Judicial Perspectives on Antitrust Trials

MR. HOUCK: Thank you, Michael.

The panel today is going to be a round table discussion among the three judges about litigating antitrust and other complex cases, including discovery and trial. This is a very knowledgeable and distinguished group and those two qualifications don't always go together, but they certainly do in this case.

We have Chief Judge Colleen McMahon to my left, then Judge Paul Crotty and finally Judge P. Kevin Castel.

All three of these judges are very experienced litigators, having litigated antitrust and other complex cases in the trenches. Judge McMahon at Paul Weiss; Judge Crotty at my old firm, Donovan Leisure, and Judge Castel at Cahill Gordon. All those firms are especially noted for their litigation practices. So we have three very experienced trial lawyers, who then ascended to the bench and in that capacity have presided over numerous complex cases, including antitrust cases. And by my count, I think we have 40 years of collective wisdom on the bench between the three judges. So we have a very knowledgeable and distinguished panel.

I want to just take a minute and thank the judges for helping us out this morning at such an early hour. I think we as lawyers sometimes forget how busy these judges are and how tight their schedules are. And to be a good judge—and these are all very good judges—you have to work very hard. In fact, the reason we are starting so early in the day is to accommodate Judge Castel, who originally had a jury trial planned for later today.

Of course, I know that Chief Judge McMahon, in addition to her docket, has many administrative responsibilities.

And Judge Crotty is now a Senior Judge, but I know that he continues to work very hard, and he, of course, is our Distinguished Service Award winner. So I hope all of you will come out for dinner tonight to see that award presented to Judge Crotty.

The way we are going to do the panel between Professor Cavanagh and myself is to split it up into two basic segments. The first segment will focus on issues relating to discovery and case management, which Ned will handle, and then the second segment will be focused on trials. To the extent we get through that we have some additional questions for the judges that Ned wants to ask. Then finally, we are going to try to leave some time for audience questions.

So that's the plan. But you know, like trials, you plan trials and they never go like you think they will, so we'll see if this is any better. But essentially what we want to do is just have informal discussion among the judges to get their insights into some of these issues that are important issues for all of us litigating antitrust cases.

I am going to ask the very first question, which is an introductory question, and then I'll turn it over to Ned for discovery and case management.

The first question has to do with the fact that antitrust cases often present complex legal and factual issues. And the question for the judges is whether they think antitrust cases are unique in any way from other complex cases; and then more generally, what are the challenges that complex litigation presents both for judges on the bench and for lawyers trying them.

I'll start with Chief Judge McMahon, if that's okay.

CHIEF JUDGE McMAHON: Good morning.

The part answer to Part A of the question, from my perspective, is no. Antitrust cases are no different than any other kind of complex case. All complex litigation presents multifaceted issues, and large numbers of them require a certain intellectual prowess. They tend to be complicated factually. Securities cases probably less so than antitrust cases. Patent cases possibly as or more so than antitrust cases.

They all tend to lend themselves to careful planning and serial attack on the various issues, both legal and factual that come up. And that to me is, from a judge's perspective, the challenge is to get the lawyers on board, or to get on board with the lawyers, depending on how proactive you are, with a case management plan that tackles issues often serially, rather than everything at one time, in order to take the wide-mouth funnel that we are presented on the day that you file the case and narrow it down to something that is either triable or disposable on a dispositive motion, on a summary judgment motion at the end of all the hard work that you do.

JUDGE CROTTY: Well, I agree with much of what the Chief Judge says. That's not a surprise.

Right now I am trying a case involving HMG-CoA Reductase inhibitors, which are compounds useful in the treatment of cholesterol. I am an English major.

[LAUGHTER]

And this is very complex litigation. There are eight defendants, and each of them has their own arguments about obviousness and whether the patent is valid, if the patent is valid, whether or not it's infringed. So I try to follow a process where I take the issues one at a time and in sequence. I find that in my experience by the inch it's a cinch, by the yard it's hard. It's tough to do if you try to knock off everything at one time.

Now the other thing in terms of case management, I've always found the principles of case management are useful but very difficult to apply, simply because you are one judge with two or three very skilled and hard-working clerks. But you're facing a sea of adversaries, who are much better armed, much more capable of filing tons of papers. And it's difficult to parse through all of these cases. So you have not only the case that you're working on, the patent case—and I agree some patent cases can be far more complex than antitrust cases. So while you're working on a patent case, you're also working on a Fair Labor Standards Act, Americans With Disability Act, 1983 cases, the whole run of cases. It's difficult to say I am going to work on this one particular case at the expense of all the other cases I have, including the criminal document where there is an urgency to that imposed by the Speedy Trial Act.

So I think the best way to approach these complex issues is one at a time, and the case management order at the earliest possible time, and then adhere to it. If it's not working, the parties will tell you that, and you can readjust.

JUDGE CASTEL: I have the easy part here. I think Judge McMahon and Judge Crotty pretty well said it. I do have a couple of observations though.

