NEW YORK STATE BAR ASSOCIATION

1980 Antitrust Law Symposium

A report from the Annual Meeting of the Antitrust Law Section

January 23, 1980

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Forward

The 32nd Annual Meeting of the Antitrust Law Section of the New York State Bar Association was held on January 23, 1980 at the New York Hilton, New York City.

The annual business meeting was held at 9:00 a.m. Chairman Henry L. King read the report of the Nominating Committee, which was chaired by Prof. Eleanor M. Fox. Pursuant to the Nominating Committee's report and upon motions duly made and seconded, the following Section members were unanimously elected to the indicated offices for the year 1980-81 commencing July 1, 1980:

Chairman ..... Irving Scher
Vice Chairman ..... James T. Halverson
Secretary ..... Walter Barthold

Also, George J. Wade, William E. Willis, Edward Wolfe, Eleanor M. Fox and Henry L. King were elected members of the Executive Committee.

The substantive presentations of the day include discussion of emerging per se and rule of reason principles at the Supreme Court, and three afternoon workshops, devoted, respectively, to procedures for expediting antitrust cases, developments under the Robinson-Patman Act, and technological innovation and antitrust law.

We are delighted to share with you, once again, the proceedings of the Antitrust Law Section Annual Meeting.

H.L.K.

Emerging Per Se and Rule of Reason Principles at the Supreme Court

MR. IRVING SCHER: Good morning ladies and gentlemen. Welcome to today's program of the Antitrust Law Section of the New York State Bar Association. This morning we will present what has now become an annual program at this meeting — a review of important recent antitrust developments involving the United States Supreme Court. We are indeed honored to have with us a most distinguished panel to discuss this morning's topic — the resurgence of the rule of reason and new per se principles at the Supreme Court.

As I'm sure you all know, until fairly recently the rule of reason seemed to many observers to be a neglected step-child at the Court. Much of the Supreme Court Sherman Act case law developed by the Warren Court appeared to be principally occupied with develping per se principles as evidenced in the 1967 *Schwinn* (1) and *Sealy* (2) decisions involving vertical and horizontal allocations of markets, and as further evidenced in the 1968 *Albrecht* (3) decision concerning maximum resale price maintenance. Indeed this pattern seemed to be continuing in the early Sherman Act decisions of the Burger Court, and in particular the *Topco* (4) decision in 1972 involving territorial allocations by a cooperative buying group trying to compete with the large national grocery chains.

Moreover, until very recently, there was an amazing lack of Supreme Court guidance on how to apply the rule of reason when it is in fact applicable to a restraint. A determination that a practice was subject to the rule of reason appeared to be almost tantamount to a decision in favor of the defendant. Neither the lawyers nor the courts were quite sure what a rule of reason analysis entailed.

All of this seems to have changed in the past three years, beginning with the Court's 1977 decision in *Continental TV* v. *GTE Sylvania* (5), declaring, among other things, that the rule of reason is the preferred method of analysis under the Sherman Act. After that change in direction, the Court has gone on to provide guidance as to how to apply the rule of reason in *National Society of Professional Engineers v. United States* (6), and in more clearly (to some observers anyhow) setting forth the role of the rule of reason in 1979 in *Broadcast Music, Inc.* v. *CBS* (7). Thus, antitrust lawyers and courts are now grappling with economic theory in their Sherman Act analyses , and commentators are providing their own predictions as to the scope of the rule of reason in future cases.

To address the emergence of what appears to be a new rule of reason and the creation of new per se principles at the Supreme Court, we have drawn together an outstanding group of speakers representing academia, government enforcement agencies, and the private bar. Our format will be a principal talk by our first speaker followed by an opportunity for each of our three panelists to respond to that talk and to add their own thoughts on the subject matter. All of our speakers will then consider a series of questions relating to the principal talk.

As our first speaker we're extremely pleased to have one of today's leading antitrust commentators, Professor Lawrence A. Sullivan, who is Earl Warren Professor of Public Law at the University of California School of Law, Berkeley, where he's been a professor since 1967. Prior to that, he was a partner in the Boston law firm of Foley, Hoag and Elliott. Of course, Larry Sullivan is known to all of us as the author of the "Handbook of the Law of Antitrust," which is almost always cited in lower court and Supreme Court antitrust decisions these days. He was a member of the President's Commission to Study the Antitrust Law and Procedure which recently issued its report. And, of course, he is the author of various articles..

Professor Lawrence A. Sullivan: Thank you, Irving. I'm really the one who's pleased to be here. For a West Coast academic to be asked to this district to give a talk on antitrust to an audience like this is rather like a pilgrim coming to Mecca and finding himself installed in the temple.

In 1978 the Burger Court, already an innovator in the antitrust field, issued two particularly consequential decisions which Irv has already alluded to — *National Society of Professional Engineers and United States* v. *Gypsum.* Early in 1979 another important opinion, *Broadcast Music* v. *CBS*, was handed down. Taken together, these cases mark a new phase in the Court's contribution to antitrust. Not only do they reinforce *Continental TV* v. *GTE Sylvania*, not only reinforce the principle that economic analysis is to be used widely and per se responses very sparingly, they also lavish an articulate attention upon the goals and methods of antitrust which sets them apart from any of the Court's earlier output.

The opinions in all three cases deal ambitiously and with unaccustomed candor with two consequential issues of antitrust ideology. The first problem addressed expressly in Professioanl Engineers is to delimit the factors that may be weighed in applying the rule of reason. To some extent all three cases involved selecting an analytical methodology for assessing the risks to competition.

If these problems were settled, the fluid contours of antitrust would take clearer form. If these problems were settled, we could better sense the relationship between antitrust and other more frankly political areas in which aspects of national policy about markets are worked out.

Because the importance of these cases depends in part upon that wider backdrop, I shall say a word about the relevant political context before discussing the cases in detail. There is a loose consensus developing among those who influence microeconomic policy. That consensus forms around propositions like these:

Markets really work better than we used to think. Regulatory failure is at least as frequent and as severe a problem as market failure. Where markets would work reasonably well, government should stay out or shoûld get out and stay out. And where significant market failures appear, governmental intervention is appropriate only if the failure can be cured or

alleviated without doing more harm in other areas than good in the area being addressed. Policy planners should, therefore, figure out which responses from a wide repertoire of possibilities — taxing, subsidizing, permit selling, bargaining, socializing, standards setting, cost of service regulating, or doing nothing at all — which of those approaches will yield the best balance of costs and benefits.

When antitrust decisions are appraised within this wider political context, the problems which the Court currently faces seem the more formidable. The Court must show a decent regard for precedent, yet it must articulate doctrine which fits reasonably well within the developing national policy about microeconomic issues.

Let us now look at these recent cases and consider just how well the Court is doing.

In its most salient features, *Professional Engineers* fits admirably within the growing national policy to favor free markets. First, the Court rejected the claim that a restraint on price competition posed by a professional association could be defended by showing that the market did not work well for engineering services and that self-regulation for closing competitive bidding was needed to protect public safety. So doing, the Court brought the market to bear upon activities of a kind which had long been claimed to be immune from the constraints of the invisible hand.

The scope of the so-called professional exemption was first narrowed in *Goldfarb* v. *Virginia Bar*. There the Court unanimously held that a bar association's minimum fee schedule constituted illegal price fixing. But in a footnote, the *Goldfarb* opinion suggested that some professional restraints might continue to receive lenient treatment. *Professional Engineers* has now reduced whatever was left of the professional exemption near to the vanishing point.

Second, in reducing the scope of the exemption, the Court in *Professional Engineers* announced a vitally important generalization about the scope of antitrust analysis. The National Society for Professional Engineers had sought to defend its rule against bidding by arguing as follows:

"Bidders competing on the basis of price tend to reduce quality and engage in deception. Such competition among engineers would threaten public safety. Therefore, competitive bidding in this industry is harmful, not helpful."

The Court rejected this justification not as a factual matter but as a matter of law. The Stevens' opinion states that the Society misunderstood the rule of reason when it made its argument. The rule's only function is to determine whether a practice does on balance have a negative impact on competition. Any argument conceding such an impact but asserting justification on other grounds must be addressed to Congress.

Significantly, the Court cited *Addison Pipe*, *Joint Traffic*, *Trans Missouri Freight*, and other industrial cases in a manner implying that they are fully applicable in the professional context. The Court emphasized that the cautionary footnote of *Goldfarb* cannot be read as fashioning a

broad exemption under the rule of reason of the learned profession. It recognized that professional services may differ significantly from business activities and accordingly that ethical norms may serve to regulate and promote competition. But for an ethical norm to pass muster under the rule of reason, it is necessary to establish that the particular norm in some explicit fashion does aid competition rather than injure it.

Breadth of this holding is impressive. As Justices Blackman and Rehnquist point out, the standards of medical societies may limit the number of entrants and the advertising regulation of bar associations may reduce price competition. Under the majority's holding antitrust liability in such cases presumably will turn upon the kind of analysis now done to determine the legality of industry self-regulation programs in a commercial sphere.

Standards now may be applied by industry rating agencies, whether for commerical products or physician services. But in each instance, they must be reasonable in the sense of facilitating price competition and may not foreclose entry. They must be fairly and objectivly applied. Professional restrictions of a kind which would not bear scrutiny in a comparable commerical context now appear to be vulnerable.

Third, the Court in *Professional Engineers* expressed itself about the style of analysis which antitrust requires. Indeed, the broadest significance of the case may lie just here. Having decided that joint actions earn no exemptions merely because they involve professionals, the Court applied the rule of reason rather than the per se rule in order to decide whether a restraint upon competitive bidding unreasonably injured competition. In this sense the case widens the area where analysis is appropriate and narrows that covered by self-executing per se rules.

Moreover, in discussing the rule of reason, the opinion acknowledges the dynamic character of Sherman Act analysis. The Court cited *Mitchell v. Reynolds*, the old kings bench common law case, for the proposition that short-run harms and benefits must be compared with predictable long-run harms and benefits.

Finally, while insisting on analysis rather than simplistic solutions, the opinion makes clear that analysis need not be exhausted where the ultimate result is clear. The Court did not treat a professional restraint on competitive bidding as tantamount to price fixing and thus per se wrong. But neither did it labor to determine whether this restraint hurt competition. It thought the matter obvious, and it said so.

The case thus emphasized that once it is recognized that only competative effects are relevant, the difference between the per se rule and rule of reason analysis begins to diminish. In some cases injury to competition is obvious, and it does not matter greatly whether the Court applies the per se rule or works out the solution analytically yet with dispatch.

As Justice Stevens is at pains to document, there is little in the antitrust universe described in *Professional Engineers* that was not prefigured decades earlier. Yet it would be a mistake to underestimate the

extent to which the opinion clarifies the law. Henceforth, anyone striving to justify any joint conduct which discernibly does even a slight injury to competition must develop and articulate specific and credible theories and supporting empirical data to show that whatever the injury may seem to be, the conduct enhances competition even more.

There are only a few recognized bases upon which a showing might be predicated. In some circumstances joint action can serve to make a market or to widen an existing one and thus improve price competition by bringing together elements of demand and supply that did not previously participate.

Standardization, for example, can have such an effect. If there were 30 firms making nuts and bolts, all of different sizes, each of the 30 might be dealing with its own subgroup of buyers. Product standardization might bring all demand and supply together yielding more competition.

In other circumstances joint action may entail an integration which enhances efficiency, thus constituting an effective competitive response or facilitating entry. But social justifications other than benefit to competition being excluded, existing case law yields only this truncated list of factors which may be admitted in justification of arrangements having any discernible restrictive effect. If any potential for expanding the list exists —and I'm not at all sure that is does — it is to be found in the theoretical concept of market failure.

Market power is not the only thing that keeps markets from working well. Concededly, markets sometimes fail to produce economically optimum outputs even when there is no problem of monopoly or cartelization. Thus, inadequate market performance may be experienced where an industrial activity yields substantial externalities, where the market is inherently unstable, where transaction costs are high, or where relevant market information is expensive and asymmetrically available.

The basic teaching of *Professional Engineers* may well be that only Congress or state legislatures may interfere to correct market failures —that private parties may not. Comments in the Stevens' opinion about Appalachian Coal and Chicago Board of Trade show quite clearly that efforts to reduce instability through cartelization cannot be justified under the rule of reason. Yet, it may still be possible to justify less restrictive concerted action when it can be shown that the specific action in question has the purpose and effect of rectifying an identifiable market failure such as an externality or an information problem.

Of course, in light of *Professional Engineers*, any concerted program having any conceivable adverse effect ought either to be designed or critically reviewed by people with both legal and economic sophistication if those participating hope to meet the rigors of the test laid down in that case. We must await further developments then before we know fully the extent to which *Professional Engineers* narrows the scope of the rule of reason.

Some of the implications of the case for joint action are, however, already apparent. *Smith* v. *Pro Football, Inc.* is an example. There the

D.C. Circuit held that the professional football draft system violated Section I. The draft dampened competition among league teams in the market for talented college players. That being so, it would be lawful only if in some respect it aided competition to an even greater degree.

Citing *Professional Engineers*, the Court rejected the contention that in this market unrestricted competition was bad, not just for the teams but also for the players and the public. It also found wanting the narrower contention that the league as a joint venture could only prosper with competitively balanced teams and that the draft enhanced playing field competition. The Court thought that if better competitive balance was needed, less restrictive ways of attaining it might be found.

Throughout the Court's reasoning is rich in implication, not only for other joint activities in sports but also for a variety of other ventures. No joint venture is fail-safe unless its designers have identified relevant deficiencies displayed by the market and fashioned responses no more restrictive than needed to counter these deficiencies.

Note also that the significance of *Professional Engineers* may not end with joint activities and joint ventures. The case may also be relevant to single firm problems under Section 2 of the Sherman Act. This is suggested by the Court's general disposition to favor analytical rather than per se responses. It is also suggested by the Court's specific indication that dynamic analysis which takes accounts of effects over time is preferred to static analysis which considers only the immediate consequences of challenged market conduct.

In recent Section 2 cases, some federal courts have used short-run, static price theory as a way of identifying efficiency. The Second Circuit decision in *Berke Photo* v. *Eastman Kodak* exemplifies that trend. The opinion suggests that a monopolist may lawfully use power in one market to gain advantage in another when doing so yields short-run efficiencies. It becomes irrelevant whether opportunities for smaller firms or possible entrants are reduced. It becomes irrelevant whether short-run efficiency gains may be offset by long-run losses as rivalry ends.

Recent predatory pricing cases have a similar thrust. Several courts specified an objective norm that they think will discriminate between price cutting that hurts allocative efficiency in the short run and price cutting that does not. This norm then becomes the sole legal test. In a vain search for precision, objectivity, and efficiency, these courts are using simplistic, short-run, static theory to solve complex, long-run, strategic problems. *Professional Engineers*, it seems to me, casts grave doubt upon the correctness of these simplistic per se approaches.

Let me now turn to the second of the Supreme Court cases I plan to discuss — *United States* v. *U.S. Gypsum Company*. Here again the Court showed a strong commitment to the policy goal of preserving free markets.

The case was a criminal prosecution under Section 1 against competitors in the highly concentrated gypsum board industry, sellers that partic-

ipated in a seller price verification program. Defendants claimed that the practice was necessary to insure that they were within the limits of Robinson-Patman's meeting competition defense.

The Supreme Court resolved this conflict between Sherman and Robinson-Patman in favor of Sherman. Chief Justice Burger for a majority of six reasoned that absolute certainty by means of seller verification about allegedly lower competitor prices is not essential to invoke the meeting competition defense. Reasonable inquiry and good faith belief are sufficient.

Of even greater significance, particularly in light of the approval in *Professional Engineers* of dynamic analysis, is the analytical style displayed in the *Gypsum* opinion. In evaluating the effect of seller verification, the Chief Justice rejected the view so ardently espoused by price theorists that markets present no problem unless concentrated explicit cartelization is acheived. Expressly adopting the analytical style of industrial organization economics, the opinion stressed the concentrated structure of the gypsum market and the institutional factors which created a risk that verifying prices would facilitate cartelization or interdependent pricing.

Another important aspect of *Gypsum* concerns the issue raised by the implication in the district court's instructions whether defendant's intent to create an anticompetitive effect can be established by showing effects alone. Although courts have long drawn the inference of anticompetitive intent from a showing of anticompetitive effects in civil cases, the *Gypsum* court in a context where the anticompetitive effects would not be apparent without the aid of economic analysis refused to extend this inference to crminal cases under the Sherman Act.

The Chief Justice regarded the vagueness of antitrust liability standards as a reason for rejecting effects as a surrogate for intent in criminal cases. Instead, the Court held that the government, to obtain a criminal conviction, must show that the defendant had knowledge of the probable anticompetitive effects of its action.

Justice Stevens dissented from this portion of the majority opinion on the grounds that if the practice of exchanging current price information is sufficiently prevalent to affect the market price, then there is an extremely high probability that the sales representatives of these companies had actual knowledge of this fact. He was willing to allow the criminal coviction to stand in the absence of explicit proof of such intent since under the circumstances existing, the possibility that defendants really had no knowledge was surely remote.

This difference between the majority and Justice Stevens implies disagreement about the determinancy of the rule of reason analysis. Justice Stevens sees the rule as proscribing actions which have a market-wide impact and that the detection of such effect may be accomplished in a relatively straightforward manner. This view is also implicit in his *Professional Engineers'* opinion which foreclosed inquiry under the rule into any question except whether or not competition is restrained. Indeed, the

view that competitive impact can be assessed in a straightforward manageable way seems essential to the credibility of the Court's recent readiness to expand the domain of the rule of reason at the expense of per se rules.

The Chief Justice, on the other hand, said that the behavior proscribed by the Sherman Act is often difficult to distinguish from that gray zone of socially acceptable and economically justifiable business conduct. He thought this uncertainty about the Act's scope rendered a strict liability approach unfair. This concern seems misplaced given the facts of *Gypsum*. As the Chief Justice said, the appropriate mode of evaluating information exchanges between competitiors is to consider the structure of the industry and the nature of the information.

Both factors pointed unambiguously in *Gypsum* to an anticompetitive effect. Under the analysis which the Chief Justice acknowledged to be authoritative, the practices challenged in *Gypsum* thus seemed illegal beyond argument.

Gypsum is the first decision by the high court indicating that the Sherman Act may mean different things in criminal and civil cases. This concept may have application to other areas of antitrust. For example, the bedrock justification for reading a bad conduct requirement into monopolization concept of Section 2 of the Sherman Act has always been the anomaly of treating the status of possessing monopoly power as a crime. *Gypsum*, however, impliedly frees the Court to draw a distinction between criminal cases and civil ones in determining the constituent elements of monopolizing. It, therefore, increases the feasibility of a civil monopolizing test which focuses only on the social evil of price enhancement through persistent monopoly power.

On the question of the scope of the rule of reason and the style of analysis under the rule, *BMI* v. *Columbia Broadcasting System* provides a provocative companion to the *Gypsum* decision. *BMI* echoes *Gypsum's* call for more rigorous standards of analysis, but does so in a civil case, indeed a case in which conduct was established by direct evidence and there was no need to draw inferences from industry structure.

Here again, the majority indicated that the rule of reason analysis is necessarily a comprehensive process. And Justice Stevens in dissent called for a relatively streamlined and narrowly bounded analysis under the rule.

BMI considered whether blanket licensing of copyrights constituted per se illegal price fixing. When a copyrighted musical composition is performed for profit on radio or television, for example, consent of the copyright owners must be secured. While no legal barrier prevents media users from obtaining separate performance licenses directly from individual copyright owners, in actual practice *BMI* and *ASCAP* obtain non-exclusive rights from owners to license the works and act as bulk copyright clearinghouses. They resell licenses to music users and compensate copyright owners based on the character and frequency of the music's use.

BMI had offered rights to its repertoire only as a single unit for varying amounts of time and refused to sell rights on a per composition or per use basis. Users such as CBS were charged on the basis of ability to pay, calculated as a percentage of their advertising revenues. CBS contended that BMI violated the Sherman Act by requiring CBS to pay for the rights to BMI's entire library and not simply the compositions that CBS actually used.

The Second Circuit reversed the trial court's dismissal of the complaint and ruled that the blanket licensing arrangement was per se invalid. Rather than simply enjoining the practice, however, the Court of Appeals suggested that the district court should consider remedies which would require the defendants to provide a form of per use licensing but also would permit blanket licenses under some circumstances. Such flexibility, the court reasoned, was appropriate inasmuch as the blanket license was not simply a naked restraint ineluctably doomed to extinction.

The Supreme Court reversed this per se ruling. Writing for the Court, Justice White remanded the case for fuller examination under the rule of reason. Emphasizing the lack of prior court scrutiny of the arrangement, he said that the Court of Appeals' per se approach was belied by its own recognition of the need for flexibility at the remedial stage. He thought three factors indicated the need for a more discriminating analysis.

First, the BMI arrangement occurred under the supervision of a Justice Department consent decree which stemmed from earlier litigation. While this did not grant private immunity, it did provide a unique indicator that the challenged practices may have had some redeeming competitive virtues.

Second, the blanket license was seen to accompany an integration of sales, monitoring, and enforcement against unauthorized copyright use. The otherwise prohibitive cost of negotiating copyrights on an individual basis meant that BMI made a market where fully effective competition on an individual basis was not possible.

Third, the congressional mandate for compulsory blanket licensing for juke boxes and secondary cable television reflected an opinion that blanket licensing and similar arrangements are economically beneficial, at least in some circumstances.

The majority opinion is consistent with a Sherman Act tradition —the per se rule applies only to naked restraints. Integration among competitors, mergers, joint ventures, joint selling arrangements, and the like may yield efficiencies which should not be stricken without sufficient analysis to determine whether they bring together enough of the market to threaten competition. Preliminary analysis then is always necessary prior to characterizing conduct as price fixing.

Here this preliminary analysis disclosed a significant integration. BMI did more than set prices. It established a centralized marketing institution which lowered the high transaction costs accompanying copyright licensing on an individual basis. These efficiencies could indeed make a market.

The rule of reason was thus properly invoked on the basis of traditional criteria to examine whether these benefits were being gained at the expense of an injury to competition, and if so, to determine whether the gains outweighed the losses giving consideration to any less restrictive ways in which the benefits might be obtained.

In this regard, the majority opinion is unusual only in the explicitness with which it identifies and discusses the characterization process. While the process occurs in many cases, few are so open in acknowledging that characterization is a distinct phase in antitrust analysis. This explicitness arose in part because of the complexitites of the BMI fact situation. Cooperative pricing definitely was occurring at the same time that conceded efficiencies where being achieved. Justice White acknowledges this complexity by noting that easy labels do not always supply ready answers, and that the decision to invoke the label "price fixing" will often but not always be a simple matter.

Where a difficult problem of characterization is present, the dividing line between per se and rule of reason approaches become less distinct. The analytical requirements begin to converge. The per se standard entails something more than a simple yes/no inquiry which suffices when an explicit price agreement among competitors is involved. Yet, as Justice White points out, the scrutiny occasionally required before a per se rule can be invoked does not merely subsume the burdensome analysis required under the rule of reason, or else we should apply the rule of reason from the start.

As this characterization process is elaborated, a third level of antitrust — a level between per se treatment and rule of reason analysis — is being constructed. Under this style, which might be called an analytically enhanced per se approach, the Court weighs the values of competitive injury and competitive benefit as it would under the rule of reason but narrows the inquiry in response both to the familiarity that the Court has with the suspect practice and the Court's assessment of the reliability with which it can make an early judgment concerning competitive effect.

While agreeing with the Court that a per se approach here was unsatisfactory, Justice Stevens dissented from the majority's decision to remand. He believed that the record before the Court contained the information necessary to hold the BMI's blanket licensing scheme was illegal under the rule of reason. Justice Stevens thus propounds once again his view of an even more limited scope for the rule of reason itself.

The majority suggests that there are three analytical categories — per se analysis, an analytically enhanced per se analysis involved in the characterization process, and full-blown rule of reason analysis. The latter would be used where structural or price theory analysis was needed.

Justice Stevens may be adding yet another analytical category — a truncated rule of reason which stands between the brief analysis done as an aid to characterization and full-blown rule of reason. Alternatively, he may be asserting that the majority's conception of the rule of reason as

always necessitating a rigorous and elaborate analysis of competitive harms and benefits is basically deficient, that it ought to be replaced in all instances by a flexible approach to the rule of reason. Such a flexible approach, such flexible analysis will provide reasonable assurance that the Court is reaching a correct result. Only enough analysis to gain that assurance would be necessary. In either event, the Stevens' opinion implies a recognition that unconfined judicial analysis is a costly process and can, by inviting the proliferation of unmanageable data, hinder rather than facilitate a pro-competitive policy.

Justice Stevens' dissent is a serious attempt to cope with the analytical unmanageability which can threaten the effectiveness of antitrust policy. His rule of reason compares actual pricing behavior with that expected from a competitive market and then asks the defendant to explain any divergence. He would find the Sherman Act violation whenever this explanation fails to indicate that more competitive pricing is not in fact possible.

The failure of Justice Stevens to carry a single vote for his view may have been a function of the unique factors of the market involved in that case rather than general resistance by the Court to the Stevens view about the scope of the rule of reason. CBS, after all, is a member of a highly concentrated TV network industry. BMI and ASCAP, the two defendants, dominated the music copyright market. In many respects then, the case was a pricing dispute between bilateral monopolists. Any monopoly increase in copyright royalities achieved by ASCAP and BMI would presumably be passed on to the copyright owners. But the effects of any cost savings on copyrights achieved by CBS through litigation is less clear. Since viewers do not pay for CBS programs on a per use basis, cost savings to CBS could not directly be passed on to viewers. Cost reductions might result in lower advertising rates, but there is little reason to expect this. Television networks have maintained a consistently high level of profits. Given the oligopolistic structure and this indicator of noncompetitive performance, CBS may have considered ... may have had considerable discretion about whether savings were to be passed on at all. These considerations are not discussed by the majority. They may have led it to doubt the competitive urgency of protecting CBS from BMI and ASCAP without further analysis.

A related point is that BMI presents a classic example of the recurrent problem of reviewing the market conduct allegations which may well stem from underlying structural problems. BMI and ASCAP clearly have market power in copyright licensing. No competitor was disciplining them to respond to customers' complaints. But merely ordering them to price on a different basis would not diminish their market power. Indeed, one would expect the two to extract the same revenue although on a different basis that CBS has previously shown its willingness to pay.

While a different pricing arrangement might strengthen competition between the two and might make it easier for competitors to enter this

market, such a result is hardly certain. Consequently, substantial ambiguities surround the efficacy of the available conduct remedies.

The fact the BMI involved a contest between bilateral monopolists suggests a more general problem which the antitrust laws may be beginning to deal with. I refer to the problem of concerted efforts to contain increasing costs. This problem is particularly salient in the health services industry where escalating costs give insurers and others a strong incentive to take common action in an effort to limit the rate of increases. Some of the legal issues are suggested, although not explicitly dealt with, in another recent Supreme Court case — *Group Life and Health Insurance Company* v. *Royal Drug.*

Group Life, a Blue Shield insurer, offered to direct its policyholders to pharmacies that had agreed to limit their profit margins on drug sales. Pharmacies that did not so agree still could supply drugs to policyholders but on insurance terms less favorable to the policyholders.
Independent, nonparticipating pharamacies brought suit against Group Life claiming that the profit margin limits were too low to support any but high volume chain druggists, and that the pharmacy agreements by channeling consumers to these outlets constituted a restraint of trade.

The district court granted Group Life's motion for summary judgment on the ground that the McCarren Act gave Group Life an exemption. The Fifth Circuit's reversal was affirmed five to four by the Supreme Court, which ruled that the pharmacies' agreements did not constitute part of the business of insurance and, therefore, gained no statutory exemption.

I'll not here consider the McCarren Act questions. I do wish, however, to suggest some of the implications of the antitrust issues raised on remand.

Because insurance has become an increasingly large and important sector of the economy, it is vitally important that the business operate under the correct antitrust incentive structure. Properly directed, insurance can aggregate competitive forces to desirable ends by grouping consumer votes behind an informed and effective bargaining representative. A properly functioning insurance market can help to achieve medical cost containment. Aggregating consumer demand might improve market performance by reducing the costs of informed choice. A firm that is representing many consumers continually reimburses medical costs. It can afford to invest more in learning about the need and reasonable costs for these services than can the individual insured who's only rarely a medical consumer.

In the Royal Drug example, drug consumers might not have been aware of disparities in drug prices; and the costs of a search for lower prices and effective bargaining to attain them might have been too great to justify the minimal savings on any individual transaction. A purchasing agent effecting the choice of many consumers could, however, spread such costs over a population and thus more closely approximate perfect

market performance where information is complete and transactions are costless.

But aggregating buying power also can threaten values served by antitrust policy. As a general matter, aggregation of buying power is at odds with the preference for decentralization. It also poses specific competitive hazards by which mass buying power can be subverted to classical anticompetitive ends.

For example, unions and employers may be able to secure better terms on workman compensation insurance policies if they arrange to purchase as a bloc rather than on an individual basis. But if insurance agents rather than consumer interests reprensentatives were to gain control of the plan's buying power and use it to exclude other competing agents, the aggregation would injure that aspect of competition. Similarly, competition might suffer if those receiving claims' payments — druggists or doctors, for example — were to control the aggregate buying power.

The Federal Trade Commission may soon have before it the question whether Blue Cros plans represent such an example. Staff reports show that when doctors whose fees are paid by Blue Cross exercise managerial control over Blue Cross actions, medical fees are substantially higher than in those instances where doctors do not control the purchasing decisions. If doctors do have the power to influence these medical payment plans, then any Blue Cross rule which penalizes the competing doctors may suggest that aggregate buying power is being used to enforce a doctor cartel rather than to benefit consumers by sharpening competition.

