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1999 Antitrust Law Section Symposium

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ANNUAL MEETING

Thursday, January 28, 1999
New York Marriott Marquis
New York City

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Kaye, Scholer, Fierman, Hays & Handler, LLP
New York City

Program Chair
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Dinner Speaker
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Moderator: **Alan J. Weinschel, Esq.**
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COOPERATION AND COMPETITION AMONG ANTITRUST PROSECUTORS: RECENT DEVELOPMENTS IN ANTITRUST FEDERALISM **23**

Moderator: **Robert L. Hubbard, Esq.**
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PRESENTATION OF THE ANNUAL AWARD FOR SERVICE TO THE ANTITRUST LAW SECTION **39**
Given Posthumously to Professor Milton Handler

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Mozelle W. Thompson, Esq.

SECTION BUSINESS MEETING, ELECTION OF OFFICERS AND MEMBERS OF THE EXECUTIVE COMMITTEE

MICHAEL MALINA, ESQ.: Good afternoon. Before we start our program, we have a few minutes of business to attend to. I have the report of the Section's Nominating Committee, chaired by Barry Brett, and the report nominates as officers for the ensuing year: Chair, Robert Hubbard; Vice Chair Martha Gifford; Secretary, Kenneth Logan; members of the Executive Committee include those officers and Kevin Arquit, Michael Bloom, Barry Brett, Edward Cavanaugh, Bruce Colbath, Dale Collins, Lloyd Constantine, Steven Edwards, Lawrence Fox, Peter Greene, Pamela Jones-Harbour, Stephen Houck, Norma Levy, William Lifland, Joseph Lipofsky, Steve Madsen, myself, Bruce Prager, Ira Sacks, Alan Weinschel and Vernon Vig.

Can I have a motion to adopt the report?

SPEAKER IN AUDIENCE: So moved.

MR. MALINA: Any seconds? Bob?

MR. HUBBARD: Second.

MR. MALINA: Any opposition?

In the absence of opposition, the report is adopted. And with that I'll turn the proceedings over to our program chairman and the gentleman who will become chair this evening after the dinner, Bob Hubbard.

Annual Review of Antitrust Developments

ROBERT L. HUBBARD, ESQ.: Good afternoon. Glad to have you all here. I will dispense with the formalities, other than I think we have a very good program lined up. We have our usual "Year in Review" and then a Vertical Restraints panel and an Antitrust Federalism panel. I'm sure you'll enjoy all of it, and I hope that you'll be able to attend the entire program. We also have a dinner program where FTC Commissioner Mozelle Thompson will be the dinner speaker, and Milton Handler will be receiving the award posthumously for service to the section. I would encourage you to attend that also.

But without further adieu, let me introduce Bill Lifland, who has given us his counsel for a long time in his Year in Review. We are very glad to have him. Thank you, Bill, for presenting your Annual Review of Antitrust Developments.

WILLIAM T. LIFLAND, ESQ.: Thank you, Bob. Good afternoon, everyone. We had a very busy antitrust year in 1998. We had significant developments in the law relating to boycotts, monopolies, collusive activities, joint ventures, mergers and vertical arrangements. You have a handout that lists some 55 noteworthy cases—mostly appellate decisions and some FTC initiatives. I'll try to highlight the most significant ones so that you can decide which you want to study further.

Boycotts

The first case to mention is of course the Supreme Court's *Discon* case which was decided about the end of the year.[1] The key ruling was was that in the boycott context, the per se rule is to be applied only to horizontal arrangements and not to vertical ones. The plaintiff alleged that it was replaced as a supplier to the defendant's organization because it had refused to go along with a regulatory scam which would result in higher prices to ratepayers. The Supreme Court's analysis of this conduct was that as it was vertical it was to be judged by the rule of reason rather than a per se rule. This statement is of course consistent with other decisions limiting the application of the per se rule in vertical cases to situations of minimum resale price maintenance and perhaps to certain tying arrangements. The Court's opinion also indicates that allegations of unseemly conduct, such as the regulatory scam, would not transform cases of improper business behavior into antitrust cases, which is also consistent with statements found in some other decisions. Since you will undoubtedly be hearing much more about the *Discon* case later in the program, I will stop there and move along to some other cases involving boycotts.

One of these is a Ninth Circuit opinion which states that the per se rule did not apply to a joint refusal by two defense contractors to deal with a high price supplier.[2] The court said that the challenged conduct was not like a price-fixing conspiracy, and the rule of reason was therefore appropriate. Applying the rule of reason, the court observed that even if an injury to competition could be made out by a temporary decline in the number of competitors, the evidence was that the number of competitors had remained the same or increased.

You see the other side of the coin in a Third Circuit decision that held that it was appropriate to apply the per se rule.[3] A roofing product distributor alleged that it was driven out of business after its competitors pressured suppliers not to supply it because it threatened to destabilize the market by reducing prices. The court said it was implausible that the defendants' alleged behavior would enhance overall efficiency and make markets more competitive; hence the application of the per se rule.

Perhaps a similar view underlay an FTC challenge to an association of car dealers.[4] The association threatened a car manufacturer to cut back orders unless the manufacturer reduced the number of cars it allocated to dealers who offered low prices over the Internet. The FTC said that the threatened boycott would have eliminated a method of automotive marketing that many consumers have come to prefer, and there were no plausible efficiency justifications for the association's conduct.

Monopolization

Speaking of the Internet, there has probably been no antitrust case in recent memory that has attracted anything like the public interest in the monopolization proceedings brought against Microsoft Corporation by the Justice Department and several states. In much of the publicity engendered by the trial, you may have seen some indication of a view among the reporters that the district court is likely to uphold one or more of the government's claims, but the Court of Appeals may be less receptive to them. As to the latter point, we should not overlook the fact that the Court of Appeals has already, in one of its decisions last year, expressed a view on one of the important issues in the case, namely the propriety of the integration of Internet Explorer into Microsoft's Windows operating system.[5] You will remember, of course, that this was a key issue in the government's contempt proceeding against Microsoft, where the district court ordered preliminary relief and the Court of Appeals reversed for failure to comply with notice requirements. In the course of its opinion, the Court of Appeals also touched on the interpretation of the provi-

sion of the decree relating to integrated products. The court stated that in order to satisfy the requirements for valid integration, the integrated product must combine functionalities in a way that offers advantages unavailable if the functionalities are bought separately; the combination must be better than what the purchaser could create from separate products; and there must be a reason for which the licensor rather than customers or end users must bring the functionalities together. The court also stated that its interpretation of the decree provision was consistent with tying law. Not everyone would agree with respect to the tying law, but tying and monopolization are clearly at the heart of the current controversy. The district court's questions seemed to pay close attention to the Court of Appeals language, and its opinion may ultimately address these very points.

Compared to the subtlety of the Microsoft case, other monopolization rulings seem almost prosaic.

The First Circuit, in evaluating a railroad's claim that a rival had attempted to drive it out of business and monopolize rail transportation in northern New England, stated that unlike other circuits it did not insist on proof of 30% or 50% or some such market have percentage as a threshold requirement in antitrust cases.[6] But it preferred to rely on the fact that there was only a single instance of predatory pricing alleged by the plaintiffs, and this was just not enough to conclude that there was a dangerous probability of achieving monopoly.

There is an interesting twist on this requirement in a Second Circuit case involving a grocery chain's effort to re-enter an upstate New York market which was dominated by another firm.[7] This firm, let's call it the incumbent, blocked for a time the efforts of the insurgent to get real estate that it thought it needed to enter the market, and the insurgent sued. Unfortunately for it, before the case came to trial, a third party had opened a hyper-market in the area. This enabled the incumbent to argue persuasively that the evidence showed no barriers to entry and hence monopolization was impossible. The Second Circuit agreed, but then went on to state that plaintiff's claim of attempted monopolization did not require proof of monopoly power, and that claim should therefore stand. This could well cause lawyers to ask if there were no barriers to entry, how there could be a dangerous probability of success in achieving monopoly. Such a probability, of course, is one of the requirements for proving attempted monopolization.

In an Eleventh Circuit case we saw more familiar doctrine when a utility was sued by a manufacturer of swimming pool heaters for favoring other products in its promotions.[8] The monopolization claim was dismissed on the ground that the utility wasn't engaged in the pool heater market and had done nothing to create a barrier to entry into the electric power market, hence no monopolization.

I'll skip over a couple of cases in your handout that involve patents[9] and go to predatory pricing.

Predatory Pricing

Predatory pricing has often been challenged as a method of monopolizing, but some plaintiffs are having a difficult time showing that predation has occurred. One example is a Ninth Circuit case in which an oil company had accused a competitor of predatory pricing but was ruled not to have shown that the pricing was below cost.[10] The defendant had gotten its gasoline in exchange for crude oil, and the plaintiff urged that the proper measure of cost was the market value of the crude oil. The court ruled instead that the appropriate measure was the cost of producing the crude, and that trying to substitute the *market value* of the crude was inconsistent with the below-cost theory of predatory pricing.

In another Ninth Circuit case, a defendant was charged with attempting to monopolize the market for equipment by selling the equipment at predatory prices and recouping its losses through the sale of spare parts at elevated prices.[11] The court treated these allegations as an admission that the price for defendant's combination of equipment and spare parts was not predatory.

The Eighth Circuit rejected a claim of predatory pricing on the basis that the plaintiff could not make a showing of likely recoupment,[12] stating that if the defendant, having eliminated the plaintiff from the market, were to charge more than competitive prices, others would simply take over its business.

In a First Circuit case the plaintiff committed a classic mistake when confronted with an affidavit on a summary judgment motion by the defendant.[13] The affidavit denied that defendant's prices were below cost. The plaintiff's responsive affidavit asserted that the defendant's prices must have been below cost because they were below the plaintiff's cost. This affidavit was described as "conclusory" by the court. Actually that was a polite description. Most of us would have regarded it as pretty hopeless. It was certainly insufficient to preserve the plaintiff's claim against a properly supported summary judgment motion.

Collusion

Turning to the subject of collusive practices, there were some very interesting FTC initiatives which may be harbingers of future enforcement trends. First, an intriguing if somewhat reckless form of price leadership was illustrated in a case in which a leading manufacturer of liner board announced a price increase which it had to withdraw when it wasn't followed by its competitors.[14]

The manufacturer then did a telephone survey of the competitors, asking how much liner board they had for sale and at what price. Based on the responses the manufacturer reduced its own production in order to purchase large quantities of product from competitors, although it would have been less costly for the manufacturer to have manufactured this product itself. The FTC challenged the activity, describing it as an implied invitation to collude. The FTC said that the action was intended to reduce industry inventories to secure competitors' support for future price increases and was so understood by the competitors. Some of the commissioners who supported the FTC's initiative indicated that an implied invitation to collude could be found only when the actions that amount to the invitation are not justified by business considerations. This could lead you to infer that there would have been no proceeding if the manufacturer found it cheaper rather than more expensive to buy from its competitors.

However, there was another FTC proceeding which might suggest that such an inference would be wrong.[15] In the other proceeding the FTC charged that the two largest manufacturers of lead anti-knock compounds had agreed that one of them would stop manufacturing and the other would supply it with a certain volume of compounds at a price discounted from the seller's price to customers. The FTC said that the agreement was an unreasonable restraint of trade for two reasons. First, the stopper's agreement to stop manufacturing would enhance the likelihood of coordinated interaction and increase prices, particularly since the stopper, having closed its manufacturing facility, would have its sales artificially capped by the limit in the supply agreement. Second, the FTC asserted that basing the stopper's cost on the price to other customers would create an incentive for the seller to increase prices to other customers, because that would automatically elevate the price charged to the stopper. To settle the charges the FTC proposed to eliminate the cap on the amount the stopper could purchase, and require the stopper and the seller to negotiate a new transfer price which would be decoupled from the seller's price to other customers.

Another FTC initiative was reflected in a proposed consent order which barred an association of motel operators in the Lake Tahoe area from participating in any agreement to restrict posting signs advertising prices.[16] The FTC found that the purpose was to end a price war for motel rooms in the area. It's interesting to ask what the result would have been if the FTC had found that the purpose of the agreement was to preserve the natural beauty of the area. In light of the FTC's reasoning one might expect the same result.

Finally, the FTC found a horizontal conspiracy in a case where a retailer sought to get its suppliers not to sell certain merchandise to warehouse outlets.[17] The retailer was charged with securing agreements from a number of manufacturers that they would supply the warehouse outlets only with differentiated products. The FTC said that by seeking such agreements and keeping the suppliers informed as to commitments made by other suppliers, the retailer had acted as the hub of a hub-and-spoke horizontal agreement among the manufacturers.

1998 also saw a number of interesting appellate court decisions on proof of conspiracy. One interesting Fourth Circuit case applied the Supreme Court's *Copperweld* ruling[18] which held that a parent and its wholly-owned subsidiary were not to be treated as capable of conspiring under § 1. The Fourth Circuit extended that holding to a situation where an individual defendant controlled the business affairs of the defendant corporations. The court indicated that it was immaterial whether the individual owned all the stock of the corporations, so long as it controlled them.[19]

Another interesting case related to conscious parallelism. The familiar doctrine is that more than mere parallel behavior is required to prove a conspiracy. Other plus factors have to be present. The Eleventh Circuit found such a plus factor where the evidence showed that during a period of stable costs, while prices and profits were rising, the existing sellers retained about 90% of their business.[20] The court said that it could understand that oligopolists behaving in a legal, consciously parallel fashion as a result of price leadership could achieve high and rising prices, even though costs remained stable. But it said the odds were minuscule that they could at the same time maintain their incumbency rates without communicating with each other.

