NEW YORK STATE
BAR ASSOCIATION

1982 Antitrust Law Symposium

A report from the Annual Meeting of the Antitrust Law Section

January 27, 1982

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1982 New York State Bar Association Antitrust Law Symposium 1981-1982 Officers and Executive Committee

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Antitrust Trends for the Eighties

MR. JAMES T. HALVERSON: Good morning on behalf of the New York State Bar Antitrust Law Section to our 1982 annual meeting. From experience, the room begins to fill up about 10:00 a.m. so we'll start with the business meeting.

It is my duty as chairman of the New York State Bar Antitrust Law Section to report to the membership on the report of the Nominating Committee dated January 15, 1982. The Nominating Committee was appointed by me and consisted of Ed Wolf, chairman, from White & Case; Irv Scher, a former chairman of this section from Weil, Gotshal and Manges; and Eleanor Fox, also a former chairman of this section and an NYU law professor.

The Nominating Committee for the section year beginning July 1, 1982, nominates the following people:

For chairman, Stephen M. Axinn, partner in Skadden, Arps, Slate, Meagher & Flynn; for vice chairman, Kimba W. Lovejoy, partner, LeBoeuf Lamb & Leiby; for secretary, Walter Barthold, partner in Kisson, Halpin & Genovese; for members of the Executive Committee, Eleanor Fox, a professor at NYU; myself, Shearman & Sterling; Henry L. King, a partner of Davis Polk and Wardwell; Irving Scher, a partner of Weil, Gotshal and Manges; and Edward Wolf, a partner of White & Case.

Do I hear a motion that the slate be unanimously elected?

VOICE: I'd like to move the acceptance of the report of the Nominating Committee and the slate elected.

MR. HALVERSON: Thank you. Is there a second?

VOICE: Second.

MR. HALVERSON: All those in favor say aye.

VOICES: Aye.

MR. HALVERSON: Opposed. The slate is elected. (The motion was seconded, was put to a vote and carried.)

Congratulations to all those on the slate.

Also, I am to report to you that our section delegate to the House of Delegates for the section year beginning July 1, 1982, who does not need to be elected (he is appointed by the chairman with the recommendation of the Nominating Committee) will be William T. Lifland from the Cahill, Gordon law firm.

Well, without causing us any further delay, I'll introduce Steve Axinn, who you now know as our incoming chairman for the next fiscal year, and he will chair the program this morning. He's a partner in Skadden, Arps, Slate, Meagher & Flynn law firm. He's extensively litigated in the antitrust field, and he is well suited to chair this program. Steve.

MR. STEPHEN M. AXINN: Thank you, Jim. I can only say to a group that has just nominated me to be the incoming chairman of this section that they surely can benefit from the education that they're going to receive at the hands of this distinguished panel this morning. As some of you know, just two days ago I was wandering in the wilderness of Sinai in Israel and took a flight home so that I could be here this morning. And it might well be said of me that I have gone from the sublime to the ridiculous.

But there is nothing ridiculous about the excellent panel of speakers that we have been able to assemble for you. Indeed, we have had an emergency which has enabled us actually to come up with Fred Rowe, who will be our first and our principal speaker this morning. If you have read your program, you know that our speaker was to be Bob Bork, but Bob has a rather commanding obligation this morning to be present in the Senate, for today is the day he is to have his hearing on his confirmation to be an appellate court judge. So Bob could not be with us. But thanks to Jim Halverson's advocacy and Fred Rowe's spirit of volunteerism, we are very fortunate indeed to have Fred to pick up on short notice and to fill in for Bob Bork. Let me tell you how fortunate we are.

Fred Rowe is so well known to all of us through his writings and his speaking engagements that it's probably not necessary for me to go through this, but it's a pleasure to do so anyway. Fred is a senior partner at Kirkland & Ellis in Washington and Chicago. He was first in his class at Yale Law School in 1952. And as if that was not distinction enough, he was also the executive editor of the *Yale Law Journal* and one of Tom Clark's Supreme Court clerks in the ensuing year. He has gone on from there to distinguish himself in everything that he has touched. He was on the attorney general's national committee in 1955. He was chairman of the Antitrust Section of the American Bar Association and of the Federal Bar Association, a member of the ABA's famous Commission to Study the FTC in 1969, and has taught at Yale, the London School of Economics, CAL, and today he's going to be teaching us. And I think we're all very fortunate to have Fred with us on today's program.

Before Fred begins, I would like to take a moment to introduce the other members of our panel. Let me begin on my extreme left with Jim Halverson, who you all know as chairman of this section and as a senior partner at Shearman & Sterling. Jim, of course, is also the former Director of the Bureau of Competition of the Federal Trade Commission.

On my immediate right is Sandy Litvack of Donovan, Leisure, and until a year ago the Assistant Attorney General in charge of the Antitrust Division and well known to all of us.

To his right is Ira Millstein, former chairman of this section, former chairman of the ABA Antitrust Section, and certainly one of the most distinguished antitrust practitioners . . . no, I'll correct that . . . just one of the most distinguished practitioners in this or any city. And Ira is a senior partner at Weil, Gotshal and Manges.

And on the extreme right is Eleanor Fox who also was the past chair of this section, a member of the Council of the Antitrust Section of the ABA, and a professor of law at NYU, and once again one of the most prolific writers and speakers in the antitrust field.

Together this panel is going to take up this morning the subject of the trends in our field of antitrust for the next several years, the antitrust trends for the eighties, something that of course occupies a great deal of attention today with the somewhat cataclysmic developments of the last few weeks. But I'm sure that in the hands of these speakers we'll be looking further into the future than just these immediate events.

So without any further words from me, it is a great pleasure to introduce to you today's principal speaker, Fred Rowe.

(Applause)

MR. FRED ROWE: Thank you very much, Steve, for your gracious and fulsome introduction. Needless to say, it is a distinct privilege and high honor for me to appear here today as a stand-in for my magnetic and eloquent partner, Bob Bork, who is also my old friend although not soul brother, who is being measured for his judicial toga today in Washington. Jim Halverson just made me an offer I could hardly refuse. Nonetheless, I am sure we will all miss Bob's wit and eloquence today, but instead we can all look forward to the pizzazz of his opinions in the F. 2nd and perhaps, God willing, in the Supreme Court reports in future years as he reveals the true faith to all.

So let me explore with you and the panel some of the prospects for the 1980's in the wake of the big crash of antitrust — the fiasco of the FTC's oil and cereal industry cases (Time magazine called it "Snap, Crackle, and Flop") . . .

(Laughter)

The Justice Department's IBM defeat, and the perplexing AT&T decree which has been hailed as an historic triumph for antitrust as well as being panned as lemon antitrust for the public. Perhaps someone will call it the thalidomide decree because of the birth defects of the new Bell Companies to be spun off.

Anyhow, as we look ahead to the '80s, will the Sherman Act centennial in 1990 resound to the clarion calls of new antitrust crusades against the concentration of economic power; or will we mourn antitrust with grave, sad requiems at the shrine of the new Vatican in Chicago? Wise men know that predictions are perlious particularly about the future.

Historically the state of the union has set the tone of antitrust. Depression is the mother of cartels. In time of expansion, antitrust rides high. Also, only fools and scholars doubt that antitrust, like the Supreme Court, reads the election returns. But I think that most important of all is antitrust over the years is marked by changing visions that reflect the dominant values and realities of a given era and which give meaning to antitrust's adaptable legal charter.

Seen in this perspective, I believe that recent events mark the end of the great antitrust vision of the 1940s with its oligopoly concentration theory of economics which energized antitrust enforcement for 30 years. To a large extent I believe that the antitrust trends of the '80s will depend on the acceptance of the Chicago School's economic efficiency theory as the basis for antitrust policies in the years ahead.

I think that the question is not whether antitrust has economic or sociopolitical aims. Nearly a century of legislative histories and judicial opinions teach that antitrust is a broad ideology with shifting values and stresses in changing times — the populist trust — busting era at the turn of the century, the protectionist small business era of the 1930s, the aggressive structuralist era of the 1960s, and the new abstentionist era that is now unfolding. I think that economists know best that economics is not a timeless truth or neutral science. Instead, the choice among rival economic models is itself a choice of a sociopolitical ideology.

Indeed, as recently shown in the Mobil-Marathon litigation, the choice of an economist is also the choice of an antitrust result. Mobil picked Professor Stigler, a Chicago efficiency prophet. Marathon, and it turned out the Sixth Circuit, picked Professor Scherer, an FTC seasoned oligopoly maverick. In short, the oligopoly concentration model is a prescription for antitrust intervention, and the efficiency model is a formula for antitrust abstention. Joseph Schumpeter wisely wrote in years past that economic analysis is based on our vision of things, and this vision is ideological almost by definition.

Let me retrace briefly the antitrust vision of the 1940s which I believe is now dying. It began with Franklin D. Roosevelt's historic antimonopoly message of 1938 which declared war on business monopoly and the concentration of private power. It unleashed the flamboyant Thurman Arnold and launched the TNEC investigation, which blamed the persistent recession on mature, concentrated industries which kept prices up and employment down. Its spirit was revived by the *Alcoa* decision in 1945, which proclaimed as one of antitrust's purposes to perpetuate and preserve, for its own sake and in spite of possible costs, an organization of industry in small units which can effectively compete with each other.

The new Antitrust Division was unveiled in Professor Eugene Rostow's influential essay, "The New Sherman Act: A Positive Instrument of Progress," in 1947. He wrote that the time's greatest antitrust challenge was to foster a wider dispersal of power and opportunity and a broader base for the class structure of our society by a more competitive organization of industry and trade in smaller and more independent units, for he felt that it was easier to achieve the values of democracy in a society where economic power and social status are more widely distributed and less concentrated than in the United States at that time. His vision of the new Sherman Act was to be a foundation for a program of industrial reforms. Its theme was enforcement of the law on a grand scale and in ways which might produce not piddling changes in the detail of trade practices, but long strides toward the great social purposes of the statute.

The nub of that grand design was antitrust law's assimilation of oligopoly economics. The new antitrust not only treated what the economists called monopolistic competition as the offense of monopoly under Section 2 but implicated, as he said, a wide range of market situations in which a small number of large sellers produce the decisive share of market supply. And not the least he felt, the law's adoption of economic concepts would dramatically shorten and simplify antitrust trials.

It was this vision which energized antitrust for the next 30 years. It infused the Cellar-Kefauver antimerger amendments of 1950 and their interpretations in *Brown Shoe* and *Philadelphia National Bank*. It formed the strict antimerger guidelines of 1968 and the Johnson Administration's antitrust task force proposals (Baxter concurring, Bork dissenting) for a program of industrial deconcentration with new laws to halt large mergers in concentrated industries. It inspired the shared monopoly campaign of the 1970s which crumbled in the fiasco of the cereal case.

Throughout, its intellectual tool was the oligopoly concentration model which equated high market shares with sick competitive performance. It was a brilliant legal synthesis for its day, for it blended a populist culture's distrust of power with the depression era's concern for protecting small business into one antitrust formula that promised certainty of result and simplicity of administration. Alas, it was a costly and tragic delusion.

At first, the government always won its merger cases. But antitrust became a numbers game within even more spurious markets — central station fire alarms, championship boxing matches, gospel music, bubblegum baseball cards, vandal resistant plumbing fixtures for prisons, custom compounded reinforced themoplastics, in-patient psychiatric care by private hospitals in New Orleans. It was the heyday of what the *Grinnell* dissenters called the "red haired, bearded, one-eyed man with a limp" classification, for the open-ended concept of the market invited endless shell games and manipulation.

Also, strict bans on trivial horizontal acquisitions created legal incentives for large conglomerations and eased foreign takeovers of American firms that did not raise domestic market shares. The antitrust doctrines to bridge the gap became quibbles about toehold acquisitions, the ranking of the likeliest potential entrants, and bickers about perceived versus actual potential competition, whether prospective or only eventual. Local antitrust folklore has it that British Oxygen's lawyer wowed the Second Circuit with his Sophia Loren seduction fantasy — desire, capability, and know-how for potential entry that yet fell short of the requisite probability.

As recently surveyed in the ABA Antitrust Section's excellent monograph, merger law was a wasteland. In the report's words, "Any effort to develop a single, regularly applied standard from the decided cases seems fruitless. Different schools of economics tend to support different results."

Similarly, antimonopoly law based on oligopoly theory sank in the bog of the endless big case. As lawyers battled and economists fought for years over the relevant market, changing technologies and competitive patterns made the case obsolete. But above all, the 1940s' vision of oligopoly and concentration became stale in changing times, for the oligopoly model typified the realities of the 1930s — a stagnant and unsure economy of mature industries, like steel, dominated by a few big interdependent sellers with sticky prices where price cuts by one spoiled the market for all.

But oligopoly hardly fit the expansive 1960s of technological change, enterprise diversification, and global competition that made fixed market boundaries and notions of seller interdependence absurd. In the face of growing foreign inroads on domestic markets, antitrust deconcentration campaigns appeared bizarre. In short, the oligopoly model was a false image for changing times, so the antitrust policies which it had formed were doomed to fail.

As oligopoly atrophied, the Chicago critique came as a radiant revalation. Instead of smiting oligopoly, it aimed to foster efficiency, defined by price theory of neoclassical economics. It likened the social impact of deconcentration campaigns to the dropping of atomic bombs on American industry. It was an elegant and devastating assault on a meddling and wayward antitrust regime.

But what was efficiency? In the pithiest restatement of the Chicago theory (and I quote), "The relative efficiency of firms is measured by their relative success in the market." But since nothing succeeds like success and efficiency is what ultimately proves to be efficient, the theory is circular and explains nothing. It is incapable of proof or falsification. It becomes an act of faith that efficiency is what succeeds in due time if left alone. But can a circular and timeless economic theory define a meaningful antitrust policy for the future?

Actually, its inner logic compels step-by-step dismantling of antitrust as subversive of efficiency. For starters, it blesses all vertical and all conglomerate transactions and all unilateral pricing. On closer look, it appears almost everything else as well, except for horizontal arrangements able to curtail output, that is price fixing cartels or large horizontal mergers that give monopolistic market control.

But ultimately only the government can guarantee lasting monopoly control. In an environment of enterprise and change, at some time in the future all private constraints and monopolies are bound to break down. So what is left of antitrust? Still, why not yes and amen if the model is right?

Sad to say, the efficiency model is illusory because the theory assumes too much. Its logical curves paint a certain future in an unruly world of risk, creativity, and change where hunch, chance, and spontaneous enterprise constantly defy the charts. Its eternal truths posit that all firms act alike in sole pursuit of instant profit with equal access to capital in a timeless vacuum where nothing else intrudes or counts and where always the fittest, not the fattest, survive. It revives the 19th century ideology that scorned the Sherman Act and the words of Oliver Wendell Holmes as a humbug born of economic ignorance and incompetence. But its assumptions about equal capital access are especially dubious in times of inflation where time is money and credit is clout, as shown by recent takeover bids.

Its image of the big corporation as an economic Adam and instant profit-maximizer is belied, among other things, by the Business Round Table's recent statement on corporate responsibility. The Business Round Table portrays the corporation (and I quote) "as a thoughtful institution which rises above the bottom line to consider the impact of its actions on the society at large and whose business activities must make social sense just as its social activities must make business sense."

Indeed, George Gilder, the economic philosopher of free enterprise, has shrewdly observed, "Despite its elegance and insights, the classical model is less useful to conservatives than their commitment to it would suggest. Though it seems to provide an argument for limited government, it in fact gives endless pretext for state intervention to remedy the inevitable imperfections."

As a practical matter, I believe that the courts and the Congress may prove to be rather slow converts. It takes faith and courage to obliterate antitrust history or to bless yesterday's criminality like resale price fixing as tomorrow's efficiency. I think the Sixth Circuit's Mobile-Marathon decision and the bipartisan oil merger moratorium bill show a distinct reluctance to see the light. Even the Antitrust Division, which no longer worries much about vertical or conglomerate transactions, seems to be lukewarm about efficiency. Apparently it deemed the U.S. Steel-Marathon merger as efficient, to the distress of the *Wall Street Journal* which is troubled by the decline of the domestic steel industry. Instead, the Department has recently attacked horizontal acquisitions in the 15 percent range for raising concentration in cigars and in beer.

But how is it inefficient for Heilman to pep up a flat Schiltz against bigger Budweiser and Miller? Perhaps the new merger guidelines will tell and reveal whether the 1980s will replay the old oligopoly concentration numbers game, perhaps with higher numbers multiplied by the square root calculus of the Herfindahl index.

So, what can we expect of antitrust trends for the 1980s? I think that, dramatized by the crash of the big case, the Antitrust Division of the 1940s is obsolete. The era of oligopoly and deconcentration is gone, although some vestiges may reappear in the new merger guidelines. Above all, changing times pose new challenges and compel new visions. I believe the stage is set for a new dialogue to shape a new consensus of contemporary antitrust ends and means, designed to foster the national interest at a time of global rivalries and rising expectations of our major institutions — big government and the big corporation. Such a broad inquest is probably inevitable in the wake of recent antitrust fiascos, the saga of Mobil and its moral for giant mergers and the aftermath of the perplexing AT&T decree.

Such a dialogue among other things must surely consider the incentives of antimerger rules for fostering giant conglomerations and foreign takeovers, the impact of antitrust policies on the ability of American firms to compete abroad, the exposure of public enterprises and local regulations to antitrust risks in light of the Supreme Court's *City of Lafayette* and *Boulder* decisions, the viability of the FTC as a public antitrust enforcer, the public purpose of treble damage litigation, which has been characterized as a transfer of wealth from the business sector to the legal profession, and more broadly the optimal allocation of roles and power among monolithic big government and multiple big corporations as effective social institutions. For I believe a century of experience confirms that antitrust is not only a legal charter, but a pragmatic and never ending accommodation whereby our ambivalent society reconciles the shifting tensions of enterprise and power with the ideals of the pluralistic state.

Thank you.

(Applause)

MR. AXINN: Fred, on behalf of the audience and the speakers, I'd like to thank you for what I am sure is a stimulating and very provocative group of opening remarks, and certainly not the remarks that many of us were prepared to deal with when your partner was originally asked to speak. Nevertheless, this panel of very versatile and flexible antitrust lawyers will not comment on this speech, which I really do believe is a farsighted speech which does tend to snythesize a great deal of what we have been seeing over the last decade or so.

I would like to begin by asking Eleanor to comment on Fred's talk and then we'll proceed in immediate order. You're welcome to come up or remain seated.

MS. ELEANOR M. FOX: I think I'll get up. I think Fred's speech is very constructive. I would like to start where Fred left off. Fred is asking the right questions as I see them. I do agree with Fred that the limited theory of antitrust that will wipe out antitrust law is not bound to succeed in the end.

I would like to start my comments by thinking about a statement that the Honorable Robert Bork might have made if he were here today. Just treat this as hypothetical. I don't like to put words in his mouth. But just suppose he got up here and he said, "Fred, this makes antitrust law mush." What do we do from here if we don't have that clear rule, the clear rule that what business does is efficient?

I would propose that even should the Chicago School theory be rejected, antitrust law is not mush — antitrust law is sound. We are in the process of some change, and I would like to suggest a way to meet the challenges of, number one, the new world competition; number two, the contention that antitrust is frustrating efficient business transactions both here and abroad; and number three, the problem of downturn in the economy which necessarily focuses more attention on the consumer. I will come out of my remarks with a proposal as to how we deal with these challenges.

I want to start out with an idea about these schools of thought that Fred has proposed. There is one school of thought that is very much in the ascendancy. And that is what I call output theory. Fred mentioned it with some other words. It is the idea that if a private business transaction does not limit output artifically, let it go; it is neutral or efficient. That is output theory.

It is based on an idea of allocative efficiency. Some who propose that idea of allocative efficiency will say that that's really what Senators Sherman, Emunds and Hoar really meant back in 1890. Others, I think, being more attentive to history, will simply say allocative efficiency is a normative value of what the antitrust laws ought to do.

One reason I wanted to get up is I wanted to try to use the blackboard for a moment. And I see there is chalk here.

The output theory school is based on the idea that if a firm attains real monopoly in a well-defined market with high barriers so that they thwart entry, that firm will find its profit-maximizing point at a price that will create a limited output. The next step is very few competitors in such a marked could do the same thing by collaborating, sometimes even without talking to one another but watching one another's moves.

The thing I wanted to draw was the welfare triangle because this is the whole gist of the output theory. The idea is you have price here, quantity here, the marginal curve here, marginal revenue curve here. I'm really only getting to the point of drawing that triangle. This is marginal cost, marginal revenue. The monopolist will price at the point where marginal revenue meets marginal cost which will be up here (a monopoly price). The competitor will price at a point where marginal cost meets the current market price, which is its marginal revenue. That will be a competitive price. The competitor will produce more if it is a competitive market.

The only thing the Chicago School is worried about is this triangle which is called the dead weight or welfare loss. This is what is not produced if you have a monopolist. The monopolist produces only this much. If you have a competitive market, theoretically the competitive market produces more. The Chicago School is only worried about the fact that more resources should optimally have gone into this market. The Chicago School is not even essentially worried about the fact that the consumer who chose to buy at the monopolized price had to pay too much for it because that is just a wealth transfer. It is not an inefficiency.

The point of my saying this is to point out the narrow, limited view of that antitrust is all about in the view of the Chicago School, I believe in the view of Assistant Attorney General Baxter. And in my reading of antitrust I cannot find anybody who supported an antitrust law who was thinking about that loss in resources that was occasioned by this dead weight loss.

To take this welfare theory one step further, you have yet another school of thought, which Fred mentioned also, which is the additional presumption that what business does is efficient. If you start out with the assumption that what business does is efficient, you come out with a view that business almost never violates the antitrust laws. If Mobil's acquisition of Marathon is probably efficient, the assumption that the economists will put into that chart in determining whether or not there is increased price or increased power over price will probably lead the economists to believe that, gee, Mobil's not getting price control by the acquisition; therefore, the acquisition is good.

I see three ways of looking at the efficiency value of antitrust. One is the assumption that business is always efficient with a little gloss on resource loss through output restriction because that's some concession to the existence of antitrust. That would prevent almost nothing. It would perhaps prevent an Exxon acquisition of Mobil, if that.

The next theory is a sort of straight output restriction theory where you don't have the extra presumptions in favor of business. That is the way our antitrust enforcers are applying the law today.

The next possible theory is tending towards an older view, oligopoly theory, oligopoly model. As Fred has said, in its application, the way that was applied rigidly and with head counting, that's basically obsolete. That is right. However, there's more than a germ of soundness to the idea combined with an idea that has been written through the years of free and open markets. The presumption that consumers are usually better off if you have some diversity, pluralism, and unclogged markets — that is our antitrust heritage through these years.

The problem, if at all, is there have been applications that have hurt consumers. My view is that consumer interest is vital today. Everybody has his and her eye on what's happening to the consumer. If an antitrust principle that is written today in the books is going to hurt the consumer, the antitrust laws will not be so applied.

I think the *ASCAP* case is an example of new flexibility in antitrust, both to keep the markets free and open and to protect the consumer. The composers who pooled their product through a joint venture (ASCAP and BMI) could in an older year been held guilty of price fixing. In this new era of concern for the consumer, it was properly recognized that this joint venture was necessary to get the goods to market.

So this is what I prescribe and see in the future. Number one, this output limitation theory is in a way very corrupt because it is, one, not what the law was about; two, it's too rigid. It doesn't have that soft edge that's necessary to reflect the consensus.

Number two, I think that our body of antitrust law will not be overruled as it would be by adoption of the theory of output limitation, but rather respect the Supreme Court cases, especially respect the Burger Court Supreme Court cases in their new flexibility in helping the consumer. And if an old application of law will hurt the consumer, it will be overruled.

One caveat I will close with is some applications of maximum price fixing hurt the consumer. The old *Albrecht-Herald* case hurt the consumer. In those applications where it can be proved that the company imposing the ceiling was really imposing a ceiling, not a floor, and had an incentive to do so, then the maximum price fix should be allowed because otherwise the consumer will be hurt.

So I think antitrust is here to stay but on a swing of the pendulum. And we'll see antitrust alive and well.

(Applause)

MR. AXINN: Well, I know it's not Eleanor's fault but I'm now totally confused. It sounds as if the new conservative Chicago School theory is aging before our eyes and won't last 40 years, may not last four years, and may never even make it. Perhaps what we're beginning to hear is that the antitrust concepts and dogmas that we used to think had a certain constancy will in the future have no more constancy than our tax policies. And if so, Ira, what does that portend for the business community that has to lay capital plans and build into the future?

MR. IRA M. MILLSTEIN: Well, I think it's terrific because it means more work for lawyers. What I'd like to talk about is where I think the Chicago School has taken us and where it can take us. I don't feel quite as angry with the Chicago School, but I don't have great hopes for it going all the way. Let me explain.

Having just come off a trial where I had to cross-examine two of Skadden, Arap's Chicago School economists, I felt it incumbent to try to figure out what the hell they were talking about. It's really not very hard after you understand where they come from. That is it's not hard to cross-examine them after you understand where they come from because the premises are really very simple. And that is the problem — their premises are just a little too simple. But they have accomplished a lot. Let me try to explain where I think they come from and where I think they've taken us and where I think the program will probably stop. And I'm going to be talking about essentially the rule of reason and not global mergers and acquisitions in deference to my friend here on the left. I'll let him talk about global mergers and acquisitions later.

The Chicago School people I think are marvelous critics, and I think that's the position we should relegate them to, namely marvelous critics. It always makes me nervous when I see someone from the Chicago School assuming an important bureaucratic role because I think when they assume important bureaucratic roles they tend to get immobilized. Their theories unfortunately lead to nothing happening. However, they are terrific critics and as such they push us all to think, and I think, to think a lot more clearly than we otherwise would.

Now what do I see as the Chicago School? I don't really think it's all that complicated. The Chicago School simply says . . . in their microeconomics, the Chicago School simply says that supply and demand control markets. That's not really very unusual. Everybody knows supply and demand control markets. That's good solid microeconomics.

They go on to say, however, that businesses always act rationally, namely that supply and demand decisions are always made for profit-maximizing or cost-minimizing reasons. And it's the "always made" part of the Chicago School analysis that begins to throw you off. Again, let me repeat so that at least everyone understands what I'm saying the Chicago

School is. It is that supply and demand decisions are always made for profit-maximizing or cost-minimizing reasons, that is are always made rationally.

So the basic axiom, the basic premise that every Chicago School analysis begins with, is that businessmen and consumers always act rationally, that is in a profit-maximizing/cost-minimizing mode. Now is that true?

The crisis in economics which is occurring, of which the Chicago School is a part, is that many economists and more and more economists are coming to believe that that isn't always true, that people don't always act rationally. Economics is no different than any other science. People don't always act rationally anywhere. Why is it to be assumed that they always act rationally in an economic mode?

Sometimes people act bureaucratically. Sometimes business acts stupidly. Sometimes people are lazy. sometimes people don't have all the information necessary to act rationally. And therefore, I don't think you can conclude that businesses and consumers always act rationally and that the rational result will always occur. And that to me is the problem with the Chicago School economics. You cannot look at the markets and say that because an arrangement is successful in the market, it's efficient because it's the result of rational thought. Therefore, whatever is is right, say the Chicago School economists; and unfortunately whatever is is not always right.

Now is that a reason for discarding Chicago School economics? No, I don't think so. Nor do I think it's a reason for throwing out everything that the Chicago School has accomplished in the last ten years. Let me begin at the beginning.

If Bob were here, I would be saying to him that at the outset I agree with you. I agree that the antitrust laws are designed to promote maximized consumer efficiencies and consumer welfare. How can we disagree with that? And I think the Chicago School did accomplish one important thing in the last few years. And that is not to use antitrust, they argued (and I think we're now all coming to agree), to achieve social policy objectives. I think the Chicago School helped us get rid of a lot of rhetoric. They helped us get rid of a lot of populist notions that were beginning to cloud up antitrust.

It's true antitrust is an economic statute. Congress chose to create antitrust to achieve certain social objectives but to achieve them through economic laws, namely a law which maximizes consumer welfare and preserves the marketplace. I am therefore in agreement with the Chicago School people that preservation of the marketplace is the sole focus of antitrust enforcement and policy. It is not designed to achieve major social objectives. And trying to turn antitrust into a social tool I think is a mistake, and therefore I think the Chicago people helped us think that one through and come to, I think, a good conclusion, namely we have an economic law; it should be used to maximize economic welfare and consumer welfare and let's not use it for social rhetoric.

Secondly, I would also agree with Professor Bork that at least until very recently — and I think Fred pointed this out elegantly — the courts had strayed from their emphasis on maximizing consumer welfare and had allowed the antitrust laws to be interpreted in a way which frequently undermined competition policy. *Per se* rules were during the '40s, '50s, '60s, and '70s expanded and presumptions of their illegality were applied to business behavior such as vertical arrangements, vertical mergers, tying arrangements, resale price maintenance, and so on. Now some of these arrangements should not have been classified as *per se*. But as you all recall the '50s and '60s, more and more and more came under the rubric of *per se*. I think the Chicago School helped us rethink that problem, look at a lot of these practices and push them away from *per se*. And I think the Chicago School gave us a basis for going into court and saying, "many of these arrangements (vertical arrangements, tying arrangements, resale price maintenance, and so on) are not and shouldn't be looked at as *per se*. Let's look at whether they promote consumer welfare and efficiency in the markeplace and let's see whether or not there aren't some procompetitive benefits."

So I think, to summarize, the Chicago School has helped us explain a number of positive economic benefits which we thought exclusionary practices, frequently condemned by the courts, could achieve in the marketplace. They taught us to look for some procompetitive effects in things we didn't think had procompetitive effects.

Secondly, they helped us demonstrate that many of the anticompetitive effects which we thought were likely to occur as a result of these exclusionary practices weren't likely to occur at all. So they gave us a tool by which to look at a number of practices which we thought were *per se*, which had been classified by the courts as *per se*, and give us a way to explain why there were some procompetitive effects resulting and why we ought to take another look at them before casting them aside.

I'm happy to say that the courts have begun to incorporate this new Chicago learning in some of their decision making. I think *GTE Sylvania* and *Berkey Photo* are two cases which indicate that a good persuasive argument could be made for something which a few years earlier had been thought to be totally preditory exclusionary. And the courts came around and looked at it when well presented.

Now where do I disagree with Professor Bork and some of the adherents of the Chicago School in their desire to take the analysis even further to support the conclusion that antitrust should simply forget about most of the restraints? Remember, the way it went was that the Chicago School took the *per se* restraints and pushed them largely into what I thought was a rule of reason area. They then (and I think this is where they got off the track) decided that easn't enough. They were going to now push those very restraints into *per se* legal areas.

Now if you read Bob Bork and *The Antitrust Paradox*, you see him arguing that almost nothing should be tested under the antitrust laws — that vertical price fixing is *per se* legal, that tying arrangements are *per se* legal, that exclusionary arrangements, restrictive arrangements are *per se* legal. Practically no distribution arrangement would be condemned under Bob's theories. Why? Because he finds that if they existed in the marketplace (going back to what I said originally) they must be efficient and they must work and therefore they must be legal because anything that's efficient is legal. Everybody acts rationally, and if all these rational people in the marketplace are willing to engage in tying arrangements, they must be legal — they promote efficiency.

Now I believe in the free market. And I have a lot of trouble starting with the premise that most restraints yield better results than unfettered competition. Indeed the basic principle I discussed above, namely using antitrust to police the marketplace to maximize consumer welfare, indicates that a contrary assumption should be drawn and has been drawn and we ought to stick with it, namely that an unfettered marketplace generally yields better results when it's free of all private restraints. I'm simply not convinced that microeconomic theory in the Chicago School justifies turning the assumption on its head to support the premise that most restraints yield positive economic results. And that's what they argue — most restraints do yield positive economic results because they are efficient. And why are they efficient? Because everybody acts rationally; and if they're in the marketplace, all these rational people have picked an efficient result.

Vertical price fixing, tying, exclusive dealing are all restraints in the sense that they require competitors to do X instead of Y or Z or A or B. Professor Bork and the Chicago School have advanced a set of theories based on their analysis that these restraints will almost never hurt consumer welfare and will almost always help it.

None of these theories, however, are based on hard evidence. They're all based on a very interesting and very well polished and well articulated theory. I don't think they're going to stand the test of time and I don't think they're going to provide the basis for reading antitrust out of the performance type restraints, putting mergers and acquisitions to one side.

Now a leading economist by the name of Harvey Liebenstein in a very good article has looked at the Chicago School and looked at microeconomics and concluded that if there is no general erosion of confidence in conventional microeconomics, there ought to be. There are a lot of people taking a look at the Chicago School and stating they're wrong. You cannot read out of business motivation lethargy, greed, stupidity, bureaucracy, laziness, etc. You cannot base a world on an assumption that everybody always acts rationally and always acts efficiently. And I believe the economics profession is turning around the beginning to question closely the Chicago School.

Now what about us antitrust lawyers? I think we have to closely examine the Chicago School. Why? Because I think we have an obligation I think when we think something is right to talk about our field because our field has a lot to do with keeping our system going. I see the government deregulating and turning more and more of the decision-making over to private enterprise. Last night's speech was just a carry-on of this philosophy. And forgetting about whether it's good or bad, it's happening. I'm not here to give a political speech. We are turning back a good deal of economic activity to the private marketplace.

Now I think when that happens you need more antitrust and more vigorous antitrust enforcement, not less. It's important, therefore, to keep the marketplace going and operating as we all think it should, namely to regulate the economy. Simply put, I believe in the efficiency of competition and not competitors. The free market will maximize consumer welfare. I'm not as confident that every competitor always acts rationally to maximize consumer welfare. Accordingly, I vote for the marketplace and keeping it free of any fetters on competition although I'm willing, along with the Chicago School, to test those fetters to see under the rule of reason whether they're good or bad, pro or anticompetitive.

In my view, actual as distinguished from hypothetical business behavior doesn't break down into the neat black and white categories of the Chicago School. Experience shows that present in every hard case is some profit-maximizing efficiency motivation and some other motivations too. And that's what the rule of reason is about. We have to look at all exclusionary conduct, all conduct which puts restraints on the marketplace, and see whether or not they are pro or anticompetitive.

I think it was a great idea to get rid of the *per se* rules, but I think it's not a great idea to go all the way over and say all vertical restraints and all other types of exclusionary conduct are always lawful because people always act rationally. I think we ought to stop halfway, and I think we ought to leave it in the rule of reason area. I think a couple of examples will tell you why that's so. Let's take vertical price fixing.

The courts have applied *per se* illegality to vertical price fixing. Bob Bork and others, and indeed the current head of the Antitrust Division, have stated that that's a very disagreeable conclusion. They think just the opposite rule of *per se* legality ought to apply to vertical price fixing. And why? Because vertical price fixing wouldn't occur unless rational people wanted it to occur; and if rational people wanted it to occur, then it must be efficient and efficiency is what it's all about and, therefore, it's lawful.

What really is happening in the marketplace by virtue of vertical price fixing? Is it really the result of rational profit-maximizing behavior? Let's take the Chicago School on its own terms and try to find out whether or not that's truly what's happening in the marketplace. Well, I'd like to talk about a business I know a little bit about which is retailing in general.

Now retailing is probably the most price competitive business there is in the United States. Why? Because there are a lot of retailers and they're all fighting with one another and they compete like crazy on price at almost all times. But competition is a tough business, and you don't necessarily make a lot of money in a hotly competitive environment. It's perfectly understandable, therefore, that some retailers would probably prefer that their competitors not undercut them on the same merchandise. This isn't profit-maximizing activity at all. It's just inertia, laziness, habit — it's the way you like to do things. You would must prefer not to have to meet competition in the market. Is that profit-maximizing? I don't think that's profit-maximizing. Is it human nature? Absolutely it's human nature. Why does anybody want to meet competition if you don't have to in the marketplace.