We do encounter securities fraud cases with great frequency. The case law can be learned. It doesn't change overnight, so the issues are thoroughly familiar to you and, with some good fortune, maybe even to your law clerks.

CHIEF JUDGE McMAHON: That's why I love litigating securities frauds.

[LAUGHTER]

JUDGE CASTEL: Yes.

Same way in the patent arena, you get complex areas of science that are difficult for the lay judge to grasp. But even doctrines relating to the validity of a patent and infringement are pretty well plowed. The case law is pretty clear.

When we get into the antitrust arena and we're dealing with abstractions like antitrust standing, antitrust injury, efficient enforcer, these are things that we do not encounter day in, day out. There are so many differences between a horizontal conspiracy and some kind of a vertical restraint, and the application of a Rule of Reason doctrine that your head really can spin. You're going to be very early on into the economic theory and applying it in the case.

So you know, non-law cases are the same. There can be easy antitrust cases, but I think that there is more complexity on the law side in an antitrust case than you'll ever see in your typical securities fraud case. So that's for starters.

MR. HOUCK: I think all three judges keyed up the issues that we are going to explore in the next 50 minutes. I am going to throw it to Ned, who will talk about the issues relating to case management and discovery.

Ned.

PROFESSOR CAVANAGH: First, just by way of introductions, back in the '70s, when we were conducting discovery it was a little bit like being in the wild west. Which is to say the rules were pretty much what you could get away with. There was a lot of hubris around, and there wasn't a whole lot of respect for rules.

Since then, notably in 1983, there have been significant changes to discovery. Among other things, changes to Rule 16 to encourage hands-on judicial management. And then specific changes to discovery, numerical limitations on interrogatories and depositions, time limits on depositions. And encouragement, if these rules are violated, mandatory sanctions for obstructionism on discovery and encouraging essentially a lot more judicial control.

Now I want to start, and Judge Crotty, if I could just follow up with you. You talked a little bit about management. Hands-on management. Do you agree with the notion with the drafters of the Federal Rules that there should be more management? Is it different in antitrust cases than it is in Fair Labor Standards Act cases?

JUDGE CROTTY: Well, Fair Labors Standard Act cases are relatively simple. When you're dealing with the cooks at the Chinese restaurant or the delivery people at a bodega, that is something I think all of us can understand. Are they getting the $7 or $7.50, and are they being paid time and a half for overtime. You can deal with that.

The problem with an antitrust case is that you'll still have 10 or 15 Fair Labor Standards Act cases, 10 or 15 ADA cases and one or two antitrust cases. Then the question becomes how do you allocate your time?

The cases I work on—Ned and I worked on the *Kodak* case and the *Westinghouse Uranium Price-Fixing* case, MDL 342. Some of the things you encounter, like in Chicago—you have to again understand how big the country is and how different people are. You go into a deposition in Chicago and you say what's your name. Objection. What's the objection? Lack of foundation, you haven't established that he has a name.

[LAUGHTER]

So you go to see Judge Prentice Marshall and Judge Prentice Marshall would see all the lawyers tromping in. We had every uranium producer in the world; must have been 35 defendants. And Judge Prentice Marshall would call this the Lawyers Full Employment Act. So how he managed the case, I really don't know. Except that I know this: He got it done. In the *Kodak* case we had tried before Judge Frankel. Our Magistrate Judge was Saul Schreiber,

who is a hard-working guy, but he never resolved anything. Because regardless of what he said, people would always take an appeal to Judge Frankel, who had different views than Saul Schreiber did as to what ought to be done. So it was a very difficult case to manage.

The nub of it is, the case was tried. It was started in trial in July, on a very hot day. We ended in a snowstorm in February the following year. And *Kodak* was held to be a monopolist for introduction of new and different products. Get up to the Second Circuit and effectively they granted summary judgment. So it didn't take very long to get a result that was favorable to Kodak.

But the point is case management had hardly anything to do with it. The difficulties with case management rules are—they are not difficult to apply. They are an easy application if you have the time and the resources to do it. The fact of the matter is that federal court judges, as Steve and Ned have already suggested, are pretty busy doing a lot of other things. It's difficult to get the focus, the attention on the important issues in a complex case. It's not impossible to do. It's just difficult to do from a time management standpoint.

PROFESSOR CAVANAGH: Chief Judge McMahon?

CHIEF JUDGE McMAHON: Ditto.

[LAUGHTER]

No, case management rules, whether legislated by the court system and the Rules Enabling Act, the committee, or the Congress in the case of securities cases, where they think they know better than we do how to run them, is always well intentioned. And it works in the main. The rules work in the main.