In a rather unique case the Fourth Circuit found that a donee of property could be charged with participation in a conspiracy.[21] The property involved was a deposit of vermiculite, and the leading producer of this product donated the property to a nonprofit anti-mining organization. A competitor thereupon brought an antitrust suit alleging that the donation was intended to prevent it from getting access to the deposit. The Fourth Circuit upheld the conspiracy claim without requiring any showing that the non-profit shared the leading producer's alleged desire to limit the seller's access to the product. The moral may be that it is sometimes wise to look a gift horse in the mouth, at least in the Fourth Circuit.

Another Fourth Circuit case affirmed a conviction of real estate operators who attended foreclosure auctions and agreed not to bid against each other and later divided among themselves the money they had saved by holding down the auction prices.[22] Although this case is not unprecedented, it illustrates the criminal application

of antitrust laws in a business which, until recently, did not have much antitrust awareness.

At one time another such area was intercollegiate athletics. Since the Supreme Court struck down the NCAA football program in 1984,[23] there has continued to be a great deal of antitrust activity in this area. Last year the NCAA got a split decision from the appellate courts. Its rule upholding or imposing salary caps on entry level basketball coaches was struck down as anticompetitive,[24] and its rule excluding graduate students from participating in intercollegiate athletics, unless they do so at the same institution from which they graduated, was held outside the scope of the antitrust laws.[25]

I will skip over a number of cases involving joint ventures[26] and merger enforcement,[27] because you will hear a lot about them later in the program, and go directly to vertical arrangements.

Verticals

The Ninth Circuit ruled that allegations of a terminated distributor against its supplier to the effect that the supplier dictated prices to distributors did not make out a violation of § 1 of the Sherman Act, since the allegations asserted only unilateral conduct.[28] That serves as a reminder that an agreement of some kind is necessary for a violation of § 1 in a vertical as well as a horizontal context.

Another termination case, this one in the Seventh Circuit,[29] was decided for the defendant with the comment that plaintiff had not reached first base on its antitrust claim because it failed to prove that the defendant-manufacturer had market power in the sense—and this is interesting—that a reduction in output by the defendant could not quickly be made up by other firms' increased output. The court indicated that for such market power to exist, the defendant's sales must loom large in relation to rivals' sales and production capacity. This seems, at least on the surface, different from the usual definition of market power; that is, the ability to maintain a price increase for some period of time without losing money.

In another termination case the plaintiff alleged that its termination was due to an unlawful exclusive contract with a rival.[30] The court concluded that the exclusive agreement, which related to unloading trucks at a grocery chain's warehouse, was not a per se violation of the law, since the restriction was vertical and did not relate to resale price maintenance. It added that plaintiff had not proved a case under the rule of reason.

Fairly recently, the FTC announced a proceeding against a leading manufacturer of generic drugs, claiming that the manufacturer had tied up suppliers of the active ingredient to the generic drugs, enabling the manufacturer to institute very substantial price increases of 1900% or more.[31]

Another interesting case suggests a different approach to dealing with allegations of unlawful tying. The Eleventh Circuit ruled against a postcard distributor's claim that it was unlawful per se to require it to purchase relatively unpopular postcards as a condition of buying the more popular ones.[32] The Eleventh Circuit ruled, first, that this was to be judged under the rule of reason, being more akin to full line forcing than tying, and, second, to be upheld because ultimate consumers, as distinguished from the intermediary, were not required to purchase the tying product in order to obtain the tied product.

Turning to discrimination, which, of course, is another form of vertical arrangement, there were three interesting cases which arose from the automobile industry. In one case a truck manufacturer's program to give its dealers assistance in meeting competitive offers was challenged as a Robinson-Patman violation. The Fifth Circuit upheld the district court's ruling that the same level of discount was functionally available to all dealers, and accordingly, the seller could not be held liable.[33]

The Second Circuit ruled that discrimination allegations should not be dismissed in a case where a terminated dealer claimed that its supplier, an importer, had provided discriminatorily advantageous terms to a rival dealer.[34] The Second Circuit said that buyer injury under the Robinson-Patman Act was inferable from evidence of substantial price differences over time and also noted that the alleged discrimination, which consisted partly of allowing the rival dealer rent-free use of premises and more favorable warranty reimbursements, violated § 2(d) of the Robinson-Patman Act, and as to this violation no injury to competition need be shown.

Another interesting decision was to the effect that leased realty should not be regarded as a "facility" within the meaning of § 2(e).[35] The Ninth Circuit said that while the statute could conceivably be read to include such leases, the historical context, the constructions of other circuits and the FTC's administrative construction all argued for narrower interpretation.

In what is probably a unique case, a state statute required car manufacturers to reimburse dealers for warranty parts at the dealer's standard rate rather than at a lower manufacturer-specified rate. A car manufacturer complied with the statute but then added the extra reimbursement as a special surcharge to vehicle prices. The court stated that the end result was not to create an actionable price difference, so there was no Robinson-Patman violation.[36]

I will skip over a couple of interesting standing cases[37] and turn to the state action exemption. The Louisiana accountancy-regulating board is composed of

practicing CPAs. The board promulgated a rule making it unlawful for Louisiana CPAs to engage in so-called "incompatible" professions, such as securities brokerage. When the rule was challenged in a suit against board members, the state action exemption was held to apply, despite the absence of active supervision of the board by the state, which of course is normally required where the action involved is taken by private parties rather than government officials. The Fifth Circuit ruled that the board's actions, being of a public nature, would involve little danger of an arrangement to restrict competition.[38]

In the Eleventh Circuit there was a somewhat comparable case involving whether an involuntary association of insurers was entitled to be treated as a state political subdivision for antitrust purposes.[39] The court stated that the central dispute was whether the association was private, in which case active state supervision was needed to obtain immunity, or not, in which case the board need only prove that it was acting pursuant to a clearly articulated state policy.

The Fifth Circuit also applied the state action exemption to immunize hospitals charged with pressuring managed care plans to deal exclusively with it, thus disadvantaging a competitor.[40] The court ruled that the hospital was authorized by statute to contract, exclusive contracts therefore were foreseeable, and antitrust immunity therefore attached. There are a number of such cases indicating that the authority to contract implies the ability to contract exclusively, but it's far from obvious that that is always the case.

Foreign Commerce

In the area of foreign commerce, two unusual cases arose. In one case the District of Columbia Court of Appeals upheld as sufficient to support subject matter jurisdiction an antitrust complaint of a radio station serving the Eastern Caribbean.[41] The station claimed that a rival station and its partly-owned local telephone company conspired to monopolize radio broadcasting in the area by filing sham objections to the plaintiff's application for a broadcast license and also by denying access to the telephone company's microwave transmitters. The denial of access claim was held dismissable because the telephone company was not controlled by the broadcaster and was therefore not to be treated as a competitor of the plaintiff, but the claim of sham technical objections was upheld as properly invoking the subject matter jurisdiction of the court.

In the other case, arising in the Second Circuit, a currency exchange firm charged two English banks with conspiring to destroy it, and the Second Circuit affirmed dismissal of the case as *forum non conveniens*.[42] While acknowledging some difference among appellate courts as to the governing principles in such cases, the Second Circuit agreed that England, where most of the witnesses resided, was an appropriate forum for the plaintiff's claims even though English courts would not enforce the Sherman Act. The court stated that the plaintiffs could challenge the allegedly anticompetitive actions under the European Union treaty, which English courts were bound to enforce. The court acknowledged that the English courts had never awarded money damages in such a suit, but the Second Circuit said they nevertheless had the power to do so.

Well, that concludes my squibs, ladies and gentlemen. I hope that some of them may have interested you enough to look further at the rulings themselves. Thank you.

Endnotes

1. *Nynex Corp. v. Discon Inc.*, 1998-2 CCH Trade Cas. ¶ 72, 362 (USS Ct. Dec. 14, 1998) (antitrust laws permit the application of the per se rule in the boycott context only where there is a horizontal agreement).
2. *Adaptive Power Solutions LLC v. Hughes Missile Systems Co.*, 1998-1 CCH Trade Cas. ¶ 72,122 (9th Cir.).
3. *Rossi v. Standard Roofing, Inc.*, 1998-2 CCH Trade Cas. ¶ 72,274 (3d Cir.) (plaintiff claimed that it had been driven out of business after its competitors pressured suppliers not to sell to it because of its discounting activities; allegations "should be analyzed using the *per se* framework").
4. *Fair Allocation System Inc.*, CCH Trade Reg. Rep. ¶ 24,479 (FTC) (association had threatened a car manufacturer with cutting back orders unless the manufacturer reduced the number of vehicles it allocated to non-member dealers offering low prices over the Internet; FTC stated that the threatened boycott would have eliminated a method of automotive marketing that many consumers preferred).
5. *United States v. Microsoft Corp.,* 1998-1 CCH Trade Cas. ¶ 72, 188 (D.C. Cir.) ("Integrated products" must "combine functionalities (which may also be marketed separately and operated together) in a way that offers advantages unavailable if the functionalities are bought separately and combined by the purchaser; the combination offered by the manufacturer must be different from what the purchaser could create from separate products on his own and must be better in some respect; and there must be a reason for which the licensor rather than its customers or end users must bring the functionalities together).
6. *Springfield Terminal Railway Co. v. Canadian Pacific Ltd.*, 1997-2 CCH Trade Cas. ¶ 72,003 (1st Cir.) (no basis for concluding that there was a dangerous probability of achieving monopoly although court did not insist on proof of "30 or 50 percent or some such percentage of market" as a threshold requirement in attempted monopolization cases).
7. *Tops Markets Inc. v. Quality Markets, Inc.*, 1998-1 CCH Trade Cas. ¶ 72,111 (2 Cir.) (evidence showed an absence of barriers to entry but the claim of attempted monopolization was permitted to stand since plaintiff was not required to prove monopoly power).
8. *Aquatherm Industries, Inc. v. Florida Power & Light Co.*, 1998-1 CCH Trade Cas. 72,206 (11th Cir.) (no violations of § 2 of the Sherman Act were pleaded because defendant was not a participant in plaintiff's market, and had not created barriers to entry into its own market).
9. *Schlafly v. Caro-Kann Corp.*, 1998-1 CCH Trade Cas. ¶ 72,183 (Fed. Cir.) (infringer's failure to prove the relevant market was fatal to his antitrust claim; possession of patents by itself did not establish a presumption of antitrust market power); *C.R. Bard Inc. v. N3 Systems Inc.*, 1998-2 CCH Trade Cas. ¶ 72,289 (Fed. Cir.) (evidence sufficient that the patent owner had monopoly power in the mar-

ket for replacement needles and that it had modified its patented gun not to improve performance but to maintain its monopoly position).

10. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 1998-1 CCH Trade Cas. ¶ 72,287 (9th Cir.) (oil company that accused a competitor of predatory gasoline sales had failed to show that the defendant's pricing was below cost. Pertinent measure of defendant's cost was its cost of producing the crude oil exchanged for gasoline sold).

11. *Kentmaster Mfg. Co. v. Jarvis Products Corp.*, 1998-1 CCH Trade Cas. ¶ 72,076 (9th Cir.) (allegation of recoupment of losses through profitable parts sales was an admission that the total price for the defendant's combination of equipment and parts was not predatory).

12. *National Parcel Services Inc. v. J.P. Hunt Logistics Inc.*, 1998-2 CCH Trade Cas. ¶ 72,228 (8th Cir.) (plaintiff could not make a showing of likely recoupment).

13. *C.B. Trucking v. Waste Management Co.*, 1998-1 CCH Trade Cas. ¶ 72,074 (1st Cir.) (affidavit asserting that the defendant's prices must have been below its cost because they were below plaintiff's cost merely "conclusory").

14. *Stone Container Corp.*, CCH Trade Reg. Rep. ¶ 24,390 (FTC) (purpose of purchasing from competitors was allegedly to reduce industry inventories with the intent of securing competitive support for a future price increase).

15. *Associated Octel Co.*, CCH Trade Reg. Rep. ¶ 24,409 (FTC) (unlawful for the two largest manufacturers of lead antiknock compounds to agree that one of them would cease such manufacture and the other would supply it with a limited volume of product at a price discounted from the seller's price to customers).

16. *South Lake Tahoe Lodging Association,* CCH Trade Reg. Rep. ¶ 24,466 (FTC) (proposed consent order would bar association of operators of lodging establishments on the California-Nevada border from participating in any agreement to restrict posting of signs advertising lodging prices).

17. *Toys "R" Us,* CCH Trade Reg. Rep. ¶ 24,506 (FTC) (FTC ruled that by seeking agreements from numerous manufacturers, and keeping them informed as to the commitments made by others, the respondent had acted as the hub of a "hub-and-spoke" horizontal agreement among manufacturers).

18. 467 U.S. 752 (1984).

19. *Zachair Ltd. v. Driggs,* 1998-1 CCH Trade Cas. ¶ 72,139 (4th Cir.) (the fact that the individual defendant controlled the business affairs of the defendant corporation was "the relevant factor behind our determination" that defendants constituted one entity).