Now along comes a manufacturer with a very well known brand and says to his retail customers, "I'm going to sell to all of my customers now and suggest the price, insist on the price at which they all resell." Now what goes on in the mind of a retailer?

The retailer says to himself, gee, that's a pretty good idea. I think that's fine. Why? Well, if everybody buys this merchandise and everybody behaves themselves and this manufacturer really insists on this price maintenance, I'm not going to have competition on that product in the marketplace. I can relax a little bit, and I can do other things and maybe sell the merchandise.

Now nobody's entered into any conspiracy at the horizontal level so the Chicago School people would say, there's nothing wrong. The retailers haven't entered into a conspiracy to maintain that price and the manufacturer has entered into no conspiracy with anybody else to maintain that price. But the price is going to be maintained, not because it's profit-maximizing at all but because inertia, habit, ease, whatever. Human nature says it's easier to do business that way.

Now is that outcome in the consumer's interest? Isn't the competing manufacturer who loses business because he doesn't maintain his resale prices hurt? Won't he be encouraged to follow suit? Isn't it possible that should this happen across the board, retailing would become a far less competitive business in general, or in specific lines of merchandise? In short, given all the circumstances, business motivations and so on, do we want to adopt a policy which will encourage all manufacturers generally to bring about a lessening of competition at the retail level even assuming no horizontal agreements? Is this a policy which promotes competition? Is this a policy which promotes consumer welfare? I'll let you draw your own conclusions.

I would not, however, opt to make vertical price fixing for these reasons *per se* legal. On the other hand, I wouldn't opt to make it *per se* illegal because the hypothetical circumstances which I described to you may or may not be the case. I do agree with Professor Baxter, now head of the Antitrust Division, that there are circumstances where vertical price fixing might overcome all of the inertia, etc., and have perfectly valid reasons.

For example, the case that he always cites of a piece of merchandise (whatever it is) where the manufacturer feels it has to be serviced, it has to be displayed, it has to have a certain type of sales support behind it; and unless the price is maintained by the retailer, that item will not be sold in the method that the manufacturer wants it sold. Now there you might have a profit-maximizing reason for maintaining prices. But it isn't, nor does it automatically follow, that that's always the case any more than the hypothetical example I gave you is always the case. My point is that sometimes it may be and sometimes it may not be. Each time we run into vertical price fixing we ought to take a look at which of the two it may be. And I don't opt for easy solutions — I don't think the *per se* illegality rule is any good, and I don't think the *per se* legal rule is any good.

In sum, my view is that rather than viewing antitrust enforcement as another form of inefficient government regulation in the marketplace, we need to apply all of our antitrust laws in an intelligent way. We have to scrutinize all conduct, all restraints under the rule of reason, look for the potential anticompetitive consequences and the potential procompetitive consequences. And although it's a pain in the neck to do it and although it may prolong a trial and although it may take a little longer, I think it's a good thing to do. Now I think it's a good thing to do because you don't wipe out the good with the bad nor do you adopt the bad with the good, which either extreme would require us to do.

I therefore compliment the Chicago School for bringing us to the point where we reject the *per se* theories with respect to all performance, all conduct, and look at everything and see whether or not there may be some procompetitive effects. And I compliment them for that. I think that's where they took us.

I would discourage us from going any further and adopting the end of the line, which is everything is legal if it exists. I think it's a tautology. I just don't believe it. I don't think it's consistent with human behavior, nor do I think it's consistent with good free competition in the marketplace which we're going to need more of rather than less of.

Thanks.

(Applause)

MR. AXINN: Thank you very much, Ira. And when you refer to our present antitrust as being immobilized, I'm sure you were not talking about Sandy's client and the Conoco and Marathon disputes, but maybe you were. I'm not certain.

Our next speaker is Sandy Litvack. In addition to having been the Assistant Attorney General, and in addition to being one of Donovan, Leisure's foremost and most auspicious antitrust lawyers, he is also of course famous for his work recently on behalf of that oil company I referred to. And perhaps in one of those many capacities that Sandy's been in lately, he will be able to provide us with some insight as to how this marketplace is going to function under this new and less certain series of rules that we've been discussing this morning. Sandy.

MR. SANFORD M. LITVACK: Thank you, Steve. I ought to tell you when I became head of the Antitrust Division, the first speech I ever gave was to this group on Wednesday night in January, 1980. And whoever drafted the speech for me . . . I didn't know in those days you had to put a title page on it or they won't accept it upstairs on the fifth floor. And the title was "Antitrust for the 1980s." And I looked at the then polls which showed President Carter well behind, and I changed it to "Antitrust for the 1980."

(Laughter)

Hopefully, the same qualification will apply to this, that what we're talking about is not antitrust for the 1980s but antitrust to the 1984.

Anyone who says that antitrust, at least now (if it never was in the past) isn't now mixed with, if you will, a political and total mood is in my judgment kidding themselves. I think that while the heads in the Antitrust Division and antitrust lawyers and I myself don't consider myself political, it is unrealistic not to recognize the fact that the mood of antitrust, the mood of the country if you will, is reflective of and dependent in part upon whatever the particular political climate is. It is no accident that the President appointed Professor Baxter Assistant Attorney General. That was a "message" appointment with the message being that "there will be a change in attitude toward antitrust by this Administration".

Yet, in assessing antitrust in the 1980's, there are really three aspects one must consider.

First is the government. Here I believe there clearly will be a change, with less enforcement by the Antitrust Division and the Federal Trade Commission. A look at the records to date gives us a clue: only five civil cases filed, and worse yet, other than the road building cases (which were ongoing when Mr. Baxter arrived) only one criminal case in almost a year. So, when you combine an avowed intent to "let up" in a host of antitrust areas with total inaction in the one area where they profess interest (horizontal price fixing), the picture is one of non-enforcement.

On the other hand, a second factor which must be evaluated is private enforcement and its impact on antitrust in the 1980's. As we all know, there have always been far more private suits than government suits and while many may be without merit, the fact is much of the landmark law in antitrust has come from private, not government suits. This is likely to continue and indeed increase. For instance, in the merger area for years the tactic of an unwilling target was to induce the government to sue. If one could get the government to act, not only would you save expense but it would lend credibility to the legitimacy of the antitrust argument of the management that, after all, wanted to stay in place. The conventional wisdom was for the private litigant not to sue too quickly lest the government enforcer might conclude there was no need for the government to act; instead, the strategy was to seek quick government action. Now these targets are not going to, they cannot, and they know it would be foolish to wait for the Department of Justice or the FTC to weigh and balance whether or not it should or should not act because, to follow up on Ira's words, they seem essentially immobilized. And even if they aren't, there's at least as good a bet that they will not intervene or not take any part as they will. So, you're going to see more private enforcement.

In other words, I don't think that the antitrust laws are going to go hide. You're going to see enforcement. It's going to be coming from a different quarter. That is a mixed bag, too, because we all know that private enforcement, whether in the merger context or in the treble damage context, carries with it a number of appropriate but from the standpoint of the total economy, very selfish motives, and is as likely as not to produce perhaps bad or at least jaundiced law. That is a problem. That is a problem for all of us. Because those who would see the antitrust law recede, if you will, may get just the opposite of their wish by their own actions, and that brings me to the third factor in the equation, and that is the courts.

Fred referred to the Mobil-Marathon thing. I'm not going to comment at length, but I think you can look at that. You can look at LTV and I think what you learn at least from those two decisions or . . . when I say learn, that's probably an overstatement . . . but one thing you can glean from them and one thing I think common sense tells you is that there are a lot more federal judges appointed by Jimmy Carter, Gerry Ford and Richard Nixon, not to mention Lyndon Johnson, than there are by Ronald Reagan, and we don't turn the laws of the judiciary over overnight. Nor has the Supreme Court spoken on many of the issues to which the current administration would address itself.

So the lower courts are (a) still bound by the Supreme Court decisions; and, (b) I think if one were to look at philosophy, politics, or if you will, educational background, probably inclined to accept what has been called cynically, the traditional wisdom, and so you're going to find, I think, a continued enforcement of the antitrust laws by the courts when called upon to do so.

I don't see from my own part a major retrenchment in terms of the operation of the laws over the next few years. I clearly do see what we all see, which is a withdrawal by the Antitrust Division, no question about it, and the FTC. And that, I think, really leads me to two other points which I would make because they are part of the look at the 80's, a look at the next several years.

Assistant Attorney General Baxter has announced that it is not enough that vertical price fixing is not illegal *per se*, it is not enough that it is not illegal, it is not even enough that it's *per se* legal to approve all that. The Antitrust Division is going to intervene on behalf of some of our poor corporate defendants to help them out in these lawsuits and establish that the law is that things are *per se* legal.

I think there are a couple of practical problems. Everyone I think who has read this said, my gosh, is that going to be the trend for the 80's, are we going to see the Department of Justice really intervening on behalf of defendants in district courts, and if so, what does that all mean?

Gazing into a crystal ball and having had many of my own programs fail and having seen some of my predecessors', I can now look at my successor's and say with some confidence don't worry about it. It's never really going to happen. I think that the Assistant Attorney General will learn, as some of his predecessors learned, that a lot of programs that sound good and have great philosophical or general thoughts behind them simply cannot work as a practical matter. That leads to another problem which I suppose ought, in the sake of candor if not wisdom, be mentioned, and that is that in enforcing that kind of program in the Antitrust Division one of the problems that one encounters is a total, and this is a problem for enforcement of the antitrust laws, is a morale problem and it's a morale problem within the staff and within the division. It is very hard to find young people who go into government at a substantial sacrifice in salary for the pleasure and thrill of working alongside some large corporate defendant in some big law firm who wants him there like they want a hole in the head. That poses a real problem and that, I promise, leads me to my last point which is something Fred touched upon, and that is kind of the whole question of, and you can't deal with it in a minute and a half, but what have we learned, what is likely to happen with the big case after the *AT&T* settlement and after *IBM*.

I'm not going to attempt to outline my views on that. I would say two things.

Number one, here too I would suggest caution in drawing too many conclusions from either the dismissal of *IBM* or the settlement of *AT&T*. Each can be explained in a variety of ways and each was in its own way *sui generis*.

But one thing which they do tell us and one thing which the existence of the cases told us and it poses a problem which Ira alluded to. I don't quarrel with the need for the application of the rule of reason in more and more circumstances. But I think we ought to start a dialogue with respect to the impact of that decision if that is the decision. More specifically what I mean is we have enough trouble now, and *AT&T* and *IBM* are classic although to be sure extreme examples of it, we have enough trouble now handling in our courts the so-called simple *per se* antitrust cases.

The courts are clogged with a host of other kinds of problems. The problems which antitrust cases bring, the scope of the discovery, the nature of the issues, and the combativeness as well as the financing of the lawyers is a tremendous problem. If we are going to interject more and more rule of reason inquiries, more and more consideration of a variety of factors that may impact on decision (and by no means am I suggesting that we should not) but then we must talk about how are we going to handle antitrust cases in the courts in the 1980's. How are we going to handle not just *AT&T* or *IBM* or are we writing off Section 2? How are we going to handle all kinds of rule of reason cases? Are the courts really going to allow antitrust cases to be tried for months on end while criminals sit in jail and can't get criminal trials promptly? I think not.

Are we going to create what has been referred to as an elitist group of judges who will simply handle that? I think probably not.

Well, then what are we going to do? Or are we simply going to abandon the rule of reason and go back to a very narrow *per se* approach for efficiency sake in the courtroom? There, too, I think not and I think that represents the real challenge for the 1980's. Thank you.

(Applause)

MR. AXINN: Thank you, Sandy. I'm glad you touched on that question and if I could just take a second. Leave the position of the chair and just make one personal comment on that. I think that the philosophy of retreat from enforcement of the antitrust laws which was widely hearlded and could be found on the front page of the *New York Times* and all the legal papers in the country certainly was not lost on the federal judiciary. I don't agree with Sandy necessarily that the judges appointed by Presidents Carter, Ford, Nixon or Johnson are any less or more antitrust advocates than those that are being appointed or will be appointed by President Reagan. I think what happened instead though is that judges, like the rest of us, may become fearful that if there isn't anyone out there to enforce the antitrust laws because of a philosophical decision by the government not to enforce it, then they had better pay attention to the private bar.

After all, it was Henry Friendly who had been around for quite a few years who in *Missouri-Portland* refused to allow the private bar to enforce Section 7, referring to it in his famous Excalibur reference as a bunch of nonsense in that particular case. Today, in *Grumman* against *LTV* and in the Mobil-Marathon cases, the Second Circuit and the Sixth Circuit pulled Excalibur right out of the old block of granite in which it was located. Judges who were no more or less conservative, I think, than Henry Friendly, but the fact of the matter was that you can't expect the government to enforce Section 7 in today's climate, even before we see their new merger guidelines because of a philosophical change of view which Congress has not yet subscribed to. Well, I'm sorry for that but I just didn't want to forget that remark.

Before introducing Jim Halverson, I just want to say a word of logistics about this afternoon. So that in case any of you have not picked up a copy of today's program, which is available outside by the way, let me just point out that when we break for lunch at about 12:15, you're on your own, but at 2:15 come right back to these Sutton Rooms which will then be broken up. You're going to be in for a treat. We have three workshops this afternoon and we've changed the format from some of the previous years.

The first workshop which consists of Federal Judges Higginbotham and Schwarzer and Administrative Law Judge Hyun and Comments by Sol Schreiber, who many of us know as a former Magistrate in the Southern District of New York, is a program which will commence at 2:15

and you're all invited to that. It will be moderated by Kimba Lovejoy, and that will be in . . . I'm not sure which one of these three rooms. But then after a break we will have two other programs and you can decide which one you want to attend and to attend it. One on Section 2 of the Sherman Act and one on Section 7 of the Clayton Act. Looking at that list of speakers, I can tell you that you will have a hard choice and I'm sorry you can't attend both, but they will be recorded, and maybe you'll be able to get the transcript when we publish it. But do attend these programs and I hope to see you all back at 6:15 this evening for cocktails and dinner with Bill Baxter.

And now it's my very pleasant responsibility to introduce to you again the Chairman of our Section, Jim Halverson, who would like to make some remarks on what's been said so far this morning. Jim . . .

MR. JAMES T. HALVERSON: Thanks, Steve. It's fun to be the wrap-up because I get to hear what everybody else has to say and I can take the role of critic of everyone.

Listening to Fred's very thoughtful talk, I am reminded that Fred and I debated where antitrust was going in London in 1978 and at that time, Fred expressed some concern with the populist movement and some uneasiness in the way in which the automatic application of the oligopoly theory appeared to be still having some degree of prevalence, particularly at the FTC. At that time, I had noted that there were already I thought signs that the populist movement and the automatic acceptance of the application of oligopoly theory had already begun to decline.

If you look at the Antitrust Division's significant attacks on regulation and government interference with the economy, if you look at the National Commission's report and recommendations with respect to deregulation, if you look at the Antitrust Division's really strong attack on the Robinson-Patman Act which is, after all, the most populist statute of all, if you look at what the courts were doing in *General Dynamics* in 1974, in *International Harvester*, in the Seventh Circuit, and in *National Tea*, a case which I tried in the Eighth Circuit, you found increasingly a willingness by the Justice Department in many situations and by the courts in Section 7 cases to take into account what I call market realities. The automatic application of market shares to determine whether or not a horizontal merger was "per se" illegal, was disappearing, and all kinds of business justifications for a merger were being considered. Market shares that had heretofore when combined been held illegal were now being held permissible, and I believe that there were substantial movements in both the Washington scene and in the courts which were indicating some movement away from automatic application of the oligopoly theory.

Then if you look at the legislative scene, we have strong legislative attacks on the FTC's "meddling" in many aspects of society. There were attacks on the cereal and oil cases from the legislative front. There were attacks during the late 70's on the merger guidelines as being outdated and too inflexible, too restrictive. There were attacks on the duplicative jurisdictions of the FTC and the Antitrust Division. Kennedy's bill, which was really an anti-bigness bill in terms of limitation on size of companies that could merge, got nowhere. Fears of competition from abroad were beginning to become very significant, and I think one of the interesting developments of that same period came in 1977 when Bob Bork and Mike Scherer appeared on the same panel in a program I chaired in Chicago. I saw an interesting movement in the two of them. Bork was beginning to express satisfaction with the direction in which the courts were moving but was still expressing strong dissatisfaction with the antitrust agencies.

Scherer, of all people, was beginning to wonder about his 1970 book and the automatic application of oligopoly theory, and in fact in the question and answer session said he was now convinced that most mergers, horizontal or not, yield competitively neutral results. I thought that was a very interesting statement coming from a man for whom I have tremendous respect and who is very thoughtful. His 1980 book reflects a drawing back from the automatic application of the oligopoly theory.

Now, all right, looking at Eleanor's discussion, I would say, Eleanor, that you have been a little unfair to the Chicago School in that I don't think it's a monolith. There are those within the UCLA Branch and other branches around the country who have graduates who would worry about more than just the welfare loss triangle and would talk in terms of protecting the consumer's interest and maximization of the welfare of the consumer as being a very important part of their total equation. I do agree with you that probably Bob Bork, if he were here, would be close to where you describe him, but I think there are a number of representatives of the Chicago School who would not go as far as Bork would go.

Ira, your turn. I agree with almost everything Ira said. It's hard to disagree with Ira, he comes at things so reasonably, but I do have some sympathy, particularly having lived through antitrust enforcement as an antitrust enforcer in the early 70's, actually when oligopoly theory was at its height. I do have some sympathy with the Chicago School attack which has yielded, as Ira pointed out, quite positive results, in that I do think that consumers and businessmen act much more rationally than we gave them credit for, and although they don't act rationally all the time and they have their self-interest and they have their selfishness, etc. There was a time at the Federal Trade Commission, particularly, where there was an almost automatic feeling that corporations acted against the interest of the consumer and against the interest perhaps of society and there was a sense of a lack of social responsibility and . . . I don't want to carry that too far . . . but I guess I end up agreeing with Ira that the benefit of what's happened is that we do now recognize that corporate managers act rationally a lot of the time and that consumers act rationally a lot of the time, and that we ought to let the free market determine where goods are going to go in terms of demand and what goods are going to be supplied in terms of supply based on certain rational decisions.

One point Ira made is extremely important and that is that we are now in the 70's or 80's facing a period of increased deregulation and regulatory reform. You can look at communications. There's a major communications proposal up. You can look at banking. There are major proposals for reform of banking. As you know, the airlines have been substantially deregulated, but that doesn't fully take effect until 1983-84. Railroads under the Staggers Act have been significantly deregulated, again with a phase in period of '83-84, and the interesting thing about all of these regulatory reform proposals is that they depend very, very heavily on an operative antitrust system. In fact, they presume that antitrust will take the place of regulation and if you look at the Staggers Act, it even specifically states that antitrust will take the place of regulation.

In fact, one of the problems I believe in the drafting of the Staggers Act is that they wanted antitrust to take the place so much that they didn't quite work out the mechanics of how you can still have some joint rate making without violating the Sherman Act. So, there is a real important place, and Ira has hit it right on the head, for antitrust in a climate where regulatory reform seems to have bipartisan support, and we're going to have substantial changes in the economy through the 80's. I would say this will be true irrespective of what administration is in power.

I can see perhaps, and I've heard bankers say this, that a deregulated AT&T and a freely-competing IBM with their satellite systems and the speed with which they can conduct transactions . . . and incidentally, bankers now think in terms of speed of conduct of transaction as a way of reducing cost to the consumer, could both be significantly present in the banking business by 1990. If you get a lessening of state regulation which is the movement a lot of the banking community would like to see, and you get a lessening of federal regulation, you could see in 1990 AT&T one of your largest bankers in the United States. If you think that's silly, I listened to a speech by the Executive Vice President of Citicorp just last week in which he said he thought AT&T and IBM could be the greatest competitive threats to large banks for the late 1980's.

So we're going to have a whole new climate of competition. Now, that climate has to be regulated by antitrust. My guess would be that IBM and AT&T will be back up again . . .

(Laughter)

. . . the reason I say that is (and if not IBM and AT&T, some company in the position of control over enormous resources and particularly enormous technological resources will be up again), because the speed with which society is moving is going to place one of them in a position where dominance is going to be a significant factor and there's going to be a lot of political pressure to do something about that dominant position.

In other words, I guess I'm saying the pendulum will swing.

I do think that what hurt the *IBM* and the cereal and oil cases, but not so much the *AT&T* case which had a better history, was the lack of control, the change of personnel, the fact they were pending so long, and the changes of theories, because all those cases had some significant changes of theories during the period of time they were pending.

If each could have been litigated in a four year period the big case in antitrust would have a much better "rep," and I think that's a lesson for everybody in government to learn. Narrow your theory, stick with it and get the case to trial, and I thought the *AT&T* case was moving in that direction before the settlement. I'm not commenting on the good or bad of the settlement, but it was certainly moving at a much more rapid pace.

I guess my net conclusion is that antitrust is needed. Antitrust will be here. Antitrust in an economy which is increasingly deregulated, as I think it should be, will be a very important factor. The pendulum will swing back and we will find ourselves, perhaps four or five years from now, in another set of debates on whether it will have swung back too far. Thank you.

(Applause)

MR. AXINN: Thanks, Jim. Fred, I think you have played the role of a true teacher this morning, the light that you have held up for us, the light that tends to indicate that perhaps the newest emperors have holes in their garments, as well as some of the old philosophies that we've grown to love, that light is somewhat troublesome and somewhat blinding I think at times. It's difficult for us to really see what's ahead. Jim refers to a pendulum and I, too, have often referred to that analogy when I've spoken about the pendulum going back and forth, and perhaps, Fred, it's not the right analogy. Perhaps we are looking at a train that has left the tracks and is now heading off in a direction that none of us are sure of. I know you've been scribbling on the back of your speech ever since Eleanor stood up to make her first remark, and I would like to ask you to return to the podium and to see what you've been able to distill from the remarks that you generated to begin with.

MR. ROWE: Thank you, Steve. Actually what I was doing was scratching out everything I previously wrote because it was so effectively and devastatingly refuted by my brethren here this morning. But I did, between the lines, retain a few thoughts which I'll try to convey, although in terms of scholarly radiance, I think we all bask in the reflections of our colleagues who stimulate us to ever broader insights and visions as we go along.

I do regret, of course, that Bob Bork could not be here this morning because the lines might have been drawn a bit sharper with his customary wit and slashing diatribe. But then, as I think about that further, perhaps that is illusory, too, because Bob Bork like all of us evolves with his insights over time. And I feel quite confident, as he ascends to his new responsibilities, that some of the critiques which are levelled in the course of dialogue such as this forum may prove to be premature and ill-founded, because in antitrust as in all else, the wisdom of the future is built upon the wisdom of the past, and what The Antitrust Paradox, his volume in 1978, so effectively devastated is being superseded by the progress of time.

What I've tried to emphasize in my remarks was really a broad evolutionary and historical perspective of antitrust over the years. I think the strength of our system really lies very heavily in the capacity of antitrust law to adapt to reflect changing times and to benefit from the insights and the critiques, such as the professional dialogues on an ongoing basis, which confer the capacity on the law to improve itself as it goes along.

Of course, all of us as lawyers have a tremendous ability to blend our disagreements into consensus and I was pleased that we were able to generate such an impressive amount of consensus today in the discussions which you have heard. Certainly, I think most of us would agree with Eleanor Fox, as she undertook the daring burden of drawing on the blackboard the wisdoms of the Chicago School, that all economic theories and models are demonstrably over-simplifications of reality, because the very act of drawing the curve is in a sense the recognition that one is distilling realities into formulas which have assumptions that may perhaps be true at some time, maybe often, but certainly not always and hence, that policy judgments based on such demonstrations are necessarily bound to be deficient and incomplete. She did make a point about the residual benefits of the oligopoly model with which I might not totally concur. My concern is that the oligopoly model was a reflection of an era and of its time. Its basic presuppositions were that identical firms making identical products acted in interdependent fashion to weaken competition to the detriment of the consumer.

The problem is that once we accept that basic premise of reality, then such tools of analysis as market shares and concentrations tend to remain even though the reality in which they were founded has long past. For example, the attempt to judge acquisitions by market shares, which apparently is continuing apace, retains the implicit premise that a certain numerical share of sellers with certain rankings produce certain competitive results. That may have been true in the simple times upon which the model was based. It is highly dubious that diversified companies with multiple products operating in multiple markets having multiple strategies will reflect any degree of interdependence, which is the fundamental assumption on which the whole science of merger law based on market shares is based.

Certainly, it is an illusion to begin to judge transactions on worldwide market shares because whatever the numbers are, the assumption of interdependence, which as I say is the fundamental premise, does not work in that context and our coming merger guidelines may or may not have that insight. And we may or may not suffer in our antitrust enforcement policies over the years by a continuation of that basic premise whose rationale has long ago ceased to exist.

Certainly, few of us would quarrel with Ira Millstein's insights that the economic models assume a pattern of rationality which does not in actuality exist in business practices. The very essence of a system of enterprise is risk, creativity, chance, hunch, judgment, and change, and to the extent we accept models as bases for policy judgments which exclude that spontaneity of enterprise, they are bound to lead us to inadequate if not deceptive results. It is a small surprise that the critique of economic model makers as premises for industrial organization policies come really from all sides of the ideological spectrum. The kind of critique that Galbraith has given to industrial organization policies is if anything exceeded in its eloquence and vehemence by George Gilder's critique, the point being that an enterprise system cannot be condensed and compressed into curves and formulas on blackboards as representations of reality. To be sure, economic models can give us an insight to illuminate complex realities in the marketplace, but they are all too often stereotypes that rather than illuminate obstruct clarity of vision.

All of us know about oligopoly, which in a sense enables antitrusters to view enterprise as gangs of four. You look at companies and you see foursomes and once you operate from that premise, in a sense you are wandering under the illusion because the reality that you see becomes a reality you wish to see. And conversely, the other, opposite model, the laissez-faire, consumer welfare model, presupposes and conceptualizes the image of the invisible hand to the benefit of the consumer and to the public, and certainly once you perceive reality in terms of that benevolent, invisible hand, whatever intervention takes place is presumptively destructive and counter-productive and you've substituted one stereotype for the other.

I think policy makers increasingly realize that economic models and economic theories cannot be and must not be substitutes for judgment, and that judgments must be made on the basis of what our society and what we want and expect from our laws and from the antitrust policies which are very profound reflections of an American culture of individualism, diversity, and enterprise. I think Sandy Litvack certainly stressed the point, with which we would concur, that antitrust is a political phenomenon and in a broad and not in a narrow sense. It obviously changes with the objectives of a particular time, and the popular preferences that are expressed in the electoral and political process are not lost on the directions and aims of antitrust. It is for that reason that antitrust is a pendular proposition and that the critiques of yesterday become the policies of today, only to be superseeded by the critiques of tomorrow in the process of ever-changing and never-ending accommodations which express and redefine the values and aspirations of a particular time.

I have some question about the role of private antitrust enforcement as a purely benevolent implementation of the antitrust tradition at a time when the enforcement agencies begin to stay their visible hand. I think the courts and the profession are becoming more sensitive to the inherent potentialities of the treble damage system for abuse, if not shakedowns, because of the calculus whereby the plaintiff incurs very little risk and can claim monumental damages which then make it in the obvious financial interests of the defendants to pay and settle. No lawyer, howsoever confident of the virtue of such a defendant's cause, will tell him that the odds of prevailing in the courts are more than 90%, and so if you have a hundred million dollar claim, a five million dollar settlement becomes a very wise bargain. And that inherent calculus of treble damage litigation is creating, I believe, a degree of skepticism which is reflected in the courts by the more willing grant of summary judgments in treble damage cases and by doctrines of standing which will make it more difficult for more plaintiffs to file antitrust cases.

Finally, Jim Halverson very eloquently pointed out that antitrust is more than a purely political vacillation, but reflects deeper values than are reflected in the judicial process. Certainly the *General Dynamics* decision in 1974 was a turning point in antitrust jurisprudence much before some of the criticisms that had been leveled in subsequent years about excessive enforcement, and so our judicial institutions have had a capacity to anticipate the criticisms and to co-opt, if you will, some of the changes that the future holds by a far sighted revision of doctrines which produce results that do not consist and do not conform with the realities that have been changing. I think Sandy Litvack's point about the big case and the big challenge of the 1980's warrants the consideration of all of us. Certainly, the *AT&T* decree and the legislative aftermath will create a discourse, a far-reaching and a wide-ranging discourse that may well lead to a reassessment of Attorney General Bell's proposition, which seemed preposterous at the time, that antitrust in the big had out-raced and out-grown the capacity of the courts to handle it, and that the legislature may well be the only forum that can address the problems of industrial organization of this magnitude, because it may well be that the final chapter of *AT&T* will not be written in the courts at all but in the Congress. And certainly as the FTC's cereal case fiasco has dramatized, it is apparently the better part of wisdom to entrust such undertakings of industrial engineering not to the frailties and the vagaries of administrative agencies or even single judges, but rather that it may in the end well be that only the legislature has the capacity to reconcile all of the conflicting interests that make for sound judgment of that magnitude.

So I was pleased to be with you and, again, my apologies also to my panelists, my fellow colleagues that Bob Bork could not be here this morning because he might have provided a much more inviting target. Thank you.

(Applause)

MR. AXINN: Well, now I would like to throw open the discussion to members of the panel and if time permits, we will also take some questions from you. I must say, my own first reaction to this is that I think this is truly a remarkable performance by a group of very distinguished antitrust lawyers at a time when the United States antitrust enforcement agencies are reasonably unanimous in their retreat. Here we have a group representing, I think, a valid cross-section of the spectrum of opinion on antitrust and we're most unanimous in our view that the antitrust enforcement agencies are misguided at the moment or at least that's how I see it, and I suspect that it probably was a divine inspiration that led the Senate to seek to confirm Bob Bork today because if he were here, this surely would not have been the result. Bob would have absolutely shattered this policy of opinion that we got.

Now, therefore, in his absence and in a role in which I'm truly unaccustomed, I'm going to try to emulate what Bork might say if he were here listening to this, and Fred, you test me. When you get back to the office and you talk to Bob later today, see if I got it right.

This is absolute mush, he would say, because you folks, in talking about rule of reason analysis at a time when I've just shown you what the proper role of antitrust ought to be in my book, are abandoning the clear cut clarion call that I have established. You talk about rule of reason because you have no policy. You talk about the role of the marketplace, Ira. You talk about competition. Well, let's take a precise case, something like the *GTE Sylvania* case to which you had the nerve to refer. You talk about retailers and slight loss of fettering of their freedom to compete and you say that that scares you a little because the marketplace is a better judge than the manufacturer. But don't you see in the *GTE* case we have more than one marketplace. We had a marketplace of manufacturers who were competing like hell at the manufacturing level, and we had a marketplace of retailers who may or may not have been competing on price and terms of service and so forth with respect to color TV receivers. And what happened in that case was the court said . . . sure, there's a restriction of intrabrand competition, which I read as retail competition. The price competition in Sylvania television sets in Sacramento, California was undoubtedly restrained. But there was more competition provided at the manufacturing level.

Look at the facts. Sylvania went from 1-1/2% to 5%. How did it get there? It got there through location clauses, not better televisions, for sure. That never entered into the Supreme Court's consideration of it. They don't know anything about whether the TV's were any better, but they do know those statistics. So, how can this group or any group reason together and come up with an analysis in the course of any one of our lifetimes as to whether or not the increased competition in our marketplace is better for us than the decreased market competition in another marketplace? Who is going to make the judgment as to whether the system functions better at a manufacturing level when it sacrifices competition at the retail level? And what will be the guides, what are the polestars to tell the court and the jury how to decide in balancing these two marketplaces and the fetters in one against the other? Now, OK, maybe that's not what Bork would say, but I would like to start the debate rolling with that and maybe if no one else would like to . . . Eleanor, would you like to shoot at that first?

MS. FOX: Yes. I don't think it's mush at all. I think that the law has developed very clear principles. On the *GTE Sylvania* problem, one looks to see the position of the manufacturer in the interbrand market. If that market is highly concentrated, and I'm sorry, Fred, I am using some old oligopoly theory as modified, I believe.

If the market is highly concentrated, there is not much competition. Indeed, there is not much foreign or maverick competition which always puts pressure on and would destroy inter-dependence. In such a situation, a highly concentrated market, if your client is the one to impose a vertical restraint, my advice is your client may not impose a tight territorial restraint such as in *Schwinn*. Your client in that situation may not tell its dealer not to sell outside of his territory. That would be illegal in my view under *GTE Sylvania*.

On the other hand, under *GTE*, if the market is highly fragmented, barriers are low and/or you're simply imposing a location where you want your distributor to be, my view is it's perfectly legal. Now, *GTE* I think is still not so difficult and as one of the more difficult cases, I say to you, Professor, Your Honor, that there are many *per se* rules that make a lot of sense that should not be abandoned for reasons that Sandy said, which I agree with very strongly, that are probably very good for the consumer in almost all cases. I include in that vertical minimum price fixing and, in fact, I include generally vertical price fixing except in the unusual maximum situation with incentive to cause price to be low.

I believe that the free rider effect is wholly over-stated. I thought Sandy Litvack brought a terrific case when he sued Cuisinart. I go to Zabar's. I would have liked to have gotten the Cuisinart at the low price that Zabar's was selling until Zabar's was deprived of the right to sell Cuisinart. I do not believe that Bloomingdale's was providing all this service and information and demonstration that the manufacturer needed in order to sell his product properly. I think it's such an unusual case where this free rider effect would really happen. I say put the burden on a defendant or company who thinks it can show that it really needs this special restraint to help the consumer. If the company proves to me that that is so, I would not apply the antitrust law to prevent that restraint.

MR. AXINN: Oh, go on, says Bork, Eleanor. You know as well as I do that the result of the Cuisinart vertical price fixing was nothing more than to h ave the American Food Processor Company sell a $40 processor in competition. If there's anything the matter with the GTE location clause, the result will be Motorola will sell more television sets because Motorola doesn't have that policy and its retailers are beating the hell out of each other pricewise. There's no problem, he says. The competitive marketplace will function and will substitute if consumers don't want this service and if consumers are interested in promoting free riders, they'll do it. They'll run out to John's Bargain Store or Trader Horn and they'll get a cheap food processor and the only thing Litvack ever did was force Cuisinart to get a Japanese motor for its food processor and dropped the price and it wasn't worth it and so we dropped the case. What about that?

MR. MILLSTEIN: Well, I'd answer that. If you're right, you'll win your case, Bob. My problem with your argument is that that's all it is. I don't trust anybody who is as certain of his position as you are. I didn't trust Mike Pertschuk when he was espousing the South Pole and I don't trust you espousing the North Pole. I think populists in their own way are just as doctrinated and dogmatic as when the right takes over and starts screaming its dogma. I don't like dogma. I don't like certainty. I've learned to live with uncertainty and in the long range of things, Bob, I think we'll all be better off with a little uncertainty.

Now, I repeat, *GTE Sylvania* was a rule of reason case. What are we fighting about? If your theories are correct and this great Chicago School concept of what's going to happen is correct, let's get into court and prove it. Prove it. There's nothing wrong with going to court. I'm just not going to take your word for it. I'm very uncomfortable with your word. Especially am I uncomfortable with it because it's so articulate, and the more articulate and amusing you are, the more uncomfortable I get.

(Laughter)

MR. AXINN: I'm getting very uncomfortable in the role that I'm playing here.

(Laughter)

But I must say that the problem with what Ira just said is that as long as the Bork view is running around at the White House and over in the Justice Department, who is going to bring these cases? Certainly not the government. So it becomes the role of the private plaintiff to root out at least these vertical restraints and probably the merger restraints. And the private plaintif . . . Fred mentioned that he's a little unhappy from time to time because the private plaintiff is motivated by at least a few considerations other than the public interests . . . and what standards then? Should we have a dual set of standards? Should we relax the standards for federal agencies to prove their violations? Adopt more *per se* rules in the federal cases, to encourage Bill Baxter and his friends at the FTC to file suits and make a more difficult standard for the private plaintiff to discourage them, or should we have a basic test in each case of whether or not the jury and the judge can figure out consumer welfare and apply it?

