NEW YORK STATE
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1997
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January 23, 1997
New York Marriott Marquis

NEW YORK STATE BAR ASSOCIATION
ANTITRUST LAW SECTION

ANNUAL MEETING

Thursday, January 23, 1997

Duffy/Columbia Suite—7th Floor
New York Marriott Marquis

New York City St. John's University, Jamaica

Section Chair
PROFESSOR EDWARD D. CAVANAGH **Program Chair**

BARRY J. BRETT, ESQ.
Parker, Chapin, Flattau & Klimpl
New York City

Dinner Speaker:
HONORABLE ROBERT PITOFSKY
Chairman, Federal Trade Commission
Washington, D.C.

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BUSINESS MEETING OF THE SECTION

PROFESSOR EDWARD D. CAVANAGH: Good afternoon. My name is Ed Cavanagh. I'm Chair of the New York State Bar Association Antitrust Section. We have a terrific program this afternoon, which will culminate in a reception and dinner this evening featuring FTC Chair Bob Pitofsky.

But before we start our excellent program, there's a little business that we have to take care of, and that is the election of officers and the Executive Committee for 1997. The report of the nominating committee is as follows: For Chair, Barry Brett; Vice Chair, Michael Malina; Secretary, Robert Hubbard; the Executive Committee will be Edward Cavanagh, Bruce Culbeth, Lloyd Constantine, Steven Edwards, Lawrence Fox, Martha Gifford, Peter Greene, Pamela Jones Harbour, Stephen Houck, Norma Levy, William Lifland, Kenneth Logan, Vernon Vig, and Alan Weinschel. Are there any other nominations?

Well, it is my pleasure now to turn over the chairmanship of the Antitrust Section to Barry Brett. Barry is also the program chair for today, so Barry, take over.

MR. BRETT: Thank you, Ned. I do very well in uncontested elections.

You've all seen the program announcement and distribution, and it's a very impressive program. We are again honored to begin the program with something that has been a staple for some years—to start with our review of the antitrust laws and antitrust developments for the past year.

And for more years than I can recall, and it probably would be ungracious to try to figure out how many, Bill Lifland has been kind enough to take the trouble to give us the benefit of his review of the prior year's developments. It would be redundant to try and introduce him with the grandeur to which he is entitled, besides which we'll hear enough about him further this evening. So it is going to kind of get oppressive for all of us, and we certainly don't want to embarrass him.

Other than all of you seeing his column regularly in the *Law Journal*, we have all heard him regularly give this program, his credentials as editor-in-chief of the

THE ANTITRUST YEAR IN REVIEW

WILLIAM T. LIFLAND, ESQ.: Thank you very much, Barry. I hope everybody has got one of these handouts. If not, there are a few more here, but they will save us from going through the cases. These are my selections of the cases that are worth talking about. Don't be frightened; we are not going to try to do all of them this afternoon, and we have to be out of here by 2:30 for the sports panel to start. But these are the cases that seem to me to be of more than passing significance. And let me apologize in advance if I've left out any of your favorites, particularly the ones that you've won during the last year.

Well, 1996 was eventful in the antitrust world. Congress overhauled the Communications Law, and that had antitrust consequences. The government enforcement agencies, both on the federal and the state level, were active; 1996 was the first year of the FTC's operations under Chairman Pitofsky, the first full year that is. There were a number of noteworthy events, including the publication of the FTC's Staff Report on the hearings that were conducted around the turn of the year. Over at the Antitrust Division, of course, there was the first $100 million fine and also the first antitrust lawsuit filed against a municipality. And although there are plenty of other developments in the legislative and executive areas, we are going to concentrate on the case law, which tends to be more incremental and to lack a unifying theme, but is still, on balance, interesting.

We had a Supreme Court decision by Justice Breyer, who has shown considerable interest in antitrust law, which related to the so-called nonstatutory labor exemption. Some might describe this as a pseudo exemption, because the Court is really just harmonizing two federal statutes. The antitrust laws here were invoked against a multi-employer sports league, which imposed a salary ceiling for developmental players after collective bargaining on this and other issues had reached an impasse. The Court ruled that the antitrust laws should not be invoked to challenge this action inasmuch as Congress had created an administrative agency specifically to referee the reasonableness of the bargaining process between employers and employees. And given the general rule of statutory construction, that the specific overrides the general, this might seem an obvious result, since applying the antitrust laws might lead to inconsistencies. In fact, some might even find unfortunate the Court's qualifications that there might be some employer agreement sufficiently distant in time and circumstances from the collective bargaining process that the application of antitrust rules would not interfere with that process. This seems to almost invite the conflict which the Supreme Court was trying to avoid. But it does not appear to have happened yet.

Shortly after the Supreme Court decision there was a Ninth Circuit ruling that a contractor had acted lawfully by inducing a large customer to insist that employees of all contractors be represented by a particular union. This impacted the profits of another contractor who sued. The court stated that to apply the antitrust laws would require it to do exactly what the Supreme Court had said it shouldn't do, namely scrutinize the labor relationships of a firm in light of an antitrust perspective. Now, many might say that in this case there was hardly any basis for an antitrust complaint. Many would say that it's just normal competition to tell your customers that you use the highest quality inputs in your product, and if your customer is going to buy from your competitors, he should insist on getting the same quality of inputs. Perhaps that is a good analogy to what was happening in that case.

A somewhat closer antitrust issue was posed by another ruling in which a union agreed with a group of construction contractors that if they faced competition from non-union contractors, they could apply to the union for a subsidy in order to make them competitive. The court stated that the labor exemption applied. Again, there is a question as to whether it was necessary, since the antitrust law should permit a supplier to offer customers price concessions in order to make customers competitive with rivals.

Now, another widely invoked antitrust exemption relates to state action. In essence, the antitrust law is held not to apply to actions of states and their delegates when the actions were clearly authorized by the state legislature and in the case of private delegates subject to active supervision. This allows states, among other things, to substitute a regulatory regime for the competitive system that is regulated by the antitrust laws.

Now one interesting ruling occurred after a county established an exclusive franchise for ambulance services. A losing bidder challenged its authority to do so. A district court read the applicable state statute and concluded the county had exceeded its authority. It said the county was authorized to establish exclusive franchises for emergency service but not for nonemergency service. Now, the case was appealed to the Ninth Circuit, which read the statute more broadly than the district court and permitted the creation of exclusive arrangements for nonemergency services as well. Now, you might say that the Ninth Circuit lost sight of the requirement that the state legislature, in order to create a state action exemption, must clearly articulate its authorization. And one might argue that if the authorization is not sufficiently clear to a federal district judge, any additional clarification should be required from the legislature before an immunity is recognized.

In a subsequent Ninth Circuit decision, the court appeared

a little closer to the mark. It reversed a district court which had dismissed an antitrust complaint against a utility, stating that the state action exemption doesn't attach merely because a state has chosen to replace competition with a regulatory structure. Instead, the question is whether the regulatory structure sufficiently authorizes the conduct alleged to violate the antitrust law and provides for active supervision where the conduct is engaged in by a private party.

The Fifth Circuit, in a case quite close to the ambulance case, ruled that a state hospital had properly given exclusive rights to the use of its dialysis units for chronic patients, noting that the statute authorized the entry of exclusive contracts, and that it was clearly to be inferred that the legislature could have foreseen the competitive impact on the plaintiff doctor.

Now, the idea turns up in a number of these cases, and it raises the question whether foreseeability, as distinguished from clear authorization, is an independent ground for immunity. The Ninth Circuit had actually indicated that it was. But then came a petition for re-hearing, and an amicus brief from the Department of Justice, and the Ninth Circuit acknowledged error and confirmed that the proper test is one of clear articulation, rather than foreseeability. That's in the *Columbia Steel* case in the materials.

Now, another interesting Ninth Circuit decision tends to remind us that immunity is not always a constant thing. It may be here today and gone tomorrow. The issue in the particular case was whether the immunity shielded a gas utility which a private party charged with predatory behavior by selling below-cost equipment for refueling gas-operated vehicles. The court looked at the statute and concluded that the legislature had clearly articulated a policy of encouraging wider use of gas-fueled vehicles. It had authorized the utility commission to allow utilities to sell refueling equipment at less than cost, in effect recouping the difference from rate payers. But the court also observed that the utility commission was directed not to permit the gas utilities to compete unfairly with others. So the court decided that until mid-1993, when others came on the market, the state action exemption existed. Of course, it wasn't necessary, but it existed. After 1993, selling the equipment below cost constituted unfair competition and therefore no exemption exists. What the state hath given, the state may take away. And since the states are rarely subject to treble damage awards, but the regulated parties may be, it suggests that regulated parties had better be on their toes to make certain that if they are relying on state action immunity, that the immunity is current and has not been withdrawn.

Turning now to the subject of monopolization and attempted monopoly: As everyone recognizes, one of the key factors in determining whether monopolization or attempted monopoly exists is whether there has been exclusionary conduct. And there has been considerable uncertainty over what constitutes exclusionary conduct, particularly since ordinary competition has a tendency to exclude the unsuccessful.

In the Supreme Court's *Aspen* and *Kodak* rulings, which are cited in the cases that appear in your handout, the opinions indicated that conduct or the tendency to exclude might not be unlawful exclusionary conduct if it had a valid business justification. The Court was not satisfied with the justifications which were tendered in the *Aspen* and *Kodak* cases, but there are some subsequent decisions by lower courts showing such satisfaction.

Now, in one case a supply agreement was terminated, an agreement for supplying perlite which was used in roofing panels, when the supplier decided that it would go into fabrication itself. The court rejected the claim of attempted monopolization, saying that the desire to enter fabricating so as to increase profits was not to be considered anticompetitive. In another case the Ninth Circuit found valid business reasons for an insurer's insistence that people participating in dental plans collect co-payments from patients. That is, the dentists who rendered the service were to collect co-payments from patients and collect the balance from the insurer. Now, it was important to the insurer that the patients pay these co-payments, because the insurer felt that that provided a disincentive to going to the dentist unnecessarily.

It strikes me that I'd be most loath to go to the dentist unnecessarily, but . . . The court said when some dentists were collecting co-payments from other insurers who insured patients only against the co-payment requirement, that the insurer's desire to require co-payments to be collected from patients only was a valid business reason, indeed that it was a foregone conclusion that it was a valid business reason.

Now, we mentioned briefly that the Supreme Court in the *Kodak* case was not satisfied, at least for purposes of summary judgment, that Kodak had stated a valid business justification for the alleged monopolistic conduct. In that case, Kodak was the sole source for some of the parts which were used to repair the copiers which Kodak sold. And it required that purchasers of the machines either do their repair work themselves or contract with Kodak and not contract with independent service operators.

Now, that case was tried during 1996, and there was a report in the *National Law Journal* about the case and an interview with the plaintiff's lawyer. According to the report, a Kodak manager testified that he did not want anybody else servicing Kodak photocopiers. The next question according to the account was, "You wanted to, in the loose sense, monopolize the business?" The answer was, "We did not want anyone else serving the customer." The witness was then asked whether customers should have a choice of service between Kodak and

independent service operators. His answer was, "No, I don't think they should."

Now, what would you do with that testimony if you had represented the plaintiff? I'm sure you would enlarge it on the screen and use it in cross-examining other witnesses and make sure the jury never forgot about it. Well, according to the plaintiff's lawyer, that was exactly what he did, and the jury returned a verdict for plaintiffs. After treble damages and fees, the award came to a little over $75 million, and I assume it is still on appeal.

Well, despite the striking success of the plaintiffs in the *Kodak* case, many other monopolization claims continued to founder because of failure to prove adequately the prerequisites of relevant market, both product and geographic, and monopoly or near monopoly power in that market and antitrust injury.

There have been a number of cases where the crucial determinant has been geographic market. A Third Circuit case, *Ideal*; the First Circuit case of *Coastal*; and Ninth Circuit, *Forsyth*, all found shortcomings in that area. A district court rejecting a geographic market that was rather local pointed out that the plaintiff, which rendered a service useful in drilling oil wells, geosteering service, had an office in Texas, but did its business with customers all over the world, and therefore, could serve any place having adequate telephone connections. There was a district court case indicating that it was unable to assess the probability of successful monopolization because of a problem in defining the relevant product market. It treated an allegation in the complaint that the parties were the only two domestic suppliers of chest equalization radiography equipment as not only inadequate to define a relevant market, but making the complaint subject to dismissal under Rule 12(b)(6). The court said there was no reference to any reasonably interchangeable alternatives and no explanation of why the market was being defined in such narrow terms, both of which were considered essential for a basic pleading.

Turning now to acquisitions. Over the years it's been observed that the FTC and the Justice Department have followed different routes if they are unsuccessful in obtaining a preliminary injunction against an acquisition. Normally the Justice Department has abandoned its challenge on the theory that if the best evidence has not carried the day at the injunction hearing, it's unlikely to do so at trial. The FTC, however, has usually continued its challenge to the transaction through administrative proceedings. Not very long ago the FTC decided that it would consider harmonizing its policy with the Justice Department. In late 1995 it in fact abandoned a challenge to a hospital merger which the courts had declined to enjoin. But in 1996, though it decided not to accede to another such ruling, it had been unable to get a preliminary injunction against the merger of two leading hospitals in Grand Rapids. The court accepted the FTC's definition of the relevant markets and found that the proposed transaction would enhance market power, but concluded that the market power was not likely to be exercised to the detriment of patients.

Now, one basis for the decision was a lack of correlation between price levels and market concentration for nonprofit hospitals. Perhaps equally important was evidence of efficiencies that exceeded $100 million, which the hospitals were willing to apply to commit to price freezes, margin limitations and serving the needy. Now, the FTC argued that this was not enough because the transaction would make it more difficult for managed care organizations to bargain for additional discounts. But the court appeared to think that this kind of a discount was a bad thing, pointing out that those discounts would be recouped through increased charges to others, and selective price advantages were not the type of benefit he thought the antitrust laws were intended to secure.

Now, the case obviously raises far-reaching issues as to whether the proposed commitment makes the transaction on balance in the interest of consumers. And if so, what, if anything, is to be done to assure compliance with the commitment?

There are some other very interesting developments relating to acquisitions, but to stay with our time schedule, I'm just going to suggest that the cases are well worth your attention, and to point out that there were some very substantial penalties for failure to comply with Hart-Scott rulings, two $3 million penalties during the course of last year.

Moving on to the subject of horizontal conspiracies: There are, of course, two elements in addition to the required effect on commerce. One of these elements being concerted action, another being unreasonable limitation of competition. There were a number of cases this past year on both these requirements.

In one case, involving customer transfer fees imposed by a brokerage firm, it turned out that the fees were settled on between the firm and its parent organization, which the court considered as a single actor. Then the firm was sold to another parent, and the determination was made to continue the transfer of fees. In both cases the court ruled that the decisions were not subject to antitrust challenge because the decisions were made by parties in a single-actor relationship.

Now, employer/employee collaboration was also held not to satisfy the requirement of concerted action. In one case staff officers had acted as agents for a hospital, agents and employees. In another case there were allegations of a conspiracy between a sports league and its officials. A district court in the Third Circuit found this was to be treated as a single-actor rela-

tionship. But in the Seventh Circuit, in a recent decision by Judge Easterbrook, it was suggested that a sports league and its members might not necessarily be treated as multiple actors. Judge Easterbrook didn't decide the issue, and said that this was to be determined by the district court. He also noted that since the Rule of Reason should apply to the actions alleged in the complaint, the district court might be well advised to hold an initial hearing on market power. Because if it turned out that no market power were found, the issue of single or multiple actors might not be reached.

Some interesting cases as to whether collective action constitutes an unreasonable restraint of trade: A Fifth Circuit case involved a doctor's claim that a hospital and a committee of physicians conspired to withdraw the doctor's privileges. In ruling for the defendants, the court said that none of them stood to benefit economically from the withdrawal. The committee members did not claim to be capable of treating the illnesses that the plaintiff doctor specialized in, and the hospital would, of course, lose revenues as a result of the withdrawal of privileges.

The Eleventh Circuit affirmed a district court summary judgment against an internist who had sued a preferred provider organization that had refused to add him to its panel of providers. The court said that that type of refusal was not the type of group boycott which was unlawful per se. And when considered under the Rule of Reason, it stated that the arrangement survived because there was no proof of any actual or potential detrimental effect on competition.

The Sixth Circuit reached a similar conclusion upholding dismissal of a neonatologist's antitrust claim that other doctors had unlawfully boycotted her by referring cases elsewhere. It's not totally clear whether the same result would be reached in the Second Circuit, which has held that an agreement between two firms in a vertical relationship can be characterized as a horizontal restraint of trade if the agreement seeks to put a direct competitor of one of the acquiring firms at a disadvantage. The Second Circuit observed that other courts may not apply group boycott analysis to these arrangements. The court also recognizes that an ordinary exclusive distributorship could be challenged on this basis, but noted that there is usually ample procompetitive rationale for such arrangements. But since in the case before it there was no indication of any procompetitive rationale, the court was willing to rule that the complaint should stand. That's the *Discon* case cited in your outline. The facts were very unusual. It involved a service contractor's claim that a competitor and a utility conspired to exclude it from serving the utility because it wouldn't participate in a sale and rebate scheme that was designed to improperly inflate the utility's operating costs for rate making purposes.

Now, the Ninth Circuit put forward a procedure for allocating burdens of proof in cases involving unreasonable restraints of competition. This is the *Hairston* case where the court ruled on a challenge to Pac-10's imposition of sanctions on the University of Washington football program. The court said that the plaintiff had the initial burden of introducing evidence of anticompetitive effect, which the court ruled the plaintiff had done by showing that the University of Washington had been barred from participation in bowl games for two years. It was then the defendant's responsibility to show procompetitive benefits, and that had been done by Pac-10 with evidence as to the importance of enforcing amateurism requirements. The burden then shifted back to the plaintiff to produce evidence to satisfy the court that other less restrictive means were available to achieve the desired procompetitive benefits. And this, the court ruled, had not been done by the plaintiffs.

Turning to vertical arrangements. There were a number of cases involving resale pricing, tying, discrimination and exclusives. Resale pricing issues, of course, are raised most often in dealer termination litigation. Plaintiff retailer claimed that it was terminated because it was a discounter and the supplier had conspired with other retailers to keep prices above a minimum level. The court stated that the allegation of conspiracy had not been proved, and that unilateral termination because of discounting was not a per se violation. Indeed, the court might have said it is not a violation at all in the absence of proof of a price fixing agreement between the parties.

A case involving allegations of such an agreement survived a summary judgment motion in the district court in the Seventh Circuit, an unusual case. A dealer terminated by the supplier complained that it was terminated because it had not observed agreements on resale price, which the supplier had imposed on it and others. The defense was that the supplier did not have market power and accordingly a per se rule should not apply.

Now, you may recall that some years ago this was the position of the government in an amicus brief in the *Monsanto* case before the Supreme Court, and the Court declined to reach the issue because it had not been raised below. Shortly afterwards, Congress stipulated that no part of the appropriation for the Department of Justice should be used for overturning or attempting to overturn settled law on price fixing. This was evidently a plaintiff's attempt to start this issue going through the legal system.

Now, in addition to alleging a violation of the federal antitrust laws, the plaintiff had alleged a violation of the state antitrust laws. And as to that allegation, the Supreme Court said that since there was not a per se rule with respect to these

arrangements under state law, the plaintiff there did have the burden of proving market power, although he did not have it with respect to the federal claim. How would the Seventh Circuit have come out on that? Quite likely the same way, although you can discuss it. There was an interesting Seventh Circuit case involving a claim of unlawful resale price fixing, maximum price fixing. There was no agreement as to a set resale price; the dealer could charge what it wished. But if it chose to charge more than the suggested resale price, then it had to remit the excess to the supplier as an additional cost of goods. Now, the court said that this requirement made it useless for the dealer, in fact counterproductive for the dealer, to charge a higher price and was thus the equivalent of a contractual restriction against exceeding the suggested price. The court said because the Supreme Court had ruled this was illegal, the dealer was entitled to go to the jury. The Sixth Circuit reversed a summary judgment dismissing a dealer's claim that he was terminated because he refused to stop discounting. Apparently there was no allegation in this case that the dealer had been party to an agreement to stop discounting, but the goods were distributed by the manufacturer through a distributor, and the court found that there was evidence which would enable the jury to find that the manufacturer and the distributor had agreed to cut off the plaintiff unless he agreed not to discount.

There are a number of interesting tying cases this year, but I think I will skip over them in the interest of being sure that we finish up on time and turn to discrimination.

There are a number of significant Robinson-Patman cases winding their way through the courts. Pharmaceutical cases are of course of great importance. One of the cases that is cited in your materials, the *Hygrade* case, involves alleged discrimination in the price of orange juice to dealers serving a particular class of customer. There's also a very interesting First Circuit case arising under the Puerto Rican counterpart to the Robinson-Patman Act. But the groups of cases I would like to concentrate on are the first, or rather what seems to me in any case to be a rather unusual attempt in the area of government enforcement.