20. *City of Tuscaloosa v. Harcros Chemicals Inc.*, 1998-2 CCH Trade Cas. ¶ 72,307 (11th Cir.) (a "plus factor" beyond consciously parallel behavior was shown by "incumbency rates" of about 90% during a period when costs were stable and prices and profits were rising).

21. *Virginia Vermiculite Ltd. v. W.R. Grace,* 1998-2 CCH Trade Cas. ¶ 72,252 (4th Cir.) (alleged mineral donation properly characterized as pursuant to a conspiracy when the donee agreed not to allow mining of the donated deposits).

22. *United States v. Romer,* 1998-1 CCH Trade Cas. ¶ 72,197 (4th Cir.) (criminal conviction upheld where bidders at real estate auctions refrained from bidding against each other and subsequently divided the money saved by artificially holding down the price of property bought).

23. *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

24. *Law v. National Collegiate Athletic Ass'n,* 1998-1 CCH Trade Cas. ¶ 72,047 (10th Cir.).

25. *Smith v. National Collegiate Athletic Ass'n,*1998-1 CCH Trade Cas. ¶ 72,084 (3d Cir.) (antitrust laws inapplicable to the NCAA's eligibility rules).

26. *Addamax Corp. v. Open Software Foundation Inc.,* 1998-2 CCH Trade Cas. ¶ 72,260 (1st Cir.) (where venture is formed to produce a new product, there is patently a potential for a productive contribution to the economy and conduct strictly ancillary to that effort is to be evaluated under the rule of reason); *Summit Technology,* CCH Trade Reg. Rep. ¶ 24,490 (FTC) (proposed consent orders prohibit parties pooling patents on surgery techniques from agreeing to fix prices (including by establishing a per-procedure fee) or to restrict each other's licensing rights); *Urological Stone Surgeons Inc.,* CCH Trade Reg. Rep. ¶ 24,367 (FTC) (joint venturers had "financially integrated" by investing in machines, but their action in collectively setting their professional service fees was not reasonably ancillary to achieving any efficiencies that might be realized through joint ownership of the machines); *Shell Oil Co.,* CCH Trade Reg. Rep. ¶ 24,362 (FTC) (resolution of challenge to the formation of joint ventures between two major integrated oil companies); *Commonwealth Land Title Insurance Co.,* CCH Trade Reg. Rep. ¶ 24, 492 (FTC) (FTC challenge to title plant joint venture on grounds that the parties had increased their prices before the legal consummation of the joint venture, and that the proposed consolidation of the title plants would violate the Clayton Act).

27. *Guinness PLC*, CCH Trade Reg. Rep. ¶ 24,359 (FTC) (merger would eliminate substantial competition in the U.S. "premium Scotch" and "premium gin" markets); *FTC v. Cardinal Health Inc.,* 1998-2 CCH Trade Cas. ¶ 72,226 (D.D.C.) (preliminarily enjoined two proposed transactions involving two separate mergers of wholesale drug distributors); *Merck and Co.,* CCH Trade Reg. Rep. ¶ 24,493 (FTC) (settlement of challenge to acquisition by a drug manufacturer of a pharmacy benefit management firm that maintained a drug formulary including products of the acquiring manufacturer); *TWR Inc.,* CCH Trade Reg. Rep. ¶ 24,365 (FTC) (settlement of challenge to acquisition of a defense contractor responsible for evaluating bid proposals submitted by other contractors including the acquiring firm.); *Roche Holding Ltd.,* CCH Trade Reg. Rep. ¶ 24,393 (FTC) (settlement of challenge to acquisition by a pharmaceutical company provides for divestiture of U.S. rights within 90 days; otherwise trustee could divest worldwide rights.); *Insilco Corp.,*CCH Trade Reg. Rep. ¶ 24, 319 (FTC) (settlement of challenge to acquisition prohibits the acquiring firm from obtaining certain competitively sensitive information from competitor acquisition targets); *LaFarge,* SA, CCH Trade Reg. Rep. ¶ 24,520 (FTC) (plant purchase agreement stipulated that the buyer would pay a larger sum if buyer's production at the plant was more than 85% of its capacity; the FTC viewed this provision as a "production penalty"); *Community Publishers Inc. v. DR Partners,* 1998-1 CCH Trade Cas. ¶ 72,093 (8th Cir.) (Court upheld the standing of a competing newspaper to challenge newspaper merger; plaintiff urged that the combined papers would have the power to soak up advertisers' entire budgets, leaving nothing to spend with the plaintiff).

28. *Mularkey v. Holsum Bakery Inc.*, 1998-1 CCH Trade Cas. ¶ 72,183 (9th Cir.) (allegation running "only to unilateral conduct" does not state violation of § 1 of the Sherman Act).

29. *LAPD Inc. v. General Electric Corp.,* 1997-2 CCH Trade Cas. ¶ 72,002 (7th Cir.).

30. *Doublespotting Service v. Super-Valu Inc.,* 1998-1 CCH Trade Cas. ¶ 72,058 (8th Cir.) (vertical exclusive agreement did not constitute a per se violation and plaintiff had not proved a violation under the rule of reason).

31. *Mylan Laboratories, Inc.,* CCH Trade Reg. Rep. ¶ 24,546 (December 21, 1998) (charging that exclusive license agreements were unreasonable restraints of trade).

32. *Southern Card & Novelty Inc. v. Lawson Mardon Label Co.,* 1998-1 CCH Trade Cas.¶ 72,104 (11th Cir.) (purchase requirement not treated as per se unlawful tie but rather as akin to "full line forcing" and upheld under rule of reason).

33. *Metro Ford Truck Sales Inc. v. Ford Motor Co.,* 1998-1 CCH Trade Cas. ¶ 72,194 (5th Cir.) (plaintiff had failed to demonstrate that the same level of discount was not functionally available to all dealers; seller could not be held liable if the challenged lower price was in fact available to the allegedly disfavored purchasers).

34. *George Haug Co. Inc. v. Rolls Royce Motor Cars Inc.,* 1998-1 CCH Trade Cas. ¶ 72,191 (2d Cir.) (buyer injury under the Robinson-Patman Act inferable from evidence of substantial price difference over time; alleged discrimination violated § 2(d) as to which no injury to competition need be shown).

35. *Portland 76 Auto/Truck Plaza v. Union Oil Co. of California,* 1998-2 CCH Trade Cas. § 72,237 (9th Cir.) (leased realty not a "facility" in light of historical context, constructions by other circuits, and the FTC's administrative construction).

36. *Liberty-Lincoln Mercury Inc. v. Ford Motor Co.,* 1998-1 CCH Trade Cas. ¶ 72,043 (3d Cir.) (no violation of the Robinson-Patman Act when vehicle surcharge merely compensates for extra payments required by state law).

37. *Campos v. Ticket Master Corp.,* 1998-1 CCH Trade Cas. ¶ 72,112 (8th Cir.) (popular music fans challenged ticket seller's alleged monopoly of concert ticket sales; court held plaintiffs lacked standing because they were only indirect purchasers of ticket services); *Lucas Automotive Engineering Inc. v. Bridgestone/Firestone Inc.,* 1998-1 CCH Trade Cas. ¶ 72,102 (9th Cir.) (acquisition increased the defendants' share of the vintage tire market to 74% from 49% but plaintiff's injury would have been the same if another company had made the acquisition; plaintiff therefore had to lack standing); *City of Pittsburgh v. West Penn Power Co.,* 1998-1 CCH Trade Cas. ¶ 72, 178 (3rd Cir.) (City's injury resulted from the regulatory regime which prevented utilities from serving the same area without commission approval; city could therefore not sue utilities).

38. *Earles v. State Board of Certified Public Accountants,* 1998-1 CCH Trade Cas. ¶ 72,135 (5th Cir.) (state action exemption did not require active supervision by state officials of board composed of practicing accountants where "the public nature of the board's actions means that there is little danger of a cozy arrangement to restrict competition").

39. *Bankers Ins. Co. v. Florida Residential Property & Casualty Ass'n,* 1998-1 CCH Trade Cas. ¶ 72,103 (11th Cir.) (involuntary association of insurers was entitled to be treated as a state political subdivision for antitrust purposes).

40. *Surgical Care Center of Hammond v. Hospital Service Dist.* No. 1, 1998-2 CCH Trade Cas. ¶ 72,249 (5th Cir.) (hospital's exclusive contracts with health care plans were foreseeable by the state legislature and antitrust immunity therefore attached).

41. *Caribbean Broadcasting System Ltd. v. Cable & Wireless,* PLC, 1998-2 CCH Trade Cas. ¶ 72,209 (D.C. Cir.) (antitrust complaint made sufficient allegations of domestic impact to support subject matter jurisdiction).

42. *Capital Currency Exchange Inc. v. National Westminster Bank PLC*, 1998-2 CCH Trade Cas. ¶ 72,281 (2d Cir.).

Applying Antitrust to Power Buyers and Sellers: Recent Developments in Vertical Restraints

MR. HUBBARD: I will turn over the next panel to Alan Weinschel, who is moderating this panel. Alan is with Weil, Gotshal, an eminent practitioner and a past chair of the section.

ALAN J. WEINSCHEL, ESQ.: I am especially honored to have this kind of a panel to introduce, because they really are preeminent people who in many respects don't need very much of an introduction. But I will ignore that and introduce them nonetheless.

What we are going to talk about this afternoon are some leading-edge antitrust issues facing us in what we have characterized as "distribution" but which in fact also touch on fairly important developments relating to the conduct of firms with market power and how we come to the conclusion that a firm has market power and has exercised it in a way that the antitrust laws ought to address.

Perhaps what I ought to do is introduce everyone at once so we get that out of the way and things will run more smoothly. On my immediate left is Irv Scher, my partner. Irv is a former chair of this section and a former chair of the ABA Antitrust Section. He has written extensively; he's the editor and co-author of Antitrust Advisor, a BNA Advisory Panel Member, former ABA Antitrust Developments editorial board member, and the list goes on and on.

For today's purposes what is interesting is that Irv has been involved in several recent important antitrust cases that we are going to talk about this afternoon, including *Toys "R" Us* and *Mylan* at the FTC and the couponing case in upstate New York as well, about which we will hear later.

On Irv's left is Steve Houck. Steve is the head of the Antitrust Bureau of the New York State Attorney General's office. Under his direction, that office has been extremely active in numerous investigations and litigations. They haven't been afraid to litigate. He is also a former chair of this section, and a former partner at Donovan, Leisure. Steve has taken some time out from his current job, which is lead counsel for the states who are plaintiffs in the Microsoft case, about which we will hear more later.

On my right is Richard Steuer, who is a partner at Kaye, Scholer and a co-chair of its antitrust practice group. He is the editorial chair of the ABA's "Antitrust" magazine, and the immediate past chair of the City Bar Association "Antitrust" Committee. Richard is involved in some of the important current matters as well, including the Pepsi-Cola/Coca-Cola litigation.

Let me try to get things going for the panel by making some observations of my own, and then I'll turn it over to Irv. One way to characterize much of what the current litigation is is a struggle to put some flesh on the bones of the rule of reason when it comes to companies with market power. There are two things that I mean by the rule of reason, one traditional and one not so traditional. First, the traditional notion of the rule of reason in the context of a § 1 case is fairly straightforward. We know what the task is; we start from the notion of a restraint, and we work through the balancing act of anticompetitive and procompetitive effects. In some contexts this is reasonably easy to do because we know what to measure. For example, when there are anticompetitive effects in an intrabrand market, we know that we can counterbalance those with procompetitive effects in the interbrand market that the company competes in. That's Hornbook Law since *Sylvania*. Of course, unless it is a minimum price restraint in which case we apply per se rules, but we'll pass that for the time being.

The net effect of the rule of reason in those kinds of cases is that up until recently there have been few cases brought and fewer cases won by plaintiffs on a rule of reason theory. Antitrust didn't dry up, but it was difficult for plaintiff's attorneys to attempt rule of reason cases. After Monsanto and *Sharp*, when it became even more difficult to prove the essential § 1 element of a conspiracy, cases became even more difficult.

You will recall that in many of these rule of reason cases there is description by the court, sometimes the Supreme Court, sometimes the circuits, that "in the absence of market power," and then fill in the blanks, that certain kinds of restraints will be tested in a particular kind of way. The implication of that is that where there is market power, the rules of the road are different, but we don't know what those rules of the road are. That's a nice segue into the second thing that I mean about the rule of reason, which is really in the context of a § 2 case, how we draw the line between single-firm conduct that is exclusionary and that which is not.

Here the balancing act appears to be different and the rules of the road less clear. Adverse effects in the marketplace can result from conduct that is clearly designed to exclude as well as conduct that is much more ambiguous. The articulations in the cases and the literature speak of things like "business justification" and whether the motivation is real or pretextual. "Raising rival's costs" is seen as a marker of exclusionary conduct by some commentators but not by very many courts. The FTC, in the Intel case, which we are going to talk about, has taken the position that anticompetitive effects don't

need to be proven in a § 2 case. The DOJ, the states and Microsoft appear to be battling over whether some short-run consumer benefit can be outweighed by longer-run exclusionary effects, even if there is a dispute about the short-run consumer benefit. For its part, the Supreme Court has given us *Khan*, expanding the rule of reason to include maximum price fixing, and has given us *Discon* more recently, which rejects a per se application of § 1 and § 2 to boycotts. We heard about that from Bill Lifland earlier today. Even in the absence of a legitimate reason, one needs to find anticompetitive effects under the *Discon* analysis, all of which leads us in need of more guidance. I can think of no better way to start than with the panel here.