That's Sandy's area, I think, right. That's the problem that vexes you.

MR. LITVACK: Yes, I share Fred's view that I am not thrilled with the thought that we are turning over enforcement of antitrust laws to private interests exclusively, and I think that has all kinds of potential problems, many of which Fred identified. Obviously, the solution is not to relax the standards for the federal enforcement agencies, since I've never heard Bill Baxter or anyone say he's not bringing cases because he thinks the standards are too tough. He's not bringing cases because he believes that the cases that you, Steve, or someone else might advocate are as a matter of economics wrong and oughtn't to be brought. What you do about that, I suppose, when all is said and done is nothing because that is the view of the current administration, and they have a right to have that view and that is what is currently existing.

I must say in response to your original question when you pose as Bob Bork, to whom I would be very deferential now that he's going on the circuit. . . I would say to Bob, who I know as a circuit judge will realize that the courts, the district courts, the juries, when you say who is going to decide all of this, we ask courts and juries to decide questions all the time with a complex of rules and alternatives. I'm not getting into the question of jury trial and an antitrust case, but I am saying in a different way the same point Ira is making. When you say who is going to tell us, I don't know who is going to tell us. I suppose the judge and the jury, and that's a system with which we have lived and which hasn't worked too badly. The alternatives, and life is a series of alternatives, is to do nothing. To just forget about these laws. To operate on the premise that Ira stated, which is everyone acts rationally and businessmen only do things for rational reasons, a premise which none of us can really accept in day to day life as a truism. That being the case, it just seems to me that these kinds of evaluations in any given case are subject to, with all the errors that are always made, but are subject to courts deciphering them. As to who makes the policy judgment, the answer is simple. Congress under our system. Congress has. If we want to change the laws, then the answer is you go back to Congress and you tell them to do that. That has or may have a political base and a rational base and is supported, while perhaps putting me out of business, would be a very sensible thing to do. But to change those laws by non-enforcement of a particular administration at a p articular point in time I suggest creates more problems than it answers.

MR. AXINN: But would Bork not say that at least as far as the Sherman Act is concerned, Congress punted and it said, look, courts solve this problem for us with some clear cut rules that you and you alone can evolve, and the courts came back with a case that I know that Bob supports, *Standard Oil*; the rule of reason. But it didn't give us clear, definitive rules to determine when the rule of reason is violated and I come back to my *GTE* example, perhaps. How do we keep the *GTE* case where we have competition in two marketplaces? One ostensibly being enhanced by the restraint and the other ostensibly being restrained by the restraint. How can we give guidance to a waiting world that there is a way for a court and a jury to harmonize this without it becoming a gigantic case in which every conceivable argument for and against have to be aired? Jim has a lot of experience, I think, with the cereal cases and the oil cases, and I turn to Jim and I ask whether or not the rules that we're talking about today are not a counsel of despair because there is no way for courts to deal with these problems. And if we can't provide more simple rules, and leaving aside former Attorney General Bell's suggestion that we throw this into the well of Congress, is there any way to deal with these problems and reach results?

MR. HALVERSON: Well, my suggestion is you come back at 2:15 because we had a very interesting dinner last night where we talked with two federal judges and one administrative law judge at the FTC about that very subject, and I am a firm believer, and I have tried a number of what would be called complex cases, both private cases and government cases, that they can be controlled. I do think it requires a very strong judge. It requires a very strong trial team on both sides. They can be controlled. They can be brought to trial and they can be resolved. I think it's very unfortunate that in some of the cases we've talked about we didn't have all those factors brought together, at least at one place at one time.

But aside from that, the movement toward rule of reason, Steve, in my experience, and really you've had a movement toward rule of reason in merger cases also, is a very healthy development. Let me talk about merger cases because I've just finished trying a couple of those. I think it's a very healthy development. It hasn't really lengthened the case that much. It's allowed, in a horizontal merger context, a presentation of the realities of the industry which was really foreclosed under the old *per se* "add up the market shares, and if they add up to so much forget about it" type of approach. And I think with strong judicial control, with the kind of advocacy that we should expect from the government and the defense bar, these types of complex cases can be brought to trial and can be resolved in a reasonable period of time. The last merger case I tried was brought to trial and was tried in about two years. It was a very complex case. The trial took about six months but the whole process from complaint to finish was about two years.

The monopolization cases, well, I think if *AT&T* had gone to result, it wouldn't had been that long from the time of filing of comlaint to resolution of that case. The others have a more checkered history. I for one, Fred, don't feel quite so comfortable about throwing these monopoly matters into the hands of what I would fear would well be an emotionally charged political climate, where you may in one session of Congress get something done to an industry that you will regret for many years thereafter, and it may take a long time to reverse it. I'm very, very wary from my experience in Washington of applying to a particular industry a one-shot remedy which one particular Congress may think is appropriate at that point in time.

Now, fortunately, in all of the bills . . . except maybe the bottlers bill which we've had some experience with . . . that are aimed at solving what we call antitrust or monopoly problems for a particular industry have so far failed. I'm not talking about regulatory reform. I put that in a different class. I mean, obviously, regulatory reform and communications has an effect on *AT&T*, but I would be much more happy with regulatory reform being the point of focus than a particular corporation or the antitrust legitimacy of its activities being determined in a Congress rather than a judicial forum, and I firmly believe the judicial forum can manage it.

MR. AXINN: Well, what about that, panel? Does anybody care to comment?

MR. MILLSTEIN: Yes, I would like to just talk a minute about litigation and the ability to solve these things in court. I do agree with what's been said and I would like to add a little bit to it.

I think there are three things happening in litigation which are going to make this kind of antitrust litigation more manageable, if you exclude the *IBM-AT&T* case which I think will always be a problem and I'm not sure where that ought to be tried, but take the run-of-the-mill antitrust litigation. I think there are three events occurring.

First of all, my experience has been that the judges are no longer, or at least many of them, are no longer frightened by these cases. It used to be that you would walk into a courtroom with an antitrust case and everybody would hide under the table and allow the lawyers to wrestle with each other for ten years as the case wound along. My experience in recent years is that judges are just not dismayed any more when an antitrust case shows up. Instead, you're quite likely to run across a judge who's taken Henry Manne's course or somebody else's course and may know the antitrust laws and the economics of antitrust better than you do, in which event he becomes quite an item to deal with because he isn't going to put up with a lot of nonsense and a lot of depositions and a lot of discovery and you can't talk your way around him. He will become right from the very outset knowledgeable about your business. The mystery and mysticism of antitrust is somewhat disappearing in the courtroom as judges take courses, learn more about it, and are not dismayed when such a case shows up and are willing to start beating you up immediately on whether or not you're taking too much discovery and etc. And you can't run rings around it any more as once upon a time counsel could. I see judges taking control earlier, which I think is a very happy circumstance.

The second thing that's happening which I think is of enormous importance is the cost-benefit that's being applied by our clients in the antitrust area. the costs of litigation are getting so astronomical that the number of clients that walk in the door and say don't spare the horses are becoming distressingly few, but it's a good thing for the judicial system that it's happening because the number of p eople who are saying I don't care, put 40 paras to work on it and 100 lawyers, this case has got to be won. Those kind of cases will always exist but they're getting rarer and rarer.

It seems to me that more often than not people are asking for budgets and they're applying a cost-benefit analysis to whether or not this kind of litigation should be prosecuted the way it's being prosecuted, if at all, or defended the way it's being defended, if at all, and that's going to be a constraint on the way these kinds of cases are litigated in the future. And I think any attorney who doesn't see that is missing one of the major developments in the area of antitrust litigation.

The third thing that's happening as I think the courts are beginning to see some of the excesses in the system and cut down on them. One of the things which has occurred in recent months, really in recent months. Look at the number of decisions by courts passing on fee applications for plaintiffs' counsel. The number of courts that are disallowing and cutting strenuously are becoming more and more, so that I think again the bounty and the ability to bring a case and figure that you're going to get a huge amount out of it if you get all the way down to the end . . . people are thinking twice about that. The courts are looking very hard at attorney fees and I think that, too, is beginning to bring this litigation under control.

So I think at least those three things are making litigation a little more practical than it used to be, and as I said five times this morning, I don't see anything wrong with uncertainty. I think it's the best kind of antitrust problem to have. I think we should stay away from dogma on either side, trust to uncertainty, go case by case, and learn how to try our cases shorter, neater, choose our theories and get them over with, if we have to go to trial.

MR. AXINN: Well, on that note of faith, let me turn to Jim who has a comment to make on it.

MR. HALVERSON: Ira, one more thing that I would say, and this is directed to something very important that Sandy said and I neglected to remark on it. If you're going to assume that we are going to be able to try cases effectively and expeditiously, we need talented government trial lawyers. And to the extent that we have a period now when talented government trial lawyers are bailing out of the agencies, that's a very unfortunate development, and I share Sandy's concern over that. And I do think morale is at a low point right now, and I think that's a very serious development because we're counting on this system to work by having talent on both sides, complimented by strong judicial control.

MR. AXINN: Let me ask the panel to comment on another concern that has always been troublesome to me at least. I suspect that businessmen, being opportunists and profit-seekers in the finest sense of the word, when they read the kind of change in the wind that clearly we are experiencing now in the early 80's under the Baxter kind of antitrust, are tempted to test the outer limits of the tolerance of the government and of the judges and of the private plaintiffs to withstand encroachments upon whatever the former fortress-like citadels of antitrust may have been. If I can hold Sandy down, I think it's fair to say that his client, Mobil, was one of those testers, one of those companies that wanted to see just how far could we go with the relaxation in merger enforcement, for example.

Surely Mobil is not unusual in this respect. I think it's typical of the modern American business corporation which can, I believe, look at this situation and see things, targets of opportunity that were forbidden before. And if it's true for the acquisitive concerns, such as Mobil, it might also be true for the monopolistic concerns, of whom there are still a few. It is also possible in the Section 1 area. Certainly we know that the signal is a very, very straightforward green light at the moment as far as the government is concerned in terms of tying up distributors and retailers vertically. That would mean to me that I would expect to see business firms getting out their snares and trying to tie up their distributors as much as they can and seeing where the law leads them, perhaps in the direction of resale price maintenance.

Now, my concern is if I'm right about the fact that that's how the business community reacts when they see a relaxation of enforcement, then we're very surely quickly going to see cases brought which bother us a great deal. Even those of us who are for relaxed enforcement of the antitrust laws, or, maybe the Sixth Circuit and the Second Circuit which consists of judges who were relaxed about merger enforcement until they were presented with the *Grumman* case and the *Marathon* case and then they were sort of forced off their principles by the nature of those cases.

Am I right about this? Is that the way the business community will behave? If I am right about it, what does that portend? I will suggest an answer to my own question at first.

It portends to me that the reasons that we have antitrust laws more or less in the form that we have them is because this is not the first time this has happened. It happened in the 1880's as a result, I guess, of some economic philosophies, Spencerian philosophies of the time which had encouraged business firms to do what they did. The Interstate Commerce Act and the Sherman Act were certainly reactions to that. It happened again after the Second World War and the Cellar-Kefauver Act was a reaction to that, and it's going to happen again, I suggest. And so what we're going to do is we're going to have a kind of an almost astronomical sort of increase in testing, which will perhaps be followed by an astronomical resonse from Congress and from the courts tightening up again. Do you agree or disagree with the way I see the next ten years?

MR. LITVACK: I want to comment because I want to first dispel the illusion you're operating under, Steve, as to the Mobil acquisition. Mobil's acquisition, as I said at the time, and it was ultimately tested by the then existing law and didn't rely upon any liberality or new interpretation of antitrust law, but as it saw it and as we saw it at the time would have or should have passed muster under the antitrust laws and, obviously, the district court and the Sixth Circuit saw it differently.

What concerns me though, following up on the concept and without regard to applying it to Mobil, is the thought which you suggest and which I think is clearly correct. In the acquisition field, if companies want to make acquisitions and indeed test new guidelines if new guidelines there be or old law, or whatever, that kind of thing becomes visible and is done and is challenged and is either approved or disapproved as the case may be. What concerns me is the liberality of thinking that leads in other areas which are not so visible. Antitrust lawyers have, I think, and I really believe this before I went into the government and I believe it while I was there, and I believe it now that I'm out. I think private counsel, corporate counsel in many cases, do more to enforce the antitrust laws than the most activist assistant attorney general ever did. But you cannot become and you cannot be a credible proph et within your own clients, as it were, when the things that you have been telling them over the years seem no longer to be the truth and seem no longer to be a concern. And it is hard, I think, as a practical matter for businessmen to distinguish in many cases lines and kinds of behavior that you told them were illegal but are not now illegal and other things which you said were illegal and may still be illegal but you're not sure, but they know that no one enforces the law anyway. And so what concerns me, Steve, is that an atmosphere is created in which over a period of time . . . and it will not happen tomorrow morning, I don't think . . . but it will happen over a period of time, and we saw this in the early 60's and we've seen it in a host of other areas of a relaxation, and if you will a tendency toward more or toward different kinds of anti-competitive and not so visible behavior and you have enforcement agencies that are, I think, in the main currently dormant, if not asleep.

MR. MILLSTEIN: I agree with that in part, but I think that most of the clients to whom I've been talking have inside general counsel who were brought up under the same training I was brought up under. They just don't believe at the moment that this represents a permanent phenomenon and I think that what we're all doing is taking a look at this non-enforcement and wondering whether it's real or whether it's going to go away within a relatively short period of time, and four years is a relatively short period of time.

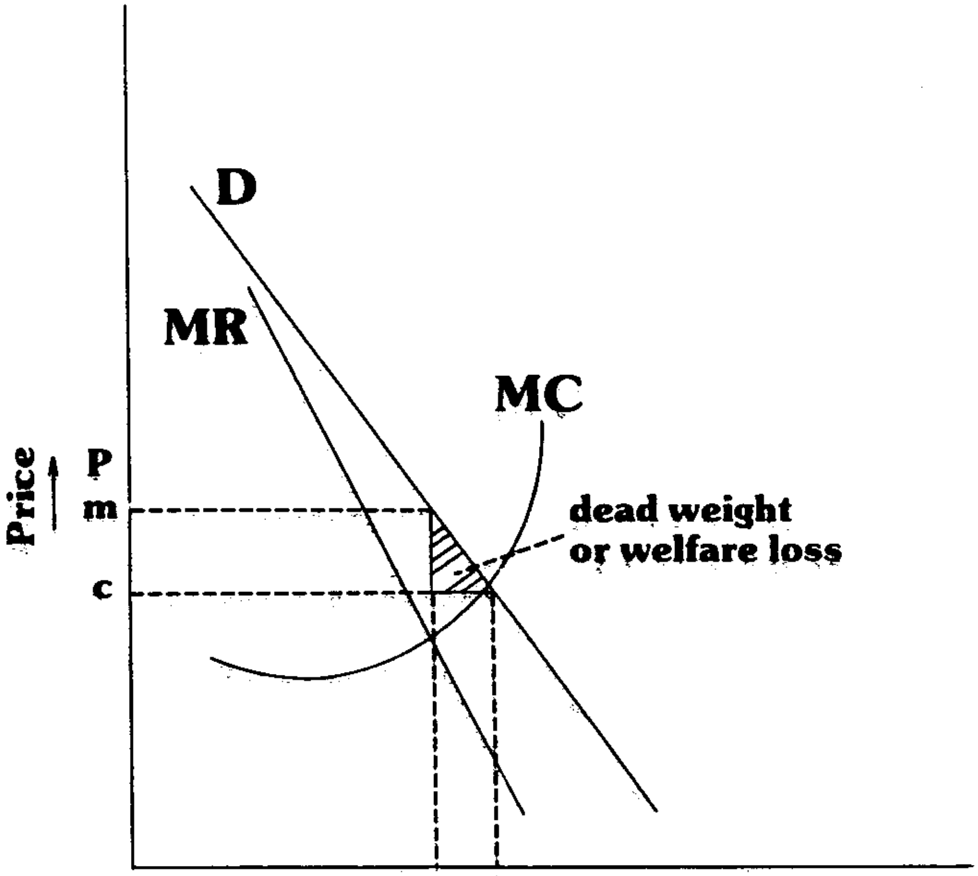
Now, if non-enforcement becomes a way of life for 8 years or 12 years, I think we could have a dramatic shift in the antitrust laws. If this is the way it's going to be, I don't think antitrust lawyers are going to convince anybody to do anything. If non-enforcement becomes an 8 or 12 year proposition, it's something to worry about. But let's look at reality as far as most of the behavioral problems are concerned. How many vertical price fixing or tying or exclusion cases of a behavioral variety were brought by the antitrust division anyhow? Most of that law was enforced privately. When I talk to a distributional client who is worried about tying or exclusive arrangements or location clauses or resale price maintenance, we never used to think a whole lot about the Antitrust Division anyhow. Maybe sometimes we thought about the FTC, but we never really worried about them a whole lot. What we were much more worried about were the distributors who were excluded or price fixed or tied and what they were going to do about it. And I haven't noticed any dearth of people suing some of our clients who are allegedly doing all these naughty things. They seem to be around and seem to be just as annoyed as they were before Baxter.

Now, if Baxter really does go in and start fighting about, on the defendant's side and the courts believe him, then things can change. I really think the problem at the moment is how long is this going to last and will the courts receive the Chicago School doctrine or are they going to throw it out, and I think it remains to be seen.

MR. AXINN: Let's take a short comment from Eleanor and then Fred and then I would like to get some questions from you out there.

MS. FOX: I think the problem may be a little more serious than Ira thinks it is. Companies are, for example, putting many more kinds of

Resource Loss
Caused by Monopoly Pricing



Quantity
D = Demand
P = Price
M = Monopoly
C = Competitive price
MC = Marginal Cost
MR = Marginal Revenue

restraints in agreement than they were before. Many more mergers of a sort that would not have happened a few years ago are happening now. I think what will happen in the short term is that the smaller competitors without market power who might have had access to markets will feel this first. I think also, in light of a lot of foreign competition and a lot of markets, the consumer probably is not getting hurt right now, but what I worry about is that foreign competition may turn off. It is delicate; changes in value of currency for example could result in different changes in cost. So what could be happening here is we could be building up a concentration that's being effectively contained and made competitive by foreign competition that could go away in the future, and we may end up with the worse deal for the consumer in the end.

MR. AXINN: Fred, you had the first word. You get the last word before the audience.

MR. ROWE: I yield to the audience for the last word.

MR. AXINN: OK, audience, how about some questions? If you have a question, please stand up in place and just give us your name and say your question.

MR. JOHN CLARK: John Clark. I have a question for Professor Bork. I think that in vertical price fixing you can't say the Congress punted when they saw that the courts with all this vertical price fixing was illegal and they allowed the states to pass the Fair Trade Act. Then when they saw what happened, they repealed that authorization. I think that's a pretty concrete statement as to how they felt about vertical price fixing.

MR. AXINN: Well, Bork's not here, and I suppose that my own view about the repeal of the Fair Trade Law is to some extent cushioned because I think the non-signer clauses and some other problems with those statutes intended to make them relatively offensive to a lot of the Congress and also that they were being used to promote high prices. Perhaps in the wake of the absence of those laws, we haven't seen the kind of price falling that we expected to see happening. And perhaps under the new Chicago School theory, where some prices will be fixed and other prices won't be fixed, we can allow the consumers to make their choice. Eleanor, what do you think?

MS. FOX: I think that's a very interesting comment because if my recollection is right, the same people who opposed the Fair Trade Laws that wanted repeal, are the same . . . Friedman as well as others, including people like me, wanted repeal . . . but the people who wanted repeal also now say that manufacturers should be free to vertically price fix. I think that's relatively inconsistent. I also think as a matter of the empirical evidence, prices are lower in a number of areas and industries where there has been a repeal of fair trade and I think that tends to dispute the Chicago School on vertical price fixing.

MR. AXINN: Yes, sir . . .

MR. EUGENE LIPKOWITZ: What do you say to the businessman who is your client who says he's got a child in law school whose heard about these trends in antitrust and says the former head of the Antitrust Division probably would have wanted to prosecute me, the current one wants to give me a medal for doing the following. So what do I do? I want to change my institutional practices. I want to eliminate a distributor. I want to have my own salesman be the distributor. All this kind of distribution conduct that we're talking about, it may or may not ultimately lead to vertical price fixing, but along the same lines. I could go back to . . . I've got a wonderful article you could read. I went to a panel and there were some fascinating speeches, but I don't want to read two hours worth of speeches. I want to know. Can I do it or can't I do it? And you tell him well, market share may be of some relevance, and he says, well, what's my market share, and you say we're on the borderline. Where do you go?

MR. AXINN: The question is how can you give advice in this era of uncertainty and the only answer I can propose is that you begin by doubling your malpractice.

(Laughter)

If you can find insurance. Then after that, I think you have to give advice with clear . . . this is my own answer to it . . . with a clear sunset provision in mind that this advice is valid until repealed by you or by an indictment or something . . .

(Laughter)

But that you're not allowing the client back in for more advice on the same subject unless you first consent. I think that, you know, to be serious about that, that is the problem which this panel has been focusing on all morning. It is clear. I think we're all in agreement that the era of uncertainty has never been greater than it is right now. Ira thinks that's a good thing. Others, I think, go only part of the way with him. I think some are concerned that the era of uncertainty breeds not only the kind of problem that you're talking about, but also the problem Sandy addressed of the gigantic lawsuit that knows no end because uncertainty . . . ultimately you bore through all the bedrock of the rules that we lawyers and judges create and you get down underneath it to an era where the rule is really one of fairness, and who is to know what fairness is or what reasonableness is except the last court to decide the question?

Does anyone have a further comment on Gene's question?

MR. ROWE: Well, of course, the phenomenon we're addressing is really the agony and the ecstasy of our profession. Namely, how to rationalize uncertainty and how to give wise advice. I don't believe this is a novel situation today. I'm sure some of the businessmen who are empaneled before grand juries by Thurman Arnold in 1938 were just as perplexed as some of those who fancy themselves as recipients of nobel prizes for what was criminal yesterday in terms of the surprising developments. I think, however, we are in a situation where the degree of change may be more abrupt today than it has been in recent times because as I've tried to indicate in a broad historical overview, is that just as there was a tidal change in antitrust in the 40s, so I believe there is at least a strong indication of a tidal change in antitrust today. Now, how long this may last is, of course, highly speculative. I very much doubt that it would change in terms of direction by the next series of election returns because I think there is a perception that the vision by which we have operated in antitrust over the past decades has in many ways been a vsion that is not obsolete and stale and that can no longer formulate the rules by which the businessman lives.

MR. AXINN: Jim, did you have a comment?

MR. HALVERSON: Just one comment. Ira's already made the point. You can't, in giving your advice, ignore the private plaintiff out there and he is always there . . . the terminated distributor, the distributor who is discriminated against, whatever. He is going to be out there and so far as

I know they have been the most vigorous prosecutors in terms of vertical restraints.

MR. AXINN: Yes, sir . . .

MR. JOSEPH WOLINSKY: My name is Joseph Wolinsky. I would like to ask if anybody on the panel would like to address the future of antitrust in the international area which has been alluded to in the comments here. Do the current laws and current theories that are being applied domestically and have set up applications internationally, are they going to stand the test of the developing international economy or are we going to see some kind of evolution with some new theories in that area as well?

MR. AXINN: The question could also perhaps have added to it another little aspect which is, in light of the developing law in the common market, for example, which is experimenting with similar but nevertheless fundamentally different sets of rules, can we learn anything from them and can they learn anything from us as to where to go next with our uncertainties? Eleanor . . .

MS. FOX: The question has two parts. One is the effect of international competition on our own economy looking at the U.S. consumer, and the other is what kinds of transactions might our companies be restrained from doing abroad even if the only person hurt is a foreign consumer.

Taking the latter, the clear trend is not to apply our U.S. antitrust laws to protect foreign consumers. However, there are a few cases on the books that either do protect a foreign intermediate buyer or possibly an American competitor excluded from an opportunity abroad. It's hard for such a plaintiff's case to be won where the real impact abroad is on foreign competition in foreign markets, and I do not believe that our antitrust laws are applied in the restrictive way that prevents efficient transactions abroad, although as Steve said there is likely to be foreign competition law abroad and one has to watch out for the common market competition law. So you might find yourself in another competition regime.

The first part of the question, foreign competition and its effect on our economy, that's an important question. Very clear that it does have an effect today. However, what it does do is change facts rather than law. Foreign competitors competing here are competitors, they're part of the competitive picture here. They have a market share here. They are counted and, indeed, their dynamic qualities are counted and they're more likely to be maverick rather than conformist. So in any industry where you find a great deal of foreign competition, foreign competitors competing here, there's much less opportunity for interdependence and there's not likely to be a real monopoly case that could be proved.

MR. AXINN: Sandy . . .

MR. LITVACK: Let me comment on it from what is really a broad policy kind of question because I think that's where you're going to see the progress in this area. And you do have two different problems.

The first question really is our companies wanting to compete abroad and how and what may they do jointly to compete abroad because they say two things. Number one, that everyone else abroad is able to mix and mingle so to speak and put in joint bids or do whatever they want, and we are therefore handicapped in our competition abroad; and number two, they say that the antitrust laws and the existence of the antitrust laws operate as a disincentive to American businessmen in competition abroad. Indeed, the two things that were most frequently cited were the antitrust laws and the Foreign Corrupt Practices Act as being two kinds of pieces of legislation or two factors which inhibited American businessmen from competing abroad. that is a major policy question and, as you may know, legislation has been introduced, has been for the past couple of years, which would permit trading companies subject to certification by the Secretary of Commerce, as I recall, and subject to other kinds of things, but the formation of trading companies which banks might be members, U.S. corporations might be members, advertising companies, to compete abroad. That is one possible development.

The second side of the coin is the one Eleanor was referring to and that is how do our antitrust laws interface with foreign companies coming over here, and let me just suggest a practical or policy type question which isn't a narrow legal question, although it ultimately ties into that, and that is that one of the real problems we have in applying our law here, apart from whatever competition those companies may inject into the marketplace, is oftentimes those companies within their home country will be banding together, will be doing what we might consider anti-competitive conduct which is clearly impacting here, and now you run into all kinds of comity and sovereign relations type questions. I'm not talking so much about act of state, although that is a doctrine which obviously deserves some consideration and perhaps re-examination.

What we are now talking about is a world where we are increasingly dependent, and it is not so easy any more to say this is our antitrust law. If you do business in this country, we are going to apply them against you and that's it. Because that has oftentimes serious, serious repercussions. The United States is not so anxious to say to one of its friendly defense allies where we have an air base that it is essential to SAC, for instance, that we don't care what the government says. We don't care that your government told them to do this. We don't care that your government would bless it. We're going to indict anyway. That's a very, very tough position to take, and the international aspects of that as the thing develops I think is going to be a very, very important area of how we are going to deal with our antitrust laws in this kind of very broad picture.

MR. HALVERSON: Let me put a cloud on that horizon and then you can ask your further question. We represent the craft paper, pulp paper association, which as you may know has been charged by the EEC with price fixing in Europe for simply doing what it is authorized to do under the Webb-Pomerene Act, and to my knowledge this is the first time that such a charge under the Treaty of Rome has ever been made by the EEC. Now there are briefs being filed, economists are filing their opinions and so on before the EEC, but that raises a cloud for the future of joint action because if that proceeding does succeed, and I tell you that they are really prosecuting for just what is allowed by our Webb-Pomerene Act, it seems to me the future of joint activity abroad, authorized by our law, particularly in Europe, is thrown into question. Then you have the problem, too, does that change our attitude toward cartel-like policy and activity which is formulated in Europe and has an impact in the United States.

MR. AXINN: It's a dam complicated world, isn't it? It sounds like exactly the reverse of the uranium cases. Yes, sir . . . you wanted a further . . . make it short because we're almost out of time.

MR. WOLINSKY: I was just wondering . . . following Mr. Litvack's comments, if he or others feel that the law as to the up to now cases provides us with answers, with positions that we can rely on for the future or do they feel that judges are going to come up with new ideas, something new here, or the Executive Branch that we have to deal with?

MR. AXINN: Is this law static, Sandy?

MR. LITVACK: For my own part, I have no question with the answer to that. The courts have not and the law that we have on the books today is not very helpful in giving us answers for the future for a variety of reasons. And when you ask how are those answers going to be formulated, I suspect that they are going to be formulated both through the interaction of the Executive and the Legislative branches and then ultimately interpreted by the courts. But we've got a long way to go and there is a lot of policy debate and a lot of law to be developed in that area for just the kind of reasons Jim's talking about. If the EEC is prosecuting because someone does something which is lawful under our Webb-Pomerene Law, I sit here and smile and think, my gosh, it's all turn about because I remember people from Europe coming in to see me when I was head of the Division talking about how various acts were legal under their law. And I remember the colloquy and the speech I used to give, and this is an interesting turn of events. It's one we have to be aware of.

MR. AXINN: Well, I can only say that I can't recall ever having participated in a panel that did a more effective job of illuminating the areas that they were assigned to deal with than this morning's panel and my hat is really off to you, Fred, for filling in on short notice and then taking us farther than I think we ever might have gone, and to the panel for bringing us their insights. All in all, I salute you. Thank you very much.

(Applause)

Workshop I: Techniques for Effective Pretrial and Trial of Antitrust Cases

MS. KIMBA W. LOVEJOY: We are about to begin this afternoon's workshop on Techniques for Effective Pretrial and Trial of Antitrust

Cases. I am Kimba Lovejoy, and I will be moderating the panel discussion. We are honored to have with us for this workshop today three judges who are acknowledged authorities on managing antitrust litigation, along with two eminent practitioners.

Before I introduce the panelists, I would like to describe briefly the format that we will be following in the program. Each judge panelist will speak for 15 to 20 minutes; after each presentation we'll have five to ten minutes of discussion among the panelists. Following the final presentation, we will open the discussion for comments and questions from you at about 3:20, I hope.

On my immediate right is Judge Higginbotham, United States District Judge in the Northern District of Texas, who received his Bachelor and Law Degrees from the University of Alabama, having attended law school on a varsity tennis scholarship.

(Laughter)

After a prominent career as a litigator in Dallas, he was appointed to the bench by President Ford in 1975, making him the youngest federal judge in the country. He is one of the most highly regarded authorities on the subject of case management and federal procedure. His testimony before the National Commission for the Review of Antitrust Laws and Procedures was influential in determining the direction taken in many of that commission's recommendations.

He has lectured extensively, both in and out of the United States, as a faculty member of the Federal Judicial Council and as an adjunct faculty member at the SMU Law School. He has also lectured at Columbia University and the National Institute of Trial Advocacy. He is presently a Council member of the Antitrust Section of the American Bar Association.

On Judge Higginbotham's immediate right is Judge Schwarzer from the Northern District of California. Judge Schwarzer was appointed to the bench in 1976, after having practiced for the previous 14 years with the San Francisco firm of McCutchen, Doyle, Brown & Enersen. He graduated from Harvard Law School in 1951, taught there the following year, and later served as Senior Counsel to the Rockefeller Commission in 1975. He, too, has lectured extensively on many subjects of interest to lawyers and has gained respect for his views on how to manage civil litigation. Several of his recommendations to the National Commission for the Review of Antitrust Laws and Procedures were adopted by the National Commission as their recommendations, and case management techniques that he has urged in lectures and in articles over the past few years have been adopted this past June by the Advisory Committee on the Federal Rules of Civil Procedure.

Most recently, Judge Schwarzer has written a book which is about to be published by Mitchie, Bobbs-Merrill titled "Managing Antitrust and Other Complex Litigation," which we can all look forward to reading this spring.

On Judge Schwarzer's right is Judge Hyun who was appointed to his position as Administrative Law Judge of the Federal Trade Commission in 1974. A native of Korea, Judge Hyun received a Bachelor's Degree in 1949 from Swarthmore College, a Master's Degree from Columbia University, and a Law Degree from Georgetown University in 1956. He is known for the skill with which he has managed numerous antitrust cases at the Commission, including most recently the *Exxon-Reliance* litigation. Prior to becoming an administrative law judge he spent ten years as a member of the Federal Trade Commission staff prosecuting numerous cases, including several merger cases, and spent two years handling Commission cases in the Court of Appeals.

On Judge Hyun's right is Sol Schreiber, who served with great distinction as a United States Magistrate in the Southern District of New York from May of 1971 thru October of 1978, where he conducted more than 10,000 civil trial hearings and assisted in the settlement of approximately 1,500 cases. His pretrial duties included numerous complex derivative and class actions in the antitrust area as well as the securities and other litigation areas.

He was the magistrate assigned to the pretrial proceedings in, among other cases, *Berkey v. Kodak* and *Litton v. AT&T*. He is a graduate of Yale Law School and has taught and lectured extensively at Fordham Law School.

Sol for the past three years has served as President of the Federation of Jewish Philanthropies. On Fedruary 1 of this year he is leaving the Federation to join the New York Law firm of Milberg, Weiss, Bershad & Specthrie.

On Sol's right is Jim Halverson, well known to all of you as the Chairman of this Section of Antitrust law. He is a partner at Shearman & Sterling; prior to joining Shearman & Sterling, he achieved great respect for his performance as Director of the Bureau of Competition at the Federal Trade Commission. He is a member of the Council of the American Bar Association Antitrust Law Section and is, as you know, a highly regarded lecturer and author in the antitrust area.

Turning now to the first part of this afternoon's workshop, Judge Schwarzer and Judge Higginbotham will in turn discuss techniques for effective trial and pretrial of antitrust cases in the federal courts. The last speaker, Judge Hyun, will compare case management at the Federal Trade Commission with case management in federal district courts.

Judge Schwarzer. . . .

HON. WILLIAM W. SCHWARZER: I want to start out by thanking you for the generous introduction, including taking ten years off . . . the time that I spent practising law. I feel younger already. I think that's a great way to start. I do want to thank you for your invitation. It's gratifying to be here, but also a bit intimidating. Those of us who like Judge Higginbotham and I sit out in the provinces know that the minute one of you walks into our courtroom the whole character of the proceeding changes, and I mean that in the best sense because you bring to our courtrooms a degree of diligent preparation and effective advocacy that sets a standard around the country. So, it's a honor to be here and one I hope that I can live up to.

Now we're going to ask you this afternoon to come down off the hills where you were this morning, where the caves are, where the gurus hang out, that spin theories and philosophy of antitrust down into the fields where the battles take place and where we sit and spend our time far away from those caves, and that metaphor brings to mind just parenthetically one that I heard a district judge say the other day which was his definition of appellate court judges. he said that those are the judges that after the battle is over, those are the people that after the battle is over come down from the hills and shoot the survivors.

(Laughter)

Well, you all know about the problems and burdens of complex litigation and if there's any answer to those problems and burdens it lies in limiting discovery, limiting pretrial and trial activities to those issues of fact and of law which are genuinely in dispute; the corollary of that proposition is that the determination of what is and is not in dispute should be made as early as possible in the litigation, and that is the problem with Manual for Complex Litigation, in that it largely ignores those two realities. I won't go into the problems and shortcomings of the Manual except to say that it just doesn't come to grips with the problems that we have, and with the ways in which complex litigation needs to be controlled.

Lawyers and judges have learned, frequently to their sorrow, that if you don't come to grips with those problems early in the litigation, it may swamp you, and so it behooves all of us not to follow the path of the Bourbons of whom it was said that they never learned anything and they never forgot anything.

Now, nothing about what I have to say here is very profound or original and I'm not suggesting that there are any magic solutions or inspired answers to these problems waiting to be discovered by brilliant minds, but I do want to suggest to you that lawyers and judges can approach the management of complex litigation in organized and innovative and practical ways in order to accelerate its pace and minimize its burdens.

I'll have something to say about how you get judges to do these things, and that's the bottom line, of course. You can't expect to defer discovery until all of the issues have been defined. On the other hand, there isn't any need to permit discovery to roll on like a giant tidal wave carrying you forward without any kind of control until the eve of trial.