The problem with the kind of cases that you all tend to bring is that they are not in the main. They are the outliers. And the amount of case management, it would need a hands-on case manager who is required just to be on top of the issues, to be able to respond in a timely way when the lawyers have an issue, have a question, have a dispute that needs to be resolved. It would really almost preclude you from doing almost anything else, which is why my case management style is to assign a magistrate judge to oversee discovery. Somebody who, because of a lesser case load, because of no criminal docket, because of a lesser trial docket—I wish that were not true, and I hope I can encourage more people to go to trial before magistrate judges—but a lesser civil trial docket, because of all those things, can take on the burden. And it's a tremendous burden of overseeing the minutia of discovery in a very, very complicated case.

It's impossible to do it, if you get a letter from a lawyer raising an issue and you're starting from ground zero because you've been working on 55,000 other things and you have no memory of this. I tell people I have a triage brain. I have a triage brain. If I need to know it today, it's here. If you sent me a letter, saying "as Your Honor will recall," I won't.

[LAUGHTER]

I won't have a clue.

So the best case management tool from my perspective are lawyers who get along, who act professionally and who don't pull my chain. And I see that in some cases. I see it particularly in patent cases, the patent bar is a cohesive bar, —and in admiralty cases, which are few and far between. But the admiralty bar is a cohesive bar.

I haven't had to do a lot of antitrust work on the bench, very little of it, and all motion practice. I've never had a case go to trial. I am not sure why I am on this panel.

[LAUGHTER.]

But it's not clear to me whether the antitrust bar has that kind of cohesion. If you know you're going to see the same people over and over and over again, in the end you have to learn to get along.

Sanctions are a cudgel, and they are—it is an unhappy situation when a judge is asked to apply sanctions. It's an unhappy situation when a judge does apply sanctions. The fact of the matter is that we know that an appellate court, which is far removed from the heat of a sanctions battle, will frequently not understand the need for sanctions. So I view sanctions as a not particularly useful remedy.

What I hope and cross my fingers for every time people come in for a Rule 16 conference on an antitrust case or a RICO case or patent case is that I have before me a group of highly professional, highly skilled lawyers who are going to behave in the highest and best traditions of the profession. It's the only case management tool that works.

JUDGE CASTEL: I think what's really interesting is to see difficult styles that all get the job done.

My style is probably quite different than Judge McMahon's, as she laid it out. I do not refer discovery to the magistrate judge. And I find sitting down up front at that initial conference and hammering out either the sequencing of discovery or the number of depositions, not as an abstract number, but making people identify who they plan to take and in what sequence gets us further down the path.

Not an antitrust case, but a securities MDL, the *Bank of America* litigation went on for years. In the course of discovery, I had one discovery dispute. It was over the timing and length of Ben Bernanke's deposition. That was it. It was submitted on letters. I decided it in 15 minutes, and I was done.

It's quite correct that it takes good lawyers and professional lawyers. But it sometimes helps that people know that the person who is supervising discovery is the same person who is going to be setting the trial date, going to be deciding the summary judgment motion and a smart lawyer, even a contentious lawyer or a would-be contentious lawyer is not so foolish and stupid to engage in collateral battles on things that are not important before the judge who is going to be making important decisions in their case.

So the maddening thing for those of you who are antitrust litigators is you have to contend with different styles just on the Southern District bench, let alone Chicago or the Eastern District. But that's the way it is. And certainly I think we all agree the wild west days are over. Certainly in the ordinary case you just don't see interrogatories. I don't see interrogatories anymore. In most cases you're going to say why can't you get that through a deposition.

Now it's possible in an antitrust case that there may be categories of information that can be more efficiently covered in an interrogatory, but certainly the days we fondly remember of 362 interrogatories each with 14 subparts have long passed.

PROFESSOR CAVANAGH: Judge, if I can follow up quickly with what's going on with discovery. And Judge Crotty referenced the uranium litigation. My recollection was that we had a lot of discovery disputes, vexatiousness, all sorts of things, nothing is getting done, all sorts of disputes. You're almost paralyzed.

You're telling me now you're not seeing lot of discovery disputes. Is that because of the rule changes?

JUDGE CASTEL: I think what I would say is it's because Judges, the state-of-the-art in 2017 is judges are more active case managers. Whether they do it directly or through a magistrate judge, I think there has been a change on the part of the judiciary. The rules changes help, but it is more the notion that if you want to have this spat, you may be winding up in front of the judge, and it may get pretty ugly. You have a dispute as to who said what to whom. You may find the judge saying, well, I have a great idea, let me get a court reporter, and you both can take the witness stand, and we'll find out who is telling the truth.

CHIEF JUDGE McMAHON: Or if it gets contentious enough and goes on long enough, I have said, fine, I'll solve this. Discovery is over. Your pretrial order is due in 30 days, and we are going to trial in six weeks.

JUDGE CROTTY: Well, I would like to think that the antitrust lawyers are better and more in charge of their own destiny.

The worst thing that can happen to a judge—and I don't want to speak for Chief Judge McMahon or Judge Castel—but when you have two bad lawyers in front of you, you're really at sea. When you have good lawyers who know what they are doing it makes life a lot simpler.