Let me kick things off by turning it over to Irv as I mentioned. And I start with Irv because the FTC's Toys "R" Us case raises many interrelated issues, including how we decide which firms ought to be subject to these different rules of the road, whether avoidance of free riders is a legitimate business justification for someone putatively with market power and whether *Sharp* applies when there are more than two actors involved. With that, I'm sure Irv will add to the list, and I'm happy to turn it over to Irv Scher.

IRVING SCHER, ESQ.: I'm going to start with the Toys "R" Us case, and I'm going to talk about three cases involving buyers alleged to have violated § 1 of the Sherman Act, one of the three, the last case also has a Sherman 2 claim. I have to tell you that I'm involved in all three cases, so you're not going to get a very objective talk from me, but I'll try to present the other side's position. One of the cases is over, so we don't have a problem with that one. The other two are still in existence, and *Toys "R" Us* is where I'll spend most of the time, because it is quite a case, for those of you who have read all 112 single-line pages of it. We've been given a 50-page limit on our appeal to the Seventh Circuit.

The thing that should stare right out at you when you read the opinion is Chairman Pitofsky's warning to all large retailers, and I'm going to quote, "in any sector of retailing, not to exercise market power against suppliers." So the case isn't intended only to create rules for Toys "R" Us, but for other large retailers as well. Keep in mind that Toys "R" Us, found to have market power, had a 20% share of the national market that was alleged in the complaint. Moreover, the HHIs both on the manufacturer's side and on the retailing side were less than 800 in each market. Nevertheless, Toys "R" Us was found to have exercised market power.

Now, there was a very simple policy that was challenged by the Federal Trade Commission, one sentence. Toys "R" Us told each of its suppliers that it reserved the right not to purchase any item that the suppliers sold or intended to sell to warehouse clubs. That was it. Now keep in mind that Toys "R" Us sold anywhere between 11,000 and 15,000 stock keeping units, SKUs, of toys; the warehouse clubs as a group sold somewhere in the neighborhood of 250. All of the total sales of all of the clubs accounted for less than 2% of the toy market, and the case involved an "all toy market."

Now why did Toys "R" Us lose this case, at least at the commission level, it's on appeal to the Seventh Circuit. Well, according to the commission, and this really wasn't in dispute, the manufacturers didn't like the policy. They wanted to be able to sell to everybody. That shouldn't be a big surprise. And they were concerned, according to the commission, that they would lose plus business with the clubs; they wanted a level playing field. Now of course that disregards the policy which says you've got to make a choice, either the clubs or us. So the plus business may have been theoretical but not actual about if the policy meant what it said. Keep in mind Toys "R" Us did offer a level playing field, either sell to them or sell to me. Nevertheless, the level playing field point was very important to some of the commission's conclusions.

The commission on the vertical side found ten agreements with ten manufacturers, and chairman Pitofsky noted that this went beyond just the announcement of a policy. Toys "R" Us sought commitment, and commitment was obtained. When you go through 42 days of trial and thousands and thousands of documents and loose language in particular documents about we agree to do X or they agreed to do Y, you're going to find language like that. Therefore, the agreements were found with each of these ten manufacturers. The commission rejected Toys "R" Us's argument that each one under the Monsanto standard acted in furtherance of its independent business interests. After all, given a choice of selling to somebody with 20% of the market or a class combined that had 2%, what would you choose? But nevertheless he found a seeking of commitment and obtaining of commitment. And that's the vertical side. I'll get back to that in a few minutes.

The horizontal findings are the most interesting, and most observers here who are following that case probably thought it was only a vertical case. However, the bulk of the decision is addressed to a horizontal agreement among the manufacturers not to sell toys desired by Toys "R" Us to the warehouse clubs. And indeed, Chairman Pitofsky said that the horizontal was a "critical feature" of Toys "R" Us's policy; it was necessary to have a horizontal agreement. He said some of the manufacturers testified that they did it because their competitors were doing it, and therefore, there was an interest among all of them to do the same thing, and they wouldn't have done it unless the rest of them did it. In addition, according to the commission, Toys "R" Us policed this agreement by taking punitive action against a manufacturer who was reported by another manufacturer to have violated the policy. Finally, the chairman concluded that unanimity was needed for the scheme to work.

Let's just quickly look at the arguments made by Toys "R" Us on these points that were rejected by chairman Pitofsky. First, Toys "R" Us argued that the manufacturers had no motive to conspire. If I'm Mattel, I'd be delighted that Hasbro sold to the clubs because then Toys "R" Us wouldn't buy from Hasbro or would buy less, and I'd be able to get some of Hasbro's shelf space. So we argued that the horizontal was implausible because it was in each manufacturer's independent interest for competitors to reject the Toys "R" Us policy because the other manufacturers who acquiesced would benefit from it. In addition, we argued there was no need for unanimity, and in fact Toys "R" Us went forward with the policy even though there wasn't unanimity. For example Nintendo, the number three toy manufacturer, refused to acquiesce on the policy. Some of the manufacturers acquiesced at one point, didn't at another. Some of the manufacturers never sold to the clubs to begin with, and some of the manufacturers did sell a lot of products to the clubs but not the so-called front-line products. So you didn't have the kind of unanimity, you didn't have the kind of dramatic change this practices that you had in the *Interstate Circuit* case, which is the commission's main case. In addition, each of the manufacturers testified to independent business reasons for why they would go along with a 20% customer rather than a 2% class of customers. And if you'll recall in *Interstate Circuit*, none of the defendants raised any business arguments. Nevertheless, the chairman rejected all of these arguments on the grounds that they were self-serving. Instead he accepted the argument, the testimony of lower level personnel and in particular the ones who were the salespeople to the clubs. That's how the horizontal was found.

Now keep in mind for those of you who counsel in this area how many times do you have a retailer saying to you that if you don't do X, I'm going to buy from Y; Y is willing to do X. And then you say, well, since the other guy is doing it, I'll do it also. Do you now have a horizontal? That's approximately what was involved in that case and perhaps in the coupon case in upstate New York, which never got any facts into the case because it was settled.

Now what were the effects of the agreement? According to Toys "R" Us the agreement only impacted on some toys desired by the warehouse clubs, a small factor to begin with. Substitutes were available. The market was all toys, although toys are rather differentiated. In addition, since the clubs accounted for less than 2% of sales, there wasn't much impact in the marketplace even in that regard, and Toys "R" Us pointed out—and this doesn't show up in the opinion unfortunately—Sam's Club, which accounts for half the market, around 50% of clubs sales, was also restrained by its parent company Wal-Mart which wouldn't allow Sam's to buy any toys that Wal-Mart would buy. So we argued that Sam's wasn't affected by the restraint, and that wasn't addressed in the opinion. The decision rejected all those arguments, obviously, and pointed out that the fact that toys were differentiated at the clubs, the clubs bought a different product, consumers made it impossible or very difficult for consumers to compare price, and that was Toys "R" Us's intention, because Toys "R" Us was embarrassed by the fact that those toys that the clubs sold were being sold at a lower price, since the warehouse clubs operate on a very tiny margin. Also the fact that the clubs were offered these combination packs and large packs resulted in them paying more for the products they were buying. Those of you who shop at the clubs will probably recall that most of the products there are combination packs and special packs for the clubs.

Additionally, the commission pointed out that the restraint stopped a pattern of "rapid growth" of toy sales at the clubs. The three years before the restraint went into place the clubs had 1.5% of the market, and they rapidly grew to 1.9% at the time that the restraint occurred and that "rapid growth" was halted. If you detect a note of sarcasm, it's intended.

Finally, the commission ruled that absent the policy Toys "R" Us prices would have been lower. A regression analysis that Toys "R" Us put in showing that contrary to the Staples situation, there was only a 1% price difference in markets where the clubs weren't present and also where Wal-Mart wasn't present, because Wal-Mart had 14% of the market. The regression analysis was rejected by the commission.

Toys "R" Us raised the free rider argument. Toys "R" Us said we buy year around 11,000 to 15,000 SKUs, we warehouse, we display, we advertise. In come the clubs for three months a year, take only the top-selling products, and we lose the sales. The commission called the argument pretextual and stated that Toys "R" Us was being compensated for those services and therefore the fact that somebody else made the sale didn't matter. Essentially, the commission felt that Toys "R" Us could operate as an advertising agency for the warehouse clubs and as long as it got its advertising and display costs back that, it really shouldn't complain that it really wasn't a retailer for those items because somebody else was making the sale. So the free-rider argument was rejected as pretextual.

Now on the law. The commission, to protect its flanks I presume, decided the horizontal as well as the vertical—the horizontal both on a per se and a rule of reason analysis. The rule of reason analysis was really based on the Supreme Court's *Northwest Wholesalers* case, which essentially was a rule of reason decision even though it was a horizontal boycott claim. So the commission looked at it both ways. In support of its per se analysis it relied on Parke-Davis, which was a price-fixing case in which, if one member did fall out of line, the whole resale price maintenance scheme would flounder. We argued that this case is totally different; Toys "R" Us

went ahead despite some manufacturers not participating. *Interstate Circuit*, which I've already tried to distinguish and a Second Circuit case which was lost by one of us here, called *Ambuck*, which Professor Erita has derided as erroneous because the conspiracy found by the Second Circuit in that pre-Monsanto, pre-Matsushita decision was implausible. Those were the cases relied upon for the per se analysis.

On the rule of reason analysis the court analyzed, again as I said, the agreement using *Northwest Wholesale* and found that Toys "R" Us failed all of the factors. The intent was to disadvantage competitors; Toys "R" Us had market power with its 20% because it was very unique to suppliers, and the suppliers added up, who went along, the ten suppliers had 40% of the market. The commission didn't address the fact that only a small part of the 40% was being restrained. Based on that and the absence of any business justification, despite all of the business justification testimony by the manufacturers and Toys "R" Us's pretextual free-rider argument, resulted in a loss under the rule of reason for the horizontal as well. The order that was entered prohibits Toys "R" Us from refusing to buy from a supplier because that supplier is selling to any toy discounter, which is defined to include any retailer who sells at a discount, including Wal-Mart, Target and K-Mart who account for more of a market share than Toys "R" Us, actually double Toys "R" Us's market share. In addition, even if Toys "R" Us doesn't articulate the reason for five years, it can't refuse to buy a product because the manufacturer is selling it to one of these toy discounters, even if it doesn't articulate that that's a reason it's not buying. So it's sort of mind control. That part of the order has been stayed by the commission while the appeal is pending.

Well, that's *Toys "R" Us*. I'm sure that the panelists will have plenty of questions. Toys "R" Us is still litigating not only on the appeal, but 44 states led by the gentleman on my left and a state attorney general parens patriae case as well as some 35 private class actions on behalf of consumers, which also tells you something about what's happening in antitrust these days.

I am going to spend a minute only on the *Western New York Coupon* case. Maybe Steve will pick up on that. That is another "power buyer" case, and I'm not saying that Wegmans was power buyer, but it certainly was alleged in the complaint. This case involved ten grocery manufacturers and an important supermarket chain in western New York, Wegmans, which is in Rochester, Buffalo and Syracuse. It was resolved with a consent judgment earlier last year resolving a civil complaint alleging that Wegmans and the ten manufacturers agreed among themselves to eliminate or reduce the number of manufacturer's coupons that would be issued to consumers during a two-year period.

According to the complaint, manufacturer's coupons reduced the prices consumers pay for products, and absent the agreements consumers would have paid less. Also according to the complaint Wegmans "sought to induce" manufacturers to eliminate or reduce their couponing in this area, and at that particular time Wegmans had a reason for doing so, said the complaint, because it was doubling the value of the coupons, along with its competitors doing that. So therefore not only does the manufacturer pay the 25 cents but Wegmans would pay an additional 25 cents for a 25-cent coupon. So it would come out of Wegmans's pockets as well as the pockets of the competitors also doubling. So the purpose, according to the complaint of the restraint, was to reduce Wegmans's expenses in selling products by reducing its couponing monetary exposure.

Now, according to the complaint Wegmans engaged in a series of communications with the suppliers, "and on its own behalf and on behalf of such manufacturers sought their agreement to eliminate and reduce the number of coupons distributed into western New York." Retailer comes to you, again as I said earlier and says I don't like coupons, could you do away with them? No, I really can't, they are important. Well, your competitor is going to do away with them; I'm going to give him more shelf space and buy a lot more from him. Manufacturer says, well, if you put it that way I'll do it. Do we have a horizontal? It is a lot like the issue, same issue as in the Toys "R" Us case. When does a vertical become a horizontal? And of course, horizontals, a lot of plaintiffs still allege, are all subject to the per se rule.

Interesting questions about the case. I've already mentioned one. Was it going to be tried under the rule of reason? I think it was. Maybe Steve will tell us whether it was. It wasn't claimed to be a price-fixing agreement but an arrangement that eliminated a form of price competition. Wegmans determined its own resale prices. So how was the case a going to be tried? If it was going to be tried under the rule of reason, did Steve intend to prove Wegmans had market power? There's no identification of a product market or Wegmans market share anywhere in the complaint. So that's an interesting case too. But one thing for sure, this case, like *Toys "R" Us*, is intended to send a warning to large retailers not to exercise "undefined" market power against suppliers.