So, my suggestion is that there be an early effort to define and to limit issues and that that process go on in a coordinated fashion with discovery, each feeding the other. That is, as issues are defined, discovery is limited accordingly and as discovery discloses information, that information is fed into the issue defining and limiting process. Now, that is a very easy sentence to say but it is a subject that has vast ramifications on which one can talk for hours and I will only pick out a few aspects of this and try to present it to you in an over simplified fashion but in the hope of getting you thinking about some of these things if you haven't already done so, and in particular what I want to do is to try to look at some of the things that can be done from the point of view of the practising lawyer, from a practical point of view, to see whether there are some things that you can do that might be helpful to you.

Now, I begin with what I regard to be the most essential part of this process, and that is to have communication between the two sides with the judge involved orally as much as possible, minimizing the writing, in order to disclose and define what issues are really in controversy, what claims and defenses are genuinely being asserted, what are their limits, and what facts are genuinely subject to dispute. Now, if the court does not call for such a conference in the very early stages of the litigation, which is my practice, then I suggest that the lawyer make an attempt to get that kind of a conference called by the court; it can be done under the guise of a Rule 26(f) conference or under Rule 16, even as it now stands.

For that purpose a lawyer should take the initiative, should use that opportunity to submit a memorandum to the court that describes what this lawsuit's about, briefly in simple words describe something about the industry and suggest an agenda for a management program of the case.

It's an opportunity to educate the judge. It is an opportunity to sell the judge on a program of managing the case and the way to do it is to try to show to the judge that all you're trying to do is make life easier on him or her, and that will be the bottom line for many judges and will make this appealing. So, here's an opportunity for advocacy. To get the communication process going by having some sort of conference system as a part of the case management program as early as possible.

Now, those kinds of conferences would go hand in hand with limited, targeted discovery — a few well chosen, carefully drafted interrogatories to develop some key dates, names, places, a few key documents that contain the key information that could be exchanged voluntarily on a letter request or by a brief request for production. Maybe a few key, brief depositions to enable each side to pinpoint the issues and determine what really has to be tried. With the product of that you can go into the first or the next conference and be informed and help inform the judge and set up a process of communicating with the other side that will lead to clarification and narrowing of the issues.

Now, as that process begins and goes on, other things can and should be done. For example, one of the most neglected areas is the area of judicial notice. Many antitrust cases involve economic data about which there ought to be no dispute, and requests can be made for judicial notice so that can be removed from the discovery process and be in shape for the trial without any further effort. Stipulations can be proposed on factual issues and if the other side refuses to stipulate, it can be proposed that they be required to submit an offer of proof to see what evidence there is on the basis of which something can be disputed. For example, whether there is a pricing issue in a distributor case.

Motions *in limine* can be used early on to eliminate theories. For example, in the damge field, to eliminate what may be preposterous theories of damages. Again, that can be coupled with offers of proof to narrow down what has to be litigated. And motions for partial summary judgment can be used.

Now, summary judgments have fallen into ill repute partly because of the *Poller* decision but also partly because of their frequent misuse by lawyers who used summary judgment motions for issues that are in dispute but seek to cover up the fact of the existence of the dispute by filing a volume of papers, and those claims of motions turn the courts off very rapidly, but they do play a useful role and they are far more appropriate and more likely to be successful than many lawyers assume they will be.

I've just made a list of some issues on which summary judgment would be appropriate. If a theory of a claim or a defense is plainly insufficient as a matter of law, where the issue itself turns on undisputed evidence, where the moving parties come forward with an innocent explanation — in a conspiracy case, for example — and the other side is able to come up with no evidentiary basis for an opposition. Summary judgment has been granted in a number of cases and many issues of ultimate fact can be decided, such as jurisdiction, statute of frauds, tolling, in many cases fraudulent concealment, collateral estoppel and other kinds of defenses, application of *Noerr-Pennington* immunity, standing, whether an agreement is a tying agreement, the reasonableness of an arrangement where there are no disputed facts. Many of those issues will be susceptible to a partial summary judgment and it is something that should not be overlooked as a tool for narrowing issues.

Even when summary judgment may not be proper, Rule 56(d), which is an often overlooked or rarely used provision, authorizes the court to make an order specifying the uncontroverted facts in the case. Now, that brings me to the final point that I want to take up with you and that's the matter of bifurcation. Under Rule 42(b) the court has discretion to order a separate trial on an issue in furtherance of convenience or to avoid prejudice or when it will promote economy or expedition. Now, that is not always easy to do in antitrust cases, Traditionally, we've used bifurcation in other kinds of litigation to separate liability from damages. In antitrust cases that's difficult because there's frequently a substantial overlap, not only because impact is a part of both liability and damages, but also because the proof of the two tends to be intertwined. But that's not always true. In the *Master Key* litigation, for example, the issue of conspiracy was bifurcated from the rest of the class claims which were then to be taken up later.

But issues such as the statute of limitations, tolling, fraudulent concealment, when disputed facts are clearly separable, potentially dispositive issues can be tried separately. In many patent, validity and infringement cases there is either an antitrust claim, a non-antitrust counterclaim or vice versa. Those kinds of claims are much better bifurcated than tried together.

My own experience has been that one major area where bifurcation is useful in the antitrust field concerns the area of the market definition of the relevant market and the establishment of market shares; that issue can be dispositive in a Section 2 case because it may be impossible to prove monopolization if the market share is not sufficient. It may be dispositive in a rule of reason case where there has to be, at least under Ninth Circuit law and I think that rule is expanding, a showing of impact on the competitive market in order to establish the unreasonableness of the restraint. So, I've found that I have been able to terminate some cases, or at least greatly reduce their length, by bifurcating that issue.

Now, the difficult question that you have, of course, is how you deal with the jury. It may frequently be advantageous to waive the jury on something like the market issue and get it tried because of the enormous savings that can be realized without a jury. You can try a market issue in a few days and you can either eliminate the need for a trial or greatly reduce the length of the trial. But even if they don't waive it, there's an argument that there is no right to a jury trial on the market issue. I don't express any view on that, but you could find an article in the *California Law Review,* I think, of January 1981, arguing that proposition and it may have some merit.

Now, if you have to have a jury on both issues then, of course, there is a serious question whether there is an advantage in having a bifurcated trial because you then have the question of whether you have to have the same jury. You have to consider that. My own view, based on the cases, is that you don't have to have the same jury unless it's clear that no jury could fairly decide the case unless it heard all of the evidence in the case, and you could have a separate jury on the market issue, I think, without any problem, but that's an issue that is still open.

If you have to have a single jury, the same jury, for the bifurcated issues, then of course there may be no real saving and then that leads to the other middle ground, and that is to have a segmented trial in which you submit to the jury one issue at a time. You might start with a liability issue. The jury would be instructed on that issue only and hear arguments on that only. They would return a verdict; depending on what they do on that, you might then go on to damages. You might have a whole series of issues separately submitted to the jury so they would only have to worry about one thing at a time on limited instructions.

Well, these are some of the things to think about in approaching this problem of how to cut these cases down to size, how to keep them from overwhelming you. There are many other things that can be done but my main interest in talking to you is to try to develop a kind of a state of mind that recognizes that you don't have to allow yourself either to rush in or have your opponent rush you into a lawsuit and into an elaborate program of discovery and pretrial activity without any control at all and it's also a state of mind in which instead of simply complaining about a passive judge and the inability, unwillingness of judges to come to grips with management, you take the initiative and make some proposals and use your skills as an advocate to try to promote some of these ideas which should be beneficial to you and your client but will also appeal to the judge as being a fair and reasonable and economical way of disposing of the litigation.

Well, these are some ideas. You may have some other thoughts when we have some more discussion about it later. Thank you.

(Applause)

MS. LOVEJOY: Thank you, Judge Schwarzer. I think that one of the major procedural issues that we'll be facing in the next decade is how to simplify and shorten the trial of these complex cases, particularly to juries, and I'm intrigued with your notion, Judge Schwarzer, which we discussed before the workshop began, of segmenting, for example, a price-fixing case into conspiracy, then impact, then damages. This, of course, runs counter to the thinking of a number of courts which have assumed that you have to try all the issues relating to violation in the first phase, which they usually assume to be conspiracy and impact, and damages in the second phase — which gives rise to the argument over whether impact really should be tied along with the conspiracy issue or along with the damage issue. I'm wondering whether you think you gain any advantage by trying all three issues to the same jury or whether you think as fair a trial would result if you have separate juries. The latter would allow an appeal between jury determinations; for example, if you first try the conspiracy issue, the determination of that issue could be appealed prior to trial of impact and damages.

JUDGE SCHWARZER: Well, that's true. Of course, if you look at it from the point of view of advantages and disadvantages, all of these programs of managing a case may have disadvantages. It may be to one or the other party's advantage to have the jury have the whole thing at one time because it gives them a greater opportunity to compromise. So that is eliminated. I think the question of appeal is a significant question only if it appears that there is a significant question for an intermediate appeal. I think in most conspiracy cases that isn't likely to be true. If you have enough to go to the jury, the most likely question for appeal would be the correctness of the instruction. So, if there is an appealable issue, it ought to be isolated early, preferably before you ever get to any jury trial and send it up under 1292(b) certification and that's also another way in which issues can be limited and curtailed.

Well, the whole problem of segregating phases of the trial or segmenting them is a very tricky one and it's a new area. There really is virtually no law. My own belief is that you can do a lot of things that either may not have been done before and may even be inconsistent with what others have done, if you get some good reasons that the appellate court can understand, and I think this is one of the things you need to think about if you want to get a judge to do something that may be unconventional. You ought to give him something that he could then use to put in his order to explain why you did it. The judges that get into trouble with innovative ways of doing things are the ones that just issue an order and the Circuit doesn't know why they did it or what the basis for doing it is. So, if you give good reasons and if they are made of record, I think you have a much better chance of having those kinds of innovative ways survive an appeal.

MS. LOVEJOY: Judge Higginbotham, have you tried bifurcated trials of complex cases?

HON. PATRICK HIGGINBOTHAM: Those that I have tried that I bifurcated proved to be complex.

(Laughter)

Yes, and I found it to be sometimes a useful tool. With all of these pretrial techniques, I think you have to be very careful to keep in mind that you're talking about a shelf of ideas and you must take from that shelf of ideas those particular ones that fit the factual situation before you, that fit the case viewed in its factual dimension, viewed in the context of the lawyers that are before you, and the pattern of the case itself, and you meld those particular ideas and come up with a particular program. In other words, individually tailored discovery programs, I think, are the thing that ought to be pushed forward. I have some reservations about the appealability of some of those intermediate orders. I also have some reservations about the effectiveness of interlocutory appeals. At least until recent times, the times for appeal were such that one cannot honestly give a 1292(b) certificate that its granting would materially advance the ultimate termination of the litigation because it would have precisely the opposite effect. For that reason and perhaps for others, the Court of Appeals and particularly the Fifth Circuit have been reluctant to accept the 1292(b) certificates, keeping in mind, of course, that that only means that you may petition in effect the court for leave to appeal.

There's been considerable reluctance to look at those. That reluctance is born, I think, of some sound policy regarding finality. When one then looks at the realities of whether a certificate would genuinely and ultimately and materially advance the termination of the litigation and one then also looks at the basic policy, which is a sound one, of trying to conclude litigation in a non-piecemeal fashion, then there are some good reasons for not taking cases up under a certificate. And I really could see no reason, no way it could go up except by a certificate. So, I wouldn't look to the intermediate review as a practicable solution, and I don't really think that segmenting a trial sets that up.

The segregation of the trial or the grouping of the trial has a great deal of benefits. One area in which I've used it with success is aircraft litgation. I've used it with success where, for example, in a suit involving the singer Jim Croce. You remember the song, Bad Leroy Brown; it's one of his hits. His whole rock group crashed in Natchitoches, Louisiana. We tried that case and what we did there was to try the question of liability only to a jury and the jury found for the plaintiff, the idea being that then the passengers would perhaps settle their cases, and they indeed did that, all except one. Actually we had three trials. I tried a separate issue with regard to certain shared responsibility, of whose plane it was and whose responsibility, at the outset, thinking that might further the litigation and settle it, it did not. We then tried liability. That resulted in liability, and then we ended up trying one of the passenger cases itself. But it did mean we did not have to try the separate damage cases of the entire passenger group. The argument that that in effect impinged upon the Seventh Amendment right to jury trial was rejected by me and the case was affirmed on appeal.

In that particular case, in a non-antitrust context I thought that it was a classical approach to a problem. I thought the lawyers really wanted it segregated, although they also wanted it appealed. So they had their cake and they ate it, too, although it proved to be somewhat distasteful.

(Laughter)

MS. LOVEJOY: I think that bifurcation of the damage issue can be useful in a price fixing context, where you have a large class claiming damages. I'm thinking particularly of the Plywood Antitrust Litigation, where the question of individual class members were bifurcated from the liability issue, and the defendants obtained appellate review of the verdict on liability before trying the portion of the case involving individual damage determination.

JUDGE HIGGINBOTHAM: An awful lot has to do with who the trial judge is and the way he proceeded with it and the perception of the particular appellate court....the experience of the appellate court with what was trying to be done, the sensitivity of the appellate court to the difficulty in managing the litigation, and as Judge Schwarzer pointed out and I wholeheartedly agree, the record revelations of the reasons that are there. The statement of why you do things for appellate review is a particular art form in itself that lawyers are well equipped to handle and judges develop in their own areas of specialization. It sometimes is helpful and sometimes is not. Sometimes it just provides a target, but those are the hazards of the appellate process itself.

I really don't believe that the appellate courts provide meaningful assistance in terms of advancing complex cases. I think that these cases have got to be handled at the trial level in the first instance and with some exception I think that for the most part they're in the trial judge's hands until the case is concluded.

Now, the tradeoff, of course, is obvious. With large cases one can go far down the path only to discover that error has been committed at some stage. The practical consequences become that there is really no hope of review for discovery rulings for a trial court judge because of the considerable reluctance of anyone to overturn a protracted case for some particular discovery ruling made early in the game. But then I'm not troubled by that because I think that for the most part those are discretionary rulings in and of themselves. Those are the tradeoffs that are involved, but I really think it's basically a trial court function and I have seen few cases where appellate review genuinely helped.

MS. LOVEJOY: Let me ask the other panelists whether they have comments at this point. Sol....

MR. SOL SCHREIBER: The judge mentioned the *California Law Review*. I would like to call to the attention of the people in the audience that in the May 1981 issue Judge Schwarzer has a very interesting discussion of communication with juries, the problems and the remedies. It's a symposium on litigation which only proves that California seems to spend more time on litigation than we do in the East.

I have a question for Judge Schwarzer. The Judge comes from what I call the hands-on school. That is, hands on the case, not around your neck. How do you handle, Judge, the judge who doesn't want to get involved; as one judge said...."My God, 26(f). If that's what it says, I don't want to have anything to do with it." What is your suggestion, if there be any, on the judge who is reluctant to get involved other than the fact that he has such effective magistrates to use. How would you handle that issue as a litigator?

JUDGE SCHWARZER: Well, my suggestion is that you're in business to be advocates. If you have to persuade the judge of your position on motions, on the merits of the case, on other procedural matters, why not try to persuade him to adopt a discovery program or management program, to adopt certain limitations on the case and as I've tried to say, to demonstrate to him that it's going to make his life or her life a lot easier. Now, you may not succeeed but it seems to me that this is a generally overlooked opportunity for real advocacy for lawyers. If you want the judge to exercise some control....it may not be day to day control. He may not jump in as some judges do and really take over, but if you want him to adopt a program that will keep the discovery, the depositions, from being interminable, that will reduce the amount of travel, that will reduce the number of people to be deposed, that will limit the sets of interrogatories, that will limit the document discovery to particular kinds of files rather than having to go through warehouses. Why not make a motion for a conference and submit a memorandum that explains why, and a proposed program? The worst that can happen will be that the judge will ignore it and not rule. But I think the majority of judges will ignore it and not rule. But I think the majority of judges will at least respond in some fashion. So, what I'm saying is yes, there are activist judges and there are passive judges, but to some extent that's the result of what the lawyers do and I don't think you should take for granted that because a judge has a reputation for being passive that therefore he necessarily will be passive in your case. You ought to try to get him to go along; Rule 26(f) and Rule 16 now, and particularly when the amendments go through, will make that easier for you.

I'm not saying any of this is going to change human nature but you've got nothing to lose.

MR. LOVEJOY: Our next speaker is Judge Higginbotham. Judge....

JUDGE HIGGINBOTHAM: One thing that I do want to say, in the generous introductions that Kimba gave to us, is that as the introducer she gets passed over, and I want to share with you a compliment....at least I want to pay a compliment, to a member of your bar and to Sol Schreiber. Sol and Kimba and some others put together comments with regard to the proposed Amendments to the Federal Rules of Civil Procedure. We had occasion to review those comments and I must say that with one minor exception they were extremely well done. Even the minor exception was artfully drafted. I simply disagree with it.

(Laughter)

Their particular view was ably and forcefully presented to the committee and the committee came close to adopting at least in one major respect the sanctions proposal that they proposed, but the impact with regard to the thinking of that committee, I think, was moved considerably by their presentation which was done by themselves in an individual capacity because of the time limitations of gaining approval of the various ABA Sections. That work was extremely well done and Kimba really and Sol must be complimented for that.

Some of what I say is critical of the use of magistrates and I quickly say that some of my remarks, at least some of my views, might be changed if I thought that the level and the quality of magistrates equalled that of Sol Schreiber. I happen to think that he, unfortunately for our system, was unique. I also observe that he's no longer a magistrate.

What I want to do is to cover somewhat the same terrain that Bill Schwarzer did with a somewhat differing emphasis, not because I disageee with him at all but just to try to cover some of the material.

The question has been asked what do you do with the judge who is not going to move in and to take a heavy hand. I assume in the suggestion I make that you as an advocate have concluded that it's in your interest, in the interest of your client, to have the case managed. I think there are very few cases where that's not the case. What the studies have revealed, the empirical data that has come in, is that the lawyers are asking for assistance from the judges, that lawyers are concerned that the judges are not involved. They are concerned that the particular devices that may be there for the control of discovery are not being enforced by the judges. They are concerned about access to the court.

Now, Bill and I have spent a good deal of time talking to judges, and I must tell you that in workshops and whatever last summer, for one week we had 150 federal judges for an entire week at the University of Michigan, Circuit and District Judges, devoted solely to antitrust, and a substantial part of that program was devoted to the management of antitrust cases. I tell you that because you should understand that there is a strong development and a mood in the judiciary today toward the involvement of the judge, and when you move out of your city and out into the hinterlands I think you'll find it to be the exception rather than the rule that, chances are, you're going to have a judge that has at least been programmed in some way that this "antitrust" case needs some kind of a different treatment.

You may still find a judge, however, who for various reasons, primarily the demands of the docket, is not going to devote a great deal of time to your case unless you get him involved. My suggestion in response to the earlier question posed by Sol is much like Bill's, that I would suggest to you that you file a motion that requests a status conference and attach to that motion an agenda, an agenda for that particular status conference, and some concrete proposals for discovery itself. What that tells the judge, in very concrete terms, is these lawyers want to get on top of this case. That is, despite their basic economic interests, which for the most part are counter to the control of the case itself sometimes, is that they want in effect participation, and I think that that will go a long way with many judges toward participation. As part of that same encouragement program or invitation, if you will, I would encourage you to resist the wholesale reference of those cases to magistrates. I think it is a mistake for the courts to make such usage of magistrates and I would encourage you to urge the judge to stay in the case, whether you do it by ill-disguised flattery about how much you need his personal attention or his experience or however be your technique as an advocate. You need that district judge.

I think that while we don't have a great deal of empirical data, my intuitive belief is that these wholesale references are counterproductive.

Now, at the outset then, my advice to you would be to try yourselves to get that judge involved. Assume then that you've got the judge involved, and you've got the judge's attention, what then happens in terms of control of discovery?

It seems to me to focus for a minute on some of the discovery tools that are available. Bill alluded briefly to the use of interrogatories, and I think we share the same view that in many of these larger cases they have limited utility. You ought to be proposing to the trial judge, if the trial judge does not do it himself, that the use of interrogatories be controlled. Now, controlled in what manner?

I don't think that necessarily limiting numbers mean a great deal unless there is already an abuse of too many numbers. Instead, you need instructions with regard to the particular data to be elicited by those sets of interrogatories and then to close off interrogatories. The bar sometimes makes the mistake of attempting to cross examine with interrogatories and you know what happens. You write the question and the lawyer on the other side writes the answer. Well, you could sit and argue with each other more quickly than that and that really is counterproductive.

Instead, it seems to me that the interrogatory has its limited utility. Get it done quickly. Primarily you want access to documents. In most of the cases the access to the documents becomes important because as the prelude to the depositions most good lawyers want to see those documents. Because by reading the documents they can then start to identify the cast of characters, identify the potential deponents, to get a feel for who in the corporate structure is making decisions, to get a feel for the internal difficulties that may be present.

Out of that initial document process, will then come proposed deponents. Then it seems to me that the depositions need to be taken within a fixed time period. My own belief, based on my experience, has been that issue definition in many cases is very difficult to come by. Bill alluded to the hope that we might identify such things as effect on commerce, the statute of limitations, prior release and so forth, and indeed many of those cases will present those issues. Frequently, however, where those cases present such an outcropping of an issue, such as a question of a prior release, or whether a particular contract is reasonable or unreasonable — those cases are readily identifiable and they leap out at you.

The problem that we're talking about presupposes a particular type of case. Now, what type of case are we talking about? First off, it's not necessarily every antitrust case by any means. One of the things that judges, and lawyers too, succumb to is a reflexive reaction that an antitrust case is necessarily protracted. We all know that there are many mine-run antitrust cases that are a lot more simple than a products case or a torts case, termination cases and others.

Now, we're talking instead about the larger case, larger in terms of the market that is involved, larger in terms of the damages that are involved, and usually initiated by a broad, sweeping complaint where it is very difficult to get a handle on what's going on. How do you start to identify those issues? And until you identify those issues, how do you start to control discovery? How do you say to the litigates well you're only going to take the depositions of X, Y and Z when you can't determine the relevance of X, Y and Z's testimony because you don't know what its's relevant to, and until those depositions are taken, you don't know what the issues are. You see we've jumped over a basic philosophical point, and that is we don't come to grips with an underlying philosophical notion of the rules, that you can file suit now and find out later what your claim is. Until you come to grips with that basic philosophical notion, you've got problems, and with all of these pretrial management techniques we're swimming upstream against the basic philosophy that underlies the 1938 rules.

Now, as Bill has pointed out in another context, there is very good justification under the rules themselves for us to do that; that is for us to manage these cases and to say that you can't sue now and find out what your case is about. I've said interrogatories provide limited utility and I've said that you need to identify these.

Well, how do you do it? Well, one technique is time. That is, that if the lawyers have only a limited amount of time to accomplish things, the self-discipline itself will tend to narrow discovery and it will also cause the issues to surface, and for that reason I'm a believer in the setting of a case for trial as early as practical, at a time and a date that is reasonably fixed. That is, it will not be changed unless the lawyers can demonstrate there's good cause to do so.

Once that trial date is set, then from that trial date one works backwards to see what must be accomplished in the meantime. I've said that with interrogatories, — we're going to have a very limited use of those at the beginning and then they're out. Now we're talking about oral depositions and they fall into two general categories, the depositions of experts and the fact deponents themselves.

I would take the experts and drop them usually at the end of the case. In other words, we cut down all discovery let's say by June 1 except for that, for the depositions of experts, and then from June 1 through to September 1, nothing is done by way of discovery except that of experts.

What does that accomplish? It accomplishes this. Once the underlying facts have been developed by discovery, then the people presumably by that time have engaged their experts. I don't allow interrogatories of experts. As a preliminary matter, I think that's a waste of time. A basic rule which I suggest to you you might suggest to your district judge that is workable is this....and it's one that I have used in small cases and in large cases, and it simply requires that shortly before the close of primary discovery, that is all discovery except that of the experts, that each side list every expert that will testify at trial. None not listed will testify. They tender them for the other side's deposition under the ground rules that the person who takes the deposition pays the cost of the actual time testifying, no preparation time, at the same rate that the person who engaged them for trial purposes pays them.

Now the other sanction. No one testifies at trial about an opinion fairly inquired into or basis for an opinion fairly inquired into that was not revealed at the deposition. That's so the expert will be ready and will not sandbag you at trial. Now, we've talked about the interrogatory usage and the experts at the end, and we've not really focused on the procedural techniques for controlling that big, huge middle area of oral depositions, except the matter of time. We've said there's only so much time to do it. So people are going to have to dwindle those out and take only essentials.

Now, one technique for getting at the identification of the pertinent issues out of this mass of material can be this. It can be the requirement by the district judge that the lawyers do two things. That they file a series of informal narrative statements. I'm not talking about a narrative statement in the form of a manual. I'm talking about a narrative statement that describes what the claim is, its essence, describes the factual basis for it, identifies the persons who will testify to those claims, and where pertinent, identifies, marks exhibits that do support it. You can start off with a succession of narrative statements and this is a variation of what Judge Green did in the *AT&T* case which....and a variation of that on a smaller scale can work in the smaller cases. I wouldn't suggest that scheme, which was a brilliant scheme for that case, is workable in smaller cases, but variations of it can work. So the narrative statement device itself can in fact help to identify those issues, together with the time constraint, the discipline of that time constraint.

The additional ingredient to that, and I'll conclude my part of the remarks with this observation, is that the internal discovery disputes that will arise thereafter must be resolved on a relatively informal basis with assistance of the court. If you get into a pattern of formal motions and some briefs, and other matters, on questions when they first arise, then the case will begin to bog down. Therefore, it seems to me that you need to be urging the court to, and hope that the court will, go along with making himself available by telephone, conference and otherwise. We've found with great success that we confer on depositions from all around the country simply by the telephone. I've had lawyers call in — they're in depositions — "Judge, I've asked these questions and instructed the witness not to answer." Fine. They were in the middle of the deposition, got on the speaker phone; I have them back up, and read me the first, the last five questions and tell me what's going on, then I start, and then ask a question and then I preside for about ten minutes. Then it's over and they go on about their way.

It's very practical. It's very direct. You say, well, gosh, what do we do about appellate review? You're not going to get appellate review on that anyway.

(Laughter)

What do we do about our record? Our record for what? Instead, it seems to me, and Bill follows this practice and so do I, of getting the lawyers in chambers and sitting down and talking to them and trying to understand what's going on in the case. Read the narratives and get a feel for the case, and be willing to reveal that you don't know and ask. Understand that that trial judge does not know what's been going on out in the field. Don't come in and start off with a supposition which seems to be happening with frequency that I'm aware of what you've been doing. I'm not, and fill me in and do it quickly, and I think that once you develop that cooperative spirit with a judge, and the judge gains the confidence that you're not trying to sandbag him and bog him down with a lot of detail, I think that you'll be well on your way towards managing the case.

In sum, you need cooporative counsel, but it's in your self-interest to do that. You need access to the court and you need management by the court, but you have a role in that and you can lead the court into managing the case if for no other reason than simply signing off on the trial program that you yourself get together with other counsel and adopt. If the other counsel won't agree to it, submit it to the judge and see if he won't sign it.

(Applause)

MS. LOVEJOY: Thank you, Judge Higginbotham. I'm going to ask the panelists to hold their remarks on the Judge's talk until after Judge Hyun speaks, because of time constraints. Judge Hyun....

HON. MONTGOMERY K. HYUN: I will thank Ms. Lovejoy for the kind introduction and also the New York State Bar for giving me an opportunity to be here today.

Supplementing the discussion by my two distinguished colleagues on the federal bench, I thought perhaps one thing I could do is to highlight some of the notable features of the revised FTC pretrial procedures for purposes of comparison. Of course, this is based on an optimistic assumption, perhaps, that FTC experience will continue to be relevant for the time being.

(Laughter)

Let me say first that I'm referring to the revised rules of practice in adjudicatory proceedings of the Federal Trade Commission which went into effect about three years ago. In general the FTC pretrial and discovery rules were modeled after the Federal Rules of Civil Procedure and many of the provisions in the Manual, with a few notable exceptions. The most notable difference is that the parties must apply and obtain a Law Judge's authorization for the use of such customary discovery devices as depositions, interrogatories, and document subpoenas.

Now, secondly, the scope of discovery under the FTC rules is somewhat narrower than those in Federal Rule 26, and there are other significant differences in the FTC prehearing procedures and I would like to briefly discuss a few of them.

The FTC rules require Law Judges to hold a prehearing conference in every case and FTC rules enumerate typical agenda items to be discussed at such a conference, and FTC rules particularly emphasize two areas, simplification of issues and stipulations. The FTC rules also require a Law Judge to establish a plan and schedule of discovery in every case. This is mandatory and what we usually do is to find out the kinds and extent of the discovery needs of the parties and based on an evaluation of those needs we attempt to establish certain definite cutoff dates, including a target trial date.

In these and other respects the new FTC rules anticipated some of the features contained in the Judicial Conference Committee proposal to amend the Federal Rules. Another interesing feature of the FTC rules is a special procedure established for so-called big cases. The Law Judges are required to identify complex cases based on their judgment regarding the likely complexity of the cases before them. Once a determination is made that a case is a complex case, as many of the antitrust cases are, then a special procedure is instituted automatically. That procedure consists of the following:

First, the law judge must hold a prehearing conference within 45 days of the filing of the Answer to the Complaint. This may be compared with the 1979 Report of the National Commission to Review the Antitrust Laws, which recommended that a preliminary pretrial conference be held 45 days after the Complaint is served.

Secondly, under this special procedure, before the first prehearing conference the parties must file non-binding statements setting out the theory of the case, issues to be tried, and anticipated proof. The upshot is that within 75 days after the Answer is filed and within 30 days after the first prehearing conference, the law judge is required to formulate a statment of issues based on the papers before him, and, of course, these statements are not perfect, are not complete, but they could be modified as the judge becomes more educated about the case.

Now, this special procedure then requires counsel to think through not only the theory of the case and the issues of the case but also how he proposes to prove his case and do all of these things fairly early in the case, and commit them on paper, and from the law judge's point of view this gives a law judge a handle in ruling on subsequent discovery applications.

FTC rules require application for every discovery process, with the exception of admissions. As you know, the Federal Rules philosophically, were designed to rely on self-regulation by counsel. The FTC rules, in giving expressed control to Law Judges, sought to give law judges complete supervisory power over the progress of the discovery phase of pretrial. In this connection, an interesting bit of history is that the 1978 FTC rules revision proposal initially would have followed the current federal practice, but the law judges at the Trade Commission filed comments opposing it and now the FTC judges retain control over the discovery processes.

Another important difference is the scope of discovery. You are familiar with what Federal Rule 26(b) says. So I will just quote what the FTC rule says in this regard. Section 3.31B(1) says the Law Judges may authorize discovery upon satisfactory showing that the request discovery may reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to a defense of any respondant. You will see there's no reference to the subject matter of the action.

Now, I know the press of time. I'll conclude here by perhaps emphasizing an obvious point that bears repetition and can make a big difference in expediting pretrial in big cases — simplification of issues. Please work out the theory of the case and keep it as lean and simple as possible. Multiple theories prolong pretrial. Remember that it takes only one good theory to prevail. Having done that, narrow the issues to be tried, narrow the contested issues. Don't be afraid to enter into factual stipulations. The more knowledgable and better prepared counsel are, the more willing they seem to do these things. Under a fair and firm judge and with the cooperation of knowledgeable counsel, a big case can be prepared efficiently and tried efficiently. I need only remind you of the *AT&T* litigation in Judge Green's court in the District of Columbia or of the 1958 *Bethlehem Steel* case which was tried before your Judge Weinfeld largely based on stipulated evidence, or to the famous 1961 *Ling-Temco* case which took less than two weeks to try before Judge Estes of Dallas, Texas, again largely based on factual stipulations entered into by counsel; amazing as it may seem, Judge Higginbotham has personally verified this to be so.

So in closing again, I emphasize simplification of issues and I hope that some of the features I discussed with respect to the FTC rules may be incorporated in future amendments to the Federal Rules. Thank you.

(Applause)

MS. LOVEJOY: Thank you, Judge Hyun. In the interest of ending this workshop in time for you to get to the other ones, I'm going ask each of the panelists for their remarks one by one and then throw open the floor for questions and comments from the audience.

Jim, do you have any comments at this point?

MR. JAMES T. HALVERSON: Yes, thank you, Kimba. I am quite pleased with the amount of agreement among the judges on the panel of setting trial, pretrial, early pretrial conferences, requiring discovery plans, setting cutoff dates, and so on. I have, I guess, a question for all three judges and that is what happens when you have two sets of counsel. One set of counsel comes in with a pretrial plan that is fairly detailed and he seems to know where he's going. The other counsel, maybe because his case is not as fully under his control, that is to say, the facts aren't as fully under his control, comes in with a much vaguer plan, and he with justification says I can't fill this in and it's going to take me considerable time to fill it in. How do you respond to that? I can see in fairness there being situations where you wouldn't want to foreclose that other party from some additional discovery and that seems to conflict with setting early dates and I address it to all three of you.

MS. LOVEJOY: Judge Higginbotham....

JUDGE HIGGINBOTHAM: Well, obviously the person with the detail comes in with somewhat of a presumption in their favor if the detail seems to genuinely suggest a studied review of the matter. The judge has got to go behind some of those schedules. The party that's on the receiving end of that has got to be prepared to explain why his particular plan is less detailed. If he can articulate that, if he can be specific, if he can back it up with a narrative statement, then I think he has no problem. If he's unable to articulate it, if he's unable to state it by a narrative fashion, he loses. That's the American way.

(Laughter)

One quick comment and I'll shut up. One other technique I failed to mention and that is called preparation of the jury charge. At some point midway discovery, it seems wise to me for judges to require the particular lawyers to submit a proposed charge. That's a marvelous discipline to see what you're ultimately going to be asking a jury in a jury case, or some findings of facts, specifically, if the judge is going to do so. Try to write them when your case is prepared.

MS. LOVEJOY: Judge Schwarzer....

JUDGE SCHWARZER: Well, there are two things you do in the situation proposed by Jim. The first thing you do is you send the lawyers out, you try to stipulate on a program. Because the best kinds of programs are those on which the lawyers have agreed, and by getting together and getting to talk they can usually work out something better than you can. Then even after they've worked it out, you have to look at it with a jaundiced eye and ask questions about it and not really accept it, because lawyers have a common interest that may be in tension with the interest of the court. Then if they can't resolve it, I think you have to approach it in phases.

A discovery and a pretrial program is not preclusive and I think any judge worth his salt is going to recognize it and it has to be changed as you go along. So what you do is you set up a first phase of discovery. I'm not using it in the sense of the Manual. Please don't attribute any agreement with the phases....that's a bad word. I'll strike that. The first stage of discovery on which the parties can agree, and then as the facts come out of that you set up the next one. You might set up tentative dates down the line that become more definite as you go along.

Now, I just want to make two brief points. Number one, on the matter of the jury charge, we don't get to that, but I would like for you to think about the need for reform in instructing juries. I don't have time to talk to you about it. I wrote an article on it. There are other articles, but if you have a chance, look at the article I wrote in the May 1981 *California Law Review*. Because I think if you haven't thought about it, it will appall you what psycholinguistic studies have shown about the jury instructions that are currently used and it will make you think about how you can improve it, and that's another thing you ought to bring before the judge.

The final point I want to make is I want to second what Pat has said about discovery. It's my practice not to entertain any written discovery motions at all. When the lawyers first come in, I tell them if you have a discovery problem, call me on the phone and we'll try to work it out. If we can't work it out, then we'll have a motion. It's just amazing how that reduces your law in motion calendar. It reduces the expense of litigation. It eliminates most of discovery disputes because when the lawyers know that they have to see you or talk to you right away if somebody raises some kind of a problem, they're going to be much more reasonable than they otherwise might be if they can bring it up by motion. So that's something for you to think about in conducting litigation in particular courts to see whether you can get these discovery disputes disposed of in a streamlined fashion. Thank you.