Like Judge Castel, I don't refer my cases to a magistrate. I think by hearing the discovery disputes, hearing and seeing what the problems are I am better prepared to try the case or handle the ultimate motion for disposition.

There is nothing like having two good lawyers in front of you. They make the world a lot simpler for themselves and for the judge as well.

CHIEF JUDGE McMAHON: They make it a lot more fun.

I would say one thing, I think firm deadlines, and I set the deadlines, when I say that I refer discovery disputes to a magistrate, he said/she said is not what I get involved in in the first instance. But it's all against the backdrop of a schedule that I've worked out with the parties at a Rule 16 conference which has a firm deadline for the end of discovery. And if you know that the deadline is firm, and it's not going to be changed, I find people are more inclined to behave.

PROFESSOR CAVANAGH: I am encouraged to hear that discovery disputes are not such a problem in the Southern District, but nationwide, they are much more of a problem.

Let me reference the *Twombly* decision which, as we all know, talks about the high cost of discovery and the need to rein in discovery.

JUDGE CASTEL: Excuse me, Ned, we didn't say discovery wasn't expensive. You know—

CHIEF JUDGE McMAHON: And we didn't say there were no disputes.

JUDGE CASTEL: But electronic discovery, you all can tell us, can be enormously expensive to the parties.

JUDGE CROTTY: Not only is it enormously expensive in a particular case, but, for example, you mentioned representing a major company you're going to have multiple lawsuits and serving documents from one lawsuit, maybe you can live with that, but two, three, four—by the time you get up to ten, fifteen cases with similar subject matters those retention orders become terribly, terribly burdensome.

JUDGE CASTEL: I had a complex civil matter go to trial this spring where the trial exhibits—now these are paper exhibits, or they used to be paper exhibits; now they are all digitized—the trial exhibits were two terabytes. That was the trial exhibits.

I asked at one point for someone to hand up one of the exhibits, and counsel stood up and said, I can't, Your Honor, it's 25,000 pages long.

PROFESSOR CAVANAGH: Well, let's get back to the cost of discovery. Because in *Twombly* the Supreme Court—

CHIEF JUDGE McMAHON: A bunch of great trial lawyers.

[LAUGHTER]

PROFESSOR CAVANAGH: —citing then Professor Easterbrook, now Judge Easterbrook, said that district judges cannot control the cost of discovery, because discovery is in the hands of the litigants, and District Courts cannot control what's in the pleadings, because pleadings are in the hands of the litigants. So the best way to deal with questionable litigation is to cut it off at the beginning, which is at the Motion to Dismiss stage.

Do you agree with that premise and that solution, Chief Judge McMahon?

CHIEF JUDGE McMAHON: Do I agree with *Twombly*?

[LAUGHTER]

I agree with Paul. The District Court got it right. *Twombly* is a very ideological decision. It had to go some to overcome a case that we all learned in law school, *Conley v. Gibson*, which had been on the books since, I don't know, since I was a pup.

PROFESSOR CAVANAGH: 1957.

CHIEF JUDGE McMAHON: 1957. I was a pup.

There is no question that frivolous litigation gets filed, and that the cost of frivolous litigation to corporate America and to individuals is very great.

This Supreme Court, as opposed to the Supreme Court in 1957, doing a cost/benefit analysis, for which Judge Easterbrook is famous, made a decision that was completely at odds with the decision made 50 years earlier. Fifty years earlier the cost/benefit analysis was, we'll let everybody get into court on a very low level of pleading. And if we can do that, it will get sorted out. That was a time when it was much less complicated to litigate even complicated cases.

Now the world has changed, and it's changed dramatically, particularly with the internet and the advent of e-discovery. There does need to be some reining in of litigation. I happen to think it's better reined in at the discovery phase than by having judges draw inferences. Because quite frankly, that's what *Twombly* puts on our shoulders. We act almost as triers of fact, drawing inferences at the outset of a case.

Now that said, that's not what I see when I see an antitrust complaint. I don't see a complaint that's dismissible on *Twombly* grounds. I see a complaint that's dismissible because relevant market isn't alleged, and I may see a complaint that's dismissible because antitrust injury is not alleged. But I don't see *Twombly* cases in the antitrust context, or really in any of the complex litigation.

JUDGE CROTTY: I worked at Verizon after I was corporation counsel for seven years, and I am intimately familiar with *Twombly*. *Twombly* as a pleading made absolutely no sense.