Since in Royal Drug power is amassed not by consumers themselves but by an insurer, the issue is also raised whether any efficiencies attained or any market power achieved is used to reduce consumer costs or to increase insurer returns. Suppose competing manufacturers by purchasing jointly were to achieve economies, there would be the possibility that the resulting cost reduction would be passed on to consumers, but they may not be passed on. And as with any joint venture, there would also be the possibility that horizontal cooperation undertaken for a limited purpose might be extended to other matters — to price, output, and market allocation.

The occasional broad dicta that price agreements are illegal irrespective of whether they are made by buyers or sellers are too sweeping for literal application in this area. Joint buying activities, like joint sales agencies, entail a degree of integration and a possibility for cost reduction efficiencies — redutions in costs in gathering information and in analyzing information and in bargaining. For these reasons per se characterization is not appropriate. Rule of reason analysis first requires a determination whether monopsony power is attained. If so, the joint activity is unreasonable. And that's a basic structural analysis. A market has to be defined and the percentage of the market which is comprehended by the arrangement has to be determined.

Next, it must be decided whether a significant risk exists that the venturers may extract super-competitive returns by colluding of sellers. The court may determine whether the arrangement yields significant and otherwise unobtainable purchasing economies and balance these economies against the potential for super-competitive returns at the next stage.

Short cuts can be provided in this analysis by looking at the significance of the purchased input in the joint venturers' production process, by looking at structural information about the market in which the joint venture occurs, and at the extent of participation in the market. There should be little cause for concern absent indications of anticompetitive intent where the cooperatively purchased item is a trivial percentage of final cost, where competitors are many, and where the purchasing arrangement consolidates only a minor percentage of all buyers in the market. The opposite should be true where buying power for a major factor of production is joined between oligopolistic firms or when an arrangement involves a significantly large percentage of firms in an industry to suggest monopolistic powers.

Suppose monopsony power is attained either by final consumers or by intermediate firms which resell in competitive markets where they are forced to pass on savings to final consumers. The major goal of the Sherman Act is to reduce prices paid by the ultimate consumer. One could argue, therefore, that any concerted practice having this effect should be permitted. The more conventional view, however, is that resources ought to be allocated and market adjustments made through competitive processes. Monopsony power achieved through a consumer cartel would violate the Sherman Act just as would monopoly power achieved through a producer cartel. Yet, even on the conventional view, ultimate consumer cartelization might conceivably be justified if needed to counterbalance monopoly power at a producer level.

Under the approach here suggested, the pharmacy agreements in Royal Drug should first be examined to determine whether they resulted from an independent cost reduction motivation on the part of Group Life or whether there is evidence suggesting an alliance between Group Life and benefiting drug suppliers. More generally, insurance cost control efforts like those involved here should be found to enhance rather than diminish competition unless they achieve monopsony levels of concentration or facilitate collusive behavior among commercial policyholders who are competitiors. The risk of monopsony can adequately be assessed.

(Applause)

MR. SCHER: Thank you very much, Professor Sullivan, for those cogent remarks, including in particular your tour through the rule of reason in the context of two pending cases that have been remanded by the Supreme Court and are now working their way back up the judicial ladder. I know that your comments triggered the minds of our panelists. And since they must be raring to go, I will introduce each of them now and then ask for their individual reactions to your comments.

First, on my far right is Robert Reich who is currently the Director of Policy Planning at the Federal Trade Commission. With his economic background, having attended both Yale Law School and Oxford University where he received an advanced degree in economics, I'm sure he's going to have much to say about Professor Sullivan's comments.

On my immediate right is David Foster, who is now a partner in Willkie, Farr & Gallagher, New York City. We're delighted to have him now in the New York Bar. A fellow of the American College of Trial Lawyers and an experienced antitrust litigator, he is currently serving as a member of the Council of the Antitrust Section of the American Bar Association, and he has frequently testified before Congress on behalf of the ABA.

On my far left is Harold Kohn, who is a member of the Philadelphia and Washington law firm of Kohn, Savett, Marion & Kohn, and is also a trial lawyer who has been in active practice now for 40 years. As many of you know, Harold is a veteran of the electrical equipment antitrust litigation and ongoing "big-case" antitrust litigation. He has been active particularly in private antitrust litigation representing both plaintiffs and defendant clients in the antitrust area as well as in the securities field.

I will start off with Bob Reich, and the comments he may have.

MR. ROBERT B. REICH: Larry's analysis is so comprehensive and rich with implications that it's a very hard act to follow. Let me try, though, to play gadfly and take issue with one of Larry's major themes.

He suggests that rather than two categories of antitrust analysis —*per se* and rule of reason — we're now faced with three or four categories: a *per se* enhanced or modified *per se*, modified or enhanced rule of reason, and then full-blown rule of reason (if you take Justice Stevens' inclinations and leanings into account).

I don't believe we have two or three or even four categories. I believe we don't have categories at all. We're faced with a continuum — a sliding scale — of analysis that has no pricipled points of differentiation from the most extreme form of *per se* analysis on the one end to the most searching kind of inquiry under rule of reason on the other.

Larry points out (I think accurately), as does Justice White in BMI, that with regard to areas of *per se* analysis that are still with us, the characterization that precedes *per se* analysis (that is, the decision as to whether a particular arrangement fits within a *per se* category) itself involves a weighing and balancing. The question becomes, what is the evidentiary burden? How much evidence is required at that first analytic stage? Justice White indicates in a footnote in *BMI* that that type of weighing and balancing should not be assumed to have the same significance and demand the same rigor as full-blown rule of reason. But Justice Stevens seems to suggest that such weighing and balancing for the purpose of characterization is no different from rule of reason analysis. The rest of the Court seems to agree with that suggestion in *Professional Engineers*.

Even putting to one side the characterization issue, the assessment and balancing that goes on with regard to assessing damages very often can be quite complex. Even if the analysis with regard to finding liability is fairly straightforward, based upon some *per se* notion, that often merely shifts the weighing and balancing to the damages part of the case. Such weighing and balancing to compute damages can be as complex as modified rule of reason analysis.

Nor is rule of reason analysis itself distinguishable from *per se* treatment. In rule of reason analysis, the court must determine, implicitly or explicitly, the evidentiary burden necessary to show that there has been a net anticompetitive effect. What kind of circumstantial evidence, or evidentiary presumptions, will be entertained to make such showing?

In *Professional Engineers*, a majority of Court said that "no elaborate analysis is required to demonstrate the anticompetitive character of such an agreement." In other words, although this is rule of reason analysis, the Court could look at the agreement on its face and determine that is was anticompetitive.

The Court could easily have gone further. It could have looked more specifically at petitioners' concern about potential deception as a consequence of competitive bidding. It could have asked whether there were less restrictive means open to the engineers to avoid deception. But the Court didn't extend its analysis that far. A majority of the Court was content to undertake a fairly superficial analysis similar to the characterization process that Justice White used in *BMI*.

Where does that leave us? It leaves us with a first preliminary analytic step. Put to one side whether we call it rule of reason or *per se*. What the Court seems to be doing is engaging in a preliminary analytic step, looking facially at the arrangement to detemine whether — on the basis of common sense, experience, and superficial attributes — there seem to be efficiency benefits in the arrangement, and whether those efficiency benefits seem to outweigh any facially anticompetitive effects. This preliminary analytic step seems to shape both the characterization of the arrangement and the evidentiary burden that the Courts tacitly or explicitly impose upon the parties.

Thank you.

MR. SCHER: Thank you, Bob. I think it would be wonderful if we could persuade the Federal Trade Commission to include economic analyses in its advisory opinions.

Let's now turn to David Foster and any comments he might have.

MR. DAVID L. FOSTER: Thank you, Irv. I'd like to begin with the observation with which Professor Sullivan ended, to wit. The fact that the present Court is not apparently a pro-defendant court but is committed to dynamic analysis of economic realities. Certainly that is the clearest strain which emerges from the present Court's antitrust decisions. It is a strain with which we must all be delighted with one exception. If the analysis takes the form of ignoring the findings of fact in the district court,

we will find ourselves in short order back in the time of the Warren Court's decisions. In fact, that is the greatest flaw, in my view, in the *BMI* decision, which I'll come to in just a minute.

Incidently, I think that case is sometimes referred to as *BMI*, sometimes referred to as *ASCAP*, sometimes referred to as *CBS*. I probably call it all three things. But you'll know what we're talking about in any event, I'm sure.

Professional Engineers, it seems to me, is a significant case from two standpoints. First, I read the analysis a little differently, I think, than does Professor Sullivan with respect to the learned profession exemption.

Professor Sullivan in effect says there is a sequential analysis in which the court first determines whether there has been a justification for the learned profession exemption in the particular case, then embarks upon the rule of reason inquiry. It seems to me that the case says simply that the existence of the conspirators as professionals is just one more factor to be considered in rule of reason analysis. Now that may come out to the same place at the bottom of the page, to wit. There is no learned profession exemption as such.

That in itself doesn't bother me because I have a lot of difficulty in understanding what a learned profession is anyway. For example, there is a profession practiced with great vigor in the vicinity of this hotel every night which may or may not be learned, but certainly could make a claim for special problems which ought to entitle it to exemptions from the antitrust laws. I suppose that some of the considerations which professionals would advance to justify their exemptions could be advanced by ordinary commercial enterprises. Accordingly, I'm not bothered at all by saying that the learned profession exemption resolves itself into a realistic discussion of the values that are sought to be protected in the particular case.

I am deeply concerned, however, by the other strain of the *Professional Engineers* opinion which appears to limit to the goal of competition the societal policy considerations which can be considered in connection with the rule of reason. I don't want to linger over that right now because we may get to it a little later. But that limitation particularly seems to me to be troublesome in *Professional Engineers*; and it does, of course, affect the implications of the case for learned professions as well as others.

The illustration that I would make on that particular point is the *Radiant Burners* decision of a few years ago, a group boycott case. The utilities in *Radiant Burners* had associated themselves in the American Gas Association, which tested burners before assigning to certain burners the so-called seal of approval. Now the *Radiant Burners* case came to the Supreme Court in this regard on the pleadings. The pleadings contained an allegation that the American Gas Association arbitrarily and capriciously denied certification to burners which were manufactured by competitors of manufacturer members of the AGA. You see, the AGA had not just utilities, but it also had manufacturers of appliances as

members. So there was an obvious and troublesome potential for anti-competitive results when the utilities themselves denied a supply of gas to burners which did not have this seal of approval.

The case has never been hard to understand when one thinks of the element of the complaint which involved the competitive manufacturer members of the AGA who might influence the AGA to deny certification improperly. The question would come up now, however, under *Professional Engineers*: Are the utilities going to be precluded from associating themselves in an organization to do certification-type work and to deny gas to burners that are not certified, irrespective of the fairness and appropriateness of the test procedures which are employed? So I think that poses the question of the scope of the social policy that is allowed to be considered under *Professional Engineers*, and the considerations in the case perhaps of *Radiant Burners* are not too different from a learned profession.

I'll talk a moment about *U.S. Gypsum*. That at first blush may not seem to have much to do with our rule of reason analysis. The case, of course, has been discussed by everybody in every panel discussion in the last several years, and there's relatively little new that can be said about it. I'll mention a couple of points which are probably familiar to all of you.

First, the teaching of the case is much illuminated by the brilliant strategem of the *Gypsum* defendants. They went back home and moved to dismiss the indictment on the grounds that the proof at the first trial was not sufficient to convict under the Supreme Court opinion; and accordingly, to retry them would place them in double jeopardy.

Well, it was just another good idea that didn't work because the Third Circuit in effect tells us that *Gypsum* is not really a standard of proof case — it deals with the charge to be given to the jury. That's the most important thing in my view to remember about the *Gypsum* case. It probably almost never determines whether in a crimnal case a conviction can be had, but it does determine what's told the jury by the court in its instructions. In that regard, however, it can be very important and it ties in with the rule of reason.

Let's take a specific hypothetical situation:

Three competitors (A, B, and C) submit bids once a week to the largest purchaser of the product which A, B, and C competitively sell. The bids are submitted at 11:00 a.m. every Wednesday morning, and every Wednesday morning at 10:00 a.m. the three competitors call each other on the phone to discuss the existing market conditions. Economic analysis, statistical analysis of the bids shows dramatically a very close correlation between the bids at the time the calls are going on. When the calls stop there is a dramatically reduced degree of bid identity.

There are two other evidentiary items in the case (in the hypothetical) I will present to you. One is that the alleged conspirators deny agreement and, of course, deny commitment to a shared objective. Secondly, there is economic evidence that while the bids are correlated, there is no price

impact. Transaction prices — by regression equation analysis — do not appear to have been elevated during the time when the telephone calls were going on.

Now that case, I submit to you, can probably go to a jury in a criminal prosecution under one of two theories. It can go under the so-called elevated *Gypsum* standard as a price fixing agreement; it can go under an anticompetitive effect with knowledge standard — either of those.

In either case, the government has an evidentiary burden. In the first case, the government has to get the jury to infer agreement even though it's denied. In the second case, the jury has to be persuaded to ignore the evidence that prices were not elevated, to ignore the evidence that the calls had no effect.

Now that case can be tried and won by the defendants in a criminal antitrust case, but I submit to you that the key to successfully defending that case is to be sure that the government gets to have the jury instructed on only one of the two theories. Either it's a *per se* case, or it's a rule of reason case. but the jury should not be confronted with conflicting charges where on the one hand the effects are not important, and on the other hand the existance of an agreement on price is not important. I don't think a jury can sort that out on those facts, and you're surely going to be convicted if you can't get an election compelled. *U.S. Gypsum* may be of help to you in urging the court to require the government to elect in that regard.

BMI is the most interesting in my view of the decisions that we have under consideration here. It is the most difficult to understand for me.

In the brief moment that I will continue to take, let me say that I believe the flaw in the case ... indeed I regard it as a virtually fatal flaw in the Supreme Court's analysis in *BMI* ... is the failure to ask at the outset the question that was asked by the Supreme Court in the *Sealey* case — are we to analyze these practices as horizontal or vertical?

The Court of Appeals, as you know if you've followed the *BMI/CBS /ASCAP* case, concluded that there was a horizontal combination. Now what that horizontal combination was, we don't really know. None of the opinions (district court, Court of Appeals or Supreme Court) really defined the supposed horizontal combination that existed. The business problem is a purely vertical problem because neither CBS nor anybody else wants to go out and negotiate with individual copyright owners. They want ASCAP and BMI to continue to exist. They just want them to change their licensing practices.

The question which is immediately presented is: "Are ASCAP and BMI simply in the position of being joint marketing agencies?" In that event, they're probably not much different from a company like Cargill, which goes around and buys grains from lots of farmers and sells it to a few purchasers. Or, are they in fact vehicles by which copyright and performance right owners withdraw individually from the marketplace in favor of the combination? If it is that kind of a horizontal combination, then it's relatively easy to find it to violate the law.

In any event, the Supreme Court was able to resolve the case without dealing with that. The Court at one point ignored the district court finding of fact which had been so pivotal in the Court of Appeals decision — the fact that there was a realistic alternative to the ASCAP/BMI practice. And at another point, of course, they followed that particular finding. And that makes the decision difficult to understand.

I regard it in the Supreme Court as a vertical case. And it is not at all surprising that the Supreme Court that gave us *GTE Sylvania* would apply rule of reason analysis to what is essentially an imperfect vertical tie.

MR. HAROLD E. KOHN: My own inclination would be to side with what I sense to be the approach of Messrs. Reich and Foster. I think Mr. Reich referred to the word continuum. I tend to prefer that to the rather conceptualistic approach that some people adopt.

Let me give you what I think is the only area in which you really have a *per se* approach, to the extent that you have any *per se* approach at all. I think there really is no *per se* which operates in favor of a plaintiff as against the defendant, and I'll allude to that later in a little greater length. However, there are what might be referred to as *per se* situations or rules which do operate in favor of defendants. Some of these may operate in favor of other plaintiffs when proferred by defendants.

For example, the Illinois Brick rule I take it is a rule which a defendant can urge as against an indirect purchaser, and it's *per se*. You have the situation of standing. Landlords or employees cannot bring antitrust suits for damage done to or directed theoretically at their employers or lessers. That's a kind of *per se* rule, and for most practical purposes it's "relatively absolute." I know nothing by comparison on the plaintiff's side.

There is the rule which prohibits one defendant from recovering from another contribution or indemnification. The old baseball industry rule, —the McCaron Act insurance rule, applicable to what really is insurance, if anybody can ever figure out what it is: those also are *per se* rules.

Now that I've paid my dues and shown you that I am a scholar, let me talk to you about what I really came here to talk to you about.

What I say I don't mean in any way to be an invidious comparison or anything of the kind. Different people approach problems from different points of view. I suppose I really belong in the Trial Section, not in the Antitrust Section, because I don't know very much about it. I don't think there really is very much to know about antitrust law.

(Laughter)

You have to analyze the situation in which you find yourself. It's one thing to be corporate counsel (and I see some of my friends among you who are) who must advise a client what it may do in the future to avoid getting into the lists with plaintiff's counsel, or with the government, two years from now. It's something entirely different when the "fat's in the fire," to advise either a defendant or a plaintiff as to what the law is. There's a whole amalgam of circumstances that you have to take into affect in either situation.

I'll to some extent be rambling here. There's no use taking notes because if you don't remember, it's not going to do you any good. Just as if I can't remember what I want to tell you, it's not worth telling.

Recently some of us were in a case in a rather provincial capital. And among the jurors, of course, were people from the provinces who were even more provincial. Somebody was congratulating trial counsel on what a briliant job they had done. And local counsel, who was on their side, said, "Hell, they didn't do a damn thing. They didn't really win the case. the case was lost by counsel for the other side who came into this court..." and this is literally true, so help me (both that he did come in and this man said it) ... "with Gucci shoes with solid gold buckles. How did he ever expect to win a case before a jury here?"

(Laughter)

There was a great element of truth in that. The whole circumstances in which you find yourself, the judge before whom you find yourself, your own personality, the personality on the other side, are significant.

You have to use these so-called rules, like *per se*, rule of reason, and so on. You can't let them use you. They're simply one of the many weapons in the arsenal of counsel who's endeavoring either to resolve a matter in the litigation stage before it gets to trial or in prelitigation, and even when you do get to the trial stage and the appellate stage. You're just kidding yourself if you think the United States Supreme Court really decided anything or meant anything specific, as a rule for all cases, when it wrote in the *Gypsum* case. You don't have to read "The Brethren" to know how Supreme Court decisions are written. Any of you who have been law clerks, any of you who have had any practical experience know that you can't sit down and say (when nine people come up with seven or four or three different decisions, so they have to classify them in the headnote: Item number one, Judge A, B, C, D, and E; Item number two, Judge C, D, and F) that kind of a decision means anything. Or even if you analyze it can you discern what was put in there by an emphemeral law clerk, what was put in there by somebody who didn't mean it, what was put in there by somebody who didn't realize that what he said had equivocal meanings, and so on?

And to talk about the "fatal flaw" in Supreme Court decisions is like talking about your right to cross a New York street in the face of a taxicab driver. You'll wind up dead, right? The Supreme Courts decided whatever it's decided, and that's that. You can use it for whatever purpose you want.

All I mean to indicate is that you should not kid yourself. It's perfectly all right to try to kid other people, but you ought to know what you're really dealing with. And what you're dealing with is a kind of human drama. You can't classify items or elements or acts or situations in the social world as you can classify things, or as we used to think you could classify things, in the physical sciences.

You have to use what you have before you. You have to use what you think may appeal to a particular judge or a particular lawyer on the other

side. So viewed, the rule of reason concept and the per se concept can be useful.

Let me close with a brief illustration, or two, in the law office management field.

If all of the graduates of Harvard and Yale Law Schools this year would get together and say that they will not accept employment from New York law firms, (assuming that is not privileged under some labor act, and I'm never sure what is and what isn't), for less than $40,000 a year, would that meet with the same reaction from a court, as if the ten major New York law firms got together and said they will not pay more than $20,000 to a Harvard or Yale Law graduate?

Take two fictitious New York law firms or (say, for example — you name them: Sherman and Case, or Cravath and Sullivan) — get together and say that we're going to charge the Fortune 500 or Fortune 1000 companies no less than $500 an hour for our services. Do you think any court would be bothered by the fact that a professional service is being rendered?

Take, on the other hand, the situation where two other fictitious law firms are in competition with one another and one goes to the courthouse, makes a search of the cases in which the other has been retained, and writes a letter to every client saying that whatever they're charging you, we'll charge you $10 less an hour to retain us. Do you have any feeling that any court is going to say that professional standards, ethics (call it what you will) can't with propriety prohibit that sort of thing?

That's the message I'd like to leave with you. I guess there will be some questions when I can ruminate a little further with you later on. That's all I have to say now.

MR. SCHER: Thank you, Harold, for what we must characterize as the underside of Professor Sullivan's comments.

This was the first time I have heard of *per se* rules that are favorable to the defendant.

(Coffee Break)

Harold Kohn would like to make a short comment before we get back to Professor Sullivan.

MR. KOHN: I guess I'm going to have to stick close to being old shoe and not try to be an analytical scholar. In my endeavor to be cryptic and get through the first part of it, I think I may have misspoke myself, and one of you in the audience was kind enough to remind me that I had.

When I mentioned the tenant situation, I probably indicated to you that it's the tenant who can't recover. Let me put it this way. If ... and I was thinking about the movie industry cases ... the tenant is the one who's actually operating the theater, then he, of course, can recover. It's the landlord who is not operating the theater, even though the landlord may be getting most of the revenue from the profits of the situation because of the lease and so on, who cannot recover because he has no standing. I simply cited that as one *per se* situation where a defendant, in a suit, brought

by the landlord (and that is an actual suit) can throw plaintiffs out of court, regardless of who has suffered the real damage. I do apologize for the cryptic way in which I put it before.

MR. SCHER: Thanks, Harold.

A few members of the audience have asked whether Professor Sullivan's comments are going to be printed. Let me remind you that we will publish a 1980 Antitrust Law Symposium that all members of the section will receive and which will include this morning's panel. In addition, Professor Sullivan's remarks will be a part of a more concise article which will be appearing in the UCLA Law Review sometime this year.

Before I ask some questions that have not been the subject of discussion I thought I would give Professor Sullivan the opportunity to respond to the comments made by our panelists.

PROFESSOR SULLIVAN: I'll be very brief. Harold's a hard act to follow.

This lesson in realism I had earlier myself. The first jury case I ever tried was what in Massachusetts we call a land damage case. And our firm represented redevelopment authorities, taking agencies, and some people didn't like the amount that we offered to pay them for the property we took and took us eventually before a jury. Usually those verdicts came about in the middle between the two most moderate estimates by the expert appraiser who appeared on the stand.

The case I tried — the first one I ever tried — we got very close to our figure, and I was so proud of myself. I walked out of the classroom beaming and one of the court attendants called me over and said, "You know why you got the verdict?" I said, "Well, we put in a good case." He said, "Well, you may have put in a good case but the plaintiff's attorney went out to the view." This was a bitter cold day in February, "wearing a hat and earmuffs and the jury was standing around freezing. He was elaborating on the warmth of his muffler and his hat and his earmuffs about the qualities of this property. They didn't like that at all."

(Laughter)

Well, fortunately I didn't have any earmuffs so I was very brief on that occasion. There is no doubt that these kind of factors affect the outcome of law suits. And I think being realistic, it isn't just the Gucci shoes and earmuffs that one has to take into account. It's also broader political and social factors which have a bearing. And being realistic, I think there's something else too; and that is precedent and the way one analyzes it. I think all of those things are relevant to the overall process. And I think it would be as dangerous and unfortunate to forget the analytical end of the spectrum as it would be to forget the end of the spectrum that Harold emphasized.

The only other comment I'd like to make is I really don't disagree with either Bob or Harold in their suggestion that when you get done with it, what seems to be happening, at least in Justice Steven's view is that a continuum is develping, a kind of an analytical continuum. Indeed, I thought I was trying to suggest that. The process is certainly moving in

that direction. And I suppose if we were to speculate about how it will go, my own speculation would be that it will go more in that direction. And hopefully, at least, that one of the factors which will become salient in deciding just how much analysis any given case warrents under the rule will be some sense about the cost of data.

MR. SCHER: Thank you. Let's address some questions which, as I mentioned before, are derived from Professor Sullivan's talk, but have not yet been the subject of comment by our panelists.

First, I found quite interesting Professor Sullivan's discussion of what he characterized as a dynamic analysis under the rule of reason that takes account of effects over time which he perceived to be present in *Society of Professional Engineers*, as well as his reference to a static or short-run analysis which he discerned in recent decisions such as *Berkex* in the Second Circuit Court, in which the court found it proper for a company to use market advantages gained in one product market to enhance its market position in another. He also seemed to express a different point of view from that adopted by Areeda and Turner under Section 2 of the Sherman Act, which seems to have been endorsed in the decision of the Fifth, Ninth and Tenth Circuits. I'd like to know whether our panelists agree that this so-called dynamic analysis indicates that the Supreme Court may disagree with Areeda-Turner and the courts that have adopted the Areeda-Turner point of view for single company conduct.

David Foster, how about you starting off on this question.

MR. FOSTER: My answer to that is that I don't think the tendency that is so clear in the lower courts — to adopt a kind of negative *per se* rule on pricing which is above marginal costs, saying that's lawful — is going to be arrested by the Supreme Court decision. The indications in the Supreme Court are not clear enough to arrest such a strong trend. My personal view is that there certainly should be cases in which the proof of a predatory intent overcomes the economic consequences of pricing above average variable cost. I hope and believe that the Supreme Court's interest in dynamic analysis may ultimately be adopted by the lower courts and the recognition made that a long-run, anticompetitive tendency to destroy competitors should be given significance over short-run benefits. I don't think it's that clear from the existing opinions, however.

MR. REICH: The problem with most dynamic analyses (dynamic price theory analyses) is the difficulty of translating them into legal rules that provide a sufficient degree of predictability so that businesses can conform their behavior. We find just that problem in the area of predatory pricing.

Some of you may have seen Professor Baronol's article in a recent *Yale Law Journal*. He suggests a dynamic theory that can translate itself into a legal rule for predatory pricing. Put simply, it would look to the subsequent pricing policies of a punative predator. If the alleged predator increased its price after having decreased its price upon the threat of a potential entrant, then you might have evidence of predatory intent.

MR. SCHER: Harold, do you have anything to add on this question?

MR. KOHN: Very little, except I think that the *Areeda-Turner* suggestions have not turned out to be as administratively efficient as some people had hoped. In a large corporation, particularly a conglomerate, when you try to find out what the actual cost is, (which would seem to be very easy) the overheads and so on, make the marginal cost as impossible as any other approach that you might take. Courts faced with that are going to tend either to throw up their hands completely, or say, "You might as well go through the whole situation and see where you are."

So I think, as David indicated, you're going to have a variety of different rules at each of the levels, depending upon, once again, the totality of the circumstances, how predatory the practice seems to be, whether the court really is convinced. The old cliche is that antitrust laws are to protect competition, not to protect competitors. But if you hit a competitor hard enough and low enough, the court is going to decide that hurts competition.

MR. SCHER: I have one further question as to Section 2. Another fascinating aspect of Professor Sullivan's remarks was his comment that the criminal liability/civil liability distinction as to intent recognized by the Supreme Court in *Gypsum* in context of determining whether there's been a conspiracy may have application to Section 2, allowing for a finding of civil monopolization liability focusing only on price enhancement gained through monopoly power. This was a subject matter of the President's Commission to study the antitrust laws. I'm wondering whether that's just wishful thinking or whether any of the panelists agree with that comment.

Let me start with Bob Reich on this one.

MR. REICH: It's going to be difficult to construct a no conduct/no fault type of analysis with regard to monopolization. It's going to be difficult to separate the degree of price enhancement which was necessary and appropriate to induce the innovation and high performance in the first place, from price enhancement not connected to such efficiency.

MR. SCHER: David Foster.

MR. FOSTER: I do not agree with the observation that the *Gypsum* footnote emphasis on anticompetitive effects may be felt in the monopoly field, or the observation that *Professional Engineers* may create a civil standard which is different from the criminal standard and which impacts the propriety of monopoly pricing.

The most recent word and the most definitive word on the specific subject is, of course, *Berkey* in the Second Circuit. Chief Judge Kaufman specifically addressed the question, is a monopolist entitled to a monopoly rent? And he said, "The monopolist is entitled to a monopoly rent. That is not a measure of damages. The damages must be attributable to a wrongful conduct which created the monopoly or wrongful conduct by which it was perpetuated."

That decision from the Court of Appeals with very distinguished counsel on both sides must have been extremely well briefed. I'm sure that the best arguments that could have been made were made. It's a careful attempt by an important court, and it does not adopt the civil liability approach to monopolization apart from predatory conduct. Quite the contrary. It is the culmination of a line of lower federal court opinions (and by "lower" I mean simply "lower than the Supreme Court"), all of which in recent years have litigated conduct rather than structure. Notwithstanding what seems to me to be the traditional approach to monopolies — that if there's a monopoly there's something wrong with it unless it's defended in some way — the federal courts clearly preferred to litigate conduct, to look for evidence of bad behavior. And that tendency, I think, is getting stronger rather than weaker. So I don't share the perception.

MR. FOSTER: Yes.

MR. SCHER: Harold Kohn.

MR. KOHN: I'm not sure that we're all directing our attention to precisely the same subject. If you are talking about the difference between criminal and civil standards, I think there's a world of difference between the two, once again, in the practical administration of law. And I can cite three recent illustrations which I think manifest that graphically. Judge Singleton's case, for example, in the *Corrugated* case where the defendants were acquitted, the *Potash* case in Chicago and a recent very interesting case which I'll give you in a little more detail, in the Eastern District of Pennsylvania — the so-called *Water Heater Industry* case.

In that case four or five of the defendants had pleaded nolo. Two of them and their indicted officers decided that they would litigate the criminal aspects of it. One purpose was the income tax problem.

They were all acquitted, despite the fact that one of them had settled for a very substantial sum of money in the companion civil price fixing litigation, and the other, the other, even after being acquitted, settled for what, for it, was a very substantial amount of money.