As everyone is of course aware, the Robinson-Patman Act was enacted to ban or make it more difficult for large buyers to obtain lower prices than their competitors from suppliers. There have been a number of recent government attempts to enjoin the use of clauses in which large buyers seek to get a supplier to agree to give them equal treatment with other customers. In other words, what you might describe as anti-discrimination clauses, although they are typically called most-favored customer or most-favored nation clauses.

Now, following the lead of the Justice Department, which has asserted the antitrust laws against a large health insurer using such clauses, the FTC charged a Tennessee pharmacy network with acting illegally in requiring these kinds of assurances from pharmacies participating in its network. The FTC stated, as had the department, that when imposed by a dominant buyer, such a provision could establish a price war and restrict competition that would otherwise allow prices to go below the floor, and the FTC said there was evidence that this had happened in the particular case.

Now, a similar proceeding is pending in the district court where the government sued challenging a dental insurer's policy of seeking an agreement from dentists to give the insurer the benefit of their lowest rates, and a motion to dismiss was denied by the district court. It distinguished precedents upholding such clauses on the ground that it had not been shown in those other cases that the effect would be to discourage sellers from discounting. Now, one has to ask what the likely outcome of these enforcement initiatives will be. Is it realistic to expect large buyers to take no action when they learn that suppliers have given competitors of theirs, particularly smaller competitors, more favorable deals, or will they take action to avoid dealing with those particular suppliers? Will they decide to integrate forward, or what else may happen?

It strikes me it's very difficult to predict the outcome of successful prosecutions of this nature, and it is at least conceivable that the outcome may be less anticompetitive or may be more anticompetitive than the status quo.

Now, another type of antidiscrimination clause may be of considerable interest to us as lawyers. One of the common provisions of antitrust settlements is a most-favored nation clause, which entitles the settling defendant to the same terms extended to any similarly situated defendant. In this case there was such a clause. There was an exception to the clause if circumstances materially changed. And a little over a year later plaintiff dismissed his claims against another defendant after deciding that there was not enough evidence of that defendant's participation in the alleged conduct. The settling defendant then asked for its money back; that was refused. The defendant moved to enforce the most-favored-nation clause; the motion was denied, and the Sixth Circuit upheld the denial. It said that it was not refusing to recognize most-favored nation clauses, as some courts did because of a tendency to inhibit settlement, but it was relying instead on the fact that the plaintiffs became aware that they had no evidence to support their claims against the other defendant, and this constituted a material change in circumstances. Well, you might say that the defendant who invoked the most-favored-nation clause here was stretching it by treating a dismissal as settlement. Normally it's a more favorable settlement, that is the purpose of the clause to provide against. But the outcome of the case in the Sixth Circuit is a pretty strong indication that if anybody wishes to draft a

most-favored nation clause for use in a settlement agreement, he had better not put in an exception based on material change in circumstances. If a change in someone's subjective evaluation of the strength of the case can constitute a material change in circumstances, then the commitment may not be of any practical value. It's highly desirable, therefore, if one tends to rely on that kind of a claim, to spell out any exceptions in different words and in terms that can be measured objectively.

A brief word or two on exclusives. Exclusive distribution arrangements are sometimes challenged under the antitrust laws, and in 1996 there were two appellate decisions upholding those arrangements. The Third Circuit upheld what has been a common practice for film distributors to grant exclusivity for first-run films to particular theaters for a particular time. The court indicated that the practice was not anticompetitive and could even be regarded as procompetitive, since it encouraged the plaintiffs, distributors who did not get the films, and other excluded theatres to actively seek out other sources of films. The Seventh Circuit, another opinion by Judge Easterbrook, upheld another common practice—licensing by owners of newspaper features, such as columns, sometimes even news services, to other newspapers. These licenses are sometimes exclusive within a metropolitan or other limited area and for a set period, such as three years. The court upheld the exclusivity, distinguishing a case requiring a buyer to use only a seller's input from cases in which the seller gets exclusive use of input on the ground that the latter cases do not impose a barrier to entry, while the former case does. The court pointed out that the restraint, which did not permit the buyer to use the product of other sellers, had been upheld provided that it was only for a very limited amount of time.

Finally, a few words on pleading. Federal judges are by and large extremely busy. Their criminal dockets are particularly heavy, and it is easy to understand, particularly as to criminal matters, that the courts may find them more important than serving as mediators or adjudicators of civil controversies under the antitrust laws. Accordingly, there are considerable indications that judges are expecting lawyers to do their share of the work to resolve cases that are brought before them, and they have expressed a good deal of criticism of generally worded pleadings that do not tell them what the case is really about so that they can make some of the discretionary decisions which they make in handling their litigation.

THE "STUDENT" ATHLETE, THE NCAA AND THE SHERMAN ACT

MR. KESSLER: Today's program is going to be on the role of antitrust in NCAA athletics in its fullest sense. By that I mean everything from its regulation of athletes and athlete eligibility, to broadcasting, to licensing, to event planning. What this really reflects is the fact that college athletics has changed dramatically in the last 20 years. Starting from a base of amateurism in the early traditions of college sports more than 100 years ago, we now have a business of very substantial size. If you put all of NCAA sports together, you're probably talking about a business that is bigger than the NFL and bigger than the NBA individually. Because they are in all the sports, you're talking billions of dollars in contracts on a multiyear basis for broadcasting revenue. You put together all the conferences from all the different sports, you're talking about huge sums of money in licensing being paid to the various teams for sneaker contracts, endorsements, coaches' endorsements, a whole variety of things which make you question whether the original assumptions and the legal assumptions about the NCAA are correct or not.

In any event, that's what we are going to address today, and we could not have a more qualified or fascinating panel, quite frankly, to address these subjects. So I'm going to spend a little bit longer time introducing the panel than my introduction was, because they are truly an extraordinary group.

First of all, on my immediate left is Judge Ralph Winter. Judge Winter, as a distinguished member of the Second Circuit Court of Appeals, has a particular claim for being here, other than his great judicial acumen, and that's the fact that he has written—I have been so updated today—five different opinions concerning either the antitrust laws in professional sports or the related aspects regarding the baseball strike, and has really become known as one of the leading judicial thinkers in this area. Unfortunately for me, I was on the opposite side of the issue from Judge Winter on the labor exemption, and Judge Winter won. But both in his own courtroom, where of course he would win, and in the United States Supreme Court as well in the *Brown* decision, we now all are equally influenced by his persuasive reasoning.

Second, and I'm going to skip now to the end, we have Dennis Cross. Dennis is a partner in Morrison & Hecker in Kansas City, where he is chairman of their Appellate Litigation Section. But again, to focus on his unique qualifications for this panel, he is the lead lawyer in a case right now pending against the NCAA in which he represents a class of people known as restricted coaches. The restricted coaches are not the head coaches, but below the head coaches, and they have a salary cap that's been imposed by the NCAA on the grounds, I guess, of competitive balance from the NCAA standpoint. That cap has been held illegal under the antitrust laws. That decision is currently subject to appeal, and a damages hearing is also going forward. So Dennis will have some interesting things to say about his experience with the NCAA.

Third, I'm going to go all the way to the end, I have Professor Ken Shropshire. Professor Shropshire, who is at the Wharton School of Business at Pennsylvania, is also well qualified to be on this panel. He has written an award-winning book called *Agents of Opportunity: Sports Agents and Corruption in Collegiate Sports*. That might give you a clue about his views on some of these issues. He has also written a book entitled, *The Sports Franchise Game: Cities in Pursuit of Sports Franchises, Events, Stadiums and Arenas*; and finally, *In Black and White: Race in Sports in America*, which was published last year. So again, he will provide us with a very interesting perspective on these issues.

Finally, in what undoubtedly will be the most enlightening perspective of all, and I say it in deference to the other members of our panel, all of whom I have the greatest respect for, we have Coach Carnesecca, who really needs no introduction, by far the most well-known member of this panel. He was the coach at St. John's in their outstanding basketball program, I think for more than 20 years. He led them to great victories and flourishes, but most importantly has deservedly developed a reputation for being one of the finest gentlemen in collegiate sports. I know we will all be enlightened by his perspective. So that is our panel today. Maybe we could all just welcome them here.

Moving right along, we are going to do this in a discussion format, where I will be asking questions for the various panelists to address, and we are going to encourage you to ask questions for the panelists to address, which I think is the most fun of all. But I'll get the ball rolling, and at an appropriate time we will throw it open to the floor and get a dialogue going, since all of these issues are really frontier issues in which a lot of thinking has to be done.

To start out, since the Supreme Court's 1984 decision in *NCAA v. Board of Regents*, which is really the most influential decision in this area, it's been clear that the antitrust laws do apply to the NCAA, at least in some context that involves the broadcasting area. The lower courts have been called upon a number of times to consider how antitrust should apply in a college setting. What I would like to ask our panelists, to get the ball rolling, is: What is your view about whether antitrust laws are a suitable instrument for regulating at least the com-

mercial part of college athletics, or do they bring the courts into places where they don't really belong? Let me throw that open, and I guess, Dennis, why don't I start with you, since I know you've got a case on this, and we'll move from there.

MR. CROSS: Well, you can probably predict what my answer will be, since I am busy enforcing the antitrust laws against the NCAA. I think that there is no reason why the antitrust laws shouldn't apply to what the NCAA does to the extent that it's involved in commercial activities, which it largely is. I think that the recent changes in the market of college athletics that you've referred to in your introductory remarks just make it all the more necessary that the antitrust laws should be applied. I think that the antitrust laws are flexible enough to deal with the peculiar problems of intercollegiate athletics, just as they are flexible enough to deal with the peculiar problems of any industry in any market.

MR. KESSLER: Coach Carnesecca, let me broaden the question a little bit for you. Do you think the courts and the laws should have a role in regulating the NCAA at all, or is this better left just to the NCAA to regulate itself?

MR. CARNESECCA: First, these are my own personal views.

MR. KESSLER: Absolutely.

MR. CARNESECCA: Okay, thank you. Thank God we have antitrust. Because whenever rights of individuals have been violated, in some cases they were, I think we have to have a body that's going to look after those individuals.

Now, I think just to get a little picture, all the rules in the NCAA were written or put together because they felt it was right for that organization. It's sort of a club. If you want to belong to this club, you're going to have to obey the rules. That was the original idea, and it's who makes up the NCAA—all the members, all the colleges, all the universities. So it's ourselves who are making the rules. But many times these rules just got a little bit out of hand. Maybe it might have been a little bit capricious, if I can use that term, maybe a little arbitrary. But thank God that the antitrust is there, because there's no doubt in my mind that certain rights were violated.

MR. KESSLER: I think, Dennis, you just found an expert witness.

MR. CROSS: We will be talking after.

MR. KESSLER: Let me turn now to Judge Winter. Judge Winter wrote the leading decision that, at least in the labor arena where there is a union in existence, the antitrust laws really should defer to the labor laws in that aspect. I'm wondering, Judge Winter, if that gives you any thoughts about antitrust laws in collegiate sports, or is it different because we are not really talking about a competing body of federal law?

JUDGE WINTER: I'm afraid we are going to make Dennis over confident for his oral argument. I don't understand what's the fuss. There isn't any court decision that even remotely intrudes on higher education or curriculum or scholarship or anything like that. I mean why should a university be able to fix prices through a group boycott? Coach Carnesecca called it a club. It's not a club; it's a group boycott. And I just don't see what the fuss is.

Now, I have the advantage of having in an earlier life been a professor in a university and having responsibility for admissions. Another law school at one time wanted to exchange information with me about financial aid to particular students that both of us had admitted, and I declined—I also was teaching antitrust at the time and declined to accept the offer. Since the offer was through an intermediary, I was not forced to make a citizen's arrest of what was then a famous dean. But I just don't see what the problem is.

Look at the football TV case. The National Football League had to go to Congress to get an exemption for its selling TV rights like that. Why should a direct competitor, the NCAA that sells TV rights, be any different? I just frankly don't see the problem. I'll see the problem some day when somehow the courts are deciding what the curriculum ought to contain or something like that. But I see no problem whatsoever here.

MR. KESSLER: Professor Shropshire, let me change the focus there, because I suspect you don't dissent from the panelists so far.

PROFESSOR SHROPSHIRE: Not now, no.

MR. KESSLER: But really, and I think Judge Winter is right, the first question was the easy question, because I think everyone, or certainly most people, would agree that the law should apply. So let's get a little bit more specific as to what they should apply to and how they would apply. Specifically I would like to focus now on the issue of student athletes, which I think is a tougher question, and the NCAA's ban on monetary payments to athletes other than scholarships, according to a variety of rules. So far the few court decisions which have looked at some of these eligibility rules (although not the basic one, which is the one that bans the payments at all) have generally held them to be lawful under the antitrust laws, saying that the NCAA has a need to preserve principles of amateurism, and that basically these rules were designed to further that goal. In fact, if you look at the NCAA case in the Supreme Court, there is at least a mention of amateurism as one of the possible justifications that could be looked at.

On the other hand, there's a book called *The NCAA Cartel*

that collects the work of a number of economists who have looked at the NCAA eligibility rules and have concluded that they suspiciously resemble the restraints that a cartel would impose in terms of compensating the athletes. What I would like to do now is assume that antitrust laws apply? Do you think the eligibility rules should be held lawful or not?

PROFESSOR SHROPSHIRE: I guess the roundabout response to this is: You want to know if, under the Rule of Reason, amateurism is a fair reason to say that the antitrust rules should not be applicable to college sports, and that pay should be restricted. There's a book called *The Ancient Myth of Greek Amateur Athletics*, written by a classical scholar, David Young. It goes through the whole origins of amateurism, and really just puts the whole thing aside as a myth; the ancient Greeks didn't even have a word for amateur. In all their athletic events prizes were awarded; it was quite the opposite of what we generally perceive. This whole concept of amateurism really emerged in Victorian England as more of a class, separatist kind of operation. If you think about it, at the time that the Olympics reemerged, when amateurism really grew up, the idea for Baron Pierre Decupertan was to make something profitable for himself, and how else do you do that but by not paying the labor. That carried over—it's in the books. That carried over, the modern Olympiad began in 1886. The NCAA really came into being in 1903, 1905, something like that. So the structure was there and the idea of amateurism was in place. College athletes have been paid in various forms prior to this time, $500 for winning rowing competitions, given all-expense paid vacations to Havana, Cuba, for helping Yale win the football championship. It was done on a regular basis. So the rationale of amateurism meaning something, that one is not too difficult to throw out, and I think most people have seen through that, especially as you look around and you see college athletes as the only amateurs left on the earth. You watch the Olympics, and you see Jackie Joyner on the field and see her doing a commercial the next day. And you see Michael Johnson with gold shoes, and it is clear he's getting paid to wear those things. So the amateurism idea gets thrown out pretty quickly.

And without taking too much time, the other issue that still needs to be looked at some is whether or not competition is impaired by allowing some pay to be given.

MR. KESSLER: Let me hold you there, because we are going to come back to the competitive balance issue. But let me turn to Judge Winter, because Professor Shropshire said most people can see through the amateurism issue. Most of those people have not yet included any of the federal courts. I'm wondering from your perspective whether you believe that amateurism is going to be an object that the courts should balance in some way in looking at these rules or not.

JUDGE WINTER: Well, I have to get a little detailed in the answer. I was struck by the football TV decision by the most quoted section, the part about the product being identified with an academic tradition. It's always quoted, usually to protect the NCAA. I think if you look at that passage there is a pretty good suggestion in it that they think it's all phony, because the words they use are "identification with an academic tradition." Not "part of the academic tradition," not "academic," but "identification." Kind of like the Marlboro man being associated with health. I just put that in. It just struck me when I read it.

But let me say where I think the NCAA is most vulnerable. As I understand it, athletic scholarships are revocable. If you don't play the sport, you lose the scholarship. In connection with this there are a lot of other restrictions, but if you look at it that way, the scholarship is pay. It isn't, "Here is a scholarship, We hope you play lacrosse [to use a neutral sport], but if you don't, as long as you keep your grades up, you keep the scholarship." It is not that at all. You come in, you play lacrosse; if you don't, we take the scholarship away. Now, if a fact finder—and fact finding would be very important here—finds that is a salary, and then you throw in the other restrictions about nothing else can be paid and no agent, no draft, I think it becomes very, very hard for the NCAA to defend it. Although, again, it's a fact finding question.

What struck me with these cases was that the no-draft, no-agent rule, which clearly can be viewed as something that forces the person with a revocable scholarship to stay in school to play basketball because they can't take the risk—they affirm those cases on the pleadings. On the pleadings they said that was all right, and it just seemed to me there was a lot of area for a trial.

The other thing that is vulnerable is that the Supreme Court opinion in the football TV case clearly said this is a commercial product, and we are going to treat it like a commercial product. I think when you have a commercial product like that, you've got revocable scholarships, you've got a group boycott. I think there's some vulnerability there because it is tough to tie the taking away of a scholarship from somebody who is doing very well academically because they don't play a sport. Very tough to make the case, I think, "Oh, we are just protecting academics and they are just an amateur." I think there's real vulnerability there.

MR. KESSLER: Let me turn it over now to Coach Carnesecca. Coach Carnesecca, putting aside the legalities of it, what do you think of the issue of limiting athletes in terms of not being able to receive any outside income or compensation? You obviously have seen hundreds of kids pass through in this situation. Do you think these restrictions help them or hurt them? What goals do they serve in your view?

MR. CARNESECCA: Ten years ago I made a statement—I was out at the Big East meeting—I think players should get paid, and I said it facetiously. Now let's look at this question. Let's say I wanted to pay the players. There are certain rules under the NCAA that whatever you do for one sport you have to do for every single one: for the tennis player, for the hockey player, for the lacrosse player. So the NCAA is looking at this pragmatically. How can we pay everyone? They even took away the $15 they used to give us for laundry back in the fifties and sixties. Fifteen dollars that was supposed to be for your laundry.

So, how can they do this situation? They would like, I'm sure, in football and basketball, which are the revenue-making sports, to give something but they can't do it because there are statutes. Whatever you do for one sport you have to do for the other. So it becomes a question. It gets too big, we'd go bankrupt.

There's another thing when we talk about big-time sports. There are only probably between 60 and 70 schools, the majority in division 2, and division 3. They are having a tough time. Same goes for coaches. We always see the big coach making a lot of money. Yes, but that's only a small number. So I think what may eventually happen, just my opinion, maybe there will be this little special group, 60 or 70 schools, that will form their own league, and they will make up their own rules, and maybe they may throw in a little stipend. That may come some day. That's a possibility. Because this way it's not working out very well. It's not, and it's becoming more and more a problem.

MR. KESSLER: Well, it is interesting for those of you who follow this in the newspapers. The NCAA just apparently took a very small step in this direction. The previous rule was that a student athlete on scholarship could not get an outside work-study job to get any more income. So you literally couldn't agree to work in the bookstore and be compensated for working in the bookstore for your income. That was also banned.

MR. CARNESECCA: During the season, in season.

MR. KESSLER: During the season. Some lessening of that restriction apparently was adopted at this most recent meeting of the NCAA, as well as, I think, some alteration of the rules of students appearing in movies or some other obscure things. But there does seem to be some movement here.

Dennis, from your perspective, having seen the NCAA's motives on the coaches, does that tell you anything about their motives on the students' side, or are they really two different kettles of fish?

MR. CROSS: Well, they are the same motives, and as Judge Winter said, it is getting free labor, or labor at a cartel price. It is not completely free even in the case of athletes, but it is limited, and like any buyers of the things that they use, they want to pay as little as possible for it. They find it easier to do that when they get together and agree on how much they are going to pay for it. So I think that is exactly the same, but I think there are some arguable differences. I haven't had occasion in my case to get into the question of athlete eligibility or athlete compensation, and indeed, it is important strategically for my case that I distinguish those cases that have upheld those rules. I think they are easily distinguishable, and they are distinguishable on exactly the ground that the Supreme Court suggests in the *Board of Regents* case; that is whether it is phony or not, there is a perception that there is a separate product called college athletics, college sports competition, that distinguishes it from professional sports competition. The NCAA rules, insofar as they go to athlete eligibility, are designed to preserve that separateness. The problem with the contrary argument is that, if you're going to have any limitation on athlete compensation, it's hard to say that any particular limitation is unlawful. I mean it would be the idea of the limitation itself that would be unlawful, or it's not. So if you throw the limitation out, if you say the antitrust laws don't allow you to put any limits on athlete compensation, then it really does become difficult to distinguish college sports or amateur sports from professional sports. I don't want to sound like I'm in the unaccustomed role of being a defender of the NCAA here, and I don't mean to do that. But I think there is an arguable decision.

MR. KESSLER: Coach, do you want to add something?

MR. CARNESECCA: I think if you were a piano player, and a good one, you could get a scholarship to college, get your books and fees and whatever they give, and go out and make a good dollar being a virtuoso. Being an athlete, they are being deprived of those things, again for what they say is the common good.