The telephone industry was divided into seven regional operating companies, the RBOCs, and they were assigned the territories in which they were monopolists. Why a company on the west coast, like Pacific Bell or Southwest Bell, would want to come to the northeast to ride on the network of NYNEX or Bell Atlantic made no economic sense. They were not going to lay out a duplicate network, because that's too expensive. And they were not going to ride on the incumbent's network, because you can't make any money that way. But to suggest the companies didn't want to compete was all wrong. What the telephone companies were doing back in the mid- 80s, into the 90s, was developing wireless technology. Wireless technology has absolutely supplanted the wireline business. The wireline business is no longer a monopoly. What you have is massive competition in the wireless industry. So the RBOCs no longer exist. As a matter of fact, AT&T is really Southwest Bell. Southwest Bell acquired BellSouth and then acquired AT&T. Southwest Bell, now called AT&T, and Verizon, which is Bell Atlantic and NYNEX and GTE, compete nationwide along with Sprint and Nextel and a lot of other companies. So you do have the national competition. And the idea one company didn't want to compete with the other and Mr. Twombly was somehow disadvantaged by that, it was a crazy reason. I think the District Court did come to the right decision. The Second Circuit was wrong, and the Supreme Court was right, although not for the reason given.

JUDGE CASTEL: Listen, we can talk about what we think of the plausibility standard in *Twombly*, and we can acknowledge that there has been something of a cutback. Take a look at the Second Circuit's decision in the *Libor* antitrust case, where the court reversed the District Court's dismissal on an application of *Twombly*, saying that all you need to do is allege a plausible inference. If there were two inferences, then you pass the pleading standard of *Twombly* if one of them is plausible.

The reality is in the antitrust arena, particularly where you're dealing with abstractions like market power, market definition, product and geographic and antitrust injury and efficient enforcement, you should have a gatekeeping mechanism to ensure that cases are weeded out or properly pled. Whether we like or don't like the specifics of *Twombly*, the job is still there. You still need to roll up your judicial sleeves and get it done.

I personally have no problem with the application of *Twombly*.

CHIEF JUDGE McMAHON: I just don't know that the job has changed. I really don't. A Motion to Dismiss in an antitrust case doesn't look any different today except for the fact that you all now add a paragraph about *Twombly*. The Motion to Dismiss in an antitrust case—the ones I've seen—don't look any different than they looked 15 years ago.

PROFESSOR CAVANAGH: Shifting gears a little bit, antitrust courts were once reluctant, in the words of Justice Marshall, to ramble through the wilds of economic theory. I think in the late 70s, *Sylvania* and *Brunswick* changed all of that when the court suddenly embraced economic theory. Then subsequently in the early 90s you had the *Daubert* case that made District Court judges gatekeepers to ensure that expert economic testimony was both relevant and reliable.

My question in the antitrust case, has the economics shed light or just more confusion and cost in antitrust litigation?

Justice Castel, if I could start with you?

JUDGE CASTEL: Yes, I don't know whether it's confusion or light. But it's there, and the job has to be done. If you're talking about a jury case, and there is a summary judgment motion made, the *Daubert* component is going to be important in the decision on the summary judgment motion. So my colleague, our colleague Paul Oetken, had a two-day *Daubert* hearing in an antitrust case on whether or not the regression analysis done by one of the economists was valid or flawed, and he concluded it was flawed. And that was critical to his decision in granting summary judgment. So it certainly is in the wheelhouse.

First of all it's quite appropriate that economic theory play a central role in antitrust enforcement for some of the reasons that Paul was pointing out with the Baby Bells. It's true in terms of global markets, service industries. It's easy enough maybe in a per se case, but in a Rule of Reason case, how else are you going to as a judge apply standards if you don't have some economic foundation for what you're doing? But I do think that *Daubert* plays a big role in the jury case.

In the nonjury case—and I'd be curious to hear from my colleagues, summary judgment isn't a common device in my courtroom. That's because we can try the case faster, more easily with direct testimony by affidavit, put on the case. The *Daubert* motion takes place in the context of the bench trial, and it can be done quickly and efficiently. And you have a final judgment that's appealable, rather than the metaphysical debate on whether there was a material issue of fact in dispute. So it's quite different in the bench trial.

JUDGE CROTTY: I am very suspicious of the *Daubert* motion, because I think that too often the expert is given documents that have been selected by his proponent or her proponent, and the expert then whips up an opinion based on what he or she has been told about certain documents or certain cases. And there is a strong suggestion that the opinion ought to be along the following lines. That's not very helpful to me.

So in patent cases and in antitrust cases I address these *Daubert* motions with a considerable degree of skepticism. Like Kevin, I believe that rather than wading through these matters on summary judgment, I prefer nonjury cases. It's simpler, more direct, easier. It's very difficult to write a decision in a summary judgment case. It's far easier to just try the case and come to a conclusion.

CHIEF JUDGE McMAHON: I am delighted to hear Paul say he views *Daubert* motions with skepticism. I am not familiar with the Federal Rule of Civil Procedure that requires you to make a *Daubert* motion simply because your opponent proffers expert testimony. But there must be such a rule.

[LAUGHTER]

And if you don't think that after doing this job for 18 years it's possible for a judge to become skeptical the minute a *Daubert* motion walks in the door, let me assure you that it is. I have seen so many ridiculous *Daubert* motions, where obviously qualified experts were being challenged on their expertise. So unfortunately all the litigants in the future have a very high hurdle to overcome to make me conclude that this is not just a knee-jerk reaction:. There is an expert; we are going to make a *Daubert* motion.

