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NEW YORK STATE BAR ASSOCIATION
ANTITRUST LAW SECTION

ANNUAL MEETING

Thursday, January 25, 2001
New York Marriott Marquis
New York City

Section Chair
MARTHA E. GIFFORD, ESQ.
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Program Chair
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Dinner Speaker
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Section Business Meeting, Election of Officers and Members of the Executive Committee

MARTHA E. GIFFORD, ESQ.: Good afternoon everyone. I'm Meg Gifford. I'm the Chair of the Antitrust Law Section for a few brief minutes more, and we have a business meeting that I need to conduct before we begin our program.

Briefly I will just report that the Section had a very active year, including an open meeting to introduce new FTC Regional Director Barbara Anthony to the antitrust community in New York, a very good program in the summer for students and new lawyers, some excellent substantive programs over the course of the year. And we have in progress a revision of our book, *Antitrust Law in New York State*, which we expect will be published this year, so look for that.

The two items of business that the Section needs to conduct today are, number one, amendments to the bylaws of the Section, and number two, election of officers of the Section for 2001.

In the materials that you received in the booklet there is a two-page document, I believe, with the proposed bylaw amendments, the actual text of the amendments. If you will allow me—I'm not going to read the text, I'm just going to summarize those bylaw amendments.

Article 3, Section 1. The proposed amendment would eliminate the provision that the Executive Committee consists of nine members and would also eliminate references to standing committees, and provide instead that the Nominating Committee will fix the number of Executive Committee members in the Section's best interest, but not fewer than nine, subject to approval of the existing Executive Committee. That is obviously to provide flexibility to the Section in resources on the Executive Committee. And I should say that the Executive Committee has not been as few as nine for a long time. It's been much bigger than that.

The second amendment, Article 5, Section 4. The amendment corrects a provision that currently states that the Executive Committee can fill vacancies in the positions of officers. That is already adequately covered in Section 5 of Article 5, and Section 4 would now read that the Executive Committee is permitted to fill its own vacancies during the year, should any vacancies occur.

Article 6, Section 1. The amendment eliminates the requirement that there be seven specified named standing committees, and it substitutes flexibility to the Executive Committee of the Section to use standing committees, ad hoc committees, task forces, informal working groups or really any other form of organization that suits the needs of the Section. And that is in fact how the Section's business has been conducted in recent years. The amendment further provides that each such group would be chaired by a member of the Executive Committee.

The last proposed change, Article 6, Section 2, would eliminate references to "additional committees," and formalize the Section's practice that now exists, that the Vice-Chair serve as Program Chair of the Section with assistance from other members of the Section. Those are the proposed amendments to the bylaws. May I have a motion to adopt those proposed amendments?

AUDIENCE MEMBER: So moved.

MS. GIFFORD: Second?

AUDIENCE MEMBER: Second.

MS. GIFFORD: All those in favor?

(Audience responds in favor.)

MS. GIFFORD: Opposed?

(No response.)

MS. GIFFORD: Abstentions?

(No response.)

MS. GIFFORD: Thank you very much.

The procedure is that those amendments will now go to the Executive Committee of the New York State Bar Association. That will happen tomorrow morning, and we all presume that the Executive Committee will approve those changes.

Now, on to the second item of business for the Section, and that is the election of members of the Executive Committee and the officers for this year. The practice of the Section in recent years has been to renominate and reelect or nominate and elect members of the Executive Committee for one-year terms, and that is the practice we are following again this year. So if you'll bear with me, I will read a lengthy list of current members of the Executive Committee whom the Nominating Committee proposes for reelection, and then a shorter list of names whom the Nominating Committee proposes for election as new members of the Executive Committee. Existing members up for reelection are Kevin Arquit, Michael Bloom, Barry Brett, Edward Cavanagh, Bruce Colbath, Lloyd Constantine,

Steven Edwards, Harry First, Larry Fox, Martha Gifford, Eileen Gotts, Pamela Jones Harbour, Stephen Houck, Robert Hubbard, Norma Levy, William Lifland, Joseph Lipofsky, Kenneth Logan, Stephen Madsen, Bernard Persky, Bruce Prager, Yvonne Quinn, Steven Tugander, Vernon Vig, Michael Weiner and Alan Weinschel. The Nominating Committee also nominates the following four individuals for election who have not previously served to serve one-year terms to end on the date of the annual meeting next year. Those are Barbara Anthony, of the Federal Trade Commission; Howard Ellins of Davis Polk & Wardwell; Saul Morgenstern of Dewey Ballantine; and Moses Silverman of Paul, Weiss, Rifkind, Wharton & Garrison. As the Nominating Committee has nominated these members, I need a motion to accept the report of the Nominating Committee.

AUDIENCE MEMBER: So moved.

MS. GIFFORD: And a second.

AUDIENCE MEMBER: Second.

MS. GIFFORD: Thank you. All in favor of the slate of nominees for the Executive Committee, please say aye.

(Audience voted in favor.)

MS. GIFFORD: All those opposed?

(No response.)

MS. GIFFORD: And abstentions?

(No response.)

MS. GIFFORD: Thank you. Now, finally, the election of officers. The Nominating Committee nominates the following individuals for the following offices: Kenneth R. Logan as Chair, Steven M. Edwards, Vice-Chair, and Pamela Jones Harbour, Secretary. May I have a motion to accept the report of the Nominating Committee?

AUDIENCE MEMBER: So moved.

MS. GIFFORD: And a second.

AUDIENCE MEMBER: Second.

MS. GIFFORD: All in favor

(Audience responds in favor.)

MS. GIFFORD: Opposed?

(No response.)

MS. GIFFORD: Abstentions?

(No response.)

MS. GIFFORD: Thank you very much, and congratulations to the members of the Executive Committee and to the new officers. I will now turn the meeting over to Ken Logan, who is the new Chair of the Section. And also as Vice-Chair this year he has been the Program Chair for the Section, and he will begin the program.

KENNETH R. LOGAN, ESQ.: My first official act feels a little bit foolish, which is to introduce Bill Lifland as the speaker who will give us an update on current developments in antitrust. I suspect there is no one in this room and probably very few people who practice antitrust law in New York or elsewhere who don't know Bill Lifland. There is a long tradition at this session of having Bill start things off. I think it puts us in a good frame of mind and sets a very high standard for the balance of the day. He's always done that in the past and I'm sure he is going to do that now. So thanks, Bill.

2000 Antitrust Developments

WILLIAM T. LIFLAND, ESQ.: The courts continued to be active in the antitrust field during the year 2000.

Monopolization

The case most in the news was the proceeding filed by the Justice Department and a number of states against Microsoft.[1] Having ruled that the plaintiff governments had proved the charges of monopolization (of Intel-compatible PC operating systems), attempted monopolization (of Internet browsers), and unlawful tying arrangements, the district court granted the government's request for an order of divestiture, which is stayed pending appeal. The Supreme Court decided not to entertain a direct appeal and the Court of Appeals for the District of Columbia ordered expedited proceedings. Oral argument is scheduled for next month. There has been speculation as to whether the district court's procedural rulings, such as its determination not to hold a fuller hearing on relief, and the court's comments in interviews with the press, could lead to remands without resolving the substantive issues raised on appeal. There has also been speculation as to whether the change in administration will lead to a different assessment by the Justice Department of the merits of the proceeding. If so, there could be a major difference in views between the Department and the 19 states which are co-plaintiffs in the litigation.

There were a good number of other cases decided in 2000 involving, like *Microsoft*, what additional conduct is required to prove monopolization or attempted monopolization where the defendant has a market share in the monopoly zone. In one such case, the Fifth Circuit upheld a ruling setting aside a $25 million judgment based on a charge of attempting to monopolize the high school year book business.[2] The defendant was charged with embarking on a program to drive the plaintiff out of business. But the practices allegedly adopted to effectuate this intention were found not predatory. The practices included bait-and-switch pricing not shown to be deceptive and below-cost pricing not proven to be recoupable. Another district court refused to set aside a $350 million verdict, before trebling, where the exclusionary conduct was mainly in removing point-of-sale advertising materials of competitors.[3]

Another district court refused to set aside a $23 million jury verdict, finding adequate evidence for its finding of monopolization, particularly from use of a bundled rebate program which effectively required customers to forego purchasing competitors' products in order to obtain rebates[4] and another district court refused to dismiss monopolization claims on summary judgment where the evidence indicated long-term or exclusive contracts and acquisitions of competitors, thus creating a factual issue as to whether the monopoly power was willfully acquired or maintained.[5] A California district court refused to dismiss on summary judgment counterclaims of monopolization where there were triable issues with respect to anti-competitive conduct, including payments for exclusivity and customer rebate programs allegedly designed to drive others from the market.[6]

On the other hand, a district court dismissed a complaint which sufficiently alleged monopolization or attempted monopolization and plaintiff's inability to compete as a result of anti-competitive conduct, but failed to allege that the conduct had anti-competitive effects in the same markets where monopoly power was alleged.[7]

In a particularly significant case, the Federal Circuit vacated a preliminary injunction against the dominant supplier of microprocessors for personal computers. The injunction would have required the supplier to continue furnishing samples and finished products to a customer who was suing the supplier for patent infringement. The injunction was based on the district court's finding that the supplier was likely to be monopolizing by withholding an essential facility. The Federal Circuit ruled that as a matter of law monopolization could not be shown because the supplier and customer were not competitors. In the court's view the absence of a competitive relationship was fatal to an effort to invoke the Sherman Act to enforce access to the property of another.[8]

In another case involving similar facts, a copier manufacturer was sued for refusing to sell patented parts to independent service operators. The Federal Circuit ruled that

> the refusal to sell was lawful to the extent it did not exceed the scope of the patent grant. The court analogized such a refusal to suing for patent infringement. The court said that it would not inquire into the subjective motivation of the patentee for such a suit so long as it was not objectively baseless. Accordingly the court said it would not inquire into a patentee's subjective motivations for refusal to sell patented parts.[9]

A related issue was present in connection with a technology licensor's failure to provide technology allegedly due under the license. The FTC had required the license to be issued as a means for neutralizing the anti-competitive potential of an acquisition by the licensor. The court ruled that sufficient market share was alleged to infer monopoly power and that the license agreement was assertedly breached in order to exclude the plaintiff from the markets. At the pleading stage this allegation was enough to permit an inference of exclusionary conduct in the market.

Normally we would ask ourselves why a licensee under an FTC-required license would not bring such allegations at least initially to the attention of the FTC. The

opinion does not indicate whether this was done in this case. The fact that the matter was taken to court may therefore be based either on the reluctance of the FTC to become involved or upon the manufacturer's desire to obtain quicker or greater relief than seemed available through the administrative process.[10]

Conspiracy

Turning now to decisions involving charges of conspiracy, the Eighth Circuit affirmed a summary judgment in favor of an auto racing sanctioning body which had been sued by a transmission manufacturer aggrieved because its product had been disqualified from use in a certain category of racing vehicles. The plaintiff alleged that the disqualification was due to unlawful concerted action between the sanctioning group and competing transmission manufacturers. The court said that the disqualification of some equipment was an incidental by-product of defining a sport and that considerable discretion had to be given to sports authorities in such matters. The court added in *dictum* that in order to prevail, a plaintiff must show conduct going beyond irrationality or unfairness, but suggesting that a plaintiff could win if the decision to disqualify were corrupted by competitors of a disadvantaged supplier, or actual adverse effect on competition had been shown.[11] Exactly how much of an exception the court's *dictum* made to the general principle of sanctioner latitude is not altogether clear. But it does appear to leave the sanctioning body open to a charge of participation in a conspiracy in at least some environments—where corruption or severe competitive impact is present.

In another sports antitrust case the PGA was sued by a firm providing on-site broadcasts of golf tournaments to spectators through special low-frequency radios. The claim was that the PGA had organized a boycott of the firm's service by agreements with tournament sponsors. In response defendants said that such a boycott was improbable because the sponsors were primarily interested in attendance and would have no reason for participation in a conspiracy. The Fifth Circuit ruled that there could be an actionable conspiracy without such a reason where one conspirator coerces others to participate despite their lack of any interest in doing so. Accordingly, the district court's dismissal of the claim was reversed.[12] In a different case, also involving the PGA, a senior professional golfer charged that the PGA and local sponsors had conspired to impose restrictive conditions on participation of golfers. The court ruled that to prove a conspiracy on this basis the plaintiff must come forward with additional evidence indicating that both the tour and the sponsors had a conscious commitment to a common scheme designed to achieve an unlawful objective. The court observed that the sponsors might indeed be indifferent to the choice of eligible golfers, so long as the tournament drew adequate public attention.[13]

This issue—let's call it the lack-of-incentive-to-conspire issue—was presented even more sharply in a case involving a network of auto-glass shops formed to contract with insurers. The network was charged by independent shops with conspiracy to drive the independent shops out of business. In affirming a summary judgment dismissing the claim, the Fifth Circuit observed that the networks had no economic incentive to harm the independent shops, since they relied on them to fill out the coverage required by insurers.[14]

In another case, involving charges of a conspiracy to spread false rumors about the plaintiff, where the alleged conspirators were the defendant and its sales representatives, the court applied the general rule that principal and agent should not be deemed conspirators. Summary judgment was granted, the court stressing the absence of evidence that the sales representatives had personal or economic interests divergent from those of the manufacturer.[15]

One of the more interesting cases involving charges of conspiracy relates to the formation of a professional soccer league. There have been many suits challenging other sports leagues as unlawful conspiracies against players—imposing salary caps, reserve clauses, and the like. But the soccer league was organized somewhat differently. It was structured as a limited liability company which contracted centrally for players' services. Some of the company's investors were passive investors; others were active investors who operated a league team under contract with the league. Despite some resemblances to a conventional league made up of separately owned-and-operated teams, the league was treated as a single entity. The court ruled that the investor-operators and the league should not be viewed as conspirators. As parts of a single entity they were incapable of conspiring. The court noted the possibility there might be independent personal interests which would defeat the application of the single entity principle in some circumstances, but found insufficient evidence to conclude that the investor-operators had divergent economic interests from those of the league.[16]

Another leading case involved the issue of when a conspiracy is to be inferred from parallel actions of competition while there are sporadic contacts between the parties.

The case involved producers charged with fixing potash prices. The evidence showed parallel pricing. The court ruled that no illegality was shown unless there were sufficient "plus factors" tending to exclude the possibility of independent pricing.

The plaintiffs asserted that the plus factors could be found from inter-firm communications and actions against self-interest. The court found that the communications were sporadic and occurred in only "several dozen" cases in a period containing thousands of transactions. Also the contacts did not tend to exclude the possibility of

independent pricing action. As to the alleged action against self-interest—participation in settlement of an antidumping proceeding—the court stated that this was also consistent with independent conduct to avoid litigation cost and risk.[17]

Where a conspiracy is found to exist, there is not necessarily a violation of law. For a violation the conspiracy must be to do something unreasonably restraining competition, like price-fixing. Last year the Supreme Court held that in a case involving the legality of a dental association's restrictions on member advertising, the FTC and Ninth Circuit had not performed a sufficient analysis to determine whether the challenged restrictions were on balance anti-competitive. The use of a "quick look" approach to applying the rule of reason was held unwarranted where the challenged restrictions might only prevent misunderstanding rather than inhibit competition. The Ninth Circuit has since reversed its earlier decision and held, after a fuller review of the evidence, that the restrictions did not bring about a net harm to competition. The factors considered by the court included consumers' difficulties in obtaining accurate information about the quality of dental service and the potential for misleading advertising.[18]

The Ninth Circuit also upheld a summary judgment dismissing an antitrust claim against a divers' association which was charged with conspiring to deny access to its membership list to a mail order seller of scuba equipment. There was evidence that retailers had insisted that the association make the list available to a trade magazine only on condition that it not accept mail order advertising. The appellate court said that the plaintiff had abandoned any claim under the Rule of Reason, and that the agreement did not meet the test for *per se* liability. The court indicated that one of the reasons for the ban on mail order advertising was that the use of some scuba equipment by uncertified persons exposed them to significant danger so that there was at least a possibility that the agreement would survive a rule-of-reason examination.[19]

In another case a district court applied the rule-of-reason in dealing with an issue that affects many of us personally. A group of airlines serving Dulles airport voted to put at security checkpoints apparatus to block oversized carry-ons. One airline, which had spent considerably to outfit its planes with larger overhead bins, as permitted by the FAA, challenged the group's action under the federal antitrust laws. Treating the challenged conduct as a horizontal agreement to limit service to passengers, the court applied a truncated rule-of-reason analysis. Having rejected the defendants' contention that the size limitation aided on-time performance, safety, and passenger comfort, the court concluded that the absence of plausible procompetitive justifications mandated summary judgment for the complaining airline.[20]

Tying Arrangements

We turn now to tying arrangements.

A district court refused to dismiss a local advertising agency's claim that a car manufacturer had unlawfully conditioned the sale of its cars to dealers on dealer payment of $1 per car for advertising services performed by the manufacturer. The complaint alleged that the local ad agency had lost most of its dealer business when the manufacturer did its own advertising and charged the dealer, instead of making the funds available for use in dealer advertising. The court stated that an unlawful tie had been alleged, as there were two separate products—the cars and the advertising—that the availability of cars was conditioned on paying for the advertising, and the seller had sufficient economic power as a seller of cars to enable it to restrain trade in advertising.[21] Why the manufacturer did not build his advertising cost into the price of the vehicle, so as to avoid the appearance of tying, is hard to understand.

But the case illustrates that tying doctrine makes distinctions as to separateness of products which are not always intuitively obvious.

This separateness issue is also raised in a more celebrated case decided last year, the *Microsoft* decision. The plaintiffs alleged, and the court found, that Microsoft's web browser and its operating system were separate products, which Microsoft had effectively tied together by building the browser into the operating system in a so-called technology tie. Microsoft argued that it had integrated the browser into the operating system to improve the operating system, and that the system as so improved, was a single product. In deciding that two separate products were involved, the district court took the unusual step of declining to apply a test of separateness laid down previously by the District of Columbia Circuit. The Court of Appeals' test seemed to imply that the browser should not be treated as a separate product if including it in the operating system arguably benefited users. According to the district court this approach was inconsistent with Supreme Court precedents. The district court stated that the Supreme Court had laid down a "separate demand" test as a means for determining whether there were two products, or one, and there was in fact such a separate demand as the products had previously been sold independently.[22] This issue of which test is right is among those to be considered by the appellate court in the pending appeals.

In the related category of exclusive agreements the Eighth Circuit affirmed a dismissal of a complaint which recalls somewhat the facts underlying the Supreme Court's classic *Jefferson Parish* decision. Nurse-anesthetists claimed that they had been treated unlawfully when their hospitals contracted out all their anesthesia requirements to anesthesiology firms. The nurse-anesthetists were

thereby forced to work for the firms in order to continue to work at the hospitals. In affirming summary judgment dismissing the claims that the exclusive contract was unlawful, the Eighth Circuit stated that there was insufficient evidence that the exclusive contracts had caused detrimental effects on competition in the relevant market.[23]

The *Microsoft* litigation also involved a claim that exclusive arrangements between Microsoft and others, such as Internet service providers, had resulted in competitive foreclosure, particularly of Netscape Navigator, the once-dominant Internet browser competitive with Microsoft's Internet Explorer. The court dismissed the claim that the arrangements constituted unlawful exclusive dealing on the ground that Netscape had shown the ability to distribute its browser free to end-users and that the evidence therefore did not indicate competitive harm.[24]

Discrimination

Turning now to the subject of price and related service discrimination, a significant Fourth Circuit ruling reinstated a Robinson-Patman challenge. The district court had ruled that a supplier's volume discounts were justified by the need to meet competition. The Fourth Circuit observed that there was evidence that the discounts were primarily extended to generate the volume necessary to operate a new plant efficiently. The need to meet lower prices from competitors was not "that big a concern." The court also noted that the contracts with favored customers contained a clause entitling the supplier to match lower competitive offers. Since this clause was an "explicit mechanism" to deal with competitive quotes, the court said that a fact-finder could reasonably determine that the supplier did not need or intend its volume discounts to match competing offers, with the result that the meeting competition defense was not available.[25]

This ruling may suggest to sellers that the inclusion of the matching clause may be a two-edged sword. On the one hand, it may succeed in giving the supplier an opportunity to meet competition he would not otherwise have. On the other hand the clause may limit the supplier's ability to invoke the meeting competition defense if the clause is not invoked. If the clause is used, therefore, suppliers may want to be sure that the clause is invoked whenever meeting competition is necessary.

A more technical discrimination issue is whether a particular concession to customers is to be considered a discrimination in price, governed by § 2(a) of the Robinson-Patman Act, or a promotional allowance, governed by § 2(d), with fewer opportunities for defense.

In one case a supplier offered two retail promotional programs, the first consisting of a rebate per unit, which was to be passed through to customers; and the second consisting of free goods, effectively reducing the unit price to the customer. Suit was brought by a customer to whom neither of the promotions was offered. The customer urged that both concessions violated § 2(d) as discriminatory promotional allowances. A district court ruled instead that § 2(d) applied to discrimination in the pass-through rebate but that § 2(a), relating to price discrimination rather than promotional allowances, applied to the free product deals.[26]

A somewhat different result was reached by a district court considering an independent book store's charge of unlawful discrimination in favor of chain buyers. It was asserted in defense that some of the claims of discrimination in promotional payments and advertising service were actionable only under 2(d) and 2(e) and not under § 2(a). The court ruled instead that discriminatory promotional allowances could be reached under both §§ 2(a) and 2(d).[27]

Whether § 2(a) or § 2(d) applies is not always a purely technical point, since injury to competition must be proved to make out a case under § 2(a) but not under § 2(d).

Acquisitions

A number of the FTC's administrative actions concerning mergers and acquisitions are especially noteworthy. As everyone knows, it is standard practice for the FTC, in announcing its intent to agree with proposed restructuring, to accompany the announcement with a brief and sometimes conclusory statement as to the need for the restructuring to avoid anti-competitive effects. In connection with its announcement concerning the merger of Exxon and Mobil, three FTC commissioners issued a more complete statement of their reasons for agreeing with the restructuring. They noted first that 60 percent of the assets of the firms were outside the U.S. and competitive effects had been reviewed by several foreign antitrust authorities, which had given approval subject to some adjustments; second, that overlaps in the United States amounted to only 3 percent of the merged assets, and restructuring had been undertaken to deal with the overlaps; and third, concentration would be relatively modest after the transaction, the top four firms accounting for only about 42 percent of refining capacity and gasoline sales. At the same time the commissioners expressed their intention to review any future proposed mergers in the oil industry with special concern.[28]

The BP Amoco transaction provided an opportunity for such review, and again substantial divestiture provided the answer. The divestiture covered all the acquired companies' assets used primarily in its Alaska businesses, as well as its assets relating to its crude oil business at a particular Oklahoma location where a petroleum storage service was conducted.[29]

The FTC's coordination with foreign antitrust agencies was exemplified in a chemical industry merger involving two diversified European firms with interests in the United States and other countries. The FTC noted that

the parties had agreed with the European Commission to divest most of their holdings in a cellulose acetate venture and the FTC supplemented this agreement by requiring competition to be preserved pending the divestiture. The FTC also required divestiture of an anti-thrombin drug under development by one of the parties, as it was likely to compete with a product the other was already marketing in the Midwest.[30]

Normally a finding that new entry will discipline any effort to raise prices after a merger means that the merger will not be challenged. In one of its settlement proposals, the FTC indicated circumstances in which new entry, despite low barriers, is made more difficult because of the large minimum efficient scale of new production facilities. According to the FTC's announcement, a new entrant building such facilities and operating them efficiently would have to produce so much product that market prices would be driven down to unprofitable levels. Since a new entrant was unlikely to do so, entry was viewed as difficult and a challenge was made, resulting in a settlement which would require divestiture of an existing plant and manufacturing technology.[31] One cannot help asking, though, how clear it is that a new plant would not be operated at a price-reducing level of output. This might depend on the relative efficiency of the new and existing plants, since it is not unknown for newer plants to take advantage of their efficiency to build a customer base with aggressive pricing.

Another FTC settlement proposed to resolve competitive concerns by requiring, in addition to some divestiture, the termination of distribution agreements with foreign manufacturers. The FTC stated that this would permit the foreign firms to enter the North American market independently, thereby acting as a competitive counterweight to the combined firm and the only other substantial supplier.[32]

In a litigated case, which is still before the court, the FTC did not accept this "counterweight" principle. It sought to enjoin a merger of two baby food firms designed to provide a counterweight to a third firm with a 65 percent market share. The district court refused the injunction on the ground that the defendants had overcome the FTC's *prima facie* showing based on market concentration. They had done so with evidence indicating that the transaction was the only way to effectively challenge the dominant competitor. The district court's logic, however, encountered substantial resistance from the Court of Appeals, which granted the FTC a stay pending appeal. In doing so, the appellate panel indicated that the FTC had demonstrated a substantial probability of success. The court stated that the parties' argument that efficiencies rebutted the FTC's statistical evidence had some support in principle but was nonetheless novel and complicated by the high concentration levels present in the case.[33] The appeal is to be argued shortly.

In another litigated case the FTC was more successful in the district court. A preliminary injunction was issued to prevent creation of a firm that could have controlled 60 percent of sales of loose-leaf chewing tobacco. The principal dispute appears to have been whether the market must include "moist snuff," another variety of smokeless tobacco. The court found that it did not. Nor was there any likelihood of new entry as unit sales were down and regulation up. As to efficiencies, the court was unsure whether they could ever constitute a defense, but it was satisfied that in the case at bar the efficiency evidence did not overcome the presumption of illegality. The proposed transaction was subsequently abandoned.[34]

Injury and Effect

In private litigation, as distinguished from litigation brought by government agencies, an important issue is often injury to the plaintiff and impact on market-wide competition. This is often a stumbling-block for private litigants. An example was a challenge to a free state-operated medical evacuation service. Plaintiff claimed the free service was destroying its competitive business. The court ruled that the plaintiff had alleged injury to its own business interests, but had failed to allege a detrimental effect on market-wide competition. The complaint was dismissed despite the fact that no private business is likely to be able to compete with a free service sponsored by the state.[35] Another case where the complaint was dismissed for failure to assert harm to market-wide competition involved a claim that a wireless telephone service had treated its direct customers more favorably than the plaintiff's customers.[36] A note of caution, however, is suggested by a Third Circuit decision which reversed a dismissal on the ground of absence of allegation of actual adverse competitive effect. The Third Circuit stated that the alleged conduct, vertical minimum price-fixing, was *per se* illegal. Accordingly the appellate court stated that if a plaintiff were required to demonstrate that a *per se* violation of the antitrust laws caused an adverse effect on market-wide competition that would come dangerously close to transforming the *per se* violation into a case to be judged under the rule of reason.[37]

In addition to allegations of market-wide effects courts continue to look for allegations and proof of antitrust injury, as well as other elements of antitrust standing. A number of cases found that plaintiffs had not suffered antitrust injury where their damages were remote or derivative. Several circuits considered claims that tobacco companies had violated antitrust and other laws in connection with the sale of tobacco products and accordingly caused undue expenses for health care of smokers, the expenses being incurred by insurers and other third-party payors. A number of courts of appeal dismissed the antitrust claims on the grounds of remoteness of injury, the smoker beneficiaries being viewed as the primary objects of the alleged illegality.[38]

The existence of antitrust injury also comes up in conjunction with private challenges to mergers. In one such case a distributor of a merging firm was terminated following the merger. The distributor's challenge to the transaction was unsuccessful. Relying on a 1995 Second Circuit ruling (GKA Beverage), the court stated that the plaintiff, although a direct purchaser from the merging parties, was not injured. Any resulting increase in price or diminution in quality as a result of the transaction was said to injure final purchasers such as hospitals and doctors, rather than the plaintiff.[39]

The Third Circuit applied similar reasoning in upholding the standing of consumers seeking an injunction against a branded drug manufacturer's alleged obstruction of introduction of a generic version of the drug. The district court had dismissed the complaint on the ground that any overcharges for the branded product were likely absorbed by third-party payors. The appellate court ruled that the district court was bound to accept as true the complaint's allegations that consumer prices for the branded product were inflated. The court added that while the plaintiffs were clearly indirect purchasers, this status was not fatal to their request for injunctive relief, as the alleged facts established a casual connection between the asserted anti-competitive conduct and the plaintiff's harm.[40]

A number of last year's decisions dealt with other elements of standing. In one case a district court declined to recognize so-called "umbrella standing." A firm of surgeons challenged the merger of two suppliers of equipment used in eye surgery, asserting that as a result of the merger they paid higher prices for equipment. A complicating factor was that the higher prices were not paid to the merging parties but to an additional supplier. Plaintiff's theory was the merger created a price "umbrella" which enabled the additional supplier to increase its price. The district court ruled that it was conjectural whether any price increase by the additional supplier was a result of the merger. It also pointed out that factors such as directness of injury, complexity and potential for duplicative recovery, all argued against the plaintiff's standing.[41]

In another case a district court dismissed claims that a supplier of retail tracking services had inflicted competitive injury on the plaintiff's foreign affiliates and joint ventures. Indicating that while plaintiff's injury was real, it was derivative of the injuries suffered by others who constituted an identifiable group motivated to vindicate the public interest in antitrust enforcement, the court dismissed the claim for lack of standing.[42]

The availability of a preferred plaintiff with incentive to sue was also explored in a First Circuit ruling. Two manufacturers of fittings came under common control and an exclusive sales representative of one of them was terminated. The representative sued, challenging the transaction, and its complaint was dismissed for lack of standing. The First Circuit upheld the dismissal, noting the factors that need to be balanced and stating that distributors presumptively lacked antitrust standing to challenge mergers of suppliers. The court recognized in *dictum* that there may be some instances where presumptively disfavored plaintiffs have standing. It said that the most obvious reason for permitting "second-best" plaintiffs to sue was that there may be no "first best" with adequate incentive to do so. In the particular case the court noted that the first best had ample incentive to bring a claim if warranted.[43]

Evidence

In many antitrust litigations key evidence must be presented through expert witnesses. Last year's decisions included a number of cases in which courts went out of their way to criticize expert presentations. In one case the controversy was over the legality of so-called loyalty discounts, where the amount of the discount is dependent upon the percentage of its requirements the buyer purchases from the seller. The court indicated that the expert's economic model did not fully reflect the product market nor did it properly separate lawful from unlawful conduct.[44] In another case the court rejected expert opinion to the effect that an airline's incentive plan resulted in predatory prices to marginal customers. The court stated that the opinion was grounded in assumption rather than facts as to obviously important considerations such as the need for additional flights to carry the marginal customers, and how the marginal customers would be allocated to the additional flights.[45] In a third case, where the issue was whether circumstantial evidence indicated price-fixing, the court ruled that the expert's economic model failed to take into account evidence that would have led to higher prices without collusion, and relied almost exclusively on evidence that was not probative of collusion. The court stated that there must be sufficient factual basis to remove opinion testimony from the realm of guesswork and speculation.[46]

In a fourth case, where a district court was called upon to determine the damages chargeable to a defaulting defendant, the plaintiffs' expert was the only witness. The court stated that his testimony was "riddled with error," in that it included some sales which should clearly have been omitted and included unreliable estimates of other sales. The court refused to make a finding of damages based on this evidence.[47]

All these cases underscore the importance of involving potential expert witnesses early in the litigation when they have both sufficient time to collect all available information from their clients and public sources and the opportunity to use discovery processes to collect information that is not generally available.