MR. KESSLER: Let me pick up on something that Coach said earlier. I think it's hard to take the amateurism claim very seriously these days for a variety of reasons, not the least of which is you just have to look at a recent comment that Penn State Coach Joe Paterno made just before the Fiesta Bowl. He was asked how he felt about having his players wear the Tostito's logo on their uniform, which they all did in the game. He said, well, it bothered him at first, but given the fact that Tostito had paid $17 million to sponsor the bowl game, where the money was basically going in large part to the two schools, he thought probably it was okay. I think it's hard to take the amateurism seriously in that context. But there may be other reasons for limiting the compensation to athletes that

could be considered under the antitrust law. At least two have been suggested by our panelists and I would like to focus on both of them.

First, let me focus on the one, Ken, that I cut you off on earlier, which is competitive balance. The favorite antitrust justification for sports leagues has been in the courts to say that the restrictions on athletes are necessary to preserve competition in the playing field. I'll come back to that later. But in the NCAA context, there are some real issues about competitive balance and whether there is any. But let me turn it over to Ken and see what you think about that argument as a possible justification.

PROFESSOR SHROPSHIRE: Well, that, like the Judge suggested, I would like to see played out more in court and described further. Why is it that competition would be impaired if you allow people to compete for labor? The argument and the presentation that comes through in the cases is that if someone is allowed to pay them, they are going to have this elite class of schools and only, as the Coach suggested, maybe 60 or so schools are the big time.

But the event that confuses that some is the College Football Association, which came into being out of the *Board of Regents* case and is no longer in being as the same collection of elite schools. I think part of what had been allowed to happen since that case is some competition in the marketplace in this whole TV area. I don't know what the outcome would be in the end. I think there is still just a relatively small group of elite enough athletes to actually get paid at the higher levels, and some schools wouldn't participate in that. I think that's the way that would come out.

The issue—and just to raise it and I'll stop—that concerns me the most in trying to figure it out, I think this is where Coach is going, is gender equity and how you fit that into this whole thing and what you do about the women's sports. Until the women's NBA and the ABO get bigger and there is more money in those areas and the sports become more popular, can you actually pay on an equitable basis. And is that what Title IX actually says to do?

MR. KESSLER: That was actually the other issue I was going to raise, which is that you have another federal statute which requires a nonmarket treatment of sports in terms of gender-equity basis, and whether it would be permissible under the antitrust laws to say the reason we can't allow market forces to apply to paying male athletes in basketball and football is because by congressional regulation that would require us to pay the same amount to other sports, even if it's not a market decision, and therefore we have to ban this because no one can afford it.

Why don't I turn over that tricky issue of intersection between two bodies of federal law to Judge Winter, since I know that's one of his favorite subjects.

JUDGE WINTER: This is outside of the scope of the letter of invitation.

MR. KESSLER: That's correct.

JUDGE WINTER: I got to sustain the objection.

I really don't see much in the competitive balance argument, and therefore I don't see much in that argument as an antitrust defense. I'll tell you why I don't see anything in the competitive balance argument—I might be persuaded after a trial. But if what you're worried about is competitive balance, I've got the solution: All television revenue, all tournament revenue, all of the big revenue gets shared equally between all the schools. Then you can pay the athletes, that will give you competitive balance, much better than you can now. I bet I could predict today 20 of the top 25 football teams ten years from now. It just seems to me there isn't a lot of competitive balance.

If I understood the argument that is made, that because of Title IX you can't pay athletes, every school can make its own decision. If you want to share the revenue equally, they can decide whether they want to pay them. If they pay all athletes, then I guess they do. I haven't thought a lot about that question, so maybe I should stop talking.

MR. KESSLER: Judicial restraint.

JUDGE WINTER: I think Dennis wanted to.

MR. KESSLER: Let me go to Dennis on these to issues.

MR. CROSS: I haven't thought a lot about it either, but it seems to me that to the extent that some other federal law requires you to do things that you wouldn't do if the law weren't there, that the economics wouldn't compel you to do if the law weren't there, well, that happens a lot. We have to obey the law all the time, even when it may not be strictly what we would do otherwise. I think that to the extent that the gender-equity rules would act as a brake on compensation of male athletes, I don't see a problem. The rules would apply across the board to everybody, and there would still be, to the extent that other laws allowed, competition.

MR. KESSLER: Coach, let me ask your view about balance in college athletics. You have obviously been there. What do you think of Judge Winter's observation that it's not terribly balanced anyway. Some schools obviously get the best coaches; some do the best job at recruiting; some have traditions that enable them to get the best athletes. It doesn't seem

like limiting how much the athletes get paid really preserves a balanced playing field. I guess from your standpoint you were never very much interested in balance anyway; you were interested in winning. What do you think about that.

MR. CARNESECCA: First of all, parity maybe is only in heaven. Maybe, okay. I think you're never going to get that. The rich are going to get richer, and we are taking away free trade here. I think when you start trying to make everybody equal, it is impossible; you're not going to do it. I think the biggest thing here is try to come up with a set of rules, and that's why I'm convinced that perhaps in the near future there's going to be this special league, and they can do what they want. You'll still get those instead of giving 20, they will give 25, be it over the table or under the table.

MR. CROSS: Some economists have expressed the opinion that the true effect and perhaps the intent of NCAA rules and the enforcement of those rules is not to preserve competitive balance but to maintain the status quo. That's why you can predict who the top 20 teams are going to be ten years from now. It's the teams that go from nowhere to becoming suddenly competitors who get intense scrutiny from the NCAA on their recruiting practices.

MR. KESSLER: Well, it is interesting you should mention that, because one of the experiences I could relate is that we did the *Freeman McNeil* free agency trial in professional football. The major claim that the NFL made at the time was that if you allowed for free agency, you would destroy competitive balance, because the rich teams would get richer. Exactly this argument. In fact, what the complaint today is by the NFL about free agency is that the so-called dynasties, the Dallas Cowboys and the San Francisco 49ers, can't keep their players. So that it has had the effect of creating more parity in the NFL. In that regard, NCAA rules may preserve the dominance of some schools, which apparently had a certain market in commercial value to it. So there may be something to what you say from that standpoint.

At this point we have a bunch of other areas to cover, but it might be a good time to take a question from the audience. Yes, Barry.

MR. BRETT: Just to begin with an observation, and that is that the panel was not put together to get a uniform view. The NCAA has in this situation and in others declined to participate in this or similar panels, and one can make whatever judgments they choose as to the reason for that.

But what I would ask the panel to comment on is whether or not there is any legal, political or other justification that one can assert for the action of the Department of Justice in bringing an antitrust action against a group of northeastern Ivy League schools who were conferring on scholarships to academic students for their academic merits and charging that is unlawful, but yet making either prosecutorial or other decisions not to challenge an absolute, iron-clad rule prohibiting compensation to student athletes and limiting what's given to them and making that absolutely uniform.

MR. KESSLER: Judge Winter, would you like to comment on that one?

JUDGE WINTER: Well, I have to say, I taught at Yale Law School, and I told people in the early seventies at Yale I thought they were violating the antitrust laws. They would have a meeting every year and they would have the names of anyone who had been taken by more than one school, and they would essentially go over that and decide how much financial aid that person would get, no matter what school they chose. I just thought that was price fixing, and I think the Department of Justice quite rightly went after that. Education is one of the most expensive products out there in the market today. Any of you who have college-age children know that, and those of you who don't can look at how many federal judges don't go on the bench when they have college-age children but wait until after they are done. So I thought that the Department of Justice was absolutely right in doing that.

I'm not sure what the solution is with athletes. What troubles me is that you can kick somebody out, you can take the scholarship away, that a restriction saying no pay in the context of a scholarship that is there only when you play strikes me as the vulnerable area. I would be very surprised to have a court say the NCAA had to allow payment, even if all it did was say you can't pay somebody who has a scholarship and can give the scholarship whether they play or not.

MR. KESSLER: Yes.

SPEAKER IN AUDIENCE: It seems to me one logical conclusion of this discussion is that, if antitrust laws were to apply, the colleges should be free to compete for athletes by paying them. I was curious to hear Coach Carnesecca's view. Suppose, for example, St. John's were to give you a budget of $5 million a year to go out and recruit athletes for the college basketball program. Do you think that's a good thing for college basketball, for St. John's, for the student athlete?

MR. CARNESECCA: I think you have to have a recruiting budget today, all over the country. I don't see anything wrong with that, because the school recruits regular students.

SPEAKER IN AUDIENCE: But this is $5 million to pay students.

MR. CARNESECCA: At St. John's we never go too far,

because we just recruit locally. But some of these schools have a tremendous budget. You figure every time they get up, they have to fly all over the country.

SPEAKER IN AUDIENCE: My question is: Suppose St. John's gives you $5 million; this is not for your recruiting expenses, but actually to buy athletes for St. John's.

MR. KESSLER: To pay the salary.

SPEAKER IN AUDIENCE: To come to St. John's you can give him a million dollars a year, if that's what it takes to get him to come to St. John's. Because it seems to me that's one conclusion one could draw from this discussion.

MR. CARNESECCA: It's not feasible. It is not practicable. You could never do it in the collegiate scene unless you had this special group, then you'd have to have a cap. Now you're getting into real professionalism; the other way it is semi.

MR. KESSLER: See, I think there are different levels of issues here. The most extreme situation would be exactly what you're saying—just remove all restrictions and let schools pay for athletes. Although, again, the economists who looked at it said that's what they are doing through scholarships, just that that is the cap. So you're negotiating about how high the cap is. But beyond that, you have restrictions, for example, where if Nike enters into a sneaker contract with the school for the students to wear the sneakers, that money goes to the school and—pardon me, Coach—to the coach.

MR. CARNESECCA: It goes to the general fund. I never met the general.

MR. KESSLER: There are few coaches who have met the general.

You could raise on another level whether preventing that money from going to the athletes, which is the only reason why Nike is investing the money in the first place, makes any sense.

MR. CARNESECCA: I would like to comment on that. I think that almost seems to be a contradiction. Coaches get the money, all right, fine, but the kids cannot. And they wear the sneakers. So that situation is going to be addressed fairly soon. That has to be addressed. How can everybody else make money, but the ones who wear it don't? It is a problem.

JUDGE WINTER: Can I say something?

MR. KESSLER: Please.

JUDGE WINTER: In connection with what the Coach said—it's not an antitrust point. I may be really off base on this, but there is so much money floating around here. We are setting up a situation in which young people who may be very worldly in a lot of ways, but also not at all worldly in a lot of other ways, are in the midst of all this money they get, and nobody gives it to them legally. I mean there's plenty of money out there to go to them one way or another from agents, from gamblers, from all kinds of other far worse alternatives than getting a percentage of advertising revenue that a school gets or something like that. I'm the kind of person who usually scoffs at other people making sociological observations, but I'll make one. I wonder if part of the problem that everybody is talking about problem athletes doesn't start at the college level when there are all these temptations and all of the hypocrisy. I really wonder what an idealistic football player at Penn State University really thought about Coach Paterno's remark, particularly in view of Coach Paterno's reputation of being interested in student progress. I can imagine that to a young person being a fairly shocking kind of remark: I was concerned about it until it got to $17 million.

MR. KESSLER: Well, before we get there, one interesting aspect of this that the NCAA again just addressed, at least in part, is that a lot of these kids obviously come from very disadvantaged backgrounds. Some of them have pro potential, although a very small number, and the rule had been, first, that you could not take any loans against your future pro earnings at all. Then the rule became changed to allow you only to borrow money to buy disability insurance. The motivation for this, of course, was to keep the athletes in school. Because one of the arguments that agents might use to get an athlete out of school was, "You're risking a career on injury and you can't afford disability insurance, and I can't pay it for you, so that's a good reason to leave school early." So that's when the NCAA responded to that. At the most recent meeting they have considered expanding the type of situations in which athletes get loans for. I was going to ask Ken Shropshire to address this whole issue of the sustenance of athletes, the lifestyle of athletes, the relationship with the agents, about which you've written a book, and how this all sort of works together with the NCAA regulations.

PROFESSOR SHROPSHIRE: That is the one area the NCAA has started to move more aggressively on. It is trying to figure out how to stop the opportunistic behavior of sports agents and others that are out there, and are saying hey, there is this void. Before this new legislation went through that said athletes can work part time, there was a gap between the amount that a student athlete could receive in scholarships and the amount that a scholar could receive in scholarships. So the gap could be as much as a few hundred dollars, which may mean, you know, dates on the weekend or other things that you can't do unless you can call home for money, or unless you can turn to the unscrupulous sports agent for money. So that's the positive the NCAA is trying to move towards repairing. Certainly, there's always going to be the person that wants

more; there is always going to be the athlete that says if I can get more, I want to get more. But I want to believe there's a core of good people out there that are saying I just need a little bit more money and ways to get it.

And I'll tell you the other issue that comes up in other settings in this kind of discussion is, who are the athletes that are bringing in the money that pays for college sports? And it is largely African-American athletes, and it is largely African-American athletes in the revenue-generating sports. And the percentages—I was just looking them up—in football 65 percent of the athletes in Division 1-A are black; in basketball, 50.7 percent; and in the nonrevenue sports it is only 5.6 percent. So you can see it is a whole different issue on who is generating the monies to pay for the train to keep running. So that's another issue that sort of hovers out there. It is, in many of these instances, those athletes that get caught up in these scandals.

MR. KESSLER: Let me go back for a second to the scholarship issue, because we've heard Judge Winter on that issue and I was wondering, Dennis, what you thought of this issue, the scholarship question. In the case that considered this, *United States v. Brown*, one of the schools, MIT, actually fought the Department of Justice. All the other schools, including Yale—probably with good advice from their alumni—decided to settle with the Department of Justice. In that case the Third Circuit remanded the case for further consideration after it had been held illegal, and in part they did it for what was a surprising reason to antitrust lawyers, which is that they said not only should the court consider the procompetitive justifications for having this restriction on scholarships to students who are admitted to the Ivy League to sort of regulate the level, but that maybe there were noneconomic reasons that should be considered, including the promotion of racial diversity and economic diversity, and that this was something that should be considered under the antitrust laws. The reason I say that's surprising is that the trend, certainly in the antitrust cases, ever since the *Professional Engineers* case in 1978 in the Supreme Court, has been to focus only on procompetitive justifications under the antitrust laws, and not other good motives.

I want to ask you first, Dennis, whether you think—putting aside your case for a minute, where I know you don't think you should look at anything else—as an antitrust lawyer, do you think there's a role in some cases for noncompetitive justifications to come in a college setting which may be a little different than a normal setting?

MR. CROSS: I was a little surprised by that case, too, and especially since I generally liked the analysis of it. It seemed to follow pretty much the right way to approach the problem until it got to the end and dealt with the issue that you're discussing.

On second thought though, I wonder—I guess the way to reconcile that holding with *Professional Engineers* and *NCAA v. Board of Regents* itself, both of which say you're only supposed to look at competitive situations, competitive justifications for a restraint under the Rule of Reason, the way to reconcile it might be that the universities here are selling a product—education, and campus life and ambiance and so forth—and it improves that product to have diversity, racial and economic diversity, and therefore it really isn't a noneconomic justification after all.

MR. KESSLER: Let me turn over to Ken on this, because you've written a book about race in collegiate sports. Generally, what do you think of a goal of racial diversity as being a possible justification by the Ivy League for regulating their scholarships, and this is in the context, obviously, of the Ivy League saying that they have need-blind policies in terms of doing this, and this is to promote that idea so you can get a more diverse community. Is that something that as a lawyer you could see being considered under the antitrust laws as a goal?

PROFESSOR SHROPSHIRE: Because of the trend, it's hard to make it fit. I like the explanation that was just given, and I'm trying to think through that some more, and see if I can make that work as more of an economic rationale. But I think in terms of just the trend, with noneconomic rationales not being as successful, I think it is problematic to try to fit in there. I think in a lot of these issues we have been talking about whether or not you should pay athletes or whether or not the schools should be more diverse; all these issues, I think there are other ways to address those, than trying to squeeze them into the antitrust issues.

MR. KESSLER: Judge Winter.

JUDGE WINTER: Well, I agree with Dennis. It seems to me quite appropriate, if that's the goal of something you're doing, to say you're increasing the ambience, as he put it, or diversity or other things that you think contribute to the life on campus. So if that's what you mean . . . I was a little puzzled in the case that they would make that claim, because what they seemed to be saying was we have to get together to agree on higher scholarships to minority applicants. I don't know why you have to get together to do that. I don't know why each school can't do that individually. I don't have any trouble with some program that does what Dennis is talking about, but I kind of laughed out loud when I read this defense, just because I think on the facts it doesn't seem to make any sense.

MR. KESSLER: Let me throw it open again to questions from the audience before we proceed. Yes.

SPEAKER IN AUDIENCE: My question is really for Professor Shropshire. I'm surprised there isn't more consideration to Title IX. What's wrong with the idea of paying student athletes? Because as I understand it, one of the strongest rationales for application for the antitrust law is for efficiency and for protecting and enhancing the welfare of consumers. If athletes are paid and colleges start allocating money and earning more revenue and seeking more revenue in order to pay their athletes more, if a large part of that revenue is going towards sports or people who aren't in an economic sense or market sense demanded by the consumers, isn't that going to cause more inefficiency? In other words, applying antitrust laws to force Syracuse University to pay the men's basketball $10 million and the women's basketball team $10 million, isn't that going to cause more of a problem and possibly more inefficiency in the market than the way it is now?

PROFESSOR SHROPSHIRE: Possibly. I think the conclusion is some places just would not pay. I think that's the way it would end up in some circumstances. As particularly more women's basketball programs become revenue-generating sports, then it begins to make more sense to say okay—because I think it is really either you pay as a school or you don't. And I think that the ideal rule could develop that, okay, now you can pay if you want to, and then you move in that direction.

But I haven't seen any explanation that says you can break it out at one institution, you could pay the men and not the women. So I have not seen a way to make that work, other than changing the legislation. And certainly different discussions that have begun in terms of "let's just drop football out of the equation, and everything would work okay," but that has not had much success at all in any kind of discussion.

MR. KESSLER: I think it's fair to say that the proponents of Title IX in fact have defended its virtues as a subsidization mechanism and that this is necessary to promote equal opportunity from an athletic standpoint. So while, you're right, the antitrust law is all about efficiency, Title IX has been all about regulation. And the question, though, is whether if you apply the antitrust laws and didn't allow the restrictions, Title IX might distort the marketplace so that it was not feasible for schools to pay male basketball players because they couldn't afford to pay female basketball players; or they pay them both less, I guess, is the other possibility. But that inefficiency would be caused by Title IX, not by applying the antitrust laws, I think. Then you can debate whether that's a good motive or not or worthy regulatory goal.

Other questions? Yes.

SPEAKER IN AUDIENCE: There seems to be a way to get around Title IX, and I was just thinking about this. Why doesn't the NCAA allow for individual athletes to receive licensing revenues? In that way the big athletes, the stars for Notre Dame, from the top universities, will be directly compensated by third parties instead of by the university themselves.

MR. KESSLER: Well, I think that's what the Coach was sort of saying about the sneakers, so maybe, Coach, you want to respond to that.

MR. CARNESECCA: There are rules in the NCAA what you do for one student you have to do for all of them. You can't make it a special group. It's impossible.

MR. KESSLER: But you could let all athletes receive endorsement income, if you will, from legitimate businesses, so you eliminate the booster issue and things like that and then—

MR. CARNESECCA: I disagree with that, because there's always going to be someone that wants that athlete, I'm going under the table. It is very tough really—I give him 10, he's going to give him 20. It's very tough to legislate that.

There may be another solution, and maybe again it would take an awful lot of work. Let's take football, let's take basketball. Are we serving as a minor league for those two sports? It doesn't cost the NFL, doesn't cost the NBA a dollar. Why not have some of those students take a certain course, give them a degree in that course, but yet let the NFL and the NBA pay some of those courses, like baseball does to their minor league? It is a possible solution. But you can't work it with the NCAA, because you have these other students there. Now how do you equate the nonrevenue students who don't make money? It is a problem, really. It is a tremendous problem. Does that answer your question a little bit?

SPEAKER IN AUDIENCE: No, it doesn't. Well, I just think Nike should be able to pay whoever they want. If Nike wants to pay Tim Duncan, and the NCAA allows for that—

MR. CARNESECCA: I agree.

SPEAKER IN AUDIENCE: —they don't have to pay the other athletes. And in that way there's no problem with Title IX, saying that they could pay the women basketball players or lacrosse players or tennis players.

MR. CARNESECCA: Nike can pay whoever they want to, and it is true, but if you want to play in the NCAA, you can't take it. That's the restriction. You want to get paid, fine. You can't play your games in the NCAA tournament in the NCAA games. It's a special situation. There is a rule.

MR. CROSS: So why not just repeal that rule?

MR. CARNESECCA: Well, I would love that.

MR. CROSS: That's what you're suggesting, right?

MR. CARNESECCA: I would love that.

SPEAKER IN AUDIENCE: Yes.

MR. KESSLER: I agree with you, it wouldn't be a Title IX problem in repealing that rule, because it would just be decided by marketplace forces.