MS. LOVEJOY: Judge Hyun, have you encountered the situation that Jim posited?

JUDGE HYUN: Yes, once or twice. The one distinction I can point to is the fact that by the time a case comes to trial before a law judge, the counsellor assigned representing the client, the respondant, has usually been through a process of education involving consent negotiations with the FTC staff. So they have been sufficiently educated in many cases.

Now when a counsel says that he needs more time to prepare, what I try to do is to keep after the counsel and ask him to define the kinds and extent of problems he may have and then schedule another prehearing conference at a certain date, and just keep after the counsel, and I've found that it is not an insurmountable problem.

MS. LOVEJOY: Sol, do you have any concluding remarks or questions?

MR. SCHREIBER: I can't resist the temptation to comment on Judge Higginbotham, who I think, along with Judge Schwarzer, rate as the finest judges we have on the district bench. The provincialism of New York, as you can see, in fast disappearing. We have to import them now and it's indeed a pleasure to have met one of them and to have renewed my acquaintance with Pat, with Judge Higginbotham, but I must confess....you know, when Congress put in the U.S. magistrate system they felt they were telling the federal judges....

JUDGE HIGGINBOTHAM: I shouldn't have pushed that button. (Laughter)

MR. SCHREIBER: The unfortunate part of leaving the bench, even as a magistrate, is you never get the last work in. So, I know it's going to come back to haunt me. But they told the federal bench, and the Chief Justice said as well, that we need sophisticated people to handle pretrial work. They appointed 300 of them. Many of them have served with distinction. Fifteen have been promoted to federal judges. There are many judges in the United States who believe that federal magistrates play an important role and should play. I suggest to you that the ones I know of, many of them, they're the same mixture, with all due respect, as federal judges. Some are very good. Some are mediocre, and there are a few that may in time reach better heights, but the point I'm trying to suggest to you is that most try to do the work, and in time they become far more sophisticated on discovery than federal judges do. They deal with it on a daily basis. So for those who feel that maybe you would rather have the judge, by all means do so, but when you get to a magistrate don't feel that the world has come to an end, and in turn, I would just repeat I think some of the things we've heard today on discovery and moving cases, but the one thing I'm a little fearful of....the new proposed changes do not talk with great moderation, with all due respect to some of the judges who have worked on it, they talk about sanctions, heavy sanctions, strong sanctions, the winds of sanctions are coming and they are coming in the new proposed changes. So you may not be able to deal in the same way as has been suggested. You may be under great pressure to tow the line because otherwise you're going to have heavy sanctions imposed upon you.

MS. LOVEJOY: Judge Higginbotham, would you like a few seconds rebuttal?

JUDGE HIGGINBOTHAM: Well, not really rebuttal, just an observation. I thought that 836 of the Code, really, when enacted by the Congress, said to the courts that the magistrates are there to use if you choose to do so. I really didn't think that it was mandatory. I also would like to clarify what I said earlier. My concern is not so much a judgment with regard to relative competence of magistrates versus judges. It's founded upon the very practical notion that the judge who is going to try the case ought to be the one who manages its earlier stages, and also upon the very practical realization that the basic tensions and discipline of appearing before the judge who is going to try your case are absent, and also the proliferation of appeals, it may make the reference itself, for all those reasons, counterproductive.

Finally, it seems to me that....and I've said lightly at some time and I mean in a light sense that this job costs me so much and I enjoy it so much that I want to do it all.

(Laughter)

MS. LOVEJOY: We have exceeded our time. I would like to thank our panelists for their very thought-provoking remarks, and I hope that you will now attend one of the next two workshops. Workship II, on Section 2, is in the Center Ballroom. Workshop III, on the merger guidelines, is in the South Ballroom. Thank you.

(Applause)

Workshop II: Section 2 — Is Anything Left?

MR. ALAN J. WEINSCHEL: Welcome to everyone. My name is Alan Weinschel and I have the great pleasure of being the chairman of the Sherman Act Committee of the Antitrust Section, and we're here today to discuss what's left of Section 2. A friend I saw earlier said that he thought it would be a relatively short session, but we do have four distinguished panelists . . . three attorneys and an economist . . . and I think anyone who puts three attorneys and an economist together in a room on the same panel has to predict that there will be at least two hours of discussion. We hope that you will join in the discussion as the panel is finished.

The procedure we've adopted is that each of the panelists will speak approximately for 15 to 20 minutes. There may be some questions in the interestices and then we'll leave half an hour or so, at the end for questions from the audience and among the panel.

I'm sorry, we're going to have a little introduction by me which I forgot . . . my little introductory remark.

It was only in 1966, you'll recall, that the *Grinnell* case was decided by the Supreme Court, and I'm going to read one quote from that decision in order to start the discussion today, and then give you a series of catch words which I hope you'll keep in mind as the discussion proceeds. That should be a useful way of trying to determine whether one can parse through the cases that have been decided under Section 2 and make some sense of them.

If you recall, the Supreme Court in *Grinnell* defined the offense of monopoly under Section 2 as "the possession of monopoly power in a relevant market and" . . . and here will be our focus today . . . "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Since *Grinnell* (and indeed prior to *Grinnell*) other cases have characterized monopolistic conduct as, and I quote . . . "predatory"; "not honestly industrial"; "unnecessarily exclusionary"; "unreasonable"; "abusive"; "smothering"; and "exclusionary." The effort that has been made by the courts over the years is to give some substance to those terms. What we're going to try to discover today is whether there have been any changes other than in language, and if so, how significant arė they and will the pendulum start swinging back at some point in time.

Our first speaker today is Dan Levitt. Dan is a partner in the Kramer Levin firm here in New York. He's a 1964 graduate of the Harvard Law School. He clerked for Judge Weinfeld here in the Southern District and for Justices Fortas and Goldberg on the United States Supreme Court. He has been an adjunct professor at Georgetown University Law Center. He has worked with Professor Posner on a series of seminars on the *IBM* and *AT&T* cases (which I have the feeling we may hear about today). He has been involved in a series of important antitrust litigations, including the Urnaium Cartel litigation recently settled in Chicago.

Dan is going to speak to us today on the subject of new technology innovation in Section 2.

MR. DANIEL P. LEVITT: Good afternoon. I think *Grinnell* is a pretty good place to start because I think that's where I started my career in antitrust. I wrote the first draft of the dissent in *Grinnell*, but the majority opinion so angered Abe Fortes that he took my draft and threw it away and wrote his own dissent which was a lot better.

Before *Grinnell* got to the Supreme Court, in a colloquy in the district court in Boston, Judge Wyzanski defined antitrust law as trying to predict how far to the left nine old men moving to the left would move. Of course, he was talking about the Warren court led by Black and Douglas. We've come a long way since then and for a variety of reasons. Right now, it's much more difficult than it was then to try to predict where the law is going. But I think we have had some clarification in the last couple of years, particularly with respect to Section 2.

First of all, I think we're beginning to learn of the uselessness of the monster Section 2 cases. They are sort of like the dinosaur. That is, too big to survive.

In the Uranium case that Alan and I were in, some of the defendants created such a discovery program that it brought their own clients to their knees. The plaintiffs in these Section 2 cases have also created a monster which makes the cases almost impossible to see through to completion. I think it's first because the United States isn't up to it. The government almost by definition doesn't have the staying power to stay with litigation brought shortly after the Civil War and to be completed in the 21st century.

The government was worn down by IBM and it was "snookered" by AT&T. Apart from that, I'm not sure that the results in those two cases tell us very much.

Secondly, there's a question whether these decade-long litigations are very effective in litigating Section 2 issues which tend to go toward shaping the economy. By the time you get halfway through the case, the economy or the economic situation which led to the case hardly exists any more, and high technology industries have vastly changed, almost every year. Increasingly the cases become rather obsolete vehicles for accomplishing any purpose.

Apart from our learning about the uselessness of these big cases, I think that we have seen a trend toward liberation of the dominant firm. There was a time when firms who thought they were candidates to be classified as "monopolists" labored under the impression that if they did anything other than have their success thrust upon them, they were in trouble. Large dominant firms, dominant in their industries, were greatly worried. They were certainly afraid of litigation over steps they might take to compete vigorously and aggressively on the merits, out of fear that they would be sued by the government or a competitor and that a court would regard aggressive conduct as a violation of Justice Hand's dictum that success has to be thrust upon you.

There are developments which have tended to liberate those firms. First is the virtual withdrawal of the United States. That's one of my readings of IBM and AT&T. I see they've just closed the LA antitrust division office. The FTC, I gather, is essentially moribund. Certainly that has to be a liberating factor.

However, there are trends in the cases as well which suggests that the Alcoa shadow isn't quite so complete and there may now be room for dominant firms to act rather aggressively. That's basically what I'm going to talk about today, at least in the area of high technology.

As a background to that discussion, we have a conflict between economists and lawyers. It's probably always been true in the antitrust area. Lawyers tend to have one approach and economists another. This panel is going to reflect that division. We see it in Professor Baxter at the Antitrust Division, in Professor Posner going onto the Seventh Circuit, Professor Bork on the DC Circuit . . . the economic point of view. I suppose one explanation of that is that economists, having failed in such areas as inflation and unemployment and foreign trade, they have fastened upon us lawyers as not knowing any better. We're willing to turn over our business to them. As we discuss the two cases that I'm going to discuss, which are the *Berkey-Kodak* case and the *SCM-Xerox* case, we'll see that conflict between the approach of economists and the approach of lawyers. Those two cases tell us something about the extent to which dominant firms may be freer than they were in the past to compete, or to do more than compete.

Let's talk about *SCM* first because it's an easier case, at least with an easier opinion, although it took twice as long to try. By the time the *SCM* case got through the Second Circuit, there was essentially, for our purpose, one issue left. It was a patent issue. Does a company which acquires an important patent before the relevant market is created, have the right to exercise all the powers of an ordinary patentee . . . such as excluding competitors, refusing to license, and so on?

SCM's position was that Xerox, at least by 1956, had acquired an impregnable patent position which led 12 or 13 years later to a monopoly position in a particular market . . . convenience office copiers using either coated or plain paper. You recall that Chester Carlson had invented the Xerox process back in 1940. He made an arrangement with the Batelle

Institute to develop those patents. Batelle licensed Xerox in a series of agreements. Finally by 1956, Xerox had gathered total control of those patents. Those patents, absent intervention of the antitrust laws, would give Xerox a monopoly on at least plain paper copiers through about 1987 . . . more than a 40 year potential monopoly. That monopoly was, in fact, broken when the FTC stirred into life and induced Xerox to sign a consent decree to license others in about 1970. But there was a period, certainly 1960 to 1970, when Xerox had a monopoly based upon these patent arrangements that were some years earlier.

SCM sued Xerox, claiming that they had been excluded by Xerox's decision not to license competitors. It claimed that Xerox had acquired more patents than it needed, that it acquired more rights than it needed, that it extinguished Batelle's ability to sublicense, and that it acted like a monopolist. Lo and behold, when it actually had monopoly power, it should have been required to stop acting like a monopolist and to license competitors.

There was a trial of over 200 days in Connecticut. The jury deliberated 38 days on that and some other issues, and the jury ultimately found in favor of SCM with a very substantial verdict against Xerox.

The Second Circuit has now spoken on that case and upheld Xerox's position, which is essentially that, if you acquire your patent before you develop monopoly power, even if the monopoly power is foreseeable, you're entitled to the temporary monopoly that the patent laws grant. Where there's a clash between the antitrust laws and the patent laws and the acquisition of the patents precedes the monopoly power, you can act like any ordinary patentee without regard to the impact upon competition. The Second Circuit agreed, and the issue is now before the Supreme Court of the United States. SCM has sought review. The United States government has been asked for its views, and the Supreme Court has not yet decided whether to take the case.

Trying to guess what the Supreme Court will do on a cert petition is always difficult if not impossible. The brief in opposition filed by the lawyers for Xerox was a masterful job of trying to narrow this case to its particular facts, pointing out that Xerox had acquired these rights before it had developed the product, that it had acquired them from a non-commercial institution, that it had tried to peddle those rights to everybody under the sun including IBM. Nobody wanted the rights, and when it was shut out by everybody, Xerox sat down and developed the 914 copier itself and became a monopolist. It argues that those facts are so unique and so special that the court doesn't have to deal with the general question of the relationship between the antitrust and patent laws.

How that gets resolved will be very important if you're sufficiently fortunate to acquire patent rights that will give you a monopoly before the product market is in existence.

The most interesting thing about the Second Circuit opinion is that, in resolving the conflict between antitrust and patent laws, it in effect puts ordinary antitrust notions on the shelf. The Court said it didn't matter that the monopoly was foreseeable when Xerox acquired its rights. It didn't matter that it acquired a lot more than it needed to do. It acquired the patents. There wasn't then a relevant market in which it had a dominant position, and that was the end of the antitrust inquiry.

My own view is, if the court takes that case, that position is pretty questionable. It certainly won't stand up in that form. All we can do is guess at that point.

A much more interesting and useful case with many more pregnant questions is Berkey-Kodak. Berkey was a small manufacturer of still cameras through the Keystone line, and a large photo finisher which competed in a variety of ways with Kodak but which also used Kodak as a major supplier of film and photo finishing equipment.

Berkey brought suit challenging the way in which Kodak had introduced two related products. They were the Instamatic camera which was a miniature camera compared to the cameras then on the market, and Kodacolor II which was arguably an improved color print that initially was produced only for use in this camera but which since had become a staple for all amateur photographers.

The Berkey position at trial — and that trial took over a half a year before Judge Frankel — was that Kodak had not merely sat back and enjoyed the benefits of its superior products, had not had greatness thrust upon it, but had done everything possible to maximize its success in the marketplace.

First of all, it kept secret what it was going to do. Even though there were other people who were going to make film for that camera and who would need photo-finishing equipment to service the camera and who might want to build cameras to use the new film, they were left at the starting gate. It took a long time to catch up with Kodak in terms of having the equipment available to make use of these two developments.

Secondly, Berkey argued that Kodak had deliberately tailored these two products together. They had used their monopoly or near monopoly in the film market to gain an advantage in cameras. By introducing the film and the camera together, Kodak intended that anyone who wanted to use the film had to buy the camera. If you wanted to use that size camera, you had to buy the film, and if you wanted to process the film from that camera, at least in the begining, you had to buy the chemicals from Kodak because it wouldn't disclose what those chemicals consisted of, and you at least initially had to get the equipment from Kodak. Kodak used its leverage in five different markets in an integrated way to maximize its benefits. The SCM view was that, because of its monopoly position in several of those markets, Kodak had an obligation not to take giant steps, but to do some rather unusual things like:

One, predisclosing what it was about to do. The Berkey position was that Kodak should have told its competitors, "we're coming out with a new camera and this is what it is. We're coming out with a new film. Here is what it is. These are the chemicals you'll need to process it. This is the equipment you'll need. We're giving you six months or a year's lead time so when we come out with these products, you will be equal with us in competing to exploit those products." Berkey argued that when Kodak made the contrary decisions not to predisclose and to combine its efforts that way, Kodak personnel had created documents which showed that they knew the impact upon Kodak's competitors. They knew this would raise hell in the photo finishing industry, that it would drive some of their competitors to the wall, and that they didn't have to do it this particular way.

You had a typical antitrust trial in which all these nasty writings were, one, produced by Kodak and introduced to the jury which obviously concluded that Kodak were not very nice people, and you had a large verdict in favor of Kodak. The jury's verdict was partly revised by Judge Frankel, and then it came to the Second Circuit.

The Second Circuit, in a long opinion by Judge Kaufmann, makes some things clear, at least to the extent that Kodak is the law. Because the case has been settled, we're not going to have an appeal. It's the decision of the Second Circuit which is going to have some consequences, whether or not it's ultimately right.

If we take the opinion at face value, we now know some things that, we didn't know before. We also know some areas that remain unclear. What seems to me clear is that although there are some individual areas in which the dominant firm now has some guidance, it remains true that in a number of contexts trial of these issues will remain questions of intent and motivation in which all of the nasty writings of defendants will be brought to the attention of the juries and the juries will really be asked to decide who are the good guys and who are the bad guys.

Let's look at what were some of the things actually decided in Kodak and what are some of the issues left open. First, we have a reaffirmation of the notion that despite some language in other opinions that monopolies as such are bad, you still have to show anti-competitive contact, particularly if you're seeking damages.

Secondly, we learn, if you believe Judge Kaufmann, that a firm that is dominant in its market is entitled to the advantages that it may obtain from lead time. There's no automatic obligation to assist your competitors, no matter how little they are, to catch up with you at the starting gate. You're entitled, as an inducement to innovate, to take advantage of your lead time in developing your products secretely even though you're a monopolist or a near-monopolist in your market.

Secondly, you're not only entitled to the benefits of lead time, but you also are entitled to the benefits of integration. It's a happy coincidence, said Judge Kaufmann, for Kodak that it had a foot in five different markets which were inter-related. Kodak had no obligation to say that because it has virtual monopoly power in a certain film market that, it can't use that advantage to sell more cameras by marketing the two products together.

There had been a notion in some of the cases that a monopolist who steps on its competitors had better show the necessity for doing so. That it was necessary for Kodak, for example, to show that it had to market this film at this time, or that it had to make it available in the format needed for this particular camera, or that it had to market this camera at this time. Judge Kaufmann rejected that position, saying that necessity is a slippery concept and courts shouldn't get into the business of deciding what is necessary as a business matter. The market can decide what's necessary. If a product succeeds, it must have been necessary. If a product fails, that's not going to raise an antitrust problem. but judges and juries shouldn't second guess a businessman who is trying to time his market conduct.

The court had before it, arguments that Kodacolor II was at least, initially, an inferior film to its predecessor product, KodaColor X, and that the product was rushed to development under a crash program because Kodak wanted to take advantage of its market power. The Court shrugged its shoulders at that and said, well, who knows what's a good product or a bad product. Camera enthusiasts may have all kinds of taste . . . maybe somebody wanted an inferior film. Let's not second guess the market.

There was also a notion in some of the cases that the monopolist must show a benefit to consumers. That went the same way as necessity. The Court suggested that what benefits consumers is hereby a matter of preference and taste. People who want a shoddy product ought to have it available to them. Courts shouldn't function as a kind of Consumers Union determining whether a monopolist has made a net contribution to humankind by introducing a product which happens to squash its competitors.

There are caveats which we'll talk about, but there is certainly support in the Kodak opinion for the view that a monopolist or a dominant firm doesn't have to attempt in advance to decide whether its product is going to benefit consumers or whether it's conduct can be justified on the basis of necessity.

Next, the court indicated that even a monopolist or a dominant firm can use some pretty hard marketing. There were many antitrust lawyers who thought that, when you represent a monopolist or a dominent firm, you had better make sure that it behaves itself because any slip would suggest that its greatness had not been thrust upon it.

In the Kodak case there was evidence that Kodacolor II film and the camera had a serious problem with red eye. When used with a flashbulb, the film was particularly susceptible to showing the person whose photograph was being taken as being a red eyed zombie. At the news conference where Kodak introduced the product, it created enough ambient light to disguise that particular feature. Moreover, the package of the film rather substantially exaggerated the product's shelflife. I think some lawyers before this opinion might have been concerned that those would have been fatal steps for a monopolist who was supposed to be more careful than Caesar's wife. Judge Kaufmann's answer to that is well the Sherman Act is no panacea for all the evils of business life. If somebody misrepresents, there's another law dealing with that. It shouldn't be a function of the Sherman Act to police all conduct by a monopolist.

Finally, and I think this is the last comfort that dominant firms and monopolists get from Kodak, and I hope all of you who represent dominant firms and monopolists, is that it doesn't matter really whether there is evidence in the record to show that you knew or should have foreseen that your steps would squash competitors to the wall. If you're entitled to do the things which are "necessary" as an incentive to innovation, you are entitled to do them even though they may have some baleful consequences.

That does not, of course, declare a complete holiday from Section 2. The opinion also makes clear that, despite all of those clarities, there remains much to litigate when a company tries to take advantage of those opportunities.

First, the opinion reiterates all of the cliches about what a monopolist can't do. It can't use power in one market as leverage in the second. Now Kodak seems to have done just that. But the Court's answer is, well, plaintiff didn't prove that anyone was coerced into buying a camera because he wanted a chance to use KodaColor II film which he heard was a terrific product. After all, Kodak didn't over-market KodaColor II film. It sort of marketed the two together. Kodak didn't really go "too far" in trying to exploit its market advantage in the one market to the advantage of the other.

Plaintiff must show coercion or actual injury. This suggests that those issues are still available to be litigated. So even when you have chosen to use your advantage in one market rather than another, you can expect that the next plaintiff will try a lot harder to show either coercion or actual injury.

Second, the court indicated, despite the rather blank check it gave Kodak in the way in which it introduced its products, that it was not saying that a monopolist or dominant firm is free of "all" limitations upon the way in which it introduces new products. It said, however, that mere introduction of a new product or a new technology by itself isn't enough. There's going to have to be some associated conduct or misconduct that would constitute the violation. There's reference to the *Memorex* case for that proposition.

It suggested, for example, that if you are deliberately building technological incompatibilities into your product that might create a problem. The court emphasized, the fact that although Kodak had come up with a new camera and a new film, that didn't prevent anyone else from marketing the film for that camera or from building a camera to use the new film. All that Kodak gained was a temporary lead in the marketplace, and it continued to market film for the old cameras. Nobody, therefore, could say that its equipment or film was now no longer usable. One could read into the opinion the fact that if Kodak, after coming out with the 110 camera, the Instamatic, had said we are no longer manufacturing film for the old 126, this might have been a step which would have been a violation of its power to introduce a new product. But Kodak didn't do that.

The court also indicated that there might be situations in which it would require predisclosure, although a plaintiff would have an extraordinary burden of showing such circumstances. And the court has suggested that predisclosure requirements to competitors as to what you are going to do might make more sense in a case dealing with prospective injunctive relief, once it has already found a violation, than in looking retrospectively at past conduct and assessing either monetary damages or criminal penalties. Remember violation of Section 2 is a felony.

So maybe we have one rule dealing with equitable relief and a second dealing with damages or criminal remedies.

The court, in passing, noted that it may well be that a proper plaintiff could have faulted Kodak under Section 2 for not making film for all available cameras. For example, Kodak has never made a film that might be used in the little Minox camera. But Berkey had no standing to assert that claim. It just wasn't in the position to do that. That leaves open the possibility in the Second Circuit's mind that a monopolist might have an obligation not to refuse to deal with competitors but to make products for them if it has sufficient market power.

Finally, although the court shrugged off the business of the ambient light at the news conference and the misleading information about shelf-life, probably on the grounds the harm was *de minimus*, and suggested that the Sherman Act isn't a cure for all problems, it did indicate that where there was actual deception . . . and I don't know what they thought that was . . . then maybe a monopolist would have more trouble.

So there we are. Certainly a dominant firm gets some comfort out of the general thrust of both of those cases which seem to place a premium on allowing sufficient incentive for innovation. Perhaps the court is looking at Japan or the Germans, although there were no references to that kind of competition hovering over the markets in these cases.

On the other hand, in neither opinion was there any effort to quantify how much incentive a monopolist does need to develop a new product. Would Xerox, for example, have not developed the 914 if it thought it might have to sublicense? Would Kodak not have come out with the 110 and KodaColor II if it had had to disclose some months ahead what it was going to do? There was an assumption that innovation requires incentives, and therefore, Katy bar the door.

I don't think the Court rules out that kind of inquiry. The records in those cases may not have permitted those judgments, or the court may not have had the stomach to reach them. So, I think the dominant firms have been given a license to be more aggressive. And we lawyers have been given a license to help litigate whether they've transcended the limits — which seems to be the best of all possible worlds. Thank you.

(Applause)

MR. WEINSCHEL: Thank you, Dan. I'm going to take the liberty, since I am the moderator, to put a couple of questions to you now and ask that if any other panelist has a view to feel free to jump in. I'm also sure that Mark Leddy may wish to present his views about whether the government is still in existence with respect to Section 2 of the Sherman Act, and I have a feeling that Mark's view is modestly different than Dan's.

MR. LEVITT: Is it true they're transferring the Antitrust Division to the States?

(Laughter)

MR. WEINSCHEL: I heard there was going to be an even swap, but for what I don't know.

MR. LEVITT: The best place to transfer to is New York, that's for sure.

MR. WEINSCHEL: Two questions, Dan. Actually, there are several sub-parts. First is the issue of the incentive to innovate. Isn't there a policy expressed in the patent law that encourages a monopoly in effect by giving the patentee an 18 year monopoly, and isn't there a general rule under the patent law that provides that a patentee has no obligation to license that patent to anyone but can retain the fruits of the invention for itself? The question is how do you reconcile that policy with your view that perhaps there should be an inquiry devoted to drawing a line with respect to how much incentive is needed. Hasn't Congress already established that line, at least in part?

Second, how critical was it in *SCM-Xerox* that the market for copiers didn't exist at the time that Xerox acquired the Carlson patents from the Battelle Institute? Would it have made a difference if the market had just started? Would it have made a difference if the market had been in existence for five years, for ten years? In other words, is the acquisition of patents different than the development of patents internally and is there a time frame that should be applied?

MR. LEVITT: Let me start with the second. I think the courts stated and the parties assumed in *SCM* versus *Xerox* that if Xerox had had a position in a relevant market and then went out and acquired patents which gave it a monopoly or a really dominant position, that would be like the acquisition of any other assets. There is ample authority to suggest that a monopolist or dominant firm, or even a firm which wishes to acquire a monopoly, if it goes out and acquires a patent form of asset, it is no different than other kinds of assets and you apply the same kinds of standards to determine the lawfulness of that acquisition.

The court avoided that problem by saying that we don't really have to deal with those cases. We don't have to deal with the problem of what an entrenched monopolist can do because here, when Xerox acquired those patent rights, the market didn't exist at all. That was central to the decision and that's how the case is being presented to the Supreme Court. SCM is arguing that, in effect, the court's decision creates an immunity from the antitrust laws where the relevant market had not yet come into existence — even where it is foreseeable. Here there was a jury finding that monopoly power in a revelant market was foreseeable when the assets were acquired.

So the way the case was decided, everything turns on that. That may not be a rational distinction. But it was central to the decision. That leads me to your first question, which was the way the court balanced the theories. The court said in *SCM* that there is obviously a clash between the theory behind the antitrust laws, which perfers competition, to the theory behind the patent laws which grants a temporary monopoly. There's a lot of law about how you balance those interests, and it's an evolving law which certainly isn't fixed. The court said . . . and I'm not sure why it follows . . . that where the relevant market has not yet come into existence, you therefore balance everything in favor of the patent law, and we ignore the antitrust laws and allow the patentee to function as though the antitrust laws did not exist. He can do anything that any other patentee can do as a matter of patent law. You push the antitrust laws aside.

SMC tried to overcome that, by the way, by arguing that this might be OK if the patentee himself was exercising the patent, but you should take a different approach where the patent's been assigned. Here it wasn't Chester Carlton who was doing it. It was Batelle and then Xerox. I think the court adequately answered that by saying that this would make it a matter of chance whether the original patentee happened to have the resource to exploit the patent or whether he didn't and that's generally been a notion which hasn't been accepted.

MR. WEINSCHEL: I would suggest that when there is an acquisition of patents as opposed to development, that one might want to look to the purpose of the acquisition and see whether the patents being acquired related in some way to innovation that was ongoing within the company and fit in with an existing program, (for example, the patents may have been blocking patents) or whether the purpose of the acquisition of the patents was explicitly to deter or prevent someone else from entering the marketplace. That leads to one of the suggestions that you made, Dan, and that is that one of the inquiries that the courts make is who is the "good guy", and that means an inquiry into the purpose. In that regard, it's sometimes been asked whether the antitrust laws were designed to punish evil thoughts.

Our next speaker, John Carney is going to talk on attempts to monopolize the issue of intent a subject which is very relevant.

John is a 1964 graduate of Harvard Law School. John clerked for Judge Danaher in the District of Columbia Circuit after law school. He's been an adjunct professor of law at Rutgers Law School and he is currently a partner at Schreiber, Klink, Schreiber, Lehnardt & Carney, handling antitrust, securities, and other types of litigation.

MR. JOHN F. CARNEY: I'm not going to be talking today about evil thoughts. I'm going to be talking about attempts to monopolize, an area of the law that I believe is hopelessly confused at least insofar as what the courts say. I believe what the courts actually do, the results reached in cases, is somewhat more understandable.

I'm going to suggest an analytical framework that will help in predicting who wins or who loses, putting aside the theory. The same analytical framework I would urge should be adopted by the courts so one can understand what they really do rather than the language that cloaks their opinions.

Right before Alan had asked me in the fall to be on this panel, into my office came a man we'll call a Mr. Kim who explained to me that he had a patent fraud antitrust case. He said that he had the case clearly won already because the judge in the patent litigation had said not only was the p atent fraudulently procured, but that untrue and misleading statements were made before him and that's why he issued a preliminary injunction against Mr. Kim at an early stage of the litigation. Unfortunately, for Mr. Kim that preliminary injunction combined with certain threats to his customers knocked him completely out of the business.

Mr. Kim explained a little bit about his business. Let us say the product was an annihilator mousetrap and it competes with the regular spring-loaded choke them to death type. He explained that he did testify how he was trying to expand in that market and was meeting with some success until this suit was brought against him that knocked him out. I asked him: what's wrong with your lawyer that you have now. I said he seemed to have done a great job. He said he's bringing up a lot of problems with the counter-claim that had been split off. I asked what sort of problems is he bringing up? Mr. Kim said that his lawyer claims he must prove a number of elements. First of all, we have to prove damages in the amount we've been injured which is pretty difficult because we've been out of the business now for four years while this patent litigation was going on.

In addition to proving damages we must prove the traditional elements of an attempt case.

First, there's exclusionary or predatory conduct. Second there must be a specific intent to monopolize or restrain trade . . . Third there has to be proof of a relevant market and, fourth, a dangerous probability of success. Following are my conclusions of the importance of the elements in Mr. Kim's case.

First of all, specific intent was not a problem at all. Specific intent is not subjective intent and as the Second Circuit recently said the proof of unlawful conduct may be used to infer specific intent and even more specifically, a finder of fact must be allowed to infer specific intent from the anti-competitive practices.

Relevant market I believe was the critical issue, and a very difficult issue for Mr. Kim. In Mr. Kim's case it may very well bar recovery as in many other cases. The thesis I will advance today is that in many cases, there should not be a need to prove relevant market or dangerous probability of success.

I believe that conduct subject to attack as an attempt under Section 2 fits into two classes. First we have foul, pernicious, anti-competitive conduct, and Second merely exclusionary conduct.

What's foul, pernicious conduct? Well, some examples would be fraud on the Patent Office, specious litigation, maybe certain sorts of refusals to deal, and burning out a competitor. Perhaps even low cost pricing if it's below an objective standard such as marginal cost or average variable cost. A simple definition would be that the conduct in the foul and pernicious category is conduct that's designed to destroy or severely inhibit the ability to compete and has no realistic possibility of being pro-competitive, regardless of the market power of the participant.

On the other hand, what I call "merely exclusionary" conduct, is conduct that may be honestly industrial when engaged in by a firm without market power but may be anti-competitive when engaged in by a firm with great market power. Perhaps certain exclusive dealing arrangements is the best current example of such conduct. I'm not quite sure after hearing Dan Levitt whether innovation fits into the category that could be merely exclusionary to any situation but I'll leave that issue.

It's certainly not what I call conduct that fits into the foul or pernicious category. Am I suggesting something entirely novel? I thought perhaps I was when I first thought about it but I'm not. Betty Bock, the economist from the Conference Board said, John, you're saying nothing than what economists said in the literature of the 1950's. I also took a look at what some of the cases had to say and what results they reached. The cases do not address the issue under the attempt rubric but often consider it the conduct under conspiracy rationale.

For example, we're all familiar with the footnote in *Albercht V. Herald* where virtually any conspiracy will do. You will recall that that was a case where a newspaper carrier was terminated by the newspaper for failing to comply with a resale price maintenance scheme. That is a maximum resale price maintenance scheme.

The Supreme Court held that a conspiracy between the agent of the newspaper who solicited the terminated carrier's customer was sufficient plurality of actions. The court went on in footnote 6 to say that a conspiracy between the suing carrier and the newspaper might have been sufficient as would a conspiracy between the newspaper and those carriers that went along with the scheme. It even suggested that it wouldn't be friviolous to argue that the customers who bought the newspapers and the newspapers could constitute a combination.

Under this reasoning one could come up with a conspiracy in virtually every situation if you're extensive enough. Let me focus a little bit on a very recent case, the Vietnamese Fishing Association case. That was a case where a number of Ku Klux Klan fishermen got together and committed a number of acts against certain Vietnamese fishermen including burning their boats. The court found that this combination would be a violation of Section 1 of the Sherman Act because it was knocking out their competitor. But when faced with the Section 2 count, the court said there is no Section 2 count because the plaintiffs had not proved a relevant market or dangerous probability of success.

Now, notice I'm talking about the results of the court's reach. The court did find liability there but under Section 1 of the Sherman Act. The case went ahead for treble damages but the court said it's not a Section 2 case. Let us suppose that the facts were slightly different. Rather than three fishermen that owned three boats getting together to knock out this Vietnamese fisherman and let's assume there's 20 or 30 boats in the area and there was one guy that owned three boats. Should we say that because one man with three boats burned out the Vietnamese competition he does not have antitrust redress but he does have if it was 3 boat owners burning one out. Can that be in any way squared with antitrust policy if the first case is right? I submit not.

There's another technique of getting around the relevant market hurdle. This is the narrow market definition technique. There's one case that is entitled *Kearney & Trecker versus Cincinnati Milicron.* There the court found the relevant market was multi-function machine tools with automatic changers. Even that style of words seems to fit exactly what Judge Fortes calls the "one eyed red haired man with the limp" characterization of markets. The court in *Kearney* and *Trecker* also said we find the monopoly and the market defined by the broad claims of the patent at issue.

Now, would that narrow marked definition make any sense if it was a price cutting case? Let us assume that the annihilator mousetrap man was conscious and aware that he might squash his competitor by lowering his prices but he wanted to get a bigger share of the spring actuated mousetrap market. Would we have defined the market in such narrow terms? Of course we wouldn't. Does Walker Process mean that the courts cannot accept what some called a limited *per se* rule in the attempt to monopolize area?

The language that is quoted most often from Walker Process is once there's a fraudulent procurement of a patent, it's "necessary to appraise the exclusionary power of the illegal patent claims in terms of the relevant product market involved." The Court did not, however, reject the *per se* rule. The court had the case on a motion to dismiss. With regard to a limited *per se* rule it said, and I again quote . . . "In these circumstances the issue is premature. We're reluctant on the bar pleadings to expand this issue."

What do the scholars say on this point? Professor Turner speaking at the ABA Annual Spring Meeting in 1980 explicitly addressed the question of fraud on the Patent Office. He addressed himself to a situation where you are "considering some plainly agregious conduct, like fraudulent procurement of a patent and the antitrust claim is presented against the patentee either by a suit initiated or as a defense to a suit for patent infringement. Assuming it were shown the patent was invalid and specious lawsuits were initiated," he concludes and I quote. "I do not think you would really want to spend a lot of time in a case like that defining the market to see whether it fits in this market or that market. In fact, I would treat it virtually *per se*."

Professor Sullivan does not accept my foul and pernicious conduct and merely exclusionary dichotomy, but he does say that we should not consider a "relevant market or any other concept of theoretical economics as a sacred cow." He urges that there be a much lesser relevant market standard for single firm practices which . . . and here's his words . . . "are plainly exclusionary, in essence single firm restraints of trade." Professor Areeda in his treatise argues for what he calls "a limited *per se* rule." By this he means that there should be no need for proof in a relevant market and dangerous probability of success therein for the same types of conduct that I have called foul and pernicious.