I have granted *Daubert* motions, but I've granted very few compared to the number that are made. And if you want me to take them seriously, you'll only make them when the challenge is serious, and not simply because it's a tool in the toolkit that's available to you.

MR. HOUCK: Due to the exigencies of time, there are more questions we can ask about discovery and case management, but we are going to shift over to trials.

I am going to ask the question, the answer to which may be of most practical interest to the audience here. It's the good, bad and ugly of antitrust trials and litigation.

The questions are: Based on your observations, what are the biggest mistakes lawyers make in getting complex cases ready for trial and trying them?

And on the other side of the coin, what are some of the positive things that lawyers can do to enhance their success in trying cases like this?

JUDGE CROTTY: Well, I am not really a good one to answer this, because I've been on the bench now eleven and a half years, and I've yet to have an antitrust case go to trial. I don't know what the Chief Judge's experience is.

CHIEF JUDGE McMAHON: Same. 18.

JUDGE CASTEL: Same. 13.

[LAUGHTER]

CHIEF JUDGE McMAHON: What is an antitrust trial?

MR. HOUCK: That's an interesting observation. But let's talk about complex cases in general, you know, which share properties with antitrust cases.

JUDGE CROTTY: Well, complex cases, it gets back into discovery, case management, Motions to Dismiss. It's difficult to grant a motion to dismiss. I am always more comfortable if there is a little bit of discovery. When somebody comes in with a motion to dismiss in an antitrust case, I'll say let's identify what the primary areas of concern are. See if we can't take a little bit of discovery on this and then try some partial motions for summary judgment. It might make the case a little bit more manageable.

But one case—it's up on appeal now in the Second Circuit—I granted a motion to dismiss. I was reversed because of the theory—which I thought was crazy—which was set by the Second Circuit to be plausible. We took a little bit of targeted discovery. The parties then moved for summary judgment and I granted a motion for summary judgment. It's up on appeal, so—

CHIEF JUDGE McMAHON: Because the theory is crazy, right?

JUDGE CROTTY: Right. I am an expert on crazy antitrust.

[LAUGHTER]

JUDGE CASTEL: Well, a couple of comments about trials. I think in this day and age, with the number of zeros associated with an antitrust trial—or any major complex litigation that's going to a jury—you should be thinking about engaging a jury research consultant. Not for the purposes of jury selection but to go through the exercise of presenting your arguments to mock jurors and seeing how they play. See what your jurors—jurors who agree with your point of view, what arguments they'd use to persuade the other jurors.

This is absolutely invaluable, and I think the argument can be made in the major case going to trial that failure to do it is arguably malpractice. As a result of working with jury research consultants and mock jurors, you will find that you will reshape your arguments. We think as lawyers we need to present our arguments so they are understandable to the lay jurors.

Some of the points I would make are incredibly obvious, I hope. But I can say not obvious to every trial lawyer.

[LAUGHTER]

That is, knock it off with the deadly deposition reads in a jury trial. It's just you're losing the jury. They don't want to hear it. If you can't crystallize it down to three Q and As, forget it. If you have to do it, you should have videotaped depositions, and play the videotaped depositions. That's not quite as deadly to the jury.

And you have to be a great in the visual arts. If you don't know how to graphically present your case and present your exhibits to hold the attention of a lay audience, you're going to get slaughtered by somebody who does.

CHIEF JUDGE McMAHON: Let me hark back to Kevin's trial with the exhibit that he couldn't be handed because it was terabytes. Do you really think that the jury—I assume it was a jury trial.

JUDGE CASTEL: Bench trial.

CHIEF JUDGE McMAHON: Oh, bench trial. The rules are off.

JUDGE CASTEL: The rules are off, yeah.

CHIEF JUDGE McMAHON: The single biggest mistake that I see in complex litigation—and I rule on almost all objections to exhibits before the trial; that's why we have a pretrial conference—the single biggest mistake that I see is lawyers coming in with mountains of exhibits, because you've gotten lost and can't see the forest for the trees. And you've gotten lost in all of these exhibits that you had turned over to you or that you found during the course of discovery.

The fact of the matter is you're going to try the case on the basis of a hundred exhibits. And I force people to cull it down. They bring in all those things, and I say we're not doing that. We're not doing that. I won't let you do that. You find me the 100 or the 150 exhibits that you really need to show at trial. This is what I do in jury trials. In bench trials, you know—

Actually, by the way, I absolutely agree with both of these fine gentlemen that summary judgment is an overused tool, in particular when you are going to have a bench trial. And I wish more people would have them; the fastest, cheapest from your client's perspective, and the easiest way to get the matter resolved at the close of discovery is to have a bench trial. Forget the Summary Judgment Motion.