Let me move onto a related subject, and the related subject is leaving school early to turn professional. One of the consequences of the restrictions on paying athletes and the restrictions on not having agents and losing your eligibility has been to encourage students to leave at an earlier and earlier time, where we now have a couple of high school graduates playing in the NBA, an increasing number of football players who are not completing their college eligibility, both in the basketball side as well. And the question arises, some of the leagues have claimed, rightly or wrongly, that the reason they don't restrict it is because they are afraid of application of the antitrust laws. If you look back, some of the early cases, the *Spencer Hayward* case and some others did in fact strike down league rules limiting early entry without having some type of justification, and eventually the leagues just got rid of it and allowed people to apply to come in.

The question I'm going to ask the panel, and I guess I'll start down at Ken and go across, is: What do you think the rule should be, if any, concerning whether athletes can leave to turn pro before using up their college eligibility or graduating? And do you think antitrust should apply to regulate these rules in some way, at least either at the pro level or at the NCAA level?

PROFESSOR SHROPSHIRE: Unfortunately, I think the antitrust laws apply, and that means that you should be able to go whenever you want to go. I think the effort, again the social engineering, should be not to let that happen as often as it does and to provide enough information so athletes don't make the mistake and go when they should not. Again, it's another one of those areas where it has been happening forever in baseball, you know, going in the minors and foregoing college altogether. It hasn't been a whole big issue. I guess in the NBA it has only been 26 players in the years to go to the pros, so it is not a huge number. Baseball, thousands that have done it. So it is something that has been going on for a while. And golfers and tennis players—everybody is excited about Tiger Woods, but that's what he did, he left school early. So for some people it is the right decision, so there should not be—and I think antitrust law is right from that standpoint—regulation that says you can't do it. But there needs to be more social activity to try to prevent it from happening as often as it does.

MR. KESSLER: And Judge Winter.

JUDGE WINTER: Well, I don't think there ought to be a law against it. If you're going to believe in personal autonomy at all, I think that has to be allowed to happen. It is not a good thing. There's a long history of lives ruined by going into major league professional sports at a very young age and encountering all the things you encounter in that. David Clyde, a Texas Ranger pitcher, and so forth. I will say this, the NCAA rules do what every monopoly does, they restrict output. One of the reasons you see so many people moving to the pros when they do is precisely because the NCAA is fixing their wages the way it is, and I think the result you get is entirely predictable. But I also don't think the NBA can have a rule saying that, unless it's protected by labor exemption, Mr. Kessler.

MR. KESSLER: I was going to say, they might be able to if their union agreed.

Let me turn over first to Dennis, and then we'll hear from the Coach.

MR. CROSS: Yes, I'd like to just address that. If you buy the argument that I sort of half-heartedly made on the NCAA's behalf earlier, that college sports is a separate product and they can define their product and adopt rules to preserve the integrity of the product, then I don't see why the NFL or the NBA can't do the same thing and define professional football as football played by 21-year-olds and older.

MR. KESSLER: There's a whole other issue about that, which is age discrimination. It is very serious, because that's been raised by the leagues.

MR. CROSS: Well, define it in a way that takes care of that problem.

MR. KESSLER: Let me ask, Coach Carnesecca, what do you think about the athletes who leave early? Even though it is true there have not been many high school players in basketball, there certainly have been many sophomores and juniors who have left to go play in the NBA and other sports.

MR. CARNESECCA: If I may give a little background. In 1972 I was coaching the New York Nets—in some areas that may have been disputed. Right in the playoffs, in comes in Mr. Julius Irving. He had been a junior up at the University of Massachusetts. He says, "Coach, I want to come and play basketball with the New York Nets." I say, "Julius, I can't take you, wrong on my part;" it was morally wrong. He said, "I'm going to leave, I just don't want to go back," he says, "I want to play pro ball." So in a situation where I thought I was doing the right thing, I was doing the wrong thing. I was stopping, in the way of my own mind, this young man from making a living, which later on was proved in a court case.

So if a young man or young lady has the attributes, has the

qualities and they can make a living and they can perform, why not let them go. And I think, as you said, the NBA has to allow them. By the same reason, you can't stop people from making a living.

MR. KESSLER: There are two aspects of this that were mentioned by Judge Winter by giving more information to the athletes. And one of the things that the NFL has tried to do, in part at the urging of the NCAA, is to provide a service to evaluate the athlete's chances of being picked very high in the draft before they actually submit to the draft or lose their eligibility. Because one of the ways a lot of lives get ruined is that the athletes leave college and it turns out they are not really going to be a pro star in any event. So while they think they are pursuing their dream, all they have done is give up their scholarship. And that's probably been a good development, and there's a possibility that will happen in the NBA as well. They are looking at that issue.

But I also think it is true, as Judge Winter said, that no one has ever complained about this for sports other than basketball and football, and that lets you become suspicious of the motives of the NCAA schools who suddenly are now outraged that these athletes are not getting their full education in the two revenue-generating sports, when they never seemed to care if a tennis player went or a golfer went or someone else went, a baseball player went, none of which earn very much money for the schools. So I think that at least raises the motive issue.

Questions or comments from the audience?

SPEAKER IN AUDIENCE: Just as part of that same issue, Jeff, should not that same effort to inform the kids of the benefits of staying in college inform these undergraduate students that at some schools less than 20 percent of the scholar athletes get diplomas? There are a few notorious cases of people having gone through, gotten their diplomas, and I can think of one end for the Washington Redskins turned out he couldn't read, even though he had gotten a degree. And maybe the whole idea of a scholarship, where they are spending such an enormous amount of time practicing and not being able to do anything else, is really a bit of a scam to begin with. Maybe that should be part of the education program promoted by the NCAA.

MR. KESSLER: Well, you touch on another issue which I would like to ask the Coach about, which is the growth of college sports has become such where there are more games played, more road trips, more out-of-state tournaments, all of which seem to cut back on the exam time, the class time, the other needs of the athletes, if in fact part of the reason they are there is to get an education, and many of them are not going to have pro careers. What's your observations about that—do you think it's gotten out of hand in terms of those issues?

MR. CARNESECCA: Well, some of the tournaments, like the NCAA which goes way up sometimes right up until the first week in April, naturally, if you're able to go that far, go to the end, it is three weeks. Although many schools will bring tutors, that's true. I think most, the majority, of the schools try to do a good job academically. And at St. John's since 1963, 86 percent of our basketball players got their degree. Not that it was easy; it was a fight. Push them during the summer, make sure they went. I think the majority of schools are trying to do a job, and I think now they are on the spot because now there's a record being kept of all the schools. The NCAA wants to know how many of those graduates—are they making progress? If they don't achieve a certain number of credits, they can't play. So there is a concerted effort to try to get this situation to go on. But has it taken away? Yes. Why? Because it becomes sort of semi-professionalism. Have to get those dates, the money is there, let's try to get it in.

SPEAKER IN AUDIENCE: I have a question. The competitive balance justification was pretty much eviscerated at the outset of the discussion, and perhaps one reason is that the NCAA is a virtual monopoly. I ask the panel if the changes or analysis at all, if the rule were to be removed and each league were to have its own different rule, so the Ivy League can say we are not going to pay any money to anybody, or the Big East could say we are paying X amount, the Big 10, pay Y amount—is it still the same legal analysis, Judge Winter?

JUDGE WINTER: I don't think so. I think it would be another issue to try. But that's one thing I've always thought, that if you had a system, not so much as Coach Carnesecca's 70 teams, you had a system where conferences set rules, you could still have tournaments, you could still have interconference play and everything else. But the athletes would have some choice at least. It might still be illegal; like competitive balance, it is something to be tried. And that would involve market power, and I think that would be one of the issues. But I think the analysis—it might still violate the Rule of Reason or it might get by, but I think it is a lot better than when you have this, what are there, 250 or 280 Division I basketball teams. I mean the athlete who has to go to college in hopes of getting to the NBA really has to obey NCAA rules. There's no choice whatsoever.

MR. KESSLER: Ken, what do you think about the possibility of different rules on compensation on a league-by-league or division-by-division basis, the Big East?

AN ANTITRUST SEMINAR: A CANDID CONVERSATION ON THE PAST, PRESENT AND FUTURE OF ANTITRUST

MR. BRETT: I shortchanged Jeff Kessler in the introduction, so I'm going to shortchange Harry First, but not take any more time. Professor First of NYU is going to chair our next panel. Should be an interesting panel and a tough one to follow.

PROFESSOR FIRST: Well, welcome. The topic is not a very broad one for today's discussion: "Past, Present and Future of Antitrust." I thought that was very open-ended and easy to figure out, except that I had the trouble of figuring out when does the past become the present and when does the present become the future, so you can think about that while we are working through the discussion today. I spoke also to someone a little earlier today and said the topic, and he said, "Oh, that's easy, past present and future, a lot, none, a little." So we can also think about that. And maybe we don't have to have two hours of discussion, we can just rely on those few words.

The twist of getting into the idea of past, present AND future—I teach antitrust law at NYU—to think about enrollments in antitrust classes as sort of a market guidepost. So actually I'm going to call on some of the panel even before we get started to see if this is right. Past: In the seventies at NYU we were probably running 300 students a year out of about 330 were taking antitrust. That changed. In the eighties none—no, not none. But I looked at my enrollment in 1990, I had 56 students, and this year I had 116 students. Which sounds good. Another aspect of that was a fair number of those students are non-U.S. law students who are coming—this is the law school's version of export trade—to the United States to study antitrust law. Harvey, how many?

PROFESSOR GOLDSCHMID: Well, that's right. At Columbia we have 300 in a class; in the seventies we would have had roughly 220 taking antitrust. In the eighties we would have been down to 100 and change. I am teaching this spring, and I've got 170 now, and Eleanor has at least 50 or 60. It is clearly a growth industry right now.

PROFESSOR FIRST: Lloyd.

MR. CONSTANTINE: I've been teaching at Fordham for seven years. My first year I had 38 students, the last time I taught, which was last year, the spring semester, I had 101 students. For a long time after Barry Hawk left Fordham, Fordham felt it could get along with an adjunct like myself during the day and Bill Lifland at night. Now they have been motivated to go out and get a fully operational regular faculty member. So Fordham is a very good barometer that the market economy works.

PROFESSOR FIRST: We have to hear from across the river. Spencer? This was not on the program.

PROFESSOR WALLER: Yeah, I know. Well, I joined the Brooklyn Law School faculty in 1990 and my classes have ranged anywhere from 25 to about 85, and that seems to depend on other market factors, like whether I'm teaching it at night or whether I'm teaching it during the day or whether the dean has scheduled me for a class on a Friday, so . . .

PROFESSOR FIRST: Like all data, it's not quite clear what they mean. Maybe Harvey is just the best teacher of us all and has the biggest classes or that everyone else at Columbia is dull.

PROFESSOR GOLDSCHMID: Or I grade very high.

PROFESSOR FIRST: Yes, high has a different connotation. Well, this will give you all more to think about.

As a way of getting into the discussion, sometimes when you have these broad discussions everyone sort of takes the long view, everything is wonderful and so forth. And I've heard Bill—actually, I didn't hear, I read it but I couldn't stand to hear it. But I heard Bill Clinton's inaugural speech, and he said we have to end divisiveness and go for harmony and unity. So I actually would like to go for divisiveness and disharmony on our panel discussion today, and I would like to open it up to all of you. So I tried to figure out how I could pose that. Two days ago I faxed to the panel two questions which will form the basis for our discussion. The first question for them to answer was: What is the worst judicial antitrust opinion of the last 30 years? Now, I picked 30 years on purpose, because *Von's* was decided in 1966, and I didn't want anyone using the poster boy, the *Chicago School* as the worst case, so we excluded that. But after that anything is fair game.

The second part of the opinion, to get the present and future, I asked people to think about what current trend or proposal in antitrust, not limited to the case law, gives you the most concern for the future of antitrust. So we have whatever is bad in the past, whatever is bad in the present that's going to lead to something bad in the future. That's the rough discussion for today.

Now, I'm going to go around and introduce very briefly the panel, each one of whom needs no introduction and will get

a very slight one only. I'm going to do that in alphabetical order. And what I'm going to ask the panelists to do, just say what the worst judicial opinion is, and then we will come back for reasons, okay, just to sort of give a little tantalizing glimpse.

So we start with Steve Axinn. I want to say for everyone, well known to everyone, from Skadden Arps, the not quite present at creation, Dean Atchison of the firm, but certainly has seen a lot of antitrust over we won't say how many years. So your candidate for the worst judicial opinion of the last 30 years.

MR. AXINN: *Schwinn*, without a doubt.

PROFESSOR FIRST: *Schwinn*, okay.

MR. AXINN: It is a lot easier than having to explain your reasons.

PROFESSOR FIRST: This part is easier. Next is Jon Baker, who is currently the Director of the Bureau of Economics of the Federal Trade Commission, a lawyer and an economist, always a dangerous combination. He has been with the Antitrust Division, the Justice Department as well as the Council of Economic Advisors. He also said 30 years is too long by the way. He said 20 would be good enough. But we'll see.

MR. BAKER: No, 30 years is definitely too long, because it doesn't solve the problem, as the last answer just pointed out. If Mick Jagger were an antitrust commentator, he would say don't trust any cases over 22 or something like that. Not 30.

PROFESSOR FIRST: How old is Mick Jagger today?

MR. BAKER: So I would have said, you know, taking your question literally, I would have said *Schwinn* as well. That's not just like shooting fish in a barrel; that's like shooting dead fish in a barrel. So I will give a real answer that really gets you into your debate, and I'll say Judge Kozinsky *Syufy* opinion.

PROFESSOR FIRST: Wonderful. I hope you know all the hidden references in that.

Okay, next in alphabetical order is Lloyd Constantine. Lloyd is the person who, when there was no antitrust, was antitrust. He managed to keep the flame alive through the New York State Attorney General's Office, and the best-named group ever thought of—National Association of Attorneys General, otherwise known as NAAG. So.

MR. CONSTANTINE: *Tighe*, using Judge Bork's criteria in the antitrust paradox, which is not necessarily bad but influential. *Schwinn* is gone. Bad, but influential, and on that criteria it is a tie between *Rothery*, 1986, D.C. Circuit opinion of Judge Bork, and a 1990 opinion of Judge Breyer, *Town of Concord v. Boston Edison*, First Circuit. It goes to Christmas past, and it goes to Christmas future.

PROFESSOR FIRST: Oh, very good. Lloyd, of course, has his own law firm now, no longer with the—I don't want to give a false impression—the State Attorney General Office. We will hear from them.

Eleanor Fox is next in alphabetical order. Eleanor, my colleague at NYU, well known as a founding member of what I like to call the New York School rather than the Chicago School. So.

PROFESSOR FOX: Okay, well, I also didn't want to shoot fish in a barrel, and I thought the right date to take was beginning 1975, between 1975 and 1980 where we really got a new equilibrium, and the Supreme Court was really sensitive to economics, and then some bad things happened. So I wanted to pick out some of those bad things happening. And you can see what continuum I'm on, because I'm picking out some of those bad things happening from the Chicago School, right. And, therefore, *Sharp*.

PROFESSOR FIRST: *Sharp*. Okay.

Next is Harvey Goldschmid, not my colleague, but sort of my colleague from Columbia. The new learning, the new, new learning, the old new learning and now . . .

PROFESSOR GOLDSCHMID: Well, I guess I take the approach: What's still creating problems out there? And I picked due process cases. I like doctrine in general in terms of what's been happening, *Illinois Brick* from the Supreme Court and *Nippon Paper* from the District Court in Massachusetts.

PROFESSOR FIRST: All right. Steve Houck, who is now currently the head of the New York State Antitrust Bureau and continuing the enforcement efforts.

MR. HOUCK: Well, I got your fax two days ago; I thought how terribly unfair it was. Here is a panel of academics who do nothing but sit in their ivory towers and read cases. I haven't read a case in about 30 years. I've been coming to these meetings, and I rely on Bill Lifland's summaries of the cases for my knowledge. But the one I came up with was *Cargill*.

PROFESSOR FIRST: All right. And let's see, we go all the way to our last panelist, Spencer Waller, who as we all know now if you didn't, teaches at Brooklyn. Prolific writer in the international area, but I don't want to tilt—maybe you're going to pick something from the European Union. I didn't say

U.S. by the way, but Eleanor pointed this out to me, I hadn't thought of it. She said, "Well, can I pick something from Europe?"

PROFESSOR FOX: I had thought about a case from Hungary. If you press me on it later, I'll tell you about it.

PROFESSOR FIRST: I want to show the global—after all, antitrust is global today. So, Spencer.

PROFESSOR WALLER: I'll stay with the U.S. for the time being. I'll pick two, my first choice is actually a shared dislike with my colleague, Eleanor Fox, of *Sharp*. And my second worst case, in honor of the passing of a great plaintiff and a great center fielder is *Flood v. Kuhn*.

PROFESSOR FIRST: I think it is very good that some people—actually three people can't answer the question, and they each of them picked two cases. I don't want to—

PROFESSOR FOX: In case they are wrong on one.

PROFESSOR FIRST: Yeah, right. And Steve, who I'm going to start with, was already retreating from *Schwinn*, thinking that he picked something easy, when in fact we have people who are picking *Sharp*. So I'm going to sit down, because I'm going to let you guys talk.

MR. AXINN: Well, I was going to say *General Foods* because I really wanted to criticize *Von's* and *Brown Shoe*, but they were too old. But *General Foods* repeated most of those mistakes, the SOS case, but I thought the question should be dealt with literally, and that's why I said *Schwinn*. I think there's a point that maybe will come back to us later.

What's wrong, why is *Schwinn* such a terrible case in my opinion? And I think the reason is that we ought to take seriously the notion of the Sherman Act as the Magna Carta of free enterprise, and we ought to remember what the Magna Carta was about in 1215. It was not about protecting the serfs from King John at all but protecting the nobles, from one noble who got to be too big for his breeches. And I think the Sherman Act is all about protecting the free enterprise system from its own excesses. And what was wrong with Fortis's opinion in *Schwinn*, in my judgment, and not only am I shooting a dead fish in a barrel but I'm also shooting any dead justice, which is a safe thing for a practicing lawyer to do. What's wrong is that trashed in the course of that majority opinion is any concern about that fundamental central core issue, in favor of kind of a formalistic triumph of a notion out of the law of sales, about the parting of title and dominion to goods as controlling the outcome. The very same opinion he decided that, well, if it had been consignment, maybe we would have had a different result. That's what was so wrong about it. Sure, it got shot down quickly thereafter, but the same sort of thinking occasionally arises in other opinions, and certainly in the section 7 area in the cases that we are not allowed to cite and some that we still can cite, like *Clorox* and *General Foods*, that thinking gets lost. The notion that what we are really searching for here is a way to keep the free enterprise system functioning, keep that process going without succumbing to its own success on occasion.

PROFESSOR FIRST: So *Schwinn* would have been okay if the consignment issue had been decided the same way?

MR. AXINN: No, it would have been okay if the non-consignment issue had been decided the way the consignment issue was, all right. It got away from per se, and if the title and dominion questions weren't controlling, but the real competitive effect was controlling and that if the focus had been, as Schwinn argued and as Stewart said in dissent, on interbrand and instead of intrabrand competition. We needed *Continental TV* very badly as a result of that decision. We obviously got it.

PROFESSOR GOLDSCHMID: Harvey, can I ask a question?

PROFESSOR FIRST: Go ahead.

PROFESSOR GOLDSCHMID: What if, Steve, it had been an airtight, watertight, dominant, firm customer of territorial restraint, would you feel the same way about Rule of Reason?

MR. AXINN: I would still feel the same way about the Rule of Reason, Harvey, but I would have come out in favor of concluding under the Rule of Reason that at this point intrabrand competition was critical, since it was a monopolist. In fact, if I remember, it had something in the neighborhood of 21 or 22 percent of the market, and there was another company called Murray who was making more—

PROFESSOR GOLDSCHMID: Oh, on the facts they are different.

MR. AXINN: Yes. But if it were 80 percent of the market, then I think under *Continental TV*, when you balance the plusses and minuses on intrabrand versus interbrand, you'd come out differently.

PROFESSOR GOLDSCHMID: Well, in *Continental* there's a fascinating concluding paragraph that's never been picked up where the court left room for a potential narrow per se, which I'd still agree with.

MR. CONSTANTINE: A rule of presumptive—a sort of presumptive illegality, which is the problem. Which is that per se always win, Rule of Reason always lose. There's really no inquiry there. There should probably be an intermediate category.

MR. AXINN: We should have told some of those guys on the sports panel that just left that Rule of Reason always loses, because I think sometimes Rule of Reason wins these days.

MR. CONSTANTINE: Well, but for example, the kind of Rule of Reason you had in the NCAA, I read that as being a rough rule of presumptive illegality or quick-look Rule of Reason, or whatever you want to call it. It has never been fashioned into something that you could put a label on, but there is a third test.

