was outside the labor laws. It was outside the environment in which the courts are saying now there is no antitrust considerations.

The *Clarett* case was very interesting to me. I was not surprised about the result for two reasons. Number one, there was no real evidentiary record developed in the case. So the record was really silent as to how much negotiation, if any, there was between us and the League about the Eligibility Rule. But the other thing was that the case was brought in the Second Circuit, a circuit which had ruled against a player in the *Leon Wood* case—who, by the way, is now an official in the NBA. It had ruled against the players in the *Buck Williams* case and expanded the labor exemption and disagreed with *Mackey*.

But remember that article drafted by Jacobs and Winter? Well, who is sitting on the Second Circuit Court of Appeals when those cases are appealed? Judge Winter. He was not assigned to the panel in the *Clarett* case, but you've got to think that he might have had an influence. You know, around the corner is the courthouse, or what have you. But he certainly had his influence through the prior cases, so I wasn't surprised by that result.

In any event, I've probably taken more than my time allotment here. In my view, antitrust is still very much alive for players in professional sports. The problem, however, is to be able to take advantage of the antitrust we have to get out of our labor environment. We have to decertify as unions and become professional associations. We are certainly willing to do that. We have done that before. Whether the hockey players are, of course, remains an open question and depends on what's going to happen in the next year or so. But that would be my first bat here with this panel. Thank you.

MR. MANFRED: I was going to start by thanking folks for the opportunity to be here, but I have to say I'm

off to a rough start. On my left I got a Don Fehr sound-alike, and on my right I got a guy who starts by taking a cheap shot at my boss. I will point out, Mr. Selig actually owned new car dealerships, and he is the kind of client that folks like you crawl around to try to get. So I guess we are even now.

This is sort of an interesting topic, and I think one of the reasons that it is an interesting topic is it's all about where you come from. What your perspective, what your background is, and your views on the topic are colored by that.

Unlike Dick, I would not say that I'm even one-third antitrust lawyer. Frankly, I may not even be one-third lawyer. I really always wanted to be a labor relations guy and ended up being a lawyer sort of by mistake. But I approached these issues and became familiar with them only because of my involvement in the labor relations of professional sports.

I have always been of the view that the rule that has kind of developed out of cases like *Brown* and *Clarett* represents the only rational balance between the federal labor policy on the one hand and the application of the antitrust laws on the other. I think that now Judge Winter was right when he wrote that article in the *Yale Law Journal*, and I think that the passage of time has proved that he's right. Let me say a little bit about why I think that.

First of all, Dick does fail to mention one sort of important basic fact when you think about labor relations in professional sports. And that is when workers unionize, whether professional athletes or anybody else, they are engaged by definition in a combination that is designed to affect the labor market. That's what it is about. And the only reason that they are allowed to do that is that they are immunized by the statutory, and to the extent that they are involved with lawyers, the non-statutory exemption to the antitrust laws. And equally important, they are protected by the federal labor laws. In my view, as long as a union remains protected by the federal labor laws, it seems to me that it's only fair that the process, including the application of economic force through lockouts, strikes or unilateral implementation and the products of collective bargaining, that is agreements on mandatory topics of bargaining must also be immune from the antitrust laws. It is a matter of fundamental fairness. If you are going to be unionized and have the protections of the federal labor laws, and employers are forced to follow the processes established by those federal labor laws, that process and the products of the process must similarly be immune.

Employees are different in professional sports. And the reason that you see the litigation that you have seen over the years under the labor antitrust laws is that their individual bargaining power is significant enough that

they don't want to act just collectively. What they really want to do is they want to have the best of both worlds. They want to act collectively in the collective bargaining arena, establish a framework, and then they want to be able to go out and bargain with the employers as individuals. That's the reason that all of these cases arise in the sports context.

You know, I spent a lot of time with truck drivers and airline pilots and teachers, you don't see a lot of labor antitrust cases in those kind of things. It's really about this economic issue. That's why you see all this law in this area.

In terms of the scope of the protection of the antitrust laws, in terms of the product of collective bargaining, it's important to focus on what our mandatory topics are; what are the topics that are committed by the federal labor laws to the procession of collective bargaining. For example, to the labor lawyer, the result in *Clarett* is really not shocking. Even though you have a non-union member who is affected by the rule that is a product of collective bargaining. Why is that? Entry into bargaining units is always a mandatory topic. In other words, how do you hire? What does a hiring hall look like? Those are all topics routinely dealt with in industries like the construction industry, the trucking industry; that mechanism by which you get into the bargaining union. That is the draft in the case of the NFL. It is clearly a mandatory topic. So from a labor lawyer's perspective not a big shock that they reached that result. Even though Mr. Clarett was not in a position to have a vote on what the NFLPA's policy was going to be with respect to the issue of the draft.

I think the remaining issue, and the one that Dick touched on that will be the source of some additional litigation in this area is the notion that you can throw the light switch, change the name plate on the door and no longer be a union. I think there will be another time—maybe it will be hockey, maybe it will be football, interestingly, I don't think it is going to be baseball, but that's just my own personal view—when a players association will say look, I've had enough of this collective bargaining fun, and maybe I can do better in a courtroom. How courts regulate that process of a players association, whatever they call themselves, what is clearly a union for purposes of the National Labor Relations Act, how courts regulate that process by which they try to switch themselves from being a union and having all the protections of a union to not being a union any longer I think will be very interesting. And I think that what the NFLPA has done, and prudently so, will make that fight tougher for unions. And it is purely a factual point. That is, I think courts understand now, because they have seen it happen with the NFLPA, that they were a union; they had about an hour and a half when they weren't a union, and then, gee whiz, guess what, they were a

union again. So I think that will be an interesting issue going forward. And I think it is the one major unsettled area of the law.

It is interesting, I think in contrast to some of Dick's comments, that my experience in baseball suggests that the rule embodied in cases like *Brown* and *Clarett* is actually good for labor relations. Let me say just a word about that and finish up with my time.

Baseball does have an industry-specific exemption from the antitrust laws, which exactly how broad it is, where it applies, I'm not sure. But I will tell you, when, I first began in baseball as an outside lawyer, I was involved in the negotiations in '89, '90, the long strike in 1994, and ultimately the agreement reached in 1996. In all six of these discrete lines of bargaining there was a huge push from the Major League Baseball Players Association to remove that exemption. In our read—I guess they may have a different view of this world—but our read on that push was that the MLBPA wanted a nonbargaining table litigation alternative to resolving disputes. Really, from our perspective, baseball and its leadership always thought about it; it was a release from the process established by the National Labor Relations Act that was not envisioned by the people who created that process.

I was fortunate. I've had some lucky spots in my life. One of them was I had the opportunity to take labor law from Archibald Cox. Before Professor Cox became a Constitutional scholar he was a great labor lawyer. He argued some of the seminal cases in the Supreme Court. And he described the NLRA process as a simple one: You got locked in a room, and essentially all the statute said to you is you have to stay there until you make a deal. And your only out is to apply certain kinds of economic leverage to the opposing party and then to come boogying back into that room and see if that changed people's view.

I think the antitrust laws can disrupt that balance. They give people the opportunity to say, well, I don't really have to look at *Manfred* anymore, because I'm going to go find me a judge somewhere who is going to tell me how to resolve this dispute.

We gave in to the MLBPA in '96, after *Brown* was decided, and went jointly to Congress and said to them: Look, we think it is a good idea to keep the rest of baseball's antitrust exemption, but get rid of it in the area of labor relations. Once *Brown* was decided we were more prepared to be just like the NFL, just like the NBA, and live with the rule of law that had been established by *Brown*.

From my perspective the result of that has been the MLBPA got what they wanted on the antitrust issue. But once they got it, and they realized that *Brown* meant you had to go out of the business of being a union in order to

exercise your antitrust rights, it didn't look so good anymore. There they are a different kind of union. I think institutionally for them to go out of the business of being a union, even for one day, would be very difficult for them to accept.

So what has it done? I think it has put them at the table in a different frame of mind. I think it is one of the reasons we were able to make an agreement in '96. It is one of the reasons we were able to make the first-ever agreement in 2002 without a strike. And I think it actually helped us in this last round over steroids. They approached the table in a different way.

Now, there are a lot of other things going on. It is too simplistic to say what happened on the antitrust side accounts for all of this. But I do think it was a factor in terms of improving our overall labor relations.

MR. ROSNER: I'm going to take sort of a hybrid approach from what you've just heard.

What I've seen over time is a natural evolution: from contract law at the outset, to antitrust law to labor law in the context of professional sports leagues. We often refer to the nonstatutory labor exemption as benefiting labor, right? Labor exemption. I think maybe the better nomenclature to attach to it now is the nonstatutory management exemption, because it really does benefit management in numerous ways and allows them to do things that obviously, or maybe not so obviously, would be violative of the antitrust laws in the absence of a union.

In reply to the question posed prior to this—Should antitrust continue to play a role in professional sports?—I think the answer is yes. Leagues are monopolies, though one could make a very good argument that they are natural ones, as the fans clamor for having one true champion in each sport. And while courts have appropriately realized the primacy of collective bargaining, a fall-back is needed even in the presence of a strong union.