The final case that I am going to mention is *Mylan*. The interesting thing about the Mylan generic drug case that was just brought by the Federal Trade Commission and ten state attorneys general, including New York, on December 21st, is that the FTC instituted this suit directly in court under § 13(b) of the FTC act. Most of you in the audience have experience with 13(b) in merger cases where the FTC goes in for a preliminary injunction pending its administrative proceeding. That's what most of 13(b) talks about, but at the end there's a little proviso that says: Provided that in proper cases the commission can go into court and get a permanent injunction. The term injunction in that provision has been defined I

think almost entirely in consumer fraud cases as including other forms of ancillary relief. So the commission here went in to the district court in District of Columbia seeking a permanent injunction, no intention to have its own administrative hearing, and to also obtain disgorgement of all of the profits that were gained by the three defendants during the period that the alleged conspiracy took place.

What was the conspiracy, the alleged conspiracy? Mylan is a generic drug manufacturer, and it is alleged that it entered into three exclusive dealing arrangements—only two were challenged actually—involving two generic drug products and essentially tied up the only manufacturer of the ingredients for those two products for ten years. The commission stated that it would take "up to 18 months" for somebody else to enter that market, and therefore Mylan, by tying up the only then existent supplier of the necessary ingredient, was, according to the complaint, able to raise prices for the two items. There was a small price increase of somewhere between 3,000 and 4,000%. So the FTC challenged the agreements as a violation of Sherman 1 and also a violation of Sherman 2, monopolization and attempt to monopolize. And in addition, they added another interesting charge, should I call it a Crandall claim? It got its name from the famous case involving Bob Crandall of American Airlines who allegedly attempted to conspire with Braniff Airlines. It failed, but had it succeeded they would have been a joint monopoly, and according to the staff that's what was intended by Mylan when it attempted to tie up another supplier who wasn't then a supplier but could have entered the market rather soon to another exclusive in the event intended to enter the market. Actually according to the complaint, even if it didn't enter the market, Mylan was going to pay some royalties to that potential supplier. Now, the states in their suit claim an additional conspiracy between that other supplier and Mylan, claiming that the supplier signaled its intention to raise its prices anyhow if it came back into the market and then did that when it did come in.

The Mylan case also has been followed up with a series of treble damage actions on behalf of indirect customers. With all of those treble damage actions pending the question can be asked whether this is a proper case for disgorgement. In an FTC case will there be treble damages plus disgorgement. In addition, the only other case in which the commission has gone under 13(b) in an antitrust context involved horizontal price fixing and a statement by the judge that that was a proper case because there was no need for the commission to exercise its expertise. Horizontal price fixing, did you or did you not do it. This is a rule of reason case, and yet the commission has gone into court in the first instance.

MR. WEINSCHEL: I have a question while we are talking about *Toys "R" Us*. Let's flip it. Let's assume you're counseling Mattel, selling toys to retailers, and let's take Toys "R" Us out of the picture. There is no Toys "R" Us, but there are a whole bunch of small retailers out there, 20 of whom who happen to have 1% of the market each, so they have an aggregate 20%. Each complained to you that your sales to the clubs are hurting them, 20 of them, at separate times. There is no horizontality there. Is there anybody in the room who would think that under *Sharp,* Mattel couldn't independently decide not to sell to the clubs at that point? Anybody take a contrary view to that?

Now let's assume that the 20 each are all concerned about sales to the clubs and they complain not only to Mattel but to all the other major toy companies, and each of those toy companies decides that its distribution system of small retailers is important to it, and it doesn't want to kill it by selling to the category killer, to the clubs. They each decide not to do that. Individually they are each okay under *Sharp*, but do we now have a horizontal problem? Not unless they all communicate with each other somehow. So now let me change it again.

At least one of the retailers says to Mattel, "by the way, all of the other manufacturers that I've talked to have told me that there's a lot of merit to what I'm saying, and they are seriously considering taking that into account and not selling to the clubs." Is the result different?

MR. SCHER: Well, the commission says that takes you into *Interstate Circuit*, the last hypothetical. But I think that even under those facts *Interstate Circuit* is highly distinguishable because nobody raised independent business reasons for doing what they are doing, and we have parallel conduct, individual complaints, no direct communications among the manufacturers, I would say at worst it's still a vertical.

SPEAKER IN AUDIENCE: May I comment on it? I find it a little difficult to believe that they couldn't have been, given the situation, that they wouldn't have been communicating with each other. Because the manufacturers of these toy products are promoting them to consumers; consumers know they are out there. It's popular product; they are going to go into the store and look for it, and if the store doesn't have it, they are going to lose the sale. So the only reason the retailer is going to refuse to carry that product, that manufacturer's product line is if he knows that his competitors are also not carrying the product line. So there has to be something going on there, because they are giving up too much by not carrying the product.

MR. WEINSCHEL: Okay, doesn't that now make *Toys "R" Us* an easier case though? Because there was no need for horizontal conspiracy among 20 different retailers because it was Toys "R" Us all alone. So why couldn't Toys "R" Us communicate independently with each of the manufacturers saying this is not a good idea. I'm

promoting all year long, and I'm getting hurt by this, and only on the products you sell to the clubs. I'd just rather not handle it. That's really the essence of the case.

SPEAKER IN AUDIENCE: That's what confuses me about the case. I don't understand why isn't a § 2 case? Why isn't it an attempted monopolization case?

MR. SCHER: Toys "R" Us had 20% of the market; Wal-Mart had 14. Those market shares were shifting dramatically. Today Toys "R" Us has 17% of the market, and Wal-Mart has about 16.5, and it is anticipated that next year Wal-Mart will have a bigger market share than Toys "R" Us. Even with 20%, an 800 HHI and somebody out there who you didn't even direct the policy against, how can it be an attempt to monopolize. The commission did not allege attempt to monopolize in the case.

SPEAKER IN AUDIENCE: Remember § 5, though, not really § 2.

MR. SCHER: Bob Pitofsky brought a Sherman 1 case.

MR. WEINSCHEL: Let's go to Richard Steuer who I think has interesting things to say on subjects that are not quite the same as *Toys "R" Us*, if my memory serves me.

RICHARD M. STEUER, ESQ.: The interesting question on *Toys "R" Us* is whether the manufacturers would say, "I'm not going to do it unless I'm sure that the others are doing it, because I don't want to be the only one hanging out there." But we'll put that one to the end.

What is interesting about the cases that we are all going to be talking about this afternoon is how different they are from the textbook model of vertical restraints cases. If you tried to diagram each one of these cases, you would see that they are not only interesting but really rather unique and departures from the very simple model that we may all be used to in looking at or teaching vertical restraints. What they tell us is that you really need to take a holistic approach to analyzing cases of this type. Who is being helped by what allegedly is going on, who is being hurt, and specifically—to address the topic of today's program—who has market power and if it is being exercised, how is it being exercised?

I would like to start with the Discon case. For two successive terms now the Supreme Court has opened on the first Monday in October with an antitrust case. Two years ago it was *Khan*, and now out of the Second Circuit comes *Discon*, which seems appropriate coming from New York because we have "dat *Khan*" and *Discon*. This year we have *Discon*. Although I was not counsel in the case, I did file a brief on behalf of the City Bar Association in support of the petitioners.

This is a case where NYNEX clearly had power of some sort. NYNEX, now Bell-Atlantic, had the regulatory monopoly in New York to be the local phone company. One of the things that it needed to do in that capacity is make sure that it could throw out old telephone equipment, and in fact, there developed a cottage industry in what was called telephone equipment removal services, so that NYNEX would contract with people to remove old telephone equipment that it was replacing. That made NYNEX in effect a monopsonist, the only buyer of these services in this area, and it was dealing with a company called Discon. This was basically a supplier/customer relationship. AT&T, which had a subsidiary that could do the same thing—tearing out and throwing away and disposing of old telephone equipment—came along seeking to replace Discon. Allegedly, the deal that AT&T offered was that it would help NYNEX to escape regulation by giving it a kickback under the table that would not be reportable for purposes of the rate base and ratemaking, so that in effect NYNEX would come out ahead by dealing with AT&T, and not dealing with Discon. As it happened, NYNEX severed its relationship with *Discon* and switched its relationship to AT&T, and allegedly was able to then go on and obtain kickbacks.

Discon sued. Discon brought a RICO suit, sued under state law, and for good measure also added an antitrust claim. The district court rejected Discon's theories, and the Second Circuit on appeal also rejected Discon's theories, as they were argued, but it came up with a theory of its own. In an opinion written by Judge Newman, it formulated what it called the two-firm group boycott theory, which could result, depending on what would be shown, in per se illegality. To a lot of us it sounded a great deal like the old Cernuto case that came out of the Third Circuit, finding horizontal effects from what basically is a vertical arrangement. If you look at the facts of the Discon case, there was a buyer with market power and two suppliers, one replacing the other, one being terminated at the behest of the other, and the Second Circuit saying that conceivably this could result in a two-firm group boycott.

There never was an opportunity to argue these theories at the Second Circuit level, but they were brought into sharp relief before the Supreme Court. The question at the Supreme Court argument that was probably the most telling was that of Justice Souter, who asked whether the elimination of competition was necessary in order to make this regulatory evasion work. In other words, was it essential that competition be destroyed in order for NYNEX to reap the benefits that it allegedly was trying to reap here. The key legal principle that controlled in the end was something that came out of the *Sharp* case. In *Sharp*, where the court had addressed the *Cernuto* horizontality issue several years earlier, the court held that a vertical restraint is not per se illegal unless it includes some agreement on price or price levels. A restraint is horizontal not because it has horizontal effects but because it is the "product of a horizontal agreement"—in other words, an agreement between competitors at the same level. And this is where Justice Breyer focused in the *Discon* opinion, citing the old *Klor's*

case and saying that unless there is horizontality, there is not per se illegality. If one can fit within *Klor's*, then injury to a competitor may be implied because you are in the per se world. But short of that it is necessary to show injury to competition. In the *Discon* situation, competition really was not being hurt in the antitrust sense, the court found, because although NYNEX had a monopoly, that monopoly was not being intensified, furthered or maintained in the antitrust sense by entering into this arrangement. All that was happening was there was injury that resulted in the regulatory evasion. That was not something to be concerned with in the antitrust realm in terms of being either the acquisition or the maintenance of monopoly power. So, even though there was monopoly power present in the *Discon* case, that is not what made the difference. If there was illegality, it was not antitrust illegality. It was illegality stemming from the regulatory evasion, which would have to wait until another day to be decided.

It is possible in other contexts to have buyer power that does result in antitrust liability. I am thinking in particular in the vertical restraints realm of exclusive dealerships or exclusive representation. Many of us learned for a long time that exclusive dealerships are almost per se lawful, and most of the cases that were around, going back to the *Packard* case, involved appointing somebody as the exclusive distributor in a territory, with the courts almost uniformly finding that that was rather benign because the fact that there is only going to be one Chevrolet dealer in a town or one Packard dealer, as in the *Packard* case, really did not result in an unreasonable restraint on competition. There have been a couple of cases, more recently, showing that taken to an extreme, buyer power can result in an unreasonable restraint. Specifically, there was a case that resulted in a consent decree called *Topa*, where one buyer, which was a wholesaler, had the exclusive rights virtually to every brand of liquor in the U.S. Virgin Islands. This was a unique situation in that you had a closed geographic market and you had multiple exclusive distributorships, so that you had a situation in which one power buyer was able to amass total power over the market because it had exclusives from virtually all of the suppliers. Another case like this is a case called *Strobel*, where a court found that a small local market had only one seller of exercise equipment, and it had assembled the exclusive distributorships from virtually all of the suppliers of this kind of equipment. So you can posit a case where a power buyer, through vertical foreclosure, is able to amass enough power that it crosses the line of reasonableness and fosters an unreasonable restraint of trade.

Let me move on from *Discon* to address briefly the *Pepsico v. Coca-Cola* case that I am involved in directly. The case is at an early stage. There was a motion to dismiss on the legal theory that was denied by the district court, and that is what makes the case interesting for our purposes. The relevant market alleged there is the sale of fountain syrup or fountain-dispensed softdrinks—as opposed to softdrinks in bottles and cans—distributed through what are called food-service distributors. These are full-service distributors that arrive with one 40-foot trailer and deliver everything that a restaurant or other type of customer needs. The issue was whether sales of a product through a discrete channel like this can be considered a relevant market. Two cases that read on this rather compellingly were two recent merger cases. One was *Staples*, in which the court found there was a relevant market based on sales of office supplies through office superstores, and that is a case where evidence was presented showing purchasing patterns and the desires and preferences of purchasers. There was evidence that there was a discrete group of purchasers who preferred to buy through office superstores, resulting in demonstrable differences in the selling patterns. The court there found that sales of these supplies through these types of stores constituted a discrete market and therefore prevented the merger of two of the three major office superstores from being completed.