MR. AXINN: Yes, I think so. Though the Supreme Court doesn't use that language.

PROFESSOR FIRST: Of course, no one knows how to apply any of those tests, certainly not the third test. But based on all of this—actually and, John, you had said that you thought that was a dead case—would anyone have voted for Justice White's opinion? And I'll eventually have to get over to the other side where it seems to me Justice White said exactly those things, you know, it is okay for the small factor, but not for the bigger factor that will give freedom. Freedom was the word that Steve used. So would everyone have voted for Justice White's opinion, eventually right *Sylvania*, to have sort of that modified per se rule.

PROFESSOR GOLDSCHMID: Oh, I'd clearly gone with White's concurrence in *GTE Sylvania*, and I think it makes some sense. Although, location clause is much less dangerous than what I posed, which gives the airtight, watertight, territorial arrangement.

PROFESSOR FOX: I was just going to comment. Yes, I can clearly go with Justice White's opinion. I thought he was the only really straightforward honest person. If you believe in law and you believe in some precedent, at least not reversing unless it shows itself to be clearly unwarranted, White was the very judicial statesmanlike person who said that *GTE* does not require a reversal of *Schwinn*, and for the same reasons Harvey said, it really didn't require a reversal of *Schwinn*.

So while *GTE* had a very good result in terms of saying one ought to look to interbrand competition, especially when you have something only like a location clause, it really was a very dramatic change in the law, seeming to throw out a lot of the other values of that trial, which we will get to later.

PROFESSOR FIRST: Do you want to go to *Sharp*? Or do you want to, Tom, you, quote, said it was shooting fish in a barrel with *Schwinn*. And my recollection is that the government's brief in *Schwinn* was basically a presumption test which was in some sense Justice White's eventual view in *Sylvania*. So if we had had that, would *Schwinn* be okay, just, you know, market share?

MR. BAKER: Well, maybe I'll articulate a little more of what I meant. Before I do that I think I need to say, especially since someone is busy typing away here, that I'm not speaking for the Commission or any individual commissioner. And my wife always likes me to add I'm not speaking for her either.

PROFESSOR FIRST: But you are speaking for yourself?

MR. BAKER: Well, that will remain to be seen. And I think I'm going to associate myself with the—no, I don't know what was in the concurring opinion decisions anymore either.

PROFESSOR FIRST: Well, we are making it up, too, because hopefully no one remembers out there.

MR. BAKER: But what I meant about the dead fish in the barrel was that the music is very different between *Schwinn* and *GTE-Sylvania*. I hear how you're parsing the two, and trying to say that no, *Schwinn* wasn't really overruled, but yeah, it was overruled. And the basic thrust of *GTE-Sylvania* was to recognize there could be efficiencies in vertical relations and make sure that we didn't have a body of rules that made it impossible for them to be achieved cheaply. That was I think clearly right from the economic point of view, and it got to a reasonable place. So that's what I meant to say, and that perspective has been adopted generally in the courts and commentaries since.

PROFESSOR FIRST: I think you could probably make an argument that *Sylvania* was in some senses the flip side of my question, maybe the most important recent Supreme Court decision in moving towards a clearer, more economic approach, and yet we have had some votes, of course, against the majority opinion. And on that note we should shift to Spencer and your pick of the *Sharp* case.

PROFESSOR WALLER: Okay. Well, my pick for the worst antitrust case in, I guess in recent memory defined as 30 years or less, is *Sharp*, because I think it stands out for me as one of the most intellectually dishonest opinions ever written. And I'm saying that with the caveat that I'm not even sure it is wrongly decided. I just think it is really, really dishonest, against a background of a purported acceptance of the per se illegality of resale price maintenance and long-standing congressional acquiesce and endorsement of that rule, Justice Scalia achieved the seemingly impossible task of reaffirming the per se illegality of a practice and at the same time making it impossible to prove in the real world. And when read in conjunction with opinions like *Monsanto* and *Atlantic-Richfield*, as all of you know even better than I, resale price maintenance has gone from a standard weapon in the arsenal of private plaintiffs to one used at great risk, where there is a substantial likelihood that the most diligent plaintiff's attorney will be

unable to come forward with the kind of evidence that Scalia says is necessary to determine between per se unlawful resale price maintenance and other forms of vertical nonprice agreements that are subject only to the Rule of Reason. And the reality is, if you can surmount *Monsanto*, which I think good lawyers in the real world taking nonfrivolous cases are able to show, it is certainly very, very difficult to show the real prong of *Sharp* as to the nature of the agreement reached as to price or price levels. And the unfortunate thing is, my looking at the lower cases, is that the judges have gone from treating resale price maintenance as a serious problem to treating cases as opportunities to impose Rule 11 sanctions on plaintiffs' lawyers who can't meet a hurdle that Justice Scalia knew was impossible to reach what he said about in the case. And I don't want to say too much more because I don't want to steal everything Eleanor may have to say on the subject.

PROFESSOR FIRST: So I understand you to say that you liked the result but didn't like the result? How are you on resale price maintenance; do you think vertical price fixing should be per se unlawful?

PROFESSOR WALLER: I don't have a problem with that at all. And I think I have to look at all the lower court opinions and really dig into the records to let you know whether ultimately the plaintiff should have won or lost in *Sharp*. But I know a lot of cases where *Sharp* is being used as a very cruel weapon against lawyers who find the best evidence that's available in the real world, which is there was some kind of an agreement, a plaintiff, a distributor of some kind that was terminated pursuant to that agreement and price goes up dramatically afterwards, but it founders on finding the kind of specific agreement as to price or price levels that's required.

MR. HOUCK: I'd just like to say that perhaps Professor Waller, like some professors do, overstated his case a little bit.

PROFESSOR FIRST: We state our case on both sides.

MR. BAKER: We state our case on both sides.

PROFESSOR FIRST: Overstate on both sides.

PROFESSOR FOX: We overstate on both sides, yes, we do.

MR. HOUCK: Yes, to provoke thought. And to be sure, it's difficult to make out a resale price maintenance case, but certainly not impossible. My office, under Lloyd in fact, carved out something of a niche in that area, and we have continued that to some extent. We had a major resale price maintenance case that settled last year for $5 million against Reebok. And one of my lawyers here today is working on a case that we are about to announce another settlement in a resale price maintenance case. So while they can be difficult to prove, they are certainly not by any means impossible.

PROFESSOR WALLER: But, Steve, you operate with the advantage of the resources of a governmental unit, and I think it remains possible to make those cases. I think on the private side—

PROFESSOR FIRST: Funding is very low.

MR. HOUCK: Our resources are slender. I'm the state, not the federal government.

MR. CONSTANTINE: Historical footnote is that right after the *Sharp* decision, the president of Panasonic, Matsushita of America, announced in something that was reprinted in *Consumer Reports* that now we can do anything we want, which caused me to issue a subpoena forthwith and within seven months Matsushita paid some tens of millions of dollars to the consumers of the United States in that case, which was then followed by the *Mitsubishi* case and *Nintendo* case and all the other cases which Steve has referred to. So I agree with Steve, that it certainly has not made it impossible. Certainly, it has made it more difficult. I agree that the case is right up there at the height of intellectual dishonesty, and it is clear that Scalia had an agenda, was looking for that case, was reaching out for that case. And I think one of the worst things about that decision—although it's not my vote—is that Scalia lays the basis for some future decisions in the way that he deals with the *Parke-Davis* case. He reconfigures the *Parke-Davis* case as being a horizontal case to lay the foundation for the next thing that he wants to do, to take the next piece out of the Dr. Miles Rule, that a vertical agreement to restrict price advertising is not within the Dr. Miles Rule. That's clearly what he was reaching to do. He is laying the foundation to do that, and I think now with Justice Breyer he will probably get the opportunity to do that in the next few years when they have a case before them.

PROFESSOR GOLDSCHMID: I think we ought to keep in mind, too, that *Parke-Davis* and the other cases remain alive. But *Sharp* came in a very hostile atmosphere toward vertical things in the 1980s, and Scalia wrote an opinion that's hard to defend, and I think everyone agrees on the intellectual level. But we ought to keep in mind Monsanto lost about 10 million bucks on this case, and Parke-Davis remains very much alive. And I've always thought both the plaintiffs' and defendants' bar have been very naive in thinking a vertical case couldn't be won today. There's lot of room for good lawyers to use *Monsanto* and *Parke-Davis* to reach a defendant. If you go back to *Monsanto* and read the facts, there's not a lot of evidence in that case that was sustained by the Supreme Court.

PROFESSOR FIRST: That's a curious thing that does get overlooked in *Monsanto*.

MR. CONSTANTINE: And *Sharp* also, the *Sharp* plaintiff won also.

PROFESSOR FIRST: They settled after the case.

MR. CONSTANTINE: Yeah, they think they won, because there's a lot of—many millions of dollars.

PROFESSOR FIRST: With monies. That's not a bad definition. But a curious thing even with that, you know, the approach that—I mean, obviously Justice Scalia, like any Justice, is not writing for one case. They are laying the groundwork for the future. Despite how he wrote that case, there was that settlement. There's been an uptick, certainly in government enforcement both on the federal and on the state level in clear resale price maintenance cases where they had disappeared in the eighties.

MR. CONSTANTINE: For obvious reasons. I mean the reasons—

PROFESSOR FIRST: Which is for obvious reasons?

MR. CONSTANTINE: There are reasons why there's been an uptick. The reason why at the states that happens is because we made a decision to do it, to—

MR. AXINN: You're not the "we" any longer.

MR. CONSTANTINE: To throw the weight of states—

PROFESSOR FIRST: He's a private attorney general now, Steve. Just remember this.

MR. CONSTANTINE: —against what we considered to be a wrong, intellectually dishonest and a decision against the law and to enforce the law. At the federal level, because the new administration knew that the old administration was constantly getting—

PROFESSOR FIRST: You're talking about Jim Rill as the new administration?

MR. CONSTANTINE: No, no, I'm talking more about Anne Bingaman, and Rill did a little bit. But Ann realized that Senator Metzenbaum and other members of the Judiciary Committee were constantly beating up on the administration over this very issue, and Ann being very politically adept, being the wife of a senator, was not going to let that happen to her. So she said, I'm not going to let that happen; I'm going to have some of these cases. That's the reason.

PROFESSOR FIRST: So you mean you think she is being intellectually dishonest?

MR. CONSTANTINE: No, I think she is enforcing the law, which is sort of what you're supposed to do when you're at the Justice Department.

PROFESSOR FIRST: As a cab driver once said to me, "They still call it that?"

MR. CONSTANTINE: It is not the right place to engage in civil disobedience.

PROFESSOR FIRST: Well, it is interesting, I heard Paul McGrath say the very same thing, so this is not necessarily a Republican/Democrate thing. But it does raise interesting questions of economic theory, and the extent to which that economic theory ends up being accepted by sort of outside the journal of law and economics, by Congress, by enforcers, even by courts. Despite *Sharp*, it seems to me there is this resurgence in an area that after you've read *Sharp* you'd say, well, let's practice some other kind of law.

Steve.

MR. AXINN: Just because you want us to be provocative, and I don't want to disappoint you, Goldwater once said intellectual dishonesty in the defense of free enterprise is not necessarily a vice. And I want to raise a question.

PROFESSOR FIRST: Which Goldwater is this?

MR. AXINN: You know which Goldwater. Nobody denies that Scalia is intellectually dishonest in his opinion and that the law is contrary to that opinion, if you can say that after the Supreme Court has ruled. But the question I'm raising is based on what we can no longer call new learning but we used to, how true is it that the firm lacking market power that sets a resale price is in fact doing anything that's any different than a firm that lacks market power that sets a territorial or customer restriction? What is the magic in price any longer when there are 16 little calculator companies and only one of them is insisting on this; won't retailers and consumers vote with their feet to go elsewhere? And if they will, you know, to be intellectually honest, Scalia should have said that, but in any event, the result he reached might have been a backhanded way of aiding the Sherman Act to reach its result.

PROFESSOR FIRST: We are heading down this panel, but I'm going to go to John and to Eleanor on that.

MR. BAKER: I'm ready on that. I think that the essential point here on the economic side is that there are a host of reasons why resale price maintenance can be part of an efficiency enhancing part of a contract. And we economists have long understood this. And when economists look at the resale price maintenance cases from that perspective they often come away wondering why it is a good thing that the practices were held illegal per se.

Now, that's not the same thing as saying the per se rule should be thrown out. And here's why it might not be crazy to have a per se rule against resale price maintenance, notwith-

standing what the economic literature shows. And the reason is that when you have judges who are not antitrust scholars but generalist judges, and you have firms trying to comply with the law, the real thing you want to protect is the per se rule against horizontal price-fixing. And having a clear rule that you don't mess around with price is a rule that protects, that truly gives guidance and avoids the really bad thing, the horizontal price-fixing result. And what are the costs of giving guidance that way? Well, the costs of giving guidance that way might be small, if you can pretty much expect that what you want to accomplish on the efficiency enhancing side vertically, you can get to at not too much extra cost with a nonprice agreement. And so long as the vertical price-fixing rule is construed narrowly, well, relative to where the horizontal price-fixing rule is meaning that sort of how kind of easy it is to—the scope of the kind of evidence that, you know, you'd look at in order to infer an agreement I guess is what I want to say, then you can protect this bright line that protects the horizontal rule and not do it at too much cost to efficiency. And if you read Justice Scalia's opinion, there's a flavor of just what I'm describing in there when he talks about the slippery slope that ends up with a returning *GTE-Sylvania* if you have a broad construction of the vertical rule against resale price maintenance, because you start sweeping in a lot of nonprice stuff and raising the costs of doing the efficiency enhancing thing that you want to do vertically.

PROFESSOR FIRST: So Scalia was doing his own version of protecting the rules that he liked, which is to allow manufacturers to have a very—sort of high cost or premium distribution system and protect it that way.

MR. BAKER: I'm not saying Scalia was doing what I'm proposing. I'm saying here is why—

PROFESSOR FIRST: No, but I think he was doing that. He said it in his opinion. So you are right on that. It's a good observation.

Eleanor.

PROFESSOR FOX: I have a question of advice. Should I launch into my criticism of *Sharp*, which actually doesn't look like Spencer's criticism of *Sharp*—or wait my turn?

PROFESSOR FIRST: No, you can launch. Launch, yes.

PROFESSOR FOX: Okay. This is really interesting. Okay, so I jumped the line.

PROFESSOR FIRST: Go for it.

PROFESSOR FOX: This is very interesting because we both picked *Sharp* as the worst opinion, and yet I think the facts are totally different from the facts we are discussing in *Sharp*. So first I just want to say a couple of words about the facts of *Sharp* and then why I think this is the worst case. Of course, some of those reasons why have come out around the table.

Of course, *Sharp* was an agreement to cut off a discounter. It wasn't on its four corners an agreement to fix resale price. At least that's the way the Supreme Court opinion reads, so we can buy into that, you know, at least for *arguendo* to accept that. So you have your manufacturer of the calculators, you have two distributors, a discounter, and the other one who says to the manufacturer, cut off that discounter, I don't like that low pricing, I don't want to have to compete with it. And the manufacturer, the jury finds, has agreed with the complaining distributor to cut off the discounter only because of the price competition offered by the low pricer.

The jury finds that and the trial judge charges the jury that if there is an agreement to cut off a discounter because of the low pricing, that's illegal per se. Well, the Supreme Court says the jury charge is wrong.

Now, my problems with *Sharp* are—here I do pick up some of what Spencer said—an opinion ensues which puts all of this personal philosophy into the case in the guise of being economic and in the guise of being law, and it was neither. Justice Scalia goes into the resale price maintenance type case and says this is like a resale price maintenance case, except the only reason that a resale price maintenance case is possibly illegal is because it gives a clear price signal, which the oligopolists can rally around and the disincentives to cheat and therefore facilitates a cartel, and an agreement to cut off a discounter doesn't facilitate a cartel, therefore an agreement to cut off a discounter is not a price restraint, and therefore it's not per se illegal. Well, that's a little fancy reasoning. I mean I think most people would say an agreement to cut off a discounter just because of the low prices, the jury found, was a vertical agreement on price.

He makes some statements of law economics along the way, for example, and I quote this: "Cartels are neither easy to form nor easy to maintain." In other words, antitrust is only about section 1, is only about presenting agreements that facilitate cartels, and he says, now it's law, it's in the case law, cartels are hard to keep together; they are going to self-destruct. So we should be very wary about applying antitrust law.

Along the way he also does the following. He says we really have to have a prophylactic rule in favor of the manufacturer in a case like this, because we can't trust juries, because juries might find as this jury did, that the agreement was only about price. And maybe the agreement wasn't; maybe it was really the manufacturer was trying to provide more service, so we don't trusts juries, and we want to push this for the manufacturer.

So my reasons for opposing the case—because I'm sympathetic with what Steve said. Steve said a minute ago that you have this manufacturer of calculators. It can't have market power. It might have set resale prices, and now I add it did make an agreement, so to speak, to cut off the discounter, but what can it do to the marketplace if it really is just one little manufacturer among many. Maybe we just shouldn't bother with it and use antitrust for it. Well, I mean I'm sympathetic to that; it probably didn't have any market power; it probably couldn't do anything to destroy the market. But my problem is the tenor and tone of the opinion. I'll go back to what Steve said first. When we look at these opinions we should look at what is the Sherman Act trying to do. And really it is trying to develop markets to cause firms to be able to respond to markets and to let the market work and not to have business control of the markets, and we want to devise our rules within that framework. Well, my big objection to Scalia's opinion in *Sharp*, which is basically the same objection I have to Scalia's opinion in other cases, is that he manipulates the framework and doesn't go back to Steve's first principle, of what the Sherman Act is about. And he says the only thing we are trying to do, if it is collaboration, cooperation instead of monopolization, prevent cartels, doesn't fall within that, it's not an antitrust violation. And don't trust juries, be very lenient; therefore, on these questions of fact be lenient to the defendants. So I see it as very much of a piece—Spencer said this, too—it is very much of a piece with the shrinking of antitrust, with *Matsushita*—I borrow from Harry, *Matsushita*. But with *Spectrum Sports*, with *Cargill*, with all of this reading little by little by little to shrink antitrust so you almost can't see it. So I was sitting in the library thinking about this, and I happened today to overhear a dialogue between Justice Holmes and Justice Scalia, and it went like this.

PROFESSOR FIRST: This is in our library at the law school?

PROFESSOR FOX: At the law school.

PROFESSOR FIRST: You have to come to NYU. It is wonderful.

MR. BAKER: Was Eleanor Roosevelt in this one?

PROFESSOR FOX: But I'm going to use Spencer's name in vein, you'll see in a second. So Holmes says: "This case should not be decided upon an economic theory which a large part of the community does not entertain. The Fourteenth Amendment does not enact Mr. Herbert Spencer's central statics." And to which Scalia replies: "So I have heard you say for 72 years, but I am happy to pronounce that today that the Sherman Act does."

PROFESSOR FIRST: Well, that's the end of the panel. There's no way to follow that. I don't know, I never had those conversations. At least I don't admit to them. I'm looking at the list, and we have a lot of candidates for dishonest opinion, so I want to move onto those. But some of the things that Eleanor mentioned, it seems to me, of course you did throw in *Zenith* against *Matsushita*, which to me actually is more fundamental and certainly earlier in foreshadowing some of these themes which one might argue—or I would argue—have not been great for antitrust. Not trusting juries, certainly in the *Matsushita* case where the court wouldn't allow this evidence to go to the jury, and Justice Powell said why he couldn't believe it because it is beyond his imagination that those Japanese companies could think that they could ever take on these huge American companies, you know that Panasonic and Matsushita or Sharp or Sony could take on Zenith. I mean who could think that that would be possible. So Powell knew that. But in any event, so not trusting juries, and cartels are hard to form, and if all that section 1 is about is anticartels and you can't form cartels, we could lead into the *Brown* and *Williamson* case also, which no one picked. You do shrink antitrust. Of course, I hope that someone on the panel will say they didn't pick that because they think that's the most wonderful thing that's happened in the last 30 years.

There's another question actually, as we are moving down and back, that is sort of a question I've always had about the distribution restraints cases. And in a sense John says, "Well, you know all economists will say price and nonprice restraints from an economic theory point of view, it doesn't look any different, so you don't have an economics rationale except to the extent that prophylactic rules have efficiency bases of their own." But it has occurred to me actually that in some ways they do look different, and the territorial restraints are in some ways worse than price restraints. Because of the territorial restraint you both get no price competition intrabrand and no service competition intrabrand. At least if you allowed price restraints but not territorial restraints, you would at least have one of them, all right. Certainly a manufacturer could say, "Well, I'll have lots of retailers, I'll, you know, set the price, but we'll let them compete on service." Now the manufacturer says, "I'll just have a few, they won't compete either on service or price." That's just a little question about whether we went at all along the right route. And maybe *Schwinn* was right—no, I don't want to say that. Steve said you said it was bad, as I remember.

MR. AXINN: It was my nominee.

PROFESSOR FIRST: Lloyd, *Rothery* and *Town of Concord*.