What are the advantages of this rule? First of all it eliminates pleading traps. In my annihilator mousetrap case the reason why conspiracy was not alleged at the beginning of this litigation was because Mr. Kim didn't want to offend his customers by saying that they might be co-conspirators.

Do those pleading traps serve any purpose? No, they don't. Getting strained conspiracies leads to great problems. For example, in the low price case would it make any sense at all to postulate a theory of conspiracy between the competitor that charged the low price and the recipient of that low price? I suggest not.

On this conspiracy point let me also refresh your recollection about the intra-corporate conspiracy doctrine. That doctrine engendered confusion and base lawsuits because two companies under common control were accused of engaging in conduct that if engaged in by independent companies might very well constitute an actionable conspiracy. The rule for which I contend would also reduce the cost and expenses of litigation.

Finally, I believe it is important to sharply distinguish between the two classes of conduct so that pro-competitive conduct by those with small market shares is not chilled by a fear of narrow markets being defined or strained conspiracy found. Different market definition standards might be developed depending on the conduct under scrutiny.

(Applause)

MR. WEINSCHEL: John, I gather that you might be more comfortable in the Ninth Circuit. The Ninth Circuit's rule on attempts to monopolize since the *Lessig* and *Tidewater* case is that in the absence of proof of market power, to monopolize in order to sustain a charge of attempt under Section 2 the conduct at issue must be either . . . to use the words of some of the cases after *Lessig* . . . "clearly exclusionary" or involve some substantial restraint." Is that a fair restraint of your position? Is it close to the Ninth Circuit? Is there some differences?

MR. CARNEY: With regard to the Ninth Circuit, the only thing I can say is it's hopelessly confused. Although generally they do not require in attempt to monopolize cases proof of a relevant market ironically and what I consider the easiest type of case to show as being anti-competitive to wit fraudulent procurement of a patent and, a specious lawsuit based on that patent, they rely on *Walker Process* to say one must prove the relevant market and dangerous probability of success. I would rather not have the Ninth Circuit be my guiding light in this area.

(Laughter)

MR. WEINSCHEL: Let me ask you one more question. Your Vietnamese fishermen case is obviously an example of egregious conduct by any definition, but why do we need to clog the courts with antitrust actions when the conduct is of a kind that it could be attacked, for example, under a state criminal statute or would be a tort under state law when there is concern about the time and expenses involved in complex antitrust cases?

MR. CARNEY: Well, first of all, I think the question of whether there should be treble damage recovery in antitrust cases is fair ground for debate. I think, however, that the answer to the question can be found if we look at the reasons why there's a treble damage remedy in any antitrust case. As articulated by the court in *Brunswick*, the treble damage remedy serves a deterrent effect. It also recognizes the difficulty of recovery by permitting reasonable counsel fees and a deterrent effect is necessary because anticompetitive conduct not only harms the injured competitor but benefits the wrongdoer and harms the consumer.

What could be more detrimental to consumers than to have a rival completely knocked out of the market? If those two rivals got together and decided on the price, we would have no problem putting them in jail. If one knocks out the other which may even be considered more anti-competitive, treble damages under a federal standard is the appropriate remedy, provided however that the conduct is truly anti-competitive and without redeeming social virtue.

MR. WEINSCHEL: All right, I'm not sure I agree with everything, John, and I think we'll have some questions on this. (I would like to, if it's all right with you, I would like to hold the questions until the end so that we can get through the presentation).

Our next speaker is Howard Kitt. Howard is playing an unusual role today. He's pinch hitting for Dr. Joskow who unfortunately was unable to make it. Howard's brief flirtation with professional baseball was as a pitcher. so, he never pinch hit for anybody. But today, he's fully qualified. Howard is a Vice President of National Economic Research Associates. He has a Bachelor's Degree in Economics and is now pursuing a Ph.D. from Columbia University. He has specialized in antitrust matters for

NERA since 1970 and he's currently one of the economics editors of the *Antitrust Bulletin*. Howard is going to talk today on predatory pricing which is a most interesting topic. It's become more interesting since the famous article by Areeda & Turner, which has taken on life of its own. I serve on the editorial board of ABA Antitrust Developments. We have a general rule that we will only cite cases because secondary authorities are subject to subjective views of the authors, and should not be relied upon. We had to change that rule in rewriting the Section 2 chapter when it came to the Areeda-Turner article because it has become almost a precedent in and of itself with courts distinguishing it, following it, but finding it impossible to ignore it.

Howard is going to speak today on whether the marginal cost rule of Areeda-Turner ought to be conclusive, presumptive or something else in terms of the weight of evidence to be accorded to the relationship of price to cost. Please let's be fair to Howard. He is not an attorney but will be speaking from an economist's standpoint. We thought it would be useful for us to have a purely economic viewpoint on this matter and with that, Howard . . .

MR. HOWARD KITT: Let's see. I've so far been accused of being a failure, of pursuing a platonic ideal, and of being a lousy pinch hitter. I plead guilty to the third, certainly. The designated hitter rule was made with me in mind.

As Alan said, I thought that I would talk a bit about the Areeda-Turner rule from the point of view of an economist and, in particular, whether the Areeda-turner rule should be conclusive in judging predatory pricing cases. For reasons which I'll state later on, my conclusion is that it should not be conclusive; that it, as well as other cost-based tests, are elements that are important to look at in determining whether or not a price cut or a pricing strategy is predatory, but that other factors as well should be taken into account.

One caveat before going further. What I have to say is meant with an unregulated environment in mind. I'm really not talking about industries and firms which are subject to comprehensive administrative regulations. We're dealing with an unregulated firm now.

Let me begin by defining for my purposes what I will refer to as predatory pricing. A predatory pricing strategy is a strategy which contemplates a sacrifice in present profits with the expectation that those sacrifices will be more than recouped in the long run — primarily as a result of the suppression or limitation of competition. It's important to keep in mind that what I talking about is a long-run strategy, that is, a strategy which will take time to work itself out; which has the effect of eliminating competition; and which depends upon that elimination or that suppression for its effectiveness.

Now, the commentators, beginning with Areeda and Turner, have generally grouped themselves into two principal camps. The first; which is typified by the Areeda-Turner position, is that a predatory price should be evaluated by reference to a specific cost standard. In the *Areeda-Turner* case, that cost standard is short run marginal costs or, as a practical alternative, short run average variable costs. In the case of marginal costs we are talking about the costs associated with producing the last unit or the next unit. When we talk about average variable costs we're talking about, on average, the costs which vary with increased output.

According to Areeda and Turner, and forgive me, because I will simplify it greatly. It's a very complex and carefully reasoned argument, but reduced to its essence, their position is price cuts or pricing strategies which can be shown to result in prices which lie above average variable costs — which, to repeat, is their surrogate for marginal costs because they are generally easy to measure — will be judged non-predatory, without further analysis.

By the same token, prices which can be shown to fall below average variable costs will be judged predatory except in special circumstances —again, no further analysis need be undertaken. If I understand Areeda and Turner correctly the purpose for such rules is that to inject conjectural long run considerations is inherently a speculative and a difficult enterprise to become involved in. That the courts will find it difficult to make judgments about such things; that subjecting firms to a less precise standard will create substantial uncertainty and will discourage what would otherwise be legitimate competitive behavior for fear of being judged, after the fact in violation of the antitrust laws.

To use some economic jargon, what Areeda and Turner are apparently concerned with is minimizing what is called Type I error, the error of calling something something when in fact it isn't. In this instance it is judging a price to be predatory when in fact it is not. They are concerned with minimizing that. They are also concerned with efficiency objectives and they believe that a price which is above marginal cost will be an efficient price because it does not represent actual out-of-pocket losses. It may represent a loss minimizing position but it does not represent a conscious loss such that there would be no other motivation but the suppression of competition.

The other principal camp, I think, can be typified by an article written by Professors Paul Joskow and Al Klevorick. Their argument is that, since the essence of predatory pricing is long run recoupment, to abstract from the long run, to ignore it, runs the risk of missing the essence of a predatory pricing strategy. So what they have tried to do is to devise a two tier test, a two part test. the first part would include a structural analysis of the industry in which the alleged predatory pricing strategy was applied. If the analysis indicated that the industry was effectively competitive and that barriers to entry were relatively low, no further analysis would be required: Under such conditions a predatory pricing strategy would be irrational for a firm to undertake, simply because on the one hand to monopolize such an industry would be very difficult and on the other, attempts to recoup the sacrificed profits by raising price in the long run would be greeted by increasing entry or expansion of existing competitors.

So that assume we have a widget industry, a favorite example of economists, and assume we find that there are lots of firms producing widgets. There doesn't seem to be any strong brand identity. Entry seems to be relatively easy at all levels and we find two firms engaged in rough and tumble pricing which is very much the essence of market competition. It may well be that in the midst of a promotion, a firm may lower its price to a point where revenues are sacrificed. It may even be that such prices are lowered below some measure of marginal or average variable cost. The point is that it is unlikely that such a strategy would be predatory because it simply is inconceivable that the firm would be able to reap the benefits by achieving a monopoly position. So, if Areeda and Turner are right in their argument that predatory pricing episodes are rare in the economy, they will be rare because of the inability to recoup and, therefore, the first tier test will eliminate a goodly number of alleged predatory episodes.

For those industries that fail the first tier test, a second tier analysis would be undertaken and here would be involved a more extensive analysis of purpose, of behavioral objectives, and indeed of the relationship between prices and costs. According to Joskow and Klevorick, a price cut below average variable cost by a dominant firm like Areeda and Turner, would be presumed predatory unless the dominant firm could show that there were special circumstances that justified such a price cut. For a price cut between average variable and full costs, that is, both fixed and variable costs, more extensive analysis would have to be undertaken. This would be the one remaining gray area. A price cut below average full cost but above average variable cost could be predatory depending upon the circumstances and depending upon the position of the firm, the likelihood that the firm could recoup in the long run. Here an analysis of intent and purpose would be appropriate.

For price cuts which are above average full cost, such cuts would ordinarily be presumed non-predatory unless there seemed to be special circumstances; in particular, whether it seemed that it would be possible for a firm ultimately to increse its price as a result of the elimination of the competition. The firm could, however, show that such increases in price were justified by changes in costs or changes in demand.

So to summarize, within the Joskow-Klevorick framework, here we have a two tier test. The first would consist of a structural and behavioral analysis of the industry. Those industries which were found to be effectively competitive would be eliminated from further analysis and the price cuts would be deemed non-predatory. For those industries that fail, a more extensive analysis will be undertaken, using the relationship of prices to cost as one important indicator of the possibility that the price cuts could be predatory.

Now it seems to me from my reading of the cases that the recent decisions in the predatory pricing area have also tended to fall into two principal camps, roughly analogous to the ones that I've just described. On the *Areeda-Turner* side, on the marginal variable cost side, are decisions such as the Ninth Circuit's decision in Calcomp and Janich Brothers, and most recently, the Second Circuit's decision in Northeastern Telephone.

Here, if I understand their opinions correctly, the courts are concerned with making sure that we do not minimize effective competition by forcing firms to operate in an area of uncertainty and hence respond tentatively and cautiously to competitive opportunities. They are concerned that vigorous price competition be encouraged, even by dominant firms, and as a result, they've been more inclined to adopt an Areeda-Turner type position — to be sure with certain caveats depending upon the case examined.

The other camp, the camp which corresponds more closely to Joskow and Klevorick, are typified, I think, by the cases such as the Federal Trade Commission's decision in *Realemon* — in particular, then Commissioner Robert Pitofsky's concurring opinion — and the most recent Ninth Circuit decision in *Inglis-ITT/Continental*. Here the courts seem to have taken the position that a cost test is useful but it should be only one of a number of factors examined.

All this leads me to the ultimate question raised in my assigned topic: should the Areeda-Turner test be conclusive and if not, why not? As I indicated earlier, I do not think so. Let me suggest to you several reasons why reliance on a simple cost-based test can be misleading and certainly incomplete.

In the first instance, it ain't so simple. There are severe cost measurement difficulties once you move away from the relatively small, single-product firm. What costs are fixed and what costs are variable? That very often is a function of the length of the period of time you're looking at. Areeda and Turner speak of the short run. How long is a run? Is it a day? Is it a week? Is it a month? Is it a year? Over what period of time should we be examining costs and prices to determine whether the revenues received by virtue of the price cut are sufficient to cover costs.

Let me give you an example of a situation where it can be very difficult. Let's assume we have a multi-line firm selling a number of brands and a number of sizes of a given brand and let's assume that the firm cuts the price of a hot seller with the purpose of creating a loss leader, a traffic builder and let's suppose that that strategy is successful. That is, increased traffic is attracted and additional items of the firm's line of products are sold and the revenues obtained are substantial. Now, I think it is arguable that some portion of those revenues realized from the sale of related products should accrue to the price cut on the loss leader, and it may be that if you assign enough of those revenues you will find that the price cut is indeed compensatory. In other words, that the revenues received — both direct and indirect — are sufficient to cover costs. How much of those revenues do you assign? What period of time do you look at to estimate the magnitude of those revenues? I don't know the answer before the fact. I don't think that there is any one general rule that can be used indiscriminately. I think it's a question of looking at each industry separately.

Secondly, a point that I made before. The focusing on the short run, the Areeda-Turner test misses the essence of predatory pricing, i.e., the prospect of long run recoupment. In a recent article Professor Areeda indicated as much: He stated that in fact most commentators would agree that predatory pricing has as its aim long run monopoly or supra-competitive profits, and then goes on to argue however, that the long run is a difficult thing for courts to deal with. It's probably true. It is difficult. It's difficult for both courts and economists to deal with, but it seems to me that to trnucate the analysis such that the primary motivation is the thing left out is a very risky proposition.

Finally, I think it is important to consider the context. I think that it is important to consider the character of the practitioner as well as the character of the practice. Or to put it another way, it's difficult to evaluate the deed without evaluating the doer. I think it's important to know the nature of the industry in which the practice is taking place. I think it's important to know the character of the firm, how big the firm is.

As I understand both antitrust law and economics, we do this in other areas: When we evaluate mergers, we take a look at the identity and nature of the merging firms. We take a look at the industry in which the firms are merging. With respect to distributional arrangements under Clayton 3 or under Sherman 1, we allow some inquiry into the character of the firms and the structure of the affected markets and I think with respect to pricing strategies we ought to do the same. So that if someone were to tell me that what we have is a firm whose identity is unknown cutting its price and that price bears some relationship to cost and then I was asked if I could reach some conclusion about whether that price cut was predatory or not, I would have to answer that I don't have enough information. That, in effect, is the basis for my conclusion that, in and of itself, a cost-based test is a necessary but not sufficient test to determine the existence of predatory pricing. It should certainly be considered. It is certainly important. But other factors should be considered as well.

Thank you for your attention.

(Applause)

MR. WEINSCHEL: Thank you, Howard. We're going to run right into Mark Leddy without any comments because we want to save some time for the audience.

Mark is here on his own. His views are his own and not those of the Antitrust Division. At the same time, I'm sure we're very interested in hearing how Mark addresses some of the problems that the other panelists have addressed.

Mark is a 1971 graduate of the Boston College Law School. He joined the Antitrust Division's New York Field Office in 1972. In 1974 he moved to Washington to the Office of Operations. He became the Assistant Chief of the Special Trial Section in 1975, the Chief of the Special Litigation Section in 1977 and is currently Deputy Director of Operations of the Antitrust Division and, Mark, without further ado, the government always has the last word.

MR. MARK LEDDY: I had a prepared text but I see it's getting late and I'm sure you are going to want to ask questions. I'll just give a brief summary of the text, but before I do that, I would like to respond to Dan Levitt, at least in part.

I've only done a few of these panels. This is my third and it seems that the only thing consistent about them is that the government is always the target. The first one I did involved discussion of the application of the Sherman Act to professions right before the Supreme Court's decision in *Professional Engineers*. We were accused of radicalizing the antitrust laws, of wanting to destroy the professions through an application of the Sherman Act to the engineering profession and to the legal profession in the ABA case. I think professional engineers settled the issue without undue impact upon the professions.

The second panel I was on had to do with the *Gypsum* case. The first panelist said, "well it's about time that the government has to prove specific intent to prove a criminal violation of the antitrust laws." My argument then was that that was nonsense. That view has been vindicated because since then all of the decisions and most, maybe 90% of the jury instructions we've gotten in criminal cases have in effect said that with price fixing, the *Gypsum* intent inherent in the fact of price fixing and specific intent is not an issue.

Then today the first speaker, Dan Levitt, says the biggest divestiture in history, an $80 billion divestiture, precisely what the government sought in 7 years of litigation with AT&T, somehow resulted in us getting snookered. I would like Dan to tell me why or how, because I think it's a tremendous victory for the government.

But in any event, the government is an easy target and maybe that's a good thing.

My prepared text was really a summary of what I take to be the lessons of the recent events, *Berkey Photo, Northeastern Telephone, IBM* and *AT&T*. I think, first of all, they reflect a heightened awareness of the benefits of competition among big firms — the antitrust laws ought not put rocks in the saddle bags of the fastest horses, without compelling justification as the world shrinks and international competition becomes really the order of the day, and especially in high technology markets.

I think the second lesson is that Section 2 remains an important tool in the antitrust arsenal, that there is certain behavior that the Justice Department and the courts will consider unacceptable and intolerable and will hit people over the head for. I think, lastly, some of the dust has settled after ten years or so of a lot of debate and confusion and uncertainty about what Section 2 is all about. (I think that's consistent with what's happened in Section 7.) I think, *Berkey Photo* and, hopefully the *IBM* and *AT&T* events will add some more certainty to what the antitrust laws proscribe and what they don't.

Of all the antitrust statutes, Section 2, the monopolization part of it in any event, most clearly reflects the paradox of the antitrust laws. On the one hand, the antitrust laws are designed to maximize the competitive race and to award the winner. On the other hand, Section 2 says, and some of the language in the case law confirms that when you monopolize, you commit a crime. This paradox and this tension is reflected throughout the years of debate about what *Alcoa* means, about what Justice Hand meant when he said this or that, and what the *Griffith* case means, etc., Again, that's because of the basic tension that inheres in what we proscribe on the one hand and what we encourage on the other." I think the guiding principle of Section 2 is that you don't proscribe activities of a firm, large or small, that are directed at benefitting its customers even though it may, incidentally impact on the competition.

I think there are two broad categories of behavior that fall into that guiding principle. One is the so-called essential facility doctrine. I think that's what the *AT&T* case and what *Berkey Photo* were all about, when you boil them down. The other is the abuse of the regulatory process, which I think in some ways may overshadow the essential facility doctrine in the litigation of the 80's and maybe the 90's as the government becomes more important in terms of certification and licensing and the ability to do business overseas, whatever.

I think *AT&T* is basically an essential facility case. The theory of the case was that AT&T's ownership and control of the local operating companies enabled it to preserve monopoly power in the equipment market and in the inter-city telecommunications market. The only way this could be remedied simply was to get rid of the incentive to cross-subsidize discriminate, was divestiture of the local operating companies.

Another essential facility case that we're now litigating is *U.S. v. Kentucky Utilities*. It's really a much more straightforward example of the doctrine. Kentucky Utilities is a vertically integrated wholesaler of electric power in Kentucky. It refused to allow its voltage transmission lines to be used by a competitor to transmit power to retailers. You can't compete in the market for selling wholesale power to the city of Frankfort, Kentucky unless you can send power over KU's lines.

Now, in those two cases it's pretty clear what the essential facility is; on the one hand, interconnection to the local operating company and on the other the transmission lines. But litigation in this area is going to be all about what constitutes an essential facility. It's often a very difficult factual determination and the answer can even change over a time. The case involving RFK Stadium in the early 1960's out of the DC Circuit suggested that RFK Stadium in Washington was an essential facility for anyone wanting to compete in the business of professional football. Now, though there's a lot of talk in the Washington press that a new stadium will be built between Baltimore and Washington by some entrepreneurs. Now RFK doesn't appear as essential to competing in the market as it was in the early 60's. Again the question is wholly factual and most often a new difficult one.

I think *Berkey Photo* is also basically an essential facility case. Dan Levitt described what happened in the case very well. Kodak had a dominant position in the "essential facility" of film and information about film. Berkey said "I can't compete in the camera market unless I have that information, unless I know what film is going to be used by the dominant firm in its cameras. I have to have that information in order to compete. Otherwise, I'm going to be left at the starting gate."

As Dan also pointed out, though, there was a critical failure of proof, at least in Judge Kaufmann's mind, because Berkey was never able to show that their losses in the camera business and their exit from the camera business was directly attributable to their lack of access to KodaColor II. But at another place in the opinion, I think, Judge Kaufmann pretty clearly stated that if at some point Kodak had refused to supply film to Berkey it would have been a refusal to deal illegal under *Southern Photo v. Kodak*. So I think the case turns on a failure of proof, at least on that issue, and not upon a dramatic rewriting of S2 law.

The second category of conduct that I think falls into the broad principles I've described is the abuse of the regulatory process. There's a lot of government activity in the marketplace, as I'm sure you all know, a lot of licensing, certification, etc. When a firm, through frivolous litigation or false statements, in effect makes the government decision regarding, for example, entry, turn other than on the merits, I think Section 2 liability is appropriate. This is because the anti-competitive effect of the exclusion of entry is not a governmental decision made on the merits but is a result of the abuse of the regulatory process. A good example is the *Woods Exploration* case out of the Fifth Circuit. That involved a plaintiff who had a natural gas well in a field where others also owned wells. The state government said, well, the way we're going to regulate this is that you all are going to nominate how much you think your well can produce. The plaintiff's competitors got together and said let's all falsify the nominations so that the plaintiff over there will have his permissible extraction reduced. The plaintiff sued. There was apparently good evidence of falsification of nominations and the court said, look, it's one thing to go to the government and try to persuade it to do what you want it to do. That's a legitimate form of competition in effect, and has First Amendment protections. You're simply competing for a government monopoly or for a government license, but when you abuse that process by frivolous litigation or by false information, which results in delay of entry or other adverse consequence to competitors, you're in violation of Section 2.

I would like now to make one more response to Dan's remarks. There have been suggestions by former Attorney General Bell and a lot of others that Section 2 cases at least the big ones, don't belong in the courts. There isn't any question that the government's record in that regard as well as the courts' record and the private bar's record is spotty. But the best rebuttal to that argument is the *AT&T* case. It was handled fairly expeditiously. We had a very strong willed, strong minded judge, who was very well prepared. Discovery was expedited, at least over the past couple of years. The trial was handled I think expeditiously. Of course, the government was going very well and I think that's a large factor in the settlement. We got a very good opinion out of Judge Green on the motion to dismiss halfway through the trial.

AT&T is an example of a case of unparalleled complexity — the facts, the law, and the technology, and the relief gave everyone a lot of headaches for a lot of years. But the trial was handled very well. The Department of Justice is pleased with the result and I think that's the best rebuttal to the argument that litigators can't handle Section 2 cases. I think they can. I think there's a lot of lessons to be learned from IBM, and we made a lot of mistakes in AT&T as well. But I don't think it's an answer to the problems of just what's "bad" conduct and what isn't, to say, "well let's let Congress decide." I would think that is the last place people would want that determination to be made.

Finally, I don't think the government's withdrawn from the S2 game at all. For example, criminal sanctions are likely for behavior that excludes competition by abusing the regulatory process. We filed a criminal case several years back that involved such an abuse at the CAB (*U.S. v. Braniff*). It would simply be a mistake to advise your clients that the government is not in the S2 ball game anymore. Thank you.

(Applause)

MR. WEINSCHEL: We'll take questions now. I do ask that if you do have a question that you identify yourself so that for the record we have that information because these proceedings are being taped and will ultimately be published. Yes, sir . . .

MR. PHILLIP J. O'BRIAN, JR.: I would like to address one question to Mr. Kitt. To what extent if at all does the statement by Mr. Justice Douglas in the *Proctor & Gamble* case that 200 firms could be excluded from the market . . . could be applied to a Section 2 monopoly case.

MR. KITT: Well, I think it depends upon the position of those fringe firms. If what you are saying is that those fringe firms don't matter so far as their ability to exercise competitive constraints on the behavior of a firm, whether they are there or not, and similarly, to the extent that there are other firms that will constrain the firm's behavior, their pressence or elimination won't matter. So in terms of judging monopolization from the point of view of the ability of the firm to exercise monopoly power, as an economist I would not be concerned about their presence or absence.

MR. WEINSCHEL: If I can interject, there is another tension in the antitrust laws which we sometimes forget. There's been a lot of emphasis on economics recently. There are some populist notions behind the antitrust laws, whether we like it or not, which to some extent seek not only to preserve competition but, notwithstanding the language of the cases, also seek to preserve competitors in some circumstances. There is some value to preserving small competitors and resolving the tension between preserving the competitive process and the "unfairness," of, for example the "good" little competitor being squeezed out of a marketplace, by the "big bad" competitor. This is where juries most often will rummage around in documents and find what they consider to be anti-competitive intent and come to a verdict for the plaintiff, regardless of the economic niceties of the situation. This is simply a fact of life that all of us who practice antitrust law have to contend with.

MR. KITT: Alan, one point very quickly. I certainly would not suggest that a firm or any firm in the market should be permitted to do anything it wants with respect to those 200-odd fringe firms simple because they're fringe firms. I'm not suggesting that it's open season.

MR. O'BRIAN: No, I perhaps wasn't precise. I was thinking in terms of excluding the 200 firms in defining the market within which you can monopolize.

MR. KITT: I would think they certainly should be included and given an importance in proportion to their position in the market. I don't think they should be excluded.

MR. WEINSCHEL: We had a question in the back before. Yes, sir . . .

MR. JEFFREY KENT: My name is Jeffrey Kent from White Plains. (Audience participant not close enough to microphone to be heard.)

MR. CARNEY: I'm not quite sure if that was a question but if the question was would anybody think of bringing an antitrust suit alleging these facts, I would say yes. Indeed, the concern might even be the opposite. Maybe I was expanding the antitrust laws to cover every common law tort and I would limit my rule to those activities with significant anti-competitive effects on the very vitality of the rival, where his continued participation in the marketplace is being severely threatened. I would not take a case like disparagement of a competitor and elevate that into a limited *per se* rule. Indeed, I believe that some sort of disparagement of rival's products might very well be pro-competitive, but when one has egregious conduct, in some states one may very well get punitive damages; in other states they may not. In some states one may get recovery of attorney's fees. In other states not. But I believe our antitrust laws reflect a national policy that deserves a national standard with regard to conduct that deprives a competitor of a right to exist. For this type of conduct it should be treated as in the limited per se category, i.e. one need not prove a relevant market to prevail.

MR. WEINSCHEL: Other questions? Yes, sir . . . Would you identify yourself, please?

MR. JOHN DANIEL: John Daniel, New York. To the extent that abuse of the regulatory process, cases of that sort we'll be seeing as I see it it started off as a general document, very wide ranging and progressively . . . (not close enough to microphone to be heard) . . . What do you see the present status of the Noerr Pennington doctrine to be and do you see any analytic cases or the present status?

MR. WEINSCHEL: Are you asking me?

MR. DANIEL: Anyone on the panel.

MR. WEINSCHEL: I think we probably ought to ask Mark.

MR. LEDDY: I think the Noerr Pennington doctrine has a great deal of vitality. Courts have been very sympathetic to it and I think rightly so. They've said that in most areas. First Amendment rights predominate over questions of anti-competitive purpose or effect.

But, at the same time, because of the continued growth of the competition, there will be room for the expansion of the California Transport exception to the Noerr Pennington doctrine. Just what, as a factual matter, constitutes frivolous litigation or abuse of administrative process, is a complex, delicate issue.

MR. DANIEL: If I could just add . . . the principal problem I see is if there are no lines of analysis and let you prevail depending on summary judgment, you've got substantial losses, and you see language that at one time suggests that one lawsuit was not enough to constitute a sham litigation and now there's findings in the cases to suggest that it is and is there any line that could be crossed to allow you to prevail on summary judgment.

MR. WEINSCHEL: I think Dan would like to address this issue.

MR. LEVITT: It seems to me that Noerr Pennington has a constitutional base. But as competitors or anti-competitors keep evolving their strategies to accomplish what are arguably anti-competitive purposes, the courts are constantly going to have to carve exceptions. Within those exceptions we may get some clear lines. But since the practitioners continue to event new methods of abuse, I think we're going to constantly see a creation of new exceptions. I think the core of the Noerr Pennington doctrine will survive but there is no way to avoid the creation of a number of exceptions. Within some of those we may get some bright lines. But I think there will constantly be new exceptions for otherwise I don't see how you will possibly keep up with the abuses. This is one of those areas where if you create a bright line, someone will begin practising on the other side of it, and very creatively. It seems to me that you're not going to be able to live with too much certainty in this area.

MR. WEINSCHEL: There were questions in the back before. Sir . . .

MR. ROBERT GREENSTEIN: In view of the *Xerox* case and the *Kodak* case, do you feel that Xerox's new technology in any way legitimizes or enables . . . (not close enough to microphone to be heard).

MR. LEVITT: There is a fairly well established body of law that deals with abuse of a position which may be based on a patent. I think that there is a growing concern which has not yet been openly articulated in the courts that we may be applying our antitrust laws in a way which is anti-innovation and which is penalizing the country as a whole in a much more competitive environment. We must become more like Japan, and courts are therefore to some extent trying to pump more incentives into a patent. You may recall that there was a period when, even as a matter of patent law, virtually all litigated patents got knocked out. That's beginning to turn around. There is a fear that we are stiffling innovation.

However, I believe that the government and private plaintiffs and their lawyers will continue to be alert to abuses. And particularly when firms have dominant positions, they will be creative in asserting claims. Even in the *SCM* case, there is no license to do whatever you want just because you have a patent. Although arguably Xerox's overall strategy was a blocking strategy, there was no jury finding back as to '56 that they were deliberately acquiring blocking patents. The dominant firm always will be scrutinized and we're not going to come to the day when you have a license to exploit. The problem is there is no pressure to increase incentives. But again, there are no quantitative limits and this frontier is going to have to be fought over. SCM is only a start. It may be that if the Supreme Court takes the case, we'll learn more. Otherwise, we may need other cases. But I don't think you're home free.

While I have the floor, I would like to respond briefly to some of the matters that Mark put to me regarding the Telephone case. I think he is rightly proud of the way the case was conducted after Judge Waddy died, but the case was assigned originally to Judge Waddy who was the most dilatory judge in the federal courts. If he had not died, that case would not be near trial, and I don't think you would be telling us how well the litigation functioned. You probably would have had to get him impeached in order to get the case tried.

Secondly, you asked why I thought AT&T was a victory for the company. Probably twenty years ago, you would have been right and the company would have been very unhappy about this result. But now I wonder if someone had offered AT&T a choice between a dismissal of all charges and this settlement, they wouldn't have grabbed the settlement. The company's top management regarded this settlement as a kind of "Occam's Razor" which cut through the '56 consent decree and all the regulatory problems and freed the core of the company to engage in, to exploit the technology of the future. I think the company increasingly concluded that they were being prevented by their history from competing with IBM in the real field of telecommunications, and you handed them a convenient way out. That may, by the way, turn out to be pro competitive in that maybe we ought to have AT&T or what's left of it competing with IBM. So it may well be that both you and IBM and AT&T won. But I suspect that top management, whatever they say in public, doesn't regard it as a defeat. I believe their competitors don't regard it as defeat for AT&T and I don't think the market regards it as defeat.

MR. WEINSCHEL: I'm going to give Mark a chance to respond, but I'm going to add something to the question and then I think we're going to conclude. My question to Mark is this. You suggested that the government viewed the AT&T case as an essential facility case. As I understand it, the thought was that AT&T was using its natural monopoly position in local telephone companies to gain competitive advantages in markets where it faced competition, that is, inter-city and other communications markets. The classic subsidization case involves the transfer of profits from the non-competitive market, the monopoly market, into the competitive market in order to gain an edge. Perhaps you can clarify for me why I've been reading in the newspaper that the subsidy in the AT&T system has flowed the other way, that is profits in the competitive market were being used to subsidize the local service even though the local service is a natural monopoly. I think there are an awful lot of people who are confused by that. You might be able to clear it up.

MR. LEDDY: I think the answer is that for years equipment and inter-city communications were not competitive markets. That is, the equipment market and the inter-city markets were not competitive because AT&T controlled access to both through its control over the local monopolies. AT&T had only modest competition in equipment and in inter-city services, and then only over the past ten years. So those businesses for AT&T were extremely profitable and when the local public utility commissions did not allow them to raise rates, what they did was take some of the money, some of the profits from those two monopolies and transferred them to the local operating companies. I think the subsidy can work both ways and so it did here. I don't know if I responded to your question.

MR. WEINSCHEL: I'm not sure. You also spoke about the consumer benefit and for most of us using telephones, the use is for local service. If without the subsidies that have existed in the current system, local telephone rates are going to go up, I wonder how that is viewed as a pro consumer result from the standpoint of the Antitrust Division.

MR. LEDDY: I personally think that argument is simply a red herring. That subsidy can be continued by the public utility commissions if that's what the state and local governments want. All they have to do is charge MCI and AT&T and any other company that wants to plug into their local system sufficiently high inter-connection rates to subsidize local telephone rates. If that's to be done, it should be accomplished by a government decision and not by a monopolist in the inter-city and equipment markets.

MR. WEINSCHEL: All right, I want to thank everybody who has been on the panel. I think we've had an interesting afternoon. I'm not sure that we've been able to define either "predatory" or "exclusionary" or "unreasonable" or any of those other terms we started off with. But I hope we have been able to at least give you our views on where things seem to be going. Thank you all and thank you for being our audience.

(Applause)

Workshop III: Merger Guidelines: Proposals for Change

MR. NORMAN YOERG: Good afternoon, ladies and gentlemen, and welcome to the Antitrust Law Section's Workshop on Merger Guidelines: Proposals for Change. As I'm sure you all know, the Antitrust Division in 1968 issued merger guidelines to acquaint the legal and business community with the standards which would be applied by the Antitrust Division in determining whether to challenge mergers and acquisitions under Section 7 of the Clayton Act. Those guidelines place primary reliance upon structural considerations in making such a determination.

At the time, the Antitrust Division expected the guidelines would be amended on a periodic basis. It's now 14 years later and that expectation is finally being realized. In the past 14 years there have been extraordinary legal developments in the area of merger analysis — in the *General Dynamics* case for horizontal mergers and the *Marine Bankcorporation* case for conglomerate mergers, to name but two.

In addition, there have been substantial developments in the area of economic learning — basic notions about concentration, profits, and economies of scale, for example, are being reconsidered in the light of recent research.

Turning to the practicalities, what does this mean in terms of what the new guidelines will provide? Both Mr. Baxter and Mr. Miller have given strong hints in their speeches, interviews, and testimony that the new merger guidelines will reflect more closely the new economic learning of merger analysis, but they have held close to their chests the details of such analysis.

In the meantime, lawyers and businessmen have engaged in a great deal of crystal ball gazing to discern what those guidelines will provide. To assist us in this crystal ball gazing today, we have drawn together an outstanding panel of speakers representing the private bar and governmental enforcement agencies.

Our format for this afternoon will be for each of the participants to give a short speech on the proposed merger guidelines, followed by comments and questions from the panelists and hopefully from you, the audience. I encourage all of you to participate in the discussion which follows their remarks. The panelists will welcome oral questions and in case any of you prefer to write down your questions, just simply pass them up to the front of the room.

I would like to briefly introduce the panelists to you and then describe their background to you in more detail when their turn to speak comes up. Starting to my immediate left is Jim Egan and to his left is Steve Edwards and to my right is Jim Campbell.