JUDGE CROTTY: Can I say something about trials. Kind of like the elephant in the room. We had a meeting of the board of judges a couple weeks ago, and the US Attorney came over, and he disclosed this year, 2016 in the Southern District of New York, the biggest and busiest district in the United States of America, we had 36 criminal trials. The year before it was 55.

Trials are getting very, very scarce. And there is a real concern, the ability to try cases is like pitching a baseball

game or being a quarterback, you have to do it in order to be good at it. You can't just read about it; you have to do it. If you're not getting trials, you forget how to do trials and make effective presentations.

So we're in danger of having a mechanism for resolving disputes which no longer works, because it is not available and it's not within the experience of some very skilled lawyers.

CHIEF JUDGE McMAHON: My beloved late partner, Arthur Liman, always said to young lawyers about the trial that the courtroom is a theater, and you're putting on a show. And meaning that in the best of all possible senses. You absolutely have to be able to distill your case, to distill the complexities of your case into some that either a Luddite or 12 people who have absolutely no educational background in your field are going to be able to comprehend. You have to make it comprehensible and you have to make it manageable. You have to pare it down. That's the value of summary judgment motions in jury cases, to allow you to pare down issues. Once you get beyond that and you're going to trial, you need to distill your case into something that can be presented in a way that a person ignorant of your field can be made to comprehend it.

MR. HOUCK: You're talking about bench trials. I've been involved in bench trials and complicated antitrust cases where the lawyers on the other side—this isn't me who used this tactic—they just dumped reams and reams of documents and deposition testimony into the record. And it seems totally impossible that any district judge could possibly read all that stuff.

CHIEF JUDGE McMAHON: We don't! Surprise.

[LAUGHTER]

MR. HOUCK: Yeah, and presumably they are doing it for a record on appeal.

So how do you handle something like that, apart from not reading it?

JUDGE CROTTY: You say I am not going to take it in, no.

The case I have on trial now they want to introduce the patent file record to address an issue whether the word "the" or "a" should have been used in describing a particular claim. You're going to give me a patent file which is six inches high to help me decide whether the word "the" or "a" should be used. This is ridiculous. No, I'm not going to do it. I mean, that's case management. You have to say no. You can't say yes just because the lawyer wants to put it into the evidence.

CHIEF JUDGE McMAHON: People show up at pretrial conferences with 1,200 exhibits. I say 125 will be admitted. You figure out which ones they are going to be. We can and we do say no.

MR. HOUCK: Judge Castel, do you want to add anything?

JUDGE CASTEL: Yes, we say no, and we resist efforts to sandbag. If you're not going to refer to the exhibit in either your trial brief or your closing statement in a bench trial, then forget it. It's going to be stricken. Even if I let it in, it's going to be stricken.

Now, there are cases, and how did I get stuck with two terabytes? Well, there were 9,662 individual loan files at issue in the case. It was pretty much inevitable.

MR. HOUCK: I worked on the *Microsoft* trial on behalf of the plaintiff states, and the district judge in Washington, even without talking with the lawyers, in his pretrial order ruling, number one, limited each side to twelve witnesses and required that all direct testimony be in writing.

Have you employed techniques, those techniques or techniques like that to help manage and shape the trial?

CHIEF JUDGE McMAHON: Oh, yeah. In a bench trial all direct testimony of any witness that you control obviously, not your opponent, comes in by affidavit. I am familiar with the affidavits when they get to court. The witness adopts the affidavit in his direct testimony on the stand, and we turn him over for cross.

JUDGE CROTTY: I don't do that. I make the direct testimony be put on live. I think it helps to make a credibility finding between the way the witness acts on direct and how he or she acts on cross.

I see the merit in taking the direct testimony by paper.

CHIEF JUDGE McMAHON: No, obviously that's only in a bench trial.

JUDGE CASTEL: I follow the same practice as Judge McMahon.

But there is another part to your question about limitations. Even in jury trials I will impose a limitation, typically a time limitation, on the length of presentations. In order to do this I a) have to know and understand the case, b) I have to hear from the lawyers and get their input on the time limits, and c) I have to be prepared to be flexible if somebody runs out of time and there would be a grave injustice in having them stop mid-sentence, you have to apply some common sense.

But I find invariably—and I have not yet had an exception to this rule—that where you set a time limit up front, invariably the parties return time at the end of the case.

CHIEF JUDGE McMAHON: Yes.

JUDGE CASTEL: They don't even come close to the limitation. That's very effective. They know what they have, whether it's 25 hours or 20 hours or 35 hours to

put on their case. The clock starts when they open their mouth. If they are up cross examining, that goes against their limit. If they are doing a direct examination, it goes against it. If they are opening or closing to the jury, likewise. And it's very effective in keeping the trial under control.

JUDGE CROTTY: My favorite story about time limits is there was a fellow arguing a case before Judge McLaughlin in the Second Circuit. Judge McLaughlin was picking up his papers leaving the bench, and the lawyer said, Your Honor, can I say one more word? And the judge said, yes, so long as it's adios. Time limits.