More recently, in D.C. in the *Cardinal Health* case, the market was sales of certain pharmaceutical products through certain types of distributors, and again the buying pattern showed that this was a discrete relevant market, and that even though there may have been other customers who could purchase through other channels of distribution, market power could be exercised within this relevant market. So too in New York in the *Pepsico v. Coca-Cola* case, the court held that it is appropriate to limit a market to a discrete channel of distribution so long as it is shown using established market definition criteria that enough customers do not view other methods of distribution as viable substitutes to the distribution method in question, and then went on to hold that the allegations in the complaint were adequate and allowed the case to proceed onto discovery, which is where it is now.

More recently, the Justice Department filed a complaint in a case called *Dentsply*, which alleges foreclosure of distribution for false teeth. Again, this is a case where a manufacturer with allegedly an 80% market share was foreclosing most of the available distribution channels, and allegedly unreasonably foreclosing competing manufacturers. What is interesting here is that, as in the *Pepsi* case, the complaint begins with a § 2 claim and there is a § 1 claim included as well. That case is at a very early stage, but it is essentially an exclusive dealing case.

I would also like briefly to address the *Intel* case, which is probably the case that I had the greatest trouble in diagramming. Intel, as you all know, is a major manufacturer of computer chips with a market share that has been declining but is well into the range that could be considered monopoly power. Allegedly, in its contracts with various customers who were in the business of making computer equipment, Intel demanded that the

customers license back their own technology that could implicate computer chips so that Intel would have access to all of that as well. If those customers or potential customers refused to let Intel share their technology, Intel refused to sell to them on an equal basis with other customers. Specifically, according to the allegation, Intel refused to supply technological information necessary to these customers on as timely a basis as it was supplying it to other customers unless they would capitulate and share their technology.

The tough part about this case is finding the exercise of market power. Intel is a seller, not a buyer. It allegedly has market power, and presumably that power is being exercised in the direction of these customers. But what is hard to map is who is being hurt. The customers are manufacturers of computer equipment and apparently the FTC's theory is that ultimately Intel is hurting competing manufacturers of computer chips either directly or indirectly in that, but for these threats and but for the licensing back, other manufacturers of computer chips might have a head start on Intel with some new innovations by taking licenses from the customers that Intel would not have. Intel, of course, makes the argument that if it is going to share its technology with these customers and be their supplier, then it is only fair that Intel have access to the technology as well. It is a very interesting, very complex case and raises many issues about intellectual property, and access to intellectual property as well as traditional antitrust. But again you have to keep your eye on the balance in looking at cases like this, and ask in which direction is the monopoly power being exercised, who is being helped and who is being hurt.

Let me touch very quickly on the broader question of where the law is today on vertical restraints. When we teach this on a more basic level we always go through all of the different "flavors" of vertical restraints—the customer restraints, territory restraints, resale price maintenance, exclusive dealing, tying and so forth. I want to mention that in some of the recent cases we now have three varieties of vertical restraints that we have not seen before. One of course is the non per se vertical price agreement, which comes in the wake of *Sharp*. *Sharp* has narrowed what the per se resale price maintenance category is, but there are other kinds of agreements that suppliers and customers can enter into that impact price. One of these, of course, is what we had in *Sharp* itself—an agreement to get rid of a discounter. There are also such arrangements as minimum advertised price programs, rebate holdbacks and so forth that impact price and where market power is important, but that are not per se. You can review *Discon* to find out what the test is. It is not enough to show that somebody is hurt; you have to show that competition is hurt. That means defining the market and finding out if market power is being unreasonably exercised.

Second of course, in the wake of *Khan* we now have maximum resale price maintenance, a separate vertical restraint from other resale price maintenance because it is no longer subject to the per se rule. Again, we need to search for market power and see if market power is being unreasonably exercised. The final one, which was invented in Washington, is the most favored nations clause, which, until some recent health care cases, most antitrust lawyers never realized was either a vertical restraint or unlawful. Yet there are instances where the imposition of a most favored nations clause has been attacked as a vertical agreement that can foreclose competition by making it uneconomic to give discounts to small new entrants. Here again, it is absolutely critical in order to make out a case of this kind to find market power that is being unreasonably exercised.

So that is where we are. Market power and monopoly power are becoming keys to looking at these nontraditional cases, and the message is that power corrupts, and monopoly power corrupts "monopoluply."

MR. WEINSCHEL: That remind me of the old ditty that monopolies are like little babies; you really don't like them until you have one of your own.

Dick, a question for you. You talked about Intel, and I've seen a speech by Bill Baer in which he explains quite candidly that he does not believe that the FTC has to prove anticompetitive effects in order to make out a § 2 case against Intel, because there are unfair effects on the customers, so that it is unfair for Intel to exercise its monopoly power in that way. Doesn't *Discon* cut the heart out of that? If you take *Discon* and line it up with Intel, why can't Intel decide who it wants to deal with for whatever reason, as long as it has no competitive effect?

MR. STEUER: I think that is probably right, and that is why I think that ultimately to succeed in this case it is going to be necessary for the FTC staff to prove a theory that the impact on the customers has a further impact on competing chip manufacturers, whether it is because those customers likely would become competing chip manufacturers themselves or would collaborate with competing chip manufacturers.

MR. WEINSCHEL: That is sort of a speculative way to find anticompetitive effects. The chairman never liked the OAG case and may be going at it in a different way.

I just want to add a footnote on Intel. I believe one of their motivations for not dealing with some of these people was that they were challenging Intel's intellectual property, and they said why should we disclose to a litigant against us advance information about our technology when they are behaving in an adversarial way to us. So there are lots of what appear to most people to be really legitimate business reasons for Intel refusing to deal with the customers who don't account for a hill of beans in either the computer market, the PC market and

certainly not in the microprocessor market. So I think the FTC has a very tough time in that case.

With that I'll turn it over to the other major government monopoly case and Steve Houck.

STEPHEN D. HOUCK, ESQ.: Thank you, Alan. I'm sure Bill Gates would be very sympathetic to the thought behind your ditty. But, as you might suspect, we of the New York State Attorney General's Office are not. In fact, it is a pleasure for me to be here today to talk about something other than Microsoft. Although as Alan has indicated I'm not going to escape entirely because he has asked me to address the subject of intent in that case.

Before I begin, I should say the usual disclaimer, which is that my remarks today do not necessarily reflect the policies or positions of Attorney General Spitzer or the New York State Attorney General's Office.

As Alan has indicated in his introduction, New York State has been very, very active in litigating in the vertical area as well as other areas. In fact all the cases I'm going to talk about today are cases in which New York State is involved as a participant.

First, a little bit of historical background about the states role in the vertical area. As most of you know, the states, particularly New York State, have played a prominent role in combatting vertical restraints, especially resale price maintenance. Considerable credit is due to one of my predecessors, Lloyd Constantine, who stepped into the void created by the diminished enforcement in that area during the Reagan years and during the ascendancy of the Chicago School theoreticians. In our materials for today that Alan prepared to get us ready for this occasion, he talked about the post-modern era, and I guess maybe we are beyond the Chicago School now in the post-modern era, at least according to Alan.

MR. WEINSCHEL: But I don't know what that means.

MR. HOUCK: Well, that is what we are trying to figure out I guess.

Over the years New York State has initiated numerous RPM cases that have eventuated in favorable settlements like *Minolta* and *Keds*. Although developments in the case law have made those kinds of cases more difficult to bring as an evidentiary matter, the states, and particularly New York State, have remained very active in that area and has focused continued attention on those kind of restraints. Indeed I think it is fair to say that even though federal enforcement has increased since the 1980s, the states remain the preeminent—and by that I mean the most active—law enforcement agencies in that particular area.

Before turning to the subject of power buyers and sellers, which is the main subject of our discussion here today, I want to talk about three of the more recent traditional types of cases in which New York State has been involved. The first is the *Reebok* case, which is a parens patriae action initiated by New York State on behalf of all 50 states and a number of territories like Puerto Rico and the Virgin Islands that led to a $9.5 million nationwide statement. *Reebok* is noteworthy here for several reasons. First, it evinces the states' continued interests and efforts in this area. Second, in its 1996 opinion the Second Circuit suggested that states parens patriae actions are a superior vehicle to rule 23 class actions for the vindication of consumer claims in this area. That is so I believe for several reasons. One is attorneys' fees are less of an issue in parens cases; class certification and notification are not necessary in parens cases, and cy pres distribution is permissible. The subject of today's second panel is the intersection between federal and state law enforcement agencies. I think an equally interesting subject in that connection would be the increasing interaction between state law enforcement agencies and private plaintiffs' class action lawyers in cases like *Reebok* and *Toys "R" Us* which Irv mentioned, raises many of the same issues and problems that we confront when we are working alongside our federal sisters and brethren.

The second case I wanted to mention briefly is a Farm Chemicals litigation which is the subject of an $11.2 million settlement between all 50 states and the pesticides manufacturers, American Cyanamid and Zeneca. At issue there was a margin maintenance scheme, the objective of which we charged was to restrain price discounting by the setting of wholesale prices so high the retailers could not earn a profit without receiving rebates awarded for sales made above the floor prices set and enforced by the manufacturers through audits. I think Farm Chemicals is indicative not only of the states continuing interest in RPM cases, but exemplifies some very creative lawyering. Because the victims of the alleged conspiracy were farmers who were injured in their capacity as businessmen rather than as "natural persons" under the parens patriae statute, the case was prosecuted as one for civil penalties rather than as a typical parens patriae action.

The third case I wanted to touch on is one that has been the subject of much commentary and was mentioned briefly I think by Richard, and that is *Khan*. As most of you know, New York State filed an amicus brief on behalf of 33 states in support of the respondent gas station owners, and in an unusual gesture, due I'm sure to the states' continued prominence in this area, the states were asked to participate in oral argument, which I can attest as an eyewitness in the front row, was very ably conducted by Pamela Jones-Harbour who is in the audience today. As many of you might not know the principal draftsman of the states' excellent brief, which I commend to your attention, was Bob Hubbard, our newly elected Section president. As you might surmise, Bob's ascendancy to this present lofty perch was not due

to the states' success in *Khan* but to his many other virtues and accomplishments.

Actually, the states were successful in *Khan* in what really mattered to them. To be sure, the states believed that the factual record adduced in the district court did not support overturning the long-established per se rule against vertical maximum price fixing, particularly because there was no showing in *Khan* that *Khan* had any market power at all, much less the power to set supra-competitive prices. The states viewed the maximum price fixing in *Khan* not as an effort by a supplier to prevent price gouging by a powerful retailer, but on the contrary, as an attempt by a supplier to maximize its share of the profits by pressuring a weak retailer. Nevertheless, I think it is fair to say that a very important motive behind the filing of the states' amicus brief was a desire to assure that the erosion of the per se rule, which seemed very likely, would be confined to vertical maximum price fixing only. Indeed, the states explicitly made that argument, and in fact the Supreme Court so confined its analysis.

I can assure you that the states remain as interested as ever in the vigorous prosecution of resale price maintenance cases in the appropriate factual situations. Indeed, New York State is actively participating in several multistate investigations in that area right now.

I turn now to the subject of the so-called power buyer. In her *Khan* opinion, Justice O'Connor stated, "We do not intend to suggest that dealers generally possess sufficient market power to exploit a monopoly situation. Such retail market power may in fact be uncommon."

In my experience at least, retail market power, although not present in *Khan* to be sure, is much more common than Justice O'Connor might have imagined. I think it is fair to say that in recent years this country has experienced considerable consolidation at the retail level of the economy and a concomitant augmentation in the power of certain retailers vis-a-vis their suppliers. One need only look at the increasing number of superstores or megastores or category killers, as they are called, in a variety of product lines from supermarkets to office supplies to toys, to records, to CDs. In other words, it is not uncommon today to see a reversal of the usual power relationship one has come to expect between buyers and sellers from the typical RPM case that has been prosecuted in the past.

One case I wanted to mention briefly—although it is a merger, not a vertical restraints case—is another one alluded to by Richard, and that is *Staples/Office Depot*. That is discussed more fully in Richard's handout, which I commend to you. It is a very useful compendium of some of the recent cases in this area. There a number of states submitted an amicus brief—as to which I should note Bob Hubbard along with Richard Schwartz of my office, again was a significant contributor and this time with a great deal more success. This amicus brief was submitted in support of the FTC's suit to enjoin the merger. Staples I think is notable because it represents a recognition by federal and state antitrust enforcers of the power that significant retailers have today in our economy to exploit a competitive imbalance to the detriment of the consumers.

One case I want to dwell on a with a little more detail is one discussed by Irv, and that is *In re Western New York Coupon Litigation*. I'm going to have to be very careful because I'm surrounded on both sides and in the audience by defense counsel. So I will tread gingerly.

This is a case that was commenced by my office, as Irv indicated, against ten very prominent, very large manufacturers of nationally known household products and a privately held supermarket chain named Wegmans in western New York. The gravamen of the complaint was that the defendants had entered into a hub and spoke conspiracy—of which Wegmans was the hub—to eliminate discount coupons published in Sunday newspapers summents.