Individual sports are a little bit different story. I can't imagine we would spend a lot of time talking about golf or tennis tours or NASCAR or college sports for that matter, where there is no unionization and thus no collective bargaining, and still require—I think out of principles of fairness—antitrust application.

But in the context of professional sports, I think that you see it as a last resort in the player-management relationship. No one is running off to court to file an antitrust lawsuit at the drop of a hat. But I think it is incredibly difficult, due to the Supreme Court decision in *Brown v. Pro Football*. The standard they enunciated (I think you all have *Brown v. Pro Football* in your materials) is that you need to be sufficiently distant in time and circumstances from the bargaining process before you can file an antitrust lawsuit. So it really isn't acting as a play-

ers association or former player's association. It is no longer just a matter of decertifying and there is a school of thought that it goes well beyond decertification. But what that is, is a very nebulous area. How long do you have to wait? I think it really puts the onus on unions to think long and hard before decertifying.

So it's no surprise when you hear Rob Manfred say: You know, the Curt Flood Act doesn't really affect them so tremendously because of the standard enunciated in *Brown v. Pro Football*.

Nonetheless, I still think when you talk about nascent leagues, these new sports leagues that keep forming with limited success, all adopting a new Section 1-proof professional league structure, referred to as a single entity (Major League Soccer players challenged that structure and the First Circuit upheld it), I think that is interesting as a new league structure—although one could argue that a new league isn't really a monopoly; they don't quite have market power. But that's a separate argument.

I think antitrust could also still be valuable, beyond the players, to any competitor leagues that may emerge, especially with respect to player access and, more importantly, facilities and access to television contracts.

I still think you have to remember that antitrust law is available to challenge individual sports' allegedly monopolistic practices. For example, athlete eligibility rules in the regulations that might be in place in the golf and tennis tours, in the absence of bona fide health and safety concerns that the tours might put forward. Another example involves the control of essential facilities. I think NASCAR had an antitrust lawsuit filed against them by their dominant competitor in terms of the operation of racetracks. NASCAR controls stock car racing in the United States, but they also own most of the race-tracks on which those races are held.

Nonetheless, from your perspective and from the sports fan's perspective, I think a lot of the things that are in the papers on a regular basis and that receive top-of-the-line attention on Jeremy's network—the NBA brawl in Detroit, the Major League Baseball steroid situation, Maurice Claret—are incredibly appropriate for resolution via collective bargaining.

Quite frankly, management and the union understand the business of their respective leagues better than the courts, better than the fans do in many instances, although not all. And in many instances better than the media as well.

Just to throw some examples out there. In the ongoing NBA collective bargaining negotiations, I think you'll certainly see a redefinition on what on-court means as a result of the arbitrator's decision in particular on the Pacers, and in particular Jermaine O'Neal's challenge.

And you'll see a broadening of Commissioner powers there. I think certainly in Major League Baseball—to give Rob his kudos—I think that's a remarkable deal to think to change the game in such a large incremental way, in the middle of a collective bargaining agreement. Collective bargaining is an incremental process, and incrementally that was a huge step forward.

I think the NFL—and I don't mean to tell Dick his business, but if I can put my Karnac hat on, with all due respect, it will include age limitations and bright-line rules. The evidentiary record in the *Clarett* case was sparse, to say the least, as to whether the age limitation rule had been bargained over. I think in the upcoming deal or whenever the next extension is, there is not going to be a matter of "Is it in the deal?" It is going to be in bright bold letters, if they indeed reach an agreement on age limitations. There is not going to be doubt about that. At least I wouldn't want there to be a doubt if I'm running a league.

At the same time, NBPA, going back to that for a moment, I think you'll see an attempt to put an age limitation in. David Stern has been public in his statements that he would like to see something like an age limitation of 20 years old perhaps, and we'll see if that occurs. That might be a red herring that is being thrown out there for additional union give-backs. The League would also like to have shorter term contracts, less guaranteed money, and perhaps a more punitive luxury tax.

So where does that fall in the pecking order? And is it possible it is just being raised as some sort of a red herring for the union to bite at? I think the trend to avoid the application of the antitrust laws that the courts have adopted should continue. What you have now are strong players associations. Players and management are on a level playing field; whereas, that wasn't always the case.

In the earlier referred to *Mackey* decision, one of the things that the Court talked about was that it was not a product of bona fide arm's-length negotiation. One of the reasons for that was that the NFLPA was still a relatively new union and didn't quite have the strength of management. That's no longer an issue in professional sports, folks. And I think you could look to the fact that the strongest unions in America are those that represent the players in their particular sports leagues.

Nonetheless, so that trend is going to be there, and it is good for the leagues and the players, though I think it is better for the leagues.

If we have time, we can talk about the NCAA. That's an entirely different story, but I don't know if we'll have the opportunity to talk about that. There is a dual set of rules in place as a result of a Supreme Court decision over twenty years ago; the short story is that the NCAA has to abide by certain rules with respect to its commercial aspects and others with respect to its noncommercial

aspects. And in the context of amateur athletics what is commercial and noncommercial is a very blurry line, and it has led to somewhat odd decisions one could argue. But I'll finish there for now and turn it over to Jeremy.

MR. SCHAAP: Thank you, Scott.

First of all, obviously I bring a different viewpoint to this than everyone else on the panel. For instance, I thought when Barry distinguished Commissioner Selig from his counterparts by saying he was not a lawyer, I thought it was a compliment—unlike Rob, who said it was a cheap shot.

And no one told me when Barry recruited me for this that we get grades. Though we get ratings in television, but we don't get graded. I had no idea. But I guess I will be graded. Be generous.

I just want to talk basically from the fan's perspective, from the media's perspective. I don't know the law. You know, I've read the documents that Steve and Barry sent me, and I've had to on occasion talk to people like Rob and Dick on the shows that I host, and we discuss legal issues all the time, and I'm terribly unqualified to do so. But I think I can talk about what I perceive as being fair. And it seems like generally, for the most part at least, that that which is fair eventually becomes law and works its way into the rules and regulations of our professional sports.

In terms of Maurice Clarett, and that's a story I covered closely, I covered him when he was in high school; I covered him when he was in college; and I covered him when he was trying to get into the NFL. And what has been said by the League, by the National Football League and certainly the decision by the federal courts, which did not allow him or Mike Williams to enter the draft, that's the law. And because I guess it has been collectively bargained with the Players Association in terms of the rule not allowing players into the draft whose high school classes haven't yet been three years lapsed from graduation, I mean that's what we're dealing with. But it just seems unfair to me that someone like Maurice Clarett is not even eligible to be in the NFL draft. Okay, we are talking about a 19-year-old male who obviously if he were in the draft would be selected. That's not even an issue. So when the NFL talks about, for instance, we can't let 19-year-olds into our league because it is unsafe for them, they won't get drafted if the team thought it was unsafe, if they thought they weren't going to somehow be valuable to them. So that argument which they made seems entirely false.

It is the same thing that David Stern talks about with age limitations. And I've had the opportunity on many occasion to talk to the Commissioner about the age limitation, what he wants to do in the NBA. I was talking to him recently about a young man named Oche Mayo who I think is now 17. He's a high school junior. He doesn't

even want to finish high school and then get into the NBA. He wants to leave after his junior year. He ends up being an old high school junior. But the rule as it now stands wouldn't allow him into the League. David gets upset when these topics are brought up. He says why don't we let everybody in. Let's let 13-year-olds in and 14-year-olds in and see what happens. And I say to him, well, why not, if they can play. If your teams are going to draft them, if they are going to pay them millions of dollars, why should there be just a rule that doesn't allow that to happen.

For me anyway, when you cover sports, you deal with a lot of social issues, and it just seems somehow again unfair that someone like say Sarah Hughes, who is a nice young girl from Long Island, who won a gold medal in the Olympics in 2002 in Salt Lake City, can make millions and millions of dollars because she's a very good figure skater. But we can't let 19-year-old Maurice Claret, who comes from a very disadvantaged background, who might not have the opportunity to make money in any other field the way that he's making money or that he could make money in football, and predominantly when we are talking about the NBA and the NFL we are talking predominantly African-American and disadvantaged people, we are going to say no, you can't make this money now and you are going to have to go to college and do this and risk jury. And you are going to have to end up paying for the insurance for the most part. But Michelle Wie, although she's competing as an amateur at this point but making money in endorsements, I believe, that she's 15 years old and she can play golf.

You know, and Rob's probably well aware, I mean three of the greatest players in baseball history happen to be three guys, Mel Ott, Jimmie Foxx and Bob Feller. And what they had in common, they were all in Major League Baseball when they were 17 years old. It didn't hurt any of them. They all ended up in the Hall of Fame, greatest players ever. So when I hear David Stern and Paul Tagliabue talk about we can't allow this, it just doesn't seem fair, it doesn't seem right. I think ultimately they are protecting a system which has worked for the most part. The NBA has a lot of problems, because so many players have been coming in at such a young age. It hasn't been good for their league, having an influx of very young players. Although two of the four or five best players in the game, Kevin Garnet, Kobe Bryant, Jermaine O'Neal, among the top ten players, never played a minute of college basketball.