The case was tried with a combination of half a dozen lawyers. The big traditional defense firms with economic experts (a very attractive young woman, economic witness) who testified that the price behavior in the market was inconsistent with conspiracy; a couple of old-line individual criminal lawyers, one of whom brought out — and how the government's counsel ever permitted it to come in, I don't know — that one of the defendants had lost his wife from cancer just three months earlier. The other had as a character witness a Catholic priest. The closing speech presentation — and this once again is literally true, was — "Whom would you believe, jury, the Catholic priest or the claimed co-conspirator, who of course was violating the antitrust laws and trying to draw this man in because the government let him off?" The defendants were acquitted.

I think you ought to decriminalize, (I've testified about this before the Senate and House committees), the antitrust laws. I think what you do is wrap defendants in cotton wool because the courts lean over backward

and treat them as if they were dealing with some murderer who is going to go to jail for the rest of his life, who is going to be executed if you didn't give him every one of his constitutional rights. Well, all you're dealing with is money and a relatively modest amount of money when you compare what is paid in fines with what is paid in the course of the civil litigation for restitution of the loss that was actually sustained. I don't know what you do with the individual, but since very few of them ever go to jail for any appreciable length of time and since apparently despite the threat that's hanging over their head, they continue, happily for the financial situtation of all of us, to continue to conspire.

(Laughter)

MR. SCHER: That wasn't quite the question but I think it's very relevant to our discussion this morning. Let me go on to another area.

Professor Sullivan noted that *Society of Professional Engineers* permits only competition oriented justifications or defenses for a restraint being analyzed under the rule of reason, and requires a showing — if the conduct is to be upheld — that it enhances competition more than the injury it causes. In considering this balancing under the rule of reason, does that case as well as *BMI* stand for the proposition — which Professor Sullivan seemed to indicate — that a restraint should be no more restrictive than necessary to serve the competition oriented justifications. In other words, must the courts now look for the least restrictive alternative in determining whether a restraint is reasonable.

Let me start with David Foster on this question.

MR. FOSTER: I guess I would have said that least restrictive alternative analysis is always sound. I didn't find it to be a particularly strong theme in either *Professional Engineers* or *CBS*, but it is in those cases as it seems to me to be very deep in the antitrust law generally.

MR. SCHER: Harold.

MR. KOHN: In view of your last remark and my very sensitive nature, I'm not going to comment on it.

(Laughter)

MR. SCHER: Bob, do you have anything to add on that point?

MR. REICH: As we see the merging of these different analytic strands — *per se* and rule of reason — the initial conceptualization stage is going to be much more critical than it's been in the past. Use of the least restrictive means analysis, really a distant cousin to First Amendment least restrictive means analysis, is going to take a larger and larger role. There are already hints of it in the case that Larry mentioned, *Smith v. Pro Football League*, and in *Professional Engineers*.

MR. SCHER: I would like the panel to address the *Smith* point further because it is one of the few cases since *Society of Professional Engineers* that discusses the impact of that decision. Did the court in *Smith* misperceive the defense that had been raised in that case when it said: "On the field competition is not the competition that the Sherman Act was concerned with." In other words, the justification of playing field competition might be the ability of the football league to compete with

other sports leagues for the consumer dollar. Enhanced playing field competition may increase the "product" created by the football league in competition with other sports leagues. Viewed in that light, should the court in *Smith* have reached a different result?

Would you like to comment on that, David Foster?

MR. FOSTER: It seems to me that the observation which you just made focuses upon the difficulty of pivoting a result upon a term like competition, which is by no means self-defining. Does competition simply mean rivalry? Sometimes we see in Supreme Court and other federal court decisions an indication that competition just means rivalry. Now, to an economist it's a much richer concept. It's the process by which resources are allocated in response to pricing decisions. Certainly in that latter sense, the kind of competition that the Rams and Steelers engage in is wholly irrelevant.

I think also that the answer to the specific question presented probably is twofold. First, I don't believe the case was tried on the theory of the relative competition between football and alternative entertainment. Secondly, it is important to distinguish between improving a competitor and improving competition. It doesn't follow that the fact that football became a better entertainment improved competition in the sense of the market allocation process. At some level, of course, it would if it had been a very weak competitor, that is, if it had not been good enough entertainment to present an alternative.

MR. SCHER: Let me go back to what we just talked about in terms of the least restrictive alternative. Specifically, what are the burdens going to be on plaintiffs and defendants in a rule of reason case? Who has the burden of proof? Is the plaintiff required to prove the unreasonableness of the restraint, which I always thought was the situation? Or does the defendant have to come forward to prove the reasonable nature of it? Does the plaintiff establish a prima facie case by showing that there's a restraint, with the burden of coming forward on justification then placed on the defendant? Or could the answer conceivably turn on the nature of the restraint? Are there in fact three analytical categories, which have been discussed this morning as a continuum suggested by Professor Sullivan and our speakers, with different burdens of proof imposed depending upon whether the conduct is, as Larry Sullvian said, blatant cartelization or ambiguous conduct or conduct requiring a full-blown structural or price theory analysis? Just what are the burdens going to be under the rule of reason?

Let me start with our practitioners. Harold Kohn.

MR. KOHN: I think you have to answer that at two levels. One, the rule is easy. The plaintiff always has the ultimate burden of proof. During the course of the trial the burden of persuasion or the burden of going forward may vary depending upon what one or another person has put in in evidence.

As Irv suggested, you have to analyze specific situations. Take for example the *Gainsville Public Utility* case and the *Bluebird* case, decided

the same day by the Fifth Circuit. One dealt with a situation where public utilities in Gainsville, Florida were trying to keep a publicly owned system from competing with them.

In the *Bluebird* case, decided in favor of defendant on a class certification issue, by way of dicta, the court stated that where there is horizontal price fixing, that, *per se* shows impact, enough to recover damages. The only remaining issue is the specific amount of damage.

In the *Gainsville* case, after the case had been decided in favor of the defendant below, the Appeals Court reversed and deciding as a matter of law that there was restraint. Those two cases are extremely illustrative.

You have two people in the conventional or classic kind of price fixing. They go to a motel and they say, "We're going to charge $100 to customer A." I don't think anybody is concerned thereafter who has to go ahead and show that that's reasonable or unreasonable.

On the other hand, you have the rather oblique situations in the *Royal Drug* case, for example, or in the *Professional Engineers* case —where defendants are not immediately determining either a specific price or agreeing on a specific practice which must necessarily increase the price or determine the price. In that situation, if the relationship between what they're doing and the price fix (using that as the illustration) is not particularly clear, then I think the plaintiff has the burden of going forward and showing that it's unreasonable, that there's a connection, and that there's little justification for it. If, on the other hand, it is relatively clear, than I would think the defendant would have the burden of going forward and showing what he was doing was motivated by economic necessity, that is no other way, or little other way, to conduct the business.

So once again, it's an intensely practical way of fitting the facts under all the circumstances to a very easy rule, namely that the plaintiff has the ultimate burden of proof. The burden of going forward shifts from time to time during the case. I don't think you can give a blanket answer. It has to be analyzed on the basis of the fact situation in each piece of litigation.

MR. SCHER: I have one final question derived from the last part of Professor Sullivan's analysis concerning *BMI* and *Royal Drug*. Do those decisions really contemplate that the relative bargaining power restraints of each side of the transaction should be considered in determining whether a practice which equalizes the bargaining position is lawful? In other words, is it at all relevant that CBS had more bargaining strength than individual ASCAP or BMI members, or that the purpose of the plan in *Royal Drug* was meant to reduce costs for consumers? If such facts are relevant, isn't the analysis to some extent concerned with the reasonableness of prices or price agreements under the market conditions that result from a pricing restraint? And is that consistent with what we have previously learned?

Let me start with David Foster on this one.

MR. FOSTER: Although the opinions in question don't articulate it this fully, it seems to me that the concept of countervailing market

strength, cross-market competition if you will between a buyer and a seller, a concept that was written about by Galbraith 25 years ago in a book called "Countervailing Power," that kind of cross-market competition can serve the underlying function of providing a market mechanism which allocates resources properly. Accordingly, I don't think that it is quite the same as an evaluation of whether the price is reasonable. It is a judgment which probably is a valid judgment in some market situations. Where you have a big buyer and a big seller fighting over the price to be charged, structurally you have a condition in which the marketplace will operate properly.

MR. SCHER: Bob.

MR. REICH: Just a brief note. The Court is going to be unwilling to embrace explicitly the notion of cross-marketing competition or bilateral monopoly power. But such relationships can't help but color the kind of analysis that the Court begins to develop, whether we're talking about how it characterizes the arrangement or the various weights and measures and evidentiary burdens that it imposes on the parties.

MR. SCHER: Harold, do you want to add anything?

MR. KOHN: Had the *Royal Drug* case been brought by Sears, Roebuck or Montgomery Ward, the result might very well have been different in my opinion. Had the BMI case been brought by our local good music station, which constantly has its hat out asking for charitable contributions, instead of a powerful network, I don't know what the result would have been. It is conceivable that the result might have been somewhat different. That illustrates my comment.

MR SCHER: Larry.

PROFESSOR SULLIVAN: I just want to be sure that what I tried to say in the paper on this is clear. I was not suggesting that I thought countervailing power was a possible defense for a buyer cartel. I think joint buying arrangements if they achieve efficiencies, and often they can achieve efficiencies, then to test their legality, one ought to ask whether or not market power is being achieved. If it is, I think there is a fairly straightforward answer in Section 1. And that is that they are violations with the possible exception — and I throw this out merely trying to be provacative rather than trying to assert what I think the law is — with the possible exception of an ultimate consumer purchasing cartel.

My suggestion that you might improve market performance by a buyer cartel which simply faced off against a seller cartel or seller monopolist I think is in the realm of speculation. I think that one can make that argument economically and analytically. But I certainly don't see much strength for the argument in the case law, and I guess I agree with the suggestion of others that it isn't likely that this court would accept that as a defense.

MR. SCHER: Thank you. Well, unfortunately we have ... yes.

MR. FOSTER: I'd just like to say I didn't mean to indicate that I thought it was likely to be accepted as a defense. I do think it's something

different, to go back to your question, than talking about the reasonableness of the price.

MR. SCHER: We have run out of time and we have to conclude our morning program. For myself, I must say that Professor Sullivan's remarks and our panelists' comments have been most informative and provocative. It should make us all look forward with greater insight to further Supreme Court and lower court exposition of the antitrust theories and considerations brought out by the Court in its recent decisions, as discussed this morning.

Considering the outstanding presentation of each of our panelists, I believe that we owe them a strong round of applause.

(Applause)

Procedures for Expediting Antitrust Cases

MS. KIMBA W. LOVEJOY: Good afternoon, ladies and gentlemen, and welcome to the Antitrust Law Section's workshop on Procedures for Expediting Antritrust Cases.

Our topic today has, as we all know, been the subject of heated debate among lawyers, businessmen, and judges for a number of years. Although there is a general consensus that most antitrust cases are not resolved as quickly or as efficiently as they should be, there has been disagreement as to whether what is needed is judges willing to take firmer control of complex cases, lawyers willing to streamline their cases, or whether we in fact need new procedural rules.

Suggestions for rule changes have included instituting precise time limits on discovery, as well as time limits on pretrial and trial proceedings, and curtailing the type of discovery that is permitted. Suggestions for curtaling the type of discovery permitted have included limiting the subjects that can be inquired into and limiting the number of depositions or interrogatories that can be taken and served.

The discussion of how to shorten the resolution of antitrust cases received special focus recently from the work of the President's National Commission for the Review of Antitrust Laws and Procedures which took testimony from jurists, litigators, and others from around the country, and has made recommendations for procedures to expedite these cases.

We are delighted to have with us today three eminent judges noted for their effectiveness in handling complex litigation, as well as two distinguished commentators who have served on the President's Commission.

Our format this afternoon will be for each of the judges to speak for a few minutes on procedures they have found successful in expediting complex cases. Their remarks will be followed by comments and questions from our commentators and, I hope, from the audience. I encourage all of you to participate in the discussion that will follow the judges' remarks. The panelists will welcome oral questions, and, in case any of

you would prefer to write your questions down, we have placed pads and pencils around the room. You can simply pass your written questions to the front of the room.

I would like to briefly introduce the panelists to you at the outset and then describe their actitivities to you at greater length when their turn to speak comes.

Starting at my immediate left is Judge Singleton, to his left Judge Pollack, and to his left, David Boies. On my immediate right is Judge Merhige and on his right, Eleanor Fox.

Our first speaker is Judge Pollack, who was appointed United States District Judge for the Southern District of New York in June of 1967. He received his B.A. from Columbia University and his J.D. from Columbia Law School. He has served on four committees of the Judicial Conference of the United States, including the Committee on Trial Practice and Techniques, and he is presently a member of the Committee on Court Administration, and is Chairman of that Committee's Subcommittee on Supporting Personnel.

Long before the recent surge of interest in expediting antitrust cases, Judge Pollack repeatedly exhorted his fellow judges to simplify these cases through a variety of procedural means. His suggestions had included early judicial involvement in paring down the issues to the essential ones and he has suggested frequently that lawyers eliminate those that were included ... to borrow one of his phrases ... like so many anchors tossed to windward.

His talks in the past have significantly influenced the thinking of other judges, and we look forward to having him share his thoughts with us today.

Judge Pollack ...

HON. MILTON POLLACK: In the report to the President and the Attorney General which came down nearly a year ago, the National Commission for the Review of Antitrust Laws and Procedure had a section entitled, "To expedite resolution of complex antitrust cases" and they said not all antitrust cases are complex or protracted, nor are all complex cases antitrust cases. Evidence before the Commission, however, indicates that on the average, antitrust cases take longer to litigate than other civil litigations, and some antitrust cases absorb enormous resources and time and undue delay. This has proved to be a serious problem in a significant number of complex antitrust cases.

In 1977, for private antitrust cases reaching trial, the median time between filing and disposition was 44 months, and ten percent of those cases took longer than five and one-half years.

The monstrosities that have emerged in recent years in the monopoly field have caused great concern to Congress and to the Bar generally. Some of the staggering statisitics in the cases that we know about have developed in the North, and I hope Judge Singleton will tell you about the Corrugated Paper case that he deals with down in Texas. The statistics developed in this area are as follows.

In the *SCM v. Xerox* case in Connecticut, pretrial took four years. The jury trial took 14 months. Depositions took 700 days. There were several hundred thousand documents and more than 60 pretrial motions which evoked 40 opinions from the judge. The jury deliberated 38 days and the trial transcripts ran 46,802 pages.

In the recent case tried by Judge Frankel, *Berkey v. Eastman Kodak*, the pretrial proceedings lasted four and one-half years; pretrial hearings, 33 days; opinions from Judge Frankel were 21; and the trial itself lasted six months.

Then there is the ongoing IBM case which has been pending for ten years. It was filed on January 17, 1969. The plaintiff has already produced 26 million pages of documents, 890,000 of which have been selected for duplication. The defendant has produced four million pages of documents, with 60 million pages that were purchased by private parties from the various sources. There were 1,270 depositions, including 800 by the defendant on the relevant market issues.

There is an antitrust case going on in Philadelphia that many of you know about involving a worldwide conspiracy, involving the last 30 years, and drawing in close to 100 manufacturers, exporters, and importers of consumer electronic products of various national origins. Discovery to date shows the following box score. Twenty million documents have been produced, 100,000 pages of deposition transcripts have been taken. There have been waves on waves on waves of interrogatories. There have been an inordinate number of Rule 37 motions. Pretrial hearings have been held three days a month on discovery. The trial is estimated to take a year or more following nine years of discovery, and several thousand documents supposedly will be introduced in evidence with thousands of models of consumer electronic products. There are 24 defendants.

Now, what do we draw from this statistical review? These giant monopoly cases are not typical of civil antitrust litigations and distorted views are likely to arise from these major monopoly cases. A good deal of the vast expenditure of time in them is due to a resurrection of the ancient history aspects each invokes; but there are relatively few such cases in the antitrust field.

Most antitrust cases are garden variety price fixing actions that ultimately are settled before trial. Few go to trial, and if they did, they would be relatively brief in elapsed court days.

A similar monopoly standard is being feverishly sought for government cases, but cutting down the issues in those cases would not answer the treble damage cases. I have yet to see the antitrust case that hasn't been overtried. It has become all too popular to treat such cases in wave after wave on wave of discovery ... first wave, second wave, et sequentia ... while the merits of the case drown in the undertow.

The first impulse is to get the jump on discovery, documentary and depositions, to ascertain what claim is or should be asserted. This brings on the inevitable motions, affidavits, and burdensome forays seeking confidential and irrelevant matter and ensuring harrassing tactics, undue friction, and animosity as well as obstructive responses.

Beyond any question of doubt, unless the Court will meet counsel before the engines of discovery get warmed up, the case is destined to get out of hand in the pretrial phases and a trial where a rational perimeter becomes mere sentimental but unrequited hope. The Court must intervene at once, strongly, firmly, and take control and stay in control, on top of the case. Time spent early will save at trial if the case does indeed survive until then. It's the Court's bounden function to attempt to define the legal claims and issues at stake and canvas the sequence of the tools of discovery pertinent thereto.

Plainly, after one or more face to face oral sessions with counsel and a vigorous attempt to penetrate the smog of legalese in which the controversy is encased, much as Wellington beef encases the meat, a routine must be established for pretrial disposition of separable questions and discovery on the rest.

I have regularly opted for documentary disclosure in the first instance by informal requests and compliance to be followed by rationally requested depositions and the flat refusal to allow the abuse of discovery by the burdensome interrogatory, usually embroidered with preliminary definitions of amorphous terms. I have in the past described the latter as the lazy lawyer's way of obtaining evasive answers from his adversary. I have yet to come across the case where responses to interrogatories have been of some earthly use in the trial of a litigation other than for the delivery of statistical or overseas or otherwise unavailable information.

Time and again at that first office conference with counsel within 30 to 60 days after the complaint is filed I've heard the defendant say that he has served interrogatories and no answers have yet come back. He's promptly met with happy intelligence, sight unseen, that his interrogatories are vacated without prejudice to renewal for good cause shown after the other means of discovery have been exhausted. This procedure is expressly authorized by the rules. The sequence of the use of tools of discovery is within the Court's discretion. This procedure lays on the examining party, the burden of developing his own case and not saddling his adversary with the burden of his preparation.

I am thoroughly out of sympathy with allowance of a mathematically set number of interrogatories at the inception ... no matter how sharply limited that number is. Numers only challenge the ingenuity of the artist to pose his interrogatory with elusive terminology and multiple facets. Nothing is gained by interrogatories in the early phases of pretiral except the consumption of a lot of lawyer time, delay in getting to trial and many Rule 37 motions as I have said, getting nowhere with never-used elusive and ambiguous responses.

It does not aid the efficient progress of a major litigation to unleash the discovery devices before a fair attempt to identify the issues for discovery. The pleadings will rarely do more than provide a flaccid introduction of the parties, the subject matter, and extravagent notions of monetary aspirations. The pleadings do little more than to furnish a guess of what is involved. It is of far greater usefulness to the judge to talk about the case and the defense with the lawyers to identify and bring to the surface and cone down the issues on which discovery will be appropriate.

The attempt to located the jugular may very well lead to the segregation, for early determination, of legal issues which lurk at the threshhold, such as jurisdiction, interstate commerce, standing limitary periods and many others.

True it is that most significant issues usually are mixed questions of fact and law and their resolution necessarily must await the completion of discovery. Even if it turns out that a conference with counsel does not taper down the scope of the case, unless the judge moves in to identify and locate the issues, he is abdicating any ability to control the case. It is essential to keep the case on regular oral report back to the judge at fixed announced intervals. No conference should conclude without a return date. I generally refer to it in my Chambers as the technique of the dentist. He gives you a return appointment with the last cleaning.

Usually, a case derives from some identifiable incident affecting the plaintiff or perhaps a governmental investigation or prosecution that generates the private claim. With such background, the judge in control can suggest topical areas for documentary and deposition discovery, not ad nauseum, not by a tandem shot at every one of the adversary's key and operating personnel, but a selective start toward ascertaining relevant facts from knowledgeable witnesses identified.

Of course, the scope is subject to expansion, even of contraction, after the inquiries get under way, but the need for protective orders may be sharply reduced by starting with a fair road map and a plan of travel. I have a very strong feeling that it should be the judge and not a magistrate, a referee or other stand-in to supervise the progress, the controversies, the barriers, the myriad questions that arise during discovery. It is important before trial for the judge to know almost as much about the significant aspects of the case as the lawyers themselves. That acquaintance comes only with first hand participation. A magistrate typically lacks in the eyes of counsel the qualifications of the federal judge, qualifications which include the authority to rule firmly and finally on discovery issues. The more that a judge feels he needs to refer discovery issues to another, the less he will be on top of the case.

One of the key requirements for early association of the judge with the issues is to fix with an appraising eye a prospective trial date after discussion of the possibilities with counsel. There is no substitute for the discipline of a fixed date for the advent of the final phase of the case ... the trial itself. All other times in the table of pretrial preparation should be

worked backwards from the trial date. This aids getting the lawyers down to business and trimming off the fat from the procedures which would otherwise be useful only for running the meter while going sidewise, not forward toward trial. This certainly forces lawyers to think about the case.

The question may be asked whether the Rules need to be changed. It seems to me that if the Rules are applied properly and with control by the judges, new procedures that would only raise new problems are really unnecessary. Much activity is under way to fashion means of reducing the delays which occur in certain of the large antitrust cases, the monopoly type cases. Professional associations and congressional committees charged with antitrust responsibilities are busily at work. Sanctions are freely mentioned for groundless procedures and dilatory devices which enable the defendant charged with liability to enjoy ongoing profits at risk in the litigation while it remains pending. The object, of course, is to keep in the courthouse the mechanism for dispute resolution and not find that it has to be administered in an alternative manner, such as arbitration for example.

There are two ways of handling the ultimate order, after the pretrial proceedings and they are different. If the case is non-jury, there is little need for a pretrial order. Since the judge is expected to make findings of fact and conclusions of law at the close of the case, the practice of requiring agreed and disputed proposed findings of fact and conclusions of law is far more satisfactory in shaping and sharpening the issues. I have described this more in detail in a speech which was reprinted in 65 Federal Rules Decisions 475 and following. [See also, 80 F.R.D. 219 (1978).]

On the other hand, if the case is to go to a jury the same result can be accomplished by requiring stipulated factual matter and requested jury instructions on the ultimate facts of the disputed matters. In this way, the Court and the jury will have before them rival contentions to be resolved and the Court will be in a position to know what precisely are the issues that are expected to be tried. Most so-called comprehensive pretrial orders are not worth the effort that is put into them. They are make-work for the lawyers. They ultimately delay the case and most of those that I have seen were large and thick but said very little.

Section 3.3 of the Manual on Complex Litigation sets out a comprehensive brief for the Court and an order which in my experience serves a very minor purpose and can readily be omitted. It generally is an overblown exercise to satisfy someone's concept of the manner in which to get things ready to be tried.

Another general requirement which I find of little use is to have the parties list their exhibits. I do require each party to premark his exhibits for identification (with any number or description he chooses) and that's the numbering we use at the trial. So that when the trial is reached, we don't go through the nonsensical process of offering a paper for identification, having the clerk mark it, handing it back to the lawyer, having it presented again as evidence. Everything has been premarked and the

manner of the premarking and the numbers or letters are of no consequence to anyone.

The lawyers can use any marking system which will indentify the paper that they have in mind. In most non-jury cases I accept all marked exhibits in evidence at the commencement of the trial, subject to rulings on relevancy, materiality and competency at the close of the proceedings, and in that way there's no trial delay with respect to paperwork.

I have some further random thoughts on handling of a protracted case when the fruits of discovery have been utilized. No hard and fast mechanical rules will solve the problems created by complex and protracted litigation. Rather, the solution to these problems requires creativity and diligence on the part of judges in managing these cases and conscientiousness and discipline on the part of attorneys in prosecuting and defending these cases.

Now, what to do after harvesting of the discovery crops. One particularly interesting method which is being utilized increasingly in complex cases is the pretrial factual submission. There's no doubt that pretrial submissions can be helpful in narrowing the issues for trial. They can serve to identify each side's factual contentions and thus, enable the parties to get together and decide which contentions are and which are not truly in dispute. Further progress can and should be made on disputed contentions by conferences with the judge aimed at eliminating those disputes which are immaterial or even if marginally relevant, those that are not worth the time and effort of pursuing them.

An overly mechanical approach to use of such submissions can, however, be wasteful. Where a trial requires each side to set forth in painstaking detail every single one of its factual contentions, each annotated with its evidentiary support, with each side obliged to set forth its own version of contested facts, the results may be a pretrial submission which runs into scores of volumes.

Apart from the enormous burden of preparing such a massive submission, the danger is that you may produce a pretrial submission so long that no trial judge can or, as he should, review it with the parties contention by contention to see where supposedly controverted factual contentions can be resolved or eliminated in advance of trial.

With a view toward simplifying the pretrial submission and making it a more useful tool, some further recommendations are in order.

First, as has been done in the Japanese electronic products antitrust litigation before Judge Becker in the Eastern District of Pennsylvania, the pretrial submission should be limited to objective facts and should not deal with contentions concerning intent or motives or reasonableness, since such contentions will almost inevitably be denied in any event.

Second, while it is important that the parties be put on notice that their factual presentation at trial will be limited to matters set forth in their respective pretrial submissions, an effort should be made to avoid the natural incentive for the parties to throw in the kitchen sink. Given the fear

that they will be precluded from asserting any factual contention not contained in the submission, parties at best tend to be indiscriminate in the contentions they set forth and may feel obliged to include every contention which they believe might conceivably be relevant at trial.

In formulating the scope of the pretrial submission, the judge should require that the parties make the more difficult decisions of selecting and including in the submissions only those specific contentions which they actually intend to assert at trial.

One possible alternative to the use of pretrial submissions is a much greater use of requests to admit. The procedure, of course, does not require that the parties set forth every factual contention they intend to assert but it only requires them to submit those factual contentions which they expect the other side to admit. That being the case, the resulting document does not provide the judge with the same type of trial outline as would be found in a pretrial order or submission. This may not be a detriment in the case of modest dimension where the issues are relatively simple and straightforward, but it would not be a satisfactory approach in a massive litigation that bristles with complex issues.

Now, turning to a different point. Most judges require immediately prior to trial the submission of lists of exhibits to be offered at the trial. As I have said, this is normally accompanied by a marking system that is of no value. Beyond that, there may be sanctions to the effect that any document not included in the list may be precluded on trial. Here again, to be useful this procedure must be properly administered.

As I said to somebody at lunch this afternoon, there's very little reason why there should be this massive submission of non-controvertible facts. It seems to me that exhibits tell something. Depositions tell something, and unless issues of credibility are involved, what they tell can be summed up in one, two, three, or four sentences, and that's what should be done rather than to plague both the jury and the judge with an endless procession of pieces of paper.

It is essential that the trial judge require any documents listed be limited to documents which the parties in good faith intend to submit at trial, which means that the parties must do their homework in advance of the trial.

Short of having the judge read in advance each document which the parties intend to offer into evidence, it's difficult to formulate an effective procedure to avoid the submission of large numbers of redundant documents. One innovative procedure which may be useful in saving trial time is the use of summary evidence where a party is attempting to prove a chronology of events, for example. Leeway should be given for that party to display a graphic to the jury giving a fair summary of the events with the supporting documents simply being received in evidence, available in the courtroom without being read to the jury. Where detailed factual or statistical data is to be presented, consideration should be given to truncating the procedure for laying the foundation for that evidence.

Finally, given the judge's diligent participation in the pretrial proceedings and his thorough review of the pretrial submission, he can and should in advance of trial set realistic time limits for the duration of the trial itself and for the amount of time to be spent on the direct and cross examinations of each witness. When properly set and applied, time limits not only expedite the trial but ensure that the respective attorneys will limit their presentations to the truly relevant and important facts of the case.

Undoubtedly, many will be the suggestions that will come forth both from this panel and other panels. Method is individual. Each artist paints his own picture, but nonetheless, it is useful to furnish the artist with the paints and the brush, and I hope that some of these paints and the brush will be useful to you.

Thank you.

(Applause)

MS. LOVEJOY: Thank you, Judge Pollack, for your very thoughtful presentation. Our next speaker, Chief Judge Singleton was appointed United States District Court Judge for the Southern District of Texas in 1966. He is a member of the Board of Directors of the State Bar of Texas and is Past President of the Houston Bar Association. Judge Singleton was a trial lawyer for 20 years before his appointment to the bench, and, as a judge, he has taken a particular interest in putting into effect practical procedures that make complex litigation manageable as well as more understandable to a jury.

Judge Singleton has been presiding over the discovery, pretrial and partial settlement of the Corrugated Container Antitrust Cases which, as I understand it, have 37 defendants and which have achieved the distinction of causing the creation of one of the largest single antitrust settlements in history, over 300 million dollars. The dispatch with which discovery has been effected in those cases and the early settlement of most of the claims has been largely attributed to Judge Singleton's efforts to control the litigation.

We are honored to have Judge Singleton with us today. Judge Singleton ...

(Applause)

HON. JOHN V. SINGLETON, JR.: Thank you very much. It's a real pleasure for this Texas judge to be invited to New York to speak to this distinguished section of the New York Bar Association.

I would probably say a lot more than I'm going to say, particularly about what a great job I've done and so on, if it were not for the fact as I look over the audience I recognize some of the lawyers that regularly visit my court these days, and I'm a litte afraid to be too specific about what I've done for fear that I will be subject to justifiable contradiction.

I realize that at seminars such as this, those asked to speak are supposed to have prepared a handout along with citations of cases that are to be discussed and analyzed along with a copy of the speech. Let me put at rest any fear that you might have that I have done any such thing.