Now Irv raised the question whether it was our intention, had his clients not caved, to prosecute this as a per se or as a rule of reason case. To my way of thinking, it is a per se case; it is a conspiracy case. The only difference between that and the traditional case is that the conspirators did not come together and meet in a room. But it was, according to our complaint, a conspiracy. There was an agreement, we had alleged, that was entered into as a result of communication back and forth through the hub among the various manufacturers. Alan posed several hypothetical questions. The problem with hypotheticals is that they eliminate the messy facts. What makes antitrust litigation interesting are the facts. I think there and in Toys "R" Us there were certainly evidence from which one could infer an agreement. I think you'll find it very rare that the communication is as sterile as some of these hypotheticals suggest. I think what you'll find happening is a power buyer, for example in *Coupons* or Toys "R" Us, communicating a desire to a manufacturer or a seller to do something, and the manufacturer or seller—none of these people are chopped liver, they are big companies—aren't necessarily going to roll over because what they are being asked to do is to change a practice they have engaged in and they want to continue. So what happens is the power buyer may get some resistance at the hub, and to further its objective of whatever it is—in Toys "R" Us for example, getting the manufacturers not to sell toys to discount outlets, or in *Coupons* getting all the manufacturers to agree not to issue coupons—they begin telling the other sellers, well, look, we have talked to seller X and this is what seller X is going to do, and if you guys don't do it, you are going to suffer the consequences. That is really what the litigation is about. You get into these factual situations, and it is never as cut or dry as a law school hypothetical, and

there is plenty of evidence, at least in our view, in both cases from which one could infer a conspiracy.

I think *Coupons* is also interesting because of the way in which it was settled. It was settled for $4.2 million, which was the largest cash recovery ever obtained by the New York State Attorney General in an antitrust action on behalf of consumers. In what I believe was a very unique and creative method for distributing the proceeds, the money was returned to consumers through generic coupons issued by the Attorney General and published in the Sunday newspapers, and they were good for the purchase of virtually any grocery product, not just the manufacturers' products who were defendants. So as a result of our distribution, what happened is that the proceeds have been returned to the victims, unlike in so many cases that involve coupon settlements, where the coupons are good only for purchase of the manufacturers' products, the beneficiaries too often are the defendant manufacturers or plaintiffs lawyers who are able to ascribe a large value to the settlement even though many of the coupons are not redeemed. I think one of the striking features of our redemption program in the *Coupons* case is that the coupons have been redeemed at a rate over 50% as compared to the usual rate of one or 2% which one finds for coupon inserts of this type in Sunday newspapers.

Perhaps the most striking aspect of the *Coupons* case, to me at least, was the enormous power wielded by Wegmans, which after all is a not insignificant player up in western New York but is a relatively small supermarket chain compared to the likes of the clients represented by Irv and Richard, which were very large, very prominent Fortune 500 companies that sell name brand merchandise throughout the country. The source of the supermarket chain's power in that situation, as far as I was able to discern, was the competitive imbalance in the marketplace. In other words, there was fairly significant competition at the manufacturer level between the ten manufacturers, but in many cases very little competition at the retail level. In other words, if you were a manufacturer and you wanted to sell your goods in western New York, really your only option in many cases was to sell through the supermarket chain which enjoyed very large market shares in certain major upstate cities. As a consequence of that, the manufacturers, even if they were not at first willing to go along with what was asked of them by the supermarket chain, were really loath to disregard the supermarket chain's wishes entirely, especially if they feared that a more compliant competitor of theirs would knuckle under and do what the supermarket chain wanted. Indeed if the case had gone to trial, there would have been evidence that communication was made back and forth about where the various defendants stood in terms of their willingness to go along with the desires of the supermarket chain there.

I think there were two factors, however, at work in that case that make it somewhat unique. The first was that in most cases the manufacturers dealt with the supermarket chain through a single sales representative whose sole function or responsibility pretty much was to deal with that supermarket chain since it was such a large player in the local market. And what happened was that the sales representative in a way became a captive of the supermarket chain. His or her success in the company really depended on satisfying the desires of the supermarket chain. In fact, the sales representative had one client, and that translated I think into a more powerful articulation of the position of the supermarket chain and the dire consequences that would ensue if the manufacturer did not go along with what it was that the supermarket chain wanted. I think the other perhaps unique factor at work there was one that Irv had alluded to a little bit, which was a confluence of the desire there among the supermarket chain and the most prominent manufacturer, which was Irv's client, to accomplish the same result, namely the elimination of coupons. The supermarket chain was interested in doing that because it cost them money to double and triple coupons and Irv's client, which was the largest defendant, had its own interest of long-standing in eliminating coupons. It believed that they were inefficient and wasteful and campaigned in a very public manner to do away with coupons. So it was not necessarily the usual circumstance where there is a power buyer and perhaps a number of resistant sellers. Here there was a seller that was very sympathetic to the desire of the supermarket chain and indeed was the most important manufacturer.

On the subject of power buyers, I also wanted to mention several other cases in which New York is playing a significant role. The first is another one Irv talked to—I think we are keeping Irv busy and probably ought to get a kickback or something from Weil, Gotshal—is the Toys "R" Us litigation in the Eastern District of New York. And this was brought by the New York on behalf of a large number of states against Toys "R" Us and several other manufacturers. At issue there is an analogous exercise of market power by a retailer back up the distribution chain, this time for the purpose of allegedly inducing its suppliers to disadvantage competing retailers by depriving them of hot selling toys. Toys "R" Us's ability to exert such power is perhaps less surprising than it was in the case of Wegmans because, after all, Toys "R" Us is a very prominent national player, and is far and away the largest customer of the various manufacturers who are defendants.

A very similar exercise in market power is the heart of the MDL contact lens litigation brought by New York State and other states, which is now in the discovery stage in federal court in Florida. And I have mentioned Bob several times and I will mention him one more time; he is the principal litigator for New York State on that

case. The scheme alleged there is a conspiracy orchestrated this time by a group of powerful buyers—ophthalmologists, optometrists, opticians through their trade associations and professional associations to restrict distribution by the defendant manufacturers of soft contact lenses to discount outlets. So in theory, it is very similar to the Toys "R" Us litigation.

Another case in which New York is prominently involved and which I will just mention briefly, as has been mentioned here before, is the Mylan case. And again this involves an alleged exercise of market power by a powerful buyer backwards up the distribution chain for the ultimate purpose of allowing it to raise prices by the modest 2,000 or 3,000% Irv alluded to do the detriment of consumers.

In short, the phenomenon of the power buyer or a collection of buyers, as in contact lens, is a very real one in today's marketplace and one which has drawn the increasing attention of attorneys general, among others. I believe this phenomenon can be explained by the old adage that power abhors a vacuum. Where a power imbalance exists in the distribution chain, the temptation exists for the company with the power—be it buyer or seller—to exploit it to increase prices in ways that well may be anticompetitive. The difference today is that the power is increasingly being wielded by large buyers against their suppliers. New York State and its sister states have been vigilant in cases like *Coupons, Toys "R" Us, Contact Lens and Mylan* to assure that this power is not unlawfully abused to harm consumers.

Before sitting down, as promised, I want to touch a little bit on the role of intent in the Microsoft case. Microsoft, of course in our view at least, as plaintiffs, enjoys vast market power on an order rarely seen in the annals of American industry. According to the trial testimony of the states' economist, Rick Warren-Boulton, and DOJ's economist, Frank Fisher, Microsoft, through its ubiquitous Windows products, has maintained an extraordinary market share of 90% or better for many years now with no end in sight. In short, Microsoft is the ultimate power seller. Microsoft down in Washington stands accused of taking improper advantage of this market power through a variety of anticompetitive actions which we contend were undertaken for the purpose and effect of maintaining and extending its monopoly. These acts include certain conduct in the context of Microsoft's vertical relations, which makes this a legitimate subject of the discussion today, such as entering into exclusionary contracts with its customers, primarily computer manufacturers or OEMs as we call them, to disadvantage the few rivals or potential rivals Microsoft has left.

As you surely know from newspaper accounts, discovery has turned up a plethora of e-mail which we have introduced into evidence at trial against Microsoft. While evidence of intent is perhaps neither determinative nor even essential in a § 2 case—as I argued to the court in my opening statement—it is extremely useful in understanding the complex events often at issue in antitrust cases, particularly in Microsoft in illuminating why Microsoft took certain actions and what Microsoft hoped to accomplish thereby. Indeed, I cited to the court Justice Brandeis's observation in *Board of Trade of City of Chicago v. United States*, which I think is equally apt today: "Knowledge of intent may help the court to interpret facts and predict consequences."

I don't think my view or Justice Brandeis's is out of the mainstream. Even Microsoft's economist, Dr. Richard Schmalensee of MIT conceded on cross-examination that evidence of intent is not only relevant but can be probative. Now I want to quote an exchange from his testimony at trial just last week on this point.

"Q. In attempting to determine whether a particular action is, in your terms, anticompetitive or not, what role, if any, does the intent of the company engaging in the action play?

"A. At most I think a secondary one for two reasons. First, what really does matters is the effect, the likely effect on consumers so that intent can't be the first question you ask. I don't hold the view that in theory evidence on intent is never relevant. Particularly clear evidence on intent may indeed help inform one about consequences that were reasonably anticipated. So I'm of the view that it can provide some information under some circumstances. I also—I think I have expressed this in writing on more than one occasion—I'm also sensitive to the difficulty of inferring intent from the kinds of evidence that's likely to be available. So it may help inform a judgment and likely effect.

"Q. Now if you have a situation in which the effect of an action is either known or held constant, will there be times in which your conclusion as to whether the action is competitive or anticompetitive depend on the intent with which it was entered into?

"A. Well, as a logical matter, from what I have just said, since I give it when it is clear-cut some weight, I can imagine a circumstance in which judgment might turn on that. I don't know that I have ever seen one, but I can imagine it.

"Q. Let me try to make sure I am being clear. I had understood you to say that if you had clear evidence on intent, that evidence might in an appropriate case inform your judgment as to what the probable effects of a particular action were. Did I understand that.

"A. Yeah."

Let me give you an example from the trial of how documents may be useful in assessing whether certain conduct is predatory or legitimately competitive. This very week one subject of the testimony by Paul Maritz, who is the most senior Microsoft executive who will tes-

tify at the trial, was an agreement between Microsoft and Apple that included a requirement compelling Apple to favor Microsoft's web browser over Netscape's in its MacIntosh line of computers. So again this is a vertical relationship; this is Microsoft selling something to Apple. Microsoft claimed that this provision was incidental; it was almost an afterthought and certainly not anticompetitive. However, several e-mail from Bill Gates himself suggested to the contrary that this provision about the web browser was a very important Microsoft goal, in fact, one of the two most important Microsoft goals in its relationship with Apple. The government believes that these e-mail of Mr. Gates are evidence of a series of predatory actions that were intended by Microsoft to squelch Netscape as an incipient platform threat to Microsoft's monopoly. To be sure, there is much additional evidence with respect to the Apple situation, including various memoranda in which Microsoft expressed an intention to use its Mac Office application suite which is really needed by Apple as a lever to extract this concession it wanted from Apple with regard to the web browsers, and similar documents suggest that Microsoft was even willing to pay Apple to take its products solely for the purpose of disadvantaging its rival Netscape. But the point is that evidence of intent, while in and of itself is certainly not sufficient, it is nevertheless highly useful in establishing what it is that is really going on in these cases.

Just a few brief observations about e-mail before I yield the podium. When I deposed Bill Gates last summer, I betrayed I guess my advanced age by describing the exhibits I handed to him as memoranda. And he would always invariably correct me and say, no, no, these are not memoranda; these are e-mail. And the implication clearly was it is just e-mail; it doesn't count, not important. It is not like a memorandum. In recounting this episode to the court in my opening statement, I told the court that, my view at least, e-mail in many respects was more probative than memoranda. After all, it is the unedited, unvarnished insight into the thought processes of the author, so that I urged the court to consider it even more strongly than memoranda in coming to a conclusion about what had happened in the case. In fact, I think Microsoft certainly, as Bill Lifland pointed out, raises many very important substantive issues of antitrust law that probably won't be resolved at the district court level or even at the Court of Appeals level. But, perhaps its most enduring legacy as a practical matter is the evidentiary use of e-mail, which is a somewhat ironic result given the fact that it is Microsoft software that has made the e-mail possible and is indeed the principal means of communication in so many of our corporations today.

MR. WEINSCHEL: Before everybody runs out and tells their clients to go get a magnet and find your e-mail disks, let me just add a footnote. Obviously, power buying has been a theme from all three speakers. There is another aspect of power buying that I just want to mention, and I am not even going to ask anybody to comment on it. But with the increase in power buying, we are going to see an increase in Robinson-Patman cases, whether we like it or not. It has already happened, and what I mean by Robinson-Patman cases are true Robinson-Patman cases and Sherman Act cases in the guise of Robinson-Patman cases. Remember my hypothetical of the 20 retailers? Suppose those 20 retailers had a trade association, and instead of complaining to the discounter about illegal sales they brought a Robinson-Patman case against all the major sellers alleging that they were illegally advantaging the power buyer. That has happened. It has happened in the pharmaceuticals case in Chicago (where there was recently a verdict for the defendants after the plaintiff's case). It has also happened in the bookseller cases. In the pharmaceuticals case the power buyers were managed care entities who have the ability to buy on formulary and decide what drugs to buy, and that gave them a different degree of buying power than individual drug stores, and the prices that they paid were different. There are hundreds of cases, if not thousands of cases all over the country brought by retail pharmacies and some consumer class actions all attacking what is essentially a price discrimination system. In the book selling cases it is attacks on pricing to Barnes & Noble and Borders and purchasers like that. So my prediction is we are going to see more Robinson-Patman cases, either in their own clothing or in Sherman Act clothing.