Our first speaker, Jim Campbell, has prepared written remarks, copies of which are at the back of the room, and you can feel free to pick them up either now or at the end of this session. Jim Campbell presently is a member of the Washington law firm of Wilmer, Cutler & Pickering. Jim received his Law Degree at Stanford University in 1964 and was a law clerk to Justice William O. Douglas of the United States Supreme Court in

1964 and 1965. In 1967 and in 1968 he was a Special Assistant in the Antitrust Division and in that capacity was the principal draftsman of the 1968 merger guidelines. As such, he is eminently qualified to introduce us to the topic of merger guidelines. Jim....

MR. JAMES CAMPBELL: Thank you, Norm. As Norm has indicated, what I would like to do in the perhaps 15 minutes that I'll take this afternoon is to discuss what "guidelines" are in the 1968 sense of that term. I want to show that the new guidelines coming out in the spring may not be guidelines at all in the 1968 sense, but something quite new and different.

As Norm indicated, I do have a written text that is available at the back of the room. It's too long to deliver. It's not too long to read in the period of time that I'm going to take here. So if any of you wishes to read and listen with only half an ear, you're free to do so.

Let me begin by setting out what I believe were the fundamental premises and basic economic assumptions upon which the 1968 merger guidelines were erected. There are a number of these.

First, it was a premise in 1968 that merger enforcement policy of the Department of Justice should conform to authoritative judicial applications of Section 7, except where the Department is confident that the relevant precedent does not represent a reasonable interpretation of the statute or is clearly indefensible on economic grounds. At all points the 1968 guidelines aimed for, and in most instances achieved, a reasonable consistency between Department enforcement policy and Supreme Court precedent. Most of the Supreme Court precedents in those days, of course, were relatively recent and Department had had a hand in getting them established.

The second premise was that merger guidelines should be short and easy to understand, understandable by businessmen as well as by antitrust specialists.

The third premise was that merger guidelines should not attempt to make a yes or no judgment on individual acquisitions. They are probability statements as to what the Department's enforcement decisions are likely to be over a range of transactions having certain common characteristics. This is the thought behind the common phrase throughout the guidelines, that the Department will "ordinarily challenge" an acquisition having certain characteristics.

The fourth premise was that merger guidelines should frame their statements as to the probability of enforcement action in terms of a strictly limited number of characteristics of the transaction that can be practicably and predictably evaluated by the parties, the Department and the courts. These characteristics are market structure characteristics, three of them in particular: the number of firms in the market, the size of the market shares, and the substantiality of barriers to entry into the market.

The fifth premise was that the process of market definition is a straight forward, achievable task that can be described with brevity, clarity and accuracy.

The sixth premise was that enforcement discretion based on other factors (i.e., factors other than the principal market structure factors) is not ruled out, but the more strongly a given merger is condemned or approved by the ordinary predictors (namely, the market structure factors), the more significant these other factors will have to be in order to be controlling.

The seventh premise in 1968 was that merger guidelines need not attempt to identify, and certainly need not discuss exhaustively, all of these other factors. By "other factors", of course, I mean things like product heterogeneity, buyer concentration, cost differences among firms in the markets....the kinds of things that one can find mentioned in Professor Baxter's testimony on the subject of merger enforcement or in Dick Posner's 1976 book on antiturst law. These other factors need not be discussed in the guidelines themselves but are left to be identified and struggled over on a case by case basis by the lawyers and economists in the Antitrust Division, on the one hand, and the merging parties' counsel on the other.

Those I would say are the fundamental premises that shaped the overall policy approach in 1968. In addition to those premises there were certain economic assumptions that determined the specific content of the 1968 guidelines. I would list four such assumptions as perhaps of primary importance.

The first economic assumption was that the risk of non-competitive pricing increases significantly as the number of substantial firms in a market drops below 11 or 12. Those numbers obviously lead to the 10% and 8% thresholds in the horizontal merger guidelines section.

The second economic assumption was that the risk of non-competitive pricing rises substantially as the sales in a market, instead of being equally distributed among the 11 or 12 or more firms, become disproportionately concentrated among some smaller group of firms — typically 8 or fewer.

The third economic assupmtion of 1968 was that it is not feasible to identify either in general or in a particular market a threshold at which a further decrease in the number of sellers or a further increase in concentration will convert the possibility of non-competitive pricing from an improbability to a probability.

The fourth economic assumption was that even though a firm has less than 8 to 10% market share, it can still typically achieve whatever scale economies are available in its market.

Now, what have been the developments of the 1970's that require revisions in the 1968 guidelines? Looking at court decisions, I would say there's really only been one judicial development that absolutely compels a significant change in the merger guidelines. That development is the increasingly clear judicial recognition of supply substitutability as a critical part of market definition. Even if one were the most hawkish 1960's variety antitrust enforcement authority, one would nevertheless as a matter of conscience and good practice have to redo the market definition section of the 1968 guidelines to take supply substitutability into account. You might find a way to rationalize ignoring many of the other decisions of the 1970's, but not what's come out of cases like *Twin City Sports Service*, *Telex*, and number of others.

In terms of what enforcement experience has taught or should have taught the enforcers during the 1970's, there are a number of additional changes that have to be made in the guidelines. In the area of vertical mergers, I think it's clear that the Antitrust Division — and I speak always of the Antitrust Division and not the FTC only because in 1968 the guidelines were done unilaterally as a statement of enforcement policy by the Division — over the past ten years I have found significant efficiencies being achieved by those transactions and few plausible anti-competitive effects. Similarly, enforcement actions against conglomerate mergers have largely abated due to lessened fears of the supposed evils of reciprocal dealing and entrenchment and the discovery that the significance of eliminating potential competition depends upon the presence of a number of factors not ordinarily present in real-world competitive situations.

But it's only when we come to the economic and legal literature of the past ten years that we begin to find developments that demand amendments to the most important guideline provisions and threaten the premises and assumptions upon which the whole edifice of the 1968 guidelines was constructed. The received wisdom in 1968 was that fewness of sellers, concentration of shares, and high entry barriers all correlated with higher industry profitability and that the reason for the correlations was that all these conditions facilitated non-competitive pricing by tacit or overt collusion. Since that time there have been a number of troubling questions raised.

What if the relationship between concentration and industry profitability is strong only at quite high levels of concentration? What if the principal mechanism of non-competitive pricing in concentrated industries is dominant firm price leadership by one or two disproportionately large firms rather than oligopolistic pricing by several firms so that mergers increasing the market shares of the third through eighth largest firms might actually decrease the probability of non-competitive pricing? What if the correlation between concentration and profitability is often due not to non-competitive pricing but to the superior efficiency of the large firms in industries characterized by economies of scale? What if the benefit to consumers from even rather modest gains in efficiency resulting from a merger will usually outweight the harm caused by the price-increasing effects of the merger?

In 1980 Areeda and Turner in their influential treatise responded to the state of the art in industrial organization economics in about 1979 and required that the merging firms combined market shares equal 13 or 14% before illigality would be presumed. At this level, they would continue to ignore ordinarily the "other factors" such as entry barriers and product heterogeneity, and in the great majority of cases a combined share of this size, in their view, would permit any scale economies to be achieved. Nonetheless, if one of the merger partners had a very small share, 2% or less, or if the defendant proved high freedom of entry, mergers up to combined shares of 20% would be permitted. Moreover, a limited economies defense would be recognized.

Well, those Areeda-Turner guidelines, if I can call them that, are obviously quite different from the 1968 guidelines, but they still bear a family resemblance to them. But the new guidelines are being written in 1982, not 1979. At the present time economists are mining two data bases for further insights into the structure-performance relationship. These are the PIMS data and now the FTC's Line of Business data. These studies are generating findings that suggest revolution, rather than mere revision, in merger enforcement.

The analyses of the PIMS and Line of Business data are finding that the relationship is not between concentration and profits at all. It is between market share and profits, where it exists, and concentration ratios simply denote the advantages of larger market share holders. The effect of share on profits is strong in consumer goods industries but weak in producer goods industries. The advantages that accrue to holders of large market shares are significantly due to scale economies. Where the advantages include ability to increase prices, these increases are at least partly attributable to superior product image or quality.

These latest dispatches from the field of industrial organization, if they can be trusted, move antitrust enforcement toward a world in which the presumptions of illegality of *Philadelphia National Bank, General Dynamics* and the 1968 merger guidelines will be as outdated as the near *per se* rules of *Von's Grocery* and *Pabst.* Isn't it the message from industrial organization that rule of reason analysis is on the way back to merger cases?

And isn't the Assistant Attorney General for Antitrust, who is obviously deeply affected by the new economic research, telling us much the same thing when he describes presumptions of illegality based on market shares as, and I quote, "terribly simplistic" and as relics of "the Supreme Court's numerology phase?"

Isn't the new statement of merger enforcement policy to be released this spring likely to be something quite different from the 1968 guidelines? Mr. Baxter says it is going to be "a concise description of the processes of analysis which the Division itself intends to impose on the merger cases that come before us." The new statement will move away from talismanic reliance on a limited set of mathematical indicators and will include consideration of many of the other factors that were left unspecified in the 1968 guidelines.

So I think that the new guidelines may not be guidelines at all in the 1968 sense or in the *Philadelphia National Bank* or *General Dynamics* sense. How then can the new rule of reason approach to mergers be squared with these Supreme Court decisions and with the mainstream of contemporary merger law? Probably it can't. So the new policy may have to disguise itself as best it can in language similar to that of the old policy. Perhaps the day will come when the old law of mergers will be swept away by the new economics of mergers, just as the economics of *GTE Sylvania* swept away the law of *Schwinn*. It is an inspiring thought for the private bar that beating the government in several large merger cases, by getting the courts to consider all of the economically relevant facts, is the best way we can help Mr. Baxter write openly and without prior restraint the kind of merger guidelines he really wants to write. Thank you.

(Applause)

MR. YOERG: Thank you, Jim, for your informative speech on the underpinnings of the 1978 guidelines and your guide to the developments in merger law and economics since that time which will impact upon such guidelines.

Our second speaker will be Steve Edwards who is one of the founding members of Davis, Markel, Dwyer & Edwards of New York City. Steve graduated from the University of Virginia in 1972 and spent his formative antitrust years at the firm of Cravath, Swayne & Moore. For the past year he has served as Chairman of a Task Force of lawyers and economists created under the auspices of the ABA Section 7 Committee. That Task Force has drafted a finely crafted and balanced proposal for revision to the Antitrust Division's merger guidelines. This proposal was sent to Mr. Baxter in early December of last year and it will be published in the December issue of the *Columbia Law Review*. Based upon Steve's distinguished work in this area, he is well qualified to speak today about the proposed guidelines for merger analysis. Steve....

MR. STEVEN M. EDWARDS: Thank you, Norm. I came here today armed with a lot of jokes but then I decided the antitrust laws are funny enough without the jokes; so I will dispense with them for now.

We often hear the proposition that courts should interpret the law, they should not make the law. That sounds good, but what does it really mean? What is a court supposed to do when it is confronted with a law that says "Congress shall make no law respecting an establishment of religion," or "no state shall deny to any person the equal protection of the laws?" In those situations, I would submit, the courts are being called upon to make law, not simply to interpret it. That is also the case with respect to a statute which we all know and love — and I am of course referring to Section 7 of the Clayton Act, which says that no corporation shall acquire another where in any line of commerce or in any section of the country "the effect...may be substantially to lessen competition." The meaning of those words is simply not intuitively obvious.

Where does one go then to derive the meaning? The first place, of course, is the legislative history; but that is also unclear. Now a lot has been written about this subject, and I think perhaps enough hot air has been expended on it to heat the city of New York for a decade, but when one finishes wading through all of that material about all you can glean from the legislative history is that Congress intended to prohibit more mergers than the Sherman Act prohibited but it did not intend to prohibit all mergers. Indeed, it only intended to prohibit those mergers that may "substantially lessen competition". The word substantially, of course, was left to the courts to define.

Left to their own devices, courts and commentators have cast about for years for a standard to govern the application of the Clayton Act. The first major attempt was the report of the Attorney General's National Committee to study the antitrust laws published in 1955. That report outlined more than 50 factors that ought to be taken into consideration in deciding whether a violation of the Clayton Act has occurred. Those factors include size, location, customers, products, special technologies, know-how, growth history, the character of the market, the functional market, competitors, rank, degrees of vertical integration, methods of sale, opportunities for innovation, price, price history, special national interest and, of course, the effect of the merger on incentive.

In a seminal article in the Harvard Law Review, Professor Bok criticized the Attorney General's report for presenting a "dizzying list of factors" that could hardly be demonstrated in a courtroom without imposing formidable burdens of time and expense." *Instead, he proposed the structural approach in which violations of the act would essentially be determined by reference to market shares. He emphasized that the advantages of that approach would be predictability and ease of administration.

In its first decision interpreting Section 7 as amended in 1950, the Supreme Court in *Brown Shoe* made noises to the effect that each merger must be "functionally viewed" and that the legislative history of the Clayton Act "reflects a conscious avoidance of exclusively mathematical tests". That being said, however, the court went on to decide the case almost exclusively on the basis of structural factors.

The court subsequently abandoned all pretense of taking a functional approach in *Philadelphia National Bank* where it held that anything other than a structural approach might frustrate the intent of Congress. The structural approach was taken to great extremes by the court in the 1960's, with *Von's Grocery* where the court prohibited a merger between two Los Angeles grocery stores on the ground that their market shares were 4.7 and 4.2%, and, of course, in the *Pabst* case where the court prohibited a merger between two beer companies on the ground that their market shares in the state of Wisconsin, at least, were 3% and 1.5%

Now it was in the midst of all of this that the Justice Department published its merger guidelines in 1968, and it's not surprising therefore that those guidelines essentially adopt a strict structural approach — although I am sure my colleague, Mr. Campbell, would differ with me on that. The 1968 guidelines say essentially that horizontal mergers involving firms with market shares of 5 and 5% will be challenged. If the market is highly concentrated, the share levels giving rise to a challenge would be 4

*Bok, Section 7 of the Clayton Act and the Merging of Laws and Economics, 74 Harv. L. Rev. 226, 256-57 (1960).

and 4%. For vertical mergers, the share levels were 10 and 6%. And the guidelines went on to say that unless there were extraordinary circumstances, economies would not be available as a defense. I would note, as Jim pointed out, that while many of us have chafed under the rigorousness of those standards over the years, they actually represented an enforcement policy that did not go as far as the Supreme Court was willing to go in *Pabst* and *Brown Shoe*.

Now there are four major justifications frequently given for utilizing the strict structural approach. They are:

First, that it is required by the legislative history;

Second, that it is the most practical way to proceed;

Third, that it is supported by widely held economic theory; and,

Fourth, that it is consistent with the case law.

Each of those justifications, I believe, is questionable.

In evoking legislative history to support the structural approach, people generally rely on two things. The first is the infamous incipiency standard which comes from the Senate Report which was written in conjunction with the passage of the original act in 1914. That report states that it is the purpose of Section 7 of the Clayton Act "to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." Now, I can listen to those words and I think I understand them, at least to the extent that they are understandable and I do not see in that language any requirement that a structural approach must be used or that it must be based on particular market shares. That sort of a requirement is simply not there.

The second aspect of the legislative history relied on by proponents of the structural approach is the concern about concentration that was expressed in the debates surrounding the passage of the Celler-Kefauver amendment in 1950. As most of you know, the original Clayton Act only prohibited stock acquisitions, not asset acquisitions. This gave rise to the, what was known as the assets loophole. The main change created by the 1950 amendment was plugging the loophole. Now there can be no doubt that proponents of the amendment urged its passage because of what they viewed as a rising tide of economic concentration, but I don't believe the exhortations of congressmen and senators in support of the amendment can change the meaning of the act. The only change in the act itself — or at least the only real change was the plugging of the loophole. The 1950 amendment simply did not change the language of the act to give courts and enforcement agencies carte blanche to roam through the American economy rooting out the evil of concentration in any way, shape or form.

As an aside, I would note that the main support for the proposition that concentration was rising in the American economy in the 1940's was an FTC report published in 1948. Shortly after that report was published, John Lintner and Keith Butters wrote an article pointing out that while the number of mergers that took place between 1940 and 1947 was large, most involved small firms and hence, their effect on overall concentration was small.* The opponents of the 1950 amendment relied heavily on Lintner and Butters and much of the dates surrounded the question whether Lintner and Butters were correct. And, of course, the conclusions of Lintner and Butters were rejected summarily by the proponents of the bill. After the passage of the bill, surprisingly enough two FTC economists who I believe were in part responsible for the 1948 FTC report published an article in which they concluded that Lintner and Butters were essentially correct.**

Now, I'm not going to prolong the discussion of the legislative history. There is much more that can be said. The bottom line, as I mentioned before, is that there is simply no basis for saying that the legislative history mandates a strict, structural approach.

That brings us to the premise of practicality, and I believe that premise as support for the structural approach is also false. Rather than making things easy, the structural approach simply forces the parties to put all of their eggs in the market definition basket. This results in an enormous amount of time and effort being wasted on questions of market definition, such as who competes with whom, and very often almost no time is spent on what should be the critical issue in the analysis — namely, the effects of the merger. In many cases the whole thing becomes a game where the government generally argues for unrealistically narrow markets so the market shares can be high and the merging parties generally argue for unrealistically broad markets so the market shares can be low. This leads to bad results in terms of gerrymandered markets, and it also makes the analysis exceedingly complicated.

So that brings us to the premise that the structural approach is consistent with widely held economic theory. It is true that in 1968 many economists believed that there was a direct relationship between high levels of concentration and poor market performance, and we all heard Fred Rowe talk about that this morning. Since that time, as Jim mentioned, a number of empirical studies have been conducted which cast, I think, considerable doubt on the existence of that relationship. Now, I'm not prepared to go into those studies and I think it's fair to say that this whole area is gloriously unclear. The one thing that is clear, however, is that it can no longer be said that economic theory or widely held economic theory in some way requires the use of a structural approach.

Finally, with respect to the argument that the structural approach is consistent with the case law, I think that is no longer true after *General Dynamics* and I guess I differ with Jim Campbell on that subject. While some people have argued that *General Dynamics* is really a market share case, I simply don't believe that argument is correct. I think the court's opinion says what it says, and the court did not make any attempt to calculate future market shares. What it said was that the company's

*Lintner & Butters, Effect of Mergers on Statistical Concentration, 1940-47, 32 Rev. of Econ. & Statistics 30 (1950).

**Blair & Houghton, The Lintner-Butters Analysis of the Effect of Mergers on Industrial Concentration, 1940-47, 33 Rev. of Econ. & Statistics 63 (1951).

weakness as a future competitor could be taken into account in evaluating the effects of the merger.*

Subsequent cases have taken up the mantle of *General Dynamics* and I think they were mentioned in part this morning by Mr. Halverson. I believe they ought to be reckoned with in any guidelines that may be adopted. I would point out that most recently the Sixth Circuit in the *Marathon v. Mobil* case listed six factors that ought to be considered in determining whether a violation of Section 7 is likely to have occurred. Those factors are the size of the industry in comparison to the size of the economy, concentration ratios, elasticity of demand, barriers, the extent to which joint operations in an industry provide the opportunity for collusion, and the possibility of increased economic efficiency as a result of the merger. I would emphasize that final factor because I think it is a very important one which I will come back to in a moment.

So the question is where do we go from here. As has been pointed out, Assistant Attorney General Baxter has announced that he intends to revise the guidelines and that such a revision will be available this spring. It is also my understanding, and perhaps Jim Egan can comment on this, that the FTC is talking to the Justice Department with a view to coming up with a set of joint guidelines for both agencies.

Now, my task force which Norman described at the outset presented a proposal to Mr. Baxter in December. I won't go into that proposal in great detail, but I will describe the proposal in an over-simplified form as it relates to horizontal mergers. Basically, our proposal divides up the world into three parts. First, it says as a general matter if the aggregate shares of the merging parties are under 10% the merger should be presumptively lawful. If the aggregate shares of the merging parties are over 30% then generally the merger should be presumptively unlawful. In between, other factors should be considered.

What are those other factors? First, there are factors militating against a challenge and they include market demand and supply elasticity, low barriers, whether the current market shares over-state the future competitive position of either firm (that's basically the *General Dynamics* case), whether shares have fluctuated over time, and whether the market has demonstrated rapid growth and technological change.

The factors militating in favor of a challenge include high barriers, whether the current market shares under-state the future competitive position of either of the merging firms (and that is, I guess, the flip side of *General Dynamics*), whether the merger takes place in a market with less than 10 competitors and whether both firms are among the top five in the market, and finally, whether the Hirfindahl index — which is something I am sure we will discuss in great detail today — is .13 or greater and the merger will increase the Hirfindahl index by .01 or greater.

Our proposal also states that economies should be taken into consideration and should militate against a challenge.

We haven't attempted to quantify these other factors, but what we do

United States v. General Dynamics, 415 U.S. 486, 503-04 (1974).

say is that as market share increases between 10 and 30% the likelihood of a challenge also increases.

The main criticism I have received with respect to our proposal is that it does not provide enough guidance or predictability. I would respond as follows. For the merger involving aggregate shares of less than 10%, our proposal provides as much predictability as the 1968 guidelines. The merger is not likely to be challenged. For the merger involving aggregate shares of more than 10 but less than 30%, our proposal provides less predictability, perhaps, in the sense that under the 1968 guidelines the merger would be challenged whereas under our proposal we would consider other factors before deciding whether to go ahead. But I believe that this lack of certainty is not necessarily a bad thing. I agree with the comments of Ira Millstein earlier today in some circumstances flexibility is better than rigidity and I believe in these circumstances, we are saying that the outcome should not depend on one or two percentage points determined as a result of a market definition exercise that is anything but scientific or indeed predictable. Other factors are important, too.

What I would like to do now is move on to what I understand Mr. Baxter has been thinking in terms of revising the merger guidelines. He has, of course, not announced the new guidelines yet but there have been some sneak previews of what those guidelines may be in speeches given by Mr. Baxter and his assistant, Tyler Baker, who is working with Mr. Baxter on the revised guidelines.

Basically, if I understand what there are saying correctly, Mr. Baxter is also thinking about dividing the world into three parts but he plans to express those divisions in terms of Hirfindahl indexes. The first division would involve markets with a Hirfindahl index of .10 or less. I guess Mr. Baxter expresses that in terms of a thousand, a thousand translates into .10 if you're calculating your market shares on a decimal basis. That roughly corresponds to a four firm concentration ratio of less than 55%. The second division refers to markets in which the Hirfindahl index is .10 to .16, which roughly corresponds to a four firm concentration ratio of 40 to 75%. The third division refers to markets with a Hirfindahl index of over .16 or 1600 in Mr. Baxter's terminology. That roughly corresponds to a four firm concentration ratio of 65% or more.

Now, what Mr. Baxter is thinking if I understand the reports in the press correctly, is that if the market has a Hirfindahl index *after* the merger, and that's important, of less than .10, then it is unlikely that the merger will be challenged. Between .10 and .16, a merger that increases the Hirfindahl index by .01 or more and that roughly corresponds to an aggregate share of 15%, will be challenged. Above .16 merger that increases the Hirfindahl index by .005 which roughly corresponds to an aggregate share of 10% will also be challenged.

Other factors such as barrier to entry, the durability of products and technological change will be considered in Mr. Baxter's analysis as reported thus far. And as I understand it, the way those factors will operate is the presence or absence of one or more of them can push your situation from one Hirfindahl category into another. It is also my understanding from what has been reported in the press that economies will be given little if any weight.

I would like to make just a few comments about the Baxter thinking before I close. First of all, the tripart division of the world based on Hirfindahl indexes. I hesitate to criticize, especially before seeing the proposal in its full form, but I must confess that I am a bit uneasy. Perhaps the best way to illustrate my problem is with two hypotheticals.

Hypothetical #1. Assume a market with two 10% firms and sixteen 5% firms. Assume further that the two 10% firms merge. The pre-merger Hirfindahl is .006 or 600 in Mr. Baxter's terminology; the post-merger Hirfindahl is .008 or 800 in Mr. Baxter's terminology. Both of those figures are well below the .10 mark and, therefore, the merger would be presumptively lawful even though you have created a 20% firm versus sixteen 5% firms and I believe you may be well on your way to creating a dominant firm in the industry.

At the other extreme, and this is my second hypothetical, assume a market with a Hirfindahl of .15 and a merger between a 13 and a 9% firm. The increase in the Hirfindahl index would be .02 or 234 in Mr. Baxter's terminology. So, this merger is likely to be challenged. Yet, the figures in that hypothetical are essentially the same as those in the *General Dynamics* case.

These hypotheticals, I hope, illustrate some of the problems I have with the Hirfindahl part of what apparently Mr. Baxter is currently thinking.

A far more serious concern to me is the decision to ignore economies. I think that's a mistake.

Two reasons are usually given for not taking economies into account in merger analysis.

First, the argument is made that Congress prohibited all mergers that substantially increase market power; it did not say that the potential benefits could be traded off against substantial increases in market power. This is essentially what Justice Douglas said in the *Proctor & Gamble* case in rejecting an economies defense. The problem with that argument, I believe, is that it misconceives the point. When my task force proposal, for example, talks about taking economies into consideration, we are not talking about trading off the good and the bad. We are talking about trading off economies against market share — not against *market power* but against *market share* — to determine whether a merger is good or bad. If we have learned anything over the years, it is that increases in market share do not necessarily translate into increases in market power. A merger between two 10% firms that are the weakest firms in an industry is obviously going to have a much different effect on competition than a merger between two 10% firms that are the strongest firms in an industry. In the first case, if the merger would make the industry more competitive by producing substantial economies for the two merging firms, the two weak merging firms, then perhaps it should be permitted to go forward.

The second reason given for ignoring economies is that they are difficult to measure. Now, that may be true, but does that mean they should be ignored all together? All of the factors that come into play in merger analysis — including market power — are difficult to measure. Indeed, economies are probably easier to measure than such concepts as barriers, elasticity, and our old friend, market power. Businessmen measure economies every day in the normal course of business in the sense that they make proposals for improving the operation of their companies through the achievement of economies and their superiors evaluate those measurements and, in effect, put their money where their mouths are by risking millions of dollars on the decisions they make. If businessmen can evaluate the potential for economies in a merger, why can't lawyers?

I would note that the concept of market power is not a concept that is measured by anyone in the ordinary course of business. it is a tool whose use is limited to the world of economists and lawyers, and I think that most economists and lawyers would admit that market power is exceedingly difficult to measure indeed, as I mentioned before, market power is *more* difficult to measure than economies.

It strikes me as inconsistent, therefore, to say that we are going to attempt to measure market power in the guidelines but we won't take economies into account because they are too difficult to measure.

In closing, I would refer you to the work of Oliver Williamson who I think has done a pretty good job of demonstrating that only relatively small increases in economies are necessary to offset increases in price resulting from increases in market power. What this suggests to me is that the cost of ignoring economies may indeed be great, and I believe it is a cost that should be avoided. Thank you.

(Applause)

MR. YOERG: Thank you, Steve, for your most informative and provocative comments upon the proposed guidelines. I find somewhat troubling the concept that the world is being divided into three parts. It sounds remarkable like Caesar's march on Gaul and we all know what happened to Caesar at the end of that.

On a more serious basis, Steve's discussion of economies as a Section 7 defense is certainly thought-provoking and, hopefully, we will have a chance to go into that area a little more fully at the end of this session.

I would like to remind you that at the end of Jim Egan's speech there are going to be a couple of questions raised by me and then I would like to have questions from the audience. So, if you would like to write them down, that's fine, or if you would like to just raise your hand, give your name, and then the question, that will be fine, also.

Our next and final speaker is Jim Egan who presently is the Assistant Director at the FTC's Bureau of Competition. Jim, who has been with the FTC since 1971, is a graduate of St. John's University Law School. Jim is regarded as one of the Bureau's leading experts on mergers and joint ventures, and has been either Deputy Assistant Director or the Assistant Director in the Bureau's Merger Litigating Section since 1978. Even more significantly for today's program, he is also the attorney at the FTC who is the head of the working group studying the review of the merger guidelines. His remarks this afternoon, naturally enough, are upon the government's viewpoint. Jim....

MR. JAMES EGAN: Thank you. Good afternoon. I am certainly very pleased to be here. I had the opportunity to sit in and listen to the program this morning and congratulations to Steve Axinn. That was one of the best programs I've heard also.

The title or nomenclature of my remarks is the government viewpoint and I was hoping that I would be able to give you something to go back and think about in terms of the government's viewpoint. Unfortunately, the government doesn't have a viewpoint right now.

(Laughter)

Instead, I would like to do two things. Discuss briefly what the Commission has done thus far in the area of merger guidelines review and second, because I really don't have a lot I can tell you, discuss some questions which I have, after spending a fair amount of time thinking over some of these things, about the Hirfindahl index.

Starting off with....oh, I should, as usual, and I'm sure all of you have always heard the disclaimer I only speak for myself. I don't speak for any commissioners. I don't speak for bureaus or anyone else, and that's especially true in this case. What has the FTC been doing? Well, we, the Commission, having concurrent jurisdiction with the Justice Department over Section 7, obviously have an interest in any new guideline. As Jim Campbell already noted in 1968 the Justice Department issued the guidelines on their own as their enforcement policy and, indeed, that might be the result of the current effort. I don't know. That is certainly one of the options; that the Justice Department will issue their own guidelines and the FTC will sit quietly by and either adopt those or reject them. I think it's a little more dangerous to do that today than it was in 1968. In 1968 the guidelines that the Justice Department did adopt were, I think it can be said, consistent with the most recent Supreme Court case law. On the other hand, if predictions are true, especially in the vertical area, the new guidelines from the Justice Department will be somewhat of a shift from the most recent case law....for example, in the vertical area, the *Fruehauf* case, which is probably the most recent Circuit Court opinion dealing with vertical mergers.

If that is the case, I think it would make practitioners somewhat uneasy to have the Justice Department with a set of guidelines and not know what the FTC's position was. So there certainly is some incentive for the FTC to do something. One option is to issue guidelines jointly with the Justice Department. I don't know whether that's going to happen.

Another option is for the FTC to endorse the guidelines that the Justice Department issues. Again, I don't know what will happen. The Commission has not made a decision yet what it wants to do and once the

Commission makes the decision, the Justice Department, of course, would have to have something to say about it, too.

Another option would be for the Commission to use the work that we've done thus far....and we've done quite a bit of work....to set its own internal standards and certainly, I think, this will happen. Whether it's on a formal basis or not, I don't know, but certainly we will use the work that we have accomplished thus far to attempt to fine tune our merger review process. That has been something which Chairman Miller and the new Bureau Director, Tom Campbell, have indicated to Congress that they intend to do; fine tune the screening process so that some of the merger cases not worthy of consideration can be cut out at the beginning.

Some of the work that we've been doing involves the question of the role in merger enforcement of efficiency, which Steve Edwards just spoke to a few seconds ago. We had an economist from the Bureau of Economics and an attorney from the FTC work together and produce what I think was an excellent piece on efficiency considerations and merger enforcement. The Commission has made that document public, if any of you wish a copy of it. If you don't have a copy already, you can either just leave your card with me or just drop me a note and I'll be glad to put a copy in the mail for you.

It doesn't arrive at a lot of conclusions but I think it does address a lot of the issues about efficiency considerations. I guess my own personal viewpoint about efficiency considerations is it would not be easy to consider in a merger enforcement context, and I have the most concern about the practicality issue that Steve Edwards spoke to, and Steve responded to that by saying that businessmen do it all the time. I'm not sure businessmen do it all the time so well and what they don't do so well I think we would do worse. One example which was cited in the FTC staff working paper was PanAmerican National where the predictions of efficiencies from the route structures were....that this was going to be a very good combination. It turned out that the route structures were such that they could not be utilized efficiently. That was a bad prediction on the part of the businessmen, the people in the airline industry who knew this industry and who studied the acquisition carefully in advance. I just don't think that the enforcement agencies can make those kind of judgments. We certainly can't make them better than the businessman and if the businessman can't do it, I don't think we can either.

The other paper that has been published also, or made public I should say, is a piece by one of our economists at the FTC concerning the economic basis for a broad based horizontal merger policy. It reviews what has happened in the literature in theory, in empirical studies and, again, does not attempt to take sides to any degree but to merely outline some of the things that were discussed this morning about oligopoly theory and the Chicago School and where everything is right now, and discusses the PIMS and the line of business data.

I would certainly agree with Steve Edwards to this extent: I don't think you can draw conclusions from these new studies about whether or not it's market share or concentration. I'll get into that a little bit when I discuss the Hirfindahl index, but it's my perception that from a practical point of view most people would still begin a Section 7 analysis with an oligopoly theory starting point. There is certainly a difference today in terms of a willingness to consider other factors, but as a starting point, it seems to me that oligopoly theory is still where it's at.

We've also done other background papers and among those have been critiques or analyses of various proposals for merger guidelines, including one by Steve Edwards' group. I was privileged to sit in on a few of the meetings where that proposal was pounded out and learned a lot from that. We presented that to the Commission and presented our comments on it. We also analyzed various general proposals in terms of the Hirfindahl index, concentration, critical concentration levels, dominant firms, etc. and forwarded those proposals to the Commission with our comments. Those are now before the Commission.

We analyzed the Areeda and Turner proposal, the Bork proposal, etc. and all of those are now before the Commission. We anticipate that the Justice Department will have a proposal that we hope to get an advance look at and then at that time perhaps we will know what if anything the Commission will do.

I guess that's pretty much....I should say that we have had an avenue of communications open with the Justice Department, also, which I think has been important and we have exchanged views and exchanged papers, working papers, but we really haven't reached a point of deciding what the framework of the continued relationship is going to be.

Moving to the Hirfindahl index for just a few seconds. Again, I only would like to raise a question or two simply because there are things that have occurred to me as I've been working on this program. I also determined not to try to tell any stories or jokes, but it did occur to me that the Hirfindahl index reminds me of the story, which I will not tell, about the ship's captain and the young ensign. Most of you have probably heard it, but you probably can get the gist of it from this.

I perceive, I envision that if the new guidelines do utilize the Hirfindahl index every lawyer....all of you in this room, myself, and Steve....we're all going to have in our desk drawer in front of us a little card and we're going to pull it out every morning and we're going to read it and it's going to say....the H index is the sum of the squares of the market shares of each firm in the market. I would like to follow from that by asking that you not ask me to compute a Hirfindahl index. Steve Edwards is the expert on that. I saw many times at meetings that he could whip out his pencil and paper and come up with the changes in the Hirfindahl index. I'm not very good at the technical aspects of it and that's really not the questions I want to raise.

I don't want to raise the technical pro's and con's of the Hirfindahl index either. I think that those have been stated by other people better than I could state them. Areeda and Turner do a nice job of that and there was a recent article by a former attorney at the FTC, Myron Dale, in a recent issue of *Legal Times* of Washington where he lays out some pro's and con's.

What I would really like to raise as a question or as inquiry or just put it forward is something that relates to the questions of oligopoly theory that were raised earlier today in the program. Again, my perception is that while there is debate in the economic community as to the importance of concentration vis a vis market share, vis a vis efficiency, nonetheless I think that oligopoly theory is still the name of the game. I would cite as support for that the ABA proposal....sorry, Steve, but after all you do have a structural approach as a starting point....and the Department of Justice proposal that Steve discussed, and the Areeda and Turner proposal. Likewise, while there certainly have been changes in the courts, I would also cite to the recent *Kaiser* opinion by the Seventh Circuit where they had an opportunity to restate their views concerning *International Harvester* and *General Dynamics*. In their conclusion....I will again not characterize it but merely quote to you their short conclusion:

"In conclusion and by way of summary we observe that under *General Dynamics* market concentration statistics continue to be the primary index for measuring maarket power and if they unrebutted, those statistics standing alone can support a finding of a Section 7 violation." Now, that's the most recent word from the circuit that has been cited probably as often as any in terms of a weak company defense because of its *International Harvester* opinion.

I guess this is about eight months old now or something to that effect, six months. So from a practical point of view, whatever happens down the road, whether market share is on the ascendency and concentration ratios are on their way out, I don't know, but right now it seems to me that concentration ratios or critical concentration levels are still the name of the game.