A final word with respect to another antitrust case which has been much in the news. That is the *Lysine* price conspiracy cases which attracted widespread publicity when it was revealed that an executive of the principal

defendant corporation had for some years secretly tape-recorded incriminating conversations with his colleagues and competitors. While doing so he was also engaged in stealing substantial funds from his employer. His failure to inform his FBI handlers about this led to revocation of his antitrust immunity as well as to his conviction for embezzlement. He was tried and convicted of antitrust violation along with two of his superiors, who were sentenced to 24 months imprisonment. The appeals of the superiors were heard in 2000. The Seventh Circuit affirmed the convictions, upholding the use at trial of the covert tape recordings, after deciding that the appellants were not entitled to benefit from a witness immunity agreement and further holding that output limitations as well as price fixing agreements are *per se* unlawful. In addition, the court ruled that a sentence enhancement was appropriate under the Sentencing Guidelines. The evidence indicated that appellants were organizers of the conspiracy, despite the need to negotiate some details with other cartel members. The court accordingly remanded the proceeding for an upward adjustment.[48]

The background of this proceeding is described at length in a book entitled "The Informant" written by a *New York Times* reporter Kurt Eichenwald. It is very interesting reading and highly recommended.

Endnotes

1. *U.S. v. Microsoft Corp.*, 2000-1 CCH Trade Cas. & 72,839, 87 F. Supp. 2d 30 (D.D.C.).
2. *Taylor Publishing Co. v. Jostens*, 2000-2 CCH Trade Cas. & 72,955 (5th Cir.).
3. *Conwood Co. v. U.S. Tobacco Co.*, 2000-2 CCH Trade Cas. & 73,077, & 73,078 (W.D. Ky.).
4. *LePage's Inc. v. 3-M*, 2000-1 CCH Trade Cas. & 72,846 (E.D. Pa.).
5. *ACT, Inc. v. Sylvan Learning Systems, Inc.*, 2000-1 CCH Trade Cas. 72,804 (N.D. Iowa).
6 . *Avery Dennison Corp. v. Acco Brands Inc.*, 2001 CCH Trade Cas. & 72,882 (C.D. Calif.).
7. *Republic Tobacco, L.P. v. North Atlantic Trading Co., Inc.*, 2000-1 CCH Trade Cas. & 72,782 (N.D. Ill.).
8. *Intergraph Corp. v. Intel Corp.*, 1999-2 CCH Trade Cas. 72,697 (Fed. Cir.).
9. *Independent Service Organizations*, 2000-1 CCH Trade Cas. & 72,795 (Fed. Cir.).
10. *Hewlett-Packard Co. v. Boston Scientific Corp.*, 1999-2 CCH Trade Cas. & 72,732 (D. Mass.).
11. *Brookins v. Int'l Motor Contest Ass'n*, 2000-2 CCH Trade Cas. & 72,985 (8th Cir.).
12. *Spectators Communication Network, Inc. v. Colonial Country Club*, 2000-2 CCH Trade Cas. & 73,087 (5th Cir.).
13. *Toscano v. PGA Tour, Inc.*, 1999-2 CCH Trade Cas. & 72,702 (E.D. Calif.).
14. *Stewart Glass & Mirror v. U.S. Auto Glass*, 2000-1 CCH Trade Cas. & 72,753 (5th Cir.).
15. *Peerless Heater Co. v. Mestek, Inc.*, 2000-1 CCH Trade Cas. & 72,917 (E.D. Pa.).
16. *Fraser v. Major League Soccer*, 2000-1 CCH Trade Cas. & 72,883 (D. Mass).
17. *Blomkest Fertilizer Inc. v. Potash Corp. of Saskatchewan Inc.*, 2000-1 CCH Trade Cas. & 72,812 (8th Cir.).
18. *California Dental Ass'n v. FTC*, 2000-1 CCH Trade Cas. & 73,019 (9th Cir.).
19. *Nova Designs Inc. v. Scuba Retailers' Ass'n*, 2000-1 CCH Trade Cas. & 72,793 (9th Cir.).
20. *Continental Airlines, Inc. v. United Airlines, Inc.*, 80 ATRR 33 (E.D. Va.).
21. *Dauro Advertising, Inc. v. General Motors Corp.*, 2000-1 CCH Trade Cas. & 72,747 (D. Col.).
22. *U.S. v. Microsoft Corp.*, 2000-1 CCH Trade Cas. 72,839, at pp. 87,249-252 (D.D.C.).
23. *Minnesota Ass'n of Nurse Anesthetists v. Unity Hospital*, 2000-1 CCH Trade Cas. & 72,852 (8th Cir.).
24. *U.S. v. Microsoft Corp.*, 2000-1 CCH Trade Cas. & 72,839, at pp. 87,252-254 (D.D.C.).
25. *Hoover Color Corp. v. Bayer Corp.*, 1999-2 CCH Trade Cas. & 72,721 (4th Cir.).
26. *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 2000-1 CCH Trade Cas. & 72,799 (N.D. Ill.).
27. *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 2000-1 CCH Trade Cas. & 72,806 (S.D.N.Y.).
28. *Exxon Corp.*, CCH Trade Reg. Rep. & 24,677.
29. *BP Amoco*, CCH Trade Reg. Rep. & 24,729.
30. *Hoechst*, CCH Trade Reg. Rep. & 24,680.
31. *Rhodia*, CCH Trade Reg. Rep. & 24,713.
32. *MacDermid*, CCH Trade Reg. Rep. In 24,685.
33. *FTC v. H.J. Heinz Co.*, 2000-2 CCH Trade Cas. & 73,066 (D.D.C.), *stay pending appeal granted*, 2000-2 CCH Trade Cas. & 73,090 (D.C. Cir.).
34. *FTC v. Swedish Match*, 2000-2 CCH Trade Cas. & 73,122 (D.D.C.).
35. *Evac, LLC v. Pataki*, 2000-1 CCH Trade Cas. & 72,825 (N.D.N.Y.).
36. *Cancall PCS v. Omnipoint Corp.*, 2000-1 CCH Trade Cas. & 72,855 (S.D.N.Y.).
37. *Pace Electronics v. Canon Computer Systems, Inc.*, 2000-1 CCH Trade Cas. & 72,908 (3d Cir.).
38. *Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 2000-1 CCH Trade Cas. & 72,765 (5th Cir.).
39. *Precision Surgical, Inc. v. Tyco International Ltd.*, 2000-2 CCH Trade Cas. & 73,011 (E.D. Pa.).
40. *Warfarin Sodium Antitrust Litigation*, 2000-1 CCH Trade Cas & 72,932 (3d Cir.).
41. *Garrabet v. Autonomous Technologies Corp.*, 2000-1 CCH Trade Cas. & 73,085 (C.D. Calif.).
42. *Information Resources Inc. v. Dun & Bradstreet Corp.*, 2000-2 CCH Trade Cas. & 72,993 (S.D.N.Y.).
43. *Serpa Corp. v. McWane Inc.*, 1999-2 CCH Trade Cas. & 72,724 (1st Cir.).
44. *Concord Boat Corp. v. Brunswick Corp.*, 2000-1 CCH Trade Cas. & 72,836 (8th Cir.).
45. *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 1999-2 CCH Trade Cas. & 72,700 (S.D.N.Y.).
46. *Blomkest Fertilizer Inc. v. Potash Corp. of Saskatchewan Inc.*, 2000-1 CCH Trade Cas. & 72,812 (8th Cir.).
47. *Industrial Diamonds Antitrust Litigation*, 2000-2 CCH Trade Cas. & 73,113 (S.D.N.Y.).
48. *U.S. v. Andreas*, 2000-1 CCH Trade Cas. & 72,944 (7th Cir.).

Indirect Purchaser Antitrust Litigation: Consumer Redress or Corporate Nightmare

STEPHEN S. MADSEN, ESQ.: I'm Steve Madsen. I'm going to moderate this panel. We have a really terrific group of panelists assembled here to discuss the subject of indirect purchaser litigation in the state of New York. I am going to give a little bit of review in the basic law in a minute, in case anyone has forgotten it or wasn't acquainted with it initially.

But suffice it to say, as Ken was pointing out, the world has, since the decision of *Illinois Brick* in 1977, divided the states into indirect purchaser states and those that are not indirect purchaser states.

Now, our state, New York, fairly recently, at the end of 1998, became an indirect purchaser state, which has some real significance and consequence as we'll see.

Let me introduce our panelists and say a little about them. Immediately to my left is Bernard Persky. Bernard is a partner at the firm of Goodkind Labaton Rudoff & Sucharow, and I think I see some of his colleagues in the audience. Bernard has been in the forefront of indirect purchaser litigation in this and in other states for many years representing plaintiffs and has pursued a number of theories of redress for persons injured or claimed to be injured by antitrust conspiracies who didn't in fact buy directly from the claimed violator. Bernie is going to be the first of our speakers.

Next will be David Copeland, a partner at the firm of Kaye Scholer Fierman Hays & Handler. I see David has some colleagues here too. David also has participated in indirect purchaser litigation, and in fact, between Bernie and David we have with us here the two lawyers principally responsible for litigation of that subject in the state of New York.

Until the legislature acted at the very end of 1998, New York was not discernibly an indirect purchaser state. David put forward the legal arguments in a case called *Levine v. Abbott Laboratories*, decided by Judge Gammerman, which decided that New York was indeed not an indirect purchaser state. Bernie was on the other side of that. Given the legislative outcome we'll see who had the last laugh there, because the decision was overturned by legislation.

Our third panelist is Robert Hubbard from the New York Attorney General's Office. Robert was also involved in the *Levine* litigation. His office submitted a brief *amicus curiae* in the Appellate Division for the First Department when the case went up. It was ultimately settled as part of a national settlement of related cases before we had a decision from the Appellate Division.

Also with us today, and it's a terrific thing that he is, Dean Edward Snyder. Dr. Snyder is Dean of the Darden School of Business at the University of Virginia and was formerly a professor at the University of Michigan. Dean Snyder has served as antitrust economist with the Justice Department and has acted as expert witness in a number of indirect purchaser cases.

Now, what are we talking about when we speak about indirect purchaser litigation? What exactly is that all about? And I want to just review very briefly how we came to be concerned with issues of this kind. Many of you will know all this ancient antitrust law already, but before we begin, we have to go back to the *United Shoe Machinery* case. In 1968 the Supreme Court of the United States decided that as a matter of federal antitrust law it would not be open to a defendant in an overcharge case—that was a § 2 case—it would not be open to a defendant sued for charging anti-competitive prices to defend on the ground that his immediate purchaser, the plaintiff, had in fact passed any overcharge onto its downstream purchasers.

The issue arose in a different context in *Illinois Brick*, truly one of the great celebrated antitrust decisions. *Illinois Brick* was sort of the mirror-image situation. In that case a plaintiff who was not a direct purchaser sought to sue a participant in a claimed antitrust conspiracy on the theory that an overcharge had been passed down through a chain of distribution to that plaintiff. And the Supreme Court rejected that offensive use of passing on, offensive in the sense that the plaintiff was saying, well, it was passed on to me, I'm the entity in the distribution chain that really absorbed it. The Supreme Court held in fairly flat emphatic terms that only the direct purchaser could sue. Several policy reasons were cited by the court for reaching that conclusion. One was the difficulty of tracing a claimed conspiratorial overcharge through a chain of distribution; another was the complexity of deciding competing claims to an overcharge amongst a group of participants in a distribution chain, almost certainly all of which would not be collected in one judicial proceeding. And lastly, there was a concern about possible multiple recoveries. If you have direct purchasers and indirect purchasers or their indirect purchasers on down the line all suing for the same offense, sooner or later you're likely to have multiple recoveries.

The issue, as we trace its history, then arises in connection with state antitrust laws. Only direct purchasers can sue under federal antitrust laws. What about state antitrust laws? In the *ARC America* decision, the Supreme

Court decided that nothing in the Sherman Act or in the Court's jurisprudence under the Sherman Act prohibited or preempted states from permitting indirect purchasers to sue. In fact, as a matter of state law, even though it might lead to a concern about multiple recoveries, an indirect purchaser could sue if state law permitted such a suit. And thence the divide of the world into indirect purchaser states and those which are not indirect purchaser states.

Prior to the amendment of the New York statute, there were 17 states that had one form or another of an express *Illinois Brick* repealer, as such statutes are called, on the books. New York, as I say, joined their ranks in December of 1998.

The *Levine* case that I mentioned, which was decided by Judge Gammerman, came down in 1996. An appeal was taken, but as I mentioned, the case was resolved as part of a national settlement before the Appellate Division could take action. The *Illinois Brick* repealer in New York came in as an amendment to the Donnelly Act, § 340 of the General Business Law. It is a new subsection 6 of the Donnelly Act. It expressly permits indirect purchaser standing and has a couple of other features that we'll discuss as we go through the program.

Now one issue panelists will address and will bring different perspectives to will be the availability of class certification in indirect purchaser litigation. Typically, if you're an indirect purchaser, and especially if you are a consumer, your purchase of the product in issue will not be enormous, and the litigation will make sense principally if claims of multiple purchasers can be aggregated as a class action. So far New York courts have not been at all receptive to indirect purchaser class actions. There have been a couple of decisions, one of the most recent ones in the *Nine West* litigation, holding that under § 901(b) of the CPLR, a plaintiff could not bring a class action under the *Illinois Brick* repealer, because as a statute providing for treble damages that statute provides for a penalty. Section 901(b) says, in substance, thou shall not have class actions for penalties.

That's the current answer in New York State. Where the class certification question has been raised in other states, results have varied. And we've included in your course materials a couple of sample decisions from other states where the underlying issues for class certification are discussed in some detail.

Typically on the question of class certification, the key issue is: Do common issues predominate? You can't have a class action if all of the members of the putative class have different interests, different proofs to put on and that sort of thing, so that you can't in fact adjudicate questions on a common basis. One of the decisions that's offered up for your consideration is *Goda v. Abbott Laboratories*, decided by a District of Columbia court, finding that under a statute, a local law of the District of Columbia, you could in fact have a class certified of indirect purchasers. That statute provided in substance that questions of fact of injury and amount of damage could be adjudicated on a class-wide basis, and the court there decided that that warranted certifying a class.

Another decision is *Karofsky v. Abbott Laboratories*, decided by a state court in Maine. The judge, after reviewing economic testimony provided by expert witnesses on both the plaintiff's side and on the defendant's side—and Dean Snyder was the expert on the defense side of that case—concluded that common issues could not predominate because of the unique elements of proof that would have to be put in with respect to any given class member to determine whether that class member had in fact been injured at all.

Now, the speakers today are going to present four distinct points of view on these issues. You may find us talking about some of the same issues over and over again, but I think you'll find it not repetitive. Bernie is going to begin with the plaintiff's perspective, talking about the issues that come up and identifying some of the various theories that plaintiff's counsel can use to pursue recovery on behalf of indirect purchasers. David Copeland will review the evolution of these issues in New York law. His firm has been involved in most of the significant cases raising these issues in New York law, including those prior to the *Levine* case. Bob Hubbard is then going to add the Attorney General's perspective, and the Attorney General speaks for the people in some respects here and acts on behalf of them, but may also join in with private enforcement efforts. And I know Bob has some interesting remarks on his perspective to make. And then Dean Snyder is going to close up by talking about the economic factors that enter into analysis of issues of this kind.

If you have significant questions as we go through, I would suggest that you pass them up or save them. I'm hoping that we'll have some time for questions and answers at the end. With that let me turn the floor over to Bernard Persky.

BERNARD PERSKY, ESQ.: Thank you, Steve.

The title of this seminar is "Indirect Purchaser Antitrust Litigation: Consumer Redress or Corporate Nightmare." I don't think of indirect purchaser standing as involving a corporate nightmare. Indeed, I think of indirect purchaser standing as involving even more than consumer redress. Because, if you think about it, indirect purchasers don't have to be consumers. They could be businesses who are also in the chain of distribution. And indeed, the fact that the state legislature so overwhelmingly passed the indirect purchaser *Illinois Brick* repealer bill was an indication of the fact that I'm sure they believed it also aided business as well as consumers.

There appears to be a very substantial increase in the number and variety of indirect purchaser litigation in state and federal courts. I'm going to briefly discuss some current issues in these types of cases from a plaintiff attorney's perspective.

Now with respect to standing, there are various theories of standing that would support the standing of an indirect purchaser in an antitrust suit. One way in which you could have standing is to file suit and invoke an *Illinois Brick* statutory repealer. Some states have enacted statutes repealing the *Illinois Brick* rule. These statutes often differ substantially from each other. There are some *Illinois Brick* repealers that are Attorney General-only provisions; that is, a statute that only would permit the Attorney General to sue on behalf of indirect purchasers. Such statutes are included in the laws of Illinois, Hawaii, Rhode Island, and there probably are others. The Attorney General could sue either as *parens patriae* or as a class rep, depending on the provisions of that particular state's statute. Indeed, in Maryland, there's an AG-only standing provision which permits the Attorney General only to sue on behalf of the state or its political subdivisions with respect to its indirect injuries. However, the most common *Illinois Brick* repealer would be the general *Illinois Brick* repealer, and that would permit both the Attorney General or a private party to sue on behalf of indirect purchasers. Presumably, if an Attorney General sues on behalf of indirect purchasers, he most likely would sue as *parens patriae*, usually on behalf of consumers. Examples of general *Illinois Brick* repealers would be Kansas, Michigan, Minnesota, New York as December of 1998, California, Wisconsin, the District of Columbia and others.

Sometimes the *Illinois Brick* repealer statutes have specific procedural provisions. Some statutes expressly provide for a pass-on defense in order to avoid duplicative recovery for the same injury. By a pass-on defense what I'm saying is that a defendant would have the obligation and the burden of demonstrating that the overcharge paid by the indirect purchaser was not absorbed by that indirect purchaser. He passed on part of it or all of it to someone else, and that, presumably, under those statutes would constitute a defense. A typical example of such a statute which contains a statutory pass-on defense would be in the District of Columbia, Hawaii, New York and New Mexico, and there are others.

Some *Illinois Brick* repealers provide for coordination, transfer and consolidation of overlapping state court suits. That becomes important because, very often, you'll have plaintiffs at various levels of the chain of distribution involved in state court suits, and they all assert the same underlying substantive law violations. New York has those procedural provisions; South Dakota and the District of Columbia are other examples of statutes that contain similar procedural provisions.

A few *Illinois Brick* repealers specifically adopt aggregate damages formulas, which expressly permit class-wide proof of indirect purchaser injury. Specifically, the District of Columbia is an example of that. That type of provision is similar to what's contained in the Hart-Scott-Rodino Act provisions governing Attorney General suits in federal court under the federal antitrust laws as *parens patriae*. Section 15 U.S.C. 15(c) has an aggregate damages formula. And some state antitrust laws, such as the District of Columbia, expressly have such a formula.

Now, aside from statutes permitting indirect purchaser standing, court decisions have granted indirect purchaser standing in the absence of an *Illinois Brick* repealer. And what kinds of theories support that? Well, for example, standing has been upheld under the general language of state antitrust laws. Specifically this has occurred in Arizona in the brand name prescription drug litigation, and in North Carolina, in the *Hyde* case. Those cases hold that "any person injured" includes both direct and indirect injuries. But the same kind of argument was rejected in Colorado in the *Stifflear* case, in Washington state in the *Blewett* case, and in New York in the *Levine* case.

Even when state legislatures have repeatedly refused to pass *Illinois Brick* repealers, some courts have, nonetheless, still upheld indirect purchaser standing, specifically in North Carolina in the *Hyde v. Abbott Labs* case. There, the Court of Appeals stated:

> Defendants further contend that the General Assembly's failure to explicitly amend North Carolina general statute § 75-16 to allow an indirect purchaser standing to sue for violations of our antitrust laws demonstrates that the General Assembly accepted the *Illinois Brick* rule. We disagree. Our Supreme Court stated—quoting from another case—the rule is that ordinarily the intent of the legislature is indicated by its actions and not its failure to act.

So even in states where the legislatures have repeatedly refused to pass *Illinois Brick* repealers, the argument may still be open to a plaintiff that there still could be standing.

Another theory of indirect purchaser standing which has often been upheld is under the state consumer protection laws or the unfair trade practices statutes. A number of courts have stated that an antitrust violation such as price fixing, monopolization or other antitrust violations constitute either an unfair practice, a deceptive act or practice or an unconscionable business practice. In those states, indirect purchaser standing has been upheld, specifically in Florida under the *Mack* case, in Massachusetts just a few weeks ago in one of the vitamins cases, and in Tennessee in the *Blake* case.

Recently in New Jersey, in some of the *Mylan* cases involving the drug Lorazepam and Clorazapate, two

courts split on precisely the same point. In the *Kiefer* case, the lower court said no, price fixing is not an unconscionable business practice. But in the *Cement Masons* case, just a few months later, on precisely the same facts, the New Jersey lower court upheld indirect purchaser standing as an unconscionable business practice under New Jersey's Deceptive Acts and Practices Statute.

Indeed, in Tennessee, in the *Blake* case, the Tennessee appellate court upheld standing under both Tennessee's antitrust laws as well as its Unfair Trade Practices Act. But in Washington state, in the *Blewett* case, the court ruled against standing because the state antitrust statute required Washington courts to interpret state antitrust laws consistently with federal antitrust law.

In the New York *Levine* case, Justice Gammerman said that the case law, and not any statute, required judicial interpretations of the state and federal antitrust laws to be harmonized.

Similarly in Texas, the Texas Supreme Court refused to uphold indirect purchaser standing under its Deceptive Practices Act because that would constitute what the Texas appellate court called "an end run" around the state legislature's refusal to pass an *Illinois Brick* repealer. That case is the *Abbott v. Segura* case.

In cases which do uphold indirect purchaser standing under the state unfair practices act courts sometimes point to the fact that federal courts have generally held that antitrust violations, such as price fixing, constitute an "unfair trade practice," under § 5 of the Federal Trade Commission Act. This occurred in the *Mack* case. And since so many states have passed little FTC acts, that's a strong basis for getting indirect purchaser standing upheld under state law.

Aside from statutory *Illinois Brick* repealers and aside from cases interpreting deceptive acts and practices statutes, recent cases, to some extent, have upheld indirect purchaser standing on common law theories. Specifically, indirect purchaser standing has been upheld under the common law theory of unjust enrichment. That occurred in the *In re Cardizem CD Antitrust Litigation* where Judge Nancy Edmunds of the Eastern District of Michigan upheld the legal sufficiency of claims of indirect purchasers of the brand name prescription drug Cardizem seeking restitution based on unjust enrichment.

Aside from claims for damages, there also can be claims by indirect purchasers for an injunction. Recently, courts have made clear that a federal antitrust claim for an injunction can be brought by an indirect purchaser. It is clear that the *Illinois Brick* rule does not bar indirect purchaser claims under § 16 of the Clayton Act. The Third Circuit recently so held in *In re Warfarin Sodium Antitrust Litigation*. That's a case on Professor Lifland's list that he didn't discuss and I guess he is leaving it to us to get into. As stated by the Third Circuit, "the Coumadin class-Coumadin is a blood thinning drug-the Coumadin class fits the stereotypical indirect purchaser mold. Indirect purchaser status, however, is not fatal to a plaintiff's request for injunctive relief under Section 16 of the Clayton Act." Later on the court stated: "While direct purchaser status is not mandated, the class must still make a showing that entitlement to injunctive relief requiring the demonstration of (1) threatened loss or injury cognizable equity; (2) proximately resulting from the alleged antitrust injury." The Third Circuit in that case held that allegations of anti-competitive acts precluding generic competition with the brand name prescription drug Coumadin causing consumers to pay inflated prices for the drug meets this threshold standing for injunctive relief under the federal antitrust rules.

Now, putting them altogether, recently indirect purchasers have filed federal suits for injunctive relief joining their damages claims as pendent to their federal claims. Specifically, pendent to their federal injunctive claims would be claims under state law under the indirect purchaser laws of the approximately, I think, about nineteen states that have *Illinois Brick* repealers, joining their deceptive acts and practices claims under the statutes of as many as 50 states, and also including common law claims for unjust enrichment.

Examples of this type of litigation that are currently pending would be *In re Cardizem CD Antitrust Litigation* and the *Hytrin* multidistrict litigations where direct and indirect purchaser suits for Sherman Act violations are pending in federal courts.

Briefly turning to class certification issues in indirect purchaser litigation, while cases have upheld indirect purchaser standing, plaintiffs have enjoyed somewhat mixed success in getting classes of indirect purchasers certified. Some courts have been particularly concerned about the predominance of individual vs. common issues. As stated in a Maine brand name prescription drug state court indirect purchaser case denying class certification-and I'm about to quote from the *Karofsky* case—the judge held as follows.

> A key distinction between the matter at bar and many of the decisions upon which plaintiffs rely is the distinction between the proof of impact on a direct purchaser and proof of impact on those who have purchased indirectly. The proof of impact has been far more troubling for plaintiffs proposing class certification of indirect purchasers, because indirect purchasers must demonstrate that any overcharges resulting from the illegal action of the defendants have been passed on to them, an entirely separate level of evidence and proof is injected into litigation of indirect pur-

> chaser claims. Proof of an antitrust conspiracy may logically lead to a conclusion that the subject of the conspiracy, the retailers, have each been harmed. No such conclusion logically follows without specific proof tracing that overcharge on to consumers.

That was in the *Karofsky v. Abbott Labs* case.

In an example of point-counterpoint, the exact opposite point of view or somewhat opposite point of view is expressed in the *Goda v. Abbott Labs* case. That court was much less daunted by the issues of complexity and apportionment. Judge Braman in the *Goda* case, which was a District of Columbia brand name prescription drug case involving the same exact facts as the *Karofsky* case, stated as follows:

> It is evident that when the class action remedy intersects price-fixing litigation, the conflict between the philosophies of the majority and dissenting opinions in *Illinois Brick* is sharpened. If we disdain the experts' theories, as does the majority, and demand the singular facts involving the particular individuals in the specific context of their market, the class action is virtually doomed in indirect purchaser cases. But if we assume the commission of a wrong that has resulted in some injury, albeit one difficult to measure, the allowance of "reasoned estimation" and "approximation" as postulated by the expert is not without appeal. The approach is especially persuasive where the wrongdoer's action has itself created a difficulty in proving damages with certainty, citing the *Bigelow v. RKO Radio Pictures Inc.* Supreme Court case.

The court went on to state: "The *Illinois Brick* dissent opens the way for admission of the experts' formulae to measure the overcharge and successive pass-ons, thus establishing injury and damages on a class-wide basis. Common questions of fact are thereby increased and individual questions correspondingly reduced."