The subject assigned to me, managing complex litigation, is really unspeakable which reminds me of a story which recently appeared in the London Times. The story read: A tiny sports car leaves a lot to be desired as a midnight trysting spot, two secret lovers have learned. Wedged into a two-seater a nearly naked man was suddenly immobilized by a slipped disc, trapping his woman companion beneath him. The desperate woman tried to summon help by honking the horn with her foot. A doctor, a fireman, and a group of passersby quickly surrounded the couple's car. The lady found herself trapped beneath 200 pounds of pain-wracked immobile man. To free the couple, the fireman had to cut away the car frame. The distraught woman helped out of the car and into a coat sobbed, "How am I going to explain to my husband what has happened to his sports car?"

Another story which reminds me of the artfulness and ingenuity of lawyers which I now face almost daily ... two lawyers had been partners for several years. The wife of one of them caught him with another woman and she instituted a divorce action. He called his distraught wife and said, "Honey, let's have lunch before you go through with this divorce." She agreed. They had lunch at a popular downtown restaurant and after lunch he said, "Now, honey, I want you to think about this divorce. You know a couple years ago we bought this beautiful new home in the exclusive section of town. Every year I buy you a new Cadillac. Last year for Christmas I bought you a full length mink coat. You have unlimited charge accounts at every major store. You have every credit card that's made available to you for unlimited use. I just want you to think about those things because, of course, once we get a divorce most of that will not be available to you." She thought for a moment and then said, "Isn't that your law partner, John, sitting over there having lunch?" He said, "Yes, that's John." She said, "That's not Betty, his wife, with him." He said, "No, that's his mistress." His wife then said rather thoughtfully, "You know, she's not nearly as cute as ours, is she?"

I have another story which I think is rather apropos of lawyers. I'm reminded of a six year old precocious boy that just was always giving his mother trouble. She never could know what he was going to say or what he was going to do under any particular circumstance and he always seemed to say the wrong thing or maybe the right thing, but embarrassing.

There was a baby across the street that was born with no ears and Johnny wanted to go see the baby, and his mother wouldn't let him because she was afraid that Johnny would embarrass her or say something to the lady that would embarrass the lady and he kept saying to his mother he would not do that. She finally consented and they went across the street to see the new baby with no ears, and just before she went in, she pinched Johnny on the ear and said, "Now, Johnny I'm going to tell you something. If you say one word about that baby having no ears, I'm going to whip the daylights out of you." He said, "All right, Momma, I won't say a word."

They went in. He looked at the baby, and he said, "My, Mrs. Jones, that's the cutest little baby I have ever seen." She said, "Well, thank you, Johnny. That's the nicest thing I think you've ever said." He said, "Mrs. Jones, how are the baby's eyes?" And Mrs. Jones said, "Well, Johnny, they're just ... it's funny that you asked. We just had the baby checked today and his eyes are just perfect." Johnny said, "That's great, Mrs. Jones, he would be in a lot of trouble if he had to wear glasses."

(Laughter)

It is said that there are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management. The types of cases that you deal with are securities fraud, contract, and industry-wide class action employment discrimination cases, which are all described as complex and protracted cases.

Unfortunately, in many jurisdictions, and particularly in state courts, lawyers traditionally believe that a judge should be a mere umpire to pass upon objections and to hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference.

I've heard many lawyers express the belief that the trial judge is the natural enemy of the trial lawyer. In the federal system that notion has been set aside long ago. It is said that the trial judge under the federal system is not only permitted but has a duty to participate in the trial, to facilitate the ordinary process, and to clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries and to discourage dilatory tactics of counsel.

The purpose of the trial is to arrive at the truth without a waste of time. You just heard Judge Pollack who is a master at that and most of the things Judge Pollack said I agree with ... particularly that part of his presentation relating to doing away with docket control orders, referring matters to magistrates and referees. I think we judges abdicate our responsibility when we do that.

I only have one disagreement with him on exhibits ... Milton, I insist that they give me a list of those exhibits to which no objection is made, and as for those exhibits, once that list is made, they are automatically admitted into evidence. I agree there's nothing that is a greater waste of time than a lawyer picking up an exhibit and handing it to a witness, asking if he can identify it, giving it to the other side. We try to eliminate that by just saying "Okay, all of these exhibits are in evidence. You don't have to offer them, they're in evidence." That's the only improvement I would suggest to your system.

In the forward to the Manual on Complex Litigation, it is said that the bench and bar must devise and employ new procedures which will increase the efficiency and improve the quality of justice without increasing the burden on litigants. Certainly, all litigation and particularly complex litigation has increased and will increase.

Milton has already given you some of the statistics on the increase in the complex cases.

I'm afraid that with the experience that I have had in the *Corrugated* case I have come to the belief that complex litigation is partly complex not only because the law is complex but also because the lawyers in the case make it complex. For that reason, it becomes of paramount importance in such cases that the trial judge take an active role in managing the process. The trial judge must do his best to make sure that the procedural devices available are being used in a good faith effort to advance the search for truth. It is his responsibility to be certain that the Rules of Civil Procedure do not become a club in any lawyer's hand, but instead are reasonable devices to facilitate the orderly progress of a trial in the search for truth.

Most antitrust lawyers are experienced in the use of procedural devices to prolong litigation for their own economic purpose or to wear the other side down, or to up the ante and so forth. One example is bringing the action as a class action.

There is no doubt that a large class has more impact upon the defendant than a single client. It is not just this trial judge that is asking this question, but most federal trial judges and many lawyers are beginning to concern themselves about the coercive impact of class action litigation. Is the class action device being abused?

Unquestionably, if a large class is ultimately certified, it changes the face of a lawsuit. As an example, the multi-district litigation panel recently sent me another series of cases involving lawsuits in various parts of the country against the film producers and distributors. Each of the individual cases was filed in different parts of the country and alleged injury and damages only as to a rather narrow geographical area.

One of the cases alleged a nationwide conspiracy to violate the antitrust laws in the film industry. At the first pretrial conference, I suggested that considerations be given to filing one consolidated complaint. The plaintiffs' steering committee recently responded by seeking leave to file a consolidated complaint alleging a class action. If leave is granted, it will of course significantly affect the nature of all of this litigation and will have a substantial impact.

Should such an amendment be allowed? Is it fair to all concerned? Such questions occur frequently in multi-district complex litigation. The pro's and con's of class actions are debated in other than antitrust circles, especially in large consumer claims and in industry-wide alleged employment discrimination cases. There seems to be a trend today in the Supreme Court and in the district courts and circuit courts to limit the use of class action devices in complex litigation.

Consolidation for pretrial purposes under Section 1407 works considerable difference in the consolidated cases. The primary purpose of Section 1407 consolidation is a conservation of judicial manpower. One judge decides the questions of, for example, contribution, rather than 60 judges in different districts who might reach conflicting results.

This primary purpose is certainly served by consolidation and all parties benefit through the reduced cost of prosecuting and defending the

cases which results from consolidated briefing and discovery; but there are far reaching implications in pretrial consolidation. One is that many of the cases will be better managed by plaintiffs, who gain in manpower where a number are consolidated. Another far-reaching implication of Section 1407 transfer is the possibility of Section 1404 transfer for trial.

As the case law has developed, the transferee judge can decide whether to keep some or all of the cases for trial. I believe only about one in ten Section 1407 cases is ever returned to the transferor court. Here again the interests of judicial economy are being served. It is clearly more efficient for the judge who has gained expertise in the subject matter of the litigation through the slow painful process of managing pretrial proceedings to continue to preside over the trial.

However economical this may be in judicial terms, it can present a considerable problem to litigants and counsel obliged to go to trial in a forum different from that where the case was originally filed and where more than likely the plaintiff resides and does business. Also, the composition of the jury is obviously different, and even procedural rules vary from one circuit and district to another as well as, of course, the personality and expertise of the judge involved.

I have found the quality of legal work in complex litigation to be excellent. The trial of the companies and persons accused by the government of illegal price-fixing in the corrugating industry took 3 1/2 months, and it was an accelerated seminar in the rules of criminal procedure and evidence. This excellence of the legal work, though by and large a commendable thing, presents a presiding judge with more decisions, and more difficult decisions, in terms of lack of clear precedent than normal litigation.

The judge does have the benefit of constant feedback on how he's doing, since the more important decisions are immediately appealed. I can say I think they've appealed everything I've done in *Corrugated*. I believe there are about five appeals pending now. Mr. Kohn just informed me today that he had received a notice of appeal on the part of some of the dissatisfied Chicago lawyers that states that they are appealing everything that I have done from the very day that I did it, which is fine. That's what the Court of Appeals is for, but it doesn't advance litigation very easily.

I might add that so far I haven't been reversed, but that doesn't mean anything because there have only been two of the five that they've acted on.

One example of an interesting evidentuary question that arose during the criminal trials this past winter concerned the admissibility of some notes that had been made by a witness named Marshall. Mr. Marshall had apparently made a series of notes on price exchange communications he had observed his superiors engaging in. His superior was a defendant in the case and Mr. Marshall was one of the government's most telling witnesses, or so the government thought.

Now, as the notes came up it became apparant that Mr. Marshall had made at least three sets of the same essential notes, allegedly at the time the

events happened (that's in 1970, 71, 72); one a sort of recapitulation of all previous information (compiled in 1973) and one a set prepared for his grand jury testimony after he was notified he would be a witness.

The government sought to introduce the first generation notes as past recollections recorded under Rule 803(5) and used the second and third generation notes to refresh the witness' memory as to the first generation notes, under Rule 612 — since the second and third were more complete and more easily understood and more to the point than the first generation.

Now, both the first generation notes and the third generation notes were made on notepaper with the company's logo on it. After Mr. Marshall had testified at length on direct, the defendants suddenly disclosed that the logo on some of the allegedly first generation notes had not been in use in the company until just before the grand jury investigation, some five years after the so-called first generation notes had been made, and therefore had cerainly not been prepared when the witness claimed they had, at the time of the events he was supposedly recording.

This was, of course, a telling blow to the government. However, the government rallied after noon recess and came back after lunch to move all of the second generation notes into evidence as prior consistent statements under Rule 801(b). Now, I doubt that the drafters of Rule 801(b) had envisioned this kind of situation, but nobody could think of any good reason why they didn't fulfill the literal requirements of the rule and we admitted them.

A judge does not encounter this kind of rigorous workout in evidence frequently in dealing with his regular docket, but it is only one example of a great many such questions which arose during that trial. I might add that the jury apparently disbelieved the whole of the government's case, including Mr. Marshall's testimony. I learned after the jury verdict that the jurors were ready to acquit all of the defendants at the close of the government case.

The government originally had indicated that they were going to present over 300 witnesses, but through pretrial conferences the list was pared down to 104 government witnesses. As the case progressed, it became apparent to me that many of the witnesses the government proposed to call would be merely duplicative of other evidence already presented, and through gentle exertion of judicial pressure, the government presented only 33 witnesses.

This brings me back to one of the most important duties of the trial judge in complex litigation, and that is recognizing the time that is being wasted and trying to do something about it. In most instances, lawyers will take as much time as you will give them to do any given job. In a complex case there is enormous temptation to waste the court's time and the client's money on all kinds of non-essential activity. Sometimes it is an issue that is and should remain peripheral, such as attempting to develop through discovery some speculative theory of recovery or defense not originally

envisioned by the parties. Sometimes it's a question of warfare among attorneys. We've had plenty of that in *Corrugated*, and the struggle over control of the plaintiff's case in that case has made legal newspapers nationwide.

Sometimes it is simply an attempt to build attorney's fees. Sometimes it's an attempt to develop a new weapon in the arsenal, such as the government trying to have defendant's attorneys disqualified from representing potential trial witnesses or plaintiff's attempts to get grand jury material on a showing that a witness is unavailable through the exercise of his Fifth Amendment rights not to incriminate himself, or urging by the defendants of their allegations of grand jury abuse in connection with the indictments, or any of a host of theories that have put forward by the enterprising and able lawyers in *Corrugated*.

Now, all of these goals may be worthy in themselves and clearly they are of considerable importance to the attorneys, but where they do not advance the efficient management of the litigation, it is the trial judge's duty to cut them off. An experienced judge can sense when a lawyer is in earnest as to the importance of an issue and when he is not. He can tell whether an issue is really critical to the lawsuit and when it is peripheral.

In complex litigation, if a case is going to be brought to conclusion in any reasonable time period, the trial judge must get involved in framing discovery, framing issues, discarding strawmen, resolving any problems before they warp the course of the litigation. There are many ways a judge can do this.

First, the judge must create the impression of not taking himself too seriously — I think that one of the worst traits of most federal judges is that they take themselves too seriously — and he must give the impression of trying to be fair, reasonable, and available to the lawyers. He should devise procedural shortcuts. As an example, in *Corrugated* we devised a deposition attendance order that allows the attorneys to notify the witness to be deposed by certified mail at least ten days before the witness is to appear, rather than going through the subpoena procedure as prescribed in the federal rules.

Also, every lawyer is not required to be there at the deposition. If a lawyer not there at the deposition wants to reopen, he must give the other side some ... I forget what it is, 30 days notice I think, and he can reopen it if he can show that he has a good cause to do so.

We instituted a rule limiting interrogatories. It has seemingly worked. We limit them to 30. I think I've had one request in *Corrugated* for more than 30. I agree with Milton on interrogatories. To me, interrogatories ought to be eliminated from the federal rules except for the express purpose of identifying documents or identifying witnesses. They serve no other useful purpose.

In 13 years on the bench, I do not believe that I've had over five interrogatories either read to me or to the jury. What you must understand, and I'm sure you do understand about interrogatories, is that

the answers to interrogatories are written by lawyers. They're not written by witnesses, and they have absolutely no useful purpose whatsoever except to identify a document or identify a witness.

The judge, of course, in complex cases must insist that the attorneys for both sides organize themselves into committees and elect chairmen so that the court can properly deal with as few attorneys as possible. Pretrial conferences are more enlightening to most judges, and I know to me, than written motions or briefs.

Sure enough, when a lot of attorneys are involved, pretrial conferences can be very expensive. As an example, at the first pretrial conference held in a *Corrugated* civil case there were by actual count 205 attorneys from all over the United States in my courtroom. I made it clear to all of the attorneys present that if there ever came a time when I would like to be asked to set attorneys' fees, no fee would be allowed for education and for unnecessary attendance at pretrial conferences, depositions, and so forth.

Since that time, most of our pretrial conferences have involved 30 or fewer attorneys. Also, I made it clear that the attorneys had better keep accurate and detailed time sheets, which I guess I'm going to have to review at some time.

Discovery must be organized and should be confined more narrowly than is common. For example, in a case involving a continuing conspiracy of many years, it may be preferable to confine discovery and evidence at trial to a relatively reasonable period of time. Again, in the government's case alleging an illegal price fixing conspiracy in *Corrugated*, the indictment read that the conspiracy started in 1960 and continued up to the present time. That's the same allegation in the civil case, too.

We limited the presentation of evidence to the period 1969 to the present and permitted only some evidence before 1969 as background. In the trial of that case I also insisted that the defense attorneys cooperate in the trial of the case. As a result, they insisted when we instructed the jury that I give the following instuction, which I did. "In order to make the administration of this trial easier, the court asked the lawyers for each defendant to cooperate in order to promote trial efficiency and save time. This does not constitute evidence that their clients were previously associating in any conspiracy and you are to draw no inference from their common efforts undertaken at my request."

One of the most interesting problems facing a trial judge in complex litigation is how to present the case in a way the jury can understand. Some courts, as I am sure you know, are refusing to allow jury trials in very complicated and protracted litigation. Some of the problems are caused by the length of the trial, some by the difficult material presented. Together, they make for a real challenge for the lawyers and the judge. For one thing, it's difficult to find jurors who are willing to spend a great many months in trial. The judge will probably have to excuse precisely that segment of the population most likely to have the training and experience to understand complicated business problems.

Even if the judge refuses to excuse people with demanding occupations, the attorneys will probably feel obligated to strike any prospective juror whose attention will clearly be divided between the evidence and his own neglected work, or who will feel such animus towards the litigants for taking up his time that he will not listen to the evidence in an impartial frame of mind.

There is not a lot of judge can do about this problem, but there is a lot he can do about keeping the jury that's eventually chosen good-tempered, friendly and interested. We furnish coffee and donuts. I was as pleasant as I knew how to be to the jury. I guess I kind of over-did it. One day the jury came in and I noticed they were carrying boxes of things and cartons, and ice boxes and they invited me and my staff to a noon buffet. They had spread out ... of course we didn't go. My staff wanted to go.

(Laughter)

But they had spread out on the jury table ... they had ham, roast, sandwiches, deviled eggs, cookies, cokes and everything. So, I guess I kind of over-did making the jury feel comfortable and at home I don't know.

We worked for a four-day week in the Corrugated trial. We let everybody off on Friday except me, and that's when I had to tend to my other docket.

The judge can and should aid the jury by allowing them to take notes, which I have done in a lot of trials. I did that in the *Corrugated* criminal case, which lasted 15 weeks. We provided them with note pads, paper, pencil. The marshall took up the notes every night, locked them up. It was an interesting experience in human psychology. I think it had a very good effect on keeping the jurors interested, and you would be absolutely shocked at some of the notes. Some of the jurors took notes that really were an absolute outline of the entire trial; others didn't take any.

In connection with notes, I gave them an instruction at the beginning of the trial and at the end of the trial, the substance of which is that they can take notes if they care to, but to remember that their notes are not an outline of the trial; that what they might right down today might assume less importance tomorrow when another witness testifies; that after all, the notes are just as an aid to their memory, if they wanted to aid their memory in that way; and that they cannot and I order them not to exchange their notes with any other juror.

Also in that case we put all documentary evidence on transparencies, and when a document was introduced into evidence, we just flashed it on a big 12-foot screen I have in my courtroom so the jury could see it. I give written instructions. I did in that case. When I read my instructions to the jury, they were flashed on the screen. I permit jurors to have a copy of the written instructions in the jury room. I even give each juror a copy of the instructions. I'm intractable about that. There's no one that can talk me out of that practice. I have ever tried a case in 13 years that I've not given a written instruction and allowed the jury to take it to the jury room with them.

On more than ten or 15 occasions where a juror had been a juror in another court where the judge gave oral instructions, they have thanked me for letting them have written instructions.

I think I have taken too long and I'm going to close right now by saying this. Sometimes when I go to bed at night I feel like saying a prayer. It would go something like this.

Dear Lord, on bended knee I pray you tomorrow send me a plain old tort case, or if you can't do that, a suit on a simple contract in writing will do just as well. That's a little enough favor to ask even if I have gotten rusty on the common law since I've been on this court, and believe me, O Lord, from any 2254's or 1981's or 1985's or any 2000 A to E inclusive, or any further transfers from the multi-district litigation panel on complex or criminal litigation. You've got troubles, I know, in enforcing Chapter 20 subsection 3 to 17 inclusive of the Book of Exodus, but it can't be much worse than we federal judges have under Title 42 or any transferee judge from the multi-district litigation panel, and if you care about me, Lord, don't send me any class actions, whatever they are. It's not that I mind the work. You know me better than that, Lord, it's just that I'm not a pedagogist, a penologist, a theologist, a sociologist, a cosmetologist, a tonsilorist, a restaurauteur, a literary censor, a personnel director, or a president of a company making cardboard containers. Another thing, please don't put me on any more three-judge courts. Lord knows I've got enough trouble to bring with myself, much less trying to convince two other damn fools. Now, Lord, I'm not trying to ruin your business, but someday you've got to put an end to this invidious discrimination against me and give me the equal protection of the Ten Commandments and all the recent amendments thereto, and one more thing, Lord, watch your step. I've got news for you. You've got real competition down in this section. The first thing you know, the Fifth Circuit Court of Appeals is going to permanently enjoin you from this discrimination against me. Of course, I realize there's a question of service on you under the long arm statute, but let me warn you. That's not going to bother the Fifth Circuit very much. Thank you very much.

(Applause)

That prayer is not original. I borrowed it from my late great friend, Alexander Lawrence, a District Judge in Georgia who died recently. Thank you.

(Applause)

MS. LOVEJOY: Thank you, Judge Singleton. I think there are a number of people in the room who are hoping that the Lord will not grant your prayer too soon.

Our next speaker is Judge Robert Merhige, who was appointed United States District Judge for the Eastern District of Virginia in August of 1967. He graduated from High Point College in North Carolina and the University of Richmond Law School. He was elected in 1979 to serve as a member of the Judicial Conference of the United States.

Judge Merhige has been known to try a number of innovative techniques in his attempts to dispose of complex litigation efficiently. If I'm not mistaken, in the Westinghouse Uranium Contracts litigation, Judge Merhige suggested a form of substituted combat where on the eve of trial he organized a softball game, pitting counsel for plaintiffs against counsel for defendants, at which he would serve as referee. His attempt at that form of substituted combat failed, I understand, when plaintiffs' counsel looked around and saw that none of them was any taller than 5'7" and the Westinghouse lawyers averaged 6'4".

Nonetheless, I think it's generally recognized that Judge Merhige's handling of those cases, along with other complex cases he has managed over the years, is exemplary in streamlining and shortening litigation. We are delighted to have him with us today. Judge Merhige ...

(Applause)

HON. ROBERT MERHIGE, JR.: Thank you, Kimba. One of the advantages of being last is they've already said it all. There really isn't much for me to say.

John, I pray too, everyday. I pray for patience and every morning before I leave for court, I look up and say, "God I want patience and I want it now."

(Laughter)

You know, I really don't have a prepared text. I made some notes this morning. I've been holding court in Alexandria this week, and then flew up on the shuttle, and I really don't have any real disagreement with my colleagues. I did speak to Judge Pollack the other day and it was suggested that perhaps I ought to sort of concentrate on settlement. I suppose because of the sucess we've had in the uranium cases in that regard.

I think what we're here for is twofold. You're here hoping to catch something that's going to help you win a lawsuit, expedite a lawsuit. The judges are here, not for winning or losing because we don't handle any of them on a contingent basis, thank God, but to do what we're sworn to do, and that's to see that justice is done.

Now, with all due respect, that's not really a lawyer's responsibility. He wants to win a lawsuit. He wants to represent his client. Judges have a twofold responsibility.

One, we want to make the courts available to people. They belong to people and when we get tied up in a six month trial or a ten month trial or a ten year trial, it just means that there's one less fellow there to handle the other cases.

I'm not sure that I know what a complex case is; and, it may be because I don't know what a simple case is. They're as complex as the lawyers make them. I have never gone under the assumption that God gave me instant smarts with the black robe. I know better than that. He did not. I have to depend on the lawyers to teach me about the cases.

I agree with Judge Pollack and Judge Singleton in reference to the use of interrogatories. I think they are the most useless things in the world

except perhaps to ferret out ancillary proceedings or prior proceedings so that you can go to them and interpolate.

I think you ought to use request for admissions more than are used. I think it would save a lot of time. But perhaps the best way to get at this ... I admit that I have a one track mind in reference to complex litigation. I think it's important to get it over with and see to it that justice is served.

I find the antitrust aspects really easy, although I haven't tried too many of what I would call complex antitrust cases, but it seems to me that antitrust cases are generally cold business cases, unless you have some dealer who's been canceled who thinks that the world will go wrong unless he can put his franchisor out of business or some such thing. Usually the green poultice takes care of it. He's not really very angry once he gets his money, but they're business cases and they are particularly, in my view, susceptible of settling.

Now, in reference to my one track mind I think as Judge Pollack has pointed out, most of the antitrust cases are disposed of before trial. As a matter of fact, the last statistics I saw ... 90 percent of them were disposed of before trial. It seems to me, however, that we ought to get to that a little earlier.

But I do want to tell you a story about a one track mind. It threw my mind I guess when Judge Singleton was talking about his English friend.

You all no doubt have heard the story ... no, if I thought you had, I wouldn't tell it. That's a ridiculous start isn't it?

A story of the reasonably elderly gentleman who became engaged to the young lady who was some 35 or 40 years younger than he and after they had become engaged, he said, "Dear, I have a confession to make and before we get married, you should know that I'm an absolute fanatic about golf. I get up seven mornings a week and go right out to the golf course, I leave the office 3 o'clock in the afternoon, three or four days a week and I go out to the golf course, and for the last two years I've been courting you and seeing you three or four nights a week, and I've been leaving you at 9 or 9:30 and I've beeng going out to the golf course and hit golf balls, and you should know that." And she said, "Well, dear, since you're confessing, I have a confession to make, too. Since you've been courting me for the last two years and you've been coming to see me three or four evenings a week and leaving me at 9 or 9:30, I've become a hooker." And he said, "Well, maybe you're standing too close to the ball."

(Laughter)

Now, that's a one track mind, and I guess I've been accused of having a one track mind, in regard to settlements.

I think the responsibility for expediting antitrust cases or any type of case is primarily the judge's. I think Judge Pollack and Judge Singleton agree with me on that. A judge has got to take control of the case.

You know, all we can give you is our experiences. We don't have the fun that lawyers ... that I used to have as a lawyer when we sat around and bulled and nobody ever lost a case in my group. We would talk about the

ones that we won. Well, judges don't win or lose, but we can give you the experiences that we've had for whatever value you may get out of it.

Let me take the Westinghouse case ... Kimba, I didn't really suggest the softball game. It was suggested by counsel but they wanted me to umpire and I said, "No, indeed." I was going to try those cases without a jury and I knew I was going to be in enough trouble.

We utilized informal sessions. As soon as those cases were transferred, and there were 13 cases transferred to me by the multi-district panel, I got all of the lawyers in and just as Judge Singleton's experience, there really wasn't any room. I began to wonder how we were going to have a public trial because when the lawyers got in my courtroom, there wasn't any room for the public. They were all interested people.

We, of course, have a rule in our district that we protect the local fraternity. You can't come in there unless you have one of our local boys with you, and the purpose of it is not really to protect the fraternity because good lawyers don't need any ... you know, you keep that clock going. I never worry about encouraging lawyers to settle because good ones, can keep the clock going to the point, like the fellow that met St. Peter and he told St. Peter that he didn't think he was supposed to be there, and St. Peter said, "Oh, yes, you're John Brown the attorney. Yes, you were supposed to be here ten days after your 54th birthday." And the fellow said, "But I'm only 42 ... 42." St. Peter said, "Well, we've never made a mistake like that. Let me go check." He came back and he said, "Well, I see what happened. We lost your birth certificate and we had to use your time sheets."

(Laughter)

Well, good lawyers don't have any difficulty keeping the clock going.

I think in the uranium cases, and I say this out of respect for the attorneys, for I think I had the best attorneys in the country in those cases ... I'll wager that I did not have as many, in all the cases; I don't think I had as many as ten hearings on any discovery problems. I didn't turn the matter over to a magistrate. I'm like Judge Singleton and I think Judge Pollack, too, but ... I think the trial judge ought to take control of the case because that's how he's going to learn about the case.

We had frequent pretrial conferences and I would suggest that to you when you get in a case that you consider complex. If the judge doesn't suggest it, you suggest to him that you report every 30 or 40 days, and I required that, and there was no telephone reporting. The lawyers would have to come. Obviously, not all of them came because we had about 70 lawyers in the case, but they agreed who would do the speaking for the plaintiffs and who would do the speaking for the defendants.

I required agendas for every pretrial conference, suggested by both sides, and I would suggest that you utilize that so that you can bring up with the judge whatever the particular problems are. Most of our discovery problems were decided over the telephone to be perfectly frank with you. If they got out and in taking a deposition they got into some kind

of hassle, they could call. The rule was that they could get me at any time of the day or night, and they utilized that because frequently they were in a different time zone. I used to accuse them of just waiting for me to hit that sack at nine o'clock while they were still in depositions at six out in California and then call me, but the truth of the matter was they knew that the judge was available and you'll find most judges are perfectly willing to be available at any time.

We disposed of most of the problems, when they were away from court, by telephonic rulings.

Now, let me tell you of one thing that they said was innovative. I do confess to the fact that when the litigation started, I insisted that each of the parties bring their principals, and I didn't want any third vice president or assistant vice president. I wanted the chairman of the board of Westinghouse and I wanted the spokesman for the respective utility companies in Richmond, and it worked out very well. They came ... my wife didn't think it worked out very well because we did it in about sets of threes. We had some come in on Monday and some on Wednesday and some on Friday and we had a little cocktail party out at the house in which there was no discussion whatsoever about the case, but everybody got to meet each other and chat, and then I met with them and suggested to them that it was just like an antitrust case, involving business problems, unless of course, there is a per se illegal situation. If they are, you want to get started on your settlement discussions early anyway, and if they're rule of reason matters, that esoteric phrase that nobody seems to know what it means, you can spend the rest of your life discovering; if some judge will let you go around discovering.

But my experience has been that good lawyers take Rule 11 seriously when they sign a pleading. That good lawyers don't participate in wearing down the other side. I know you are all accused of it. Lawyers always are accused of trying to out-paper the other fellow, and I suppose there are some that do it, but that's a trial judge's responsibility and if he's watching the case, he can soon spot those people and do something about it.

This business of ... I recognize in antitrust cases plaintiff's cases are usually made by documents and they just go out and hunt up all the documents. Well, we had the same situation in the uranium case. At one time they were making 40,000 pages a day of copies of documents that the parties wanted to see. We solved that right easily by just getting the plaintiffs to go to Pittsburgh where all the Westinghouse documents were; and I had them turn over the building to them for certain hours for a number of weeks and I said go look at anything you want, and we did enter a protective order right quickly. All of you represent clients who think every time they put a needle into a shirt, that that's some secret business trade secret that they don't want anybody else to know, but we solved that right quickly by putting down a confidentiality order and everybody abided by it and we didn't have any difficulty about it.

But we went through that document business and had it over with, frankly, in about 90 days.

About one of the first things I did after I acquainted myself with the case was to appoint a settlement master. Now, good lawyers want to get rid of cases. There isn't any doubt in my mind of that. The plaintiff wants to get every penny that he can get for his client, and the defendant doesn't want to pay one penny more than he has to pay for his client. I recognize there are other factors in antitrust cases besides that particular facet. Some people say well, I've got to go through the trial because if I don't, I'm going to have a dozen other people bringing lawsuits. Yet, the bottom line is money.