MR. CONSTANTINE: Yes. Again, I took my criteria right out of the antitrust paradox where—

PROFESSOR FIRST: Excuse me, Lloyd, as Justice

Stevens always cites Judge Bork, in a way that Judge Bork could never imagine because he's the worst possible person, and Stevens says, "Ah-ha, even Bork says it."

MR. CONSTANTINE: He did that in *Sharp* also in the dissent.

PROFESSOR FIRST: You're right, yes, oh, of course, and this is the same touchstone.

MR. CONSTANTINE: This is the same touchstone. In the paradox he's nominating the worst antitrust decision of all times he says it's *Brown Shoe*. And he says it is not merely a bad case, he says it is a trendsetter, as if the poems of E.A. Guest had determined the course of modern literature. So using Judge Bork's criteria, Professor Bork's criteria, my first nomination is *Rothery*, the '86 Bork decision. I should say this claim that I was very instrumental in putting together the anti-Bork panel at his nomination, in which I think both Bob Pitofsky and Eleanor Fox both testified with great success, and I also was the sole antitrust witness against Justice Breyer. A really quixotic enterprise.

Anyway *Rothery*. In one decision this is what Judge Bork does: He overrules two Supreme Court decisions, *Topco* and *Sealy*; he disregards a Supreme Court decision decided ten days before he releases his opinion, *Indiana Federation of Dentists*; he disregards the relevant balancing tests both for the D.C. Circuit and for the Supreme Court; he disregards a triable issue on market power or regional markets in that case; he basically says that the only rationale for the antitrust laws is his definition of consumer welfare; he embraces the ancillary restraint doctrine, the old *Addison Pipe* ancillary restraint doctrine, as being the only rational way to interpret the law; and in the guise—and this is my favorite part—in the guise of paying homage to Judge Taft, because *Addison Pipe* was when he was Judge Taft as opposed to Justice Taft or Chief Justice Taft, in the guise of paying homage to Judge Taft, he recapitulates the *Addison Pipe* decision, tries to create the kind of effect that Natalie Cole and Nat King Cole produced in that record a few years ago where they did "Unforgettable" where they sang together. But he really tries to one-up Taft, so actually he sort of sings out of tune. And all of this is totally unnecessary for the decision of the case.

Now, I went back and did an empirical analysis here and saw how many times *Rothery* has been cited, at least in the circuit courts and the district courts, so that it really does meet the criterion of being very influential. And for those reasons I think it's the worst antitrust opinion up until today.

I would like to just quickly run through why I think *Town of Concord v. Boston Edison*, Justice Breyer or Judge Breyer's 1990 decision is probably going to be the worst decision for the next 30 years. That's a case in which he overturned a $39 million verdict in a price squeeze case, set aside a verdict. And he pounced on the so-called optimum monopoly pricing theory or single monopoly profit theory, and along the way he rejects Judge Hand's price squeeze analysis in *Alcoa*, basically lays the foundation for the Supreme Court ultimately saying that all vertical mergers are per se lawful, all vertical restraints are per se lawful, there is no rule against tying, no per se rule against tying, and once and for all knocking the last nail in the coffin of monopoly leveraging theory. All of that clearly flows from the *Town of Concord* decision of Justice Breyer. And because he was confirmed 98 to one or 99 to nothing I think he is going to be able to knock all of these balls home eventually. So I see this as being the future worst decision of the next 30 years.

PROFESSOR FIRST: You mean Judge Breyer?

MR. CONSTANTINE: Judge Breyer.

PROFESSOR FIRST: Continue the Judge Taft.

MR. CONSTANTINE: Judge Breyer's decision in 1990.

PROFESSOR FIRST: Right. I guess I don't remember *Town of Concord* that well. I didn't seem to remember all of that in there. Do you want to support a little bit of this, Lloyd?

MR. CONSTANTINE: Yes. *Town of Concord* presumably—you're assuming that everybody is very familiar with *Rothery*?

PROFESSOR FIRST: No, this is one of the most complicated opinions.

MR. CONSTANTINE: *Town of Concord* was a case where there was a price squeeze involving a utility which was competing with another electrical company in Wellesley, Massachusetts, and Concord, Massachusetts. The plaintiff had won a $39 million verdict in a price squeeze case. Price squeeze is a situation where you charge, you know, the same or a higher price at wholesale than you charge at retail. So that the utility was a competitor with its wholesale customer. This resulted in a $39 million price squeeze verdict, which formally followed the classical price squeeze analysis which comes out of Judge Hand's famous *Alcoa* opinion in 1940. Judge Breyer overturns the verdict, throws it out. And he does this on the basis of OMPP theory—optimal monopoly pricing profit theory—which basically holds that a monopolist gains nothing by taking its monopoly from one market and leveraging it or moving it into a second adjacent market. All of the profit that the monopolist could have gotten it gets in the first market, and it can gain no additional profit by gaining additional power or competitive advantage or even a second monopoly in the second market. Therefore, if it has done so, it must have done so for efficiency reasons. It must have done it for good reasons, and it must have done it for reasons which we certainly should

not inhibit through application of the antitrust laws. There are some—even Judge Breyer would hold that there are some—limitations on this theory involving certain very special circumstances. He posed that none of those apply under the facts of *Town of Concord*.

Now, the implications of that analysis, and to me, this was very striking to me, because I recall back in July of 1990 I was testifying before the Senate Commerce Committee or Science Commerce and Transportation Committee before Senators Gorton and Bryan. And the question was posed whether the antitrust laws continue to be a good weapon against certain kinds of restraints of trade and international trade predation. And I said, no, they were no longer a formidable weapon because the law had been trivialized to the point it was a very weak weapon, and I said, it had been trivialized into a little argument about a little triangle. And I actually drew the triangle for the committee. It was actually a big day, because the same day Boone Pickens was testifying, so there were TV cameras there and all that. Two months later in the *Town of Concord* decision, Judge Bryan drew the same triangle, and he said if this is what the law is about—and this is done very well in Eleanor's book, where she talks about this triangle also. But he drew this triangle as an appendix to the *Town of Concord* decision, and flowing from his exaltation of this OMP theory is the end of all vertical merger cases, because the only reason there would be a vertical merger would not be to take your dominant position from one market into another market in a bad way but for an efficiency enhancing way. Same thing with monopoly leveraging. The only reason that you would take your power from one market into an adjacent market is for an efficiency enhancing reason, because you could not gain any additional profit under this theory, if you look at this triangle carefully enough. Same thing with tying. Monopoly leveraging is the same thing as tying. It is economically, and Jonathan will probably slap me down, but economically it has the same implications, so there goes the vestiges of the per se rule in all tying cases. And this is in the same way that Justice Scalia clearly, clearly had and has an agenda to not just take these little, little pieces out of the antitrust law, as Eleanor said, but big hunks out of the antitrust law. But because of his personality and because of his intellectual dishonesty will probably not be the one who leads the charge.

Justice Breyer, who is much more modest, less intellectually dishonest, more respected, will very successfully take huge chunks out of the law, and he will be the guy who writes the opinions which take the law—which knocks off another 30 percent of the law. If we start out with a baseline in 1975 of 100 percent, and you knock off or you get to where we are now, which is around 50 percent, I'm sure that Justice Breyer is going to get us down to around 25 percent.

PROFESSOR FIRST: Harvey hasn't said enough, then we are going to Jon.

That's an interesting phenomenon about the discussion; it harks back to how I started this. It is very hard to distinguish, even though it sounds like three separate periods, past, present and future, because the cases you're pointing out in all of what we have discussed as the horrible things of the past, one of the odd things is none of the horribles seem to be happening. Vertical mergers are out. They are in, hey you actually have enforcement. This is extraordinary. Exclusionary—hold on, hold on, hold on.

MR. CONSTANTINE: If you'll recall what the FTC did as enforcement in the *Time-Warner* case—

PROFESSOR FIRST: No, no, no. I call, when enforcement agencies wake up from the dead and file a case, I call it enforcement. Now, it may not be great enforcement, but it is something. So something is happening there. Exclusionary practices are happening. Exclusionary practice of cases. Of course, they are always exclusionary practices.

MR. AXINN: Tie in is still per se. Just ask me. Boy, the Tenth Circuit in *Harcourt-Brace* really leveled me on that.

PROFESSOR FIRST: You know, right from the trenches. So all the bad things that are supposedly happening, on the contrary. And resale price maintenance has arisen literally from the dead. We have this resurgence in the face of simple-to-understand theory in Breyer's appendix. There's only one monopoly price, and the consumers in the *Town of Concord* aren't going to pay any more whether they buy from one, whether they raise the wholesale price or not. So, Harvey.

PROFESSOR GOLDSCHMID: You want to be careful on this. There's a kind of negative tone picking out snippets from opinions if they are really going to drive the world, and they don't. And aside from Steve Breyer being a friend to the *Town of Concord*, he went out of his way to say very carefully that this was a regulated industry, and a lot of what he was talking about had that in mind. When we talk about monopoly, this Supreme Court is as a strong an anti-monopoly Court almost as you could want. *Aspen Skiing* and *Kodak* are very strong opinions. The idea that Steve Breyer is going to drive us the wrong way on monopoly, as much as I think Lloyd is wise in all kinds of ways, that just won't hold.

PROFESSOR FIRST: This is really off the charts. So what you're saying, so long as Justice Stevens stays on the Court, is what you're saying.

MR. CONSTANTINE: Harvey, you know that the one or one of the two generally recognized exceptions to OMP theory is in regulated industries, isn't that right?

PROFESSOR GOLDSCHMID: Well, but—

MR. CONSTANTINE: My professor, this is my Judge Taft.

PROFESSOR GOLDSCHMID: And I gave him a good grade. Steve put a lot of weight on the fact that in a regulated industry the regulators are going to control the pass-ons and use of the power anyway, so don't treat this as if it were a free market.

MR. CONSTANTINE: And he has a lot of respect for regulation and regulators. He is probably the preeminent regulation basher on the Supreme Court.

PROFESSOR GOLDSCHMID: But that point is right, too. It doesn't—I mean to say that an industry is regulated and that regulators will help set price and that that has an influence on what they can do is not to say they are going to be wise. And everybody from Ralph Nader to Steve Breyer to Goldschmid to Fox to First, I mean anybody around has said some of the regulation that was done historically is dumb and wasteful.

MR. CONSTANTINE: So the question, Harvey, if this OMP theory gains, it completely gains ascendancy, do you not agree that the implications of that are the end of per se tying, monopoly leveraging and any law against any vertical merger?

PROFESSOR GOLDSCHMID: I don't think that reflects Steve Breyer's thinking or his opinions as a circuit judge or his writings, and so I'm not worried.

PROFESSOR FOX: And you have to hear Jon Baker on that.

PROFESSOR FIRST: We have to hear—

MR. BAKER: I really don't remember—I don't really know the *Concord* case, so you guys go ahead. I actually wanted to say something about *Rothery*.

PROFESSOR FIRST: No one remembers *Concord*, let me tell you, except for Lloyd, who looked it up and didn't tell me what he was doing, so I can't remember it either.

MR. BAKER: Even the cases I do remember, like *Rothery*, I remember the Cliff Notes version of them.

PROFESSOR FIRST: They were better that way.

MR. BAKER: Everyone knows right now that the Supreme Court precedent on whether to look at efficiencies in merger analysis, to take something else here, is no, it is not allowed. That's the precedent. And everyone knows that if the court took that case today that would not be the result, and there have been appellate opinions, at least one, *University Health* I guess, that says that it is appropriate to think about efficiencies for merger as a factor in determining whether it is illegal or not. And there's something similar going on with *Rothery*. My recollection—well, you guys can correct me if I'm wrong, but the Cliff Notes version of the holding of that case is that, if you have something that looks like market division but there's a big efficiency from it, you look at it under the Rule of Reason. And something like the parallel to the way BMI worked for horizontal price fixing. And that has to be right. I mean, you know, that it is consistent with the whole thrust of the way in which the Supreme Court was looking at all other horizontal—at other vertical and horizontal practices, and the way the commentary was going, and just the way that antitrust had moved in the seventies. And from that perspective I don't think *Rothery*—I mean sure, it technically overruled the Supreme Court—maybe not even, not hypertechnically, but it has the basic thrust of overruling the Supreme Court. But it was an opinion meant to be overruled.

PROFESSOR GOLDSCHMID: Oh, no. Let me just add this. Bob Bork overruled *Topco*, and I think he's wrong on that, and not only do I think he's wrong, but the Justices clearly think he's wrong. Because a few years later they came down with *BRG of Georgia* where they not only didn't hear the case, they just did it on briefs in a *per curiam* opinion, and said, look, *Topco* is good law, you divide the market, and you create a sham above it of saying this is some kind of venture, and we are not going to take that seriously; we are going to use per se. *Topco* is not necessarily wrong. But the point you make is fair, if there are real efficiencies and there's real venture, everyone agrees we are going to have to look at it with some greater degree of sophistication than Rule of Reason.

MR. CONSTANTINE: It should have been a two-sentence—the result was correct. It should have been a two-sentence *per curiam* opinion. Instead it runs some 70 pages including the entire recapitulation of the common law instead, which is what makes it a bad decision.

MR. BAKER: That's what happens when you get academics on the Court.

PROFESSOR FIRST: This is when publishing is free. When publishing is free, you can write forever.

PROFESSOR FOX: The interesting thing about these cases is *Rothery* was clearly right. Indeed, all three judges went in the same direction. Wasn't Ruth Ginsburg in the majority?

PROFESSOR FIRST: No, Patty Wohl.

PROFESSOR FOX: No, Pat Wohl dissented, but wasn't Ruth Ginsburg the other person in the majority? I think so.

MR. CONSTANTINE: Maybe.

PROFESSOR FOX: But anyway, the result in *Rothery*

was simply a covenant not to compete on an agent from a company that didn't have market power, and the Court said that's fine, not an antitrust violation. But that's insignificant. But the power behind this little insignificant opinion, the way it's couched, the way he, as Lloyd says, purports to overrule anything that does not fit within his paradigm is what I view as sort of the creeping dangerous phenomenon, that there's something happening with respect to a great number of these cases that are in a certain line, and we're going to come to the end of it and say, "Oh, where was antitrust?"

However, I also agree with Harry, we are probably not going to get to that point, because despite all of this great rhetoric, we sometimes find a new enforcer comes in and she brings cases, the old vertical cases, and somehow they get credence despite this creeping disappearance act.

PROFESSOR FIRST: So we are not slouching towards Chicago, to use Judge Bork's new book title, right?

PROFESSOR WALLER: Now, I should point out, I'm from Chicago but not of Chicago; I went to Northwestern, among other things. But let me point out a couple of silver linings to both of the cases that Lloyd objects so vehemently to. I guess I kind of like the thing that Lloyd doesn't like. I like the resurrection of the ancillary restraints doctrine. I think Taft basically got it right in 1890, whatever it was.

PROFESSOR FIRST: 6.

PROFESSOR WALLER: And said that the key is to look for what is a naked restraint versus what is an ancillary restraint to a lawful purpose and no more than necessary to achieve that lawful purpose. Now, you could stop there and say horizontal divisions of territories unaccompanied by anything else is per se, and you could have a relatively short opinion or relatively long opinion. But frankly, if Judge Taft's formulation had been picked up, he would have saved the Supreme Court 30 some years of agony fighting over the interpretation of whether or not to have a Rule of Reason and what does it consist of. And I think he would have given some analytical content to section 1 of the Sherman Act that would have gotten us out of the older attitude that per se you win, Rule of Reason you lose. So how do you bring any content to that. So I kind of like that part.

MR. CONSTANTINE: The problem is that it is another one of these magic tests. If Judge Taft wrote that opinion and said that the so-called reasonable price test was a "Sea of Doubt," and therefore he was going to get us a test that would work in all the cases. The case that Harvey invoked, *Palmer v. BRG of Georgia*, was a case in point. There you had two companies divide up the entire United States. One got, for bar review courses, 49 states and the other got 1 state, and they agreed not to compete with each other. Now, the lawful—according to the Eleventh Circuit—the lawful main purpose of doing that was to cross-license intellectual property. And under the ancillary restraints doctrine that was what they were really about. Now obviously, that requires some judgment. You have to look at something and say what is really going on here. So the ancillary restraint doctrine would not have saved anybody any trouble. It still would have required judges to make judgments as to what is really going on here. The Eleventh Circuit said this is really all about a cross-licensing of intellectual property, and the Supreme Court, eight to one with, I think, Justice Marshall—

PROFESSOR GOLDSCHMID: No, no, not even a dissent, whether they want briefs.

MR. CONSTANTINE: Right, he said, "I would like to have a brief here." He said, "Don't be ridiculous." And that notation was very much a message to the lower courts to the Eleventh Circuit and to the other circuits that don't give us that crap.

PROFESSOR FOX: But the "don't be ridiculous" is partly because prices went up 300 percent after the so-called licensing, so was it a license or was it a—

MR. AXINN: It was also a summary disposition, and it was a failure of proof case on the issue of whether there was legitimate cross-licensing or not. So don't read too much into it.

PROFESSOR WALLER: Lloyd, let me try one other silver lining on you that you'll probably disagree with even more, which is, if Justice Breyer uses *Concord* or anything else in his intellectual arsenal to have the Supreme Court get rid of the doctrine of monopoly leveraging, I will stand up and cheer. Because I have read the Sherman Act and the Clayton Act dozens of times, and I cannot find any basis for holding that a powerful firm that uses its market power to extend into another market but not monopolize or attempt to monopolize, I can't for the life of me figure out why that should be a section 2 offense. I can see why it might be a violation of article 86 of the Treaty of Rome as abuse of a dominant position, but I don't see why—

PROFESSOR FIRST: This is for the second hour, and we are already in the second hour.

PROFESSOR FOX: I think Lloyd is saying that *Concord* is sour grapes.

PROFESSOR FIRST: I've never met a naked restraint, but—well, I want to switch to Steve and get into a whole different set of area of the law. But you can think about whether *Topco* would come out differently under Judge Taft's ancillary restraints.

MR. HOUCK: Well, first of all, I would like to assure everybody that every once in a while the Supreme Court issues intellectually honest opinions. I think *Cargill* is one of them. I've reread it, and I think there's something to be said both for the majority opinion, written by Justice Brennan, and the dissent. I happen to agree with the dissent more. But the reason I selected that was for the consequences of the decision. What the decision did was significantly restrict the standing of competitors to sue to enjoin mergers, and I think that's had a number of effects, one of which of course is that it has pretty much placed the principal burden on government enforcers, both federal and state, which I think is a problem to some extent. And we are presently, as you know, in the middle of a merger tsunami. Going over with my daughter last night, my 11-year-old daughter studying for a test on minimum civilization, and I learned that—this was in Crete—and I learned that the civilization was destroyed after the eruption of a volcano by a tsunami, which was a tidal wave. And that's what we're having now; we are in a tidal wave of mergers, and it is extremely difficult for the agencies to keep up with. And among other things, one of the consequences of that is the development of law by consent decree or administrative fiat, which I know is something that you have criticized yourself. And another aspect of that, I think, is necessarily reduced enforcement. And I think that is a particular problem in the merger area. Alluding to your anecdote about the taxi driver, I think the average man or woman on the street, what they know about antitrust law is mergers. What concerns them is this title wave of mergers. They see large banks merging one into the other—there's reduced diversity of choice; there's increased conglomeration of power; there's likely to be increases of prices. All of these things are things that the antitrust laws are supposed to prevent, and I don't see a lot of enforcement. And one of the answers, you ask, you have people ask, "Well, what's going on?" And you say, "Well, the Herfendahl delta was only 65, sorry." So I think one result of that decision has been a cynicism among the public about the antitrust laws, about people like us, antitrust lawyers.

PROFESSOR FIRST: So I want to keep on this private enforcement, and not put Jon too much on the spot on this merger enforcement stuff. But do we really think, would there be more private enforcements, is it really driven so much by court decisions as sort of a different set of mergers that are going on now as opposed to the takeover period in the seventies when you had the antitrust laws being used as a tactic by targets. I wonder whether it would look much different in terms of private enforcement today. I don't know, Steve, if you have any view on that as we slide back over to Harvey on some more procedural things.

MR. AXINN: Well, we have of course—we are sitting in the one circuit that overruled *Montfort* against *Cargill* in *Bigelo*. And for good measure threw in the *Goldfield's* case, so that targets could sue as well. And I don't see a huge flood of cases brought in this circuit where national or international mergers could be challenged in any of our jurisdictions. There have been some. I remember vividly a number of cases in takeover wars, like the *Schneider Square D* case, which were brought in before Judge Sand, and he refused to transfer it at my request to a place like Chicago, which seemed like a good place to be.

PROFESSOR FIRST: Why was that, Steve?

MR. AXINN: Target was headquartered there, and I thought it made sense. That's where all the books and records and witnesses were. Judge Sand said he thought it could be handled here, notwithstanding the fact that it was an obvious choice of forum by my friends at Wachtel.