Other class certification issues include proof of injury. Will the court require proof of each class member's individual injury? Or will class-wide damages formulas or aggregate damages proof be permitted? In the *Goda* case, the case from which I have just quoted, the District of Columbia antitrust statutes specifically permitted proof of damages on a class-wide basis. But the District of Columbia statutory provision on aggregate damages merely codified a rule that's already used in many direct purchaser price-fixing cases, such as the *NASDAQ* case, which routinely allow class-wide formulas. And as I had previously said, the Hart-Scott-Rodino Act in § 15(c) of 15 U.S.C. also has an aggregate damages provision with respect to Attorney General *parens patriae* actions in federal court.

In a California appellate court decision, *BWI Custom Kitchens*, the presumption of injury for purchasers of a price-fixed product was applied by that court in an indirect purchaser case. However, courts denying class certification require specific, clear proof of individual injury as to each class member.

There are also issues involving experts when it comes to class certification in an indirect purchaser context. Some courts will accept the methodology of plaintiff's expert as to the proof of indirect purchasers' injury without any extended inquiry or second-guessing the merits of the expert's approach.

Judge Braman in the *Goda* case held that the only question is "whether the expert's methodologies are sufficiently colorable to merit jury consideration." According to this approach, the court should not pick between the two experts so long as the challenged methodology is colorable.

On the other hand, other courts are more rigorous. And some even hold trial-type evidentiary hearings to determine if the plaintiff's expert's damages approach should be accepted or discounted by the court as too unreliable. This approach may be strengthened if the court applies a *Daubert* type of analysis to the expert's affidavits submitted on the class cert motions.

In the Maine brand name prescription drug case, the court rejected plaintiff's methodology and held that "tracing the alleged overcharges from manufacturers to wholesalers to retailers to consumers presents individualized issues which would dominate this litigation and preclude certification."

Other significant issues involving class certification of indirect purchaser litigation involve the nature of the product purchased. Does the product pass unchanged down the chain of distribution; for example, is it a pill? A pill goes from the manufacturer to the wholesaler to the retailer to the consumer. The less the product changes, the fewer the complexities. Is the product merely an ingredient to be used in another product, such as food additives or preservatives? Did the indirect purchaser purchase the price-fixed product itself, or only a product containing the price fixed product, such as copper or scrap copper which would be the commodity whose price may be fixed or a product containing some amount of copper. The case is simpler if the indirect purchaser bought the price-fixed product itself rather than merely a product containing the price-fixed product, for example, a food additive or vitamins. It is the difference between the purchaser of food additives, such as sorbates, versus a consumer who merely purchased a box of cookies containing a minute amount of sorbates.

There are also issues of duplicative liability of the antitrust violator. In the Supreme Court decision of *ARC America*, the court held that the antitrust violator could be liable for price fixing under both federal and state antitrust laws. The court held there is no constitutional due process problem. The court said, in essence, that this was a settled question of dual sovereignty. Thus, the same conduct can violate, and be punished under, both federal and state law.

What about issues of duplicative liability under state law itself? Without judicial recognition of a pass-on defense, the defendant could theoretically be forced to pay under state law several times before trebling for the very same price-fixing overcharge because of the various levels of the chain of distribution, of course, assuming 100 percent pass-on.

Another level of difficulty is whether the action is a multistate or a single-state indirect purchaser class action. Federal multidistrict litigation of indirect purchaser suits currently pending involve multistate claims joined with federal injunctive claims. Sometimes, multiple state court lawsuits are also removed to the multidistrict litigation court based on diversity. Multistate litigation may make class certification issues more difficult and complex. Some state court indirect purchaser suits have been settled on a multistate basis, with multistate settlement classes certified. State courts in Minnesota have certified a multistate class settlement of the Lysine litigation, and recently, in California, the copper products litigation was settled on a multistate basis in state court.

On an adversarial basis, recently a state chancery court in Chicago certified, over defendant's objection, a nationwide class of indirect purchasers of the drug Coumadin under the deceptive acts and practices statutes of all the states whose laws were not materially different from Illinois' deceptive acts and practices statute.

As the foregoing indicates, indirect purchaser litigation is on the rise and presents numerous interesting and complex procedural and substantive challenges for an antitrust litigator. Thank you.

MR. MADSEN: Thank you, Bernie, that was great. I have to say, all of us, as I mentioned, dealt with each other before on the same side or on opposing sides. So part of the deal amongst us for the day is that there would be no partisan bickering up here, and that people would not batter one another over the head. I guess I just can't help but observe as to the title of the course, of the session, the corporate nightmare part. Don't forget, everything that Bernie outlined is possibly happening to a defendant in an indirect purchaser suit is usually on top of and in addition to suits by direct purchasers who are entitled under federal law to get 100 percent of their claimed damages, even if it could be provable that the overcharge had been passed on down the line.

Our next speaker is David Copeland from Kaye Scholer.

DAVID S. COPELAND, ESQ.: As I was standing in the back and listening to Bill Lifland's superb summary of last year's antitrust developments, I came to think of my remarks this afternoon, somewhat fancifully, as an act of both confession and redemption. The fact or the aspect of it that's confessional is that I was taken back to 1983 when as a student at Fordham Law School I was taught antitrust law by Professor Lifland in an evening class that lasted from 6:00, I think, sometimes until as late as 9:00, in the evening. I have to admit that at times some of the students got a little punchy going into the third hour. And I rather vividly remember getting into an extended debate with a fellow student in the third hour of one of those classes about the meaning of the dissent in a 9th Circuit opinion which we had been assigned by Professor Lifland.

The confessional aspect is that my distinct recollection is that neither I nor my adversary had read the 9th Circuit opinion or the dissent. I like to think that Professor Lifland knew that, but that he allowed us to continue because he was trying to teach us to craft imaginative arguments. My remarks this afternoon are also an act of redemption because I can solemnly affirm to Professor Lifland that I have read all the cases that I'm about to talk about.

I thought that it would be useful to go over the history of the New York case law that has led up to the current situation, because even though some of that case law predates the recent amendments to the Donnelly Act, there is language in those opinions that arguably is still good law and in fact has informed some of the more recent post-amendment cases.

I start in 1978, the year after *Illinois Brick*[1] had been decided, in the case of *Russo and Dubin v. Allied Maintenance Corporation*.[2] And here the Supreme Court, New York County, was faced with a class action by tenants for damages resulting from an alleged conspiracy by building maintenance service companies to fix prices to the landlords. So the landlords were the direct purchasers and the tenants were the indirect purchasers.

There are in that relatively brief opinion two holdings. One is that the plaintiff, as an indirect purchaser, "has no valid claim, under the holding of the Supreme Court in *Illinois Brick*."[3] That virtually is a holding that the decision in *Illinois Brick* preempts any contrary rule in the state of New York. And as Bernie Persky pointed out in the briefs he wrote on behalf of the plaintiffs in the *Levine* litigation,[4] that part of the holding of *Russo and Dubin* doesn't really seem to hold weight after the Supreme Court's decision in *California v. ARC America Corp.*,[5] which made it clear that *Illinois Brick* does not preempt state antitrust laws.[6] So the question reverts to whether in fact indirect purchaser recovery should be

permitted under the Donnelly Act as a matter of statutory interpretation, which is the issue that was dealt with in *Levine*, which I'll get to momentarily.

The second holding of *Russo and Dubin*, which may not have gotten that much attention over the years, now has significance. It sort of seems like a ticking time bomb in the 1978 decision. The holding was that plaintiffs in any event could not maintain a class action under Article 9 of the CPLR because, as Steve Madsen alluded to, § 901(b) bars a class action to recover a penalty; treble damages are penal in nature, and moreover the court held plaintiff cannot waive treble damages because if he or she did so, they would no longer be a fair and adequate class representative under subparagraph (a)(4) of § 901.[7]

The court then also went on to express its doubt that the class action would be in any event "manageable" under 902(5).[8] And although the court didn't really explain its reasoning, it's the kind of argument that later was explored by the Maine court in *Karofsky*[9] and the other courts that Mr. Persky alluded to.

Russo and Dubin wasn't the only decision by a New York court that spoke to the issue of the availability of class actions under the Donnelly Act. It was also addressed in 1977 in a decision called *Blumenthal*,[10] also in Supreme Court, New York County, in which Judge Fein held that no class action was available under the Donnelly Act because of the penal nature of treble damages, and again the argument that plaintiff couldn't waive and still be an adequate class representative. And as we'll see, that issue resurfaces in the *Nine West* litigation.

That was the state of play going all the way up to 1996 and the *Levine* case, which involved, as has already been indicated, a class action by consumers of brand name prescription drugs for damages resulting from an alleged conspiracy by manufacturers to fix prices of drugs sold to wholesalers as well as retail pharmacies.[11] In an opinion on defendant's motion to dismiss, the trial court held that indirect purchasers cannot recover damages for price fixing under the Donnelly Act.[12] In so holding, Judge Gammerman explained that the Donnelly Act should be interpreted differently than federal antitrust law only when state policy differences in the statutory language or the legislative history justifies such a result.[13] He took that legal standard from the New York Court of Appeals decision in *State v. Mobil Oil*, a 1976 decision.[14] The *Levine* court basically found no differences in the key statutory language between the Donnelly Act and the federal antitrust statutes, and also found that New York policy disfavors duplicative recovery.[15] The court also found that multiple liability was in fact a distinct possibility, not just hypothetical speculation, adverting to the fact that there was already in play federal antitrust litigation in the MDL court in Chicago involving many of the same claims.[16] And I guess, if I have my timing correctly, there had indeed been a substantial settlement in the MDL case where hundreds of millions of dollars had been paid out by several of the manufacturing defendants.

I should add there was a lot more to this issue of whether New York policy was consistent with the *Illinois Brick* rule in the briefing in *Levine*. One of the things that the defendants argued was that, generally speaking, New York common law follows *Hanover Shoe*[17] in not allowing a pass-on defense in an overcharge case, relying mainly on the *Orange and Rockland* decision by the First Department.[18] The plaintiffs, on the other hand, argued that there really isn't a privity requirement in New York, and defendants in turn sought to distinguish those authorities as related mostly to personal injury situations. None of this was really developed or decided by Judge Gammerman. But it was part of the backdrop over the debate of whether New York policy was consistent with the federal rule against indirect purchaser recovery.

Then, finally, Judge Gammerman found that the legislative history issue would not favor indirect purchaser recovery, because to the extent there was any legislative history, it involved two failed attempts to enact an *Illinois Brick* repealer in the New York legislature.[19] Obviously, that's since been mooted and is no longer the case.

The court also had a holding regarding the New York Deceptive Trade and Practices Statute, which is § 349 of the General Business Law. It's worth mentioning in light of Bernie Persky's correctly pointing to the alternatives to state antitrust statutes as a mode of recovery. So if you're in New York and you're considering indirect purchaser recovery, and for example, you feel stymied because you don't seem to be able to get a class certified, you might very well turn to the Deceptive Trade Practices Act.

Now in *Levine* Judge Gammerman actually dismissed the DTPA claim on the merits because he found there was no allegation that the allegedly excessive prices were undisclosed.[20] People knew what they were paying for the supposedly overpriced drugs. In the briefing, plaintiffs came up with an imaginative way of arguing around this point by arguing essentially that there was misrepresentation by omission, because it was undisclosed that the prices were not set by market forces. The way that Judge Gammerman dealt with that particular argument in the *Levine* case was to point out that it really hadn't been pleaded in the complaint and that it wasn't something that he was going to consider in the case.[21] But I think going forward it's something that may be an issue on a case-by-case basis. I wonder whether that argument really would have been successful in the brand name prescription cases, because the existence of a

so-called two-tiered pricing system, where retail pharmacies often pay more for brand name prescription drugs than certain managed care entities, has been more or less a matter of public record for 10 to 20 years in this country. But nonetheless, there may indeed be a case where the plaintiffs can allege that sort of misrepresentation by omission, put it in the complaint and have it be in effect a way to create a valid claim under the deceptive trades and practices statute. At the time Judge Gammerman was also concerned about the possibility of an end run on the Donnelly Act rule against indirect purchaser recovery.[22] But now that the act has been amended, that's no longer a concern.

Again, we come to 1998 and 1999, when the act gets amended; so much of *Levine* is no longer law. However, there are some issues that are now currently in play, which certainly harken back to some of the earlier decisions in the '70s by the New York courts. And as Steve alluded to, the *Nine West* litigation involved a decision by the Supreme Court of New York County.[23] It was a class action by consumers for damages caused by conspiracy by a manufacturer and retail distributors of women's footwear to fix minimum prices at which shoes are sold. Here the court went back 20 years, followed *Blumenthal* and *Russo and Dubin*, and held § 901(b) of the CPLR bars class actions under the Donnelly Act, essentially following the reasoning of those earlier cases.[24] But it is worth noting that the court found it significant that treble damages are mandatory under the Donnelly Act, so that they actually couldn't be waived, regardless of whether the waiver of such treble damages would make the plaintiff an inadequate class representative.[25] I note that treble damages are not mandatory under the New York Deceptive Trade Practices Act, which under § 349 of the General Business Law permits private actions for actual damages and permits the court in its discretion to treble damages up to a certain amount. But in any event, my point is that going forward, plaintiffs in a class action may try to get around this particular problem by bringing claims both under the Donnelly Act and the Deceptive Trade Act statute, and if they can't overcome the bar on class actions for penalties with respect to the Donnelly Act, maybe they have a separate avenue with the other statute. However, that does not get you through the further argument that's been alluded to here about whether a class action is appropriate in any event under Article 9 because of all of the issues about whether individualized issues predominate.

Another holding which is in the *Vitamins Antitrust Litigation* is that the New York statute is not retroactive, which is relevant to the extent that a claim is brought for indirect purchasers damages that both predate and postdate the amendment of the Donnelly Act.[26] The court in that decision—which was actually by a district court in the District of Columbia—held that the damages would not be available if suffered prior to the amendment but would be available if suffered after the amendment.[27] In that decision the court followed precedent in some similar cases. I recall there's a *Keating* case in Minnesota where the court reached a similar decision, holding that Minnesota's *Illinois Brick* repealer was not retroactive.[28]

So here's where I think we stand right now. There are a couple of significant open issues under the Donnelly Act as amended. Perhaps the most important is whether indirect purchaser class actions brought under the Donnelly Act can in fact be certified. There is this apparent problem with the fact that treble damages are penal in nature and the New York CPLR bars such class actions.[29] Now, either that's going to have to be reviewed or revisited by an appellate court or may even be the subject of a further attempt to amend the legislation. But even if the plaintiffs are able to get around that particular issue, they are going to have to face eventually a case where the very issues that were litigated in *Karofsky* and *Goda*[30] and several other decisions came to the forefront, namely whether all told this is an appropriate class action, given the issue of having to trace through the overcharge and determine whether individual plaintiffs were in fact damaged. And it's worth noting that this is indeed quite an old debate. It really predates *Illinois Brick*, going back, as Bernie Persky mentioned, to *parens patriae* litigation. In 1976, Professor Handler from my firm and Mike Blechman authored an article on antitrust and consumer interest in the *Yale Law Journal*, and they specifically dealt with the question of whether it made any sense to view these types of damages on a class-wide basis.[31] So 25 years later we're still arguing about the same basic idea.

Lastly, I would point out that I believe that there's an issue under the amended Donnelly Act and even under the Donnelly Act prior to amendment as to whether a private plaintiff can seek injunctive relief. Mr. Persky pointed out that as a matter of federal case law it appears that even if an indirect purchaser is barred from recovering damages under the Clayton Act, it can seek injunctive relief under § 16 of that act.

In New York, the law is arguably different. Section 340(5) of the Donnelly Act permits damages for private plaintiffs but doesn't specify injunctive relief and § 342 specifically gives the Attorney General that right, the right to seek injunctive relief. Again, you can contrast the Donnelly Act with the deceptive trade practices statute, § 349(h), which specifically and expressly does permit private plaintiffs to seek injunctive relief.

So in summary, the decisions which predate the recent amendment of the Donnelly Act may indeed be instructive on some of the issues that are going to be faced going forward. Thanks.

MR. MADSEN: Thank you, David. Our next speaker is Robert Hubbard from the Attorney General's Office.

ROBERT L. HUBBARD, ESQ.: Good afternoon. I am glad to be here. This topic is near and dear to my heart. I remember one of the first things I worked on when I joined the Department of Law was a concrete case where the state alleged that all the concrete construction work in Manhattan was rigged. There were criminal convictions. Participants in the rig served time in jail. I think that the rig was pretty clear. One of the first things I advocated in that litigation, right after *ARC America*[32] came down, was we ought to try to recover damages for those state agencies that were injured but didn't have a direct contract with the bid riggers.

We made that motion in the form of a motion to amend the complaint. Judge Sand in the Southern District denied it. With all this talk about how unsettled New York law is, I'm reminded that Judge Sand said that the state's argument that the Donnelly Act allowed indirect purchasers to recover was clear enough long before *ARC America*; that the state should have made this argument before *ARC America* was decided. *ARC America* wasn't enough of a change to merit the state having delayed until *ARC America* came down to make this argument.[33]

There's been a lot of things that I've been involved with since that concrete case, and it's all been pretty interesting. We've all referred to the amendments to the Donnelly Act that happened in 1998 and 1999. The legislature in December 1998 added the first sentence of 340(6), and they added another sentence the following January in 1999.[34] I would have argued that this section just confirmed that indirect purchasers could recover. Regardless, there was no longer any question that indirect purchasers could recover under state antitrust law, according to that section. There was a whole flurry of litigation.

In the Attorney General's office we get notice when somebody asserts a Donnelly Act claim.[35] Notices trickle in; parties are not punished for failing to give the notice to us. But after these amendments, all sorts of them started coming in. Notices came in the *Microsoft* case, came in all these drug cases, a whole flurry of notices. The state law claims were usually parts of a national effort to aggregate all antitrust claims together, try to make recovery complete. The claims were sometimes filed just in state court. They were sometimes filed as supplemental claims to a federal claim. There was one in Tennessee state court in which the plaintiff alleged a Donnelly Act violation and tried to certify a class of New York consumers in Tennessee state court. There was one down in Alabama that basically did the same thing. Those claims were really a stunning array of hope on what would happen here in New York.

Some of those complaints were extremely aggressive. Some alleged that all the indirect purchaser litigation throughout the country ought to be consolidated in New York State courts and ought to be decided there. All of the claims sought to represent New Yorkers, and all of them sought to aggregate the claims as a class. The flurry has sort of died down now. We were going through the count here, and I think it is 5-0 defendants at this point. Plaintiffs have yet to sustain a claim. I do note that all of those decisions are trial court decisions. It's probably going to take some sort of appellate review of the claim until the flurry comes again. Maybe the flurry has stopped; maybe you'll see it after appellate review. I don't know.

I do want to make some observations about the 1998 amendments. I think it's useful to think about the amendments in a broader framework. Shortly after *Illinois Brick* came down, commentators were talking about 17 state *Illinois Brick* repealers. Those 17 statutes happened within about two or three years of *Illinois Brick* coming down in 1977.

What is it that happened in 1998? What is it that took New York so long to get around to passing a statute? I think it's useful to understand what drove the Legislature here. What happened was you had all those indirect purchaser statutes in other states. There were recoveries under a lot of those indirect purchaser statutes in other states. The legislature and the people in Albany thought New Yorkers weren't getting their share, that the small businesses in New York, the pharmacies that are indirect purchasers from these drug companies, weren't getting their share. People that are indirect purchasers in New York are not being as well represented as the dairy farmers in Minnesota, as indirect purchasers in California. Recoveries created a certain momentum after a while. Success flowed from some of the *Illinois Brick* repealers. New York was the first place where that second wave, as it were, began. Other states followed. These states don't parrot the New York statute, but Nevada has a repealer now, and a new wave appears to be coming.

Maybe a critical mass has been passed. Maybe it's just a question of how long the dike will have fingers in it. Maybe in the long run most states will permit recovery. I don't know.

I also note that one aspect that's always appealed to me about these arguments for indirect purchaser is the fundamental disconnect when you go into state court and start talking about *Illinois Brick*. People just really don't get it. They don't understand how in a quasi tort context you have to have a contract to recover. That seems inconsistent to a lot of people. Thus I urge a state policy argument to keep in mind. One reason why a state Donnelly Act action ought to allow recovery is this lack of privity. As argued in the *amicus* that the Attorney General's office filed in the *Levine* case,[36] a whole line of cases talk about if you're harmed by a wrong, you don't

have to have a contract with the person who harmed you to recover. That concept goes back to *MacPherson*, in which the car manufacturer creates a car that doesn't work right, and the person who is driving that car, even though they bought it from a dealer or somebody else, is not precluded from recovering for the damage that flows from the acts of the manufacturer.[37] A whole series of cases from a tort perspective say that privity is not required.

New York is a leader actually in attacking the citadel of privity as a prerequisite to recovery. A decent argument under state law can be made that *Illinois Brick* is merely another citadel of privity argument that ought to be rejected.

But we now have a statute. All of those arguments are more historical than anything else. As David and Bernie have talked about, those cases have run head on into the CPLR. What does the CPLR mean? When can you have a class action? People use different phraseologies. I think it's useful to quote the exact language of the CPLR. It says: Unless a statute creating or imposing a penalty specifically authorizes the recovery thereof in a class action, an action to recover a penalty may not be maintained as a class action.

Now, as David and Bernie talked about, the defendants are 5-0 in arguing in front of trial courts that treble damages are a penalty, and under this provision, CPLR 901(b), plaintiffs can't assert the claim as a class action. I personally would pause before reaching the conclusion that treble damages are a penalty under 901(b). That's how all these things have been fought, and I certainly recognize that there is significant precedent for that argument. But I do note that the Donnelly Act does have penalties provisions that are specifically labeled penalties. Civil penalties are recoverable under N.Y. Gen. Bus. Law § 342(a); there are criminal penalties under § 341. It makes eminent sense you can't join those penalties claims in a class action. Maybe there's a difference between the criminal and civil penalties and the treble damages provision that's meaningful under CPLR 901(b), and 901(b) only applies to penalties.

One thing those trial court decisions talk about to conclude that a penalty is being sought is that damages are trebled. You don't have just single damages. More than just compensation for the harm caused is provided. That's what makes it a penalty. So can you undo the results that the trebling causes the recovery to be a penalty?

The first one has been talked about a little already, which is can a plaintiff waive trebling? There's the ethical issue there; there's a policy issue. I would not ever want to see a plaintiff recover less than treble damages in an antitrust case. We'll leave all that aside. I do note that there's an argument under the Donnelly Act, at least I think there's an argument under the Donnelly Act that single damages are recoverable under common law. In 1975 the Legislature added § 340(5) to the Donnelly Act, and that's the section that says that treble damages are recoverable. Before that statute was enacted a series of cases as a matter of common law awarded single damages to those people who asserted Donnelly Act claims.[38] There may be a question whether that common law right to single damages survives the amendment. There's also the argument of maybe there's a restitution claim under the Donnelly Act that is more in the nature of single damages. Perhaps that's another way that the trebling problem is eliminated for purposes of avoiding characterizing damages as a penalty and certifying a class.

The next thing that those cases talk about is that the CPLR provision that I quoted requires that the class action be specifically authorized. A part of the problem here is that both the treble damage provision in § 340(5) and the indirect purchaser provision in § 340(6) are silent on class certification. They don't say you can certify a class; they don't say you can't certify a class. They just don't say anything. That silence is why the courts conclude that class certification is not specifically authorized.

Some of the things that the plaintiffs have argued in those cases is that there are assumptions in the legislative history of § 340(6) that these would be available in class actions, and plaintiffs try to argue that § 340(6) intended for class actions to be permitted. Affidavits by the legislative sponsors support that construction. I don't know how successful that argument will be. I do note that class actions are referred to elsewhere in the Donnelly Act. Under § 342(b) of the Donnelly Act the Attorney General can pursue claims for public entities. The section doesn't say that you can do this as a class action. All that specific section does is assume that you can. It says "in any class action the Attorney General may bring," and then it goes forward. Class treatment arguably is express in the Donnelly Act and class action is arguably an appropriate vehicle when you look at § 342(b).

But I think that you have to understand that in New York we're not getting to the merits. We are not getting beyond CPLR 901(b), which has been construed to prohibit a class. There haven't been other cases that have tried to pursue an indirect purchaser claim outside of a class.

Next, I note that even though class certification efforts have not yet been successful, the Attorney General has broader authority than just that. Some of the Attorney General's efforts have indeed been successful without using a class vehicle. For example, the Attorney General under the New York Executive Law § 63(12), has the right to seek remedies for "repeated, fraudulent or illegal acts." Among the remedies that the Attorney General can seek are restitution and damages.

Now, we have certainly in the Attorney General's office taken the position that repeated fraudulent or illegal acts include violations of the antitrust laws. We think that's well supported. Indeed that was the theory that the state of New York pursued in the *Mylan* litigation. *Mylan* had 32 states that pursued various theories to try to get indirect purchaser recovery. The theories included some of these executive law arguments. New York's argument was under the Executive Law § 63(12). A motion to dismiss was made in *Mylan* and New York was one of very few states that didn't have a motion to dismiss made against them. Defendants attacked all the other provisions. I don't know whether the defendants thought our N.Y. Exec. Law § 63(12) argument wasn't worth attacking. But in *Mylan*, New York State made that Executive Law argument, and it wasn't challenged by defendants in the motion to dismiss.[39] That litigation subsequently was settled.

I also note the Attorney General has represented public entities as a class, including in the tobacco litigation. Most people think about the tobacco litigation for consumer fraud and other claims. But in New York's complaint there was an antitrust claim, and the Attorney General represented the public entities. Indeed, there was even a bit of a litigation about that. When the settlement came down, the county of Westchester didn't think it got its fair share, and there was some litigation about whether the authority of the Attorney General was appropriately exercised in that case. That litigation assumed that the Attorney General had such authority, and the question was whether adequate notice and other things had been provided.[40] Thus the Attorney General can both represent individuals under the Executive Law and represent public entities as a class under the Donnelly Act.

Just to also get a broader perspective, there are alternate theories of recovery under state antitrust law. Bernie has alluded to many of these alternate theories. We have a checklist of theories that might apply when we think there might be a damaged state agency or damaged consumers in New York. For state agencies, many state contracts have these big long forms that bidders have to fill out. That big long form has an assignment clause, and if you provide the government or public entities with various products, you assign any antitrust claim that you might have along with selling the product. We have used that successfully in some litigation, and the assignment theory comes up every so often. Sometimes interesting issues arise in those cases.

The other thing that I found interesting in the *Mylan* case was an argument under federal antitrust law that § 16 gave a disgorgement remedy. Because the court had general equitable jurisdiction., the states argued that the court had jurisdiction to provide disgorgement or restitution. That theory was challenged in the motion to dismiss, and the states lost that argument. Judge Hogan in *Mylan* granted the defendants' motion to dismiss on that claim. That argument has not completely gone away yet. I note the FTC prevailed in an argument that a similar injunctive relief provision gave the FTC a similar disgorgement remedy.[41] I've tried to understand how those two holdings by Judge Hogan are consistent. I don't think as a fundamental matter those two holdings are consistent. I don't know whether a § 16 argument is going to come back, but I note there are other ways under federal law to try to get around *Illinois Brick*.

Now Bernie also referred to consumer protection statutes. I think Florida was the first state that took an antitrust claim, put it into a state consumer protection statute and got recovery for an indirect purchaser. Many states in *Mylan*, not including New York, used that theory as a way to get to recovery. Many of those states were successful. That success happened in two stages. A few states prevailed in the original motion to dismiss on that state consumer protection argument. In a motion to reconsider, an additional group of states convinced Judge Hogan that the same argument ought to be applied to their state consumer protection statute.

From my perspective those successes raised issues that are useful to think about under the Donnelly Act. Is restitution a claim that can be made under the Donnelly Act? Is it a single damage claim? Does the Consumer Protection Act provides a way around the *Illinois Brick* wall? Is General Business Law § 349 a little FTC Act that under the reasoning in *Mylan*, provides restitution? I also note that § 349 gives a private right of action. And as David has already mentioned, the trebling provision doesn't say "shall treble," it says "may treble." Thus, a plaintiff could waive trebling as a way to get around the CPLR 901(b) problem.

Finally, I was asked to comment on the interaction that the AG's office has with class plaintiffs. I'll begin by saying that public interest benefits are well recognized for both public and private antitrust enforcement. We have recognized that for a long time. My rule of thumb now is to tell everybody, when I am asked how do you feel about class plaintiffs, I say, bottom line is that the AG and the class plaintiffs are on the same side of the "v." You have to remember that. Trying to vindicate the public interest in preventing antitrust violations is a goal that we both share. That's not to say that the defendants don't share that goal, but I do want to remember that class counsel and Attorneys General are both antitrust plaintiffs.