I've often suggested that if we did away with treble damages we would cut antitrust cases by about 70 percent, and I believe that, but if we don't expedite them, we're going to end up using some precedure such as suggested, I believe, by Attorney General Bell that these antitrust cases really ought to be tried in Congress. I have no feeling on that. That's a political issue and I couldn't care less for at the moment, I'm not trying an antitrust case. I'm going to be trying a tort case, John, that you prayed for or I'll be trying a criminal case, and I find excitement in any of the cases that come down the pike. So, I have no real feeling on the matter except that I think justice is better served in courtrooms and by lawyers and judges working together.

Now, I appointed a settlement master even though they told me in the beginning there wasn't any chance of settling it. All these utilities had Commissions looking over their shoulders that they were just going to have to go straight through it. Westinghouse didn't owe anything. They have been shafted by a bunch of oil producers and so forth and so on. But I said, "Well, you're going to try." Cases have got to have some value to somebody, even if it's just litigation expense and I might add that the litigation expense I'm satisfied in that one case was more than I grossed in 20 some years of practice of law. It was enormous as it is in all of these cases.

But I appointed a special master for purposes of settlement, and I put out an order that required the plaintiff to submit to him, in camera, that which I described as "your best shot," what will you take to get rid of this case? Having been a lawyer, and still in my heart a lawyer, I knew I wasn't going to really get the best shot, but it was going to be something different than their complaint. I didn't think they would do that, yet I felt that they would be perfectly sincere and put forth a reasonable proposal and I made the defendant submit a counterproposal.

The order required that the master examine those in camera and that he not report to me in any manner whatsoever as to what had been told him in these submissions, nor could he convey to the other party what he had.

My theory being that, perhaps, they weren't as far apart as they thought they were, and I turned out not to be wrong in one or two of those situations. Frankly we got two of the cases settled before we ever really got into the liability feature of the case. I found that to be extremely helpful.

I found some resistance in insisting that when the master wanted to sit down and talk to the parties, as he had a right to do under the order, that they have a spokesman who could speak ... somebody who could say "yes, this is what I'm going to do — subject to the board of directors approval, ... but I can speak for the company," and that helped. The expense of that, I frankly don't know what it was because I told them if they couldn't work out what the payment would be, they could then come to the court and they worked it out on an hourly basis, but regardless of what it was, it was diminimous in comparison to the amount of time and energies that were saved.

We ended up ... well, I tried the liability feature for I think eight of the cases and rendered a liability decision, and then we were going into the damage aspect. As a matter of fact, we did go into the damage aspect and as it stands now, all of the cases have been disposed of with the exception of two in which I'm going to issue my findings in reference to the damage aspect but I would be surprised if at least one of those two doesn't settle. I anticipate that they will, but I do commend to you, suggestions to your trial judges ... and it's not a sign of weaknesses. You know, times are changing, thank the Lord. In the old days, everybody was afraid to make an offer for fear that it would be taken as a sign of weakness. Well, that's old country bumpkin nonsense. It doesn't mean anything. Good lawyers prepare their cases and if they have to try them, they try them. That's what trial lawyers are for.

I would suggest that gigantic discovery is generally useless. I don't know how many thousands of exhibits we had in the uranium cases but I really think it was easier for me to handle it than it would have been for a jury. Although I would have been happy to have a jury. I love to try jury cases for that's easy work. I just have to sit there and rule on admissibility of evidence, and rule on objections, and charge the jury, and they go ahead and worry about who they believe and who they don't believe. I find non-jury cases to be much more difficult so to speak, but they're exciting.

But of all the thousands of exhibits, I doubt seriously that I utilized over 100, and of all the thousands of pages of depositions, and Judge Pollack, I'm going back and insert your suggestion in my orders from now on. I'm not going to sit and listen to depositions being read. You're quite correct. I think they could take one page and paraphrase whatever the witness said.

We didn't need it all. We simply did not use it, and I think a massive number of exhibits just confuse a jury. Now, I recognize that some of you want to confuse the jury. I can understand that. I practiced law, too. But good lawyers generally want to get rid of their cases. The statistics show that you do get rid of your cases, and I think you ought to spend more time towards encouraging your clients to sit down and see what they can do to work it out. Thank you very much.

(Applause)

MS. LOVEJOY: Thank you very much, Judge Merhige. Your remarks and those of Judges Pollack and Singleton have been quite

thought-provoking and I'm looking forward to hearing comments from our commentators, Eleanor Fox and David Boies.

I would like to remind you that during the discussion that follows their comments, we're hoping that you will have questions for the panelists which you can send up to me in writing or which you can ask simply by raising your hand when the time comes.

Our first commentator, Eleanor Fox, is a professor of law at New York University Law School and is of counsel to the firm of Simpson, Thatcher and Bartlett. She has recently served as a member of the National Commission for the Review of Antitrust Laws and Procedures and has testified before Congress concerning the need for revisions in procedural and substantive rules of law to expedite complex antitrust cases. She is also co-author with Byron Fox of a three volume treatise entitled "Corporate Acquisitions and Mergers" which is published by Mathew Bender. We are very pleased to have her with us today. Eleanor Fox ...

(Applause)

PROF. ELEANOR M. FOX: Thank you, Kimba. I am going to begin on a note of consensus. There are remarkable inefficiencies and potentials for inefficiency in the handling and trial of a complex antitrust case. I am going to combine my role as commentator today with an attempt to tie work of the Commission on which I served with pending legislation to improve the efficiency of the antitrust litigation process.

I will speak of three facets of inefficiency; one being the natural tendency to attenuate these complex cases, of which our panelists have spoken. Another is a subject not spoken of yet today — inefficiencies attributable to barriers to the use of available facts and fact-finding. Thirdly. and perhaps the most provoking topic, is the subject of dilatory practices of attorneys.

I do believe that there is a natural tendency of these cases to become more attenuated than they need to be. Lawyers do tend to complicate these already complicated proceedings. Our Commission thought about these problems and came up with a number of solutions. Let me just mention three.

The first, which you've heard a lot about today, is active judicial management. That is something that we endorse primarily, and since we have heard it spoken of so articulately, I would respectfully incorporate by reference our distinguished panelists' words of wisdom. In short, our Commission believed that the judge must get involved, and must get involved from day one; understand the case; understand the issues; help define the issues, and set schedules, given an understanding of the case.

Secondly, and a more arbitrary approach, is time limits. Should time limits be imposed? Should the judge set a date for trial soon after the complaint is filed, perhaps soon after a first pretrial conference? The Commission heard much testimony. We had many litigators come before us. One litigator who came before us was Harold Schmidt, a lawyer from Pittsburgh, Pennsylvania, who said, "No, there should not be time limits. It just takes more time to wash an elephant than to wash a dog."

Also among those who testified before the Commission was Fred Bartlit of Chicago, who said, "Yes, a judge should set a case for trial two years from the time of the filing of complaint. Let the lawyers set their own priorities. If the lawyers are confined to a certain period of time, then they will decide what's important to them. They will let the unimportant issues go by the wayside and they will prepare the case for trial." We liked that approach. If I may incorporate a metaphor of Judge Pollack's, we, too, believe that each painter should paint with his or her own brush; but the size of the canvas should be limited. That was one of our recommendations.

I believe also that the time of trial ought to be limited. I commend Judge Newman's restricting the time of trial in the *SCM* case. If a case runs on, perhaps more than a year of trial time, the facts tend to slip away, memories become less good. Injustice may be done by attenuated trial time itself.

Now, for a third way to deal with the natural tendency to attenuate: the Commission considered rewarding parties for speed, or perhaps taxing them for attenuation. The Commission proposed that courts award prejudgment interest; that is interest running from the time of complaint. Our proposal resulted in one of the several bills now pending, on the efficiency of antitrust litigation.

The Senate bill which includes a number of these provisions is S.390. On the House side the prejudgment interest bill is H.R. 4048. The House bill is similar to the Commission's recommendation, in that prejudgment interest would be awarded unless unjust; it is intended as an incentive to speed. The Senate bill as it now stands is somewhat different; it would allow the imposition of prejudgment interest only if that would be just, and the implication is that prejudgment interest would be awarded only if the parties are dilatory. The Senate formulation would tend to punish, rather than simply to award the speed. I prefer the House side. Prejudgment interest may be fully justified as compensatory. If it needs additional justification, it ought to be an incentive for speed.

I come now to my second subject: inefficiencies from barriers to use of facts. There are two points here, and both have resulted in legislation now pending. One, suppose a private party brings a treble damage suit against a defendant already held to have violated the antitrust laws in a prior government enforcement action. Section 5A of the Clayton Act allows the private party use of the government judgment only to the extent of its prima facie effect. That's an anachronism, because collateral estoppel under common law would give such a plaintiff greater rights if not limited by Section 5A. Our Commission made a proposal, which is in a bill, that judgments in antitrust cases should be accorded general, common law, collateral estoppel treatment; that Section 5A should not limit such rights.

My second point is that available facts aren't used efficiently now. The government has not had satisfactory access to facts that have been pulled together from documents by a private plaintiff who has had discovery against a target of a government action. Should the government be able to

get the target's documents as pulled together by a private plaintiff? Our Commission said yes, and there is a bill pending now that would allow government to reach those documents by CID, on notice, of course, to the target, with allowance for the target to object; and, of course, the target would have every opportunity to put together its side of the case and present additional documents appropriate to a complete understanding.

The third source of inefficiency is dilatory tactics. Some question whether this is a problem. There are very strong feelings on the subject. Some are convinced, and indeed the Commission was convinced, that all too commonly litigators are engaged in strategies to delay, stonewall and complicate for the sake of delay. Should we do something more about the potential for dilatory tactics?

The Commission, in addition to proposing some changes in codes of professional responsibility, proposed an amendment to 28 U.S.C. §1927, which already allows the judge to impose costs on a party unreasonably and vexaciously engaged in delay. The Commission's proposal, and the bill now before Congress, would put some teeth into this statute. It would allow the court to impose costs, attorney fees, and other expenses on an attorney who engages in tactics primarily and unreasonably for delay. The attorney himself or herself could be fined because of this dilatory behavior.

I testified for the bill that incorporates the proposal, H.R. 4047. The same day I was there, representatives of the National Association of Manufacturers testified against the bill, arguing that if the bill is enacted the days of zealous advocacy will be over. There was more opposition to this bill than to any of the other bills to improve efficiency in antitrust litigation. That bill alone, of the several, did not come to a vote on the House Subcommittee side because of the opposition. The others came to a vote and were passed by the House Subcommittee. They or their counterparts have all been passed by the Senate.

Will the bills be enacted? Probably; at least most of them. Will they make a difference? I hope so, but it may be a small difference in the scheme of things. Two things, I think, will make a difference. One is a signal of inhospitability to ineffeciencies and delaying tactics in antitrust litigation; and second, more jurists like the ones we have on our platform.

(Applause)

MS. LOVEJOY: Thank you, Eleanor. Our second commentator, David Boies, is a member of the firm of Cravath, Swain & Moore, from which he took a leave of absence in 1977 to become Chief Counsel and Staff Director to the Senate Antitrust Subcommittee. Thereafter he became Chief Counsel to the Senate Judiciary Committee. He served as Senator Kennedy's representative to the National Commission for the Review of Antitrust Laws and Procedures, and although he has now returned to Cravath, he continues to do work in Washington relating to deregulation.

He has taught a seminar at New York University Law School for a number of years and he is co-author of a casebook on Regulated Industries

entitled, "Public Control of Business." We are delighted David could participate on the panel today. David Boies ...

(Applause)

MR. DAVID BOIES: The perils of being last leads me to believe that the best thing that I can do in order to get to some of the questions from the audience is to put from my perspective some of the comments and some of the common grounds of agreement into some context.

One of the things that I think is worth remarking on is the uniform agreement on the need for the federal judge in a complex case to take an early and vigorous participation in the framing of issues and in the forming and regulating of discovery. That is something that I think we would have found far less agreement on ten years ago or even five years ago. I think there is increasing recognition of the need to have the early direct, continuing and viorous participation of the court in setting limits as to how far discovery can go, to setting priorities as what kind of discovery needs to be undertaken, and attempting generally to frame things in a way that permits the case to proceed to trial while at the same time allowing some substantial freedom and flexibility to the individual attorneys to frame their own cases and frame their own discovery.

One of the things that I think is also common is that there are at least two ways to begin limiting the complex case.

One is to attempt to limit it in terms of the subject matter of the case. You can begin to cut it back in terms of timeframe, for example, in terms of ruling out what has been referred to as ancient history, of limiting things that happened a decade ago to those that are essential to the background understanding of what's going on currently.

You can begin to require an early statement of the issues, not a statement that's necessarily cast in concrete, something that is subject to evolution as the cases progresses, but something that at the beginning or at least very early in the progress of the case identifies what the issues are, identifies the parties' early position, and permits the court to impose some limits on what otherwise is broad and almost limitless discovery when you're talking about monopolization cases and other broad antitrust cases.

A second basic way to limit the scope of a complex case is simply to shrink the time frame that is available to pre-try it. Given four years or six years or eight years to prepare a case, it is in part the nature of the lawyer's craft that that time will be spent in discovery. There are an inevitable number of documents that can be discovered and depositions taken and interrogatories propounded, but if the court at the outset sets a trial date and begins to march back from that trial date to other cutoffs, cutoffs for documents production, cutoffs for depositions, cutoffs to interrogatories, cutoffs for request of admissions, then you begin to have a framework which does give the individual attorney the opportunity to select what is of greatest priority to him to get done, gives him what is perhaps a generous amount of time to do it. A two year limit was mentioned and that was what

was recommended by the Antitrust Commission, subject to the ability always of the federal judge to grant relief in a case where manifest justice would otherwise result. But it is important to send a very clear signal that you would expect all cases except in a very unusual circumstance to be prepared for trial within two years, and of course, obviously most of them sooner than that.

This would provide the incentive and direction to get the case prepared and from my perspective would help solve in perhaps a less complex and in some senses a less troubling way, some of the other concerns that go to, for example, the need for sanctions for dilatory tactics or the need to have prejudgment interest. Both of those kind of problems, or both of those solutions attempt to address the problem of delay. They do so in an indirect way. You try to figure out what an attorney's motivation is for a particular action and if you conclude it is primarily for delay, you impose sanctions.

You impose prejudgment interest as a means of speeding the case along. If those are the only tools available to us in order to promote the expeditious handling of these complex cases, I think maybe those are worthwhile things to do, but I think a more direct way to do it is to set and publicize a requirement that says by statute, if necessary, although I think the judiciary clearly has the power to do it on its own, that except in cases of manifest injustice, we will expect that cases will go to trial in two years or less after the time they're brought. I think that that would have a very beneficial effect, not only on defendant's lawyers who are the normal targets of the complaints about delay, but also on plaintiff's lawyers who also contribute in a lot of ways to delay by an excessive attention to discovery, searching for too many issues, putting too many issues into the case, taking too many documents or depositions.

When you get to trial, obviously if you've got a judge trial, the judge has the ability to control the pace and the fact-finding process. The complex case raises a peculiar problem when you get to a jury trial. I think that the cases that are presently pending in a variety of circuits that begin to take away the jury trial in some complex cases are founded on a very sensible concern that in these areas the jury system which has served us very well in much simpler context where credibility is the primary issue have severe limitations when applied to these kind of complex antitrust and some complex non-antitrust issues.

But to the extent that the jury trial remains the preferred way for plaintiffs to try complex antitrust cases, then I think it's critically important the jury be given as many of the tools as is possible to make that jury trial a success.

Now, one of the ironical things about the way we've handled jury trials in complex cases is that by definition you've got a jury far less capable of making the fact-finding, conducting the fact-finding process by the judge, and then you take away from the jury most of the kinds of tools the judge has available to him to help him perform that job ... in terms of the ability to

call for argument interspersed throughout the trial, the ability to review transcripts and exhibits, to compare them with the notes. I think the idea of giving the jury written instructions is absolutely essential if the jury is going to have any chance of understanding what is going to happen, but I think it's useful to go further than that.

I think it's useful to give the parties an opportunity to make their arguments in a written way to the jurors. If you're going to have the jurors sitting through a four month trial or eight month trial, or a year long trial, you want them to be able to have something other than their own haphazard notes to guide them. You want to be able to focus for them. That's why it would be inconceivable that a judge trying a complex antitrust case would not receive the benefit of written materials from the parties, would not get citations to the record, would not then have the time to compare those citations with the actual record. Will the jury be able to do as good a job as the judge in understanding that? I think clearly not. But will that give the juror a little bit better chance of coping with what is almost an impossible task? I think it will, and I think that that kind of approach to the trial of a complex case as long as we're going to have jury trials to resolve those issues, is something that more parties and more judges could usefully consider.

One other proposal that I have tried in one jury case that lasted for several months is to attempt to get the court to permit the jury to ask questions of witnesses when they don't understand things. In a trial before the court without a jury, if the court doesn't understand something, it's the most natural thing in the world for the court to intervene and ask for a definition, for an explanation, for elaboration on what appears perhaps to be an inconsistency, to ask how something ties together. Jurors virtually never do that. I mean, every now and then one blurts out some question, and he's usually told he's not supposed to do that, but rarely if ever is the jury instructed in a complex case that they have the opportunity to ask questions and have the opportunity to try to clear these things up.

Obviously it's going to make in some senses for a less orderly trial, in the sense that you're constantly going to have interruptions of witnesses, you're constantly going to have jurors who probably don't understand most of what's going on in most cases, asking a lot of irrelevant questions, but that goes, I think, to the capability of the jury to handle these cases at all. If you're going to begin with a proposition that you want these cases tried to juries, it seems to me that you want to give the jurors at least as much flexibility in attempting to deal with these questions that will baffle and overwhelm them as we would to the judge who is much more capable of dealing with those questions in terms of ability and education and background.

(Applause)

MS. LOVEJOY: Thank you, David. We're now ready to take questions. David's remarks raise a point that we really haven't touched on. We've touched on how judges can help juries try antitrust cases, but I

would be interested in hearing whether our judge panelists believe that try as we might, we can't ever succeed in making juries understand the issues in a complex antitrust case. Judge Pollack, do you have a view on that?

JUDGE POLLACK: Well, I happen to be on the panel appointed by the Chief Justice to look into the possible alternatives to jury trials in complex and protracted trials such as in cases as described by Ms. Lovejoy. So, I'm under some restriction in formulating what I want to say.

I tried many, many jury cases of more or less complexity over a period of 38 years, and I came to the conclusion that the problem with the jury by and large is the inability of the lawyer to translate his thoughts to the jury in terms of the lowest common denominator of understanding of that jury. But if the lawyer gets right down to the language, the degree of education, the format of expression, the concept of understanding of that lowest common denominator on the jury, it has been my experience that the juries don't go wrong and they come up with a just and fair decision. And of course, the old adage is that 12 jurors never go to sleep at the same time, but one judge sometimes does miss something, and I think that the problem that you're facing really with the problem of jury trial is that we're in a computer age with mind-boggling concepts in business and in science which defy the minds of judges and the minds of lawyers and what right have we got to expect the jurors will be in any better position? They're certainly in an unequal position when it comes to trying any one of these large cases, because the lawyers really cannot translate his case in terms of the lowest common denominator of understanding of that jury.

First of all, there isn't time. It would have to be a type of regular summation almost on a daily basis during the trial. He couldn't do it at the end of the case. There's nothing more paralyzing than the lawyer who sums up for two hours, three hours, six hours, two days, and none of that summation could conceivably cover the scope of any one of these big cases. So that the jurors never get a crack at an understanding of what it is they're really going to decide. Giving jurors an inordinate number of special questions is an exercise in futility ... you might just as well give them the 46,000 page record and say, "Now, hunt through the 46,000 pages and see if you can find me an answer to one of these 85 questions or 58 questions" or whatever the number is. It just can't be done.

The clash comes with the adherence, the strict adherence to the 7th Amendment. There have been two judges at least in this district, and I think one in another district who have said that there are cases that are not jury-decidable and yet, the Ninth Circuit in reviewing those very cases and incorporating those cases in its most recent opinion has said there has to be a jury trial of such cases. The Ninth Circuit by a divided court has said that there is no such thing as a case that is too complex for jury resolution.

Well, with due respect to the Ninth Circuit I don't think that it faces reality in this computerized age and in these monopoly cases. The other types of cases as I said, and somebody said it was 90 percent of the antitrust work ... perhaps it is ... take care of themselves, but the problem remains of

finding other possible solutions for a jury trial in the truly complex case, truly complex case ... the one that even a judge can't understand. He may be tutored during the course of trial and thinks he understands it ... thinks he understands the patent, thinks he understands the type of invention, thinks he understands the machinations that go on in business and that kind of thing. He really doesn't understand. He just sees a glimmer and a hope and he decides and a decision then becomes an unsatisfactory solution to what is a large problem.

I really don't know what the answer is but I am convinced that there are cases that nobody could properly translate to a jury.

JUDGE SINGLETON: I doubt if I really do think that there are cases that shouldn't be tried to a jury. Trial by jury is such a fundamental part of our system of equal justice under the law that I for one would not want to do away with jury trials. I do think we have too many strictures on the jury as Mr. Boies alluded to.

For example, and I forgot to mention this, in many cases that I've tried, in the criminal case in *Corrugated*, I give preliminary instructions to the jury before the trial ever starts. Before the trial starts in the conspiracy case, I give them a definition of conspiracy. I tell them what credibility is before the trial ever starts. I tell them in a criminal case what reasonable doubt is before the trial ever starts, and in a civil case what preponderance of the evidence is and such matters as that. That's one thing.

He raised a very interesting subject about juror questions. Certainly, it would not be orderly to allow jurors questions as such, but why not let the jurors every day write down a question and submit it to the judge and let the judge decide whether the question is relevant to the case and whether it has already been asked, or whether it is just allowing a layman to cross-examine a witness. I think that would be very good. I think lawyers — and I say this everytime I make a speech — trial lawyers ought to practice asking questions, just like an actor or an actress practices his or her lines, because the the truth of the matter is (and we all know it, the judges know it, lawyers know it whether they admit it or not) that the question that the lawyer asks is evidence in the juror's mind. That question is evidence, and lawyers ought to think about their questions.

For example, Kimba, in my written instructions to the jury — I don't call them charges, I call them written instructions — I long ago quit using the words "prior" and "subsequent." No lawyer in asking a question should use the word "prior" or "subsequent" in a jury trial. There's just a hell of a lot of jurors that don't know what that means, but there are damn few that don't know what "before" and "after" mean. I've long ago quite using the word "corroborate." I use "confirm" or "deny" in my instructions to the jury. Those are just two examples of how you can aid jurors in understanding complex cases.

MS. LOVEJOY: Judge Merhige, do you have a view on whether we could do away with jury trials in some antitrust or other complex cases?

JUDGE MERHIGE: I have mixed emotions about it. I made my living for 23 years by saying let the lawyers try the cases and me and the jury would decide them and it worked fairly well. My concern really is that the burden is put on the jurors. I don't think you're going to get a true cross-section of people who can spend nine months in a jury box, but these cases that Judge Pollack referred to, that held that the case was too complicated for a jury, are not without some foundation. The Supreme Court of the United States addressed that way back; I think it was the case of *U.S. v. Stone* in the context of a criminal case in which they held there may be cases of such a complex nature that it would be violative of due process to require it to be tried by a jury, but that didn't happen to be one of them, and so it really isn't a new thought.

I'll just shorten this by saying I am satisfied that the good Lord has a special veiw of our country and of our profession. I know he has, because we've messed it up so badly that if he wasn't watching it, we would be in terrible shape but my experience has been the jurors generally do the right thing, at least what I think is the right thing. They try to do the right thing.

MS. LOVEJOY: Eleanor, did you have a remark ...

PROF. FOX: On the question at hand ... in my mind the jury's still out. I do want to pass on a comment that Judge Newman made to some of us on the antitrust commission regarding the *SCM* case, *SCM-Xerox*, which was tried before a jury. Judge Newman was very gratified by the jurors knowledge and understanding of the case. He cited to us instances in which the jurors, when they called for documents, called for the most significant documents, and in the most logical sequence.

MS. LOVEJOY: One theme that sounded in each of the panelists' remarks is that lawyers are frequently the cause of delay. Eleanor mentioned that the Commission considered and recommended a revision of Rule 37 to authorize sanctions against attorneys for delay in certain cases. I think Judge Singleton mentioned his concern that plaintiff's attorneys may in some of these cases prolong the litigation, and the suggestion has been made on that score that hourly fee compensation — I think Mr. Kohn, who is in the audience, has also testified to this — hourly fee compensation for plaintiff's attorneys can be destructive of expediting these cases. I'm wondering whether the panelists have views on these two possible solutions to attorney delay. Judge Pollack ...

JUDGE POLLACK: Let me answer that by saying that everybody who is a parent knows that there are many ways of directing the child without spanking him. I don't believe in sanctions. I don't think it's necessary to use physical force.

MS. LOVEJOY: Do you have a view on this, Judge Singleton?

JUDGE SINGLETON: No, I wish I did because I'm struggling with it right now. The paperwork that I'm getting everyday is just ... it would boggle your mind in the *Corrugated* case. It's just absolutely unbelievable. I don't know how you stop it. I agree with Mr. Kohn that maybe keeping time sheets isn't really a good idea, although I don't know how else to go about it. There's got to be some way that judges can better

control the litigation. I've tried everything I know how and I'm seeing paperwork, paperwork, paperwork. I don't know what to do about it. I wish somebody would tell me.

MS. LOVEJOY: Eleanor, can you tell us what the specific recommendation of the Commission was on this?

PROF. FOX: Yes, the Commission suggested an amendment to a statute to put more teeth in it. This is 28 U.S.C.§1927. The amendment would make imposition of sanctions somewhat more common. But sanctions would probably still be seldom imposed. I think the effect of the amendment might be reflected more in consciousness-raising than in enforcement. As the Commission perceived, there is a major problem in that the fact that large numbers of lawyers believe it is a proper rule of the game to delay for the sake of delay; that's why our considerations spilled over into ethical considerations and codes of professional responsibility. If lawyers, young lawyers, come out of law school and begin their practice believing that it is a proper rule of the game to delay, to do virtually anything for delay if delay will increase their chance of success, then delaying strategies will be the rule of the game. We had some hope ... some might say it's Pollyanna-ish ... that something could be done to change the balance.

MS. LOVEJOY: Judge Merhige, have you used sanctions to discourage attorney delay?

JUDGE MERHIGE: No, I'm like Judge Pollack. I've never held any lawyer in contempt or issued sanctions against any attorney. I don't know what more you need than U.S.C. 28 §1927 which permits you to make the lawyer pay the costs. Now, I will admit I have had my law clerk make copies of that and at the end of some pretrial conferences, I've handed it to one or two lawyers ... but I've never had any conversation about it. I've never really had any difficulty. I think part of it is these frequent conferences that judges ought to have. It's just like identification of issues. I set a trial date right away, but it's not an absolutely inflexible thing, but by being in touch with the lawyers every 30 days or so, I keep abreast of issues. The issues are going to change, and I know that. the only thing I'm watching for is to be sure nobody shoots a partridge on the ground. I want everybody to get their fair shake. I really haven't had too much trouble, but in that connection I might say every antitrust case, you know, is not an IBM case, and part of the problem, and this ... part of the problem is that part of the plaintiff's bar finds an antitrust problem behind every contract, and sues for these 50 million dollars or 100 million dollars and defense counsel says to his client, if he gets you, he's going to get you for three times that; when the case is probably worth $100,000.

Now, what happens is the defense lawyer is going to go out and paper him to death, and I've had that situation and I've called them down and said what are you doing it for, and the lawyer's answer is quite understandable. He will say, "Judge, they have sued us for 50 million dollars and if they get it, we can pay it and we're just not taking any

chances." The point I'm making is that I think a little bit more responsibility on the part of certain segments of the plaintiff's bar might be of help.

MS. LOVEJOY: I've been a little surprised at the comments today that are so negative with respect to the use of magistrates. I think the Commission came out against their use and I think most of the judge panelists have spoken out against their use. Judge Merhige, do you use them?

JUDGE MERHIGE: No, I don't use them at all. The only one I've ever had is a special master for settlement. No, I want to know what's going on. I have a hard enough time understanding things when they're taught to me. I want to stay with it right from the beginning.

JUDGE POLLACK: That's because he's a country judge.

MS. LOVEJOY: Traveling from city to city, I'm afraid. Eleanor, did the Commission suggest that they not be used at all?

PROF. FOX: No, we suggested generally against the use of magistrates, but like Judge Pollack, we recognized that individual judges have their own practices and preferences. We suggested judges should feel free to do whatever works best for them.

JUDGE SINGLETON: Unless you're going to create a lower level of federal jurisdiction. In my view, one of the greatest failures that we've had is the magistrate. That's my view. I think if you have one magistrate for every judge it may work, but in a multi-judge district like Houston, we have now three magistrates for nine judges. The lawyers are not going to pay any attention to the magistrate. If they've got a case, they send some paralegal or some guy just out of school over to the magistrate and they don't pay any attention to what the magistrate says. It's a waste of time, I've found.

JUDGE MERHIGE: It may change. I think part of it is the way they set it up, you know. It's kind of hard to get anybody to take your job for $22,000 a year and I think that's what it was when we started, for the magistrate. Now, I think they're up at $48,000, but a lot of the fellows that came on at the 22 have had their terms renewed while at the lower salary. I think we may find a different situation later but I think we're some years away from it. We don't use them in our district, in any event. We have them. I don't know what they do.

(Laughter)

MS. LOVEJOY: Mr. Kadish?

MR. CHARLES KADISH: Miss Fox used the word stonewall and made reference to settlement ... Judge Singleton mentioned discovery and the problem now relating to civil depositions. Did the Commission consider recommending that the organized crime control act of 1977 be
revised...

PROF. FOX: No, in fact, our considerations were almost all on the civil side...

MR. KADISH: That does have significance ... Most major antitrust cases...

PROF. FOX: Yes ... yes. The answer is we did not.