[LAUGHTER]

MR. HOUCK: So one final question. And then we are going to have about five minutes for audience questions.

We have talked about *Twombly* and *Daubert* and the expense of motion practice and developing expert testimony and all the hurdles in getting to a trial. And I know plaintiffs lawyers often lament they have to win a case two or three times over before they even get to the trial stages. Is that a fair point, and if it is, how do you counter that or get rid of it?

JUDGE CROTTY: Which rule do you want to get rid of—Rule 56, Rule 23, the *Daubert* motions. They are there and the plaintiff has to make his or her case. So I don't have much sympathy for that.

JUDGE CASTEL: Ditto.

CHIEF JUDGE McMAHON: Ditto.

MR. HOUCK: Well, that leaves an extra minute for audience questions.

[LAUGHTER]

Do we have some questions from the audience? If not, Ned and I have more questions to ask, but I wanted to give you a chance.

CHIEF JUDGE McMAHON: It's early in the morning.

MR. HOUCK: None at all.

Ned, do you want to go?

PROFESSOR CAVANAGH: Yes.

In the late 70s and early 80s there were a slew of motions mostly made by IBM to strike jury demands because the antitrust issues were beyond the ken of jurors. Outside the Third Circuit those have been largely rejected and the Supreme Court hasn't looked at it.

More recently there is a similar argument that's come from the academic community, Hovenkamp, Donald Turner, suggesting that jury trials are not a good idea, and that perhaps these issues are beyond the ken of a jury. Then in *Trinko* the court talks about the difficulties that generalist judges have in deciding antitrust issues.

I want to get your reaction—I am afraid to ask this question, but do you think antitrust issues are beyond the ken of generalist jurists, number one?

Number two, would it be a good idea to try to create a panel of judges just to hear complex cases, like groups that could be assigned by the JPML to hear complex cases?

CHIEF JUDGE McMAHON: Well, I don't think it much matters whether those issues are beyond the ken of jurors or not. I think if you want a clue as to where the Supreme Court would go in the antitrust context, we have already crossed that bridge in the patent context very recently when the late Justice Scalia educated us all about the nature of patent claims, which as you know are statutory claims. They are not really claims at common law in the United States, except they were claims at common law in 1789, which is why we have to let juries decide all the issues about the validity of patents.

So I don't think there is a whole lot to be gained from ruminating about whether jury trials are the best vehicle or whether jurors can understand issues. I think you take the jury as a given. And the Constitution says what the Constitution says, and the statutes say what the statutes say, and you make the case comprehensible. You make the case comprehensible for someone who is not familiar with your science or situation, really because you have no choice.

JUDGE CASTEL: Ned, there is almost a little bit of tension between your first question and your second question. We have these built-in protections. We have the gatekeeping role. You have the judiciary on the scene, both at the District Court level and at the appellate level. So yeah, I mean juries are here to stay. I don't think that argument has legs that it is so complex a jury can't understand it.

And the fact of the matter is, while I haven't tried any antitrust cases to verdict, I've certainly tried patent cases to verdict, and jurors rise to the occasion. Lawyers rise to the occasion in their ability to explain the subject matter. And I think we as a people lose something by taking jurors out of it.

I am not a particular fan of having specialized courts. Now we do have a patent pilot project in our district where a judge can refer a patent case that he or she prefers not to have to judges who are open to taking patent cases. Something like that seems fine. And of course, a lot of antitrust cases wind up being MDLs, and the MDL panel does assign or refer to a particular judge in a particular district. So there is a little bit of that already.

But be wary of the specialized court, because then you're going to have ideology really seeping in. It's better to have disparate results from different judges

that get sorted out through the appellate process than having shifts that are generated by the composition of a specialized court.

JUDGE CROTTY: Under the Seventh Amendment I think we are going to be dealing with juries for long time.

With regard to specialized courts, if you look at the Supreme Court's recent jurisprudence on the federal circuit with regard to patent cases, you notice the federal circuit is being treated now like the Ninth Circuit. If it goes to appeal, it will be reversed.

My own experience, I found the juries in the summertime have a higher level of education. That's because teachers and people who are academics don't like to take jury duty during the school year and volunteer for jury for the summertime. So I've had a couple of jury trials where you had four or five Ph.Ds and a couple of masters, and they have a very good understanding of quite complex issues.

CHIEF JUDGE McMAHON: When I was a judge in state court we called them summer juries. We really did.

MR. HOUCK: Speaking for Ned, he's very pleased to have those comments about academics.

[LAUGHTER]

Now I think we are going to close this out. We are out of time. But I do want to thank you very much for what was a very informative and lively discussion, especially at this hour of the morning. Thank you very much.

[APPLAUSE]

MR. WEINER: That was in a word ,great. I think we could have listened to this for another hour or two. But thank you. We are going to move right into our next panel. So Elai and group, please come up.