But nonetheless, there is a tension between class authority and *parens* authority. There have been instances

in which that tension has welled up in litigation. We have always argued that *parens* authority is superior to class authority. The Hart-Scott-Rodino Act supports that argument. The Second Circuit case in *Reebok* emphatically reinforces *parens* authority.[42] Some of the reasons why that's true is that a *parens* representation is effective upon filing, whereas class representation is only effective when the class is certified. A *parens* claim is not dependent on the adequacy of the representation or that the representative's specific claim is typical for the class.

I do note that there is a tension between class counsel and Attorneys General but in general a very good working relationship exists between state AG's offices and class plaintiffs. Even when the tension isn't fully resolved, and a matter is finally settled, the states assert *parens* authority and class counsel assert class representation. Those representations overlap. In the settlement context plaintiffs agree that everything is covered, without resolving precisely who represents who. I also note that we are starting to go to trial every so often with class plaintiffs. They are co-counsel sitting right with us at counsel table. That has an effect. Finally, I note that sometimes class counsel fills the gap when state AGs do not act on a 50-state basis. For example, in the music CDs litigation, 45 state Attorneys General brought a litigation, which was transferred by the MDL panel to Maine. The relationship appears to be developing that the class is going to represent the consumers in the five states where the Attorneys General did not sue.

Another thing that's useful to recognize for these class counsel is that we have talked about some of these provisions, and the support that the AG's office has provided to class counsel or for which there is evidence in this very matter that this panel is discussing. There was, as we've already referred to, an AG *amicus* in the appeal of the *Levine* case. The Attorney General's Office supported the amendment to the Donnelly Act that provided relief for indirect purchasers. So it's an interesting world out there. We'll see how it develops, and this is just the beginning of the story. Thank you.

MR. MADSEN: Thank you, Bob. That was great. That was very informative. Now, when you're dealing with issues of these kind, you're always dealing with them in some kind of specific economic context. And unless the matter gets stopped right at the outset on the pleadings, sooner or later you have to begin to deal with those economic facts. To speak to those sorts of economic facts, we now turn to Dean Snyder of the Darden School of the University of Virginia.

EDWARD A. SNYDER: Thank you, Steve. I recall being surprised when I was deposed in the *Wood v. Abbott Labs* case, which dealt with these issues, and seeing the size of the gathering of lawyers at that time. Today's gathering is yet more significant, reflecting the importance of these issues. It's a pleasure to be here.

With the benefit of the analysis and perspectives offered by Mr. Persky, (and by the way this is a more enjoyable interaction than our previous ones), and those by Mr. Copeland and Mr. Hubbard, I would like to do three things in the time permitted. First, as Steve indicated, I would like to identify and discuss some of the factors that I see as relevant to the possible certification of indirect purchaser classes, given the "common issues predominate" standard. Second, I would like to comment on the utility of tools such as regression analysis and tax incidence theory and proving class-wide impact. Third, from my perspective as an economist, I would like to offer some thoughts about the legal terrain on which indirect purchaser class certification matters are fought.

So first, are there economic factors that tend to make individual issues more or less prominent and significant in these matters? To explore this question, I'll use the prototypical context of a price-fixing allegation at the manufacturer level with one or more intermediaries between the manufacturers and the indirect purchasers. Let me quickly identify seven factors that I see as influential.

Naturally some of them deal with the distribution channel. One is the number of layers and the complexity of the distribution channel. As Bernie indicated, the most straightforward case is when there's just one intermediate step before the product gets to the indirect purchasers. This doesn't guaranty that all those intermediaries will pass on the alleged overcharges, but it certainly simplifies the analysis. In contrast, where there are multiple levels of intermediaries, the decision by any one actor at any one level may mean that a price increase is absorbed and the parties down below may not be injured.

I took note of the contrast between the *Goda* and *Kerr* decisions dealing with the same issues. In the *Goda* case the court basically characterized product distribution as one intermediate step, because they viewed the wholesalers as part of the conspiracy. And my reading as an economist of the *Kerr* decision was that the court still saw it as two levels.

Another type of complexity is when a subset of the products may bypass a particular level. In the case when a manufacturer sells direct at a discount to a certain subset of consumers, that raises questions about do those lower prices indicate a lack of an overcharge, or just reduced number of markups? That obviously can lead to more detailed inquiry. Bernie mentioned the extent of added value activity by the intermediaries. I think it is right. When the intermediate actors merely distribute rather than transform the product, the analysis is more straightforward. In contrast, when the product with the

alleged overcharge is a mere input and to value added activity, assessing the size of the alleged overcharge and whether it's passed on becomes more complex. There are a lot of examples along these lines. The overcharges on citric acid may or may not be traceable when you look at 12 packs of soft drinks. Do higher prices of vitamins result in higher retail prices of beef? And of course the classic one: Do price-fixed bricks raise the cost of construction projects?

Let me turn to what I think is sort of a classic battle ground, and that's the third point, concerning strategic interactions among rivals in the distribution channel. We all know that intermediaries have to cover their total costs to survive. But whether their pricing on a particular item that they sell is cost plus and mechanical in nature may depend on the rivals, the nature of the rivalry among those intermediaries, and on the characteristics of the product in question. And rather than pass on price increases, an intermediary may decide to absorb the overcharge for competitive or strategic reasons. The combination of rivalry among a relatively small number of retailers in local areas and the product characteristics can lead to, as I have discovered, a great deal of variance in passing on decisions. This variance makes the question of injury to indirect purchasers highly individualized. Which retailer did the person buy from? What products? What time period?

There are other factors that may generate individual issues that concern the product and the consumers. One is product differentiation. I think of product differentiation as most importantly in the minds of the consumers. Do the consumers see important product differences? When they see a branded product to which they are loyal, that can affect pricing practices. The channels themselves may be product specific, and the retailer or manufacturer pricing strategies may vary.

I've been reading some of these cases to make sense of them. The court in *ExecuTech Business* denied class certification, taking into account the many grades and types of the particular product, which was thermal fax paper. The court found they were not interchangeable, and that affected pricing.

A fifth factor is the similarity of the people who would make up the indirect purchaser class. When individuals in the proposed class play different economic roles, complexities and even conflicts within the proposed class may follow. Let me cite a case outside of the classic price fixing. Lanham Act claims involving Kona coffee, which is a very high-quality type of coffee grown in a relatively small area of Hawaii, led to a class certification effort by Kona coffee growers. But while some growers only grew coffee, others processed the coffee beans sometimes to the stage of roasted coffee, yet other of these growers were involved in distribution. Some were integrated into retailing, including local outlets, mail order and even Internet sales. These differences led to questions about the alleged injuries to individual parties who had integrated downstream into the retail market.

My sixth and seventh factors relate to the alleged conspiracy itself. The sixth factor is the tightness and effectiveness of the alleged conspiracy. And my main point here is that when one says the overcharge at the manufacturer level, for an economist, that term may be a gross simplification reflecting not only a presumption that there was a conspiracy, but also that the conspiracy raised the prices of all of the conspirators' products and did so by like amounts. As with any other agreement, the parties to a conspiracy may not adhere to the terms, a cheating of various types, discounting to large customers, exempting certain product lines from the price increases, and delaying price increases on some products, so-called buy-in periods, by offering those to distributors, essentially at the old prices. That kind of behavior may mean that no overcharge exists on some products, or that there is significant variation in the sizes of the alleged overcharges, without denying the existence of the conspiracy.

Whether an alleged conspiracy was effective may indeed involve individual questions about the manufacturers and the pricing of specific products. The effectiveness issue was raised in a Michigan hearing in the *Holmes* case dealing with infant formula. The plaintiff's characterization of a staircase of price increases on the products shifted during the course of the evidentiary hearing based on the presentation of actual manufacturer price changes to the characterization of the same facts as a fuzzy staircase at best. The implications for injury and damages I think are pretty obvious beginning with the question: Which particular products did the customers buy?

The seventh and last factor that I'll mention, without trying to be exhaustive, is the size of the alleged overcharges. I have not seen mention of this factor in any litigation, but I'll offer it anyway. Simply put, it seems to me that the likelihood that at least some portion of an alleged overcharge will be passed on increases with the size of the overcharge. It's hard to find a case where an intermediary will absorb a 95 percent overcharge; in contrast, a five percent overcharge, especially on a minor input, might easily be absorbed for competitive reasons or simply lost in the shuffle.

Given that these and other factors may generate variations in potential injury and damages, the next issue is the utility of economic tools, such as regression analysis and the application of tax incidence theory in proving class-wide impact. One potential response by plaintiffs to observe variation in prices and markups in the products themselves, discounts, contractual features, etcetera, is to say in effect, of course, there are these differences, but

the alleged conduct moved by a common percentage or common dollar amount all the prices to a higher level. This I think of this as sort of a constellation argument. The constellation just shifts higher into the sky due to the alleged conduct. And the constellation argument may have merit, but in my view, I think it should be tested, and it can be tested in a straightforward manner. Did the conspiring manufacturer shift all prices upward? Did the intermediaries who react to price increases—and I think this is the most straightforward test of the difference between actual and but-for worlds—did those intermediaries act in a common way? If in fact some of the retailers decided not to pass on a price increases on prescription drugs to establish a competitive advantage over their local rivals, then the constellation—at least not all of the stars shift up. And there may be no difference between the actual and but-for world, and therefore no injury in particular cases.

Another particular tool is tax incidence theory, which leverages the analogy between an overcharge and a tax, inquiring as to what will actually bear the harm. Using standard theory, an economist can predict the aggregate rate of passing on, that is the percentage of the overcharge that would be passed onto the next level, based on the elasticities of supply and demand in the relevant market. However, these predictions are only valid when the market is competitive, which in turn assumes common behavior. An economist also can predict partial passing on when either the intermediary is a monopolist or, assuming this notion still has some meaning, when the intermediate market is monopolistically competitive. But if the market is oligopolistic and the intermediaries act in a strategic manner, economic theory offers precious little.

What do economists really know about oligopolistic interaction? The answer is: It depends. In my view, theory on how oligopolists behave has to yield to empirical analysis. It may be the case that a fairly routine product is not the subject of a sophisticated merchandising strategy among oligopolists, but in other cases the products will be. For example, a person with a new prescription for a maintenance drug that he or she is going to take for a long time is a very attractive customer from the point of view of a retailer, especially a mass merchandiser who sells thousands of products and for whom prescription drugs are a relatively small part of sales. Another example concerns the merchandising of infant formula products. How likely is it that a parent can get a case of infant formula at bargain prices from the back of a Toys 'R Us store to the checkout line without buying something else?

Now, the sharpest tool in the economist's shed for dealing with individual issues is multiple regression analysis. Sure, things vary, but the expert on the plaintiff's side may say that he or she will be able to identify the relevant variables, measure them, specify and estimate a regression equation that reveals the structure of the key relationships and of course, this is the goal, isolates presumably for the whole class the effect of the alleged behavior.

Now, it is unfortunate, in my view, that when the mantra of multiple regression analysis is chanted, often this isn't an inquiry into whether the tool can be applied with real data. Any economist who has done this kind of work knows that actually estimating the regression is different from just specifying, writing down the equation. One of the problems concerns the fact that a lot of the variables that you like to put in these regressions are so-called categorical variables. Is the retailer a suburban chain? What's the nature of the product? Is it a maintenance drug or not? And when a regression includes a lot of these kinds of variables, several technical issues tend to arise, and whether an economist can get convergence on the estimated equation isn't known before it's done.

The other important issue in applying regression analysis is that the results are about central tendencies. Averages and central tendencies, however, are not the focus—at least in my view—of the relevant economic analysis for class certification purposes. Rather, as I understand it, the objective is to gain an understanding of the extent of the complexities affecting individual injury and damages and then assess whether the central tendencies represent a good or bad portrayal for the class as a whole.

One of the comments I made in one case was something to the effect that the average of minus 50 in boiling is temperate. But I wouldn't want to be in either environment. The average of injury and no injury, well, what does that really mean?

Whether a regression can account for individual factors depends on the actual implementation of regression analysis. It turns out that once you have estimated a regression, it's possible to apply it to individual cases and identify the predicted effect. And you can also identify the so-called confidence interval around that prediction and see if the regression makes sense. One can evaluate whether regression really accounts for the relevant sources of individual variation, but only after it's done.

Finally, I want to offer some very brief comments about the legal terrain on which indirect purchaser class certification matters are fought. In discussing these matters with people like those of you gathered here, I perceive receptivity to the proposition that passing on decisions may make the question of injury to members of the proposed class individualized. In contrast, it seems to me, there tends to be less receptivity to inquiry about whether the nature of the conspiracy may make the question of individual injury relevant. Passing on is the expected battle ground; conspiracy tends not to be. And I

would speculate that some of the resistance to the latter is probably due to the fact that the existence of the conspiracy is a common issue.

The court in the auction house litigation said: Price-fixing conspiracies, at least to the extent that they succeed in fixing prices, almost invariably injure anyone who purchases the relevant goods or services. The qualifier, "at least to the extent that conspiracies succeed," makes sense to me. And I would suggest and believe that defendants can sometimes find fruitful territory in questions about the implementation of the conspiracy, its completeness and effectiveness.

My last comment on the legal terrain concerns the implications for the economic expert. With class certification matters the legal terrain is different from other areas of antitrust. The legal standard itself is quite different from other contexts. And more to the point, the nature of the analysis required for class certification matters goes in some ways against the grain of social science training. The answer, "it varies," never got anyone his doctorate. The training of economists is to identify and understand central tendencies. We are trained to assess market-wide and aggregate effects. Our job often is to look beyond the variations and complexities to simplify. Class certification work is different.

As someone in the business school has had the opportunity to learn from experts and strategy and marketing, I find it interesting and challenging work. It's about gaining an understanding of the significance of individual issues in the marketplace, and evaluating the effectiveness of our tools to gain control over these issues, in effect assessing whether our tools are up to the task. Thank you for the opportunity to be here. It has been enlightening and a pleasure.

MR. MADSEN: Thank you. I see we are close to the end of our time, but I think we have time for a couple of questions, if there are any.

AUDIENCE MEMBER: Dr. Snyder, is there an indirect purchaser case that you think would be appropriately certified or would be susceptible to a regression analysis?

DEAN SNYDER: Yes, is the short answer.

AUDIENCE MEMBER: Would you describe it?

DEAN SNYDER: I think without trying to go through all of the factors, I think if you look at some of the factors that I identified, the question of whether or not intermediaries behave, for example with respect to pass-on in a common way is an empirical one. And I believe you can find cases where they do so. But that's the nature of the analysis that I believe needs to be done. Regression equations: having done that work, I tend to think "show me before I believe it." But I have been able to estimate regressions that had fairly tight confidence intervals. And if, for example, you estimated a pass-on rate in a particular case to be 60 percent, you might find very reasonably that the pass-on rate, given the confidence interval, you can predict it to be 60 percent, but you're very sure that it's not zero. That's the kind of kicking the tires on the regression that you'd want to do, and if it survived, then the multiple regression analysis would be able to offer class-wide guidance.

MR. MADSEN: If I can just offer a thought to follow up on that. You made the point in your remarks that a regression is an average, and the average of freezing and boiling may be comfortable, but you're not sure you'd want to be at the extremes. Now, you need to have some confidence, as I took what you were saying, but the passing on rate you predicted is one that was fairly uniform through the marketplace you were observing.

DEAN SNYDER: My sense, from being involved in this and listening to people like you, is that oftentimes the critical legal question is: Are you sure that the pass-on rate is something above zero? Is there real injury? If it's 60 or 70 percent and you're unsure about the exact level, that's not such a big deal. But if you're estimating it to be 60 but you're really not sure if it is zero or 120 percent, that's a problem.

MR. MADSEN: I think that was the point I was trying to make. Other questions. Yes, sir.

AUDIENCE MEMBER: Just a comment and a question on the title: Consumer Redress or Corporate Nightmare. Maybe it's both. The panel did an excellent job of presenting some of the legal issues which are really quite difficult. But you shouldn't lose sight of the fact a number of the cases that were mentioned in fact were settled for quite a lot of money. The *Mylan* case, the settlement has been announced for a $100 million. The vitamins litigation, Dr. Snyder alluded to briefly, has settled in 23 states for $225 million plus another $30 million for state direct and indirect purchases.

So somehow or another this is being worked through in very difficult situations with a lot of uncertainty, but it is both consumer redress and perhaps corporate nightmare and all those zeros. So hopefully corporations maybe will stop fixing prices quite so often.

The question, however, for Dr. Snyder is one that intrigued me a little bit about the pass-on issue which is something that I think of as the magnification effect. And we often see cases which in the distribution system, at least, there's an initial claim, that many parties operate on a cost-plus basis where they take their inputs as given, they add on a certain percentage markup and it goes through. Now, if that's the case in the distribution system and a couple of steps, what you face is not a question of whether you have less of the overcharge pass through; it seems to me the question is how much more gets passed through to the ultimate consumer. So to

some extent you may have an underestimation problem here rather than an overestimation problem.

I wonder if Dr. Snyder has dealt with the economics of this, if you have any comments on that issue?

DEAN SNYDER: Unfortunately I really haven't gotten into that particular issue, which I think you would get into after a class is certified and actually estimating the damages. But if I may, I'll go back to the first question. It's probably no surprise—I've turned down the opportunity to help defend against some class certifications, which may suggest to you that there are certain cases at least where I would find it difficult to make that argument. But I think the key is to go back to the question that you pose. If you actually talk to the intermediaries and you do the homework and you find out that indeed everybody has got that kind of formula, that is to me the relevant indication of common practice. And if you have overcharges and then you have common pricing practices downstream that result in pass on, then that's going to tend to generate common impact below.

MR. MADSEN: Yes. Okay, I think we're out of time. I want to thank all the panelists for doing a wonderful job.

MR. LOGAN: The schedule is to take about a ten-minute break. Let me also again thank the panel. I think this was an unusually thoughtful and balanced panel. I know every one of these people has been emotionally invested in the outcome of this issue, and it's great to see them present it in a way that's fair and balanced, both individually and in the aggregate. So ten minutes, and we'll start up again.

Endnotes

1. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
2. 407 N.Y.S.2d 617 (N.Y. Sup. Ct. 1978).
3. *Id.* at 621.
4. *See Levine v. Abbott Lab.*, Index No. 117320/95 (N.Y. Sup. Ct. Nov. 25, 1996), slip op. (hereinafter cited as *Levine*).
5. 490 U.S. 93 (1989).
6. *Id.* at 101-102
7. *Russo and Dubin*, 407 N.Y.S.2d at 620.
8. *Id.*
9. *Karofsky v. Abbott Lab.*, Docket No. CV-95-1009 (Me. Super. Ct. Oct. 16, 1997).
10. *Blumenthal v. American Society of Travel Agents, Inc.*, No. 16812/76, 1977 WL 18392, 1977-1 Trad. Cas. & 61,530 (N.Y. Sup. Ct. Jul. 5, 1977).
11. *Levine* at 1.
12. *Id.* at 2-4.
13. *Id.* at 6.
14. *Id.* at 3 (citing *State v. Mobil Oil*, 38 N.Y.2d 460 (1976)).
15. *Id.* at 3 and 4.
16. *Id.* at 4-5.
17. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).
18. *Orange and Rockland Utilities, Inc. v. New England Petroleum Corp.*, 400 N.Y.S.2d 79 (1st Dep't 1977).
19. *Levine* at 6.
20. *Id.* at 6-7.
21. *Id.* at 7.
22. *Id.*
23. *Rubin v. Nine West Group, Inc.*, No. 0763/99, 1999 WL 1425364 (N.Y. Sup. Ct. Nov. 3, 1999).
24. *Id.* at *2.
25. *Id.* at *3.
26. *In re Vitamins Antitrust Litigation*, No. 99-197 (TFH), 1285, 2000 WL 1511376 (D.D.C. Oct. 6, 2000).
27. *Id.* at *5.
28. *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987).
29. N.Y. CPLR 901(b) (McKinney 2000).
30. *Goda v. Abbott Lab.*, No. Civ. A-01445-96, 1997 WL 156541 (D.C. Super. Ct. Feb. 3, 1997).
31. Michael D. Blechman & Milton Handler, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 Yale L.J. 626, 666-70 (1976).
32. *California v. ARC America Corp.*, 490 U.S. 93 (1989).
33. *New York v. Cedar Park Concrete Corp.*, 741 F. Supp. 494 (S.D.N.Y. 1990).
34. N.Y. Gen. Bus. Law § 340(6).
35. N.Y. Gen. Bus. Law § 340(5).
36. Notice of Motion for Leave to File Brief and to Participate in Oral Argument as *Amicus Curiae* in *Levine v. Abbott Lab.*, 117320/95 (1st Dep't, Nov. 20, 1997).
37. *MacPherson v. Buick Motor Corp.*, 217 N.Y. 382, 111 N.E. 1050 (1916).
38. *Straus v. American Publishers' Ass'n*, 85 A.D. 466, 83 N.Y.S. 271 (1st Dep't 1903), *aff'd*, 177 N.Y. 473, 69 N.E. 1107 (1904); *see Alexander's Dep't Stores, Inc. v. Ohrbach's, Inc.*, 266 A.D. 535, 42 N.Y.S.2d 703 (1st Dep't 1943).
39. *Federal Trade Commission v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999), *reconsideration granted in part*, 99 F. Supp. 2d 1 (D.D.C. 1999).
40. *New York v. Philip Morris* (movant County of Westchester), 400361/97 (Sup. Ct., N.Y. Co. Nov. 12, 1998).
41. 15 U.S.C. § 26.
42. *New York v. Reebok*, 96 F.3d 44 (2d Cir. 1996).

B2B Electronic Exchanges: The Antitrust Framework

LAWRENCE I. FOX, ESQ: Hello. I'm Larry Fox, and it's my pleasure to welcome you to the panel B2Bs promise and reality, as seen from the government and private perspective.

The structure of the presentation will proceed as follows. I will provide a brief overview of B2Bs generally and then we'll run down some of the general expectations people have had for B2Bs and then contrast that to some of the realities that we have confronted and then obviously address the antitrust issues that must remain in the forefront of our minds whenever we are talking about formulating or creating a B2B operation. I will then turn the discussion over to our distinguished panelists who will offer their perspectives on the antitrust framework applicable to B2B exchanges. We will conclude the session with questions and answers and probably some questions and dialogue amongst panelists.

Let's start with, what is a B2B? The FTC in June had a B2B panel, and in their report that was issued defined it as: B2B commerce refers to electronic marketplaces that use the Internet to electronically connect businesses to each other. Well, that's pretty basic. And usually it involves individual or groups of buyers or sellers which come together in a single electronic space to purchase and sell goods and services.

Now, B2B transactions certainly have existed before the advent of the Internet, via telephone and faxes and communications through nonelectronic means. But the Internet has promised the exchange of information in a seamless way and much more rapidly. According to the FTC Chairman Pitofsky, and I quote. "B2B electronic marketplaces offer great promise as a means through which significant cost savings can be achieved, business processes can be more efficiently organized and competition may be enhanced." As we all know, increased efficiency in competition results in lower prices and improved quality. Thus businesses and consumers stand to benefit substantially from promises that have been offered by the advent of B2Bs.

So what in a nutshell does this technology provide us? In a word it is efficiencies. B2Bs have great potential to reduce costs in three essential ways. Improving inventory and supply chain management, by connecting vertical supply chains with communications software, by achieving a critical mass of buyers or sellers to achieve economies of scale and eliminating transaction costs associated with paper and manual processing of orders.

As one business analyst cited in the FTC's October 2000 B2B report, from a very macro perspective, B2B e-commerce is simply the next generation of productivity growth in the U.S. economy. Obviously, some very high expectations. By 2003, one research firm, the Boston Consulting Group, estimates that B2B e-commerce will reach $2.8 trillion in sales. Another consulting group estimates it will be $7.2 trillion. And they estimate that by that year there will be between 7,500 and 10,000 separate B2B entities in operation. B2Bs currently account for 79 percent of all e-commerce spending and is expected to grow to 87 percent by 2005. B2B marketplaces are expected to spend $80 billion on infrastructure such as technology services, and up to $2.1 billion expected just in the year 2001.

In a recent Arthur Andersen poll, the executives surveyed see digital marketplaces as a critical means of competition, positioning themselves for a competitive world in the next twelve months. That's a fairly aggressive expectation that we have for this new type of enterprise.

Well, now let's kind of contrast that a little bit to where are we today as it relates to those expectations. B2B exchanges are clearly in transition. While hundreds if not thousands of B2B sites have been proposed, only a few have actually come into being and are up and running and fully operational. While efficiency expectations are high, few sites have had the time to develop a track record to prove whether those expectations are in fact merited. B2B stocks are currently trading well below where they had been, amid a general slow-down in technology stock. In fact, the laid off tech world in Silicon Valley has coined a new acronym. B2B now stands for back to banking, and B to C, back to consulting.

Nevertheless analysts and business partners are optimistic about are the future of B2B commerce because of its inherent efficiency gains. B2B exchanges today have been implemented in a wide variety of industries. We have in the automobile industry, the Covisint exchange, involving Ford, GM, Daimler-Chrysler, Renault and Nissan. We are very privileged to have with us Bill Slowey, counsel for GM, who was involved in establishing the Covisint exchange with the other members of that industry.

We have in the defense industry exchanges, airline industry, food industry retail, electronics, energy, oil, real estate, metals, meat packing, chemicals, tires, all of those industries have industry-oriented exchanges.

The FTC sponsored a public B2B workshop in June to improve understanding about B2B antitrust issues. In October the FTC issued its report on competition policy in the world of B2B electronic marketplaces. I'm delighted Molly Boast, Director of Bureau of Competition at the FTC, is on our panel and will speak to the concerns of B2B concerns and arrangements. We are very pleased to have you, Molly.

The April 2000 Antitrust Guidelines for Collaboration Among Competitors issued by the FTC and DOJ also set

forth a basic framework for a assessing B2Bs and basically established if there is legitimate integrative activity and not a sham for price fixing, such entities will generally be viewed under the Rule of Reason. But neither the FTC nor the DOJ has challenged the formation of any B2B exchange.

The FTC has reviewed the Covisint exchange and closed its investigation in September, citing it is in its infancy; there wasn't enough to evaluate what its competitive impact would be. The Commission reserved its rights to take future enforcement action after an evaluation when the Covisint exchange actually gets up and running, what bylaws, operational rules are implemented.

I'm pleased very much to have Bill Slowey with us who will be talking about not only the formation of Covisint but also how to protect your client at formative stages of an exchange, and what are the real nitty-gritty practical issues that lawyers have to confront when working with their competitors in a collaborative environment to set up an exchange.

Now, generally, there are a variety of platforms that B2B exchanges can take. You can have single firm platforms where you have a sell side site, one firm dictating product selection and priced to many buyers or you could have a buy side site, where you have major buyers attracting a variety of suppliers of inputs. Then you have the exchange platform, where you have distribution or sales portals, where you have a few suppliers aggregating catalogs to attract a large number of buyers, or a procurement portal, like Covisint, where several output suppliers combine their purchasing catalogs to attract input suppliers.

The key to understanding how B2Bs fit within an antitrust framework is to understand that technology is fostering a new method of communications both by buyers and sellers. The antitrust issues raised by B2Bs in communication between competitors are the same as generally confronted when you're dealing with an association or joint venture or group purchasing organizations.

Richard Steuer will be addressing all of the issues that pertain to joint purchasing arrangements within a B2B exchange and all of the horizontal issues that that entails.

What are the fundamental antitrust issues that this new technology and the collaboration of competitors sets forth? It comes down to two basic issues: collusion and exclusion. On the collusion end, when you're looking at an exchange, the question is the collaboration among the members of the exchange, to what extent will they be coordinating price or purchasing or terms of sale; to what extent will they be working with one another in a fashion that may stabilize competition in an industry. So that is collusion among members of an exchange.

On the exclusion front, there are two forms of exclusion. Competitors in an exchange excluding a rival from access to this exchange. And if the exchange is going to be effective, generally you want network effects, so that you have a large entity that's covering almost an entire industry. Therefore the potential for exclusion and anti-competitive effects running from that exclusion is substantial. So exclusion first is rivals of the participants in the exchange. The second form of exclusion is other exchanges. To what extent are the rules of an exchange such that other exchanges will not be able to form so that you basically have one exchange monopolizing an industry to the exclusion of the formation of other exchanges.

To illuminate us on all of these various issues we will be having these expert panelists address from the FTC's perspective the learning that they had from their workshop and some of the issues that the FTC considers to be extremely significant. We will lead off with Molly Boast telling us about the Commission's efforts in evaluating and learning from the industry the various antitrust concerns and how to minimize those concerns. Then we will be talking to Steve Salop—Steve will be addressing the economics. We'll set up the economic paradigm to evaluate exchanges. And then we will talk to Richard Steuer—he will be presenting to you views about the horizontal issues. And finally, we will be hearing from Bill Slowey on the practicalities of setting up an exchange from the vantage point of someone who is involved in setting up the Covisint exchange. It is a pleasure to have Molly address us now.

MOLLY BOAST: Thank you, Larry. And I do apologize for running in at the last moment. I became Bureau Director last week, and we had a Commission meeting this morning that went on three times longer than I expected. With the new title I can't just sneak out the way I used to, so I had to stay for the duration.