JUDGE SINGLETON: I was going to ask the same thing. You said something about they considered that the idea of the government getting the plaintiff's documents?

PROF. FOX: The idea of the government's getting targets documents That is, the government is investigating a target company, and the same company is a defendant in a private case. The private plaintiff has and has organized the defendant's documents.

The Commission did consider better access to transcripts of grand jury witnesses. The Commission as a whole did not recommend change in the procedure whereby the applicant must show particularized need to obtain disclosure. However, I and two of my fellow commissioners recommended amendment of Rule 6(e) to provide for continued secrecy only where the government demonstrated particularized need for preserving secrecy.

JUDGE SINGLETON: One thing I would like to ask the attorneys and Judge Pollack, too, because he's on the Judicial Conference Committee ... I'm talking about interrogatories and depositions. Isn't it really unreasonable to impose this hundred mile limit on subpoenas, where you can't subpoena a witness more than 100 miles of the district? Isn't that unreasonable? The government can subpoena anybody they want to in any case. They're not bound by the 100 mile limit. If the plaintiffs in a private case want to pay the expenses of subpoenaing a witness from New York to Houston, Texas, why in the world not let them? I think the 100 mile limit ought to be abolished from the rules of civil procedure.

MS. LOVEJOY: I think in many of these cases it effectively is abolished to the extent that the attorneys agree that all depositions will take place in one of three or four cities.

JUDGE SINGLETON: We've done that in the civil case. Depositions all take place in New York, Washington, Philadelphia, San Francisco, etc., but in the other type case, the plaintiff wants to take somebody's deposition in federal court. Why shouldn't he be able to do it if he's willing to pay the cost of that witness coming in?

MS. LOVEJOY: Could you please state your name for the purpose of the transcript ... your question ...

MR. MICHAEL MOSKIN: I wonder if one of the judges or all of them would comment on the appropriateness or inappropriateness of making summary judgment motions that go to the merits based on expense of pretrial discovery ... such a motion might or might not have delay in the trial.

MS. LOVEJOY: Would one of you like to ...

JUDGE MERHIGE: I could quickly. It wouldn't delay a trial before me. If it was filed that late, I just wouldn't give any further consideration to it, but it's kind of odd to get a summary judgment to stick in an antitrust case. You might do it, but it's one of the suggestions for expediting cases. There are, of course, some issues that you can decide in

advance of trial and it saves a lot of time and you ought to make your motions to dismiss, affirmative defenses for example, that sort of thing early on.

MR. MOSKIN: My real concern is I'm curious about how a judge would approach it. Would you rather try the case and let them go through briefs that make citations ...

JUDGE MERHIGE: Well, I don't get 100 page briefs more than once from any lawyer ...

(Laughter)

I mean it. I'm not going to be hypocritical about it. I didn't take this job to do that. Any lawyer who files a 100 page brief with me is out of his mind. My bar knows that my mind stops after page 16. I mean, they can't do that in the Supreme Court of the United States. No, I don't take 100 page briefs. I give it back to them and just like Judge Pollack with his depositions, paraphrase it. Give me your two best cases and move on.

MS. LOVEJOY: Would either of the other two judges like to comment on that question?

JUDGE SINGLETON: On the Fifth Circuit if you give a summary judgment, you're going to get reversed. So I never give it.

(Laughter)

MS. LOVEJOY: Judge Pollack ...

JUDGE POLLACK: It's almost professional malpractice for somebody to lose a summary judgment motion. If you can't contrive by elastic words enough concepts to make a glimmer of a triable issue of fact, you're not a very good lawyer. My feeling about summary judgment is this. If you're ready for summary judgment, it means that you have lined up the relevant witnesses with the relevant testimony, and you're ready for trial and I want to see that fellow on the witness stand, where he can't use those rubber words concocted by the lawyer, give the testimony.

Now, in the Second Circuit, you practically have no chance on a summary judgment motion unless you have an iron clad general release backed up by a promisory note and backed up by a party who's dead who can't testify.

MR. MOSKIN: That's why these motions seem to be made.

JUDGE MERHIGE: And they ought to be made in the proper case. I don't want to speak for Judge Pollack. They're hard to win but that's no reason to make them.

JUDGE POLLACK: Name me one that's been won.

JUDGE MERHIGE: I'm stuck on that. That's what I said before.

MS. LOVEJOY: Especially in the Second Circuit. Mr. Kohn...

MR. HAROLD E. KOHN: I can name you one. As a plaintiff's lawyer I didn't tell anybody this, but representing a defendant, we did before Judge Stewart obtain in summary judgment in an antitrust case. The Court of Appeals dismissed the appeal and awarded us double costs. You have to choose the right case. You have to be moderate and sensible and practical in all of these things. It can be done in the right case and has

been done. Judge Clary, in the Eastern District of Pennsylvania case, gave summary judgment to the government in a major antitrust case because he said he wasn't going to listen to people deny what was plain in their own documents, that were written by them.

JUDGE POLLACK: Well, I could tell you about Judge Stewart's case and why that was dismissed, but I think that would be telling tales out of school. But every iron clad rule has an exception and you've got it.

(Laughter)

MS. LOVEJOY: Yes, Charles ...

MR. MOSKIN: All three judges talked about depositions and use of depositions in trial. In one case that I was involved in, we tried the case by affadavit and not just one sided affadavits. This was a Section 7 case where both sides went out and got affadavits of witnesses ... they decided to exchange that and then worked out a change among ourselves and submitted it as joint affadavits as testimony of the witnesses. Where we could not reach agreement, the underlying affadavit, the original affadavit would be filed, and the witness could be called to trial for cross-examination and redirect. What would you think about that?

JUDGE POLLACK: All that you are citing is an agreed statement of ultimate fact and controverted statement of what you've just recited is this, and it's what I have said for years. That if the lawyers cooperate, they can both agree on what is reasonably controvertable and what is not, and the only thing that is reasonably controvertible is the issue of credibility and the conclusion of law. Of course, all other things wind down to agreement subject to clearing up semantics, and what you are saying is that the things that you didn't agree upon involve somebody's credibility. Otherwise, the affadavit would have been accepted. I think that's a good idea, better than a deposition.

PROF. FOX: Your case sounds like the *Amax* case before Judge Blumenfeld. There was a case before Judge Blumenfeld in the District of Connecticut, which was also a merger case, and which we cited it in our report. The interesting thing about it was, and this may have been true in your case, both sides had the incentive to expedite. The acquiring company wanted to be certain that the merger was legal or did not want to merge. When the parties have the incentive to expedite, they do. The key to expedition is the incentive to expedite.

JUDGE SINGLETON: Excuse me, on depositions I often ask lawyers, "Have you ever sat down and thought about how much money your client has spent on this simple phrase, 'now let me ask you this?'

"Did you ever figure out how much money you cost your clients in depositions? Just the little phrase, 'now let me ask you this'" by God, it's repeated a thousand times — "now let me ask you this."

PROF. FOX: Actually, in the old bill, S.1284, there was a provision for defendants to get attorneys fees in meritless cases. It would have been a very hard standard to meet. The provision was never enacted.

Attorneys' fees are granted only to successful plaintiffs because private plaintiffs are, to some extent, private attorneys general. The Clayton Act meant to encourage private antitrust suits as a complementary source of enforcement.

MS. LOVEJOY: Yes ...

MS. HARRIET MULHERN: I'm Harriet Mulhern, Federal Trade Commission. I would like to pose this as an idea and address the question of feasibility to Judge Pollack. I thought while sitting here why not break down these complex monopoly cases into two, three, or four cases with separate juries. What I have in mind is defining the issues which apparently are numerous. I'm assuming they're numerous in order to come up with so many pages. So, we have more than one issue. I personally sitting here and that's why I wanted your opinion on it. It seemed in my mind with breaking down these gigantic complex cases into separate cases with separate juries and a matter of expediting.

JUDGE POLLACK: An immediate answer to that and probably not a complete answer is that 7th Amendment entitles you to a jury trial of all the issues. There is some serious question as to whether you can have a different jury for liability and a different jury for damages, unless there has been consent and the reason for it ...

MS. MULHERN: It's a good idea.

JUDGE POLLACK: Yes, you've just got to modify the Constitution, that's all.

MS. LOVEJOY: We're running very short on time. If there are no further questions, we will end the program. We'll be here for a few minutes after the program if someone would like to put a question to one of the panelists. We thank you, all of the panelists, for being here today and for their very interesting presentations and we thank you for being here.

(Applause)

Recent Developments Under the Robinson-Patman Act

MR. MICHAEL MALINA: My name is Michael Malina. Let me welcome you to this workshop on Recent Robinson-Patman Developments. Given the quality of the competition provided by the other workshops, I want to thank each of you for coming. I don't pretend that Robinson-Patman issues are as interesting or as sexy as either Innovation or Pre-Trial Procedures in Large Antitrust Cases, but we'll try to make it as interesting for you as we can.

At the very outset, let me express our regret that one of our speakers, Peter Standish, is unable to be here today because of illness. We will try to substitute for him as best we can. The members of our panel are eminently qualified to discuss problems under the Robinson-Patman Act. To my right is Bill Dallas who, believe it or not, is a direct decendant of President Polk's Vice President and the founder of the city which bears his name. He is associated with Sullivan and Cromwell and has had extensive experience

in cases under the statute, particularly a recent leading Second Circuit case which you'll be hearing more about later, *FLM v. Ford.* To my left is Charles Kazlauskas, Jr. who heads up Texaco Inc.'s antitrust litigation operation. I think that if one counts the reports of Robinson-Patman cases, the name Texaco appears more often after the V than any other name. Charlie has had a very substantial string of successes under this statute, and we'll be hearing about some of that later.

There's been a great deal of talk about the Robinson-Patman Act in recent years, most of it devoted to whether or not the statute ought to be retained. At this juncture I suppose those decisions ought to be left to the senators and the congressmen and to Mr. Litvac. We'll try to spend our time today talking about what the statute does as we have it, and how we can comply with it.

Let me suggest at the outset that audience participation is encouraged. Anybody who has any questions at any time just put your hand up in the air, and we'll try to deal with it. There's a lady over here who is going to be trying to take down a transcript of what we're saying. She's asked me to ask you first to identify yourself if you have a question, and second to try to speak slowly enough so that she can hear you.

The Robison-Patman Act can best be described as a jigsaw puzzle of an abstract picture. If you're trying to comply with it or to bring a lawsuit under it or to defend one, you're often going to be best advised not to try to make sense out of what you're doing, but to look at the various statutory elements and put the pieces in piece by piece, leaving for someone else to decide whether the picture that you come out with makes any sense. This statute is notorious for not making very much economic sense. At the same time, if you try to look at the pieces one by one we can bring some rationality to it. Before we get into the interesting questions of injury to competition, functional discounting, meeting competition, defenses and damages, it's important to lay out clearly in our mind what the statute's basic jurisdictional requirements are. There are essentially five of them —and we're talking here about Section 2(a) which is the basic subsection of the Robinson-Patman Act which deals with price discrimination. The statute doesn't apply unless its peculiar interstate requirements are met. There has to be a discrimination in price. The price discrimination has to be between different purchasers. They have to have purchased commodities, and the commodities have to have been of like grade and quality. We'll try to look at each of those requirements in turn.

First of all, then, we have the statute's commerce requirement. The Act says that a seller has to be engaged in commerce before the statute applies. That is the one part of this statute that hardly ever is significant in litigation, because virtually any company that has substantial business is engaged in commerce. If the company buys anything that's sold interstate or has generally interstate business, it will be engaged in commerce, and it's very rare that you're going to be able to defend a price discrimination situation based on that language. So we'll pass it. More significantly, the

statute says that the discrimination has to be in the course of such commerce where either or any of the pruchases involved in the discrimnation are in commerce, and that means that at least one of the two sales which are being compared pricewise must cross a state line. The Sherman Act's much broader jurisdictional base, which the Supreme Court just expanded even further the other day in the case against the New Orleans Real Estate Board, does not apply to the Robinson-Patman Act. It is not enough for the plaintiff or the Federal Trade Commission to show that a price discrimination had an interstate effect. We have to have sales in commerce which means across a state line, and that requirement is also applicable to cases under Sections 2(d) and 2(e) which have to do with promotional allowances and the provisions of promotional facilities. One caveat. It is not 100 percent clear just how the commerce requirement applies to brokerage payments under Section 2(c), although I think the better rule is that you have to have sales in commerce there as well. What does it mean that at least one sale has to cross a state line? Well, the easy rule is obvious from the statement of the rule itself. If there's a seller in New York who sells a product to one purchaser in New York and to another purchaser in New Jersey and the prices are different, that's most likely a price discrimination which is in interstate commerce.

Were the litigated cases raise a problem is where goods come in from out of state, sit in a warehouse for a while, or are converted somehow into something else, and then sales are made within the state. Are the sales in interstate commerce? There's no easy off-the-top-of-the-head rule on this, but the recent decisions in the district courts seem to be applying the following tests. If the goods are sitting in a warehouse but they are earmarked for a particular purchaser before they came into the warehouse from out of state, the flow of commerce most likely will not be deemed to have been broken, and if the goods came from out of state in the first place they will be deemed to have been sold in interstate commerce for purposes of the Robinson-Patman Act. On the other hand, if goods come in from out of state and are put into a general warehouse where no one can tell when they go in to whom they're going to go, most likely the courts will find that the goods are no longer in commerce, that the stream of commerce has been broken, and if two sales are made within the state, the Robinson-Patman Act does not apply. I should warn you that in this particular area it is not easy to reconcile all of the cases, and that if the issue is going to be litigated one ought to look very carefully at the case law, particularly in the district or circuit where you're litigating.

For purposes of planning, for purposes of advising clients, the best rule is to assume that this aspect of the commerce requirement is likely to be met if you're dealing with an interstate company, and assume that you're not going to have a valid commerce defense. If litigation arises, then you can worry about whether or not you can show that this element of the violation isn't present.

There's another aspect of commerce which ought to be borne in mind. The statute says that the discrimination has to be in sales of goods

which are sold for use, consumption or resale within the United States. Unlike the Sherman Act, there is no foreign commerce within the scope of the Robinson-Patman Act. That means that if one of the sales which is being compared is either sold out of the United States or sold to an exporter for sale outside of the United States, the statute does not apply. Again, there's case law suggesting that when the peculiar problems of brokerage payments under Section 2(c) are involved, this limitation may not be read into the statute. That's a question with very little case law on it. What little law there is suggests that the domestic use or consumption or resale requirement doesn't apply to 2(c).

There are interesting Sherman Act implications in a pricing program which charges lower or higher prices, as you will, on sales for exports than for domestic sales, because a requirement that the goods be sold only outside the United States by contract runs you into the rule of reason under the *G.T.E. Sylvania* case; and it may be that you are permitted under the Robinson-Patman Act to give a different price for exports on the assumption that they will be sold for export, or even require your customer to tell you after the fact where he resold the goods in order to justify your different pricing to him, but you run some sort of a Section 1 risk if you actually impose a restriction on him that he only sell the goods in export. That's a question that has not been litigated very much. The little litigation that we've had merely establishes that if you're selling to somebody who is an exporter or selling outside the United States this statute doesn't apply.

Once we've got a sale in interstate commerce the next question is is there a price discrimination. Generally speaking, with the exceptions I'll come to in a minute, a price discrimination means merely a price difference. There's no implication in the word discrimination of a neferious difference or an anti-competitive difference. That comes in later on when we worry about whether the discrimination is likely to substantially lessen competition. If there's a price difference, there's a price discrimination. What's interesting is the converse of that principle. If there's no price difference, there's no price discrimination, and this statute does not apply whatever the economic consequences. That means that a seller may lawfully decide to sell to everybody — wholesalers, retailers, and consumers —at the same price, a situation which makes it impossible for either the wholesaler or retailer to make a profit because they will be finding people lower down on the chain of distribution getting the same price that they're paying. This statute is not violated whatever the consequences because there's no price discrimination. Thus, it is lawful to charge a uniform delivered price throughout the United States even though such pricing entails economic discrimination according to the economists. The fellow who is right next to the plant pays the same price as the fellow who is three thousand miles away even though there's a very significant differential in terms of freight. That doesn't matter. One judge, Judge Lasker, in the Southern District of New York about a year or so

ago in a case called *Worldwide Volkswagon v. Audobon Motors* (it appears in 1978 Trade Cases) was very troubled by this and stated, without authority to support it in my view, that a uniform delivered pricing system which entails such an economic discrimination can violate this statute, and he refused to dismiss a complaint on its face. As far as I know, that's the only case that has suggested this result outside the broader limits of Section 5 of the Federal Trade Commission Act, which we'll get to in a minute. I would suggest to you that that's a ruling you shouldn't concern yourself with. Generally speaking, if you charge everybody the same price the statute doesn't get violated.

Now, it is not a price discrimination if the same price is charged to all customers who are selling at the same level of distribution, even though those same customers get different prices when they sell at different levels of distribution. Suppose I have a purchaser who is a duel distributor, he's both a wholesaler and a retailer, and I say to him, "I'll charge you a dollar when you act as a wholesaler and sell to retailers, and $2.00 when you sell as a retailer to consumers," and I have two people, one of whom sells as a retailer and the other sells as a wholesaler so there's a price difference in the prices they pay for the same products. That is not a price discrimination, because the same price was available to each of those customers depending on the function he was performing and what he was going to do with the goods. That is the holding of the *FLM* case which we'll hear more about a little later on on the issue of functional pricing. What's interesting about it is that the court did not approach the question as one of injury to competition, but rather approached it as involving whether there's a discrimination in the first place. To repeat, the court held that if you can establish what it is your customer is doing with the goods, you can charge different prices depending on his resale function so long as both prices are avalable to everybody, there being no discrimination.

The same idea of functional availability is more readily understood in the context of a simple cash discount. A seller charges one dollar for his product to everybody, but tells his customers that anyone who pays him cash within 30 days will get a five percent discount. One customer pays early. The other does not. There's a price difference, but the courts have consistently held that that is not a price discrimination, because the lower price was reasonably available to anyone who wanted to take it, and you can't hold the seller responsible.

I should add that there's a great deal of confusion in these cases as to whether this notion of functional availability really goes to price discrimination or whether or not it should be considered only in the context of injury to competition. The courts are fairly split on that.

Price, for purposes of determining whether there's a price difference, means not only the actual price that is paid, but also price related in terms of conditions of sale. Credit arrangements, freight allowances and the like. You look at the general net price that's paid and you compare it with that paid by the other purchaser. As you know, the Federal Trade Commission

has very broad powers under Section 5 of its statute to condemn as unfair methods of competition practices which might not otherwise violate the letter of the antitrust laws. The Robinson-Patman Act is no exception, and in certain industries — cement is one — the Commission has considered the question of whether or not uniform delivered pricing, which would not involve a price discrimination if you were construing this statute, is nonetheless an unfair method of competition which should be prohibited. There is presently an investigation going on under the Trade Regulation Rule Practices of the FTC to see whether or not such a rule should be imposed on the cement industry.

Okay. We have a price discrimination and sales in interstate commerce. The next requirement is that there be different purchasers. That means that there have to be two actual sales. The statute does not apply to leases. It does not apply to licenses such as licenses for making phonograph records from masters. It does not apply to true consignments and true agency arrangements. I say true because there often will be a litigable fact issue as to whether or not what is denoted a consignment in a contract is in fact a consignment, or merely a sale called a consignment. Charlie is aware of a number of cases involving oil distribution where the factual issue has been very hotly litigated, and different fact finders come out different ways on it. Generally speaking if it's a true consignment, it's not within the statute. There have to be two completed sales, or at the very least contracts to sell. This statute does not apply to refusals to deal. Whatever the Sherman Act consequences may be, it cannot violate the Robinson-Patman Act if I'm selling to one customer at one dollar and another fellow comes to me and says, "I'd like to buy from you for one dollar," and I say, "No, if you're going to buy from me it's going to have to be at two dollars." If he refuses to pay that price and sues me, that does not violate the statute because there hasn't been a price discrimination between two actual purchasers.

One interesting aspect of the purchaser question which has been litigated in recent years is the question of whether or not intra-enterprise transfers, for example, between a parent company and its wholly-owned subsidiary, can be viewed as purchases by the subsidiary for purposes of the Robinson-Patman Act. If they are so viewed, it makes it very difficult for an affiliate to give its subsidiary a lower price without running into all kinds of price discrimination problems.

Prior to 1979 the case law seemed to be that there was no separate sale to the subsidiary unless it was run as an independent entity, held out as an independent entity, and there was arm's length negotiation between the seller and the buyer. This generally took care of the situation where transfers at a low price close to cost or at cost were merely a matter of internal bookkeeping, but the cases permitted of a situation where there could be purchases for this purpose if the companies were actually dealing with each other at arm's length.

Just a few months ago the Fifth Circuit in a case called *Security Tire and Rubber* expressd very serious doubt whether that should ever be the

case, and it held that a parent's transfer to a wholly-owned subsidiary is never a sale for purposes of the Robinson-Patman Act. There was also a case in the Southern District of Illinois a few years ago called *Snyder v. Howard Johnson* that stands for the same proposition.

For the present time, outside the Fifth Circuit, I would say the issue is an open one and will turn as do most antitrust questions involving intra-enterprise relationships on whether or not you're really talking about a single business entity or whether you're really talking about separate companies that happen to be affiliated.

Then there is the other side of the coin — sales by two related companies. Are they sales by one company for the purposes of the price discrimination law? There's one case on that of which I'm aware. Back in 1957, the court held that unless it can be shown that the affiliated companies really had a separate existence, separate sales policies, you can't treat their sales as being by one company.

Needless to say, sales to separate purchasers for purposes of the Robinson-Patman Act have to be reasonably contemporaneous or else there's no price discrimination. It would make absolutely no sense to say that if I sell to somebody in 1960 for one dollar and then sell to somebody else in 1980 at 20 dollars if that's the proper rate of inflation, and I suppose we're close to that, there's a price discrimination. That statute is designed to attack price discriminations in reasonably contemporaneous sales.

There is one wrinkle to the purchaser requirement which ought to be borne in mind: the so-called indirect purchaser doctrine. Under this doctrine, which is rarely applied, a seller can be held responsible for the prices charged his customer's customer if that seller is in reality controlling the price charged to his customer's customer usually in situations where there have been direct dealings with the original seller and the customer's customer. Thus if a company sells to a wholesaler who sells to a retailer, but the original company's salesmen are out there deaing with the retailer at all times and there's sufficient control over the price the wholesaler is charging to the retailer to make it equitable to hold the original seller responsible, that retailer will be considered his indirect purchaser. There are usually problems of verticle price fixing under the Sherman Act in such situations as well. That's for another day.

This question of whether or not an indirect purchaser is a purchaser for purposes of the jurisdictional elements of the statute is a very separate one from the question of whether or not an indirect purchaser has standing to sue the original seller for what otherwise might be a Robinson-Patman violation.

Assume the seller sells to a wholesaler who is selling to a retailer and he's also selling directly to a retailer, and he charges the retailer one dollar and charges the wholesaler two dollars. Also assume that the wholesaler takes a 50 percent markup and charges his retailer-customer $2.50 that is almost invariably a violation of the Robinson-Patman Act unless there's a meeting competition defense, because there's injury to competition with the favored buyer. It is going to cost him one dollar. If he resells at $1.50, he

can't conceivably make a sale unless he's willing to take $1.50 loss on every unit that he sells, and we now have a lawsuit by this retailer against that seller. In that situation, the issue is whether or not the retailer has standing to bring a damage case. It is not an issue whether or not there have been sales at discriminatory prices between two purchasers because there have. The wholesaler is one purchaser and the retailer is another. The courts are split as to whether or not such an indirect buying plaintiff has standing to assert a cause of action.

One judge in the Northern District of California just last year held that as a matter of antitrust injury and standing principles, the indirect purchasing plaintiff was within the target area of the violation. He was injured by that which made the price discrimination unlawful and should be able to sue. There is another line of cases ... the leading case is *Klein v. Lionel* I believe ... which holds the contrary. That line of authority says that unless you're a direct purchaser you are not permitted to sue, again as a matter of standing principles. The issue is really an interesting one, because we have two conflicting lines of standing philosophy that merge in this situation. On the one hand purely is a matter of antitrust injury under the doctrine of the *Brunswick* case, one could argue that this retailer is injured by that which makes the discrimination unlawful. On the other hand, in order to prove his claim he's going to have to prove a kind of pass on which the Supreme Court in the *Illinois Brick* case (involving a different set of facts) found inappropriate as a matter of law in holding that an indirect purchaser of a price fixed product can't recover. Until we get further enlightenment either from the courts of appeals or from the Supreme Court of the United States, that issue will have to remain an open one.

Now, the important thing to bear in mind is that this question of standing does not have any bearing on whether or not there are two purchasers who are making purchases for purposes of jurisdiction.

The next element of the statute which has to be borne in mind is that it does not apply unless we have sales of commodities. These are the words of the statute, and that means we must be dealing with tangible property, goods. The statute does not apply to the sale of services or other intangibles. Thus, we have cases that say the Robinson-Patman Act doesn't apply to sales of electric power, doesn't apply to leases or sales of real estate, doesn't apply to television advertising time, doesn't apply to services such as repairing glass on automobiles. There's one case that says it doesn't apply to the sale of mutual fund shares because those aren't commodities. There are several cases that hold that the sale of space in newspapers for advertising is within the statute. I think they're questionably decided and the recent decision of the Second Circuit just a few months ago in the Ambook case (which held that sales of advertsing through advertising agencies generally are not within the statute) I think casts a very substantial doubt on their holding. Generally speaking, you have to have commodities, and the commodities have to be of like grade

and quality. That means very simply physically and chemically identical, or at least sufficiently physically and chemically identical as not to make a marketing difference. It is not a defense on the issue of like grade and quality that people think goods are worth more than other goods which happen to be the same. That was the issue in the Supreme Court decision in the Borden case where Borden argued that their private brand milk, which was the same product that they were selling under the Borden brand but they were selling for less money, was not of like grade and quality with the branded milk because people were willing to pay more for the Borden name. The Supreme Court said that when it comes to fitting in the jigsaw puzzle labelled like grade and quality that's irrelevant, but it had to be considered in deciding whether the price discrimination had an anti-competitive impact, and the lower court ultimately found that it did not.

That completes a very basic summary of the jurisdictional elements of the statute, and before we turn to the more interesting questions of injury and competition, I would like to touch very briefly on what is known as the *Grand Union* Doctrine under Section 5 of the Federal Trade Commission Act which colors everything that I've already said. While all of the technical requirements of Robinson-Patman apply in private actions under the antitrust laws, when the Federal Trade Commission attempts to enjoin what it may deem to be unfair methods of competition, it has broad latitude under the Second Circuit's decision in the *Grand Union* case to fill in the interstices of the statute so long as they are within its spirit. Interestingly enough, the Federal Trade Commission on occasion runs much farther with that ball than one might expect the courts wanted to and we have a recent decision by a hearing examiner in the General Motors crash parts case where there was plainly no price discrimination under the Robinson-Patman Act. The administrative law judge held that there was neither monopolization nor an attempt to monopolize but nonetheless he found what he considered to be an invidious discrimination and ordered it enjoined under Section 5.

Before we turn to the next issue, does anybody have anything they would like to ask or comment as far as we've gone? Yes sir.

MR. STEPHEN HAUFFMAN: Could you just briefly touch on the relationship of volume discounts?

MR. MALINA: Yes sir, if Bill will forgive me for intruding a bit on what he's about to touch on. Contrary to the assumption of most American businessmen and certainly most clients that I've dealt with, most quantity discount schedules if they are not cost justifiable and if they are not within meeting competition defense may violate this statute. The best rule of thumb I can give you is that it will not be a violation if the largest discount is on a volume reasonably buyable by the smallest customer. If the small fellow is going to be in a position reasonably to take advantage of the highest discount, even if he doesn't in fact, I think you should be able to define the schedule. The doctrine is called functional availability. You have

to bear in mind that we're dealing with a statute here which was specifically designed to protect the small customer against the large customer, and the quantity discount runs head on into that legislative pupose, and if there's a small fellow who is likely to be hurt, the bias of the court is going to be very much against it. Yes sir.

MR. KEN BERNARD: The problem I've always seen is if you have a customer who specifies what he wants and it may be almost identical to what you're making for somebody else ... I'm not talking about cost justifying. The price is probably going to be different. We've got three customers, each one is specifying ...

MR. MALINA: Generally speaking, if you are making a custom product for a particular customer and it's going to be different than the product you're selling to someone else, so long as the difference isn't so insignificant as to be de minimis, I think you're entitled to charge whatever you'll charge for the trouble of making it up special. On the other hand, it's very dangerous to have general rules here.

With that introduction to the jurisdictional elements of the statute, we'll go on as I said to what most people consider to be a lot more interesting which is section 2(a) requirement that before a price discrimination can be found unlawful, it must be shown to be likely to substantially lessen competition, and for that we'll turn to Bill Dallas.

The Robinson-Patman Act: Injury to Competition

MR. WILLIAM M. DALLAS, JR.: I think Mike has given us a very good summary of the jurisdictional hurdles which must be surmounted to state a claim under the Robinson-Patman Act. There are other requirements which must also be satisfed in order to make out a successful claim under the Robinson-Patman Act. One of these, as Mike mentioned, is that there be a showing of substantial likelihood of lessening of competition.

The statute itself identifies three competitive levels at which one can try to measure the lessening of competition.[1] The first level is the seller level. If a competitor of the seller, who is granting the discriminatory allowances, is able to show that he has been injured in his competition, he then has made out what is commonly referred to as a "primary level injury" claim; but there are other levels also. A customer who does not receive the same discount that another customer of the same seller is receiving likewise may be injured in his competition with the favored customer, and that frequently is referred to as "secondary level injury." Finally, as Mike's diagram shows, you can also have claims of competitive injury at even remoter levels than the initial customer level. For example, if a seller grants to a favored retailer a substantial discount in price that is not available to wholesaler-customers of the seller, the favored retailer is paying less than the wholesaler, and certainly less than the retailer-customers of the disfavored wholesaler. If these retailers compete with the favored retailer, the latter may enjoy a substantial cost advantage. The Robinson-Patman Act seeks to remedy this situation by providing that

injury to competition may be shown as well at the "tertiary level" — where the injury occurs to a customer of the direct purchasing disfavored customer. Those are the three levels at which injury to competition may be shown.