Now how does all this relate to the Hirfindahl index? Well, it seems to me it relates in this respect: What do we do when we analyze a market? Traditionally, we look at the market and we say what is the two firm....if we believe in what Kokwa said in his study....what is a two firm ratio, what is a four firm ratio, what is perhaps even the eight firm concentration ratio? And why do we look at that? We look at that because we believe that there's some critical level at which markets will not operate competitively and we hope that we can maintain those markets above those critical levels.

I can't say that empirical studies have been the only source of how we arrive at those critical levels. Certainly, I think some of it has been intuition. But there have been studies that indicated that there are critical concentration levels. The problems of those studies have already been discussed here and I don't necessarily disagree with those. But they are the best we have and they do indicate certain critical levels of concentration.

Now, the proponents of the Hirfindahl index would say that a major problem with the use of concentration ratios is that you're going to run into many situations where you might challenge a harmless merger because you didn't take into account size and disparities of the remaining firms in the market. This only happens, it seems to me, if you mechanically apply oligopoly theory, if you mechanically apply the concentration ratio market share analysis, and my experience has been that we have not been able to mechanically apply those concepts for quite some time in merger enforcement.

But at any rate, the proponents of Hirfindahl index would say well here's a way around it. We give you a Hirfindahl index and this takes size and disparity of remaining firms into account, and indeed it does and is a very useful tool in that respect. But then the question becomes what have you gained, it seems to me, by doing that? How do you choose a critical Hirfindahl level? Now, Steve had some question about the Hirfindahl level that was chosen by the Justice Department. But that's really it seems to me a different question. That is what the level should be. It's different than how do you arrive at deciding that, what the level should be.

In the case of concentration ratios, you have at least some empirical studies which indicate critical levels. In the case of Hirfindahl, you really don't. The whole reason concentration ratios were used in the first place was because there was data available from which studies could be done.

Well, there aren't such studies from Hirfindahl and my practical perception has been that when people pick a Hirfindahl level that we should have some concern about, they do just what Steve did earlier, and that is they translate it into concentration levels. They say, well, I'm choosing this level because it equals a four firm concentration of 75% or 60% or whatever. I hope I'm not picking on Steve. But he did prepare a very useful chart and I think it was....wasn't it circulated with your papers?

MR. EDWARDS: Yes, it was.

MR EGAN: Yes, and it is very useful and those of you who haven't gotten a copy of the ABA papers, you really should and it's a chart showing what the Hirfindahl index would mean in terms of four firm concentration ratios and also in terms essentially of market shares and distribution and it's very interesting. It shows that at any given Hirfindahl level there's a wide range of concentration levels that can be encompassed. By definition that's true and, indeed, that's I guess one of the strong points of the Hirfindahl index. But it also leads to aberrations and it leads to the same problem that you have with concentration ratios that you can't mechanically apply Hirfindahl either, because if you do, then you"ll run into situations of the kind that Steve pointed out. So, I guess the question that I have is does this all get us anyplace?

If we have to translate from the four firm anyway and if you have the same aberrational problem that you have with concentration ratios, does it really get you awful far down the road toward a better guideline? I don't know. I really don't know the answer to that question.

I would say that when you're trying to answer that question, I think it's a question that has to be answered by the Commission, by the Justice Department....when you try and answer that question, you have to realize that the use of a Hirfindahl is not without cost. Recently we had a group of practitioners seek a meeting with us, our working group, and at the same time with Tyler Baker and his working group at the Justice Department. We had a joint meeting to discuss what their concerns were about a guideline and one of the subjects which came up was the Hirfindahl index. One of the concerns voiced at this meeting was....look, we have to explain our analysis to our clients and I challenge anyone to explain the Hirfindahl index, it was said, in less that 100 words or 200 words or do it in a half hour to a client and so that the client will understand not only what the Hirfindahl index is and how you compute it but why are you using it.

Perhaps even more important was the point raised again by these practitioners that they're often, as I assume most of you are, called upon to render an opinion to a client very quickly and with very little information available. Now, the Hirfindahl index requires that you have the market share of every firm in the industry. Very hard information to come by. Now the point is made often, of course, that not a lot is lost if you don't have the smaller firms in the industry. That won't affect the outcome. But, nonetheless, I think that it is a valid point to question whether or not Hirfindahl is a good guideline tool when it requires information that is not readily available to the practitioner in the time period that they're required to render an opinion, and for that matter, available to the FTC or the Justice Department in the time that they are required to render an opinion.

I guess that really concludes my remarks. I enjoyed very much coming here today and I'll be pleased to respond to any questions.

(Applause)

MR. YOERG: Thank you, Jim, for your incisive remarks, particularly on the issue of the Hirfindahl index. I found that very enlightening. One of the areas I would like to comment upon is in the area of efficiencies. You can argue back and forth on this whole issue, but I think that it's important to focus on two questions and those are: what type of efficiences are we talking about and, secondly, how do you measure them? Now, there are really two types of efficiencies that the economists talk about. There are the technical efficiencies and the non-technical.

The technical efficiencies deal with such issues as what is the optimum efficient size of a paticular plant. When we're talking about non-technical efficiencies, you're talking about such things as transaction costs. How much does it cost to get some money to build a plant, or how much does it cost to get an efficient management....items of that sort. I believe that in the horizontal area, in particular in a close cse, the courts in the future will look closely at technical efficiencies. Non-technical efficiencies are more difficult to establish, more difficult to measure, and appear more frequently in vertical mergers than in horizontal mergers.

Turning to the second aspect, looking particularly at how efficiencies are measured, the economists, as you heard this morning, have wonderful theories using graphs and charts and marginal revenue curves but as abstractions these really aren't too helpful. But when you get down to measurement, I think there are a number of methods and techniques that economists have developed which could be used by both the prosecution and defense in determining efficiencies and I would just like to mention some of them to you.

There are engineering studies, the survival method, statistical cost studies, and profitability studies. Now, each of these techniques has certain flaws and certain benefits to them and I think that if you're interested in this area, I know that Jim Egan mentioned one of the papers that was prepared by the FTC on this subject which would be important for you to read. In addition to that, Tim Muras at the FTC has written a law review article on the whole area of efficiencies, and that's a very interesting article to read. For your information, it appears in 30 *Case Western Reserve Law Review* starting at page 381 and that's a 1980 article.

Now, I would like to ask one question myself for the panelists and then I will open up the discussion to questions from the audience.

All lawyers, and antitrust specialists in particular, realize that market share and market definition will continue to be an important aspect of any kind of merger analysis, and I'm talking, of course, about both product and geographic market definition. In the area of product market difinition we certainly are going to have some discussion in the guidelines on supply side substitutability, but just how far will the guidelines go? For example, will a company which manufactures jelly beans be considered in the same market as manufacturers of chocolate chip cookies? I know this is not only a burning issue, but the only issue which is of concern to both President Reagan and to Ana, my two year old daughter. On a more serious basis I think it's a very difficult question to answer and I would like the panelists to discuss that.

The second area is, of course, the area of geographic market definition, and we have had some recent learning from the Sixth Circuit in the *Marathon Oil* case. But, as we all know, this is an issue which frequently is not litigated. It's often determined by stipulation of the parties that the geographic market is the United States as a whole and I would like the panelists to also raise our discuss that particular issue.

Why don't I start with Steve Edwards and move on down the line? Steve....

MR. EDWARDS: Well, on the question of supply substitutability, I guess the best thing for me to do would be to describe what my task force has proposed. I believe that supply substitutability is a very important factor that ought to be taken into account in any merger analysis. The problem always is how do you quantify it? Even if you assume that the manufacturer of product A would manufacture product B if a profit opportunity arose, how do you know how much of product B that first manufacturer would make? That is a difficult problem and I believe it complicates the issue of supply substitutability when you're talking about market definition.

Now, the way we handle that particular problem is we say that if the switch in production facilities — and I believe the same analysis applies to an extension of geographic markets, — but if the switch is both, would be both reasonably immediate and easily quantified, then you take supply substitutability into consideration in calculating market shares.

Now, as an example of that let's take geographic supply substitutability and let's assume you're talking about grocery stores in Los Angeles. Assume further that two years ago a particular firm had established a grocery store in Los Angeles and had been responsible for X quantity of the sales in Los Angeles but since then it has gotten out of that particular market, although it would re-open that store on a moment's notice. Assuming Los Angeles is a market in our hypothetical, in talking about the Los Angeles market today, it might be reasonable to include the prior sales of that particular manufacturer or that particular grocery store operator in your maket share calculation exercise because you have a way of quantifying it based on past experience.

That's what we propose in a case where supply substitutability is reasonably immediate and easily quantified. In a case where supply substitutability is not easily quantified, we don't say it should be ignored. We say, OK, go ahead and calculate your market shares, ignoring supply substitutability for a moment, but when you go to draw certain inferences from those market shares, what you should do is remember that there is a great degree of supply substitutability having an impact on this market and perhaps that impact should cause you to temper the inference that you draw from whatever market share you have calculated.

MR. YOERG: Thank you very much, Steve. Jim, do you have any comments on that?

MR. EGAN: Yes, I guess I would just add to the discussion on the supply side interchangeability issue a couple of things. I think Steve has already suggested it somewhat, but the problem that always arises when you try to analyze this and try to figure our how to work the concept into a guideline is, and I'm afraid I'm not going to be able to offer much precision in articulating this, what is the difference between the supply side interchangeability and barriers to entry? Assume that you have defined the market and you've properly taken supply side interchangeability into account, and then you also take barriers into entry into account. Where does it all leave you? I just throw it out. It's a problem it seems to me. Obviously, if someone could switch over and start producing something on their machinery that they're not doing now, that could be also viewed as a separate market with low barriers. Or it could be viewed as no market at all. There's also the problem of how do you count that production that's not now being produced in the market? So it's a very difficult area. But I do agree, I certainly agree that supply side flexibility has to be considered, and I guess it's just a matter of degree when you're considering it. It has to be considered in defining a market. I just am not sure how you put down on paper how you go about doing it in terms of a guideline. I think it's a very difficult issue. An interesting point is that the *Kaiser* reward was in part premised on the fact that one of the

Commission's market relied upon supply side flexibility as the only criteria in support of its definition. It was thrown out by the Seventh Circuit on the basis that we cannot use supply side flexibility standing alone to define a market. That unless we also have demand characteristics, supply side flexibility will not define a market. Very interesting it seems to me.

MR. YOERG: Thank you, Jim. Jim Campbell, do you have some comments on that?

MR. CAMPBELL: Yes. I'm certainly going to pass up the opportunity to argue the *Kaiser* case with Jim at this point and instead simply embrace warmly his statement that you have to consider supply substitutability in defining markets. In terms of a guideline, I would offer what my colleague, Don Turner, offered unsuccessfully in a cert petition to the Supreme Court just recently when we were trying to get them to take a sharper look at that subject than they did in *Brown Shoe*. The guideline is that lack of user substitutability does not exclude a product from the market if the product is produced from the same kinds of facilities as other products in the market and if the suppliers of the product can readily switch to the other products in response to increases in demand. The case involved firms engaged in supplying avionics for aircraft. If you have assembled and installed the avionics for a 737, that particular package of avionics is not usable by the owner of a Lear jet or in fact any other sort of plane, but the firms that supply avionics to 737's also supply avionics for other models of aircraft. In a "service" business of that kind it seems quite sensible not to try to define a market, as one misguided court of appeals did, in terms of avionics for a particular model of airplane. It's the people who are in the business of supplying avionics for all sorts of airplanes who are competing with each other. Similarly, if you have a production process where you mix different batches of ingredients to produce different kinds of say, margarine, depending on whether you're using peanut oil or safflower oil or whatever, and you have the same production facilities and simply put in different kinds of oils into the vats then you ought to have an all margarine market rather than a diet margarine market or a corn oil margarine market or whatever.

So I think that if we keep common production facilities as a point of reference that we ought to be able to write a market definition guideline that allows you to include all of the output that is produced by those kinds of facilities, regardless of whether a particular customer who is devoted to diet margarine finds extra rich margarine a satisfactory substitute.

MR. YOERG: Thank you, Jim. I have one comment to add. There is a recent article in the *Harvard Law Review* written by Mr. Posner and Mr. Landes, and in it they discuss market power in an antitrust case. They come to a very startling conclusion: if there are any sales by a particular company in a particular market, all the sales throughout the geographic region by that particular company should be considered in that particular geographic market.

For example, if you have a foreign company which is selling 100 tons of a particular product in a particular market, let's say the state of Illinois, but worldwide they produce 100 million tons of that product, their theory is that you should consider those 100 million tons of material in developing what the relevant market is in Illinois. This is quite a startling conclusion but they have some logic to support such a conclusion in this paticular article and I would call your attention to it. Yes, Jim....

MR. EGAN: I always thought that that raises an interesting question. I'm sure that they have an answer to it, an answer that alludes me but it seems to me that raises a logical question. Suppose you have a market of the city of New York, for example, and you have a firm with a 10% share in the city of New York and then you have another firm which ships in from California and that firm ships in, say, .5% into the market. Under traditional analysis, you would say that you got 10% and .5% probably no violation because the acquiring firm is too small unless you look at a potential competition theory or something. But under this proposal you would include that firm's entire production, even though it never shipped into New York, and presumably you could find a violation of the antitrust laws.

Now I don't think that's the result that the authors were trying to achieve, certainly, but it seems to me that it logically follows and it raises an interesting question again.

MR. YOERG: Thank you. Yes, Steve....

MR. EDWARDS: In an antitrust situation, you are really looking at two things. You are looking at market share, at least under traditional structural analysis and you're looking at power I think you have to distinguish the share calculation exercise from the power calculation exercise, if you will. I think what Landes and Posner meant to say was that in evaluating power you have to remember that you've got this huge tremendous firm out in California with all this capability to come into the New York market if a profit opportunity arises and I think that has to be taken into account in some way.

If you start trying to take that into account for share calculation purposes, then I believe you enter a morass and that's where the problem really lies.

MR. YOERG: Thank you. I would like to open up for questions from the audience now. Jim Halverson....

MR. JAMES T. HALVERSON: Yes, Norm, just a comment. I think they themselves felt that this would be subject to an examination of the barriers to entry like tariff barriers and shipping barriers. They also raised the same question Mr. Edwards has raised and that is how much of the capacity would you consider? You wouldn't consider all of the capacity, and I recommend to everyone a very interesting comment in Areeda and Turner which really raises serious questions about the feasibility and reliability of using estimates of capacity outside of the United States for purposes of those requirements. Tariff barriers are often very high, and shipping into the U.S. on a competitive basis can be quite difficult, depending on the weight of the particular commodity. If shipping barriers are high, it can be meaningless to talk in terms of inclusion of foreign capacity or even a portion thereof.

MR. YOERG: That's right and I was a bit unfair in mentioning 100 pounds to 100 tons. They also say that it should be non-negligible sales into that particular geographic market. Are there any questions from the audience? If there are, you can just stand up and give your name and the question. Yes....

MR. WALT ROBINSON: I would like to address this to Mr. Egan if I could. I wonder if he could tell us who is on his group at the FTC that is studying guidelines or potential guidelines and whether like Mr. Baxter there is a definite date, although the dates seem to be slipping at the Justice Department. But the last I heard it was going to be this spring when Tyler Baker and his group come out with the guidelines. Do you have a definite time period and who is on your group?

MR. EGAN: We've had a lot of time periods that we've already met to do certain things, but as far as producing....the Commission producing a guideline, the answer is no because, again, the Commission hasn't even determined whether it will issue a guideline. The status of everything right now is we have presented to the Commission I think....I think we've done a very good job actually. I'll give myself a pat on the back, and I think we've done a good job of presenting to the Commission all of the information they need in order to make the kind of policy determinations that they now have to make, and I expect that there will be a Commission meeting on the issue in the near future. But it has not yet been set. As far as who is working on the group, we've had....I suspect the names wouldn't mean anything....we've had quite a few staff people. It's been a joint effort with the Bureau of Competition and the Bureau of Economics. My counterpart, the Bureau of Economics, is Doug Dobson who is the Assistant Director for Economic Evidence. He has utilized I would....I've heard him grumble about it on a number of occasions in terms of getting enough people to staff the cases. He has utilized....I don't know, maybe 20 economists at one time or another to do separate little inquiries or studies. A couple of people who have had important roles are Paul Paulter who is an economist who did one of the papers I spoke of earlier and a second one would be Alan Fisher who participated in the efficiency paper.

My people have included people from the Planning Office at the FTC, Bob Land who participated in the efficiency paper and Jim Hurwitz who worked with me on the vertical aspects, and then we've had numerous junior people participating in research, etc. I hope that responds.

MR. YOERG: I would just like to make one point and that is I talked to Tyler Baker on Monday and he mentioned to me that the spring was still a valid target date and he is very confident that target date would be met. Yes, Jim....

MR. HALVERSON: Norm, one more for Jim Egan. Isn't there some way we could get off ground zero here and have the FTC work in a more intimate way with the Justice Department staff? It does seem to me if we're going to have a new set of guidelines, it would be awfully nice for the practitioner for the two agencies to agree at least on a substantial part on the guidelines.

MR. EGAN: I expect there will be an effort to have that happen and I expect that it will be frankly at a higher level than mine and I expect that Tom Campbell, the new Bureau Director, will play a much more direct role in that. I expect that to happen in the near future.

MR. YOERG: Are there any other questions? Well, I thank the panelists very much for the excellent presentations they made and for the fine job they've done, and I think they deserve a round of applause.

(Applause)

I also thank all of you for coming. Thank you.

Annual Dinner

MR. JAMES T. HALVERSON: Could I have your attention. While you're finishing your dessert, we'd like to get started.

On behalf of the Antitrust Section of the New York State Bar, I'd like to welcome all of you to our annual meeting and to the Section's annual dinner. Today many of you may have been fortunate enough to come to the several programs we had. We had a full day's program with twenty distinguished panelists, each of whom I thought did a splendid job of enlightening us in a particular area of antitrust practice or procedure.

This morning we had a program moderated by Steve Axinn on antitrust trends for the 1980s. It actually turned out to be everything you wanted to know about antitrust but were afraid to ask. And Fred Rowe did yeoman's service in replacing Bob Bork who was to be our lead speaker, but was up on the Hill today in his confirmation hearings for his appointment to the Court of Appeals for the D.C. Circuit and was not able to be with us. I want to thank all of those participants.

This afternoon Kimba Lovejoy chaired a program having to do with expediting pretrial and trial of complex antitrust cases. Our second workshop dealt with Section 2 of the Sherman Act, and Alan Weinschel was the moderator of that program, also excellently received. And Norman Yoerg moderated a program on the merger guidelines and the proposals for change.

I'd like to introduce the head table. And hold your applause if you will until I finish. Almost everyone up here had something to do with the program today.

I'll start at my far right with Alan Weinschel of Weil, Gotshal who was moderator of the Section 2 program. Next to Alan is Judy Whalley who's an associate with Donovan Leisure; and she is sitting in for Sandy Litvack. Next to Judy is Kimba Lovejoy who today was elected Vice Chairman-Elect for our upcoming 1982-83 Antitrust Section year. And also she moderated our program on techniques for effective pretrial and trial of antitrust cases. Next to Kimba is Mark Leddy who is Deputy Director of Operations at the Antitrust Division, Department of Justice. Next to Mark is Irv Scher who is the immediate past Chairman of this Section and from Weil, Gotshal. Next to Irv is our speaker tonight, and I'll save the introduction there.

At my immediate left is Steve Axinn, with Skadden, Arps, who after this morning is the Chairman-Elect of this Section and will become Chairman for the 1982-83 fiscal year. Next to Steve is Bill Lifland who is our Section Delegate to the House of Delegates of the New York State Bar, and is with Cahill, Gordon. Next to Bill is Walter Barthold who has done yeoman's service as Secretary of this Section for at least three or four years and will serve in that capacity again in '82-'83. Next to Walter is Sol Schreiber whom all of you know as one of the premier magistrates in the country and is of course now an ex-U.S. Magistrate for the Southern District of New York. I understand on February 1 Sol goes into the private practice of law here in New York. Next to Sol is Eleanor Fox, a member of the Executive Committee and a past Chairman of this Section. Next to Eleanor is Ralph Giordano who is Chief of the New York office of the Antitrust Division. Next to Ralph is Lloyd Constantine who is Assistant Attorney General in charge of Antitrust for the State of New York. And down on the end, last but not least, is Jim Egan, Assistant Director, Bureau of Competition, Federal Trade Commission.

Would you give them all a good hand please.

(Applause)

Before I introduce our distinguished speaker this evening, I have one duty which is always a great pleasure for the present Chairman. And that is to hand out the plaque to the immediate past Chairman for services to the section.

Irv Scher of Weil, Gotshal has done yeoman's service for this Section for many, many years, has been very active, as you know. He left me in the enviable position of having wiped out several years of deficits, and I now can say that we are solvent for the first time in about five years. Now Henry King will take partial credit for that because he also had a slight surplus, but it was Irv's year that wiped out all previous deficits.

Irv, if you'd come forward I would like to give you an award in our appreciation.

(Applause)

This plaque reads: "New York State Bar Association, 1876 the founding date, presented to Irving Scher in recognition of his services as Chairman of the Antitrust Law Section 1980-1981."

Irv, congratulations.

(Applause)

MR. IRVING SCHER: Thank you. Thank you, Jim. I'm glad that we now have a surplus, but on the other hand I'm sorry that the dinner costs so much.

(Laughter)

MR. HALVERSON: We now come I believe to what we've all been waiting for. Given the developments in recent weeks, and actually in the recent ten days, we're all very anxious to hear from William Baxter, the Assistant Attorney General in charge of the Antitrust Division.

Bill Baxter and I have been friends for a number of years. As you all know, he was for many years a distinguished professor of law at Stanford University Law School. He's written extensively in the antitrust area. He's spoken extensively in the antitrust area, and as he and I were talking together tonight, we recalled a time in Hawaii at an ABA Antitrust Section meeting where he was debating the effectiveness of antitrust enforcement at the FTC. I don't think either of us at that time expected that he would be up here speaking as Assistant Attorney General in charge of the Antitrust Division.

Bill Baxter.

(Applause)

MR. WILLIAM F. BAXTER: Thank you very much. I tried to think of some topic that no one of your panelists would have talked to you about today and abandoned that effort as totally futile. If you'll tolerate it, I thought I would talk to you very briefly about what I hope to do, and to some extent about what I think I have done, since I came to this strange and somewhat bewildering job — talk not too long, I hope, and then give you an opportunity to ask some questions. I always feel more comfortable answering questions than I do talking. That, I suspect, is part of the legacy of having been a law school professor for so long a time. It does give the assurance that we'll be talking about what you want to talk about rather than what I want to talk about.

When I came, I had made sort of a secret list of the things I hoped to do something about while I was here. First and foremost on that list was to bring to some sort of appropriate close the then very much elongated proceedings in IBM and AT&T. I did not have in mind bringing them to a close on the same day. That was sheer coincidence.

I wanted very much to do something about the Merger Guidelines. Although the Antitrust Division, as a practical matter, had pretty much walked away from the old guidelines, I had on any number of occasions talked to clients and said, "Now, that merger will be perfectly all right," and had clients and general counsels of clients who persisted in going home at night and reading the guidelines for themselves and saying, "But, gee, it really is in violation of the guidelines." And having seen several deals abandoned for that reason — corporate rearrangements that I thought were very much in the interests of the American business community and, more importantly still, in the interests of the consumers of the industries that were involved — I felt strongly that something should be done. And that project is very much in hand.

The guidelines in a sense are written. They are in draft stage, and I still hope that we will have them out sometime in the next few months. I'm not shooting for any particular time. It's much more important to get them right than it is to get them out. But perhaps by the time of the spring meeting of the ABA we'll have an opportunity to talk in more detail about them.

There were, I knew, a substantial number of outstanding consent decrees, judgments. Several of those with which I had some familiarity seemed to me to have created regulated industries — in several instances administered by individuals in the Antitrust Division. And there, too, it seemed to me important that something be done. That project too is well along the way.

We have a number of decrees under study, and have filed papers in connection with several. And I hope over the course of the next year that we will be able to remove the most offensive of those from the industries to which they apply.

I had also hoped to rehabilitate (if that is the right word) a wide variety of so-called vertical practices. Most of these pertain to contractual arrangements in the distribution industries, arrangements between manufacturers and wholesalers and wholesalers and retailers — exclusive distribution arrangements of various kinds, so-called tie-in sales having to do with franchise arrangements, even vertical price maintenance — where it seemed to me that businessmen, under the pressure of competition, were finding their way to perfectly sensible business arrangements away from which they were being chased by decisions handed down by judges who had no comprehension of the business arrangements they were interfering with. We have not yet made nearly as much progress on that front.

But we have made some progress, I think. The cases even there are slowly turning. We have filed a couple of amicus briefs in those contexts, intend to file more, have more indeed under consideration, and continue to look for cases which represent good vehicles for an effort to get the rules turned around in those areas.

In saying all that, I don't mean to suggest that I think there are never circumstances under which arrangements which appear to be vertical or cast in vertical form can be harmful. I think there are. They usually manifest themselves in situations where, in the context of a concentrated industry, all or substantially all the participants are using precisely the same so-called vertical arrangements. And under those circumstances, they can be a facilitating device for horizontal collusion. But as long as we have our eye on what the problem really is, it ought not to be difficult to identify the sorts of contexts in which those arrangements can be harmful and those in which there are really no risks.

There, too, as I say, we have made some, but I would say only halting, progress.

The last of the areas which I would mention is one in which we have done substantially nothing, and this is not because in any sense I think it the least important, but only because the pressures were greater in all other areas and we've not really had a chance to turn to it. In many respects it is an area that is nearer and dearer to my heart and my research efforts, and to some extent my writing efforts over the years, than many others, and that is the whole area of intellectual property. I have in mind primarily patents but also copyrights and trademark law. I think the antitrust precedents in that area are about as misguided and destructive as any other area of antitrust I can imagine. I'm not even sure the area is susceptible to rescue, short of legislative change. And on this front, we have so far done substantially nothing at all.

I may be overdoing it just because this has been a substantial area of interest to me over the years. But I really think that our dismal performance, our colleagues' dismal performance on the productivity front over the last eight or ten years, is in no small part attributable to misguided antitrust concepts that have interfered with the incentives to invest in the development of new intellectual property, because they have made it so difficult to exploit the property positions that the patent laws and copyright laws and trademark laws quite properly were intended to create. That is an area in which my debt to you still is essentially 100 percent and about which we will try very hard to do something over the next year or so.

I think I'd like to stop there if I can. I do invite questions on the areas on which I've touched very briefly and summarily, or indeed any other area, while carefully reserving the right to refuse to answer, or more likely evade, any particular question you may wish to ask. I will try to cope with most of them.

VOICE: "Could you tell us what your views are on the restrictions that a patentholder may impose on his licensees in a patent license?"

MR. BAXTER: Sure. Having earned himself a patent, the question then arises what one is entitled to do with it. We have developed a wide variety of restrictions on the ability to exploit that right. A patent is a very abstract piece of property. Often it will be useful in a wide variety of different applications and some of the applications will be much more valuable than others.

A patentee should unquestionably, in my view, be able to charge what the market will bear in the context of each of those different applications. And often the only way to do that, as a practical matter, will be to engage in one form or another of metering of the intensity in which his licensees are using his idea. And not at all infrequently, one of the very most cost efficient methods of metering will be to require the licensee to buy some input into that process. I have in mind, as an example, the old *IBM Card* case of 1936. There is a variety of other circumstances where tie-in sales were used to accomplish that objective — the *A.B. Dick* case in 1912, the old *Heaton-Peninsular Button-Fastener* case at the turn of the century — but the reasoning of those cases was sort of mindlessly rejected by such later decisions as the *Mercoid* cases of the 1940s.

There is a variety of other restrictions on patent licensing techniques, all of which incidentally are vertical practices by a patentee with respect to another level of the distribution system. Carving up and giving exclusive rights in particular areas of activity.

Indeed, I would summarize the whole situation something like this. A patentee really ought to be able to exploit the value of his invention in any way he damn pleases save only this: That if he enters into an arrangement which has a tendency to suppress rivalry between the technology to which his patent pertains and some other competing technology, then there is a horizontal problem of sorts. But if there is not a tendency of the licensing arrangement to suppress competition between rival technologies, he really ought to be left alone. And we have an enormous quantity of antitrust rules that does not comply with the description.

VOICE: "Could you tell us when you think tying of sales — especially in the franchise area — should be viewed as legal?"

MR. BAXTER: Well, tie-in sales are used for a variety of purposes. But the one purpose for which they are most frequently used is that of metering intensity of demand and essentially charging different prices to people who use the so-called tying product more intensively than others. There is substantially no disagreement, I think, in the economic community that it is imposible to assert that price discrimination of that sort has any adverse welfare effect. It is really a lawyer's obsession that people whose circumstances are different and whose demand for the use of the product are different should nevertheless for some reason (never articulated) be charged the same price, whatever that means, in any particular circumstance.

A good area about which one can talk in fairly intuitive terms involves the franchise cases — Chicken Delight and that type of thing. What we have, more often than not in the franchise area, (here, we're talking about fast foods let us assume) is a sector of the economy that is about as intensely competitive, and atomistic as any area one can possibly imagine. There are scores of local fried chicken places. There are scores of local hamburger stands. But if a company chooses to franchise on a national or regional basis, what it is typically marketing is familiarity. You can safely go into the McDonald's in this remote area of the state of Washington and it will be just like the McDonald's with which you're familiar back home. The prices on the menu will be the same. If your kids like it in Peoria, they will like it in Yakima. It's a kind of insurance. And it's an important part of that insurance that the menus be the same color and that the arches be the same color and the table clothes and the napkins and the waitresses' uniforms and so on and so forth.

Now I don't know why we shouldn't have entities of that type. Not all of us like them, to be sure; but they have an enormous appeal to a risk adverse and increasingly peripatetic American public.

So the franchisee has identified some set of images, some size hamburgers, that he thinks will be profit-maximizing across the region or the entire United States for the chain. But it takes almost no thought at all to realize that what is profit-maximizing across the region may not be profit-maximizing at any particular location. The proprietor at any particular location will preceive, quite rightly, that in order to maximize profits at his establishment, he would be better off to change the menu color, reduce the size of the hamburgers, increase the size of the arches, or whatever it may be. But, of course, if he is permitted that kind of unilateral change, he would be doing two things.

First of all, he will be doing better financially I assume (these people are not misguided) in his local establishment. But at the same time he's free riding on the franchise name. And a lot of people are coming in from Peoria who, by hypothesis, are less pleased with the situation in that forum than they would be if he were conforming with the national image. So you have what in any other context we would call suboptimization by subunits within the national organization. And I see no reason why that's necessary.

If he wants to be a local establishment, the entry barriers are negligible, let him be a local establishment and serve hamburgers of the kind he wishes. But if he wants to carry the national franchise name, I don't see any reason why he can't be expected to live up to his contract and take the good with the bad. And as you all know, of course, we have an enormous number of cases that involve exactly that controversy.

I see no reason whatsoever why contracts between these people and distribution chains should not be fully enforceable. No one is required to have a franchise from Chicken Delight or Colonel Sanders or Holiday Inn for that matter (whatever it may be). And those comments, although I've confined them to one particular area of commercial activity, are susceptible to generalization across a very large portion of the distribution spectrum.

That undoubtedly is a much longer answer than you had in mind, but I apologize for it.

VOICE: I am going into the hamburger business immediately.

(Laughter)

VOICE: "How do you feel about the recent decision of the Sixth Circuit in the *Mobil/Marathon* litigation, striking down the option granted by Marathon to U.S. Steel to acquire the Yates Field as a 'manipulative practice'?"

MR. BAXTER: I think that's an extremely difficult question. Well, I shouldn't stop there, but I'm tempted to.

(Laughter and Applause)

On the one hand, I believe very strongly that people should be able and permitted to work out their own deals. And it may be that you just could not get United States Steel to make that deal unless they had an option to pull that particular asset away, and one is reluctant to interfere with that paragraph.

The preceding paragraph is uttered on the implicit assumption that the management of United States Steel was faithfully representing the shareholders of United States Steel. I'm sure they were. But there's always the risk that in some hypothetical situation, that they may not be. And it takes very little imagination to see that a management who would prefer not to have its company taken over has many incentives essentially to concoct a suicide potion so that if anyone other than the desired suitor should have any chance of being successful, the value of the prize is simply destroyed.

I also have very little difficulty seeing the logic that underlies that decision. It really depends very, very strongly on how much confidence you have that, in any particular situation, the management officials who made the deal, which at least coincidentally is going to save their jobs and life as they have known it in the recent past, are faithfully representing the best interests of the shareholders rather than themselves. I'm confident there have been instances of both kinds over the years, but I am at a loss after a good deal of thought to come up with any kind of a generalized rule that would give us any assurance that we would be better off as a society if we consistently applied that rule rather than another. I may have some great insight on the plane going back to Washington, but as yet I have no good answer to that question.

VOICE: "Would the Antitrust Division consider getting involved in specious litigation involving the enforcement of a patent?"

MR. BAXTER: Well, I'm not quite sure what kind of specious litigation you have in mind. The Antitrust Division arguably has engaged in a fair amount of it itself over the years.

(Laughter and Applause)

VOICE: "Would you object to parties bringing specious litigation in patent enforcement cases, as an antitrust violation?"

MR. BAXTER: Oh, I'm sure that not only would I, but so, also, would the counsel for the other party. We already have cases like the Motor Transport case in California, which I think basically answers your description, and at least one patent case where frivolously commenced infringement actions were held to be an antitrust violation. I don't see that any new and creative doctrine is necessary there. The difficulty, of course, is a rather different one — that you're getting very, very close to the Noerr-Pennington line, to appropriately easy access to the judicial process to enforce your property rights or whatever other rights are being asserted. It's an area where the factual distinction are exceedingly difficult, although it seems to me the theoretical distinctions are perfectly plain and simple.

Now having given that much of an answer, it may be that I've mistaken what your question was.

MR. HALVERSON: Two more questions. One in the back.

VOICE: "Could you give us your views on the differences between a process patent and a product patent?"

MR. BAXTER: My answer would be, they ought not to differ nearly as much as they do under existing law. Indeed, if I were writing on a completely blank slate, I would issue only process patents. And a new use for a product would again be patentable for that new use with much more extensive enforcement rights than we have at the present time. I think we have considerably overdone the distinction between process patents and product patents with the result that process patents in many contexts are almost totally worthless and unenforceable because of the sort of sterile and metaphysical limits that the courts have attached to process patents by reason of the fact that they're process patents.

VOICE: "You said once that the Antitrust Division was looking for cases requiring enforcement of the Robinson-Patman Act, despite your low opinion of that statute. Are you still looking and have you found any yet? Is the Antitrust Division going to seek its repeal?"

MR. BAXTER: Well, we haven't found any this year.

(Laughter and Applause)

But as I said last spring, in the existing political climate, as best I perceive it, it does not seem to me a worthwhile endeavor to spend the political capital that would be necessary to try to get it repealed. We will keep looking for cases that,

(Laughter)

if prosecuted, would carry as much social value as suppressing another cartel. And if we find one, we will bring it.

VOICE: "As part of the New Federalism, do you favor the transfer of the enforcement of the federal antitrust laws from the federal government to the states?"

(Laughter and Applause)

MR. BAXTER: No. I think, as a matter of theory, that there's no particular reason why antitrust law is better enforced at the national than at the state level. But my perception is that the process, to the extent we've had an opportunity to observe antitrust enforcement at the state level, has tended to be rather more political, in some states even self-financing oriented, and that the federal authorities have done a rather better job, bad as that job at sometimes has been. But, no, under present circumstances and as presently advised, I would not see anything to be gained by transferring the authority in any general sense to the state level.

MR. HALVERSON: Thank you very much, Bill.

(Applause)

I want to thank Bill for engaging in a courageous debate with the audience. We're all done, and have a happy trip home.

Thank you very much.

(Applause)