When Larry first broached the suggestion that I participate in this program, I thought by the time we reach January 2001 this surely will be a shopworn area. Certainly those of us at the Commission have been thinking about it for several months and have been on any number of speaking tours on B2Bs, and yet I continue to get invitations, as to do other members of the Commission, to address this topic. So I'm clearly wrong; it is not shopworn. The market interest remains, although it has subsided to some extent. Press interest continues and certainly enforcement agency interest continues.

I want to talk about a few of the basic areas of concern. David Balto prepared for me a paper that I hope reached you, but if not, we will put it up on the FTC's Web site. It is probably the most comprehensive compendium of reference materials on B2Bs I've seen thus far and I couldn't hope to go into the level of detail that he has, but I certainly commend it to you. Let me note that the comments I make are my own and do not reflect the views of the Commission or any Commissioner.

As Larry said, the FTC became involved in B2Bs because it recognized the potentially great efficiencies in these exchanges, principally through reduced transaction costs. But we had little understanding of how these would actually be effectuated. So the workshop that was held in June, followed by the staff report, was designed to help us understand what industries hope to achieve with B2Bs, how they would operate them, and what services they would provide. At the end of the workshop we discussed some of the antitrust issues. Transparency was a major goal, but also we were really trying to gauge the extent of interest and get a sense of what we might confront as B2Bs started to emerge.

Through that workshop and through the Commission's subsequent review of Covisint we came to a better, although still imperfect, understanding. First of all, buyer groups seem to be the most prevalent B2B model. Some of the firms involved in these buyer sites have individual sites, but they are still joining the group sites, and presumably they perceive some differentiation in the service or product they are going to achieve through membership.

Joint purchasing remains a possible goal of some of these sites, although some of them have taken that off the list because of concerns that we can talk about a little bit later. But there are various models for these sites. There are auction sites, there are catalog sites, as was referenced; there are bid ask systems, not unlike the way the New York Stock Exchange operates. The variety is really quite wide.

It's very difficult to generalize about B2Bs because each one really stands on its own facts. As Larry mentioned, the analytical framework we would recommend to you in thinking about B2Bs is the joint DOJ-FTC Competitor Collaboration Guidelines. For those of you familiar with joint venture law, the guidelines are a more elaborate distillation of that. The key thing to remember about the Competitor Collaboration Guidelines is what they would recommend, and we would analyze a B2B by looking at each different agreement that it encompasses. So if you have exclusivity provisions as part of the agreement, that might be analyzed separately. And you'll see as you go through them that you need to think about not just the gestalt but all the individual pieces of your arrangement.

I would identify six major issues for counselors, and I'll try to go through them relatively quickly to give you a little bit of the flavor of the way we think about them. Larry really touched on many those, although he categorized them differently. The first is, as set forth in the Competitor Collaboration Guidelines, the legitimacy of the joint venture or exchange. This is a standard joint venture issue: is it a sham transaction to cover up price fixing or some other illicit conduct?

From our perspective there is no presumption in favor of a legitimacy of a joint venture. There's also no presumption against it. But don't assume that because you believe it is efficient we will agree. The efficiency or the legitimacy of exchange needs to be something that is demonstrable in some way or another. The standard that the guidelines set forth is that the efficiencies need to be integrative efficiencies to yield procompetitive benefits. That's the key for getting Rule of Reason treatment and ultimately probably for successful Rule of Reason treatment.

The second major thing that we would look at is the size and scope of the proposed exchange. The fundamental issue we are grappling with here is whether the exchange will be able to exercise market power. Is it of a size that it allows competitors; is it overinclusive so that other competing exchanges would be unable to or unlikely to thrive and succeed? A separate question, but one we have to think about in this context, is whether the marketplace itself will allow competing exchanges. Some have suggested, although I think there are many who disagree, that ultimately within any industry the exchanges will all gravitate toward one, whether it is through failure of some, mergers of others or simple economies of scale. I'm not suggesting that's necessarily bad. I think it would really depend on not only the industry but also the structure of the exchange itself.

The Competitor Collaboration Guidelines suggest a safe harbor when you're thinking about the size of a venture of 20 percent of the market. Bear in mind that in calculating that 20 percent we would aggregate the shares of the individual participants and the exchange itself. I do not mean to suggest that anything over 20 percent is illegal. The safe harbor simply tells you that if you're extremely conservative in giving advice, stick to 20 percent, but pay attention to what happens as the exchange grows.

Why do we care about the size of the venture? We believe that on balance competition among exchanges is probably a good thing. We think that it would result in reduced service charges. We think that it would likely result in better and differentiated services, and of course more innovation as people learn to use the technology that these exchanges entail. In addition, the size of the venture might increase the risk of collusion, and it might increase the risk of monopsony if a joint purchasing is allowed through a buyer exchange. And at some point we might perceive that the efficiency gains of having an increased number of participants are marginal enough that the overall legitimacy of the joint venture comes into question.

The third area for inquiry is coordination issues. Here we would go through a balancing exercise. There are, on the pro side of the ledger, sometimes reasons we think information that is available through this kind of mechanism might be procompetitive. We all know that under certain circumstances price information is believed to

facilitate competition. It could also enable participants in the market to adjust supply and demand more promptly and readily. It could help promote product comparison, and it can sometimes allow smaller firms to better compete with their larger rivals.

On the con side, the wonderful transparency a B2B permits might allow coordination of output. It obviously could allow other kinds of coordination, but output seems one that might be made significantly easier by, for example, monitoring competitors' inventory levels. It might enable price leadership or following—coordination in a less direct sense than price fixing. And, of course, access to information of competitive sensitivity can be useful for lots of strategic reasons, not all of which are bad but some of which may be.

So when you're thinking about the coordination issues, I think the issues are relatively straightforward. You want to consider what information would be available to competitors and how it would be made available to them. Some of the exchanges have confidentiality rules that would allow the owner of the information to control who has access to it. The second question is, who would have access to which kinds of information. Is it available elsewhere? Is this information that is just being collected (and therefore maybe it's an efficiency) but could be obtained elsewhere? And are there standardized trade terms, such as credit or warranty terms, that might eliminate a dimension of competition or make coordination easier?

The airline tariff publishing case is an example of the kind of seller collusion you might see in a B2B exchange. In that case the airlines were charged by the Department of Justice with having coordinated advance announcement of prices or tariffs and having footnotes that linked those prices to routes, so they were all basically signaling. That was a very sophisticated, at least at that time, way of thinking about signaling. I would suggest that if one wanted to one could use a B2B exchange for similar very sophisticated kinds of signaling. These are the kinds of risks as you work with a client in this area to which you're going to have to be very alert as participants get further and further into the kind of information they might be disseminating.

The fourth area about which we would inquire would really be relevant only to the buyer exchange, and that is monopsony. This is a really difficult enforcement issue for us. The concern is that in a monopsony situation prices will be pushed so low that output ultimately would be reduced. But in practice it can be very difficult to distinguish buyer power, where prices are lowered but to the benefit of consumers, from monopsony power. We don't have any magic bullets on this. If we did, our lives at the agency would be a lot easier.

Certainly in the B2B context concerns about monopsony power would be closely related to the inclusiveness of the venture, to how many of the participants in the industry it involves, to the possibility that it performs a joint buying function as opposed to just enabling bilateral transactions, and to the existence of competitor exchanges which would mean that sellers to the exchange would have other options.

The fifth area of concern is exclusion and access. The principal issue is that raised by the Northwest Wholesale Stationary case. Does the exchange have market power or provide access to something necessary for effective competition? A subsidiary but related question is: Are the reasons for the exclusion or the restriction on membership related to the efficiency rationale for the exchange? In thinking about this issue, we would consider things like, again, whether there were multiple alternative sites, which would make it less likely that any one exchange was essential to effective competition.

Individual sites may well be effective alternatives to an exchange under certain circumstances, and indeed so could other distribution channels. We would want to know how a firm can reach the market. We would consider whether the restrictions on membership or access were overbroad. If they seemed broader than necessary to achieve whatever efficiency goal was articulated, then we would have heightened concerns. Because we would in the ordinary instance, absent a true sham joint venture or serious per se problem, be looking at a Rule of Reason inquiry, we would try to see whether the denial of access or the membership restrictions had any cognizable competitive effects, such as higher price or lower output. You could have somebody complaining about denial of access but with no injury to competition.

The sixth area of inquiry would be exclusivity, that is limiting or banning participation by members of the exchange in other exchanges. This is sometimes a feature of joint ventures in their infancy in order to make the venture work. But enduring exclusivity requirements would require a different explanation. And absent again some efficiency explanation, enduring exclusivity requirements might be more suspect. Please note that exclusivity can be achieved through different means than having a rule that says "thou shalt not." It can be achieved through different kinds of incentives such as discounts or rebates. It can be achieved through forfeiture provisions, penalties paid upon exiting the exchange.

We would also look for examples in the real world. Having rules that do not include exclusivity requirements, but then having no transactions taking place outside the exchange, would make us wonder whether there was some other incentive mechanism that was less apparent. Of course, our most serious concerns about exclusivity would likely arise if we thought the exchange was already overinclusive and that it had a large market share.

Those are the sort of broad areas of inquiry that we have undertaken with the exchanges we have looked at

thus far, and I see no reason why we would change this approach.

I wanted to talk a little bit about some practical points and then comment briefly on where we are in our thinking about B2Bs. One practical point is that a B2B can be a notifiable transaction under the Hart-Scott-Rodino Act. Many of them have been structured as LLCs, so they haven't been notifiable. But some of them do require notification.

Bear in mind that we can investigate an exchange absent its notification, and indeed we have. We just have different tools available. If it is notifiable, the investigative tool would be the second request; whereas we would use subpoenas and CIDs outside that context.

More importantly, even if a transaction isn't notifiable, we strongly encourage anyone who has a question about how to go about structuring an exchange or a question about whether it might get caught in our web to come in and talk to staff. This is an area where we really are still learning. Both the Department of Justice and the FTC are finding that there are so few of these exchanges that are really operational that it is tough to get a grip on what's going on. We encourage people to share their thoughts on how they are likely to proceed. You won't come away with any blessing from staff, but they have been very good about reacting to ideas, telling you where there might be a concern raised, and making suggestions. They have seen probably more transactions than most people and know how to correct their course. So I encourage you to think of this as a good government gesture, not a law enforcement gesture.

At this point, with one possible exception, I am unaware of any serious antitrust problems in the exchanges that are under review at either agency. But it is very early in this process. The prevailing wisdom is that at the outset most of these exchanges appear just fine; only when they become more fully operational will we be able to tell whether there are likely to be problems. We assume the way we will learn about those problems is customers or sellers coming to us and complaining.

Finally, there is a host of areas of antitrust significance that were not touched on at the commission's workshop at all. The three principal ones are the prospect of mergers in the B2B area, the question of interoperability between B2Bs which would, if possible technologically, certainly alleviate some of the concerns I identified before, and the question of standard setting and whether that exacerbates some of the network effects that Larry alluded to. We are now in the planning stages for another B2B workshop to be almost exclusively focused on antitrust issues, including these I've just mentioned. We hope some of you will participate.

I will secede the microphone to Steve at this point and be happy to take questions afterwards. Thanks.

MR. FOX: Our next speaker is Steve Salop, Professor of Economics and Law at Georgetown University Law Center and Senior Consultant at Charles River Associates.

Steve, it's clear that the more participants that would be in a B2B, the more likelihood there is of efficiencies. Yet the greater the number of participants, the greater the concern about collusion and exclusion. I'm looking for some elucidation here. Help me.

PROF. STEVE C. SALOP: Thank you.

By way of introduction, I just want to say the FTC B2B staff report is really excellent. I think it showed very hard work by the staff. It also really shows the maturity of antitrust and success of the guidelines process. Here is a very difficult problem. A year ago everyone was scrambling around trying to figure out how to think about B2Bs. And simply by applying the Competitor Collaboration Guidelines and an integrated law and economics approach, the staff was able to get a coherent view of the potential antitrust problems and the potential benefits of B2B networks within a very short term time period. Compare that to how long it took for the government to figure out what policy they wanted to follow with respect to physician networks some years back or with respect to bank mergers. This was really very quick. While people may disagree about some of the policies, I think everyone pretty much agrees about the framework. So, good work.

At the same time, this makes my task both easier and harder. Easier because I think that it is easy for people to catch hold of the framework and apply the standard legal antitrust analysis. But harder because I have to figure out something unique to say that makes the economics a little different than simply repeating the staff report.

My first slide is a flow chart. What this flow chart shows is that there are four relevant levels in analyzing B2Bs. If you follow the flow of the commodities, you've got certain inputs—electricity, auto parts, whatever—they are then sold to input buyers, and so you have an input market, and that goes through the B2B exchange. So the B2B exchange sits between the input sellers and input buyers. The input buyers then turn around and produce a product. They are also output sellers, and they sell to final consumers who are, of course, our ultimate clients in antitrust. Antitrust is intended to protect the final consumers.

So you have these four levels, and we need to analyze the effects at all four levels. There are three markets. There's the input market. There's the output market in which the ultimate goods are sold to consumers. And, of course, there's the market for exchanges. There are lots of way in which inputs can be purchased by input buyers. One way is to go through exchanges, and there may be multiple exchanges, and so that is the third market.

Now to apply an economic analysis here is really very simple. We have efficiency benefits to analyze, and we have potential anti-competitive harms. Potential anti-competitive harm you could classify into collusion and exclusion; and I would include mergers in collusion. The way I think about it is collusion is about marrying your competitors, making an agreement with your competitors in which you both agree to reduce output. And exclusion is about killing your competitors. And all of antitrust and all the potential harms can be reduced to either marrying the competitors or killing the competitors.

In this case the collusion or exclusion can be targeted at any of the four levels; that is, at any of the three markets. So there are a lot of potential problems. I'm not going to have time to talk about all of them, but I'll try to give you a flavor.

The first issue is efficiencies. Larry talked about the various efficiencies promised from B2B exchanges, and they seem quite real. In standard antitrust parlance, B2B exchange can serve to reduce costs, or it can serve to improve the quality of the procurement process. So it fits comfortably within *BMI*. Naturally, for a legitimate joint venture, something that's not a sham, we would follow the Rule of Reason. The cost reductions could be reduction in administrative costs or reduction in the search costs of finding the best commodity, the cost of setting up your procurement system and so on.

On the anti-competitive side we have collusion and exclusion. I want to start with collusion and then move onto exclusion. Collusion can take place in any of the three markets. I want to use as my main example collusion among the output sellers; that is the input buyers, the third level down. The way in which antitrusters think about the collusion problem for B2Bs usually involves exchanges of information. That's the way Larry talked about it and Molly as well. By exchanging information, they can signal better, and they can use the B2B in a signaling process. That can be true if the output sellers want to collude or if the input sellers want to collude.

There are three other ways that a B2B could help to collude that I want to just highlight. One could be direct output restrictions. A B2B could limit the amount of trade that is processed through the B2B, and that could serve to reduce total output. They could also do it by limiting the capacity of the B2B and only keeping it open for certain types of inputs in a way that would serve to reduce output and competition.

Finally, a classic economist's way for the output sellers to collude would be to use the B2B to raise their own costs. Now, that may seem peculiar. Why on earth would firms ever want to raise their own costs? But let's trace it through. Suppose the B2B is owned by the input buyers, and suppose that the way they finance the B2B is that every time the buyers make a transaction they have to pay a transaction fee to the B2B. Initially this would seem procompetitive; the buyers own it. Instead of making the sellers pay, which might seem like some kind of exercise of monopsony power, they pay the cost as a user fee. It seems fair because the people who make the most transactions pay most of the cost of running the B2B. However, suppose they set that per transaction fee very high, extraordinarily high. What would happen in that case is that the buyers would then reckon that their costs were higher, because every time they bought something they would have to pay this fee, so their variable costs of production would be higher; they would naturally want to raise their prices. Normally in a market if your variable costs go up, you can't always raise your price because your rivals's costs don't go up as well. But if they are all paying transactions costs to the B2B, everyone's costs will go up, and as a natural result, without any explicit collusion, the price of the outputs will rise. No collusion is involved.

Well, B2Bs are a little different. The transaction fee goes to the B2B. So the B2B, instead of becoming a cost center, becomes a profit center. The owners of the B2B could dividend out those fees, or they could do an IPO and get a high valuation on the IPO, because of the monopoly profits that the B2B is going to earn. It is not monopoly profits from a B2B monopoly but from a cartel of output sellers raising prices to final consumers.

Now, of course, as with all collusion, there's a problem with deviation. Each owner of the B2B thinks it is great that everybody else is paying the high transaction fees, but each person would like to contract outside the B2B to avoid the high transaction fees. Better to get the dividends but not have to pay your contribution yourself. So there would be incentive for each individual input buyer to try to contract outside the B2B. This could be prevented at the time they set up the B2B. They could set up the operating rules to require the input buyers to make all their transactions through the B2B. That eliminates the cartel defection problem. Now, I don't know whether we've seen this yet, but it is a potential problem with B2Bs. The way you would recognize it would be to see if these per transaction fees seemed high relative to costs. That is, it is more suspicious to antitrust if the B2B is a profit center rather than a cost center.

The second type of collusion problem is monopsony, a buyer cartel. The input buyers might use the B2B to engage in joint purchase and to exercise monopoly power over the input sellers. Although it is straightforward to say that antitrust clearly covers buyer cartels as well as seller cartels, as Molly pointed out, monopsony power is extremely tricky for antitrust. Seller cartels are simple: seller cartels would raise prices ultimately passed onto consumers. But that's not true with monopsony. In the first instance, it leads to lower input costs. So one might think that those lower input costs would be passed on to consumers and consumers would end up getting lower prices. What separates good buyer power, the kind that is applauded in the merger guidelines, from bad monop-

sony, is whether output goes up or down. And when you have a test, an antitrust test that directly requires evidence of whether output goes up or down, it is very difficult, because there's a benchmark problem. What is the relevant benchmark for measuring the competitive level of output? So I think that monopsony, unless the B2B is quite unskillful, is a less likely antitrust concern because of the difficulty in showing consumer injury.

The next set of issues involves exclusion. As I said, you could have exclusionary conduct in which the targeted victims could be input sellers, or exchanges, or output sellers. Let me first talk about output sellers and then just explain how the same analysis would apply to input sellers.

This is basic "raising rivals' costs" type of analysis. The relevant cases are *Northwest Stationers*, *Associated Press*, *Terminal Railroad*, most recently this *SCLC* in the Tenth Circuit.

The output market foreclosure issue is that the exchange may in some way prevent certain output market competitors from participating in the exchange or making it more costly for them to participate in the exchange. To the extent that it occurs, the output market rivals will have higher costs; and, since they have higher costs, they will have the incentive and indeed may have the necessity of raising the prices they charge to final consumers. Thus the members of the B2B that organize this type of group boycott may get to raise their own prices and exercise market power. This is what I've called exclusionary market power in my articles.

Where is the market power coming from? From excluding rivals. How do you analyze it economically? It is basically a three-step analysis—raising rivals' costs, power over price, and efficiencies.

First, raising rivals' costs. The fact that they have cut off this output rival from the exchange does not necessarily mean that the rival's costs are raised. The rival may have alternative exchanges they can go to, or they may not need the exchange. For example, in *Northwest Stationers*, Pacific (the plaintiff in the case) had its costs raised by some tiny percentage. It was a trivial increase in cost; not something that could actually significantly disadvantage them in the ultimate output market.

So the first question would be: are the rivals actually harmed? But of course that's not the end of the story. The fact that rivals are harmed is not enough to show an antitrust violation in a Rule of Reason case. This is because antitrust is focused on consumer welfare, not competitor welfare. So it will also be necessary to show consumer harm too. I call this step power over price. Do the output sellers gain the ability to raise their price? Do they gain exclusionary market power? Again, that's not inevitable, even if the rivals' costs are raised. In particular, although they may have raised the costs of certain rivals, they did not raise the costs of other B2B owners. So there could be continued competition among the owners of the B2B.

For example, suppose there already ten sellers in the B2B, and they prevent one seller, an eleventh from joining. Well, even if you knock that eleventh person out of business, you still may have sufficient competition among the ten who are members that there's no consumer harm. And indeed if there are efficiencies from joining the B2B, well, then those ten might have lower costs than they would have absent the B2B. So competition might be more intense than it would be without the B2B. So it's necessary for the plaintiff to actually prove consumer harm, not just assume it.

When I talk about power over price, it may involve prices rising, that is rising above the price that existed before the B2B. But it may not involve actual price increases, but rather preventing price decreases. What I've called in my work "price-down" cases. What the exclusion might do is prevent an efficient rival from entering, a rival that otherwise would have led to lower prices.

So suppose you have these ten firms that are relatively inefficient, and the eleventh one that they didn't allow in had much lower costs. It would have been a maverick; it would have disrupted collusion by the ten. In that case there would be no price increase, but the exclusion would prevent the price from falling. It is important to analyze that correctly because in doing market definition and analyzing market power, there's a potential *Cellophane* trap. The court may erroneously think that the sellers do not have collective market power because they can't *raise* their price. But that would be incorrect, in that they have market power in the sense that they can prevent the price from falling. The benchmark for market power analysis is the price that would have prevailed absent the restraint. It is not the price that would have prevailed absent the B2B. It is absent the particular restraint. The Competitor Collaboration Guidelines, as Molly pointed out, are quite explicit that you look at the subagreements of the master agreement, provision by provision. So although the overall master B2B agreement could be procompetitive or competitively neutral, a particular exclusionary provision could have anti-competitive effects relative to not having that provision. Hence, that particular provision could be viewed as illegal anti-competitive. (I should mention that a controversial political issue is whether the new administration will continue to look at B2Bs and other competitive collaborations on a provision-by-provision basis, rather than looking simply at the whole gestalt. That's a key antitrust question.)

Then third step is to look at efficiencies. To the extent that there is a potential harm, one needs to balance the benefits that consumers get from the efficiencies versus the harms that consumers suffer from the anticompetitive effects, to evaluate a net effect on consumers.

Under the current administration, the standard is net consumer benefit. There has always been some controversy in antitrust as to whether the relevant antitrust standard is consumer welfare or some type of aggregate economic standard. As of now, it is premised on consumer welfare. There has to be at least partial pass-on of the efficiency benefits to consumers so that on balance consumers get some benefit.

The same kind of foreclosure could be focused on the input sellers as well, and the story basically would not change. The question of whether there's been foreclosure or whether the input seller is harmed. And even if the input seller is harmed, that nonetheless may not cause a harm to consumers.

The last issue involves potential foreclosure focused on the exchange market. If the owners of the exchange each promise to use that exchange exclusively or if they require other people to use the exchange exclusively, one could end up driving rival exchanges below minimum viable scale, so they are forced to exit the market. Or exclusives could put them in a position where they anticipate that they can't achieve minimal viable scale, and that would act as a barrier to entry and, as a result, the rival exchange would not enter. So the power of the initial exchange would be entrenched. This could be a "price up" or a "price down" case. That is, the exclusives could prevent a new exchange coming into business that would lower transaction prices that ultimately would be passed onto consumers.

I think this is a difficult issue for the agencies, because exchanges have some natural monopoly elements, some economies of scale, some network effects elements. So the exclusivities that could actually lead to the barrier to entry also may be efficiency oriented. The first exchange may have required its owners to deal with it exclusively or required other users to use it exclusively because they themselves were worried about achieving minimal viable scale. At least, they may have wanted to get to critical mass. So the very thing that makes it anticompetitive might also make it procompetitive. So there is going to be a difficult issue of figuring out how much exclusivity is too much exclusivity.

The staff report and also talk about over-inclusion as a potential harm, that the exchange would have too many members. It's hard to know how much is too much, particularly where there's an economy of scale. So I think this is going to be a difficult issue to litigate.

The last issue that I want to mention is mergers. I think right now we are all very excited about B2Bs. This is the future, they are very efficient, B2Bs are the next industrial revolution, so on and so forth. But what we know from every new industry is that there is going to be a shakeout. There is going to be over-entry, and ultimately (especially because there are economies of scale here) there is going to be a shakeout. We are going to find there are too many B2Bs, and at that point they are going to want to merge. That is where the agencies are really going to face a problem. Because once the B2Bs are up, maybe you should just force them to stay in business, let the exchanges fight it out, wait for failure to be obvious rather than simply anticipate it. Or, there will be a question of whether you should let them merge now to create a more efficient entity, even though consumers may lose some short-run benefits of intensified short run competition.

MR. FOX: Thank you, Steve. I hope we all have an opportunity to pose a number of the questions that I'm sure we all have to ask Steve about some of the issues that he raised.

Our next speaker is Rich Steuer, Chairperson of the Antitrust Practice Group at the Kaye Scholer law firm and a prolific writer and speaker on antitrust topics. He will help us through the thicket of the joint purchasing aspects of B2B exchanges when you have an aggregation of purchasers and the potential for monopsony concerns.

RICHARD STEUER, ESQ.: Thanks, Larry. I wanted to focus on joint purchasing today because I think it is the most challenging of the issues before us on B2Bs.

Adam Smith, of course, in his famous quote said in substance that business people virtually never meet for any purpose but that the conversation eventually gets around to fixing prices. With the Internet it is no longer even necessary for business people to meet. They can meet virtually in cyberspace, and we still have to be on guard for the same types of problems that Adam Smith foresaw so many years ago.

I want to talk about joint purchasing and a little bit about joint action in terms of formation of B2Bs and possible mergers of B2Bs. Joint purchasing—Bill Slowey is going to talk about Covisint—and one of the things that's not in that model is the kind of joint purchasing that eventually we get around to with many other B2Bs. When these things are in the formative stage sooner or later somebody says, particularly in the case of a buyer-initiated exchange, which as Molly said, most of these are today, what can we do in terms of buying together? What can we do in terms of pooling our buying and being able to get better prices?

The history of this in terms of the case law is fairly sparse, but somewhat instructive. We don't have a lot of recent law on the subject. Certainly nothing on B2Bs; this is brand new stuff. But we can go back to look at cases like *Saucony Vacuum*, all the way back in 1940 that took a very dim view of any kind of joint action, including joint purchasing that might possibly have the effect of resulting in price stabilization or the fixing of prices.

Much more recently, in 1985 the Supreme Court decided Northwest Wholesale Stationers, which we have

heard a little bit about already, one of the things which the court emphasized in that case is there are occasions in which joint purchasing is procompetitive, can result in efficiencies, can increase consumer welfare. So the Supreme Court has come full circle, in a way, from a *Saucony Vacuum* to *Northwest Wholesale*, so although it is not giving a blanket approval by any means to joint purchasing, it is certainly the case that the Supreme Court has opened the door for arguments that there are procompetitive aspects to joint purchasing. And if they are not all legal, they are surely not all illegal.

More instructive, perhaps, are the consent decrees that come a little closer to this model. They are somewhat bipolar in that they have taken different views over the years. There was a group of consent decrees during the Reagan Administration on joint purchasing. These included things such as movie theaters; all the movie theaters in Detroit wanted to get together and buy popcorn and tickets and things like that and were given a business review clearance enabling them all to get together to engage in joint purchasing. There were a number of joint purchasing arrangements that were issued at that time that actually took a rather broad view of the law and were rather generous towards joint purchasing.

We also have a number of business review letters that have come down much more recently. One of the overarching themes in all of joint purchasing that we're going to see is that there is a difference in the kind of inputs that are involved, and one of the more instructive cases that I'll come back to is a 1999 consent decree involving funeral operators. The product there was caskets. In that case a group of funeral operators got a business review letter to jointly purchase caskets. What is significant about this matter is that caskets aren't in demand by many buyers other than funeral operators. At least nobody I know. Vampires perhaps. But just looking at the U.S. market, this was a group of funeral operators that collectively accounted for 6.3 percent of purchases. But what was more significant is they put a cap on their arrangement up to 35 percent—which was not a random number.

There were a couple of sets of guidelines that came out on joint purchasing that are instructive but may be a little generous by today's standards. Let me mention them. During the Reagan Administration there were guidelines issued suggesting that joint purchasing would not be challenged as unlawful by the government if the total purchases accounted for by the joint purchasing arrangement were no more than 35 percent of total purchases in the market, or no more than 20 percent of the price of the goods that group members sold in competition with one another. You could hit either/or. That 35 percent, no doubt, was of some guidance in some of the joint ventures that were set up after that. The health care guidelines that were first issued in 1993 also have tests of 35 and 20 percent, but it's different. It's not an either/or test; it's a both. Both the total of the joint purchasing must be no more than 35 percent of the total market, and no more than 20 percent of each company's total revenue. So the difference is it is a slightly different test. But the important thing is that both of those had to be met.