But I don't think that there's been a flood of litigation in our circuit, notwithstanding the fact that we seem not to observe the *Montfort* rule here, the *Cargill* rule here. But I don't think it is for the reason that there's less of an incentive. And I certainly agree with the notion that the administrative, the bureaucratic tinkering that does take place in Washington to permit mergers to go through is not what the law ought to be all about. Although in at least—I think most of the people in Washington conclude after they are finished that they had done a good job, and we will probably hear that from Bob tonight when he gives his talk in things like *Time-Warner*. I think that the private litigation was oversold in the seventies and eighties before *Montfort*. Most of the courts before whom we appeared as a plaintiff on behalf of a competitor or a target took the view that was taken by the other *Cargill* decision, *Cargill* against *Missouri Portland*, where the court spoke of drawing Excaliber from a sword where it would otherwise remain sheathed in the face of a higher offer. And I think most of us who lived through all of those litigation wars in the sixties, seventies and eighties on behalf of private plaintiffs found the courts pooh-poohing most of the theories that we were advancing, because if the Justice Department or FTC or maybe a state Attorney General was not there alongside us making the same arguments, our credibility was minimal. So I think that while I agree that it was not a good decision, and it does deprive the court of the voices of people who are most directly affected, I don't think that the world would look a lot different if it hadn't been decided.

PROFESSOR FIRST: That's interesting in the sense that the courts would view or view private anti-merger litigation somewhat differently than the rest of private antitrust litigation in the sense that we have really given this to government enforcers to handle, maybe because of Hart-Scott and looking at all of them, but also because of maybe the context that it was

often a party where you didn't really think they were speaking up for competition but had a whole other agenda. Maybe that played a part.

MR. AXINN: Well, but they weren't speaking. None of us ever spoke for competition in those days.

PROFESSOR FIRST: I wanted to put it nicely, Steve.

MR. AXINN: But of course, the court is there to determine what the outcome ought to be, and it ought to approach the question of anticompetitiveness without regard to who is pushing the question before them. If there's an anticompetitive merger, the fact that the target is complaining or that a competitor is complaining doesn't save the public from the anticompetitive result, so that if the government, because of resource allocation or a variety of other reasons is unable, unwilling, etc., or maybe under *Baxter* in those days, unwilling for other reasons to get involved, who the hell is going to do it if we don't? So I think that it is unfortunate; however, some of the more sophisticated antitrust judges in this country, not just the generalists but the sophisticated judges in the major metropolitan areas, including the Second Circuit, took that very dim view of private litigation because so often the litigation was compromised in the face of a 75-cent increase in the tender offer.

PROFESSOR FIRST: Harvey.

PROFESSOR GOLDSCHMID: Okay. Let me bring it to *Illinois Brick* very quickly. For me it is a 1977 Supreme Court case which was fun to teach and a very close case in terms of the opinions and the merits at the time it was written. You remember, this built on *Hanover Shoe* where in terms of cartel the Court held that you couldn't use a defense—a direct purchaser couldn't lose to a defense that you passed on the monopoly profit or the cartel profit. *Illinois Brick* dropped the other shoe in that Justice White writing for the Court, said that indirect purchasers couldn't sue. We can use it defensively; we can use it offensively, too. And it was a fun class to teach. There was a wonderful dialogue between White and Brennan, both of them understanding the issues, which isn't always true at the Supreme Court in antitrust. There were procedural hurdles discussed, which would be better for enforcement; the ability to decide how much was passed on in terms of complexity in the courtroom and such. My own bottom line went with the Brennan dissent, that it was fairer to purchasers to let indirect purchasers sue, that you could determine, at least roughly, how much was being passed on, and you didn't need neutrality. You could not allow passing on to be used as a defense, but still you could use it as a defense affirmatively in order to get enforcement. But it was a close case and an interesting case.

Over time since 1977 it really is out there now as a real problem for the law that's going to continue. For one thing the Court had to leave open several pass-on defenses. If there was a preexisting contract, the Court said of course then you could bring an indirect case. But then it had to figure out what that meant. And in *Kansas v. Utilicorp*, which is 1990, five to four with White now dissenting, they narrowly, very narrowly, construed what pass-ons mean. And now there have been a host of other smaller cases around just creating a disturbance.

But the real problem with their opinion in 1989 in *California v. ARC American Corp.* where they held, quite correctly I think, the Sherman Act didn't preempt state law and therefore indirect purchasers could be given the right to sue under state law. And so here we are now with 20-plus statutes, plus a host of common laws and local court decisions in various states allowing indirect purchasers to sue. And now with a useful corrective to Supreme Court opinion, what you now have is a vast procedural mess. Tennessee, for instance, currently has a multistate class action, covering all kinds of other states with indirect purchasers suing. Many of the key products out there are being sued by the private bar in state court. Now exactly what they are doing there, and what state judges think—what we think may be good and why defendants ought to be exposed now to six times damages because we don't know how we are going to put state court proceedings together with indirect purchases, and federal proceedings under antitrust laws with direct purchases, what you have is a procedural morass out there that's going to create considerable problems in the future. And that's one that simply—it was a close case and a questionable case when it was written. Today it is indefensible in terms of the way it is working out, and we ought to eliminate it from the law.

The second case—I thought we had to do something alive in the courts now. The *U.S. v. Nippon Paper* case came down from the District Court in Massachusetts, Judge Turow, in September of 1996. Again, it is a price-fixing case involving foreign companies, involving fax paper, but the important conclusion of the court was that the Sherman Act section 1 for criminal purposes would not cover conspiracy. And let me read you the exact language where the overt acts of the conspiracy take place outside of the United States. Now that is nutty on a whole bunch of levels in terms of result. What it means—and Judge Turow, of course, had to concede that a civil claim could be made for conspiracy, where the acts of planning of the conspiracy taking place overseas, because that could go back to *Alcoa* in 1945 and the 1982 Act and *Hartford Fire* certainly covered that in the Supreme Court in 1993. But he said criminal cases are different; you don't have the same interpretive flexibility. What it means is that in a world where the globe has been shrinking, that's been terrific in terms of competition, but it is also a world in which foreign tradition is very different than ours are there. There's more need for policing of overseas

companies and U.S. companies. Cartel conduct is more of a danger now than it's ever been. We cannot bring a criminal case, if you took the holding seriously, against a foreign conspiracy. The Justice Department I think is appealing the case. I can't understand how in policy terms it would be upheld. There's relatively little precedent either way, but everything points to good sense and the ability to reach a foreign criminal conspiracy that has direct, immediate effect and is aimed here.

If it's not overturned, we have a real problem because for me one of the healthiest things that's happened over the last 20 or 25 years has been the use of criminal penalties, imprisonment which has real general deterrents, and now the use of a 1987 Act which allows for much more than $10 million of fine against a criminal defendant. The Archer Daniels Midland settlement in the '87 Act, that allows for twice the gain received, and that's how they got up a $100 million settlement.

PROFESSOR FIRST: Next time they will have all their meetings in Tokyo, instead of just some of them in Archer Daniels Midland.

PROFESSOR GOLDSCHMID: Oh, yes. I mean, they make lovely vacations in a horrible world.

PROFESSOR FIRST: We still have one more with *Syufi*, which I wanted to hear about. But Harvey's cases are really great segues, again, into what's coming or what you might be afraid of. Because the world you are painting in terms of international competition can in some ways be a world to be feared as well—

PROFESSOR GOLDSCHMID: Oh, yes. It is clearly a mix. One loves it in terms of the greater competition in the markets and all of the rest, but one worries, one knows there's more policing needed now than ever before.

PROFESSOR FIRST: More policing means more enforcement, means more antitrust litigation. Sounds good. But I want to hear about *Syufy*.

MR. BAKER: This is the part where I stop sounding like I'm defending the Chicago School, and it has nothing to do with the fact that my boss just walked in.

Syufy is a 1990 opinion of the Ninth Circuit written by Judge Kozinsky, and the reason I think it's the worst decision in the last 30 years is not just because it encourages courts to overstate the role of entry in merger analysis or the possibility of entry in solving anticompetitive problems in merger law, although it does do that and it does that in a way by encouraging courts to consider merely whether entry could solve a competitive problem without asking the question of whether entry would solve that problem. And that perspective, I believe, is inconsistent with section 7 because it doesn't connect the entry analysis to the question in the statute about whether the merger is going to lessen competition. It merely looks at entry in the abstract, rather than whether this merger is going to be problem.

But that's not my real problem with the case; that's just why I think it's wrong in its music, in one aspect of it. The problem is that the perspective Judge Kozinsky takes is fundamentally hostile to antitrust. He views the world as though there's an opposition between relying on the market and antitrust enforcement, as opposed to what I would say, which is we need to have antitrust law to protect the market. That without antitrust you can't rely on the market the way that Judge Kozinsky would want. And I'll read you one quote which suggests his perspective; this is in the middle of the case. Judge Kozinsky says: In a free enterprise system decisions such as—and we are talking about the merger agreements among competitors here—should be made by market actors responding to market forces, not by government bureaucrats pursuing their notions of how the market should operate. And I view that way of thinking about antitrust as antithetical to what antitrust is really all about in protecting competition for the benefit of consumers and economic growth and the economy as a whole.

PROFESSOR FIRST: So you view the good thing about antitrust is that government enforcers should make the decisions. I was just wondering about the quote.

MR. BAKER: He has another—there's another thread of his story, which you just highlighted, which he talks about how we have to be very concerned about the ways in which antitrust enforcement itself stifles competition. And there is an aspect of his argument that takes that into account. Notwithstanding Steve Axinn's concern about bureaucratic tinkering—

MR. AXINN: I want to take that back now that Bob is in the room.

PROFESSOR FIRST: You don't want to call it tinkering. Ruining is what you want to say.

MR. BAKER: You know, I think it is very tough to make the case that government antitrust enforcement in the past, you know—

PROFESSOR FOX: Since 1980.

MR. BAKER: Yes, sure, since 1980, has done the thing that Judge Kozinsky claims to here.

PROFESSOR FIRST: Well, this is the segue into the future. Maybe we should, since I did ask everyone to think about what awful things, now that we've talked about the awful things of the past, how they might come into the future, maybe I'll start down, we'll just go sort of in order here. And I wonder if you're going to follow up on your international, or

do you have something else, Harvey?

PROFESSOR GOLDSCHMID: No, I think generally the case law, as I've indicated, I could cure any of the loose language from the Supreme Court, which in the end is the only court that counts, without any real trouble. It won't happen, but if I were Justice we could make everything come out the right way without much trouble in terms of the language.

What really worries me now is something that's also very good, which is the dynamic, fast-moving pace of economic change. On one level it is competitive and useful, but as you think of industries like telecommunications, pharmaceuticals, computers, defense industry, you keep going on, one sees the movement towards consolidation that we've all seen. And the key issues that are open, and we don't understand those industries well enough and it worries me, is where the entry barriers come in. Are we heading towards a new Standard Oil? What kinds of concerns ought we to have? And it is very hard to get good information. Obviously, we are talking merger, one side comes in and wants the merger, and they will tell you it's efficient, and clearly a new emphasis on efficiency is healthy, but it is efficient, terrific, and they've got enormous resources. When industry is against any degree, they have their own kind of bias. And getting a feel for the reality in these dynamic industries, what government ought to worry about in terms of merger enforcement, and where the barriers will be in the future is something I keep worrying we may not have a particularly good handle on, and that's my major concern.

PROFESSOR FIRST: Let me just push it a little, Harvey. It strikes me that that is a very important concern in terms of our understanding of the economy and where things go and then how that should make antitrust policy. But let's put it back into what's happening today in antitrust policy with regard to those issues. Are we on the right track there? Are we doing too—

PROFESSOR GOLDSCHMID: Well, it is very hard to evaluate what's happening in terms of government enforcement. I mean one thing, Bob and I and Diane, we just did a new edition of our case book.

PROFESSOR FIRST: I noticed it.

PROFESSOR GOLDSCHMID: There weren't many new merger cases put in. Certainly none from the Supreme Court. We don't have a lot of guidance, and to understand the real problems, some mentioned *Time-Warner*, other places, you need a knowledge of the industry and where things are moving, and certainly academics, in general, don't have that. But one of the problems for everyone, and particularly for government which must take the lead in the merger enforcement, is to make sure it gets good information as to what's happening in very dynamic and complex markets.

PROFESSOR FIRST: I want to keep our eye on whether we are going too interventionist or not interventionist enough as we go, because—

PROFESSOR GOLDSCHMID: I can't tell you. That's what worries me. What I know is, going back to the President's speech the other day, I don't want the concentration we got at the turn of the last century developing in a very new industrial and communications context today.

PROFESSOR FIRST: The concentration of power.

PROFESSOR GOLDSCHMID: Concentration of market power.

MR. AXINN: Could I just pile a concern on top of what Harvey said, which I happen to agree with. And that is that we have seen a lot over the last half a dozen years, in particular thinking about the defense industry and *Time-Warner* and other situations where the result was: Yes, we will permit the merger, but there will be a conduct remedy, and there will be some sort of enforcement with respect to that for a period of years. There will be some sort of firewall created to keep this satellite technology from being talked about over here in this part of the plant and so forth. And where that leaves us is with an overtaxed government whose enforcement section is clearly not capable of the fine analysis and discovery and protection. And I think it's ironic that, at least as I understand the message that we are getting from the administration, at least as to defense, that they seem to like that. They actually appear to be encouraging this consolidation throughout the military defense contracting business. And I think that Harvey is right, and it's going to get worse unless people start taking these cases to court and taking a chance the old-fashioned way of having a court determine whether or not that merger should be permitted to go forward. If there is enough concern to attack the merger and require this sort of remedy, then perhaps some of these cases—we ought to recognize the limitations the government has in terms of seeking to enforce them and let them be determined. Some you'll win, and some you'll lose, and when you lose them, you'll regret that you didn't go for the halfway solution I suppose.

PROFESSOR GOLDSCHMID: To some degree, I wish Bob wasn't here at this point, but thank God the agencies are in very strong hands in terms of both the FTC and the Antitrust Division.

MR. BAKER: I'll take that about me then.

PROFESSOR GOLDSCHMID: You got it, Jonathan. Because this is a time where we are trusting an awful lot to good judgment and good sense and ability to follow up and do this seriously.

MR. AXINN: Yes, but my concern is eight, nine years

from now when somebody is trying to do a compliance audit on Lockheed Martin.

PROFESSOR FIRST: I wonder which way this argument should go, whether you'd rather have the government in worse hands, in the sense that hands that do nothing and just let these mergers go forward, or whether you'd rather have them in worse hands, enforcers who say, well, that's a clever deal, but you know we are just going to go and sue and either it is on or off. Either you merge or you don't merge, and that's the only remedy we think of, because actually that's the antitrust remedy.

PROFESSOR GOLDSCHMID: That's why I raise—no, I don't want either of those. I want the quality hands, but I want to make sure it is being used as well. And part of the problem here, Harry, you've got to take account of the time frames. Government is acting in a very short period of making the calls. And Steve is right, if you get a superficial remedy that you can't follow up on, it may not work. It may work with *Pharmaceutical Pipeline*, but it may not work with other kinds of things. But that's why the more sophistication you have out there the better. But we do run antitrust in this country with roughly $150 million. That's not the kind of budget that can do everything you want to do.

PROFESSOR FIRST: Well, there's an attraction to greater antitrust budgets from all of our points of view. But, Lloyd.

MR. CONSTANTINE: The biggest problem that I see is that there's no big idea out there right now. There's no big initiative. And there is not the power in the antitrust laws or the antitrust agencies to do anything very, very significant quantitatively or qualitatively right now.

In the eighties you had some big ideas. I didn't agree with those ideas, but the ideas were big. The administration went up to the Hill in 1986, and they said let's do away with treble damages; let's do away with joint and several liability; let us effectively repeal section 7, and a number of other things. I don't know that there's any kind of a legislative program right now.

The agencies now, compared to 1980, in 1980 there were 467 attorneys in the Antitrust Division; there were over 300 at the Federal Trade Commission. You're now probably at around 75 percent of those totals, with twice or maybe two and a half times as much work. All of the things that we've talked about today have made the antitrust laws a less effective weapon. *Cargill*, *Matsushita*, all of the cases that we have been talking about—I'm not even talking about the specific rules like *Sharp*, but just broad rules having to do with standing and evidentiary rules. And there doesn't seem to be any major attempt to do anything about that. I think everybody loves Bob, and Bob is sitting back there and all that, and that's great. But the administration above Bob is quite complacent and happy with this. Its approach to antitrust is very much its approach to almost everything. What are we going to do about Medicare? Well, maybe we can fix it for ten years. What about are we going to do about letting gays in the military? Well, we will adopt a don't ask, don't tell policy. What are we going to do about soft money reform? Well, we'll limit soft money to $100,000 contribution from a single contributor.

PROFESSOR FIRST: What are we going to do about *Time-Warner*?

MR. CONSTANTINE: I'm going to get into that. These are not half measures. These are not even quarter measures. These are token measures. And when something very big comes down the pike, like *Microsoft*, like *Time-Warner*, my verdict on that is *Microsoft* was a five cents on the dollar kind of remedy. It was akin to something that I once did, which an editorial board said it wasn't a slap on the wrist, it was a slap on the wrist that missed. *Time-Warner*, in my estimation, was a 20 cents on the dollar remedy, but clearly not sufficient. And what is the one single sort of big idea that is floating around now? It's the idea which is embodied in the first volume of the report which came out of the wonderful hearings that were held at the FTC which I and many of us testified at, and the idea is to more effectively and more completely consider efficiencies in merger analysis. Well, that's a great idea, but the agencies are not up to it. They don't have the staff to do it. If recent history tells us anything, that it will make it even less likely that they will be able to effectively and quickly move on the very, very limited number of initiatives that they have the resources to tackle. And Bob's intellect and personal force cannot save us from that. It can make it somewhat better, but it cannot save us from that.

So my big problem is that the law is much weaker; the resources are clearly inadequate, and the administration is not doing anything about it on any level. When they had the chance to make some appointments on the federal bench, for example, they certainly were not thinking about the antitrust laws when the two appointments were made. Now, Justice Breyer and Justice Ginsburg are absolutely fantastic, wonderful people, but these were not justices that were going to breathe any new life into the antitrust laws. Quite the contrary, certainly with respect to Justice Breyer.

PROFESSOR FIRST: Big ideas?

MR. AXINN: Well, we know where Lloyd stands. I come back to where I was at the beginning, which is that antitrust has always had a constituency, a popular public constituency. It did when it was adopted. It certainly did when it made mistakes along around 1936, and coming along with Robinson-Patman.

It had a constituency. It was an ignorant constituency. It had a constituency in 1950. It had a public support base. If there's one thing that disturbs me, and I think it is pretty much what I'm trying to distill to some extent both what Harvey and Lloyd said, is that as we move forward here, towards the bridge to the future, we must not take antitrust in a direction where we are controlled by the economic theory *du jour*, whether it is game theory or one of the other incarnations that are not supported by or understood by a large enough constituency to protect and defend the free enterprise concept that the antitrust laws are all about.

I fear that the process that my good friend Hart-Scott-Rodino created, aided by things like *Cargill*, has expanded, is the notion that all merger decisions are made in conference rooms either at 6th and Pennsylvania or wherever the Justice Department is at the moment. It is sort of a constant movable feast. And they are never aired in court, except to get the final signature. I still sit here absolutely agog at the *Thompson West* deal. I mean, there are law professors surrounding me here, all of us lawyers, that is one of the more shocking decisions of the 20th century in my opinion. Hard to explain but amusingly, when Judge Freedman held his Tunney Act hearing, nobody attacked the basic decision. Everybody who came in to attack it, like Lexis, was attacking around the fringe, you know, what are we going to do about autocite. I didn't think that was the issue. I thought the issue was whether you could have the dissolution of Bancroft, Whitney, Lawyers Co-op and so forth. That was sort of a surprise to me. But it is the kind of thing that scares me when I see it happening, not just where lawyers are silent, or largely silent—even the law librarians really refused to put up a fuss on that one. But when it happens in the defense industries, when it happens in communications, and it happens wherever it happens, where consumers are affected, and the result is done behind closed doors and aired in a hearing where the only issue is the consent decree, I think we start to move away from our constituency.

When GE won the *Industrial Diamond* case, that might have been, I don't know, that might have been the right result. But when Justice brought the *Industrial Diamond* case, there was at least around places where I tested consumer reaction, the public thought that was great. They thought price fixing was bad and something should be done about it. And even if it was an ill-advised case and the judge correctly dismissed it, the Justice Department put up its dukes and fought. And I think that that's an important thing to do in antitrust. This is, after all, a statute with victims, and it ought to get enforced. And I think that we need to keep that in mind at policy levels in the agencies. And I hope the Supreme Court remembers it and maybe doesn't do another *Montfort*.

PROFESSOR FIRST: As I pass to our economist, I'll just throw in a couple of things along the way. Trying to sort of put these together, the idea of antitrust constituency is in some ways a puzzle. I think now the major constituency, frankly, is the professional one, the lawyers and the economists who keep it going.