Now clearly, the NFL doesn't want to see the same thing happen in its sport. They like the system as it is. They like getting this kind of known quantity out of college football. Their draft is much less a guessing game than what the NBA draft is now, because you are dealing

with so many 17- and 18-year-olds. And that gives them some assurance they like to have. They don't have to educate kids how to play the game the way the NBA has to, because it is taking chances on 17- and 18-year-olds.

It just seems to me, especially in sports where performance can be so easily measured, where you are rewarded for the most part based on what you do, that David Stern getting on a high horse talking about we can't allow any more 19-year-olds in the NBA doesn't make any sense to me. It seems economically unfair. It seems unfair in every sense to me. And I have to believe that somehow the courts, despite what we've heard today about how antitrust law has been trumped by labor law with the collective bargaining agreements, that somehow there will be a way around that. So that you won't be able to tell a 19-year-old who would be drafted in the first or second round of the NFL draft, you won't be able to tell him that he can't make that money. So that was one of the things I wanted to discuss.

Last night I stayed up late watching some of the tennis from the Australian Open on our network, which I should mention by the way, as I was told by my boss. Just as a plug, I'm not representing the views of the network, only my own. That I'm watching 17-year-old Maria Sharapova playing—I guess she's now about 20 years old—Serena Williams. But she won the U.S. Open when she was 18 years old. So you are watching these young women who have been playing professional tennis since they were 14 or 15 years old playing for three hours in 120-degree conditions. And Paul Tagliabue says the NFL is too rough for Maurice Claret. I just don't buy it, and I think there has to be at some point a remedy for that.

I hope I get a good grade.

MR. BERTHELSEN: That was not at all a winning argument in the case. I can assure you of that.

MR. SCHAAP: No, but that's what they say publicly.

MR. BERTHELSEN: But the winning law in the case is one the public very much supports. If a union and an employer agree to a hiring hall type of arrangement or any rules about entry into a bargaining agreement, that agreement will be enforced. And until the labor laws would be changed, that just is the reality.

When I talk to people about that same issue, I mean as a young lawyer I would have said, yeah, you are exactly right. But when you represent people who have jobs that they want to keep, and they don't want a lot of young people coming in to take them at a lower cost, then you kind of change your view of a situation.

MR. SCHAAP: Or at a higher cost.

MR. BERTHELSEN: It wasn't so much Maurice Clarett. It would be if a lot of people are eligible, it is not the seven draft choices, because there is a fixed number of those. But after the draft is over there is a whole bunch of free agents. If you can come into the NFL at that young of an age, with no college, there are a whole lot of people out there that would play for half the minimum salary. Believe me, that would be the primary effect.

MR. SCHAAP: And certainly everyone that covers sports knows the NFL Players Association under Gene Upshaw with yourself has done a tremendous job ensuring consistently high salaries. They have gone up exponentially in the last 20 years, and despite the lack of guaranteed contracts, for the most part it has worked. And the philosophy I know, in speaking to somebody like Robert Smith, is that a running back or former running back of the Vikings, the philosophy is we don't want guaranteed contracts because that means inevitably you got money going to people who aren't playing, where the money should be going to guys who are playing. But it just seems fair to me that a guy like Maurice Clarett should have an opportunity to play in the NFL.

MR. BRETT: A couple of observations.

I thought it was interesting that we heard a word—an important word—coming into a discussion among antitrust lawyers, lawyers in general. And that's what's fair as a criterion for determining how the law ought to function. That's not necessarily a typical observation or a typical argument. Clients have told us, well, that's not fair. Well, you can't get up before the judge and say, judge, please, the result isn't fair, please do something different. And it is kind of interesting to hear that deemed to be such an important part of the rules that are here applicable.

Let me hold that for a moment and respond to something that Scott said in regard to NASCAR. I was in the NASCAR case, and it was not quite as you described it. But there are no unions in NASCAR, and I don't think anyone here has to worry about any drivers or take up any collections for them. They all do very, very nicely, thank you. Maybe working 26, 28, maybe 30 weeks a year.

MR. ROSNER: At tremendous risk to themselves by the way.

MR. BRETT: There are risks. But I've been to Daytona. I've seen them drive. And the injuries and the results, and the safety record is pretty darned good. In a couple of years we are going to have a track on Staten Island for NASCAR, and they are dying to come to New York. And maybe we'll turn into a Red state too once we get that.

It is not a northeastern sport right now, but maybe it will be.

It is interesting, I just want to make a comment when talking about what's fair and the law. Rob says it is fair that the collective bargaining exemption should also protect the leagues. It is designed to protect the players; it is fair that the leagues should be protected. Well, certainly the rules were not adopted originally to protect the leagues or employers. They were originally adopted to protect the unions. Maybe it is all right if they also protect the leagues, but are we in a situation where there is a potential for abuse? And can we see a situation in the next round of collective bargaining between the NBA and the League where the Players Associations are delighted to agree to a rule that the next LeBron James or the next young man who comes out of high school, the next first round draft choice will be limited to a \$150,000 a year contract and can't use up anymore salary cap space. Are they all going to agree upon that, and these young people coming out are going to be bound.

MR. MANFRED: The answer to that is really the answer to Jeremy's question about the age issue. Which I will point out, I'm not self interested on this one. We sign them at 15. It doesn't matter.

MR. SCHAAP: Not legally at 15.

MR. MANFRED: Within six months of 16 they can be signed. I mean, I think that really the answer to that, and it is the answer on the age question, the fact of the matter is what the federal labor laws say is that a union and an employer have the right to make agreements that they see are in their self interest as part of the process of collective bargaining. It is not irrational for the NBA players to decide that, you know, look, 17-year-olds who are not ready to play and taking jobs is a bad thing. And it's really not all that different from electricians agreeing with construction contractors that you can't just walk in and say today I'm an electrician. You've got to go through an apprenticeship program. There are certain periods of time that have to pass. There is nothing irrational about that. It is not a bad thing. There is nothing illegal or immoral about a union making a decision that LeBron James shouldn't get \$10 million year; that he ought to get \$150,000, and the money ought to be spent somewhere else. That's what the process is about.

MR. ROSNER: Right. And I think we need to remember also it wasn't that long ago, folks, that you had rookies coming into the NBA—Glenn Robinson, Jason Kidd I guess was the last class where this happened—and they were on the open market essentially. And you had Glenn Robinson getting \$68 million before he played an NBA game. The response to that in the NBA, and in a different framework in the NFL, was to cap the amount of money that the entering players can

make. So they are not paid market value. In fact, one could argue that LeBron James is not being paid market value for his services during the initial period of his employment as an NBA player. But that's something that is the prerogative of the union to give away in every context. Seniority rules in the context of a labor union, or a players association, or whatever you want to call it. And just because the guys at the entry level in professional sports are incredibly well paid in comparison to the average electrician, I don't think it changes the principle behind it.

MR. SCHAAP: But to me there are a couple of key differences, I mean, Rob, between plumbers and future NBA players and NFL players. First of all, it is unlikely that a plumber is going to suffer some kind of plumbing career injury between the time he starts his apprenticeship and he's allowed to practice professionally. And secondly, nobody is going to hire a plumber who doesn't have any training or a degree. But teams have proven over and over again, given an opportunity to draft these guys, and sign them, they will do it.

MR. BRETT: LeBron James can play.

MR. MANFRED: You know, look, I think the other side of that coin is that a lot of the guys that get drafted and take spots in the NBA are not ready to be there. There are some players who can walk in and begin to play. But even Kobe Bryant, there was a substantial period when he was taking up a spot. How the employer and the union more importantly decide whether that spot is going to be taken by someone who, if you apply a general age rule, would not be allowed in the League and is not really ready to play, or it is going to be taken by a veteran player who is at the other end of it. That veteran guy, what is he next? And if it extends his career by two or three years, those are the balances that a professional sports team has to strike.

MR. SCHAAP: But doesn't a team have a right to decide we'd rather have guys sitting on the bench, like Jermaine O'Neal or one of these guys, for the next two or three years, learning the game, instead of sending him to some college coach who might screw up his game, rather than some 39-year-old guy who gets in the game for 20 minutes?

MR. MANFRED: I'll bet Dick will agree with me. You know, what collective bargaining in professional sports is really about is the League working with the union to discipline the irrational activities of clubs, which is driven purely by one thing, and that's winning on the field.

MR. BRETT: That, by the way, sounds like let the market decide.

MR. MANFRED: Do you agree?

MR. BERTHELSEN: There are a lot of things as lawyers we should be especially aware of. What's fair and what you think you would want for your son or daughter is oftentimes different than what the law said.

We just had our new player reps in to Washington, so I have to give them a course on labor law 101. And you know, the thing they reacted to most negatively that I told them? I said there are states in this country where players can refuse to pay their union dues. They are called right-to-work states. But we as a union, we can't discriminate against those guys. We have got to represent them in a grievance if they have got a beef with their team. We have got to give them all the benefits, even though they don't like you or support the union. They said that's not fair. I have to respond: But that's the law.

MR. SCHAAP: But I know in baseball, for instance, the players who haven't been in the union, the so-called scab players, they don't get in the proceeds from the player association deals.

MR. MANFRED: We call them replacement players.

MR. SCHAAP: Sorry, Rob. There are some distinctions though. Right, they don't get the money.

MR. MANFRED: Yes.