Now, that raises the question as to whether the 35 percent figure really has any significance when we're talking about joint purchasing in a business-to-business exchange. Although people have bandied that number about, I think that the more cautious note that comes from the agencies is that you'd be safer looking at the 20 percent safe harbor in the new joint venture guidelines than trying to rely on the 35 percent figure in the Health Care Guidelines, which although perhaps appropriate in the healthcare industry, may not necessarily be appropriate in other industries. So basically, what we're dealing with is a 20 percent safe harbor on joint purchasing; 20 to 35 percent, which one can argue is less risky based on some of the guidance given, and then over 35 percent, where possibly a much stronger showing would be necessary.

And what would that showing be? Really what we're talking about is the purpose of purchasing co-ops. If you're outside of the safety zone of 20 percent, what kind of showing should a B2B exchange want to be able to make in order to justify joint purchasing among its members. And by joint purchasing, of course what we're talking about is members of the exchange who are buyers pooling their purchasing in order to get more favorable terms, create efficiencies. And the justifications would focus on efficiencies, the first being efficiencies in ordering collectively among the buyers who are in the group.

The great efficiency that one gets from one of these B2Bs is that one representative of the buying group can search for the lowest price to get for the group as a whole. And this is a more efficient way of searching than if you have a rather disjointed group of very small buyers who are trying to get favorable terms. For instance, in the business review letter in the casket case, one of the things that was impressive to the government is the fact that these were basically small operators who were trying to get terms comparable to what some of their very large competitors were getting already. Certainly there is lots of precedent for joint purchasing among relatively small buyers to be able to pool their buying power to get on a level playing field with very large buyers. As the buyers get larger and the percentage increases, obviously these arguments become harder to make. Although the efficiencies of doing the search for the best terms and the best products still has some power, no matter what the numbers are.

On the other side of the equation we have efficiencies for suppliers. Obviously, in terms of trying to sell, there are efficiencies to a supplier who is confronted with a group of buyers and doesn't have to go out finding each one of these buyers all over the marketplace, possibly

over quite great distances from one another. Whereas you've got a ready-made package of buyers who are ready to buy collectively a relatively large amount. So if that seller can come to terms with this buying group, there are efficiencies in that negotiation that can also help to drive prices down.

Obviously, as Steve mentioned, one of the results of a business-to-business joint purchasing exchange should be lower prices and higher consumer welfare if all of the pieces fall into place properly. The dangers that have been identified is that the joint purchasing, if the numbers are high enough, and the group that's doing the joint purchasing is large enough is going to drive down prices to such an extent that it actually harms sellers; that sellers are not able to operate profitably, and that ultimately there may be less competition and perhaps too little competition amongst sellers. Also, it conceivably could result in raising competitors costs, because if there are competitors outside the buying group, and the buying group is forcing its own prices down, the sellers may have to make up the lost profits elsewhere and basically prey upon buyers who are not part of the joint purchasing group. That could result in a disparity that would be anti-competitive.

Having all this history and having these decrees, none of which involve B2Bs, why is this such a hot issue now, what's changed? First of all, joint purchasing through a B2B exchange results in potentially far greater efficiencies than we've ever seen before because of the great power of the Internet. It also results in a global element that's unprecedented, in that not only can we have various buyers forming a group, but we are no longer talking about all of the movie theaters in Detroit. We are possibly talking about every buyer in the world of particular products at least potentially participating in one or more exchanges. The Internet has tremendous geographic reach, and it's something we've never seen before. And at the same time it has tremendous geographic reach among sellers. You've probably seen the commercial currently on TV about a seller in Texas being able to sell its products to a buyer in Tokyo. These things happen every day on the Internet. What it means is that these joint purchasing arrangements can be of much greater scale than anything we've ever seen before in the other joint purchasing cases. Of course the other great advantage of the Internet is it is instantaneous, depending on how mechanically the exchange is set up. All of these joint purchasing arrangements can take place with far greater speed than anything we have ever seen or imagined in the past. So there are tremendous efficiencies to be had, at the same time the concerns are the same as with any joint purchasing arrangement we've seen over the years.

Let me talk a little bit about how one would minimize risk if you're trying to operate a B2B exchange with a joint purchasing element. There are really two kinds of products that are bought collectively in joint purchasing arrangements in B2B exchanges. One might be called direct inputs, and one is indirect inputs. I have my demonstrative exhibit with me that I brought from my last airplane trip, which is a napkin. You can collectively buy napkins; I can say that categorically. There are exchanges that buy very specific items and exchanges that buy less specific items. For instance, an exchange among automobile manufacturers that buys automobile differentials, there aren't lots of other uses for automobile differentials than to build automobiles, just as there aren't a lot of other uses for caskets, other than in the hands of the funeral operators. At the other end of the scale are napkins. Lots of people buy napkins. And if the leading automobile manufacturers want to get together and collectively buy all of their napkins, that's probably going to be okay. In other words, to the extent that we've got indirect inputs—pencils, napkins, all of these typical things that companies need, to the extent that they buy them collectively, it is not likely to have much of an impact on the overall market. Because although they may be great big companies in the automobile industry, they are not huge buyers in the napkin industry. You see this repeated over and over again, whether it is napkins or paper clips. That's one end of the scale.

The other end of the scale are highly specialized products that nobody in the world wants to buy except the people in this joint buying group. Obviously the impact on the market is going to be vastly different depending on what you're including. So when business-to-business exchanges are set up, it is not necessary to have joint purchasing of everything. The first decision to be made in a joint purchasing arrangement are what products are going to be included and what products are going to be left out. The easy choices are the napkins. The harder ones are when you get closer to the caskets. And as you could see from that business review letter, if you're in a category like caskets, it is a whole lot safer to do joint purchasing if you only account for 6.3 percent of the market, as in that case, or certainly no more than 35 percent of the market, than if you're talking about something like paper clips, where all of these are going to be tiny, tiny percentages of the overall.

Next is whether or not there's going to be exclusivity. Surely, when the participants in the exchange have the option of buying independently or buying through other exchanges or both, the level of antitrust risk diminishes quite a bit. The exclusivity problem that Steve mentioned is a very real one. When exchanges are being formed it is sometimes necessary to have some guaranty that they are going to be used by those who are forming them, and there are procompetitive effects from having a certain degree of either exclusivity or at least minimum usage. But the risk of antitrust challenge is going to drop quite dramatically if there are these escape valves where participants can buy outside the exchange and are permitted to engage in other exchanges as well. If there are minimums, they should be reasonable minimums. Again, these are all

sliding scales. If the exchange accounts for a large percentage of the relevant market that we're talking about, then setting the minimums low is helpful in allowing a lot of the purchasing to take place outside of the exchange. If the exchange as a whole is accounting for a very small amount of the market, then it becomes less dangerous to have people more fully committed.

Relevant to that are fees. Are there going to be up-front fees in order to participate in the exchange, or are there going to be mandatory investments in order to participate in the exchange. Do you have to become a buyer of shares of the exchange in order to participate? All of this raises the issue of whether there is a lock-in. In other words, if the participants have to pay a lot of money before they can begin using the exchange, even if they are permitted to use other exchanges as well or buy outside the exchange, for practical purposes, does that become very unlikely or impossible? On the other hand, are fees simply per use fees? And Steve mentions some problems that could come with the sliding scale of usage fees, but basically I think fees that reflect usage rather than a heavily loaded up-front fee are much less likely to create this lock-in problem and be suspect in that regard.

Naturally, there should be firewalls set up; this should go without saying. It is not just a matter of joint purchasing, but standard operating procedure among B2B exchanges today, communications between the exchange itself and individual members should be confidential. If there is joint purchasing, it should be operated by the exchange. The exchange should do the negotiating on behalf of the members of the joint purchasing group. There shouldn't be self help on the part of members of the group doing it themselves, and there shouldn't be communication among the members of the group. At the end of the day it is important to distinguish between joint purchasing and bid rigging. There have been those in the past who have gotten confused about the issue.

You probably well know the stories of the antiques dealers and the used machinery dealers who got into criminal trouble some years ago because they failed to distinguish legitimate joint purchasing ventures from outright bid rigging. And it's important that the participants in these exchanges be well counseled. There are folks who seem to have the idea that things that go on in cyberspace don't count. It is like the folks who go into chat rooms or either the ghost of Adam Smith or Marilyn Monroe or somebody else, they do count. This is not some other universe that folks operate in cyberspace. Not only are they subject to U.S. antitrust law, they are also very likely, depending on how it is set up, subject to EU antitrust law and the antitrust law of other countries as well, all of which are very sensitive to these issues.

So that basically is joint purchasing. I'm going to spend just a couple of minutes on formation issues and merger issues which also raise horizontal questions. In forming exchanges it is very much like getting together to do any other joint venture or merger. The participants are competitors, and you're putting the participants together in a room to talk about their needs and their hopes and wants in terms of how they would like to buy or how they would like to is sell. It is important to avoid the unnecessary disclosure of purchasing information. If this is a group of purchasers, cost information, price information. You need to create a need-to-know set of firewalls, just as you would in forming any kind of joint venture or in negotiating any kind of merger. So that the people who have information have it on a need-to-know basis, and there's not a free-for-all exchange of information about sensitive topics like prices and costs among competitors that could be used for other purposes. Also, it's important when forming a joint venture not to begin prematurely. Assessment has to be made as to whether the venture is notifiable. And that means not just in Washington, but possibly in Brussels, possibly in Brazil and other jurisdictions that may have even more aggressive premerger notification programs than the United States does. So gun jumping is an important danger that needs to be avoided. And of course, the best advice is to involve counsel early, because this is not a casual affair. And although there is obviously a procompetitive purpose at the heart of this, there are plenty of pitfalls along the way that folks can fall into if they try to put these things together without competent counsel showing them the way.

Finally, I would like to just touch on the subject of mergers between exchanges. We are not there yet, but the day will come when either because some are falling by the wayside or for other reasons—not the least of which is the feeling among some that there are many industries that really only can sustain one exchange, that it is more efficient to have one marketplace than to have splintering of many marketplaces. In any event, mergers of B2B exchanges are just like any other merger, but maybe worse. Not only do you have two entities presumably, but you've got two entities that include within them groups of competitors that can collectively involve all or most of the industry. Again, there are problems of communication, there are problems of coordination. I would caution you about an 8th Circuit case a few years ago called *International Travel Arrangers* that suggested that once merger partners start talking they become incapable of conspiring because they have a joint purpose. Don't follow that case. It's been rather widely criticized and not something that I would want to have to rely on.

My conclusion from all of this is that joint purchasing formation of B2Bs, and many mergers of B2Bs are all doable. But the important thing is to remember that the Internet is not a virtual smoke-filled room where anything goes. It's important to observe all of the same rules that have come down on joint purchasing, that have come down on formation of joint ventures, and mergers in other contexts, and one will be able to steer their way clear. Thank you.

MR. FOX: Well, we've all been privileged, all of you, and Molly and Steve and myself and Rich, because we've been traveling on a supersonic jetliner at about 30,000 feet above the B2B landscape. It's time to take this craft down and land and really talk to someone who has been in the trenches and actually created one. I'm privileged to introduce counsel for General Motors in the Covisint matter, Bill Slowey.

WILLIAM B. SLOWEY, ESQ.: Good afternoon. I want to thank Larry for the invitation to be here. It's always a pleasure to return home to New York. You have heard from Steve, the economist, and Molly, the regulator, and Richard, the counselor. Now let me talk somewhat as a historian and speak not so much about the general but of one specific set of facts.

General Motors, Ford and Chrysler each in common and diverse ways have been looking to extend e-commerce business. As you may have read, General Motors and Ford Motor Company have each attempted direct and dealer sales on the Internet of new vehicles, but so far those efforts have been frustrated by state regulations and lack of consumer acceptance. General Motors, Ford and Daimler-Chrysler have also considered launching a joint venture for the location and sale of automotive parts, but that is still in the formation stages. A third B2B exchange is the joint venture between General Motors, Ford, Daimler-Chrysler, Renault-Nissan, Commerce One and Oracle Corporation, known as Covisint, to meet the supplies of the automotive industry.

In January and February 2000, after General Motors had announced its Trade Exchange and Ford had announced Auto Trade exchange, the companies began discussing whether there could be an industry-wide exchange. The idea was actually originated by a supplier which did business with more than one OEM. The suppliers feared having to invest in more than one technology at great cost to themselves and having to choose among exchanges of competing OEMs from which to buy their own requirements. They sought to avoid both cases.

The OEMs had completely different objectives. The first one was to create a publicly-held IPO that would earn sufficient income through transaction and subscription fees to make a public offering soon and very profitable. The second one was to improve efficiencies in our own operations, principally in the following manner: To reduce transaction costs with regard to the acquisition of direct and indirect materials; to improve supply chains management with regard to inventory, forecasting and scheduling down through the "nth" level of suppliers; and third, to reduce the structural costs by streamlining and improving the design, engineering and the development of new products as well as improving the quality and performance of existing products. While all these goals seemed common, the priorities of the OEMs differed significantly, and those differences have resulted in very long delays. Once the joint discussions were undertaken, antitrust issues were an area of prime concern. At General Motors, and I'm sure at the other OEMs, antitrust compliance is a duty, not an option.

Secondly, for competitive reasons, processes and procedures had to be developed that would limit personnel working on the B2B exchange to the business of the bazaar and the emporium, the catalog sales, the auctions, the reverse auctions, the security, the privacy, the confidentialities and the commonality of software. Trade information about the joint venture partners relating to the underlying business of the companies was not to be discussed. That was a rule from the outset.

Third, all the OEMs wanted to employ best practices, but all were reluctant to disclose its own best processes if the OEM thought those processes gave it a competitive advantage. So we negotiated for a long time "about the shape of the table."

Early after General Motors, Ford and Daimler-Chrysler began discussions they jointly decided to retain a law firm to represent the putative joint venture and to provide legal guidance to the mixed employees who were trying to develop this company. Retained counsel was only to advise as regarding that joint venture. In this way we believed we could minimize conflicts of interest and privilege issues. Each company's own counsel would continue to advise its own officers on its own proprietary issues.

The criteria used for looking for this outside counsel broke down as follows: We wanted knowledgeable, known, reliable antitrust lawyers. We wanted counsel known to each company, having done legal work for each company, but not specifically identified with any one of the companies. We wanted counsel who understood the processes and the procedures of the federal antitrust agencies, but most importantly the HSR procedures. We wanted counsel who would stay on to advise the exchange once it was organized and became operational and would also be interested enough to know its vision, its goal and its objectives so it could help formulate its legal policies and manage its legal challenges. And at least for General Motors, we wanted counsel who would be vigorous advocates of the Rule of Reason, both in the United States and around the world.

Having done that, and setting that criteria, you may ask, why one exchange? Why not many exchanges? The answer is largely economic. The development of the exchange to its fullest capacity will cost more than a billion dollars. A single exchange would accordingly lower the investment cost of each of the founding partners. Common technology for all OEMs would also encourage more levels of suppliers to invest in the software of the exchange and to keep that exchange up to date. That would not necessarily be true, even with parallel exchanges. With more levels of suppliers as participants

in the exchange, supply management would become easier. And a common exchange for the industry, it was believed, would maximize the savings of transaction costs for each participant, because of the total volume of transactions and lower the structural costs for the development of products.

In an ideal world, in my opinion, one exchange in the B2B market would minimize antitrust risks so long as the exchange was operated independent of the founding partners, by truly independent managers and directors appointed because of their skills necessary to manage the needs of the business and to maximize the profits of the business, without particular loyalty to any founding OEM or to any group of suppliers. Or if you believe that is too Utopian, with sufficient safeguards to allow for the success of other potential OEM automotive exchanges or supplier exchanges so that the founding partners could not by any joint activity adversely affect competition in the markets of their hundreds of suppliers or could not injure competition in the automobile market by limiting access of their competitors, other OEMs, to reliable and quality suppliers.

Because we knew that the issues of a B2B exchange by several automotive OEMs would be of concern to the antitrust agencies, we approached the FTC long before any final agreement was reached among the manufacturers. To its credit, the agency was not cynical, but it was skeptical and a bit cautious. Plainly, the FTC did not want to interfere with genuine and demonstrable efficiencies, but since the agency is charged to prevent antitrust violations or to nip them in their infancy, it wanted evidence that the probability was strong that the competition in any actual or new market would not be injured.

At the end of the process the FTC agreed to allow the project to go forward, but advised that when Covisint was operational it would watch with wary eyes to judge that the claimed efficiencies were real and that there were no substantial anti-competitive effects. Clearance of competition authorities in the United States, the Republic of Germany, the European Union and Brazil, without undue delay, was a prime concern to the companies. Equally important was developing a common set of operating principles and antitrust guidelines that could be utilized globally.

I will outline for you some of the antitrust and other sensitive provisions of the agreement of the founding partners in part constructed to obtain FTC clearance. From a business viewpoint, the agreement is not ideal, but it does allow sufficient room for Covisint to enter the market. One of the first issues that we looked at was the aggregation of purchases. Because of the size of the purchase requirements, there was an immediate concern about automotive OEMs aggregating their purchases through Covisint. Monopsony, or exercise of substantial market power, by these companies which themselves account for approximately a third to a half a trillion dollars in annual purchases, raised immediate questions about what its effect would be upon markets and favored or disfavored suppliers by reason of the OEM aggregation. While the numbers appear large, in the purchase of indirect requirements, like paper, pencils, plant fuels, the companies would not really represent significant market power. But in other areas, depending upon market definition, any joint activity could have a significant effect on the number and strength of suppliers.

To achieve the objectives of the exchange without creating alarm among the suppliers, the OEMs agreed among themselves, first, that no founding OEM will engage through Covisint in any aggregate purchasing with any other founding OEM for any products or services. Secondly—and this runs through a lot of the restrictions that I will talk about—the bylaws of Covisint provide that any change in that rule requires a two-thirds vote of the board or a vote of the shareholders, including a majority not of the shares not held by the OEMs.

Now, that was restrictive, but there are other sides of that. Each OEM is unilaterally allowed to determine the extent to which it will aggregate its requirements with its subsidiaries, affiliates and suppliers on a global basis. If practiced, the effect of this unilateral aggregation or vertical aggregation could result in substantial savings both with regard to the volume of purchases and the commonization of products or services within a single automotive group. We estimate that those savings can amount to more than five percent of the cost of production of a car.

Confidentiality and security were another area of concern. Covisint, as you know, is like a shopping mall where each OEM and other users can have a portal that is independently operated by the owner of the portal. For the success of Covisint, as was brought out at the FTC B2B workshop, confidentiality and privacy are essential. Firewalls, gate locks, passwords and the like are being installed in the Covisint software for that purpose. The parties also agreed, however, that the entity providing data to Covisint shall be considered the owner and the originator of the data and shall control its flow. Without the consent of the originator, no other person can have access to the data. When a transaction is done through Covisint, each of the parties to the transaction will be considered an originator of the data. In the absence of affirmative authorization from the originator, access to that data will be denied to anybody else.

Through a user agreement, for management purposes, Covisint may aggregate data as to the number of transactions and the aggregate value of the transactions but may not collect information with regard to the underlying substance of the transactions. Like the aggregate provision with regard to the rules of the board and the bylaws appearing to aggregation, those same rules apply to this confidentiality and security.

What about access to Covisint, who would have access? Two issues here are whether the OEMs or suppliers who are not investors can have access, and whether suppliers using Covisint can participate in other exchanges. Covisint will be open to all automotive OEMs and qualified direct and indirect suppliers. Terms of access to Covisint will be reasonable and shall not favor the founding OEMs or any group of suppliers. The terms of access to use Covisint will be determined by objective criteria and published on the Covisint Web page in the open and public area. Covisint users will be encouraged to compete vigorously in compliance with the antitrust laws and to pursue their own competitive advantage in terms of technology, quality, service and price. Moreover, Covisint will develop technology to facilitate the ability of other exchanges to connect with and to interoperate with Covisint, and will publish those interface standards on Covisint's Web site, so that the standards will be available to those other exchanges. Again, provisions relating to access are protected by the same bylaws that we talked about before, so that they can not be inadvertently or easily changed.

Let me turn to a few other subjects. Customer agreements, corporate governance and antitrust compliance. All of those subjects are also covered by the bylaws which prevent any change to initial structure unless two-thirds of the board of directors or a vote of the shareholders, including a majority of shares not held by the OEMs agree to the change. In the case of customer agreements, by reason of concerns of the antitrust and competition law agencies, the founding partners have also agreed among themselves not to change the provisions with regard to openness for at least 18 months.

Equal access to Covisint and to competitive exchanges for suppliers became a critical issue in the United States and Europe. We believe that Covisint can attract customers by reason of lower transaction costs and high quality services. Covisint agreed to some unusual provisions to establish the liberty of the customer and to avoid any appearance of coercion among suppliers. Under the applicable founders agreement, neither any shareholder of Covisint nor Covisint will enter into any agreement with either an actual or potential customer that would require the customer to use Covisint as its primary or exclusive trade exchange. Covisint will not prohibit its customers from holding equity or revenue-sharing rights or entering long-term agreements with other trade exchanges. Covisint will not take any action that would prohibit its customers from using other exchanges. And Covisint would not enter an agreement that would obligate customers to use Covisint for more than 18 months. All of these provisions were adopted, not to foreclose the market to the funding or growth of competing exchanges.

On the other hand, Covisint has some freedoms. Covisint is permitted under the founders agreement to exclude from consideration of its board any customer or supplier that has an equity interest in any other exchange. It can also offer incentives to suppliers to use Covisint as their exchange. And the OEMs are permitted to require suppliers to use Covisint for their dealings with that OEM but not with the customers. Because many suppliers of direct material do a large part of their business with the automotive OEMs, we do not believe that the open access provisions will jeopardize the market success of Covisint.

We turn to corporate governance. With truly independent directors who will meet the New York Stock Exchange standards, appointed by reason of the needs of the business and charged with maximizing profits for the benefit of the shareholders through service fees and commissions, many of the safeguards which the founding fathers placed upon Covisint are, in my opinion, unnecessary. Covisint under those circumstances simply would not present any competitive threat, because there would be no fear of coercion or retribution for using another exchange or fear of exclusion from the business of the OEM. But even for the founding partners, Covisint is an experiment. At the outset, the OEMs wanted a strong voice in its direction because of the potential cost savings and agreed to stringent bylaws in order to have that voice.

It is less certain that Covisint in the short term will produce revenues sufficient for a successful IPO. That doubt existed even before the decline of the dot-com companies and the NASDAQ index. Presently, the Board of Directors of Covisint is composed of approximately 50 percent of OEM and technology partners, directors and the other half "independent directors." For present purposes an independent director is defined as one who has not been affiliated with an OEM for five years; is not an employee or designee of an OEM; is not the spouse, parent or child of a founding OEM member. Most of the "independent" directors are suppliers who do business with the OEMs. The directors undoubtedly know the automotive business and may be able to work out the difficulties with regard to sourcing, supplying management or design problems within the automotive industry and create even greater efficiencies than are now anticipated, but they are not experts in the B2B business. Over the next months we shall learn whether B2B operations are different in *kind* or only in degree or form from other kinds of business.

The limitations agreed to by the OEMs and reviewed by the competition law authorities are not perfect, but they can protect competition until the services are developed to make Covisint a viable exchange and allow it to be independent. It is probable that Covisint may take some actions more restrictive of competition than what the OEMs agreed to in order to permit an early start-up, but at that time it will be an independent public company.

Antitrust compliance. As a part of the bylaws of Covisint, the founding OEMs have agreed that Covisint will

retain its own antitrust counsel and adopt and publish its antitrust policy on its Web site. Matters brought to the board of Covisint will be related strictly to the business of the exchange and unrelated to the business of the founders, the shareholders, the board members or the suppliers. Counsel will generally review the Covisint board agenda prior to the meeting for sensitive antitrust issues. Director and employees will be specifically instructed in antitrust compliance and in the requirements for data security, confidentiality and record retention. Covisint antitrust policy and implementation shall be published on the Web site. And employees who violate the antitrust compliance rules will be disciplined. Users will be prohibited from using Covisint exchange in a way that violates the antitrust laws.

Covisint was finally organized in December 2000. It expects to hire a CEO shortly. It is slowly beginning operations and plans to be fully operational this year. We accept at face value the FTC, along with other competition law agencies, banks, brokers and industry experts that they will be watching carefully to see whether Covisint can save hundreds of millions of dollars for its users, promote competition in the automotive industry and generate enough revenues to catch that shooting star called the IPO. We have found getting started and growing a B2B exchange has been far more difficult than we ever envisioned. And while antitrust issues have presented real challenges, two facts have emerged; (1) there are acceptable answers to antitrust challenges, and (2) antitrust issues are not the only challenges. Thank you.

MR. FOX: Thank you very much. Let's open it up to questions I'm sure the panel has a number of questions for each other, but the most important thing is to take your questions at this time. So let's open it up to the floor and have some lively debate. Yes.

AUDIENCE MEMBER: I have a question that focuses on I guess what Rich described as the confusion between bid rigging and group buying. If you strip away a lot of the ancillary issues of exclusion and monopsony, that so many of the discussions today focused on, and you recognize that a buyer cartel continues to be *per se* unlawful, how do you define the line between a buyer cartel and acceptable purchasing without being able to look at necessarily integrative efficiencies? And it seems to me that this is a point where it's just not clear whether the Collaboration Guidelines, whether the Health Care Guidelines, whether the earlier guidelines really are addressing this issue at all. Because it seems to me that saying that you have less than 20 percent of the buyers doesn't begin to answer the question if what you have is an effective buyer cartel. So any guidance that anybody can shed, either Steve from an economic perspective, Molly from an enforcement perspective. How do we determine what other trappings need to be there in order to be confident that our clients aren't just creating a buyer cartel?

MR. SALOP: Actually it is worse than that because the efficiency could be the lower price. It could be the cartelization. So you know, I agree. This is the soft underbelly of the whole area. If you had a cartel that was comprised of 20 percent of the people of the dealers buying antiques at an antique auction, I don't think that you'd want to advise your clients that that's okay.

MR. STEUER: Let me make two observations. One thing that distinguishes these from bid rigging is that it's open; whereas, the traditional criminal bid rigging was secretive. The other is that in bid rigging the buyers are getting together and agreeing on price; whereas, in a lot of these models the buyers are getting together and appointing a joint negotiator who is then going to negotiate a price on their behalf, sometimes with some parameters. But it is a different dynamic in a sense, particularly where the group that is being represented is one of many other buyers, particularly if it's not even collectively the largest buyer in the group. But it's certainly open and notorious, and it is the function of negotiation.

Now, that doesn't necessarily get you all the way to where you want to go I understand. But if you layer on top of that the fact that there are a number of precedents, including from the Supreme Court, that have said that where efficiencies are created, these groups should be subject to the Rule of Reason, I think it gets you out.

MR. SALOP: Rich, this can't work. The efficiency is the lower price. These other guys did it secretly because they feared going to jail. So is the answer that this group of antique dealers has to appoint one guy to go to the auction for them and get the lower prices and negotiate the lower price as a result? Is that what makes it the rule?

AUDIENCE MEMBER: The FTC has said in the healthcare area, where there were putative IPAs, independent practice associations, that were found to be little more than a group of doctors who appointed a negotiator to get them better reimbursement rates from the HMOs, that that was clearly not an integrative efficiency and those were not legal.

MR. FOX: Well, you also had the D.C. lawyers association case, where that was just a cartel of lawyers trying to get a better price. But I think to the extent you're looking for a litmus test from a standpoint of whether you really are likely to have an enforcement action, I think if you're going to have this integrative efficiency that is truly efficient, as Steve was saying in the lower price, you should have a corresponding increase in output. And where you merely have the lower price but a decrease in output, you I think should be concerned that you have a buyer cartel. But if they are in fact utilizing those efficiencies to enhance their competitive positions in the rivalry, you should see an increase in output. I mean to the extent you're looking for something, that's at least something to look for. Yes.

AUDIENCE MEMBER: Following along with that, couldn't you make the argument that the efficiency is not just the price, but efficiency in the process of finding the lower price and that should count for something?

MR. FOX: I didn't hear that.

MR. SALOP: So in the auction, just one guy shows up at the auction, rather than all of them, that's different than going out and finding the antiques to buy.

AUDIENCE MEMBER: No, because you're just focusing on one thing. That obviously goes far beyond what the boundaries should be. I thought we were talking about something with other protections and other boundaries, but it can't be the sole boundary. But why are you only focusing on one benefit, the lowest price? I know you're also focusing on the procedure by which you get there. Every business always looks for the lowest price.

MR. FOX: Well, I think the ultimate objective is that B2Bs do promise all of these great efficiencies and elimination of waste and elimination of search costs and transaction costs so that you can ultimately have lower prices. But the lower prices aren't an end to themselves for competition policy. The end in itself is higher quality products at lower prices to consumers.

AUDIENCE MEMBER: And for example, when you're doing a regular bid process you get bids in with all different terms and conditions and that would enable you to truly compare different suppliers.

MR. FOX: And that is a benefit. I think what we're all struggling with here is we have a wonderful device that can do good and do evil. We're trying to divine what are the signals that would indicate to us that an otherwise benign enterprise has gone awry.