MR. AXINN: And the military industrial complex.

PROFESSOR FIRST: Well, they get operated on. But the people who are running the show, who are most interested and most knowledgeable are the professionals. There are some things about antitrust that resonate to people, but we don't stress them a whole lot. High prices are something that always resonates. So there's some of that. Mergers—we have lost our focus—really think what people are saying in a way is we have lost our focus just on pure concentration of power as an issue, whether rightly or wrongly. In some ways, and I'll repeat, it may have sounded like a facetious remark, maybe we are in the hands of too good people. I mean people who think and have the ability to say, well, maybe we can really get it a little better. We will let it go through, but it will go through better. We will fix this. Time-Warner will have affirmative action, they will have to have another 24-hour channel. We will do this, and it will be better. Maybe instead we need to move backwards towards saying, "no." Our remedy, you know, Thurman Arnold said, "I'm an enforcer, I do my business in court." We go in and enjoin them, that's it. I don't know that we are ready to accept the implications of that in a world, as Harvey says, which is very difficult to piece it out, to say, well, really will that be the best result if we are going to be guided by the economic theories.

Theory *du jour* was something that I remember Steve saying, so on theory *du jour* we will turn to Jon Baker.

MR. BAKER: I'm the designated economist?

PROFESSOR FIRST: Yes. And if you weren't here, we'd amend you.

MR. BAKER: A brief comment first on the discussion on the right-hand side of the table about the role of the agency. Sure, we are stretched thin now, and sure it is true, defendants don't take us to court, so you see a lot of consents. But the concern about the conduct remedy really is are we being smart enough? And we understand our responsibility to think hard about the divestitures and the consent agreements we take. And in fact, we've gone back and looked at the Federal Trade Commission at a series of divestitures. There was a study that my bureau and the Bureau of Competition did together, and we discovered ways in which the divestitures systematically didn't seem to be getting at the problems that we were trying to

PRESENTATION OF THE FIRST ANNUAL AWARD FOR SERVICE TO THE ANTITRUST LAW SECTION

WILLIAM T. LIFLAND, ESQ.

MR. BRETT: I'm Barry Brett, and I want to welcome you all this evening to the next phase of what has become a very, very special day. The program during the day was very, very special, and we are very, very grateful to all of the people who participated, particularly Jeff Kessler, who organized and did a spectacular job of running the sports program, and Harry First, who put together and chaired the afternoon program with the various distinguished scholars. I think everyone who was here was really enlightened and had a lot of fun.

It was a really wonderful program. As always, we began with Bill Lifland's talk on antitrust developments last year, which, instead of reading the advance sheets, saved us a lot of work. There was a good handout on it. Anyone who missed it, too bad. In fact, I had written some lovely notes and materials, and just as I do when I'm preparing an oral argument, I threw them away and scribbled a whole bunch of stuff on the back of an envelope to say what I was going to say. I decided the best thing to do is just be quick and talk as little as possible.

So let me begin by introducing your dais to you. I apologize for Steve Axinn not being up here, but there was no room at the end of the table. Steve has been here so often, we thought we could be excused for not including him. On my far right is Ralph Giordano, who is head of the New York Office of the United States Department of Justice Field Office in New York. To Ralph's immediate left is Lloyd Constantine, and anyone here who does not know who Lloyd is or what Lloyd has done or his achievements doesn't belong and should leave immediately. There's really nothing further to be said. Next to Lloyd is Michael Bloom, who is the FTC Regional Director in New York, and we are very pleased to have Michael with us again as we are to have Ralph join us. To Michael's left is Steve Houck, a former Chair of this Section and currently the Assistant Attorney General in New York in charge of the Antitrust Division. To my immediate right is Bill Lifland, and for a whole bunch of reasons I'm not going to say anything else about him at this point. To my far left is Michael Malina, who I'm pleased to tell you was elected Vice Chair of the Section this morning and will be serving in that position for the next year. Michael is a distinguished antitrust practitioner, and also a great source of knowledge on baseball in the 1950s. Seated next to Mike is Alan Weinschel, also a former Chair of the Section, and he is the immediate past Chair. Next to Alan is Eleanor Fox, who, again, needs no introduction—Professor of Law at NYU, former Chair of this Section, and has held more former chairs of distinction in the antitrust field than anyone I could think of. Next to Eleanor is Bob Pitofsky of the Federal Trade Commission, from whom we will be hearing more later. And to my immediate left is Ned Cavanagh, who, until this morning, was the Chair of the Section, and at this point I don't know why he's here.

We have a few bits of business to attend to, very, very pleasant bits of business, before dinner, and let's see if we can get those out of the way. Then we will look forward to hearing from Chairman Pitofsky after dinner. Again, it is my great pleasure to carry on a tradition of long standing in the Association, and that is to present to our Outgoing Chair, Ned Cavanagh, a gift to acknowledge our gratitude for the fine job he did. Ned deserves an enormous amount of credit for the fine program that was run today, and I think it was special. I think it was better than anything certainly the ABA puts on. Jim Loftus is not here this evening, and I think all of them are on their way to Hawaii, so they will not hear it. I've been on a lot of those programs; there was nothing to compare to today. The people and subject were very interesting, and Ned had a terrific year as Chair.

Ned, thank you, and we present to you this symbol of thanks for your contribution to the Association.

MR. CAVANAGH: Thank you.

MR. BRETT: We have one more really nice thing that we are going to do this evening, and in order to do that let me ask Eleanor Fox to step up. Eleanor will make an award on behalf of the Association.

PROFESSOR FOX: Well, I have the pleasure and honor tonight to make the Section's first award, and we are honoring someone whom you all know and love, and it is Bill Lifland, who is to my right.

Bill, why don't you step up, too. I'll just say a few more words.

Bill, as you all know, is a lawyer, counselor, scholar, teacher and a friend to us all. He has been very devoted to this Section over many years, and his annual lectures have been something we all look forward to. He has many great credentials in his past, one of which I think we would all envy, going way back when you were Supreme Court law clerk to Justice John Harlan. He has been, of course, the Chair of this Section; he has been on the executive committee of this Section for many years. He is a partner in Cahill, Gordon & Reindel. We are happy that many of your partners are here tonight to see the presentation. You are a very insightful writer and lecturer, and you are antitrust with a very human face. It is a great honor to be able to make this presentation to you for your great service to the Section. Thank you, Bill.

MR. LIFLAND: Thank you very much, Eleanor, and thank you very much all of you. If I deserved this, I would appreciate it, because I do not deserve it, I appreciate it all the more. I'm touched by it. Thank you, all.

MR. BRETT: One more announcement note, and

DINNER SPEAKER:

HONORABLE ROBERT PITOFSKY
Chairman, Federal Trade Commission

MR. BRETT: Ladies and gentlemen, while you enjoy your coffee and dessert, it is with great pleasure that I introduce our speaker tonight and tell him of some of our program this afternoon. Perhaps he will comment on why the FTC has not brought the case that our afternoon program showed was a "gimme," according to Judge Winter, against the NCAA for fixing prices to be paid for its laborers and student athletes. We had an interesting panel this afternoon, in which some scholars told us about the very worst antitrust cases in the last 20 years and the worst opinions. Perhaps he will tell us what he thinks they are. I do know that Mike Malina has asked time to respond after the Chairman tells us about Ciba-Geigy, but he has been denied that opportunity. With the full knowledge that no one will have the opportunity to refute the remarks, Chairman Pitofsky will speak with us now. Thank you.

HONORABLE ROBERT PITOFSKY, Chairman, Federal Trade Commission: Thank you. I love that no refutation rule. I wish it were like that at the Commission.

This is a great pleasure for me to be here. I attended the dinner of this group many, many years ago and had an opportunity this evening to see some old friends, and some new acquaintances. On the new acquaintances front, I did overhear two senior lawyers outside during the cocktail hour approach each other, and one said to the other, "My goodness, I'm glad to see you, it's been so long. I know how much we have worked together, but let me tell you, I'm awfully embarrassed. I can't remember your name." The second gentleman said, "Oh, listen, that happens to me all the time, you shouldn't be embarrassed at all. How soon do you need to know?"

The program this afternoon was past, present and future, and I'm going to talk about the future. That's always more fun than past anyway, and perhaps more than the present.

Let me just say a few words about where we are now and maybe incorporate response to some of the remarks I heard at the panel at the end of the afternoon. I guess the way I would put antitrust at the FTC—I can't speak for the Department of Justice—is that we are no longer in the sixties. There is not the kind of exceptional activism in antitrust enforcement that we saw in those days; but it's not the eighties either, which I would describe as a minimalist antitrust enforcement era. We are trying to find a middle way. We are trying to learn from what people have taught us in the sixties and seventies. We are trying to appreciate the economic aspect of antitrust enforcement.

Lloyd Constantine said that there's no big idea in the nineties. I don't know, maybe that's right. That, in a way, is the price you pay for being in the middle. You're not ideological; you're trying to extract the best from the left and the best from the right. I think there is an idea that the commercial world has changed radically in the last 40 or 50 years and in the last 10 or 20 years. And we have to think through whether or not competition policy in this country really makes sense in light of the way the world does its business. But I'll come back to that.

In terms of levels of activity the Federal Trade Commission on the antitrust front brought more cases last year than in any year since the sixties, and maybe in any year since 1914. I'm not sure about that. Is that because our attitude is more prosecutorial? I don't think that's true. I think the main reason is the merger wave and the Hart-Scott procedure which brings these mergers to us.

The Federal Trade Commission five years ago investigated two percent of all the mergers it looked at and challenged one percent. Well, that's just about where we are now. The difference is we see 3500 mergers filed under Hart-Scott now, and maybe 2400 or 2500 five years ago. We challenge one percent of those cases, and then that turns out to be 35 cases, not 22 or 24.

Incidentally, the same thing is true on the consumer side. We bring vastly more cases than at any time in the recent past, in the last 20 or 30 years. But the reason for that is Congress directed the Commission to adopt a telemarketing rule and to challenge telemarketing scams aggressively. We probably brought around 150 or 200 cases in the year and a half that I've been there. Needless to say, it is hard to lose a telemarketing fraud case—you know the kind of people that you're dealing with. As a result, we have brought these cases, and we continue to succeed.

Are we more active than 10 or 15 years ago? I'd say slightly. I'd say that close call cases are more likely to be challenged. I'm echoing some of the comments that were made in the afternoon's program. Well, why are so many cases settled with regulatory decrees rather than taken to court where the judges will have an opportunity to talk about antitrust? The suggestion is that maybe the agency isn't asking for enough and therefore gets a settlement with a regulatory decree. Maybe that's right. I may not be the best person to react to that. But my sense of it is that cases don't go to court as often because the parties, when they are challenged, don't take the case to court, for understandable reasons of expense, time, delay, burden. They would rather say to you, once you bring a

case challenging the whole deal, "Oh, you didn't like that deal? Okay, I'll go off and find another deal, let's drop that one." Or they will offer to cure whatever you think the problems are, and that's how you get into these regulatory decrees. That's where we are now.

I really want to talk this evening about the future. And we started addressing that about a year and a half ago, a little less, with a series of hearings on the question of whether or not American antitrust law is appropriate to the way the world does its business today. We adopted two premises: (1) the globalization of competition and (2) the increased importance of innovation competition are the most important changes. We try to ask ourselves the question: Is American antitrust law, much of which comes out of Supreme Court cases from the 1940s and 1950s, about right for the 1990s and the 21st century? Well, first of all, on both fronts certainly the premise of our hearings was confirmed by everything that we learned—and that is a vast increase in cross-border trade and therefore the importance of the internationalization of competition. Let me stop with that one. Briefly, imports have gone from 7 percent in 1970 to 14 percent today; exports from 5.5 percent to 12 percent. In terms of the gross domestic product, exports and imports are now 25 percent of the American gross domestic product, what our consumers buy and what we export. In dollar terms, exports and imports are ten times what they were 24 or 25 years ago. And I'm not even incorporating cross-border investment, that is to say companies buying firms in Brazil or Japanese firms buying companies in the United States.

Why is it happening? Well, there are many reasons. One stands out above all others. Twenty-five years ago average tariffs in the world were 40 percent; this year they will be between 4 and 6 percent. When the Uruguay Round is fully implemented, it will be less than that. So that when a firm has a good product and it is located in a foreign country and they want to sell to the United States, unless it is a product with vast transportation costs, there is this great market that is open and available to them.

What should we do about it? Well, some of what we heard in our hearings confirmed that the agencies were doing about the right thing. Their sensitivity to export and import competition was more than adequate. The one thing that came out was that maybe there ought to be a reconsideration of the way the American enforcement agencies and the American courts treat claims of efficiency. Many of you will recall that in the sixties, there was a short misstep in which the Supreme Court seemed to be saying efficiencies would be held against the transaction; put that aside. Pretty much for the last 20, 25 years the courts have said efficiencies are neutral. And yet here you are in a world in which American firms will succeed only if they can successfully challenge Japanese firms, German firms, Italian firms, Brazilian firms in a world market. Would it not make sense to think about whether or not efficiency should be part of the antitrust equation? It certainly is in many, if not most, other countries.

We set up a task force—the Department of Justice and FTC. It is an exceptionally complicated question: How do you treat efficiencies in merger enforcement, joint venture enforcement and generally? We've made great progress. We are not ready with a report immediately, but we're pretty close. And there will be, I believe, a proposed adjustment to the Merger Guidelines dealing with the question of efficiencies.

Is this just another example of antitrust becoming more lenient? Yes, to some extent. There will be some cases in which the defendants will be now able to assert an efficiency claim in court, and if it's a close call case, right at the border, the deal may go through where it wouldn't have 20 or 25 years ago. By the same token, there's another side to this. If you give a full opportunity to firms that advocate their transaction by claiming efficiencies, and they haven't got anything to say on that subject, I feel enforcers can be more aggressive in challenging the transaction on the theory that at least general efficiency in the economy is not going to be injured by challenging that particular transaction. So there are two sides to increasing the significance of efficiencies in antitrust enforcement. And since the court, it seems to me, is already doing so in horizontal restraints and in joint ventures, it only makes sense to move it over to the area of efficiency.

I've heard the criticism that efficiencies are so difficult to measure, so difficult to trade off that the staffs of the agencies won't be able to do it. Maybe that will turn out to be right. I don't believe it. I don't believe efficiency analysis is any more difficult than barriers to entry or minimum efficient scale or a lot of other concepts in antitrust that are very difficult to deal with. So I am very high on the prospect that we can come up with something constructive in that area.

On the innovation side, it's harder to measure whether innovation competition is more the name of the game than it was 25 years ago. We've heard a lot of testimony that in those industries that are expanding most rapidly, that we care about most—biotech, computers, software, pharmaceuticals and so on—that customers care about price. Of course they do. But they also care about whether or not new generations of product will be available from that supplier over time, and that a lot of competition now consists of innovation competition. That led to what I thought was the most controversial issue in the entire two months of hearings among something like 200 witnesses, and that is: Suppose you have a transaction that is totally related to innovation, for example, a merger between two companies that have overlapping patents. What should you do about that? Should antitrust intervene at that level and either

challenge or try to restructure the transaction, or should it wait for some time to see if the innovation arrangement really turns out to be anticompetitive?

I am going to talk this evening about Mike Malina's case, about *Ciba-Geigy*, which I think is one of the more interesting cases I've seen since I've been back at the Commission. It was a merger between two companies. There were three areas of overlap, one had to do with flea collars, another had to do with herbicides, but the third is the one that I want to talk about to you tonight. That had to do with biotech and genetic engineering in order to address certain kinds of disease: gene therapy. This is a technique whereby genes are taken out of the body or treated in the body. They can be adjusted, and hopefully there will turn out to be ways of dealing with diseases we can't deal with now. We are not talking about minor things here. We are talking about possible cures for hemophilia, for AIDS and for cancer. This is not a small potatoes matter. Also the deal involves $63 billion in stock and $80 billion in assets. Two enormous companies.

They both had begun clinical trials of these new techniques. They were two of the few capable of developing these products, but it was clear that they were nowhere near introducing a product to the market. At the earliest, one of them—at least on the evidence or information we had—might have a product in five years. On the other hand, if the product ever got going in the way that people were predicting, the way some of the experts from the FDA were talking to us, you could have a $45 billion market by 2010. These two firms merge, and they consolidate their collection of patents, what should antitrust do, if anything, about it?

In the hearings I would say the majority of witnesses felt that antitrust should stay its hand; that it's too speculative. Who knows what will happen five years from now in such a dynamic sector of the economy. Barriers to entry in these areas are allegedly low, although people would quarrel about how quickly you could get a patent pool comparable to what these people have. There is no theory as to what is enough research, too much research, not enough research. And as the CEO of the new combined company said, if you're too aggressive here, you're going to deter investment and innovation in the first place. And finally, the argument is: Why do you have to do something now when it is all that speculative? Why don't you wait and see what happens in the product market. If there's a problem five years later, then you can do something about it. More or less persuaded by arguments like that, the European Union allowed the transaction with no qualifications. I've asked somebody to look at the question, although it may be that patent policy in Europe is a little different than patent policy in the United States. Maybe the patents weren't as secure there.

We did not feel that we should stay our hand, but rather taking all the arguments that I've just made into account (which would lead one to be very cautious about intervening in a market area where the product isn't going to be available for sale for five years), nevertheless we felt that if we did not move now, five years later might be too late. I mean, after all, if you try to mandate licensing after the product gets to the market and the new company has to go through the same clinical trial period, then the leaders are five years ahead of everybody else. In a market like this, one can question whether someone five years behind will ever catch up. Therefore, we put together a remedy which involved a collection of patents, which became available at no royalty, at a low royalty to a third party, thereby restoring competition, at least between two players in the market.

Why do I make so much of this case? Well, one reason is that there was an editorial in *Business Week* last week—I don't know how many of you saw it—saying: "The trust busters get one right." I hardly ever see editorials that way. Usually when I get up in the morning I see an editorial saying "bust up the trust busters" or "trust busters action greeted with derision," or something like that. Anyway, this is such funny thing, I'll read you the first sentence: "The Federal Trade Commission settlement with Ciba-Geigy and Sando shows a new savvy among trust busters about high tech competition." Then it goes on and on. You ought to all get a copy of this.

It's a tough call. It is a very tough call dealing with issues like this, but I hear all the theoretical arguments left and right, do something, don't do something. And then I see the facts of this case, and it seems to me that antitrust is unwise not to appreciate that the real competition is going on now in developing the product, not later when the product gets to the market.

A little more about the future. The question is: What's next? I said when I started with this job that I thought there was something about the history of the FTC that suggested that hearings oriented toward understanding what the world is like, taking a look at law and seeing if the law is up to date or behind the curve, is something the FTC ought to do. And I've said before that some of the most illustrious activities of the FTC over the years had nothing to do with cases; it was hearings about stock fraud in the market in 1928-1929 that led to the creation of the SEC in 1933; it was hearings about the emergent radio industry in the mid-twenties that helped create an FCC; and of course there were hearings just after World War II about the merger wave going on which led to the Zeller Kiefover revision of section 7. I believe that's the sort of thing that this agency—it is an independent agency; it is equally beholden to the administration and to Congress; it has a tradition of doing this kind of thing; it has an excellent group of

economists there—should be doing.

Today in Washington we announced what our next set of hearings are going to be, and I thought I'd report it this evening. I don't know if it will be hearings. It might be some other format, round tables, task force—I'm not sure about that. We are going to investigate the question of American law as it applies to joint ventures, and our goal would be, maybe a year from now, to come out with Joint Venture Guidelines comparable to the Merger Guidelines that we have today.

It is interesting, at the end of our last set of hearings, when we said to the participants, "What is the area of American law that you think is least adequate, that is most unclear, causes the business community the greatest problem, and leaves everybody perplexed?" it was overwhelming that joint venture analysis led the way. And so we will initiate this round of hearings.

Preview of coming attractions: What do I think some of the issues will be? One, where does cartel law end and joint ventures begin, and where do joint ventures end and mergers begin; how do you distinguish across that spectrum? We wrestled with that in the Health Care Guidelines. We came up with some proposals, which I would hope would be useful, but it is a tough call as to when you tip over from the per se kind of treatment that you apply to cartels over to more efficient integrated joint ventures.

Secondly, if you get into the joint venture area, the chances are you're going to be dealing with the Rule of Reason, and the very characterization that is a joint venture leads you away from the cartel approach. Well, what are the factors that one would look at in a Rule of Reason? Yes, you'll say market power, effect, less restrictive alternatives, spillover are possibilities. But what about the next question: What is the order in which you'll address those questions? Do you take them all together, throw them up in the air and try to find an answer, or is there a sequence with which they ought to be addressed? What is the weight, what is the priority to be given to these factors? There has been a lot of academic writing on it; there's the Commission's mass board decision a few years ago. We'd like to try to do a little better job on this question of priority and weight. Also, if there is going to be such a thing as a quick look, and it certainly appears to be that that's the wave

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