MR. BERTHELSEN: The labor law says you can't discriminate against people you don't represent. If one of those people wants to bring a case, maybe there would be a different result.

MR. MANFRED: They have a duty to pay a rep with respect to those individual players. So in other words everything Dick says is a hundred percent right. Kevin Millar, for example, is a replacement player. They have never let him be a member of the union. Despite the fact that he is not a member, if there is a grievance, as a matter of fact Millar had one when he almost ended up in Japan. They vigorously represented the player.

MR. SCHAAP: Right, but he doesn't get money from the car deals.

MR. MANFRED: The only reason they get away with that under the labor law is that is commercial activity, separate from their role from the union. In other words, they are collecting money like any other licensing agent at that point. They are not acting like a union.

MR. BRETT: I want to ask the panel to comment on something we just touched on. From the point of view of antitrust lawyers it is an easy one. Colleges recruit football and basketball players to play for them. Very few of them graduate. Certainly there are a lot of issues about whether this affects African-American young men; very few turn pro, very few graduate. If the player is success-

ful, the school is going to make millions, bowl games, for twelve to fourteen million, the coaches make millions. The schools who are competing with each other for these players have all gotten together and agreed on exactly what they are going to offer the kids to come to Michigan or USC or University—

MR. SCHAAP: Not exactly. Not at the boosters.

MR. BRETT: They have all gotten together, and they have all offered exactly the same thing. Kids can't have endorsements. Kids are not allowed to work. Is that illegal? And maybe in the context of what we have been talking about, is it fair? Is it immoral? Is it exploitive? Should it be illegal?

Sounds to me like the NCAA is a walking cartel making billions and selling rights to ESPN and to others under the flag of amateurism, which really doesn't—is this fair, to use the mantra of this program?

MR. ROSNER: You are touching a nerve here as a graduate of the University of Michigan.

But my sense is that you are right, Barry. I mean the NCAA is a classic cartel. But this is where you get into this idea where there are some commercial things that you can do, and there are some other things that you can't do. Clearly—and it is not exactly the best explanation that you've ever heard, but the idea is that on most things the NCAA can get away with it. But where they lost, they can't restrict the earnings of their coaches and artificially depress the market. They can't artificially depress the television market, like they did within the context of the Board of Regents Georgia's 1984 Supreme Court case. But they have gotten away with some of the other things recently—for example, the judiciary endorsed a rule that says that you can only play in one certified basketball tournament a year or two every four years, in events such as the pre-season NIT, the Maui Classic.

There are private sport operators that operate these things. They all want the best teams. With all due respect to my workplace, you don't really fill Madison Square Garden on a regular basis with Penn. You fill it with big conferences and big names.

The Sixth Circuit recently ruled that quick-look analysis was at least inappropriate, though there was no Section 1 violation. This wasn't anticompetitive. The recruiting rules that are placed on coaches are pretty strict. And if anyone has ever seen the NCAA Manual, it is about 500 pages long at this point, most dealing with closing a loophole that has been exploited at one point in time. But a lot of it deals with recruiting.

If you are a private university or public university, what they refer to as an institutional sports camp, you have a lot of advantages over private operators of sports

camps, because the coaches can recruit at one camp, they can coach at an institutional camp, but they can't do it at a private sports camp. And that puts the private sports camp operators at a distinct disadvantage. That's been upheld by the Eastern District of Pennsylvania so far. The NIT is in some ongoing litigation with the NCAA over post-season tournaments. The rule is if you are a member of the NCAA by rule and invited to their post-season tournament, you have to go. Or another way to think about it: You can't go to any other tournament. So you can't turn down the NCAA men's basketball tournament for the NIT. And many of you will say, well, who would do so? But if you are the operator of the NIT and you can clearly make an argument that that is anticompetitive, this is one of many cases. The NCAA has proven itself consistently able to win most of these cases.

MR. SCHAAP: And look, again, I don't know anything about the law, as you are well aware at this point, but what again seems to me the problem here, covering college sports and working for a network that relies so heavily on NCAA contracts and conference contracts, is that you've got two sports basically, with rare exception: Men's basketball and football, that provide all of the revenue for the athletic departments and make it possible for all of the other teams to travel, to equip themselves to set up schedules to recruit. I would say it's a fair deal. Sure, schools are making millions of dollars. The athletic departments in some cases are making millions of dollars, et cetera. I'd say that's fair in exchange for scholarship and an opportunity to graduate from many fine schools.

But the problem is the reality of the situation is that these kids don't get a chance to graduate, particularly in the revenue-generating sports, because their coaches don't let them study. It's gotten to the point where they practice—the top fifty college football teams practice six hours a day in the fall sometimes. And then they are traveling on weekends or playing at home on the weekends. And basketball is worse. I mean they start practicing October 15th, and the season is not over until April, which is virtually the entire academic year.

To me, if you were to give these kids a real opportunity to study and you were going to be serious about not playing college football games—and this is ESPN's fault more than anyone else's at this point. ESPN is scheduling college football games on Tuesday, Wednesday, Thursday, Friday nights. When are these kids supposed to find the time to study, to take advantage of that scholarship, which is supposed to be their compensation for building these programs and maintaining them? That's the problem as I see it.

MR. BRETT: We are going to take questions from the floor in a moment. I just want to respond to Scott's observation about the NCAA and NIT by saying my

alma mater is the only school that ever won the NCAA and NIT in the same season, and they did it with every player on the team shaving points.

AUDIENCE MEMBER: I have a question about the issue with the Major League Soccer case on the issue of market definition. There is an international market for soccer players, and I wondered if anyone on the panel would care to comment if that is going to be applicable, assuming there is a future antitrust litigation, to whether someone telling baseball players, you don't like it, go play in Japan. And that could be addressed.

MR. ROSNER: I'll start. I was really surprised by that decision in *Fraser v. MLS*. Obviously, as the defendant in these antitrust cases you want to define the relevant market as broadly as possible. It doesn't get any broader than the global soccer market. And so that was the relevant market in that case. You can argue with the merits of that decision, but certainly I think soccer is unique in that perspective.

I think the relevant markets in the other leagues are a lot easier to determine. They are played certainly throughout the world, but the relevant market, you can argue, is primarily the United States. Because the strongest league in each sport is in the United States.

MR. BERTHELSEN: I think the issue in those cases really, are there viable competitors elsewhere? The answer to that is yes, in soccer. Although I don't agree with the decision in the *Fraser* case, but the answer to that is no. Certainly in football, and I would argue also in baseball. I don't know where hockey stands as far as European leagues. Probably the same answer. Are there viable competitors outside of this country for the services of this player? I don't see it as an issue for us at all, and I doubt that it is for anyone else, other than soccer players.

MR. HOUCK: A question in the back.

AUDIENCE MEMBER: Baseball has always used farm leagues to recruit their talent, and as somebody

pointed out, you could recruit somebody at the age of 16. Basketball and football have used the colleges. Is there any reason why they could not set up farm teams the way that baseball has done and then recruit these people younger?

MR. MANFRED: There are really good economic reasons why people don't copy the baseball model. And that is the only way that Minor League Baseball has been viable in the United States, is that Major League Baseball subsidizes it to the tune of 300 to 400 million dollars a year. We pay a huge price for the privilege of developing our own talent. And if we could get out of that business without disrupting a very elaborate system in the minor leagues, and if the colleges in fact had baseball programs that were capable of developing our talent—which they don't right now, we would get out.

MR. ROSNER: And by the way, I'm not so sure that having a vertically integrated minor league system is out of the question in the NBA. And I think you could see some sort of a middle ground reached where that potentially could be the case, where you assign X number of players into an expanded NBDL. So it is a possibility. It is going to be a loss leader, but it is a possibility.

MR. HOUCK: One more question.

AUDIENCE MEMBER: This question is for Mr. Manfred. What are your thoughts on the position that in today's world, today's baseball, only small market teams are benefiting from whatever is left of baseball's antitrust exemption, and specifically as it pertains to revenue sharing and franchise movement and player draft?

MR. MANFRED: I think that the single biggest beneficiary of what remains of our exemption are—I think without the exemption that we enjoy its application to franchise location; there will be more franchises in LA, New York and New England. And clearly, the Yankees and the Mets are the biggest beneficiaries of that. You see small markets move into the big markets.

MR. HOUCK: I want to thank the panel very much.

Antitrust Dinner

Service Award Recipient:

Hon. Pamela Jones Harbour
Commissioner
Federal Trade Commission
Washington, D.C.

Dinner Speaker:

Hon. Lewis A. Kaplan
United States District Judge for the Southern District of New York

MS. ANTHONY: Good evening, everyone. My name is Barbara Anthony, and I am literally seconds away from being the former Chair of the marvelous Antitrust Law Section.

It is my pleasure once again to welcome you all to this event. We had a terrific program today, and I want to welcome you all to our special dinner this evening.

Before I introduce the people who are here on the dais, I want to ask you to join me in acknowledging the special job which Steve Tugander, the Chair of today's program, has done in pulling this all together. He did a marvelous job. Just fabulous. Thank you on behalf of all of us.

Now, I would like to introduce some very special people on our dais, and I'm going to begin with my immediate right, which means your left, depending on where you are sitting. To my immediate right, I want to introduce our keynote speaker for this evening, the Honorable Judge Lewis Kaplan of the United States District Court, the Southern District of New York.