PRIMARY LEVEL INJURY

Because of time constraints, I'll focus mainly on injury to competition at the primary level and the secondary level. Turning first to injury to competition at the seller level or primary level, the cases are virtually uniform: for the competitor of a discriminating seller to make out a claim of primary level injury he has to point to something in addition to just showing that the seller is charging two different prices for the same product; he must show that the discriminating seller is engaging in or has engaged in predatory conduct.

I think it is useful, when analyzing primary level cases, to distinguish cases decided before 1975 from those of more recent vintage.

The leading pre-1975 case on predatory conduct is the Supreme Court's decision in *Utah Pie Company v. Continental Baking Co.*,[2] a case which has been the bane of scholars and lawyers alike, partly because of the decision's vague analysis of the allegedly predatory conduct of the three defendants, who were large national baking firms. In addition to making cakes and bread, the three firms for a relatively short period of time engaged in price cutting in a local market, Salt Lake City, Utah. The plaintiff, Utah Pie Company, was not a struggling, small-sized competitor for which one might have sympathy. It was a virtual monopolist in the Utah market, but it saw its market share decline to some extent during this period of localized price cutting. Even so, during the relevant period, Utah Pie was the dominant factor in that market; it was enjoying substantially increasing sales of its pies during that period, and it was continuing to enjoy substantial profits. Notwithstanding these facts, the Supreme Court found that there was substantial evidence of predatory conduct on the part of the three defendants. With respect to two of the defendants, the Supreme Court *appears* to have found that they had made sales below their fully allocated costs during all or part of the period in which they were engaging in some form of price cutting. As to the third defendant, it appears that its primary sin was placing an industrial spy in the plant of Utah Pie which the Court found somewhat shocking. Nevertheless, the Court labelled this conduct predatory. Instead of stating clearly what predatory conduct means, the Court resorted to a vague condemnation of these three defendants for causing "a deteriorating price structure." It was deteriorating from a monopoly price level to a more competitive level; nonetheless, the Court deemed such pricing to be a violation of the Robinson-Patman Act.

Other pre-1975 cases have similarly lacked clarity as far as their condemnation of predatory conduct. In the 1960's the FTC brought an action against Lloyd Fry Roofing Company, accusing that company of taking steps to discipline a competing roofing company for failing to follow

a publicly announced price increase.[3] The way Lloyd Fry decided to discipline this errant competitor was to estimate what that competitor's costs were, and to price below the competitor's costs, but above its own costs. The FTC claimed that this pricing practice was predatory in violation of the Robinson-Patman Act and resulted in primary level injury; the FTC's claim was sustained by the Seventh Circuit.[4]

Another case, decided by the Tenth Circuit in 1973, involving the Continental Baking Company, set forth what might be called the "predatory investment" concept.[5] In that case, Continental, the same Robinson-Patman "sinner" involved in the *Utah Pie* case, had moved its operations from Utah next door to Colorado, and had built a plant in the Denver, Colorado area: a brand new, very efficient, highly automated, great looking plant. The problem was that at that time there was excess capacity in the Denver bread market, and the plaintiff (Old Homestead Bread Co.) claimed that the only way Continental could have operated its new plant at a profit was if some of the other competitors in that market closed up shop and left. Homestead claimed that the construction of this new plant was sufficient evidence to show a predatory intent on the part of Continental, even though there was no evidence of below cost sales. The Tenth Circuit agreed that the investment decision by Continental was sufficient evidence of predatory intent to give rise to a successful claim of primary level injury.

That, in brief, was the state of the law prior to 1975. It was a rather unhappy state. The case law offered little guidance to measure predatory conduct or to distinguish such conduct from lawful, aggressive competition.

However, 1975 was a watershed year. It saw the publication of the now famous article by Professors Areeda and Turner. The article was entitled *Predatory Pricing and Related Practices under Section 2 of the Sherman Act.*[6] Although the article focused on claims to predatory pricing under Section 2, the analysis set forth in the article is appropriate, as the authors recognized, to primary level injury claims under the Robinson-Patman Act.

What Areeda and Turner did in their article was to acknowledge that the law was in a sorry state as far as providing any meaningful standard or distinguishing predatory from non-predatory conduct. They sought to fill the void by articulating a two-prong test. Simply stated, the test is: if a seller prices his product at a price which is above his reasonably anticipated marginal costs or his reasonably anticipated average variable cost he is acting in a presumptively lawful, non-predatory manner. Conversely, if he prices his product below his average variable cost or below his marginal cost, he is acting in a conclusively unlawful manner.[7]

For purposes of their analysis, and I think it has general acceptance in economics, they defined the term "marginal cost" to be that cost which is incurred by a seller in producing one additional unit of output.[8] For example, if it costs a seller $10.00 to produce a hundred units of a product,

and he is able to produce 101 units of the same product for $10.01 , the seller's marginal cost for the the extra unit of output would be $.01. Areeda and Turner reasoned that the economists' model of perfect competition posits that competitors price their products at or just above marginal cost. Thus, no penalty should attach in the real world when a seller prices his product at or above his marginal cost; he is pricing in a pro-competitve (indeed, in a perfectly competitive) manner. The only competitors who would be injured by this type of pricing would be those companies which are less efficient than the particular seller. Areeda and Turner concluded that the antitrust laws should not be concerned about the survivial of less efficient rivals. As long as a competitor is pricing at or above marginal costs he should be deemed to be acting in a properly competitive manner.[9] By the same token, they observed that when a competitor prices below his marginal cost he is pricing not only at an absolute loss to his own operation, but he is also injuring equally efficient rivals; they saw little justification for that type of pricing behavior, and concluded that it ought properly be deemed *per se* unlawful.[10]

At the same time, Areeda and Turner recognized that the concept of marginal cost is largely a theoretical economists' tool, which has little relevance when one looks at the financial books and records kept by businesses.[11] As a surrogate to the concept of marginal costs, they suggested that one could use the concept of average variable cost.[12] Variable costs are simply those costs which vary with changes in output;[13] things like raw materials costs, labor costs, transportation costs, fuel costs, and the like are variable costs. Average variable cost is simply the computation made by dividing the sum of all variable costs by the units of output involved.[14]

The Areeda-Turner thesis has been embraced and approved to a greater or lesser extent in four circuits. It has been approved by the Fifth Circuit which was the first circuit to adopt it in 1975.[15] Two years later it was adopted by the Tenth Circuit[16] and by the Ninth Circuit;[17] most recently, the Seventh Circuit adopted this standard, with some qualifications.[18]

What these courts have done in each of the four cases is to dismiss a primary level claim because of the failure of the plaintiff to show that the defendant had priced its product at a level that was below its average variable cost. In the Fifth Circuit case, the question raised was whether the plaintiff was entitled to a directed verdict on the grounds that the defendant had priced its product at a level that was below its total cost, but above its marginal or average variable cost. The court there held that in order to make out a claim as a matter of law the plaintiff has to show that the defendant was pricing below its average variable cost.[19]

In the Tenth Circuit it was just the reverse. The question was whether the defendant was entitled to judgment as a matter of law if the defendant was pricing its product at or above its marginal cost. The court there said yes it was.[20] A similar issue was raised in the Ninth and Seventh Circuits with similar results.

In effect these courts have applied what might be called a double inference test of injury competition. First, one needs to show sales below marginal costs or average variable cost. Once one has made that showing, then the inference is permitted that the seller had a predatory intent, and having made this first inference, it then is permissible to make a second inference, namely that the seller's pricing was injurious to competition.

The Second Circuit has yet to adopt the Areeda-Turner thesis. The Second Circuit's most recent primary-line injury case is *Hall v. Waterbury Petroleum Products*.[21] The court there harkened back to the *Utah Pie* standards and held that there was sufficient evidence to show that the defendant had sold at a price below its total costs which justified an inference of predatory conduct, which in turn supported an inference of injury to competition, and, therefore, justified the issuance of a preliminary injunction.[22]

Moreover, the *Waterbury Petroleum* case indicates that the Second Circuit continues to adhere to its 1945 decision in *Samuel Moss v. FTC*,[23] in which the court held that once the plaintiff shows a price discrimination, he then has satisfied his initial burden of showing injury to competition; the burden is then shifted to the defendant to show an absence of injury to competition.[24]

I would submit that as long as the *Moss* test is applied it does make a difference whether one is talking about a pricing system which is arguably available to all customers operating at the same functional level (*i.e.*, an absence of discrimination) or instead is speaking of an absence of injury to competition.

One avoids the *Moss* presumption as long as one treats the issue as an absence of discrimination. Then the *Moss* doctrine would not apply to shift the burden to the defendant to show an absence of injury to competition. As long as the *Moss* doctrine does apply, however, the burden of showing primary level injury in the Second Circuit, I submit, is substantially less than in those circuits which have adopted the Areeda-Turner principle for two reasons. First, as long as the plaintiff is able to make out an initial showing of a price differential, under the *Moss* doctrine, the presumption is shifted to the defendant to show an absence of competitive injury. Second, assuming that the defendant is able to submit sufficient evidence so that the burden of persuasion is then shifted back to plaintiff, under the *Waterbury Petroleum* standards, it would seem that the plaintiff need only show that the sales made by the defendant were below his total costs in order then to support a permissible inference that the defendant was engaging in unlawful conduct. In contrast, under the Areeda-Turner analysis, one would have to show sales below average variable cost.

On the other hand, under the Areeda-Turner standard, as long as the plaintiff is able to show sales below average variable costs, then he has won as a matter of law. This is not necessarily the case under the *Waterbury Petroleum* standard; additional evidence may be required to show that the below cost sales were motivated by a predatory intent.

SECONDARY LEVEL INJURY

Let us turn briefly to the issue of secondary level injury. There, unlike the primary level cases, we are not concerned so much with predatory intent. Most cases have recognized that injury competition at the customer level is made out when the plaintiff is able to show a significant difference in price and when the disfavored customer is competing with the favored customer in a highly competitive environment. The leading case on this point is the Supreme Court's decision in 1948 in *FTC v. Morton Salt Co.*[25] In that case, Morton Salt offered a graduated system of discounts. The largest discounts were practically available only to handful of large chain stores. The FTC contended that this system discriminated against the small retail grocers who were unable to avail themselves of the larger discounts. The Supreme Court in *Morton Salt* agreed with the FTC's position. The court rejected Morton Salt's claim that the discounts were equally available to all customers, stating that while theoretically they may have been available, they were realistically available only to a handful of large chain stores.

In addition, the Court said that the FTC, having shown that the retail grocery business was highly competitive, had satisfied the burden of showing a "reasonable possibility" of injury to competition between competing grocery chains and retail grocers, and therefore a cease and desist order was properly issued in that case.

Now, as Mike has indicated, where the discount is freely available to all customers, a different situation is presented. The issue then becomes whether there is indeed any discrimination. The *FLM*[26] case I think is interesting on that point, because of the factual context in which that case arose. Ford Motor Co. dealt only with its franchised dealers in the sale of "crash parts" — fenders, bumpers, door panels, etc. The dealers at times used these crash parts in their own repair operations and at other times resold the parts to independent repair shops. Thus, the Ford dealers simultaneously were retailers and wholesalers of Ford crash parts. Since the independent repair shops could not buy directly from Ford, they were at a competitive disadvantage with the dealer because they had to buy from a dealer. At the behest of the FTC, which was concerned about the possible injury to competition at the independent repair shop level, Ford instituted a "wholesale incentive allowance," which gave dealers a discount when they sold to the independent repair shops. The dealers did not receive the discount if they sold to anybody else, such as another Ford dealer, or if they used the crash parts in their own repair operations as a retailer. An independent wholesaler — who was not eligible to receive the discount in purchases of crash parts from Ford dealers — claimed that the incentive allowance amounted to unlawful discrimination because Ford dealers received the allowance on sales to independent repair shops, while he did not, even though he competed with the Ford dealers in such sales. The district court found that this incentive system was discriminatory, relying largely on the principle that price discrimination occurred because two prices were being offered by Ford for the same product: one price

when the dealer resold to an independent repair shop, another price when he resold to an independent wholesaler or anybody else.

The Second Circuit reversed on the grounds that all Ford dealers were treated alike: the dealers got the discount when they sold to qualified customers; they did not get it when they sold to others. Hence, the Court reasoned, there were no favored Ford dealers, no disfavored Ford dealers and, thus, no discrimination.

The *FLM* case also illustrates one of the problems raised by so-called "functional discounts." A functional discount is simply a discount that is given to customers based on the function they perform. For example, one would reasonably expect that a wholesaler would get a lower price from a seller than would a retailer from the same seller. As Mike mentioned however, there is no obligation under the Robinson-Patman Act to offer functional discounts, even though the result would be clear economic discrimination.

When one talks of traditional functional discounts systems, there are generally no serious problems. Even though the wholesaler is paying less, there is no injury to competition since the wholesaler is not competing with the retailer.

Unfortunately, the real world does not always mirror the model of functional discounts. One of the problems frequently encountered is where one wholesaler has an elaborate inventory, he has a nice warehouse, he may have colorful brochures, and salesmen that he sends out; and a second wholesaler has absolutely nothing except a telephone. The question then is: can the manufacturer offer a larger discount to the wholesaler who is offering services than to the other one who does not offer these services?

Initially, the FTC took the position back in 1955 in the *Doubleday* cases[27] that yes, the manufacturer may recognize a difference between wholesalers based on the services they provide. The Commission reasoned that the wholesaler with the inventory, the salesmen and the catalogues was providing services that the manufacturer might otherwise have to provide, and that it was only fair to reimburse that wholesaler for his extra services.

Doubleday, however, is no longer the law. The Commission changed its mind in 1963 in *Mueller Company*.[28] In that case, Mueller had a system of offering discounts to so-called stocking jobbers which were not given to jobbers who were not so classified. The FTC held that *Doubleday* was no longer good law, that when competitors are buying from the same seller they must be treated equally as far as the discounts being offered.

Mueller is now the law. In recent years a gloss has been given to the *Mueller* standards. The most recent case was decided in the Eastern District of Wisconsin last year in *Century Hardware*.[29] In that case the district court held that three conditions must be satisfied in order to have a valid functional discount. One condition is that the discount be equally available to all similarly situated customers. That in essence is what the

Mueller case stands for. In addition, the discount must be reasonably communicated to all potentially eligible customers so they can decide for themselves whether they want to avail themselves of the discount. Finally, the eligibility requirements for the discount must be capable of objective application.[30] If these three conditions are satisfied then you have a valid functional discount. If they're not, you don't.

Another problem that is raised when one talks about functional discounts is where a customer operates at two levels. In *FLM*, the Ford dealers operated at times as wholesalers and at other times as retailers, using the parts in their own repair operations in competition with the independent repair shops. How does a seller protect himself under the Robinson-Patman Act? There is a risk that if you give a discount to the wholesaler he may use that part in his retail operations in competition with a retailer who doesn't get that discount. Thus, you may have injury to competition at the retail level. The practice that is followed most often in these cases is to require the dual functioning customer to document the functional level at which the sale was made. In other words, you do not give the discount in advance of the resale. The risk that one runs, and one has to be careful as Mike alluded earlier, is that the manufacturer or the seller should not use this reporting requirement as a means of policing the resale activity of his customers. There is always the tendency when the manufacturer sees the price at which the dealer has resold the product to get upset; either he's selling too high or too low. If there is evidence of that kind of conduct, then there is a serious risk that the seller may be found to have violated Section 1 of the Sherman Act by having engaged in a form of resale price maintenance.

In closing, I think the guiding rule when one talks about functional discounts is equality in treatment. All similarly situated customers should be given equal opportunity for equal discounts. If that rule is followed, I think Robinson-Patman risks are reduced and reduced substantially.

FOOTNOTES

[1] 15 U.S.C. §13(a).

[2] 386 U.S. 685 (1967).

[3] *Lloyd A. Fry Roofing Co. v. FTC*, 371 F. 2d 277 (7th Cir. 1966).

[4] *Id.*

[5] *Continental Baking Co. v. The Old Homestead Bread Co.*, 476 F. 2d 97 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973).

[6] 88 Harv. L. Rev. 697 (1975).

[7] *Id.* at 733.

[8] *Id.* at 700.

[9] *Id.* at 711.

[10] *Id.*

[11] *Id.* at 716.

[12] *Id.* at 718.

[13] *Id.* at 700.

[14] *Id.*

[15] *International Air Industries v. American Excelsior Co.*, 517 F. 2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

[16] *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

[17] *Janich Bros., Inc. v. American Distilling Co.*, 570 F. 2d 848 (9th Cir. 1977), *cert denied*, 439 U.S. 829 (1978).

[18] *Chillicothe Sand & Gravel v. Martin Marietta Corp.*, 615 F. 2d 427 (7th Cir. 1980).

[19] *Op. cit.* note 15, 517 F. 2d at 724.

[20] *Op. cit.* note 16, 551 F. 2d at 797.

[21] 588 F. 2d 24 (2d Cir. 1978), *cert. denied*, 440 U.S. 960 (1979).

[22] *Id.* at 28.

[23] 148 F. 2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945).

[24] *Id.* at 379.

[25] 334 U.S. 37 (1948).

[26] *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F. 2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

[27] *Doubleday & Co.*, 52 FTC 169 (1955).

[28] *Mueller Co.*, 60 FTC 120 (1963).

[29] *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wisc. 1979).

[30] *Id.* at 354-56.

MR. MALINA: Thank you, Bill. Before we take questions I'd just like to make one comment to underscore something Bill said. When we're in the area of secondary line injury to competition, competition between competing purchasers, there's not terribly much of a conflict between basic antitrust principles under the Robinson-Patman Act. The Robinson-Patman Act is designed in that instance to protect the ability of the small competitor to compete with its larger competitor, and by and large the rules are very strict. When you come over to the primary line side, the reason why the courts struggle for a definition of what is a predatory price is that we really don't have a statute dealing with discrimination at all. Jurisdictionally if I charge a predatorily low price below my cost however measured to everybody, I may have a problem under Section 2 of the Sherman Act, but there is no Robinson-Patman problem because of the peculiar jurisdictional fact that there is no price discrimination. On the other hand, if I sell at one dollar in California which is below my cost and at 15 dollars in New York, and I'm sued by a competitor who lost the sale in California, there's a discrimination because I happened to have made a higher priced sale in New York, but the injury to competition to the competing seller and the whole discombobulation of the marketplace in California has nothing to do with the price difference. It's just a peculiarity

of a jurisdictional standard of the standard, and because a statute in that instance impinges on the vitality of price competition in the marketplace the courts are very loath to apply it and you only have to worry about it if you really are in a below cost situation.

To the extent that we're talking about somebody who does not buy at all, the Robinson-Patman Act isn't going to apply whatever your Sherman Act problems may or may not be. I'm assuming we're talking about people who are buying but are not getting the benefit of a lower price.

(Inaudible question)

MR. MALINA: If these are customers who are unwilling to purchase because they're being charged too high a price, and actually don't buy it, they're out of luck under this statute whatever sense or nonsense they may make, because as I indicated before, until you actually have two purchases at discriminatory prices this particular piece of legislation infinitely crafted by Representative Patman and Senator Robinson doesn't apply because it doesn't apply.

VOICE: Could you discuss hauling allowances?

MR. MALINA: To try to give a little more content to those who may not be fully familiar with what this is all about, a black haul allowance is basically an allowance given off a delivered price to those customers who are willing to take a truck and bring it to the warehouse and pick up the product, and the Federal Trade Commission has traditionally taken the position that since the delivered price already has built into it an average cost factor nationwide, it's discriminatory to give an additional allowance equal to the same cost on the freight hauling to those who have a truck willing to get it, and that that's not functionally available to everybody. Congress for years has been importuned by various agencies, the Commerce Department in particular, to make it clear that these back haul allowances are legal and the Federal Trade Commission troops up there every year or so and says why they think it shouldn't be. Back in 1973 the Commission attempted to "clarify," and I put the word in quotes, its position on this, and I will read you its clarification. The words are not mine. They are those of the Federal Trade Commission: "The Commission expressed the view that questions probably would not arise under the laws it administers [that means this statute] if sellers using valid uniform zone delivered price systems offered to all customers on a non-discriminatory basis in lieu of a delivered price the option of purchasing at a true f.o.b. shipping point price."

That clarification apparently didn't do the trick, so in 1975 they gave the following clarification of their clarification, and I'll read this into the record: The Federal Trade Commission speaks as follows: "Some unfortunate confusion has arisen as a result of the Commission's use of the term true f.o.b. shipping point price. In fact no question of unlawful discrimination would arise so long as the f.o.b. price was uniform and available to all customers on a non-discriminatory basis. No legal requirement exists at the alternative f.o.b. price be of any particular amount or computed in any particular way."

What all this adds up to, as I understand it, is this. The FTC is willing to give you the option of either a uniform delivered price to everybody, or an alternative f.o.b. price offered to everybody, but what they don't want you doing is having a delivered price and then giving back haul allowances off the delivered price to those customers who have trucks, and it's an interesting debate as to whether that ought to be considered a price discrimination. The judge in *Sweeney v. Texaco* indicated that it was, and the matter is still open.

At a time when we're in an energy shortage arguments have been made, and I think very persuasively, that this kind of thing what ever its technical effects under the Robinson-Patman Act ought to be permitted.

We're pretty much where we were except in this case. That's *Sweeney v. Texaco*, and I think it's in '79 too.

Just a few words before we turn to Charlie on some aspects of the statute that we ought to note but not spend very much time on. There is something called a cost justification defense. The statute says that there's nothing there that is going to prevent ... now I'm quoting ... "differentials which make only duel allowance for differences in the cost of manufacture, sale or delivery, resulting from the differing methods and quantities in which such commodities are to such purchasers sold or delivered." You have to have cost justification limited to certain types of costs, and the savings have to result from either different quantities or different manufacturing methods. Never rely on cost justification as a counselling matter to take your client off the hook from what otherwise would be a Robinson-Patman violation. Others may differ. That's my view. This kind of thing can occasionally be made out to defend a lawsuit or to convince the Federal Trade Commission that you ought not to be sued, but I believe it is the better part of valor not to count on making out a valid cost justification defense when you're setting up a pricing program. It's a very sticky, very complicated business.

Now, we've talked about what the jurisdictional elements of the statute are and we've talked about the injury to competition which makes it work. What Charlie is going to focus on is some nuts and bolts aspects of this which in the final analysis may be more important than all of the philosophy that Bill and I have tried to spell out, because when it comes to the crucible of private litigation for damages, which is where this statute really becomes effective, questions of how you prove damages and whether or not you can defend meeting competition defense are usually the front line of the litigation. That's what Charlie is going to talk to us about.

MR. KAZLAUSKAS: Thanks, Mike. After listening to Mike — our superb pinchhitter — and Bill, you can see that making out a *prima facie* case for a private plaintiff is not as easy as many lawyers think when they file a complaint alleging price discrimination. Even if a claimant is able to surmount the insurmountable hurdles of "in commerce," functional availability, injury to competition and establishes that he is not involved in

a "non-sales" or a "non-commodity transaction," and further establishes that he has standing to sue, he is still a long way from home. For the plaintiff's bar, I am afraid that I am the bearer of very bad news. There are two other substantial barriers that stand between the hopeful plaintiff and the treble damage bonanza. First, his damages are not "automatic" and he has not yet made out a *prima facie* case. On the contrary — according to what I believe is now the law of the land, and often to the surprise of plaintiffs who believe they have struck gold, he must yet prove, by reason of Section 4 of the Clayton Act, that he was injured in his business or property by the discrimination, and *further*, he must prove the amount of damage by reasonable standards of damage measurement.

In other words basic Horn book analysis of proximate causation and measurable damages are not to be ignored, and damages do not accrue automatically in the amount of the discrimination multiplied by the number of units purchased. This is the teaching of Learned Hand in his landmark opinion in *Enterprise v. The Texas Company*[1] which, of course, is my client. As I'll discuss in a moment, this is not a trifling burden. At best, from a plaintiff's standpoint, it is an arduous task which requires laborious back breaking fact collection and all the ingenuity counsel and his expert witness can muster and at worst, it's tantamount to an absolute bar to a *prima facie* case.

The second siginificant barrier which a price discrimination plaintiff must often scale is the formidable and absolute defense of good faith meeting competition provided by Section 2(b). Where, as is often the case, the defendant can show that the lower price to the favored customer was made in good faith to meet an equally low price of a competitor, a plaintiff's *prima facie* case is absolutely rebutted. What's more, as recent decisions suggest, where there is such a showing, it should be grounds for summary judgment.

I'm not exaggerating the reality of these burdens to a treble damage plaintiff. Statistics tell the story. In my industry — big oil — where price differences used to proliferate and price discrimination claims were standard fare on our litigation menus, I know of only one Robinson-Patman Act verdict which has held up (and the Act has been on the books for 40 odd years) and the *Enterprise* doctrine and the good faith meeting competition defense are in large part responsible for plaintiff's singular lack of success.

First, I'd like briefly to discuss the *Enterprise* doctrine as well as its historical antecedents. Its evolution is a very interesting story. In all fairness to plaintiff's bar, I have to admit that until recently there was (and some may think there still is) a contrary view. Indeed, the first opinion on Robinson-Patman Act damages suggested that automatic damages was the rule.

It all started in 1945 with the opinion in *Elizabeth Arden v. Gus Blass*[2] written by Judge Johnsen of the Eighth Circuit for a divided court. *Elizabeth Arden*, which was not Judge Johnsen's last word on the subject, held in a claim brought under 2(d) and 2(e), (and significantly not a 2(a)

case) for a seller's failure to provide promotional allowances to competing customers on proportionately equal terms, that at a minimum, the appropriate measure of damage was the amount of discrimination. A couple of years later, Justice Jackson in gratitious dictum in the Supreme Court opinion in *Bruce's Juices v. American Can Co.*[3] lent credibility to this automatic damage notion implying that the *Elizabeth Arden* rule might be appropriate in Section 2(a) claims as well.

However, in 1957, Learned Hand in the famous *Enterprise* decision, dissected *Elizabeth Arden* with common law logic and discarded it as pure sophistry. *Enterprise* was a product of the gas war days which, though but a faint memory today, were commonplace as you all know throughout the fifties and sixties. Plaintiff in this case owned a service station on the Berlin Turnpike just outside of Hartford, and he was denied price assistance while stations in Hartford with which plaintiff claimed he was competing, received price discounts. The trial court concluded, among other things: (1) that some of the Harford stations did indeed compete with plaintiff: (2) that plaintiff was injured by this discrimination; and (3) that the appropriate measures of damages was to multiply the largest price differential by the number of gallons purchased by the plaintiff, and the court accordingly awarded a verdict calculated on this basis.

However, in Judge Hand's view, even if plaintiff had otherwise made out a case, he had failed to prove the amount of damage or indeed that he had suffered any damage at all. Accordingly, Judge Hand explicitly rejected *Elizabeth Arden* and *Bruce's Juices*. An interesting sidelight was his observation that even the Eighth Circuit had rejected the windfall profit approach of *Elizabeth Arden* in *American Can v. Russellville Canning Co.*[4] though again, it's noteworthy that it did so over Judge Johnsen's dissent. As you'll see, Judge Johnsen was no quitter.

Judge Hand's *Enterprise* analysis goes something like this. First, you must recognize that unlike all other antitrust violations, a Robinson-Patman Act violation is an undercharge to a favored customer, rather than an overcharge to the unfavored customer. In Judge Hand's words, "Overcharge and discrimination have very different consequences and must be kept distinct in thought."[5] What Judge Hand meant was that the seller need not have charged the plaintiff the lower price, he could have avoided liability simply by charging the favored buyer the higher price. Thus, to demonstrate any antitrust injury and damages, a price discrimination plaintiff must connect both his injuries and his damages to the undercharge.

How can he do that?

If the favored buyer does not decrease his resale price he can do nothing — for while the favored buyer in such a case has benefited from an increase in his margin, it is impossible to conclude that the plaintiff has suffered any injury. To be sure, had plaintiff enjoyed the lower price, he would have made more money but that's to say that he lost any money.

This comes as a surprise to many plaintiff's lawyers, but Judge Hand's reasoning was nothing new. It was bottomed on earlier decisions

arising out of railroad rate discrimination lawsuits. In one such case, Justice Cardozo aptly summed up the analysis as follows: "The question today is not how much better off the complainant would be today if he had paid the lower rate. The question is how much worse off he is because others have paid less."[6]

It then inexorably follows that the only way a disfavored buyer may be injured is when the preferred buyer passes some of his cost savings on by lowering his selling price. If this is done, plaintiff's damages may be measured in two ways. First, if plaintiff cuts his resale price to meet that of the favored buyer, obviously his damages are his decrease in profits caused by his lower price. If, on the other hand, the disfavored buyer maintains the higher resale price then his damage is measured by the lost profits on the sales if any ... that's important ... diverted to the favored buyer by reason of the favored buyer's lower price.

As you can imagine, establishing damages under this stringent standard in today's complex and dynamic markets consisting of multiple competing sellers, literally hundreds of buyers and countless competitive pressures is usually a hopeless burden for any plaintiff.

While the logic of Judge Hand in *Enterprise* is unassailable, and although it was eventually totally embraced by most courts, it was not at universally adopted. Primarily responsible for this temporary dichotomy is our old friend Judge Johnsen who started it off with *Elizabeth Arden.*

In 1969, Judge Johnsen was sitting by designation in the Ninth Circuit in a price discrimination case entitled *Fowler v. Gorlick*[7] which involved a claim under Section 2(a). Now, despite the fact that *Elizabeth Arden* had been overruled in his own circuit, despite the fact that the Supreme Court had in *Enterprise* denied certiorari, despite the fact that the only precedent in the Ninth Circuit followed *Enterprise*, and despite the fact that *Enterprise* had been followed universally by all other courts, Judge Johnsen breathed new life into his *Elizabeth Arden* opinion by blithely holding the Robinson-Patman Act was different from the Sherman Act, that automatic damages are the minimum, and it is not necessary to make showings of aproximate causation or to measure damage.