MR. STEUER: I might add one of the toughest problems is measurement. Clearly you're correct, there should be efficiencies on both sides of the equation, both in terms of the buyers and in terms of sellers with search costs. How to know whether the amount by which the price they are getting is lower is reflective of the amount of the cost savings is probably impossible to match up.

MR. FOX: Yes.

AUDIENCE MEMBER: I'm not sure exactly how these exchanges work, but one question is, if the buyers had access to the information about what the other member buyers are purchasing, that's something that's normally considered to be a fairly sensitive bit of competitive information. Is that a problem insofar as you would potentially enable the buyers to coordinate output?

MR. FOX: I think it is. I think you could basically police a collusion by monitoring someone's input, because you know how much output is going out. So if you have an agreement to restrict output and you could monitor somebody's input purchases, you have a good way of policing input to restrict output. Steve, Molly?

MS. BOAST: I think this is the two-edged sword of the transparency of the B2B exchange. All this information is there to make transactions take place more quickly, and at the same time all of that is valuable information that could be used anticompetitively.

I think the whole problem with this area is that we don't have any real-life examples yet where somebody has taken that information, as far as we know, and misused it. From Bruce's question, I think he's trying to figure out how to advise somebody going in, and he has no way of knowing whether there's going to be decreased output until it is too late. So this is a tough problem.

MR. STEUER: I might just mention the Health Care Guidelines provide some pretty good guidance on the kinds of information that can be shared. I guess the question to ask yourself in this situation is: If more information is being shared than what's described in those guidelines, why is it necessary to do so?

MR. SALOP: Well, I would ask yourself the question another way. Which is, if a cartel came to you and said, we want to be subject to Rule of Reason treatment, we heard about these guidelines, could you write this up for us in way to make it look okay; how hard would it be for you to do it, and how many hours would it take you to do something.

MR. FOX: Another question. Meg.

MS. GIFFORD: Yes, both Steve and Richard alluded in describing some hypotheticals to the purchase of an input and then the input buyer processes and turns around and resells a product in an output market. Is there or should there be a different level of the skepticism that Bill talked about where the exchange deals with products—and I would say these are quite likely to occur in natural resource markets, energy products markets, agricultural products markets—where the buyers are frequently simply buying and then reselling directly to another level of distribution in the market without processing.

MR. SALOP: I don't think I'd cut it that way. I think the way I'd cut it is that you've got more concern where the buyers are also competitors, because that's where I think you go beyond a potential monopsony concern into a potential collusion concern at their level.

MS. GIFFORD: But in the model that we generally talk about, and I think this model is referred to in the report by the staff as well, again, we tend to talk in terms of the purchase of an input and some processing and manufacturing and then output. And in that case, too, the buyers who then become the output sellers are competitors in the output market.

MR. SALOP: That's a good point. That's right.

MS. BOAST: One thing that seems to be missing from all of this conversation, and maybe because there are no

candidates to support this view, but at one point we thought that in addition to industry-sponsored exchanges we would see third-party run exchanges, and a lot of these concerns would go away. What I've gleaned from tracking a little bit of this literature, although not much of it, is that the third-party exchanges really lack market credibility; that the industry sponsored ones are really much more popular on the street. I don't know whether anybody has any reaction to that. I think this is probably an unfortunate development.

MS. GIFFORD: Or that there are third-party exchanges being considered and being worked on, but when industry participants start learning about them, I think what we've been seeing, is that industry participants come knocking and say wouldn't you like some support from us on an ownership basis in those third-party exchanges.

MR. SLOWEY: From what Molly says, one of our goals here is we would like to change Covisint from an industry exchange to a third-party exchange, a truly independently held public corporation. We would hold a minimum of stock, if any. Because we think in that way, if it comes up through the industry and then goes public, we can maintain industry credibility for it at the same time as it would make it independent.

MR. FOX: Any further questions? Everybody is anxious to get to the cocktail party.

MR. SALOP: Can I ask one quick question for Bill. What does Covisint stand for?

MR. SLOWEY: It is an acronym that I can't tell you now that I know all seven, but it is cooperation, innovation . . ., each one of those letters has a great tag word.

MR. FOX: These are clearly formative times for B2Bs, and where this is all going to go is still unclear. Counselors who are attentive to the antitrust concerns will clearly be in a better position to guide their clients through this antitrust thicket. I want to thank our superb panelists for a wonderful session. Thank you all.

MR. LOGAN: Let me just finish up and remind people that the reception is up on the seventh floor Astor Ballroom and starts in ten or fifteen minutes. Thanks again. The panel was terrific, very timely, and I think we will come back to these issues again and again and again.

Notes

Horizontal Issues

By Richard M. Steuer
Kaye, Scholer, Fierman, Hays & Handler, LLP

Joint Purchasing

Companies engaged in joint purchasing before the emergence of the Internet or B2B electronic exchanges, and much of the law governing joint purchasing developed at that time.

Groups of purchasers that collectively do not account for too great a percentage of overall purchases of a product have been permitted to engage in joint purchasing where such activity makes purchasing more efficient and potentially allows for procurement of products at lower cost. The FTC/DOJ Joint Venture Guidelines suggest that if a group accounts for no more than 20 percent of the overall purchases of a product, it should fall within a safe harbor, but this does not mean that groups accounting for a higher percentage of total purchases necessarily will run afoul of the law. *See* David A. Balto, *eCommerce Strategies for Success in the Digital Economy: Antitrust Concerns*, 618 Practising Law Institute/Patents 305, 316-17 (2000).

For groups that account for more than 20 percent of total purchases of a product, legality will depend on the business justifications for the arrangement, the efficiencies that are expected to be achieved, the likelihood of foreclosing competition and the availability of alternative approaches. The law reflects a concern that joint purchasing might impair competition by driving prices to the group down and forcing suppliers to charge rivals outside the group higher prices, enabling buyers within the group to charge higher prices for their own products. Another concern sometimes articulated is that if buyers employ joint purchasing to suppress the price of a product, so that producers of that product are denied a normal return, the result will be a misallocation of resources, with producers making too little investment in that category of products.

A chief concern regarding groups accounting for over 20 percent is whether the economy would be better served with a larger number of smaller groups. A key issue in such situations is whether it would be more efficient to have a larger group open to a greater number of buyers than to exclude buyers from the group after it reaches a certain size. Consequently, where groups exceed the 20 percent threshold, it would be useful for them to be able to show that: (1) there are efficiencies achieved by including all of the members of the group, even if the total purchases of group members exceeds 20 percent; (2) these efficiencies could not be achieved by splintering into a larger number of groups; (3) there is no prohibition on members of the group simultaneously participating in alternative groups; (4) there is no prohibition on members of the group engaging in other purchasing outside the group, including direct purchasing; and (5) the economic health of suppliers is not in jeopardy and competition among suppliers is not in danger of weakening.

It also is important to maintain "firewalls" and other safeguards to insure that companies engaging in joint purchasing are not colluding or inappropriately exchanging information on their anticipated requirements. Joint purchasing should be coordinated by the exchange's personnel, not by the participating members themselves.

Relevant Case Law

Joint purchasing has been invalidated in situations where the participants could dominate or significantly influence prices in the market, but has been upheld in instances where it served to balance countervailing bargaining power and make markets more efficient.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The Supreme Court explained that the "elimination of so-called competitive evils" is no justification for joint buying programs that fix prices, since "[t]he reasonableness of prices has no constancy" and the danger is that "[t]hose who fixed reasonable prices today would perpetuate unreasonable prices tomorrow . . ." *Id.* at 220-21.

United States v. Crescent Amusement Co., 323 U.S. 173 (1944). The Supreme Court drew a distinction between joint purchasing activities undertaken to fix market prices and those designed for other purposes where, in condemning a group of buyers for conspiring to fix prices, it explained: "It will not do to analogize this to a case where purchasing power is pooled so that the buyers may obtain more favorable terms. The plan here was to crush competition. . . ." *Id.* at 183. This suggests that a joint purchasing program organized for the purpose of obtaining "more favorable terms" is not necessarily illegal.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948). The Supreme Court struck down joint purchasing where it amounted to a buyers' cartel.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). The Supreme Court suggested that joint purchasing can create efficiencies and make markets more competitive where the members of the group do not wield unreasonable market power.

There are not many cases in the lower courts, and they provide only limited insight. Generally, they hold that joint purchasing may be upheld under the rule of reason where it results in the achievement of economies of scale and ensures the availability of goods, but may be condemned as per se illegal where it concentrates too much of the demand in a market in one group. *See* ABA Section of Antitrust Law, Antitrust Law Developments 408-09 & nn. 90-91 (4th ed. 1997).

Associated Greeting Card Distributors of America, 50 F.T.C. 631 (1964). The FTC found no evidence of injury to competitors of either the challenged group of purchasers or their suppliers, and held that the case involved "nothing more than a relatively simple practice of joint purchasing by small business wholesalers in an industry marked by the predominant use of other distribution methods. . . ." *Id.* at 633-34.

White & White, Inc. v. American Hospital Supply Corp., 723 F.2d 495 (6th Cir. 1983) (joint purchasing of hospital supplies upheld).

Cartrade, Inc. v. Ford Dealers Advertising Ass'n, 446 F.2d 289 (9th Cir. 1971) (joint purchasing of inventory exchange services upheld), *cert. denied*, 405 U.S. 997 (1972).

Vandervelde v. Put & Call Brokers and Dealers Ass'n, 344 F. Supp. 118, 137 (S.D.N.Y. 1972) (citing *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) and *Live Poultry Dealers' Protective Ass'n v. United States*, 4 F.2d 840 (2d Cir. 1924)). Unadorned price-fixing "initiated by a group of powerful buyers, no less than price-fixing by sellers, is per se illegal."

Instant Delivery Corp. v. City Stores Co., 284 F. Supp. 941 (E.D. Pa. 1968) (joint purchasing of package delivery service upheld).

Business Review Letters

As important as the case law are administrative determinations. Under the Reagan Administration, the Justice Department announced a policy under which it would not challenge joint purchasing arrangements where a joint purchasing group accounted for less than 35 percent of total purchases, or where the product or service being purchased accounted for less than 20 percent of the price of the products or services which the members of the group sold in competition with one another. *See* ABA Section of Antitrust Law, Antitrust Law Developments 391 (3d ed. 1992). If these thresholds were exceeded, the Department would examine other factors to determine whether they would eliminate any competitive concerns. *Id.* at 392.

The Justice Department applied this policy in clearing a number of shippers' joint purchasing arrangements during the 1980s. *See* Department of Justice Business Review Letter to Beverage Importers' Freight Ass'n, No. 89-7, 1989 WL 296688 (Aug. 24, 1989); Department of Justice Business Review Letter to FRA Shippers' Ass'n, No. 88-7, 1988 WL 252571 (June 17, 1988); Department of Justice Business Review Letter to International Beverage Shippers Ass'n, Inc., No. 85-25, 1985 WL 71893 (Dec. 13, 1985); Department of Justice Business Review Letter to Wine & Spirits Shippers Ass'n, Inc., No. 85-18, 1985 WL 71885 (Aug. 30, 1985); Department of Justice Business Review Letter to Transportation Brokers Conf. of Am., Inc., No. 85-4, 1985 WL 71873 (Feb. 8, 1985).

Earlier, the Department gave its approval to joint purchasing organizations set up by a group of hospitals, a group of service station operators and a group of motion-picture theater operators:

Hospitals. A group of not-for-profit hospitals in Ohio was established to purchase such products as hospital furniture, paper products and bulk oxygen in large volumes,

with the expectation of obtaining better prices than any individual hospital could obtain alone. No member hospital was required to purchase any products through the group, however, or to refrain from dealing with any other supplier. The Department's business review letter stated that there appeared to be "no likelihood" that the joint program "would restrain trade in any particular product market." *See* Department of Justice Business Review Letter to Ohio Hosp. Purchasing Consortium, No. 82-10, 1982 WL 49874 (June 9, 1982) and press release (June 10, 1962); *see also* 42 Antitrust & Trade Reg. Rep. (BNA) 1321-22 (June 24, 1982).

Service Stations. A group of organizations of service station operators in New York was formed for the purpose of purchasing automotive products for resale under the group's own trademarks through both member and non-member dealers. Sales to non-members were planned to be made on the same terms as sales to members, except that a reasonable service charge was expected to be added in the case of non-members to cover administrative costs. *See* Department of Justice Business Review Letter to Mechanics Choice Auto. Prods., Inc., No. 83-8, 1983 WL 45993 (May 17, 1983) and press release (May 18, 1983); *see also* 44 Antitrust & Trade Reg. Rep. (BNA) 1045 (May 26, 1983).

Movie Theaters. A theater operator group, formed as a corporation to be jointly owned by theater operators in the Detroit area, was created for the purpose of making volume purchases of such goods and services as advertising, promotional and merchandising services, theater equipment, paper goods and other "resale merchandise." *See* Department of Justice Business Review Letter to Greater Detroit Theatre Operators Purchasing Corp., No. 83-9, 1983 WL 45994 (June 16, 1983) and press release (June 17, 1983); *see also* 44 Antitrust & Trade Reg. Rep. (BNA) 1213 (June 23, 1983). According to the press release issued by the Justice Department, "[b]y purchasing goods and services in volume quantities," the cooperative organization "hopes to operate more efficiently than individual theaters through lower cost purchases." *See* press release at 2. Under the arrangement, no individual theater operator was obligated to purchase any specific quantities, or anything at all, nor was any operator precluded from dealing directly with other suppliers.

None of the above three purchasing groups was wholly lacking in market power. The hospital consortium represented 160 of the 204 not-for-profit hospitals in the state of Ohio. The service station program was designed to include approximately eight different organizations of service station operators throughout the state of New York. The theater cooperative was open to all 36 theater operators doing business in the greater Detroit area. While it is not clear how much market power the Justice Department would have considered to be too much, the amount of purchasing power involved in these situations did not exceed that maximum.

During the Clinton Administration, joint purchasing arrangements continued to meet with approval by the Justice Department:

The Department issued business review letters approving several joint purchasing arrangements among groups of health care providers. *See, e.g.*, Department of Justice Business Review Letter to Houston Health Care Coalition, No. 94-7, 6 Trade Reg. Rep. (CCH) & 44,094, at 43,337-38 (Mar. 23, 1994); Department of Justice Business Review Letter to Bay Area Bus. Group on Health, No. 94-4, 6 Trade Reg. Rep. (CCH) & 44,094, at 43,333-34 (Feb. 18, 1994).

Also, the Health Care Guidelines issued jointly by the Department and the Federal Trade Commission provide a so-called "safety zone" for arrangements in which a group's purchases account for less than 35 percent of the total market *and* the cost of the jointly purchased products and services accounts for less than 20 percent of each participant's total revenues. Unlike the policy announced under the Reagan Administration, *both* of these conditions must be satisfied in order to fall within this safety zone. U.S. Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust (1993, *revised* 1994 and 1996), *reprinted in* 4 Trade Reg. Rep. (CCH) & 13,152, at 20,785 [hereinafter Health Care Guidelines].

For joint purchasing arrangements that do not meet these parameters, other factors still might overcome any competitive concerns. These factors are essentially the same as factors that were articulated under the Reagan Administration—specifically, there will be less concern where members are allowed to make purchases outside the group, where the group's negotiations are conducted through a negotiator who is not employed by one of the group's members, and where communications between the group and its individual members are kept confidential from other group members. *Id.* at 20,786.

These guidelines could have broader applicability because the agencies have made the point that the Health Care Guidelines are not intended to create new substantive rules, but merely to articulate how existing antitrust standards should apply to the health care industry. *See id.* at 20,773 n.1 (stating that the Health Care Guidelines are not intended "to deviate from applicable law or policy statements" but are intended to describe the agencies' analysis "in understandable terms"). If the rules for health care really are no different than the rules for other industries, the safety zone and other standards outlined in those Guidelines could serve as guidance for joint purchasing arrangements in other industries as well. However, initial indications are that the FTC staff presently does not consider these guidelines applicable outside the health care industry, and instead considers the 20 percent safe harbor of the Joint Venture Guidelines more appropriate in other industries. Federal Trade Commission and U.S.

Department of Justice, Antitrust Guidelines for Collaborations Among Competitors §§ 4.1-4.3 (2000).

During the Clinton Administration, a number of purchasing joint ventures outside the health care industry met with approval in Justice Department Business Review Letters:

NSM Purchasing Ass'n, 99-1, 6 Trade Reg. Rep. (CCH) &44,099, at 43,505-06 (Jan. 13, 1999) (group of funeral home operators permitted jointly to purchase caskets).

Textile Energy Ass'n, No. 98-9, 6 Trade Reg. Rep. (CCH) &44,098, at 43,492-94 (Sept. 4, 1998) (group of textile manufacturers allowed jointly to purchase electrical energy).

California Large Electric Power Purchasing Ass'n, No. 97-16, 6 Trade Reg. Rep. (CCH) &44,097, at 43,468-69 (Nov. 20, 1997) (group of cement and steel manufacturers allowed jointly to purchase electrical energy).

Association of Independent Television Stations, Inc., No. 95-3, 6 Trade Reg. Rep. (CCH) &44,095, at 43,363-65 (Mar. 7, 1995) (group of independent television station operators permitted to exchange information on the purchase of television ratings services).

Lessons for B2B Joint Purchasing

Under the authorities described above, joint purchasing that does not have the purpose and effect of fixing market prices normally should not be *per se* illegal and should be assessed under the rule of reason. As one judge has observed, "There is nothing inherently unlawful in the acquisition and retention of a great volume of purchasing power. It is only when that power is used in such a manner as to further an unlawful restraint of trade that the wielder of the power runs afoul of the Sherman Act." *G&P Amusement Co. v. Regent Theater Co.*, 107 F. Supp. 453, 459 (N.D. Ohio 1952), *aff'd*, 216 F.2d 749 (6th Cir. 1954), *cert. denied*, 349 U.S. 904 (1955). While today's courts and antitrust enforcers may not take quite as benign a view, they can be expected not to condemn joint purchasing out of hand.

Joint Discussions Upon Formation or Mergers of Exchanges

Where companies forming an exchange are competitors or potential competitors, or where competing exchanges are discussing possible merger, the dissemination of information beyond the circle of executives that needs to know such information can run afoul of the antitrust laws, and the coordination of competitive activity prior to completion of a deal is extremely risky. *See* Mary Lou Steptoe, Acting Director, FTC Bureau of Competition, Address Before the ABA Spring Meeting, Washington, D.C. (Apr. 7, 1994), *reprinted in* 7 Trade Reg. Rep. (CCH) & 50,134, at 49,030-033.

The law in this area is sparse, but certain guidelines are clear:

Torrington Co., 114 F.T.C. 283 (1991) (consent decree). Would-be merger partner became the target of an FTC complaint for having diverted customers from one company to the other prior to the merger, even though the merger never was consummated.

International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1397 (8th Cir.), *cert. denied*, 114 S. Ct. 345 (1993). The Eighth Circuit has held that prospective merger partners can become legally incapable of conspiring if they "lack[ ] independent economic consciousness after they ha[ve] decided to merge."

However, the FTC's Bureau of Competition has rejected the Eighth Circuit's holding in the preceding decision, and would try to persuade the Commission in analogous situations to hold that "at all times prior to consummation" the merging companies will be held "fully accountable" to the letter of the antitrust laws. Steptoe, *supra*, at 49,029; *see also* Stephen Calkins, Copperweld *in the Courts: The Road to* Caribe, 63 Antitrust L.J. 345 (1995) (examining the applicability of the Supreme Court's opinion in *Copperweld* to the single-seller doctrine); William Blumenthal, *The Scope of Permissible Coordination Between Merging Entities*, 63 Antitrust L.J. 1 (1994).

Bottom Line

Parties forming an exchange, and exchanges negotiating a merger, should not share information about one another more broadly than necessary and should not coordinate operations in advance.

Presentation of the Annual Award for Service to the Antitrust Law Section

Given to Barry J. Brett, Esq.

MS. GIFFORD: Good evening everyone. Would you all please take your seats and we can start this dinner reasonably on time and get through our proceeding.

I am Meg Gifford, and until a few minutes ago I was the Chair of the Antitrust Law Section of the New York State Bar Association. Our new Chair has given me just a couple of minutes to speak to you before he takes over for tonight's proceedings.

We've had a really good year, and the reason has been, I have to say, the Executive Committee of the Antitrust Law Section has been just terrific this year. It's the cream of the crop. And that is not to cast aspersion on any of you who are not on the Executive Committee of the Section. But it's just been a terrific group of people who have done great volunteer work and stepped forward and done important projects that needed to be done this year.

Very briefly, let me tell you what we've done this year. In May of last year we presented a great program on the competition law aspects of multidisciplinary practice, an issue which, as you all probably know, is now in the dust heap because of the actions of the ABA and the New York State Bar Association Executive Committee. But it was a really good program.

We held an open meeting to introduce the new director of the FTC Northeast Regional Office, Barbara Anthony, to our members. And let me say that Steve Edwards and Norma Levy did terrific work, along with Barry Brett, on that issue of multidisciplinary practice. In the summer Steve Tugander of the Department of Justice, I guess for the second year in a row doing this job, put together an excellent program for summer associates and new lawyers on the practice of antitrust law as a young lawyer. In the fall Bob Hubbard, Barry Brett and Larry Fox, working with the Fairfield/Westchester chapter of the American Corporate Counsel Association presented great materials and remarks in a distribution issues program. In late November, with the City Bar, ACCA, and the Northeast Regional Office of the FTC, we co-sponsored a tremendous program on the question of Consumer Injury: Necessary or Not? And actually one of the speakers at that program was a speaker on one of our panels today, and I heard him refer to that issue again. It was not resolved by our program on November 30th, but I would say it was substantially advanced.

Among the other things we did: we engaged in some informal consultation with the New York State Bar's Special Committee on the Unauthorized Practice of Law, whose purpose, of course, is to keep our jobs safe, but which, seriously, raises some interesting antitrust law questions. And Steve Madsen and Michael Bloom got a lot of credit for working with the special committee, and Michael gets special credit because he participated in a program on that issue this afternoon, and I gather displayed his acting abilities in a dramatization of issues involved in the unauthorized practice of law. I'm not sure how you do that, but they did.

Also, I'm sorry, I omitted to say that on the November 30th program on consumer injury, Norma Levy was instrumental in helping to organize the program and Steve Houck was one of the commenters on that panel. And last but not least, we are in the process and the work has been going on all year on a new edition of *Antitrust Law in New York State*, which is a unique publication. It was a great publication when it came out about five years ago and will be an even better one after Bob Hubbard and Pamela Jones Harbour complete their editorial work on this new edition. And that should be out this year, so please look for it.

I'm going to turn this over to Ken in just a moment, but I just couldn't resist. This has really been a very interesting year both for our Section and also for the practice of antitrust law and the antitrust bar. I see three omens that the coming year is going to be even more interesting. One is that the year 2001 began with the opening of a movie called "Antitrust." I haven't seen it, but I'm told by those who have that it depicts a young, powerful CEO of a huge software company who excludes his competitors in the market by murdering them. So for those of you who haven't brushed up on your non-white collar criminal defense practice, it sounds like this is the time to do it.

The second omen that it is going to be an interesting year is that we have a nominee for United States Attorney General who apparently believes that the only good use of the antitrust laws is to sue the National Organization for Women for organizing a boycott by consumer groups and others of the state of Missouri on account of its refusal to pass the Equal Rights Amendment.

The third omen is that we have a new president whose views of the antitrust laws may be somewhat different than perhaps most of us have assumed, and I will not paraphrase our new president. But I would like to very briefly quote. This is from an interview in *The Financial Times*, February 17th, 2000. George W. Bush said, "My own personal view, just in general, is the application of antitrust law needs to be applied where there are clear cases of price fixing." Asked if there was a

role for aggressive antitrust enforcement in cases other than price fixing, Mr. Bush said: "Well, no, everything evolves into price fixing over time. Price fixing up and price fixing down. Price fixing down to eliminate competition." Who knew that he was a supporter of the laws against predatory pricing? ". . . And price fixing up to accumulate profit." However, Mr. Bush said: "Antitrust investigations might be warranted in agricultural markets such as hog farming." Reflecting his experience in campaigning in rural areas of Texas and Iowa, he said meat packers might be exercising too much power in corporate-owned hog farms. For all of you who fear that antitrust might decline in the next four years, don't all run out the door now and try to scare up a client in the hog farming business. I'm sure there are enough to go around—actually, there may not be enough to go around. I'll leave it all to you to draw conclusions from these omens. But it is going to be an interesting year. Ken.

MR. LOGAN: I know everybody wants to eat. I just have a couple of things to cover. One is I want to thank the panelists who organized the materials today and made the presentations. They were terrific.

A large group of people attended, and that makes the effort worthwhile. It was a very, very worthwhile set of panels. We will mention some of those people in a second. I want to thank everybody here for coming tonight. It's a strong turnout. It's nice to see everyone. It is a tribute to Commissioner Leary that such a large crowd is here, and we look forward to his remarks later on.

I want to introduce the people sitting up here on the dais first. On your right, symbolically on your right, most of the enforcers are on that end. The end is Harry First, who I think most of you know; he heads the New York State Antitrust Bureau and has been there I think now for about a year and continues the nice tradition of that office. Next to him is Barbara Anthony, who is the Northeast Regional Director for the Federal Trade Commission. As Meg mentioned, she was a participant in one of our programs during the past year. Next to her is Bob Hubbard, who is becoming something of an institution within the Antitrust Law Section, and is a deserving person to be at the dais because of his long-time efforts and contributions. Meg, whom you've met, is next to Bob. Tom Leary, whom you will all meet later, and we will come back to.

And on the other end, at the far end is Bill Lifland, who in fact is an institution, as we said earlier today, both within the Antitrust Law Section and generally as a writer and commentator about antitrust in the New York area and beyond. Next to him is Steve Madsen who chaired a terrific panel this afternoon on indirect purchaser litigation and related issues. Next to him is Ralph Giordano who heads the Antitrust Division's New York office and has done so for some time. Next to him is Pamela Jones Harbour, now the secretary of this Section, formerly with the New York State Antitrust Bureau and other positions in the state government, and now at Kaye Scholer. Next to her is Steve Edwards who is Vice-Chair, and who next year will have the honor of putting together today's program. Next to him is someone else who will be introduced later, Barry Brett, one of our honorees tonight.

Our other honoree tonight, and I would like to do this right now, is Meg. In the tradition of the Section, I would like to present a small token to the outgoing Chair. I just want to say a few words. Meg has done a fabulous job this year. She's taught us all how to be organized and how to pay attention to detail, how to be inclusive in what she does, how to be thoughtful. She has done a terrific job to continue to build the energy within this group. Meg, I would like to give to you a small gift on behalf of the Section.

MS. GIFFORD: Thank you.

MR. LOGAN: Why don't you all eat now, and we'll have some other interesting comments later.

(Dinner served.)

MR. LOGAN: One important step each year is to take a moment to recognize a person who has made an important and significant contribution to the Section, not just this year, but over a long period of time. What I would like to do is introduce Meg again who will present that award.

MS. GIFFORD: Thanks, Ken.

The tradition also has been that the previous year's recipient of the Section's service award presents the award to this year's recipient. Last year's award recipient was Eleanor Fox. Eleanor was here briefly this evening but has a conflict. She had to leave, which we knew in advance, luckily, so we could take care of this situation. She expresses her deep regrets to Barry for not being able to do this herself, but I am delighted to be able to present the award to Barry tonight. The award is being made to Barry Brett, a former Chair of this Section and a partner at Jenkins Gilcrest Parker Chapin.

Barry has been the Co-Chair of the litigation department at what was then Parker Chapin and a few other names, and the head of the antitrust trade regulation practice as well as Parker Chapin. His newly merged firm currently has over 600 lawyers—I don't know where these firms come from, Barry, but you turn around and what was 400 yesterday is 600 today.

Barry is one of—I won't say "vanishing breed," but certainly a less common type around here these days. He went to Parker Chapin in 1965, became a partner in 1973, and he has been there ever since.

Barry is a graduate of the City College of New York and a cum laude graduate of Columbia University School of Law. Following graduation from law school he served as a law clerk to United States District Judge Charles Metzner in the Southern District.

The Section's service award, as Ken said, is presented to someone who has performed really outstanding service to the Section. We also try to recognize in this award leadership in the practice of antitrust law and contributions to the development and the practice of antitrust law. There is absolutely no question that Barry has excelled and has made great contributions in both of those respects.

Barry has served as a director, advisor, counselor and litigator to a great number of business entities. In the course of his work as a lawyer he has contributed to the development of antitrust law in some very noticeable ways. I'll have to start with the fact that he had a very major role in contributing to the establishment and development here in the Second Circuit of the Section 2 monopoly leveraging theory in the *Berkey Photo* case, a landmark case against Eastman Kodak Company, and still continues to think about that issue to this day. I know, because I had a conversation with him about monopoly leveraging in the car a few months ago on the way back from a program. But in that case he was working on undoing or helping to undo the monopoly leveraging theory. So I think this is a perfect illustration of Barry's open-mindedness and serious, thoughtful contribution to developing antitrust law.