Seated next to Judge Kaplan is his wife Lesley Oelsner, who is an attorney and a writer. Sitting next to Ms. Oelsner is Barry Brett, Jenkins & Gilchrist, who was the co-Chair today with Steve Houck, of the marvelous panel we had today on sports and antitrust law. Sitting next to Barry is Alan Weinschel of Weil, Gotchal, who was the Chair of the Standard Setting Panel. Seated next to Alan is Meg Gifford of Proskauer Rose, who was the panel Chair on the *Noerr-Pennington* Immunity Panel. Seated next to Meg is Bernie Persky of Goodkind Labaton, and he was the Chair of the *Empagran* Panel. And seated next to Bernie, the last seat, is Saul Morgenstern of Kaye Scholer. And Saul is our incoming secretary. So thank you very much all of you.

Seated to my left is Steve Tugander, who is the incoming chair of the Antitrust Law Section, and who was the Chair of today's marvelous program. Seated next to Steve is a very familiar face to all of us here in New York, Federal Trade Commissioner Pamela Jones Harbour, who is also a former Chair of this committee. Welcome Commissioner.

Welcome back. Always happy to see Commissioner Harbour back in New York. Seated next to Commissioner Harbour is Steve Houck of Menaker & Herrmann, who co-chaired the Antitrust Sports panel. Sitting next to Steve is Molly Boast of Debevoise & Plimpton, who chaired the Antitrust Law Developments panel. Seated next to Molly is Jay Himes, who heads up the New York State Attorney General's Antitrust Bureau, who was also a panelist on the *Noerr-Pennington* panel. And seated next to Jay is Ralph Giordano, another very familiar face to all of us here in New York, who is the Chief of the New York Field Office of the U.S. Department of Justice Antitrust Division.

So why don't you join me in greeting the entire dais.

Thank you. I want to thank our sponsors, some very special sponsors tonight, Charles River Associates, who provided the marvelous cocktail hour that everyone I think enjoyed. Thank you very much to Charles River Associates.

I also want to thank once again Competition Policy Associates for providing the wine this evening, red or white, your pleasure, to accompany dinner. So thanks to both of those firms for helping sponsor this event.

Now, I would like to turn these proceedings over to the incoming chair, Steve Tugander.

MR. TUGANDER: Thank you, Barbara.

We really were very fortunate to be joined today by such a distinguished and knowledgeable array of speakers. I hope everyone enjoyed the program as much as I did.

The planning for the program began almost a year ago, soon after last year's meeting was completed. So at this time what I would like to do is take a few moments to acknowledge the hard work and dedication put into the program by our outstanding panel chairs and panelists.

First, leading off this morning I want to thank Molly Boast and Irv Scher for a great job in providing us with a review of the past year in antitrust developments, con-

tinuing a wonderful tradition started by Bill Lifland many years ago. So a round of applause for Molly and Irv.

Thanks also to Meg Gifford and her panelists for taking us through an excellent and detailed exploration of the application of the *Noerr-Pennington* doctrine.

Third, I want to thank Bernie Persky and his distinguished panel for providing us with a very informative and very spirited debate surrounding the rationale and implications of the Supreme Court's 2004 *Empagran* decision.

And fourth, thanks to Alan Weinschel and his diverse panel for a great job giving us a variety of perspectives on current standard-setting issues both in the U.S. and in Europe. Thanks Alan.

And fifth, thanks to Barry Brett and Steve Houck, who chaired a terrific panel on the intersection of antitrust and sports, which was really a special treat for all of us sports fans. So Barry and Steve, thank you.

(Applause.) I also want to give special thanks to Lori Nicoll of the New York State Bar Association staff in Albany. I see Lori in the back. Thank you, Lori.

As always, Lori did a tremendous job from behind the scenes, coordinating all of the logistical details that go into putting the program together. It wouldn't be possible without Lori and the staff's help. So thanks a lot, Lori.

Another tradition we have here at the Antitrust Law Section is for the incoming Chair to present a gift to the outgoing Chair.

So Barbara, on behalf of the entire Antitrust Law Section, it's my pleasure and my honor to present you with this gift as a token of our appreciation for the leadership, hard work, dedication and enthusiasm that you brought to the Section during your tenure as Chair.

MS. ANTHONY: Thank you very much, Steve. I want to thank you and my colleagues and the faithful members of the Executive Committee this past 18 months who have worked so hard to put programs together, to be supportive. I've appreciated your support, and it has been a great experience, and I thank you all.

Now, we have another tradition, which is a very lovely tradition here in the Antitrust Law Section. Each year we give an award, and it is called the Antitrust Law Section's Annual Service Award. It is my last official act as Chair and one that gives me great personal pleasure and pride.

It is a very special honor to present the Antitrust Law Section's Annual Service Award to one of the finest, most dedicated, brilliant public servants in our country

today: Federal Trade Commissioner Pamela Jones Harbour.

Now, the Service Award is our unique way of recognizing outstanding contributions and leadership in the field of antitrust law. And Pam Harbour, an antitrust litigator and strategist, prolific author and public speaker, a leader among her antitrust colleagues and peers and a public servant with vision and independence certainly qualifies for this award.

Now time does not permit a full recitation of Pam's biography and accomplishments, so I'm going to touch on some of the highlights that reflect her extraordinary contribution to the antitrust bar and also, in particular, to the antitrust bar right here in New York.

I think, like many of you, I knew Pam Harbour before I knew Pam Harbour. And by that I mean that her reputation as an antitrust litigator, leader and manager of so many prominent antitrust cases of the past fifteen years preceded my actually meeting her. Pam is one of those rare stars in the antitrust galaxy of stars, in that most of her career, to date at least, has been spent serving the public interest through state and federal government appointments. Pamela Jones Harbour served for eleven years through four administrations in the New York Attorney General's Office. Now, anyone who can survive and succeed through four administrations in New York State politics is clearly extraordinary.

My friends, that alone dwarfs anything you can see on the TV version of *Survivor* and reality TV. This is real life.

Let me begin by giving you a nutshell version of Pam's antitrust career. She joined the Attorney General's Office here in New York in 1989 and began her antitrust career as an ordinary staff attorney in the Antitrust Bureau of Bob Abrams' office. She rose through the ranks, and in 1996 became Deputy Attorney General of the Public Advocacy Division under Attorney General Vacco. Now, the Public Advocacy Division is the largest division in the Attorney General's Office, with management of over 350 lawyers, and that division includes both the Antitrust and the Consumer Protection Bureaus.

In 1999, when she left the Attorney General's Office to become a partner at Kaye Scholer, she had achieved a rank of Assistant First Deputy Attorney General of the State of New York. As a partner at Kaye Scholer she counseled clients on Internet privacy, e-commerce, consumer protection and a variety of competition-related matters. But she was not long to stay in the private sector. In August of 2003, the call to return to public service beckoned Pam, and she was appointed by President Bush as an independent to the Federal Trade Commission for a term that expires in September of 2009.

Now, if you look at some of the past recipients of our Section's Service Award, including recent awardees, David Boies, Lloyd Constantine, who is here tonight; and others before them, you'll see some common threads of characteristics, and those characteristics I think can be boiled down to three things: Leadership, intellectual integrity and independence, all in pursuit of antitrust law. A look at the career of Commissioner Harbour shows a professional life dominated by these characteristics—leadership, intellectual integrity and independence.

Now, in her role as a litigator and key manager at the New York Attorney General's Office, she developed a strong belief that anticompetitive vertical restraints can cause serious harm to consumer welfare, and that for the benefit of consumers it is critical for government forces to take a leadership role in prosecuting such cases. During the late '80s and much of the '90s that role fell to state antitrust enforcers, and the state of New York was the unrivaled antitrust leader amongst its colleagues across the nation. And I know that firsthand, because I was in Massachusetts in a similar role to Pam's at the time, and I had to listen to my Attorney General complain about how Pam Harbour's division was always getting the jump on us in bringing the high-profile cases. So Pam Harbour represented New York and many other states in a retail price maintenance case against various companies that resulted in multimillion dollar settlements for the benefit of consumers.

It was during this period that she was chosen by her peers from all over the country to represent more than 30 states in oral argument for the United States Supreme Court in the landmark price-fixing case of *State of New York v. Khan*. In addition to these major cases, Pam, as a key player in the Antitrust Bureau, played a strategic role in the development and prosecution of the Microsoft case, the *Poughkeepsie Hospital* case and multistate action against Mylan Pharmaceuticals.

Now, little did we all know that the *Poughkeepsie Hospital* case to enjoin price fixing and a virtual merger, would end up being about the only hospital merger victory for any government entity in recent memory. And as we all know the *Mylan* case resulted in millions of dollars in redress to both direct and indirect purchasers around the country.

Now the critical contribution of Pam Harbour during this period was as a leader in the vanguard of state antitrust enforcers who brought cases not just for the interests of their particular state's constituencies, as important as that was, but for the interests of all consumers across the country, regardless of where they lived.

At the time it was a novel idea. It was thinking outside the box. It took audacity, professional courage and wisdom. Those cases required leadership and indepen-

dence at a time when it was not exactly the most popular role to assume. However, despite criticism from the established bar and sometimes the federal agencies, Pam and her peers understood that if they did not work to address the harm to consumers caused by some of these restraints, including vertical restraints, such injuries would never be rectified.