Though plainly aberrational, the Supreme Court did not illuminate matters by denying certiorari in *Fowler*. However, over time, the doubt created by *Fowler* was eroded, first, by subsequent decisions in the Ninth Circuit, and then it was ultimately swept away by the Supreme Court's 1977 opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat.*[8] Though a Section 7 case and not a price discrimination case, *Brunswick* made it definitely clear that it is not enough for a private antitrust plaintiff merely to prove a violation of the antitrust laws and to show that as a consequence, he is somehow worse off than he would have been absent the violation. Instead, *Brunswick* requires that he must prove his injury has a legally cognizable causal nexus to "that which makes defendant's acts unlawful."

In a price discrimination case, that which makes a defendant's act unlawful is a favoring of a customer by granting him a lower price. Thus,

applying the *Brunswick* rationale to a Robison-Patman Act case requires that all damages must be proximately connected to the undercharge. The *Brunswick* analysis was applied in exactly this way just last month in a price discrimination case by the Fifth Circuit in *Chrysler Credit Corp. v. J. Truett Payne, Inc.*[9] in reversing an automatic damage award. Moreover, earlier in the year, Judge Cahn in *Sweeney v. Texaco Inc.*[10] also noted that because of *Brunswick*, *Fowler* was no longer the law of the Ninth Circuit or anywhere else. Whatever doubt remains, if there is any, I feel will be eliminated by *Hasbrouck v. Texaco*, another case involving my client. In that case, a Spokane jury last September awarded multiple plaintiffs a verdict of some $2.5 million on an automatic basis. The court is presently considering a motion for judgment n.o.v. and needless to say we're very sanguine about the outcome of our motion.[11]

A brief word about the second barrier to the treble damage jackpot for price discrimination claimants which I alluded to earlier. Assuming that a private plaintiff had scaled the *Enterprise* Chinese Wall to the jury room, in most cases defendants have yet another roadblock to prevent plaintiff's claim from being considered by his peers. This is, of course, the affirmative defense of good faith meeting competition afforded by Section 2(b) of the Act. It is well established and was never seriously doubted that Section 2(b) afforded an absolute defense to the charge of price discrimination. This much is clear not only from the language of the proviso but from all judicial precedents. The purpose of defense is to simply permit a seller to grant the lower price to a customer who is being wooed by a competitor's offer in order to allow the seller to retain that business without a wholesale alteration of the pricing schedule to other customers. However, until quite recently, most of us believed that the defense was a fact issue for the jury. As such, particularly in the typical context of small businessman suing a faceless behemoth, the defense was, by and large, illusory to the defense bar.

There was little reason to believe that the seller's good faith was anything but a jury question, given the Supreme Court's caveat in cases like *FTC v. A.E. Staley Manufacturing*[12] which seemed to impose an obligation on the seller to confirm that the lower price quoted by its customer was indeed an accurate price. Indeed, the *Staley* court went out of its way to warn that "causal reliance on uncoroborated reports of buyers or sales representatives without further investigation may not ... be sufficient to make out the requisite showing of good faith."

Be this as it may, in 1970, the Fifth Circuit in *Jones v. Borden Co.*[13] dropped a mild bombshell by holding that good faith meeting competition could indeed be approximately disposed of by summary judgment. In *Borden*, defendant — in justification of granting lower milk prices to certain customers — offered affidavits and deposition testimony the thrust of which indicated that these customers advised Borden salesmen that they were being offered prices five percent lower than Borden's. On the strength of these papers, the District Court granted summary

judgment finding that Borden's lower prices were a good faith effort to meet competition.

The Court of Appeals affirmed, noting first that there was no evidence contradicting these claims of competing offers, and that Borden had met the standard of acting as a "reasonable and prudent person attempting to meet its competitor's prices."

For those of us who thought the question was one for the jury, it is particularly noteworthy that the *Borden* court observed that summary judgment is usually inappropriate in cases "where motive, intent, subjective feelings and reactions, consciousness and conscience are to be searched and examination and cross examination are necessary instruments in obtaining the truth."

The lessons of *Borden* is that the seller can insulate himself from the Robinson-Patman Act liability simply by documenting that he acted in a reasonable and prudent manner in granting any price discount. We, as I'm sure do many other companies, have a practice which requires written authentication of competitor offers prior to allowing any discount. In the event the discount subsequently spawns a lawsuit, this documentation is the raw material we use to frame meeting competition affidavits. With the rationale for the lower price so memorialized, it is a relatively easy matter to show that the pricing decision had a rational basis, i.e., that the the individuals making the decision were responding as reasonable and prudent businessmen to what they perceived to be a competitive reality. As you know, such facts are usually incontrovertible and will not be controveted because of Rule 56(e) which requires that any plaintiff's opposition affidavits to be based not only on personal knowledge but must also meet all the other evidentiary standards for admissibility at trial. Thus, affidavits based on hearsay or other nonadmissible evidence, particularly affidavits by lawyers are routinely rejected out of hand. In Texaco's case, this very simple practice has paid temendous dividends by providing the basis for summary judgment in literally dozens of cases since *Jones* came down in 1970.

Before closing, I should add that the Supreme Court seems to have endorsed the *Borden* summary judgment approach in the Court's two Robinson-Patman Act opinons during the 1978 and 1979 terms. As you know, in *Gypsum*,[14] a Sherman Act case, involving the exchange of price information among sellers, the Court rejected a defense premised on the argument that interseller price verification was necessary in order to establish that sellers were satisfying the good faith requirments imposed by Section 2(b) in the *Staley* line of cases. In rejecting the defense, the Court explains that the 2(b) standard is based on "good faith belief rather than absolute certainty" and can be satisfied without resort to price verification. The Court went out of its way to observe that in several cases the good faith meeting competition defense was successfully invoked without verification of the buyer's alleged offer. It's also worth noting, in this context, that the court cites — with apparent approval — *Borden* and

other 2(b) cases disposed of by way of summary judgment, including *Cadigan*[15] *v. Texaco*, a case we're very proud of.

I also find comfort in the Court's opinion in the 1979 term in *A&P*[16] The Court in dismissing the 2(f) claim against A&P held that the seller —Borden — had a good faith meeting competition defense the benefit of which A&P was derivatively entitled. That's not surprising. What's remarkable is that the majority found, as a matter of law, that Borden had made out a 2(b) defense on very skimpy representation on competitive offers made by A&P and despite the fact that Justices Marshall and White in their dissenting opinions found that Borden had not made out a meeting competition defense. Indeed, Justice Marshall pointed out that the administrative law judge specifically found that it "is very probable that Borden did not have such a defense." Juxtaposing *Gypsum* and *A&P* with the *Borden* line of cases, it's clear to me that good faith meeting competition will become an easy and routine mechanism for the summary disposition of price discrimination cases. It seems inevitable that courts can now safely dismiss Robinson-Patman Act cases on the skinniest factual showing of competitive reasonableness.

FOOTNOTES

[1] 240 F. 2d 457 (2nd Cir.), cert. denied 353 U.S. 965 (1957).

[2] 150 F. 2d 988 (8th Cir.), cert. denied, 326 U.S. 773 (1945).

[3] 330 U.S. 743 (1947).

[4] 191 F. 2d 38 (1951).

[5] 240 F. 2d qt. 460.

[6] *Interstate Commerce Commission v. United States* 289 U.S. 385 (1933).

[7] 415 F. 2d 1248 (9th Cir. 1969), cert. denied, 396 U.S. 1012 (1970).

[8] 429 U.S. 477 (1977).

[9] 1980-1 Trade Cases P. 63,067 (5th Cir. 1979).

[10] 461 F. Supp. 359 (E.D. Pa. 1979).

[11] On March 31, 1980, Judge Callister did indeed grant Texaco's motion for judgment n.o.v. in a lengthy opinion which rejects *Fowler* and embraces *Enterprise*.

[12] 324 U.S. 746 (1945).

[13] 430 F. 2d 568 (5th Cir. 1970).

[14] *United States v. United States Gypsum Co.*, 98 S.Ct. 2864 (1978).

[15] 492 F. 2d 385 (9th Cir. 1974).

[16] *Great Atlantic & Pacific Tea Company v. Federal Trade Commission*, 99 S.Ct. 925 (1979).

MR. MALINA: Thank you, Charlie. What do you think of a situation where a plaintiff comes in and says, "I can't show that my competitor lowered his price to take advantage of his lower cost, but he

spent a lot more on advertising and that's what hurt me." Do you think that can satisfy an *Enterprise* standard?

MR. KAZLAUSKAS: I'm not sure, Mike. You're probably getting into an area of 2D and 2E now. Probably not.

MR. MALINA: There are cases where plaintiffs have at least mouthed the intention to do so. I don't know of any that got passed the settlement stage, and actually decided the point. I think it's interesting to note in the context of meeting competition precisely what it was that Borden was able to rely on in establishing what Justice Stewart held made out the defense as a matter of law. A&P came to Borden and told them that they had decided to go into private brand milk. Borden should have been warned right then and there that the Robinson-Patman Act was about to rear its head, because they had been through the mill once, and they told them they would like a price. They quoted them a price, and the A&P buyer said, "Oh, gee, that's just not going to do, and it's not even in the ballpark. In fact if you took $50,000 off it that wouldn't be enough." These are, by the way, stipulated facts as the Supreme Court states them. "You better go back to the drawing board and come up with another price." They came up with another price that in fact was several hundred thousand dollars lower than the competitive price offered by Bowman Dairy, and the Supreme Court says, "Well, they asked who is the other competitor." A&P wouldn't tell them. What were they supposed to do? It seems to me that the radiations of that are that to the extent that the *Staley* case still has any vitality in imposing an obligation to verify what it is your customer tells you, you can probably satisfy that obligation just by asking him, and if it doesn't appear to you that a rat ought to be smelled when he gives you an answer, I think that's the end of it. Again, I think this extension of the meeting competition defense is just another reflection of the Supreme Court's feeling that when Section 1 of the Sherman Act comes into conflict with the Robinson-Patman Act, the Robinson-Patman ought to give way. Do you have any comments on that, Bill?

MR. DALLAS: I think one of the open areas still is where and what obligation is imposed on the seller when he has reason to believe that he's dealing with a lying buyer. Charlie, do you have any thoughts?

MR. KAZLAUSKAS: The court intentionally ducked that issue.

MR. MALINA: It seems to me quite interesting. The court specifically ducks the issue of whether or not you can make out a 2(f) case if there's a lying buyer, an issue of which the logic of Justice Stewart's opinion implicitly answers because he holds squarely that you can't violate 2(f) unless there's a violation of 2(a) including the meeting competition defense. So the question it specifically leaves open is one which I don't think is very difficult to answer.

MR. KAZLAUSKAS: I'm not sure it is open, because A&P comes pretty close to the lying buyer in any case.

MR. MALINA: Yes.

Let me see if I could clarify that some. The nice catch phrase "meet not beat" is merely a way of illustrating what is meant by good faith which

is the language in the statute. The paradigmatic case is really very simple. I'm selling to everybody at two dollars, and you are a very good customer of mine and you come to me and say, "Hey, Dallas is giving it to me for $1.50, how about it?" If I have no reason to believe that's not true, indeed you show me an invoice from Dallas and I've got proof, and I charge you $1.50, that's a good faith meeting of his competition. If I charge you $1.45 I'm beating it. It's not in good faith, no defense. Borden, in fact, went below, but what the Supreme Court found as a fact was that the fact did not derogate from its good faith because it had no reason to believe that its lower price wasn't necessary to make the sale. The interesting aspect of the case which the Supreme Court disposed of as a matter of statutory construction was the effort to impose on A&P a liability on the buyer under 2(f), because it knew the price was much lower than was necessary even though Borden might have a 2(b) defense. Indeed, the Second Circuit, when Chief Judge Kauffman wrote his opinion finding liability on A&P's part as a buyer, specifically went out of his way to say it wasn't necessary to determine whether or not Borden had a defense; and the Supreme Court overruled that, finding as a fact that the defense was available.

The real issue that's interesting in *A&P* is how little bit of the verification requirement there is. If you put *Gypsum* and *A&P* together, I think the rule comes out something like this. If you haven't got reason to smell a rat, if what the buyer is telling you seems to be right, you can rely on it, but if there are objective reasons why you're not quite sure that you've got to do something more than ask your competitor what price he offered, and what is this something more is the question no one knows the answer to. Yes sir.

VOICE: Suppose the price quoted to you was below your own average variable cost?

MR. DALLAS: That's an interesting point. The cases really have not addressd it, although Rita and Turner in their article do address it. They distinguish between a monopolist and a non-monopolist. They say when a non-monopolist may for a brief time go below his average variable cost or his marginal cost, and meet the competition of another competitor, a monopolist may not. They reason that there may be situations given a market structure where a new entrant in order to get a tow hold in a new market where there's a monopolist already in place needs to promotionally price his product, and that if you give a carte blanche to the monopolist to meet that price you in effect are giving him a license to forestall and preclude new entry, and you should not be able to do that. Where it's a competitive market and you're not a dominant factor or monopolist in the market you ought to be able to meet that price.

MR. MALINA: I'm a lot clearer than Bill. Putting aside questions under Section 2 of the Sherman Act which would require a whole session, insofar as this statute is concerned I am clear as a bell that Section 2(b) applies no matter how low your price is, ... with one possible exception. If

the price is so low that you have reason to believe it's below your competitor's average variable cost, and you know you're meeting an illegal price, you probably do not have the meeting competition defense to save you.

MR. KAZLAUSKAS: I'm confident of that. Absent the monopoly, I think a seller's cost is irrelevant. Indeed we have studiously avoided giving a cost of our product, gasoline, claiming we don't know what our gasoline costs.

MR. MALINA: Everybody knows that. Yes sir.

(Inaudible Question)

MR. MALINA: We're positing a situation where I'm selling widgets at one dollar to everybody, and my customer come to me and says, "Dallas is offering a gidget which is something a little different at X price, 60 cents. Can I meet it? I don't know any decided cases that deal with the point squarely. As a matter of analysis, I would expect that what you would do is look to see what the normal price differential between my product and his product would be for starters, and then to the extent that he is discounting his for his lower price, I would be permitted to discount my premium to meet it. I don't know of any case that supports that, but I think that ought to be right as a matter of logic.

Thank you very much for attending this session this afternoon, and particular thanks to our panelists for their insights.

Annual Dinner and Remarks by the Honorable Sanford M. Litvack

MR. KING: On behalf of the Section on Antitrust Law of the State Bar, I would like to extend a warm welcome to all of you for coming out tonight and joining us and expecially to those of you who participated in the program during the day. We had a very successful program.

In the morning there was panel on the per se rules and rule of reason as exemplified by recent Supreme Court decisions. In the afternoon we had three workshops: on Robinson-Patman, on the management of complex antitrust cases and on technological innovation and the antitrust laws. In all, we had 24 persons participating in these various panels. I would like to thank each and every one of them for taking the time to make this such a successful day.

It is my pleasure to introduce the people on the dias to you. Starting at my far right, is Lawrence Sorkin, who is Secretary of the Section.

(Applause).

Next to him is John Desidario, Assistant Attorney General of the State of New York in Charge of the Anti-Monopolies Bureau.

(Applause).

I commend to you John's 1979 report as an indication of how active and vigorous the State antitrust authorities have been.

Next to John is Harold Cohen of the Philadelphia Bar. Harold likes to think of himself as a general practitioner ...

(Laughter)

... but he is, in truth, one of the most knowledgeable and dangerous adversaries in antitrust litigation. Harold participated in one of our panels earlier today.

(Applause)

Next to Harold is Eleanor Fox, immediate past Chairperson of our Section, Professor of Law at NYU specializing in antitrust, member of innumerable government commissions and friend to all of us.

(Laughter)

(Applause)

Next is Ralph Giardarno, head of the New York Office of the Antitrust Division. He is experienced in antitrust regulations, and has managed to get the support and admiration of his staff, as well as his adversaries.

(Applause)

On my immediate right is Irving Scher, Vice Chairman of the Section and Chairman-elect of the Section, to take effect July 1st ... a walking encyclopedia of antitrust law.

(Applause)

On my far left is Jim Withrow, former Chariman and Patron Saint of the Section and Dean of the New York antitrust bar.

(Applause)

Next to Jim is Melanie Cutler who is Special Assistant to the Assistant Attorney General in charge of the Antitrust Division. Melanie held the same position under John Shenefield and Sandy has kept her for a section act because of the critical and universal acclaim that she had in that position.

(Applause)

Next to Melanie is Leroy Ritchie, the New York Regional Director of the Federal Trade Commission: experienced and knowledgeable in all phases of FTC work in this, we like to think, the most important region of the country.

(Applause)

Next to Leroy is the Honorable John Singleton, Chief Judge of the United States District Court for the Southern District of Texas, in Houston. Judge Singleton was one of the participants in today's program on the management of complex antitrust cases. He knows whereof he speaks since he has had the responsibility for overseeing the Corrugated Container Antitrust Litigation in Houston, probably the largest in terms of numbers of parties and the amount of commerce involved of any antitrust case in the last generation. We thank you, Chief Judge, for coming to New York to share your experiences with us and for gracing our table tonight.

(Applause)

Then, of course, there is Sandy Litvack, about whom we will hear a little bit more in a moment.

(Applause)

It is traditional each year to present the immediate past head of this Section with an award. This year it is more than tradition that impels me, with inordinate pleasure, to thank Ellie Fox for the enormously effective job she did as Chairperson of the Antitrust Section last year.

She was our teacher, our goader into more effective action, always energetic and intelligent. She was a credit to the Section in her work on the National Commission to Study the Antitrust Laws. We are proud of you Ellie. On behalf of the entire membership in the Section, I present this plaque to commemorate your service to us.

(Applause)

MS. ELEANOR FOX: Thank you very much.

(Applause)

MR. KING: It is now my great pleasure to introduce Mr. Sanford Litvack. Sandy is truly one of us. He was born in the city. He has lived here almost all of his life. He has practiced law here for most of his professional career. He served us three years as the secretary of this Section.

He attended the University of Iowa on a football scholarship, which most people don't realize. I was about to say that after a couple of years of being battered he came back East, but he corrected that. Sandy doesn't bruise very easily. He came back for family reasons and graduated from the University of Connecticut and then from the Georgetown Law School.

He spent two years as a trial attorney in the Antitrust Division in Washington and then joined the Donovan Leisure firm where he has been a partner for a dozen years, during which time he actively litigated antitrust cases throughout the country. His former partners have told me, with justifiable pride, that Sandy has never lost an antitrust case. While in a general sense we wish you good luck in your job, I am not sure, speaking on behalf of some but not all of us, that we wish you a continuation of that record.

(Laughter)

This is his first speech in his new position. The Bar knows this, Sandy, because we have all come out in great numbers to hear you. We have almost 400 people here tonight, which is the largest attendance we have had in many, many years.

I give you Sandy Litvack ...

(Applause)

MR. LITVACK: I am delighted to be here with you tonight to share some thoughts about my intentions and priorities for the Antitrust Division in the coming year — the start of a new decade. I am particularly delighted that my first speech as head of the Antitrust Division is in New York — my home — and to the Antitrust Section of the New York State Bar — my friends. You know, it is only a little more than one week since I took charge of the Antitrust Division — after waiting, as many of you know all too well, for several frustrating weeks while the machinery of official Washington ran its course.

However, now that I am finally in the job, I must confess that I have had some difficulty in trying to outline what I'd like to say to you tonight. In fact, I had to tell your Chairman, Henry King, only a few days ago, long after I had agreed to speak, that I had no title for the speech and no theme for my remarks. Nonetheless, Henry who obviously likes mysteries or confusion, insisted that he would like me to speak tonight — about something — and so here I am.

I suppose, at the outset, that there were a number of reasons why I had such trouble in preparing this talk. First, there was the concern that, no matter what I said, it would sound pretty much like every one of my predecessors. Yet, it's tough to sound new and different when, to be sure, my basic aspirations probably do not differ drastically from those who went before me. On reflection, however, I decided that this was a vain fear because the objectives are, and should be, more important than any one man's style or delivery. And, whether the articulation of my goals is clever or creative is not nearly so important as whether and how I accomplish them — which led to a second concern.

There was the worry that in my initial enthusiasm and inspiration, I would promise more than I could hope to deliver and would have to face you a year from now. Now in truth this fear was premised on both good news and bad news. The good news was the thought that I might be back here next year; the bad news was the explanations I might have to give. However, I decided that was a vain concern, too, because all anyone can do is set goals and then devote all one's energies and talents toward their realization. Since I took this job because I believe that I have something important to contribute, I decided now was not the time to lose confidence.

Finally, I had to deal with the fact that suddenly my longtime colleagues in the private bar and, indeed, my former clients, were just that —"former" clients, "former" partners, "former" co-counsel. In some very important senses, it was no longer appropriate to think or speak of you and me as a collective "we." In short, to use the popular parlance, I guess I was confronting a mid-life identity crisis of sorts. It made me think long and hard about the relationships between government and the private sector and about my own professional, ethical and philosophical commitments over a career combining public and private service. What I concluded was that one of the real strengths of both the private antitrust bar, and I firmly believe, the Antitrust Division as well, is a mutual bond of respect, professionalism, and cross-pollination of ideas and people. In the most important sense, then, I realized I continued as part of a collective "we" that did indeed encompass the goals of the private bar as well as those of the government.

One of the questions which gave me the least difficulty during the course of my confirmation hearing before the Senate Judiciary Committee had to do with whether I, as a member of the private antitrust bar, doing mainly defense work, could fully and fairly enforce the antitrust laws. I said, and I am absolutely convinced that I am correct, that private

practice is and can be a great training ground for government prosecutors. After all, who better than you knows the devices and techniques available to expedite investigations and litigation; who knows better when reasonable business practices end and anticompetative acts begin? In my case, I have come full circle. I started in the Antitrust Division, spent eighteen years in the antitrust private bar and now have returned to the Department. I hope and believe that such a background will enable me to be an effective and fair prosecutor.

Having said all that, what are my priorities and how do I intend to distinguish my tenure as head of the Antitrust Division? My goals are not particularly unusual or debateworthy.

The Division's mandate is a very broad one — to make competition work. We serve as an advocate for competition policy before regulatory agencies, within Administration, and before Congress. All of this activity is important, I support it, and it will continue. The core of the Division's activities, however, has been investigating and prosecuting violations, and while I think it essential that the Division be at the "cutting edge" of antitrust law and constantly alert to ways in which new legislation or new theories can enhance our effectiveness, I think it is even more important that we do that which the law has already conferred upon us as a mandate by vigorously enforcing existing law.

As Attorney General Civiletti noted in a key speech this past November, despite the availability of felony sanctions, flagrant price fixing and other *per se* violations of the Sherman Act continue to occur with alarming frequency. I intend to devote a major portion of the Division's resources to pursuit of those cases, using every weapon in our arsenal. I hope to succeed by focusing my attention on the machinery and processes of the Division. First and foremost, I intend to streamline and sharpen the litigation management techniques employed by the Division. Second, I intend to push for and lend personal support to a stepped-up criminal enforcement effort. And third, I hope to add to the sense of professionalism and institutional pride among the Division's attorneys upon whose efforts the success of all else depends. Let me expand briefly on each of these points.

I am hardly the first to proclaim a need for more efficient management of antitrust litigation. From investigation, to case filing, to discovery and trial, there is a crying need for reform that has been recognized by President Carter's National Commission for the Review of Antitrust Laws and Procedures; by the Congress in introducing new legislation; by the Judiciary; by the Department of Justice itself; and, of course, by you — the members of the private antitrust bar. While the Department of Justice, and indeed this Administration as a whole, has heartily endorsed new legislation to improve the effectiveness of antitrust enforcement efforts, there are many steps we can take immediately, without waiting for the enactment of new laws, to improve the *status quo*. The responsibility for such efforts rests in part with the private bar, which should self-censor delay tactics —both purposeful and inadvertent, and in part with the

Antitrust Division since we, I believe, must set the example. I do not subscribe to the view that antitrust cases are by definition too complex to be investigated and tried quickly and efficiently. To the contrary, I know it can be done.

As I'm sure you can appreciate, my first week and a half at the Antitrust Division presented me with a host of compelling issues (and people) competing for my immediate attention. It may serve to illustrate my sense of priorities when I tell you that the very first meeting I held was with the Division's Operations Office, through which all our investigations and litigation pass. Since that time, I have met personally with the head of each Section and with each member of the staff in a series of meetings. We have talked about lots of things but mainly about how we can improve our litigation skills and how I can best apply myself to that task. Although there are, I am slowly beginning to realize, a host of non-litigation demands upon my time, I have told the staff that, in my view, there is nothing more important than our litigation efforts and I intend to make the time to attend to this. You will be delighted as professionals (although perhaps concerned for your clients) to know that the response has been excellent.

With the support of Operations and the Sections we hope soon to have in place a system that will facilitate my personal involvement in the basic workings of Division litigation management. The Chiefs and the staff have indicated not just a willingness, but a desire to meet with me on a regularly scheduled basis early in the morning and in the evenings, after normal working hours — in addition to their demanding normal schedules — to plan, review and discuss our specific litigation and investigative problems. I cannot, do not want to, and do not believe it is necessary, to involve myself in every document request or every interrogatory, but I can, I believe, have some welcome imprint on our litigation style and techniques.

The Division has a history of being tough, able and fair investigators and I hope to be able to add to that. In that regard, I should mention that one of the things that I plan to do is initiate some further in-house training programs — using both our own talents and those of some of you who are willing to help — to enable us to investigate better and quicker. Happily, the groundwork for this effort was underway when I arrived and I am hopeful that we can make it a reality shortly. My own experience has taught me that if, early in an investigation, we know what we are looking for and why, and have a practical sense of where it may be, we can focus our requests and investigations so as to reduce the burden on the companies involved. We must reduce the volume of irrelevant paper we so often receive and either proceed with a case promptly or drop the matter, as may be appropriate. Lest any of you be concerned that I believe that a sudden transformation will eliminate the words "irrelevant" and " we can and will improve our efforts to make it tougher, at least, for some of cabulary, let me assure you I harbor no such you to pass the straight-face ievetest when claiming burden or lack of relevance in response to a Division request.

As I mentioned earlier, I also expect to continue, and to step up, the Antitrust Division's criminal enforcement activities. I know from my experience in private practice that the risk of civil antitrust liability is sometimes treated merely as a competing factor in a balancing act that weighs the perceived benefits of anticompetitive conduct against the possiblity of injunctive relief. Indeed, it is a sad but true fact of life that in the past, even the risk of criminal fines has, in some cases, simply been factored into businessmen's evaluations of the utility of anticompetitive behavior. There is an effective deterrent against such "cost/benefit" calculations, however, and it is the realization that the Division is closely monitoring price fixing and other *per se* offenses and that the penalties for such violations pose a real and serious threat to personal freedom and reputation. Accordingly, the Division will seek criminal convictions and maximum penalties, including jail sentences, whenever appropriate. The day when such violations deserved a mere slap on the wrist has long since gone. While I have heard (and indeed made) many arguments why jail sentences ought not to be requested, I intend to make the seeking of jail sentences and stiff fines the rule, not the exception.

Talking tough is not enough, of course. The only measure of success will be in results, and those results are possible only through the dedicated efforts of the Division's attorneys. As they all now know, I expect a great deal from them as well as myself. It is, and has long been, my opinion that they represent the best of the government bar. But, we face great difficulties in attracting and keeping the best young attorneys. Although much is demanded, they are not paid as well as their counterparts in the private sector; nor are there the same resources available to train and polish them as exist at the private bar. What can and must motivate them, then, is not money or fancy offices or the promise of spoonfeeding, but only a sense of professional pride, a sense of excitement, and a fundamental concern for the public interest. I put you all on notice that we at the Division, and I personally, intend to compete with you in the most vigorous way possible for the best people in the law schools and elsewhere. The Honors Program has been a great success and we intend to be even more aggressive in delivering our message to the young lawyers — the Antitrust Division is the best place to be: it is exciting, challenging, and, in a real sense, rewarding.

Many years ago, Chief Justice Arthur Vanderbilt of the New Jersey Supreme Court, a former Dean of the law school at NYU, made a far more eloquent plea than I ever could to young lawyers for the investment of their time and energies in the public service, noting that

> "[t]he attorney whose professional thoughts begin and end with his own private clients is a pitiable mockery of what a great lawyer really is. Training for public service is a lifetime career. There is no sadder sight in the legal profession than that of a lawyer who has long dreamed of unselfish public service but who has been so engrossed in serving private clients that when

the call does come to him for public career, he has so lost contact with the spirit and problems of the day that his efforts in the public interest prove abortive."*

I agree with that assessment. I remember my own early years at the Division vividly. In many ways, that was the most exciting time of my professional career. I hope I can share that sense of inspiration and purpose with today's Division attorneys — a group brighter, more sophisticated and better equipped than any other in history to carry out the Division's mission with vigor and success.

Having bared my soul at sufficient length regarding my strong feelings on the subject matter of antitrust enforcement in general and the Antitrust Division mission in particular, let me end where I started. I am delighted to be here and I'm even more delighted to have the opportunity to head the Antitrust Division. We have accomplished a lot; we have a lot more to do and we intend to do it.

(Applause)

MR. KING: Sandy, let me say that we are enormously proud of you, this group particularly, to have you down there in Washington. We are confident that you will do in that job what you have done throughout your life in bringing dedication, intelligence and hard work to the task.

This is such a nice note I sort of hate to end it. But that's all folks. Thank you all for coming.

(Applause)

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* Vanderbilt, *The Five Functions of the Lawyers*, 40 A.B.A.J. 31, 32 (1954).