He represented the Schubert organization in the very significant contested proceedings that led to the termination of the 1956 antitrust decree, which had restructured the industry known as legitimate theater, legitimate Broadway theater. He has represented a number of other notable clients in notable lawsuits, such as Omniglobe Corporation in a 9th Circuit patent and antitrust suit against American Cyanamid. And for those of you who have teenage children, he's represented Transcontinental Records in litigation with *NSYNC and the Backstreet Boys.

Barry brings to his practice of antitrust law something that I have found in my discussions with him to be very valuable, and I have talked to a lot of other people who have dealt with Barry, and they say the same. He brings a tremendously wide background in other areas of counseling and litigation, which informs his views of business behavior and business practice as he encounters it in the antitrust practice. He has handled a very wide range of matters in not only trade regulation and antitrust but corporate governance, distribution matters, trademark, contested takeovers, mergers, partnerships, trusts and estates and a lot of general commercial litigation.

From my own observations, and again those of other people with whom I've spoken about Barry, Barry sees his role as more than just solving individual problems for clients, though that is obviously something that he does with great ability. He has an impressive record. He views his responsibilities as a practitioner with great seriousness in terms of developing the law in the antitrust field.

I had the pleasure recently of working with Barry on a couple of matters, and I can attest to the scholarship, the depth of his analysis and his willingness to take the time that is needed to deal with a matter properly, to really think it through, and say: Is this the right conclusion in view of where the antitrust law is today?

In addition to his tremendous contributions to the development of law through his practice, he has also done so in his organizational activities. His list of outside bar association activities is tremendous. He served as Chair of the ABA's Antitrust Section Committee on Sports Labor and Entertainment Industries. He served as Chair of the ABA's Clayton Act and Sherman Act Committees, Chair of the Legitimate Theater Division, of the ABA's Forum on Sports and Entertainment Law, and was a member of the governing committee of that forum. He has been a member of the Association of the Bar of the City of New York's Committee on Trade Regulations. He writes and lectures extensively and is a frequent commentator on and explicator of the laws on the Fox News Network.

For the Antitrust Law Section, Barry has provided us with tremendous leadership. He is a former Chair of the Section. Someone said to me earlier tonight, wasn't he Chair for about 20 years? And while I think that's not exactly accurate, in a sense it has been. I know I have found, and others who have preceded me have found, that Barry contributes in a very active and lively way. He's not your typical former Chair, which means you just get to use the title and then sit back.

He has contributed to the revitalization of this Section in an extraordinary way. His focus on what this Section ought to be doing, the issues with which we ought to be involved, has been very clear and has helped all of us who have been Chair after him, in heading in the right direction. His focus has contributed to the level of activity that we find now in the Section.

I will just give you one example. As I said earlier, during the last year we dealt with the issue of the competition law aspects of multidisciplinary practice. And the fact that we dealt with it and that we dealt with it in a very professional and very informed way, was in a large measure due to Barry's leadership on that issue. He has served as the Section's representative to the House of Delegates, along with others—he hasn't been the only

representative to the House of Delegates. But last year in particular, Barry made a terrific presentation of the Section's competition law views on the multidisciplinary practice issue and did the Section great credit in making that presentation.

He's been dependable, reliable, and as I said, has provided tremendous leadership. Barry, it's my great pleasure, and my personal pleasure, to ask you to accept this memorial as the recipient of the Section's service award.

MR. BRETT: Thank you.

Meg and Ken insisted that I make some remarks in response, over my objection. I told them that I don't do humility. I don't want to be out of character for this group, and I couldn't think of a particularly good reason for me to be on a list that includes Bill Lifland, Milton Handler, Eleanor Fox and Irv Scher. That is really very distinguished company and very, very flattering. So I do thank you for the award.

I tried to think of the reasons why I might have gotten it, and two words came to mind that were appropriate for this group, and they were "free booze." When I was Chair of the Section I went to my good friend Bob Warner and asked him whether or not Charles River Associates would like to pay for the cocktail party for this dinner. Bob and his group were gracious enough to do that, so we changed a cash bar to a free bar with free hors d'oeuvres and free refreshments. The attendance at the dinner and reception increased geometrically, and that tradition has continued. That, along with the fact that about that same time I tanked a tennis match with Joel Klein, and immediately persuaded him out of guilt to come and speak here at the association. Those I think are two of my principal contributions, and perhaps different in kind from the other recipients of the award, but distinguished nevertheless.

I would be remiss in standing here and hearing someone talk about the *Berkey-Kodak* litigation, during which I met many of the people here, without saying thank you to my mentor, Al Stein, who was the first Chair on that case and taught me a lot as we tried that case. And also to my wife, Leslie, who was kind enough to come here tonight. Because as with so many of you, that's the only way we get to see each other.

It is nice to be here with so many good friends, and it is a very distinguished group, and I'm very, very honored. I thank you all.

Dinner Speaker

Commissioner Thomas B. Leary
Federal Trade Commission
Washington, D.C.

MR. LOGAN: Before introducing Tom Leary, I would also like to take a moment to thank Charles River again this year, following in Barry's fine tradition, for underwriting the cost of the reception and, as Barry said, the free booze. And we welcome the competition among the consulting firms for next year's proceedings.

Tom Leary was kind enough to come here tonight. As you know he has been a Commissioner for now a little bit more than a year, including five days of the current administration. In a sense, this is a return home. Tom started his legal practice in White & Case and from there went in-house to General Motors, where his responsibilities included, among other things, their antitrust work. From there he went, as many of you know, to Hogan & Hartson where he was a partner for a number of years, and from there to become an FTC Commissioner with a term that continues to 2005, to all of our benefit.

My immediate reaction when I heard that Tom was being proposed as a Commissioner was a sense that it was very, very valuable to have an active practitioner who had been in-house and at a law firm and who had worked on a series of real-world problems who would now be a Commissioner. We as practitioners would know that there was another person, now within the Commission, that we could talk to and who could identify better with the kinds of issues we were facing. So he has been terrific; he has been a great addition to the Commission. He has another five years to go, and I think we'd like to get a sense this evening of what he's thinking about. Thank you.

COMMISSIONER THOMAS B. LEARY: I want to thank you for asking me here, and I really am gratified by the size of this turnout which I am sure has a lot to do with the free booze and not much to do with me. But it's always pleasant when you make a trip to have a bunch of people to talk to. I'm also pleased that you told me I could talk about whatever I like. I really like that freedom.

About two weeks ago I was talking to one of my advisors and I said to her, what do I want to talk about up there? And she said, I think quite wisely, that's not really the question. What you want to talk about is not what these people necessarily want to hear. What they want to hear is what antitrust in the new administration is going to be like. And I said, I don't really know much about that. And she said, well, neither does anybody else, so you might as well give it a try. So that's what I'm going to try to talk about.

You know you get the usual disclaimers when somebody from the Commission talks to you, and they say I am not here for the Commission, and I can't speak for any other Commissioner, and I can't speak for the Commission, etcetera, etcetera, etcetera. I have to add to that disclaimer and tell you that I'm not even sure I know what I'm talking about. It might be appropriate for a New York audience—where some or most of you probably have a nodding familiarity with securities law—to tell you that you're not going to get any inside information tonight. None of you are tippees, if that's the right word. But I will do the best I can.

Let me give you some of what I call signs in the wind or objective indicia of what we might expect in broad terms. First of all, antitrust was not a campaign issue. Now, I know there were some isolated quotations in some foreign newspapers, but I would not pay much attention to isolated quotations from people who speak thousands of words every day by virtue of their office or the office they aspire to.

The fact of the matter is that there have been, up to now, no signals on antitrust policy that I have heard directly or indirectly from the newly-elected president or any of his close advisors. The transition team for the new administration was into the Federal Trade Commission in the first week in January. The head of the transition team was Wendy Graham, whom some of you may know, a very well-known economist, wife of Senator Philip Graham.

Of course, as you can imagine, after we talked to these folks everybody got together. She interviewed all the Commissioners and all the top people and so on, and we compared notes on impressions of the interview, what did she tell you and so on and so forth. And I have heard no indication that the transition team's recommendation to the new administration involves major surgery of any kind. Quite the contrary. The feedback I have gotten is that the general impression was that no major changes in antitrust direction are necessary. Now, this is from the transition team. That doesn't necessarily mean that that advice will be heeded, but that's my impression of the view that they have formed.

A third thing that you need to keep in mind is that we're not getting any strong signals from the Hill. I think it's fair to say that antitrust has not been a live political

issue in the legislative arm of government for quite some time. I remember when Jim Rill took over the Antitrust Division in 1989, and I asked him what was his principle objective. I remember him saying: My objective is to take antitrust out of partisan politics without being obliged to do something stupid. I think he succeeded to a considerable degree, and I think his successors have succeeded to a considerable degree.

If you look at the history of antitrust legislation and legislative initiatives on the Hill over the last 20 years, I think it's fascinating that the only things that have passed have been things that have passed only by acclimation with broad bipartisan support. Controversial initiatives from either direction have failed. I'm thinking, for example, of Senator Metzenbaum's failed efforts to overturn the *Illinois Brick* decision or to modify Supreme Court law and vertical restraints.

Initiatives from the other direction aimed at modifying the treble damage remedy or modifying the rules having to do with joint and several liability failed. The only legislation that's passed in recent memory are, as I indicated, these broadly noncontroversial bills like the bills having to do with research and production joint ventures, *de minimus* exceptions to § 8 of the Clayton Act, and, most recently, the modifications to Hart-Scott-Rodino (filing thresholds, filing fees, and some modification of the second request process). That's the kind of legislation that has been passed, and the dramatic initiatives in either direction have failed.

Another straw in the wind for me, at least on dealing with legislative sentiment, is my mailbox. Congressman and senators are not shy about communicating with members of the Federal Trade Commission on matters of interest. And there's nothing improper about this; I'm not suggesting for a moment that they are in any way attempting to exert improper influence. But they are letting us know about matters that they are concerned about. I get an awful lot of these letters, and everybody else does too, and I have to tell you that I can't detect any particular partisan slant. I get letters from members of both parties on both sides of every major issue that we deal with. The best predictor of the position that they are going to take has nothing to do with their political party. It has to do with the identity of their hometown constituents or an industry in which their particular region may be interested. Again, I'm not suggesting there's anything remotely improper about that. That's what government representatives are supposed to do, I guess. But it is not a partisan issue, as I see it in Washington today.

One other thing that I want to throw out here for you is the matter of ideology. The great battle, as I see it, for the soul of antitrust was fought about 20 years ago. Basically, a consensus was formed that antitrust is informed by economics primarily (what we think of as consumer welfare economics or microeconomics and so on). The decision-making process that I participate in is economically driven. Everybody in the Commission talks about the economic impact of what we're trying to do. That does not mean the issues are easy. This is something I'm going to return to at the end of this talk. I think we know a lot less than we thought we knew on these subjects. It does not mean there isn't room for controversy, but I don't see it as partisan ideological controversy anymore of the kind that you saw in the '80s. I think those battles in a sense are over.

There are a few other things I would like to mention that I think have a constraining influence on dramatic change in antitrust. We are not the only game in the world. I think people learned in the 1970s and in the 1980s when they tried to make dramatic changes in antitrust law in the U.S. government agencies, they found (1) that they either got resistance on the Hill, or (2) it stimulated effort in the states. The private bar enforces the antitrust laws, and most important of course, is the proliferation of international antitrust regimes. The United States is not the only game in town anymore, and the Federal Trade Commission is not the only game in the United States. That has a constraining factor on dramatic changes, at least in our agency.

Another constraint arises from the way we are structured, as you know. We have five commissioners with staggered terms. We're appointed by the President, but we don't serve at the pleasure of the President. Even if a President wanted to make dramatic changes in the Federal Trade Commission, it can't be done overnight, because you have to wait for a vacancy, and then you still have the problem of acquiring majority votes.

It might be useful for you to remember a little history. When Jim Miller came into the Federal Trade Commission in 1981 with an agenda for very dramatic changes, it was not until roughly two years later that he was able to achieve a voting majority for the dramatic changes that he wanted to implement. To my knowledge there is no pressure or inclination for anybody to make changes of that degree of magnitude today. But even if someone did feel that way, getting from here to there is not that easy.

It is no longer perceived that antitrust is necessarily pro-business or anti-business. I happen to think antitrust is pro-business, but increasingly in the matters we consider there are substantial business interests on both sides of the dispute. Now, that creates problems of its own, by the way, because I have to appropriately discount when I'm talking to anybody. I try to figure out, well, where is their self interest? Even people who tout themselves as being representatives of the public interest frequently have self interests. That has to be accounted for. But the business people are on both sides of our major issues repeatedly, over and over and over again. So I defy anyone to try to figure out what is supposed to

be the pro-business point of view or the antibusiness point of view on many of the matters that we deal with. It's not a simple, populist "them and us" sort of thing.

By the way, that's one reason I tend to disagree with Judge Posner's article. I'm sure some of you read the article that Judge Posner wrote recently about how the agencies don't have the high-tech expertise to be able to understand what's going on in the high-tech world. I think he underestimates the very real and helpful contribution that members of the business community make in helping us out with those issues.

So those are, in my view, constraints that we have to recognize on dramatic changes that may or may not occur in a new administration. I think it's important that you should understand the fact that, even if we wanted to change things, our ability to do so is bounded.

I'm not saying there will be no changes. I think one thing that you might want to do is take a look at the dissenting opinions. Take a look at the opinions in the Commission where there seem to be dissents along party lines. And just as a thought experiment, imagine what might happen if there had been say one more Republican Commissioner. Well, what are some of the party line dissents? *McCormick Spices*, a Robinson-Patman case, had a 3-2 party line opinion. But I'm not sure that anybody here cares about *McCormick Spices*—you've got to really love this stuff. That is not a case that shook the world, let me tell you. In *McCormick Spices*, everybody agreed the bottom line was that the *Morton Salt* presumption of automatic secondary line injury arising from price differences was too broad and should be narrowed. And the Democratic majority on the Commission thought that the *McCormick Spices* case was a useful case to do it. The dissenters felt that this was really a primary line case, that the major injury claimed in the case was primary line injury, and whether that occurred or not it does not lend much assistance in dealing with a secondary line presumption. And as I said, if that's something that really gets you stirred up and excited—well, you're a small group.

Okay, what's another one. Well, the one having to do with minimum advertised prices for the CDs (CDMAP). It was a fairly well-known case around here. That was a case where you lost your advertising allowance, not only if you advertised below a particular price in the ads that were being paid for, but even in the ads that you pay for yourself. The Commission 5-0 thought that that program violated vertical restraint law as it currently exists and as it had been given to us by the Supreme Court. Two of us, Republicans, concurred and said that we would welcome reexamination of Dr. Miles some day, on the ground that it really doesn't make a great deal of sense to have this doctrinaire distinction between resale price maintenance and airtight territories. But there's not anything I could do about. Our concurrence was just saying to the Supreme Court, you know, maybe it would be nice if you revisited that rule some day. If they don't, I have to take the law as given. And I'm not going to read RPM law as it exists today any differently than the majority. I have no trouble voting for the complaint in that case. I just simply said I'm not sure that this is the right thing, but I feel this is what we've got to do.

BP-ARCO, that was a party line case. The two Republicans dissented from the bringing of the complaint. The case was subsequently settled, and the settlement was approved by a 5-0 vote. Well, what does that mean? That may mean something significant actually, believe it or not. Because the reason I dissented, and I assume that my fellow Republican dissented, was because we thought that the semifinal settlement proposal on the table was adequate. We didn't want to say this in print or say it publicly because we did not want in any way to undercut the Commission's litigation position. That's a delicate issue when you are in a minority. I feel that if the majority has voted for something and they are going to go into court, unless there's some darned good reason for it, I really don't want to embarrass our lawyers by in a sense writing a brief for the opposition. So my feeling in a situation like that is I would prefer to have dissenting views communicated privately. But now that the case is all over, I don't have any problem with telling you the problem that I had with that complaint. My feeling was that we were being overly doctrinaire in asking for a so-called clean sweep of the ARCO assets in Alaska, in other words so-called clean sweep divestitures. Those of you who do mergers know what I'm talking about. I felt there were some aspects of the decree that would be perhaps overly regulatory. And as a matter of fact—this is public—there was a particular regulatory aspect of the decree where we were able to persuade one of the three Democrats to join us. So that particular regulatory aspect of the decree was disapproved, by the two Republicans and one of the Democrats, even though the parties were willing to agree to it. I think that's the only recorded vote that Bob Pitofsky lost in all his years as Chairman. That particular issue was relatively narrow. But the question exists as to whether we may be overly rigid in the kind of relief demanded; I think you might see some fresh scrutiny in a new administration with another Republican vote.

The next one was 4-1. I was the only one who dissented from the *Mylan* settlement. I was concerned about the implications for the *Illinois Brick* case. I guess you had a little discussion of *Illinois Brick* today. I don't mind saying I'm less enthusiastic about using § 13(b) in the antitrust context than some of my peers. I don't know whether I'd go so far as to say it is a mistake ever to use it, but I'm not all that happy about it. I see some enormous unintended side effects, and the impact on *Illinois Brick* is just one of them.

Now, that's public, and my views on that are available if anybody is interested. Is that going to be a political change? I don't know. There's no great enthusiasm for using § 13(b) all that broadly with the existing management of the Commission. Is it going to be less popular with a Republican administration? My guess is yes, I think so. I think that may make some difference.

There's one further case; this is one in the Bureau of Consumer Protection. The only party line dissent in a Bureau of Consumer Protection case was the so-called *Reverse Auction* case. It raised the issue of whether or not you can ground a complaint on unfairness. Bear in mind that in consumer protection cases you can have deception and you have unfairness. In reaction quite frankly to the excesses of the Perchuck years, unfairness, by statute, has to require substantial injury. And the question in issue in *Reverse Auction* was whether a privacy invasion was unfair. The issue for the dissenters was whether a violation of privacy was a substantial enough injury to trigger the unfairness jurisdiction. My feeling was on the facts of that case it was not sufficiently substantial. I said I can conceive of cases where an invasion of a privacy interest would be substantial, but I certainly didn't see it in that case.

Is it fair to say that if there were three commissioners who thought the way I did that there might be somewhat less concern about privacy invasions than if there were three commissioners who felt the other way? I guess that's true. I guess that's fair. I am concerned about privacy invasions like everybody else, too, but maybe less concerned than some other people. After all, I'm old enough to have grown up in an era when there were no antibiotics. And if a kid was sick in the house with a communicable disease—some of you old guys must remember this—the Board of Health would come by and put a big poster up on the front door of the house that said Warning! You know, there's a kid sick in here who has got scarlet fever, beware. Talk about privacy! Don't come near this place, okay. We didn't have much privacy in those days. And frankly—and if this is controversial, make the most of it—I frankly think there's some undue hysteria on the subject of privacy today. There really is. The average person living in one of these urban cliffs in New York today, Internet or no Internet, has infinitely more privacy than someone living in small town America 150 years ago. I promise you. So I think people just have to calm down a little bit.

What may be new? Apart from some of these things I've been talking about, what may be new? This gets even more speculative. I'll tell you a story. Remember Ed Flynn, the boss of the Bronx? I'm getting more and more out of date. No such thing as political bosses anymore? If Ed Flynn had not been boss of the Bronx, Franklin Roosevelt never would have been President of the United States, did you know that? Because Franklin Roosevelt ran for Governor of New York before he ran for President of the United States, and if he lost that election he probably never would have been a candidate for President. It was a very close election. And the votes in the Bronx came in late and in sufficient number. I presume there were certain people who may have voted several times and I presume there were people who may have exercised their franchise post mortem. In any event, Ed Flynn delivered the votes for Franklin Roosevelt and made him Governor of the state of New York and the rest is history. But Ed Flynn always used to say—boy, this is some digression—don't confuse what you want to happen with what will happen. Wishes are not predictions. That was his guiding political motto.

An awful lot of what I'm going to say right now is to some degree what I want to happen, what I am trying to stimulate to happen. First of all, I am very much concerned, and I think I alluded to it earlier, about the limits of our knowledge. I mentioned there's a consensus, and I think it is a very strong consensus, that economics informs antitrust. It is the primary source of our wisdom. But, before I practiced as an antitrust lawyer, and now for the first time in my life I really have to try to decide things rather than advocate something that has already been presented to me. I find increasingly that I'm not sure that I know what I'm doing. Because there are limits. Economics can get you just so far, and then we don't really know what we are doing. Market definition is not a science, Merger Guidelines notwithstanding. It's an art. We don't really know, except for at the extremes, what concentration means or doesn't mean. We don't have any idea how to weigh present competitive effects against future competitive effects. You know, the *Microsoft* case is in the other place, but that's what *Microsoft* is all about really, about trying to weigh the present against the future. We don't know how to do that in a rigorous way. If you're interested I've got a bunch of speeches and papers up on the Web site examining this in greater detail. It's for me a confession of ignorance. I would like to see much more attention paid, more candid recognition, and more talk about this, not only on the part of people who are doing what I'm doing, but in the bar. Ky Ewing, the Chair of the Antitrust Section this year, has started that process, to his credit. You may have been reading about a couple of these seminars; he is trying to get people to start thinking about what I call the limits of antitrust knowledge.

Efficiencies is another one. Some alarmists say, well, nobody pays any attention to efficiencies at the agencies today, and that's got to change. That's just not so. The number of decided cases on efficiencies where efficiencies have been weighed as a "defense" are relatively small. Sometimes the agencies say things about efficiencies in litigation that I wouldn't necessarily agree with. But the fact of the matter is that mergers are cleared all the time because of efficiencies. We don't call it an effi-

ciencies defense. People come in and we'll ask, why are you doing this? What is the rationale for this transaction? What do your documents disclose about the rationale for this transaction? And if the documents disclose that the transaction is driven by efficiencies, those mergers get cleared. A very small percentage of mergers are attacked. You all know that.

So yes, of course efficiencies are important, and of course they are considered every day. The question, though, is what is or what is not an efficiency that might justify a merger that may have some anti-competitive effects? We try to figure it out through using various market measurements that we don't necessarily know anything about either. That's a little tougher question. Just to give you an example, one of the requirements that's in the guidelines is that efficiencies be merger specific. In other words, if you've got a merger that has an anti-competitive potential and you want to say okay, it is justified by efficiencies, one of the next questions is well, did you have to merge in order to get those efficiencies; could you have gotten those efficiencies on your own? Or could you have engaged in a joint venture that is not as anti-competitive as this? One of the interesting side effects of the more liberalized treatment of joint ventures—the ability today to rationalize production through joint ventures with competitors—is that it may be more difficult to justify an outright merger, because you don't have to merge in order to get those efficiencies. You can get them by conduct short of merger. I don't think we know as much about that as we should, and what we do know I don't think is being communicated all that well.

The interface between patent and antitrust, you hear a lot about that. A lot of talk about the *Intel* case in the Commission for example. I don't have a vested interest in the merits of the *Intel* case because it was voted out and settled and decided before my time. People sometimes tend to forget that there were intellectual property interests on both sides in *Intel* by the way. I think that the patent-antitrust interface needs to be explored in greater depth, particularly because of the concern of high-tech industries. We have to try to know more about it and again communicate what we know.

Is there a conflict between patents and antitrust? I don't see them as conflicting at all. I see them as complementary. There's a conflict between the two only if you take a static point of view. Obviously, if you take a static point of view, patent law sanctions monopolies, and antitrust is very suspicious of monopolies. If you take a long-term point of view, both of them exist for the purpose of stimulating innovation, stimulating competition going down the road, development of new products, the kind of competition that really matters. They are sort of upside down, you see. Antitrust says we may attack situations where there seems to be a benign present impact on consumers, because of concern about what might happen to consumers going down the road. See, that's the *Microsoft* case. The patent regime is *Microsoft* upside down. It says we will tolerate present anticonsumer effects, present monopoly, because of the impact it may have on stimulating invention going down the road, not only in this industry but across the whole economy. Both of them involve some predictions of the future and some leaps of faith about what might happen in the future. So they are brothers and sisters under the skin really. But if you look at it from a purely static point of view you say there is a conflict. I think we need to know more about it; we need to talk more about it.

Self regulation is a big one for me. I refer you to the *California Dentists* case—which again I have no vested interest in because it was voted out before I was appointed. I don't know how I would have voted on the *California Dentists* case had I been at the Commission. But what the Supreme Court has said, in a 5-4 opinion, is that there may be certain competitive situations where you have this information asymmetry between buyers and sellers. It may justify certain forms of self regulation that would be anti-competitive in other contexts. I'm trying to generalize what I read from that opinion. That's about all it says. And for me it is important not just because of the small corner of antitrust that has to do with the professions, it is also important because of what I regard as the exploding need for industry self regulation in the field of e-commerce, particularly B2C, not B2B. If you're really going to have worldwide electronic commerce, if you're really going to have the tremendous savings that can be achieved from this virtually costless way to reach people all around the world and sell your products, you've got to have some assurances. You're on the other end now. You're the buyer. This is the information asymmetry. You don't know who these sellers are. You don't know how reliable they are. You don't know whether they are advertising their products honestly or not. How are you going to get that assurance? I think one way you may be able to get that assurance is through some kind of industry self regulation, some industry codes. Where you know this person is a member of some group that's given them the Good Housekeeping Seal of Approval and they will stand behind their product. For you the practical remedy doesn't have to do with state laws or national laws; it has to do with the reliability of some entity that you can look to and that you do recognize that vouches for this particular seller.

This requires attention to the antitrust aspects of industry codes of regulation that happen to foster the objectives of the other wing of our house. This is the intersection, you see, of our Bureau of Competition and our Bureau of Consumer Protection. And I think there's a growing appreciation of the fact that the Bureaus are not unconnected left hands and right hands out here. So I think we need to pay attention to the larger meaning

and larger significance of the *California Dentists* case. It's not just one involving professions.

I would also call for rationalization of responsibilities between the federal government and state governments, and governments of other states around the world. It's still *ad hoc*, case by case. I think we can do a better job of making more effective use of the particular advantages of our own states, and the other states around the world. Some people here in state government may be offended, but I don't think it is particularly effective or efficient to have the federal government challenging a particular transaction and to have 20 states also involved in the litigation. I think, frankly, it makes it unimaginable. I would like to figure out better ways of staying out of each other's hair, and if that involves ceding some responsibility at the federal level, I think it is not too high a price to pay. We need to talk about that. There have been tremendous gains—believe me, the relationship between the feds and the states is vastly superior to what it was a decade ago—but I think we can go further.

Now, on top of that, there are all kinds of other issues that I won't call housekeeping, they are more important than housekeeping; one is the clearance process between the Federal Trade Commission and the Department of Justice. We've got to figure out a better way to do that. I'm still not satisfied that we are handling the Second Request process as well as we might, notwithstanding an outstanding cooperative effort by a bar group headed by Eileen Gotts, who is around here somewhere. A cooperative effort. I think it's a very useful beginning, and I think we've got a long way to go.

I think one of the most significant initiatives in the Federal Trade Commission in the last five years was Bob Pitofsky's practice of having these various workshops where people representing a wide variety of views can get together and talk about a lot of these things. I would like to see that continued, expanded and strengthened, because I think that's one of the most useful things we do. It is mutually educational. It also happens to be entirely consistent with the original fundamental charge from Congress to my agency.

As a young associate, I once had to read the legislative history of the Federal Trade Commission Act. It's kind of interesting because there's an awful lot of stuff in there that sounds very quaint today. But the one message that comes across loud and clear is the Federal Trade Commission was not supposed to be a government prosecutor. It was not supposed to be like a bunch of judges really. The Federal Trade Commission was supposed to communicate with the business community and engage in educational efforts to determine what was and what was not a fair method of competition. Now that is part of the early 20th century reform tradition, that Brandiesian kind of thing about fair competition. It reached its high point in the NRA, in the early days of the New Deal, and then of course was declared unconstitutional, and it's fallen out of favor. I don't think anybody wants to see this kind of state-sponsored capitalism anymore; that's not what I'm talking about. But what I'm talking about is the notion that one of our prime missions—and the thing that quite frankly distinguishes us from those arms of the government that are more overtly prosecutorial—is to engage in an ongoing dialogue. That's something that we've started to do much more intensively, and as far as I'm concerned I would like to see expanded in the new administration.

And that is all I can tell you. Thank you.

MR. LOGAN: I would like to thank Tom for his openness, which is very, very refreshing and as well as for his provocative comments which will all give us a lot to think about. I'd also like to thank all of you for coming tonight, and I hope you join us next year and at other events during the year.

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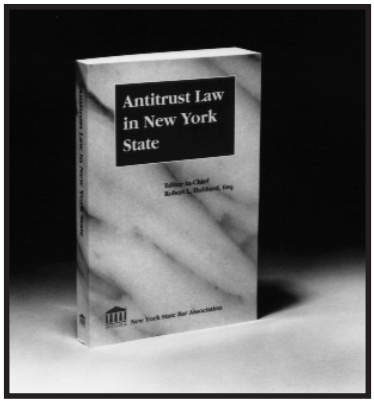

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