When we look at her work as a state antitrust official, we see Pam Harbour's deep understanding and appreciation of federalism in the practice of antitrust law. She understands and appreciates that the state and federal governments can and should be partners in the pursuit of consumer welfare. She also knows that sometimes the state and federal agencies are not partners, and that different views and debate about how to achieve the best outcome for consumers is healthy and consistent with our federalist system. Again, leadership, intellectual integrity and independence. Judicial setbacks and restraint by federal agencies pursuing vertical cases did not undermine her belief that where warranted there is an appropriate role for the federal agencies in prosecuting vertical trade restraints on behalf of consumers.

Her extensive writings published in numerous ABA and PLI publications and her lectures, both here and abroad, include well-reasoned and thoughtful presentations on antitrust enforcement against price and nonprice vertical restraints, as well as articles on a number of antitrust subjects, including jury trials and antitrust cases and, of course, the role of state antitrust enforcement.

For New York State practitioners in particular, Pam Harbour, together with our own Bob Hubbard, is the co-author of *Antitrust Law in New York State*, a practical guide to the Donnelly Act. In both her public and private sector capacities she has spoken extensively on competition policy in the world of e-commerce and has lectured about the great digital divide of e-commerce and the opportunities for empowerment through technology for African-Americans.

Throughout her career she has been an outspoken advocate and promoter of women in our profession, an active supporter of the Women's Antitrust Committees both here in New York and in Washington. And she's been involved with ABA's Commission on Women in the Legal Profession. Importantly, she's an ardent advocate of our profession being more responsive to family and child care issues for both men and women. As a wife and mom to three children she knows all too well the challenges of juggling a successful professional and family life.

Now, many of us in this room know Pam from her dedication, hard work and commitment to both ABA Antitrust Law Section and the Executive Committee of this Antitrust Law Section. Throughout her career, she

has continued to be a forceful, thoroughly engaged Section member and leader. She served our Section very well as Secretary, Vice Chair, Program Chair, and ultimately Chair. She was always respectful and courteous to her peers and colleagues. She was a superb and eloquent leader and spokesperson for all of us. Here is one of our own, a native New Yorker, a long-time member of our Section, elevated to the rank of Federal Trade Commissioner.

If you've been following her speeches and decisions in her new role, you will see she continues to exhibit the qualities of leadership, intellectual integrity and independence that brought her to that role in the first place. I think the pundits who are watching Commissioner Harbour only have to look at what she told the nominating committee during her nomination hearing. She told the committee members that she did not bring any particular agenda to her role as Commissioner. She brought an objective mind, open to mastering the complicated facts and sophisticated concepts that are frequently before the Commission. She told the committee that she believes that the antitrust laws and the open competition which they foster and protect work best when businesses and consumers meet in a marketplace unsullied by fraud, deception and misinformation. She pledged to advance the work of the Commission and to extend the benefit of intelligent antitrust and consumer protection enforcement to all of our society.

Now, if you look at her record as an FTC Commissioner over these past 18 months, I think you will agree she's kept her promise. She displays leadership, intellectual integrity and independence. When she deems it necessary, she's made difficult calls, even when it was not the most popular thing to do. She's made all of us very proud.

On a personal level, I must add that she is enormously supportive of the FTC's regional offices around the country and the roles that we play in executing the mission of the agency. Commissioner Pamela Jones Harbour has excelled in the field of antitrust law as a litigator, manager, policy maker and now decision-maker. We are grateful she's agreed to accept this award and be here with us tonight. I'm very proud to present Commissioner Pamela Jones Harbour with our Antitrust Law Section Annual Service Award.

COMMISSIONER HARBOUR: Thank you, Barbara, for your overly kind introduction. And thank you to everyone in the Section for honoring me with this award.

As you know, I began my career as a state antitrust enforcer. And as a young attorney in 1989 seeking professional development, I quickly found a home within the Antitrust Section of the New York State Bar Association. Throughout my years in the New York State Attor-

ney General's Office and later in private practice at Kaye Scholer, I relied upon the Section for camaraderie, for education and for support. And I am pleased that even in my new position as Federal Trade Commissioner that I have been able to maintain my close ties to this Section.

The quality of this Section's programming today and throughout the years remains first rate. Although this group is delightfully New York-centric, the Section nonetheless succeeds in broad explorations of cutting-edge antitrust issues from local, national and even international perspectives.

Becoming a Federal Trade Commissioner is an opportunity to pursue, in the words of Eleanor Roosevelt, "the privilege of being useful," and to protect the public interest to the best of my ability. I am thrilled to work with Chairman Majoras, my fellow Commissioners and the FTC's devoted and talented staff to set the Commission's antitrust enforcement agenda.

But if you know me at all, you know that I am still a strong believer in the unique value of state antitrust enforcement. This issue is now before the Federal Antitrust Modernization Commission, which has announced that it intends to study what changes, if any, should be made to the enforcement role the states play. A primary purpose for the adoption of the Sherman Act was to supplement, not supplant, the state's enforcement of its own antitrust laws.

I am extraordinarily proud of our record of achievement during my eleven years in the New York State Attorney General's Office. And I have seen firsthand that antitrust enforcement by state Attorneys General enhance consumer choice and promote our national economy.

My office at the Federal Trade Commission has a marvelous and humbling view of the United States Capitol. But still, I am constantly looking toward the 50 state capitals, eagerly following, anticipating the emergence of innovative antitrust enforcement actions that enhance consumer welfare.

So I would like to leave you with this idea. When you think about service to the antitrust community, I urge you to acknowledge the efforts of the state antitrust enforcers here in New York and elsewhere who are the foundation upon which my Service Award is based.

In closing, let me say once again how very grateful I am for the relationships that I have formed through my close involvement with this Section and with the antitrust bar as a whole. When I look out into the audience, I see the faces of my husband John, my family, my friends, my colleagues, who have been instrumental in my professional development—not just because of your generosity of spirit, support and advice, but because of your extraordinary legal abilities.

I am truly touched to receive this honor, which will remind me that our professional rewards in life will always be in direct proportion to our service rendered.

Thank you.

MR. TUGANDER: The final portion of our program will be to hear from our guest speaker Judge Lewis Kaplan of the Southern District of New York.

Judge Kaplan has a very long list of accomplishments, so in the interests of time I'll only cover some of the highlights from his bio. Judge Kaplan was appointed United States District Judge for the Southern District of New York on August 9, 1994 and entered on duty on August 22nd, 1994.

After graduating *cum laude* from Harvard Law School in 1969 he served as law clerk to the Honorable Edward McEntee of the United States Court of Appeals for the First Circuit. Judge Kaplan joined the law firm of Paul Weiss Rifkind Wharton and Garrison in 1970, and was a partner with the firm from 1977 until joining the bench. While at Paul Weiss he engaged in a litigation practice with emphasis in the areas of antitrust, securities and intellectual property.

Since his appointment to the bench, Judge Kaplan has presided over a number of well-known cases, including the civil antitrust price-fixing cases brought against Sotheby's and Christie's and the companion criminal antitrust case against Sotheby's.

Judge Kaplan is a Judicial Fellow of the American College of Trial Lawyers and a member of the American Law Institute, the American and the New York State Bar Associations, the Association of the Bar of the City of New York, and the Federal Bar Council. He is also the current Chair of the Technology Committee of the United States District Court for the Southern District of New York.

Judge Kaplan's publications are numerous, and in the antitrust field they include an article on potential competition and Section 7 of the Clayton Act, published in *The Antitrust Bulletin*; and a chapter on international discovery in antitrust litigation that he contributed to *Antitrust Counseling and Litigation Techniques*.

It is our honor to have Judge Kaplan speak to us tonight. Judge Kaplan.

JUDGE KAPLAN: Thank you, Steve, for that wonderful introduction. And good evening, everyone.

It is both an honor and a privilege for me to be here this evening, and especially to be among all these famous luminaries of the antitrust bar.

As Steve indicated to you, I spent a lot of my career before I went on the bench as an antitrust lawyer. And as I look around this room, I see many friends, comrades in

arms and former adversaries. So joining you for this event feels a lot like coming home. So, figuratively speaking, if I may, what I would like to do is sit around the kitchen table with you and talk about a subject that perhaps is not as staggeringly interesting as the Robinson-Patman Act or the *Noerr-Pennington* Doctrine, but one that nonetheless is very much on my mind these days. And that is the subject of sentencing.

Now sentencing, of course, has been a topic of discussion whenever lawyers have gathered anywhere. The stories abound. I was reminded the other day about the tale of the elderly man who was sentenced to do 40 years in prison. "But Your Honor," he protested, "I won't live that long." "Never mind," said the Judge. "Just do the best you can."

Jokes aside, sentencing is important to the antitrust bar. Criminal antitrust enforcement never, ever truly goes away. The synthetic rubber prosecution has yielded guilty pleas and fines, I read this week, totaling over \$200 million. The government obtained convictions in the DRAM case, the rubber additives case, a food preservatives case and, of course, the very highly publicized auction house case, to mention only a few.

These prosecutions, I'm sure you all know, were not isolated events. Furthermore, the government obtained convictions, according to the data I looked at yesterday, in about three-quarters of the criminal cases it brought over the last four years for which we have data, and about half of the individuals convicted went to jail. Compounding this, Congress recently, as I'm sure everyone in this room knows better than I, amended the Sherman Act to increase the maximum term of imprisonment for violation of the antitrust laws to ten years and the maximum fines to a hundred million dollars for corporations and a million dollars for individuals.

So antitrust lawyers need to be interested in sentencing. But the importance of sentencing goes far beyond the antitrust bar. The last figures that I could get were as of mid-2003. As of that point in time our nation's prisons and jails held almost 2.1 million people. According to Human Rights Watch, this was a higher percentage of the population than is incarcerated in any other country in the world. Sentencing, therefore, is important not just to antitrust lawyers, it is important to every citizen.

We stand at a critical juncture as a result of the Supreme Court's decision in *Blakely* last spring, and just two weeks ago in *United States v. Booker*. So I would like to share some thoughts with you tonight about where the federal system at least might go from here.

The story, as some of you I'm sure are quite familiar with, really begins many years ago. But a good place to start is 1984. Congress was very concerned about what it perceived to be unjustified disparities in federal sentences, so it passed the Sentencing Reform Act. That

statute in Section 3553(a) requires that courts consider a number of factors in determining sentences. The relevant considerations include things like the nature and characteristics of the offense, the history and characteristics of the defendant, the need for the sentence to reflect the seriousness of the crime, and the need to afford appropriate deterrence. Among the factors listed was the need also to avoid unwarranted disparities in sentences.

But the Act, as I'm sure you know, didn't stop there. It went on to establish the United States Sentencing Commission. It mandated the adoption of sentencing guidelines. Most importantly, it required federal judges to impose sentences within the ranges established in the Guidelines, except in exceptional cases.

It took a few years to write the Guidelines. Anybody who has picked up the huge volume knows it must have taken years to write. They took effect in 1987. They assigned a base offense level—in other words, a number of points for every federal crime. There is a big appendix, you can look up any statute, and it will tell you the base offense level. That level, in the absence of any other factors, when you put it together with the defendant's criminal record, tells you the range of permitted sentences.

So to give an example near and dear to the hearts of everyone in this room, the base offense level for a violation of Section 1 of the Sherman Act is ten. If the defendant doesn't have a criminal record, and there is no other compounding factor, a defendant convicted under Section 1 is looking at six to twelve months in jail, with the possibility of a split sentence—part jail, part something else—that could result in less jail time.

But the devil of course is always in the details. And in any volume that thick, there are plenty of details. I'll mention three. First of all, the Commission was very concerned that the particular statutory offense with which a defendant is charged might not reflect the full scope of the defendant's criminal behavior. So it provided that the offense level, the base offense level, would be determined not on the basis of what the crime charged happened to be, but on the basis of all of the defendant's "relevant conduct." Time doesn't permit me to talk about exactly what that means, but I can give you a quick example. A mobster might be charged with a single count of extortion, but the relevant conduct might include three or four murders, labor racketeering, loan sharking and any other number of crimes.

Secondly: The presence or absence of a number of different factors require alterations in the base offense level. So for example, with Section 1 of the Sherman Act, price fixing is ten. If you rig bids, it goes up to eleven. And the Guidelines manual is sprinkled with provisions like this under almost every conceivable base offense level.

The third detail of huge significance is the fact that once you get to the base offense level, you've only started. The Guidelines provide for adjustments, mostly upward, occasionally downward, of the base offense level to reflect all sorts of factors that the Commission thought increased or decreased the seriousness of the crime. I'm talking about things like how many victims there were. What were the characteristics of the victims? Were they especially vulnerable? The importance of the role that the defendant played. Whether the defendant obstructed justice. How much money was involved? And on and on and on.

So to go back to the Sherman Act example I started with a minute ago, the defendant starts with a ten for price fixing. Now let's assume that the amount of commerce the defendant did as to which prices were influenced or fixed was in the range of \$15 to \$37.5 million. There is a big chart about all the dollar ranges, but let's pick that one. That all by itself ups the offense level to sixteen. Now, if we add to that the assumption that the defendant obstructed the investigation or the prosecution—suppose for example the defendant just happened to dispose of some inconvenient documents, tried to put a little pressure on a witness, something like that—the level goes up again, this time to eighteen.

Now, the many determinations that the Guidelines require were hugely important. They resulted in differences in sentences that could be quite dramatic. And in the price-fixing example I've just given you, the increase from that base offense level of ten up to the sixteen or eighteen, to the eighteen specifically that I spoke of, jumps the sentencing range from six to twelve months up to 27 to 33 months.

Now, the key point is that all of these determinations I've been talking about have one thing in common: A guilty verdict or a plea of guilty didn't necessarily address any of them. The judge had to decide what constituted the relevant conduct. The judge had to decide whether any or all of these factors were present, and to come to the final offense level. The judges did this based upon a preponderance of the evidence, rather than beyond a reasonable doubt. The jury had nothing to do with it, except in extremely rare cases.

So as Justice Stevens said in *Booker* two weeks ago, the jury's finding of the underlying crime is less significant. That was an understatement in some cases. That produced quite a reaction in the Supreme Court over the past five years or so.

In *Apprendi v. New Jersey*, the defendant was convicted of possessing a gun, but his sentence was increased because the judge found there was a racial motivation for having the gun. It was a hate crime. In 2000, the Supreme Court rejected that increase, saying that any

fact that increases the penalty for a crime beyond the proscribed statutory maximum sentence, other than a previous conviction, must be submitted to a jury and proved beyond a reasonable doubt.

Apprendi was followed last June or July when the Supreme Court struck down the Washington State Sentencing Guidelines, which increased sentences beyond standard ranges based on findings by judges lately. This set the stage for *Booker*, which involved the question of whether the Federal Sentencing Guidelines, with this host of adjustments that I've been talking about made by judges, would survive. Two weeks ago we learned that they did not. In an opinion by Justice Stevens the Court held by a vote of 5-4 that the provision of the Sentencing Reform Act that required federal judges to impose sentences within the guideline range is unconstitutional. It does not respect defendant's right to have the maximum sentence that a judge may impose determined solely on the basis of facts found by the jury or admitted by the defendant. And in the former case, that is found by the jury, found beyond a reasonable doubt.

In a separate opinion by Justice Breyer, writing for a different majority, a majority that included on both counts only Justice Ginsberg, the Court held that the remedy was not to throw the baby out with the bath water. Rather it was to sever and excise the requirement that judges sentence within the guideline range while leaving the rest of the Sentencing Reform Act save a provision for appeals that is not at the center of this. So this requires sentencing judges to consider the Guidelines, as well as all the other objectives of sentencing I referred to. Sentences are reviewable on appeal for unreasonableness.

Now of course, the number of questions that this raises is huge, and it's not my purpose to speak about them tonight. My purpose is to talk about where we go from here.

The reaction to *Booker*, has tended, I think at least in these initial stages, much toward the extremes. At one end of the spectrum is a comment by Mark Pomerantz, a former Chief of the Criminal Division of the United States Attorney's Office for the Southern District of New York, who has now gone straight and works on the defense side—I'll hear about that later. Mr. Pomerantz was quoted as saying, and I quote, "The defense bar has viewed the Guidelines as the wicked witch for a long time." He happily pronounced: "Ding dong, the wicked witch is dead."

At the other end of the spectrum perhaps is Congressman Tom Feeney of Florida, author of the controversial Feeney Amendment last year, which further restricted judicial sentencing discretion. Congressman Feeney called *Booker* an egregious overreach, and he reportedly said that "the Supreme Court's decision to

place this extraordinary power to sentence a person solely in the hands of a single Federal judge, who is accountable to no one, flies in the face of the clear will of Congress."

In view of these reactions, it is no surprise that the newspapers are filled with reports that Congress may take action. Before racing head-long into a new legislative effort, however, it is important to begin by considering whether either one of these responses that I've referred to rests on an accurate assessment of *Booker* and its likely consequences. *Booker* itself suggests that they do not.

To begin with, the Supreme Court in *Booker* stressed that most of the Sentencing Reform Act is not affected by the decision. This includes the provision that requires judges to impose sentences that take into account the need to avoid unwarranted sentencing disparities. Since the Guidelines are the only standard of reference, judges have to consider the Guidelines in imposing sentence. Reports of the death of the wicked witch, to use Mr. Pomerantz's phrase, have been greatly exaggerated. Nor has *Booker* left the power to sentence "solely in the hands of a single Federal judge accountable to no one." Every sentence imposed by every district judge is subject to review on appeal to determine whether it's reasonable. Given that sentencing judges are obliged to consider the Guidelines, and obliged to avoid unwarranted sentencing disparities, it seems a safe bet that the Guidelines are going to be a significant factor in assessing reasonableness.

Although only two weeks have passed since *Booker* came down, we already have one careful analysis by a thoughtful district judge that suggests that perhaps not very much is going to change as a result of *Booker*. In *United States v. Wilson*, Judge Paul Cassell in Utah, who somehow managed to deliver an enormous opinion the day after *Booker* was decided, confronted the question of just how advisory the Guidelines are. He concluded that courts should sentence within the guideline range except in unusual cases, where clearly identified and persuasive reasons warrant a different sentence. In other words, the Guidelines, in Judge Cassell's view, are entitled to heavy weight, and the appropriate sentence will be the Guidelines sentence in all but the most unusual cases.

It is useful to consider the factors that led Judge Cassell to this result. The decision, not surprisingly, begins with the fact that the principal portion of the Sentencing Reform Act that the Supreme Court invalidated in *Booker* was the section that required a sentence within the Guideline range. The requirement, as I said, that judges consider the sentencing Guideline range in imposing sentence still stands. But Judge Cassell went on to argue that the Guidelines ordinarily should be followed also because they are authoritative indications of the sen-

tences that are just in particular cases. They reflect, in Judge Cassell's view, public opinion regarding the appropriateness of particular sentences for particular crimes. The sentences that they have required, again in Judge Cassell's view, have assisted in controlling crime. But perhaps most important, Judge Cassell made the point that I made before: If we are to avoid unwarranted disparities and if, as at least at the moment that is the case, the Guidelines are the only standard, how else can you do it? How else can you avoid disparities without paying attention to the Guidelines?

Now to be sure, Judge Cassell's view isn't the only one, even this soon after *Booker*. In a case called *United States v. Ranum*, Judge Lynn Adelman in Milwaukee apparently took issue with Judge Cassell. The Sentencing Reform Act, he said, requires sentencing judges to consider the history and the characteristics of the defendant. The pre-*Booker* requirement that judges generally sentence within the guideline range, he argued, usually prevented judges from doing that because the Guidelines provided that the judges ordinarily should not consider such things as the defendant's age, the defendant's education, mental and emotional condition, family responsibilities, civic and military contributions. Thus he argued that the invalidation of the requirement of imposing the Guidelines sentence leaves judges free to consider all of the factors enumerated in the Sentencing Reform Act and diminishes the weight to be accorded to the Guidelines.

Nevertheless, and I think this is the key point about *Ranum*, Judge Adelman concluded his analysis of the effect of *Booker* by saying that he agreed that courts in all cases must seriously consider the Guidelines. They are free to disagree in individual cases with the ranges proposed by the Guidelines as long as the ultimate sentence is reasonable and carefully supported by reasons tied to the factors enumerated in the Sentencing Reform Act.

So it seems to me that while there is certainly a vast difference in the rhetoric employed in *Wilson* on the one hand and *Ranum* on the other, it is not entirely clear that the formulation Judge Adelman adopted actually would lead to results much different than the formulation Judge Cassell adopted in specific cases.

But again, for my purpose this evening, that's not the principal point. What is important, I suggest, is that we are still in the very early days of the post-*Booker* era. There is no way to know tonight how the debate by Judge Cassell and Judge Adelman will play out if matters are left to develop in the courts. One possibility at least is that federal sentencing after *Booker*, after everything settles down, will look very much the same as federal sentencing before *Blakely*. Judges will follow the Guidelines in a large majority of cases. Courts of Appeals may demand substantial justification for non-Guideline sentences, just as they previously did for Guideline departures. So the extent to which defendants

actually are sentenced outside the Guideline ranges remains to be seen. And regardless of the frequency of non-Guidelines sentences, the reasons that judges give for non-Guideline sentences to come may warrant serious consideration.

You know, we Americans are people who pride ourselves on our common sense. There is an old adage that seems to fit here. "If it ain't broke, don't fix it." Without meaning to suggest that the Guidelines were above criticism, and I take no position on that one way or the other tonight, that old adage suggests caution here. Before Congress concludes that *Booker* broke the sentencing system and sets out to fix it, it would be useful if it allowed some time to pass to see whether the results of *Booker* require or warrant further action. If the rate at which the courts impose non-Guideline sentences isn't markedly different from the past, perhaps a legislative reaction to *Booker* will seem unwarranted.

Furthermore, it's important to bear in mind that such sentencing disparities as are out there are not solely the result of decisions by judges. If and when Congress comes to the point of considering legislation in the pursuit of reducing disparity in sentencing, I respectfully submit that there are some other matters that are worthy of consideration. Prime among these is the fact that decisions by prosecutors, not judges, may be responsible for considerable disparity in the manner in which defendants committing like crimes are sentenced. These disparities may arise where prosecutors under charge in the first place, where prosecutors agree to dismiss serious charges in exchange for guilty pleas to lesser offenses and where prosecutors bargain not only about the guilty pleas they will accept, but about the facts relevant to sentencing that will be brought to the judge's attention.

Possibly the most egregious of these situations has been the so-called fast-track programs for alien illegal reentry cases along the southwest border. Some of the United States Attorneys in border districts frequently, indeed routinely, offer to charge illegal reentrants with offenses that carry lower maximum sentences than otherwise might be charged, in exchange for quick guilty pleas. This means that the maximum sentence to which an illegal reentrant is exposed could vary by a factor of more than two, depending upon whether he or she happens to be arrested in a border district with a fast-track program or in a district farther away from the border.

If one is concerned about sentencing disparities, one should reflect on whether it really is justifiable to give an illegal reentrant who crosses the border in Tijuana and makes it all the way to New York a sentence of 70 to 87 months in jail, while another illegal reentrant who rides the same truck across the same border and who has the same criminal history gets only 30 months because he was caught in San Diego. And that happens.

I certainly recognize the practical means of resolving the huge volume of illegal reentry cases in the border districts. But if the overall goal here is equal treatment for equal conduct, then there is at least a question whether administrative convenience or reluctance to invest the resources required to prosecute all these cases in the normal fashion warrants such wholesale disregard of the principle of uniformity.

Another example is the disparity under the Guidelines where a defendant renders substantial assistance to the government. In fiscal year 2002 there were substantial assistance departures on motion of the government in 17.4 percent of all cases nationally, about one out of six. In the Tenth Circuit, there were such departures in only 11 percent of the cases while the figure was almost triple that in the District of Columbia Circuit. If you look at individual districts, the rate of substantial assistance departures ranged from a little over 3 percent in the Eastern District of Oklahoma to 46.3 percent in the Middle District of Alabama. I suppose it may be necessary to give substantial assistance departures to almost half of all defendants in middle Alabama in order to keep the wheels of justice turning, but that prosecutors in Oklahoma can get by by giving them the less than in 25 defendants. I suspect, however, this isn't the case. I suspect instead that there is a vast difference in the way in which prosecutors of different districts approach substantial assistance departures.

This prompts a comment about a sacred cow in this room, the Antitrust Division's amnesty program. As many of you know, corporations and individuals who report antitrust violations prior to the commencement of an investigation may qualify for amnesty under existing Antitrust Division policy. Indeed, if memory serves, that's where Christie's went in a case I had something to do with. In other words, in an antitrust case, the whistle blower gets a free pass. Contrast this, if you will, with, for example, the policy of the United States Attorney's Office for the Southern District of New York. The Southern District requires all co-operators to plead guilty to every chargeable federal offense in exchange for the hope of a downward departure if the government later decides that the cooperator rendered substantial assistance to the government and if the judge decides to go along. Far from getting a free pass, cooperators in the Southern District wind up with felony convictions, often lots of them, and probably in most cases jail sentences. This disparity in treatment between antitrust cooperators and everybody else is undeniable.

It often has been said that the Sentencing Guidelines resulted in a substantial shift of discretion from judges to prosecutors. I don't think that can be doubted. And there

is ample basis for thinking that the manner in which prosecutors exercise that discretion has led to substantial disparities in treatment. So if we truly are going to be serious about sentencing uniformity, Congress might well consider that an examination of prosecutorial contributions to any unwarranted disparities is appropriate, along with whatever examination of disparities attributable to judges is warranted.

But my central mission and message tonight is not to launch a jihad against anybody. It is quite different. It is to suggest that this is in fact a moment for reflection, not a moment for hasty action. We don't know how *Booker* will evolve if the courts are left to work out these problems. That's worth noting. Furthermore, and more importantly even than that, I respectfully suggest that the courts and the Congress are not and certainly should not become adversaries here. Whatever the initial reaction to the Sentencing Guidelines may have been almost 20 years ago, and despite the well-known and highly publicized controversy about the Guidelines and the limitations they place on judges, I suspect that the area of agreement between Congress and the courts is probably larger than either Congress or judges believes it is. I don't think anybody believes that a system with wide and unjustified sentencing disparities is desirable. I don't think there are any judges out there who think that the sentence that a given defendant receives ought to depend—to use the phrase that's current sometimes—on what the judge ate for breakfast. It is quite possible that we are not talking about substantially different objectives, but about ways and means of achieving largely shared goals. And even if that is not true, though I suspect it is, we are well past the days in which sentences were not reviewable on appeal. The appellate process has been and it is likely to continue to be a significant force promoting uniformity.

So let's try to remember that the things that bind us all together are far greater than whatever divides us. I address that first and foremost to the Congress, but to all of us. So let us reason together about sentencing. It is too serious not to do so.

I thank you for your attention. And if I've imposed by not talking about the Robinson-Patman Act, I hope you'll forgive me. Thank you.

MR. TUGANDER: Thank you very much, Judge Kaplan.

That concludes our program. Good night.

(Whereupon, the Antitrust Law Section Annual Meeting concluded.)

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