Now having said that, we do have some time for questions, and the floor is open. Yes, sir.

SPEAKER IN AUDIENCE: I want to revert to one of Irv's questions and address Mr. Houck. What was the relevant product market in the *Coupon* case?

MR. HOUCK: The allegation was that the objective of the conspiracy was to eliminate a form of price competition.

SPEAKER IN AUDIENCE: But the products were all of different lines.

MR. HOUCK: There were several product categories at issue.

SPEAKER IN AUDIENCE: Did you separate them out?

MR. HOUCK: I can't remember if we did in the complaint, but certainly if the litigation had proceeded, we would have. Household cleansers were one example of product; laundry detergents were another. We had ten defendants, and not all of them sold the same products. But typically in various product categories there were three or four major sellers. Irv's client was a very large company; it was the one company that had products in most categories. Others sold just in a few, so it did cover a variety of product categories.

MR. WEINSCHEL: Yes.

SPEAKER IN AUDIENCE: Have you taken a look to see whether or not the net prices paid by consumers in that part of the state have declined in those categories?

MR. HOUCK: That is a softball question for Irv. I'm going to turn it over to Irv.

MR. SCHER: We presented evidence during the settlement negotiations and before that that prices to consumers did not go up.

MR. HOUCK: We, needless to say, didn't necessarily agree with that.

MR. WEINSCHEL: Back there, please.

SPEAKER IN AUDIENCE: Mention was made earlier about the Intel license agreement where Intel required licensing back from its customers. I was wondering if there is any similar issues in the Microsoft case that Microsoft, if it attempts to dominate its licensees by similarly requiring acts from them or whether that is not at issue?

MR. HOUCK: Well, I think the principle difference as I understand Intel and Microsoft is that the predatory activity in Microsoft is really being ultimately directed against a company or companies it perceived to be its competitors for the purpose of preventing the competition from arising. I guess the difficulty I have always had with Intel is one Richard alluded to earlier. There is clearly alleged an exercise of monopoly power, but it isn't a hundred percent clear who the intended victim is really. I think that is the most significant difference between Microsoft and Intel, as I read the Intel complaint.

MR. STEUER: Yes, there was an investigation reported some years ago into Microsoft which allegedly was requiring nonassertion clauses from licensees. As far as I know that never went anywhere, and I don't believe it is part of this case.

MR. WEINSCHEL: Also the Intel licenses are nonexclusive. So at least analytically, you are disseminating technology to more players, and that is generally seen as procompetitive. So you've really got several levels removed with a nonexclusive grant back. If Intel had said to all of these people: I will only license to you my technology if I get an exclusive license back for your technology, I have a big problem with that.

SPEAKER IN AUDIENCE: Did Intel's license back run only to improvements made to technology licensed on Intel or all?

MR. WEINSCHEL: I can't answer that. Richard, can you answer that one?

MR. STEUER: I believe it is broader than that.

SPEAKER IN AUDIENCE: In some cases it was all.

MR. STEUER: Certainly broader than improvements.

MR. HOUCK: A noteworthy aspect of the exclusionary licenses of Microsoft is that many of the exclusionary provisions about which we complained were waived by Microsoft not surprisingly on the very eve of trial. So in some sense we are litigating about something that happened in history. But if we are not successful, Microsoft would be free to reinstate those clauses as it wished.

MR. WEINSCHEL: Yes.

SPEAKER IN AUDIENCE: In the coupon case, did the defendants argue that limiting the number of coupons would force direct price competition to the ultimate benefit of consumers and, if they did argue, how much weight was that given?

MR. SCHER: You can't tell how much weight anything was given. We did argue that very strongly, that limiting coupons and reducing the prices to the trade instead would actually filter out to the benefit of all consumers rather than just those who clipped coupons and redeemed them. And, you know, we settled.

MR. HOUCK: One of the problems with that argument—apart from whether it is factually true or not, about which I will not state an opinion—is that if the company making the argument really believed it to be true, it could have done that unilaterally, and it presumably would have benefited in the marketplace. The problem, as we saw it at least, was that nobody was willing to take that gamble unilaterally, and they wanted to have the assurance that nobody else was going to be issuing coupons, because coupons in fact did tend to increase sales.

MR. WEINSCHEL: Yes.

SPEAKER IN AUDIENCE: Just to follow up on the couponing. The announcements were made unilaterally, and it was your theory that the communication by the salesmen, by each separate salesman to Wegmans constituted the conspiracy. So this might be deemed the unconscious parallelism case, because they were all acting independently to say we don't want to do couponing.

MR. HOUCK: That was really the issue of the case, whether it was independent or not.

SPEAKER IN AUDIENCE: And there were still coupons being issued.

MR. HOUCK: For a time coupons were withdrawn from the marketplace by a number of defendants.

SPEAKER IN AUDIENCE: Only in certain aspects. All of them were still issuing coupons for new products and for certain purposes, but there was a reduction in the level of the coupon issuing.

MR. SCHER: Only some. Some reduced the level. Some eliminated entirely.

MR. HOUCK: And also, when we filed our complaint, news of our investigation was disseminated fairly early on into the working of this particular situation, and that I think impacted some decision making.

MR. STEUER: Steve acted very fast.

MR. WEINSCHEL: Any other questions?

MR. SCHER: Let me mention something on that, Alan. Keep in mind—and this is really something you have to take back to your own offices and your own counseling—what you are hearing in cases like *Toys "R" Us* and *Coupons* is, well, should I be counseling my client that when he sees a retailer who is "a power buyer" or a large retailer, and the retailer says you'd better do this, because if you don't I am going to shift my business to your competitor, because he is willing to do it, should we tell our clients to tell that retailer please don't tell me what my competitor is doing because if I do the same thing, it is going to be a horizontal, and Monsanto really doesn't apply to those kinds of communications between customer and supplier. That is really the heart.

MR. WEINSCHEL: Well, you can tell your client that, but there is no way that the clients won't want to know what is going on in the marketplace before they make their decision, which is the real danger here, because everything turns into a horizontal conspiracy in the end. So it is good for antitrust lawyers, I suppose.

SPEAKER IN AUDIENCE: Without changing the subject, we were talking about power buyers, and I wondered if anybody had any comments on how power buyers are affecting the law relating to mergers and joint ventures? There are a number of industries where power buyers are forcing suppliers to merge or consolidate in order to be a little stronger, to be more efficient, and where even though the market shares that result look large, because of the power buyer, there really isn't any real chance that they are going to be able to raise the prices.

MR. WEINSCHEL: I think it would be very hard to generalize an answer to that. I think that is very fact specific. There are cases that deal with power buyers and their impact on the exercise of seller market power, even where shares are high, particularly the D.C. Circuit case, *Baker Hughes*, where there were only a few sellers, but there were also only a few buyers. They bought on a bid basis; they only bought one a year. It was highly unlikely that you would collude in that kind of a market and that high concentration was going to lead to any kind of anticompetitive effects. There are other cases, and you can make that argument to the government, but you'd better have the facts to back you up. Because sometimes you make that argument and turns out one of the people complaining is one of those buyers. So it is fact specific.

MR. STEUER: The ultimate power buyer in the merger area is probably the Defense Department, so you can start there and work your way down. Certainly, the argument has been successful in a number of cases, that a larger merger of suppliers should be permissible if there is a lot of countervailing power on the buyer's side.

MR. WEINSCHEL: Any other questions? Anybody on the panel want a last word?

MR. SCHER: Can I say one more thing?

MR. WEINSCHEL: Go ahead.

MR. SCHER: I just wanted to say one more thing. Because I think what you are hearing from Steve and also from the FTC and Toys "R" Us is essentially a new definition of market power when you are dealing with a large buyer who has strong bargaining power, for reasons of being a better retailer or more efficient or providing more services. We're arguing, and we'll argue again in the Seventh Circuit, that market power requires the power to control prices or exclude competitors, and that is not happening with Toys "R" Us. What Toys "R" Us is doing is becoming essential to the supplier because of the efficiencies it creates out of the services it performs, and the Supreme Court in *Fortner II* said that is not market power unless your competitors couldn't possibly do the same thing. We will see what happens on that issue, focusing on buyers certainly in that case up at the Seventh Circuit.

Cooperation and Competition Among Antitrust Prosecutors: Recent Developments in Antitrust Federalism

MR. HUBBARD: Antitrust federalism has long been very near and dear to my heart, and when I had an opportunity to put together a panel for this program, it was the first topic that occurred to me. Having been a state assistant attorney general for over a decade now, the kind of federalism issues that arise have always interested me. When I first joined the AG's office, the only question that was posed when you were talking about a public enforcer was what was going to happen in Washington, D.C. There wasn't even a contemplation of what might happen in one of the state AG's offices. State antitrust enforcement developed from a vision to actually working out the ways to get together the evidence, to try the case, to assert the claim, to coordinate among the various state AG's offices, and others acting as plaintiffs. The change has been stunning. Not so long ago at the spring meeting of the Antitrust Section, they had speakers from the enforcement regime that included just the FTC and the DOJ, and not the states. There are so many things that you can point to.

I have always thought of federalism as a sort of upstart prosecutors, the states, taking on the monopolists in D.C.; they try to show them what can be done, what can't be done. They make sure that gaps are filled when they need to be filled, and that the people represented by the state attorneys general get protected. I was fortunate to get the panelists here to speak on this topic. It is particularly appropriate in my mind to speak on this topic at a program for a state antitrust section. The first speaker that we'll have today is Lloyd Constantine. Lloyd was already identified by Steve Houck as the impetus, in a singular tense even, of state attorneys general as realistic enforcers of the antitrust law. He served as the New York Bureau Chief in the Attorney General's Office. He started the momentum under the auspices of the National Association of Attorneys General. He had his fingers in many guidelines, in many amici, in many, many things over the years. His vision, particularly when you look back historically, is amazing considering where we were a decade ago and where we are now. Lloyd is a large part of that.

Another panelist we have here is Harry First. He is a professor of antitrust at NYU. He is published extensively. He has a case book, various antitrust publications. He has thought about these kinds of competition among enforcers, ideas from an international perspective. I am very pleased to have him with us.

The third panelist we have with us is Bill Rubenstein. He is a partner at Axinn, Veltrop & Harkrider. He has a long background in enforcement. He was with the FTC, but I know him and his principal background is as an assistant attorney general in Connecticut. In connection with that he worked on many multistate matters and was very helpful in moving us from the vision of an enforcement force to an actual litigating force.

With that I just want to give you a sense of how we are going to present this panel today. Lloyd, as the impetus for this, is going to act as our historian and try to set the context for how we got where we are today. Then we'll turn to Bill, who will have comments on where we are today, the kinds of details and specifics that arise with competition between state attorneys general and other enforcers. Then we'll turn to Harry First. He'll discuss how this extends to international ideas and the academic questions about the costs and benefits of having competition among enforcers. Finally, we'll give Lloyd another shot, and we'll have him talk about where he thinks we ought to go now, what can be done, where it can be improved, and how we can move forward.

With that I will turn it over to Lloyd.

LLOYD CONSTANTINE, ESQ.: I come into this discussion with three advantages or what some might call handicaps. One, I have a pretty good memory; two, that I have been a participant in most of the events that I will talk about, the federalism events, and three, for the last three months I have also served in the role as Chairman of the Transition Committee for the new Attorney General of New York. So I have gotten to think about these issues a lot in the last three months: What the Attorney General of New York should be doing in the antitrust area; what should be the role of the state attorneys general of the United States, what should be the role of the federal government, and how does this whole thing work. So I have been thinking about this a lot for the last few months.

This is what I intend to do with the time allotted. I am going to briefly chart the history of antitrust federalism up to 1991 or 1992. At that point Bill will pick it up. Later on I will discuss what happened to the states when the federal government reemerged with the Clinton administration antitrust enforcers, what happened to the states at that point in time, why it happened, what is wrong or right with what happened, and what should happen, and what is likely to happen in the future. First, how we got here.

This is now a certified CLE program, so we are all scholars here. For those of you who are seriously inter-

ested in the topic, I will immodestly recommend three articles which I have written on this topic in the past. You can find them at 56 Antitrust Law Journal 99, which is a 1987 publication and that one reads sort of like a war correspondence report, because that came—for those of you with memory of these things—that came at the height of the federal-state wars. I see a number of the members of my army during that period of time out in the audience, as well as some of my opponents. The second one is an article called *Antitrust Federalism*, which is found at 29 Washburn Law Journal 1990 at 163, and in fact the entire volume of 29 Washburn Law Journal is devoted to antitrust federalism. So it is a series of excellent articles by people as diverse as Frank Easterbrook and Mike Scherer and people like that all talking about this issue. It is a wonderful volume. And the third one is an article called *The Mission and Agenda for State Antitrust Enforcement*, which you can find at 36 Antitrust Bulletin 835. The federalism piece in particular focuses on the constitutional dimensions of these issues.

Now briefly, although antitrust can trace its roots to England—and when I taught antitrust I always used to go back to those quaint old English cases— in fact, antitrust is quintessentially an American idea, and I think it is the best expression of American populism. Prior to 1890 virtually all U.S. antitrust came from the states and in particular came from state attorneys general. They were enforcing common law antitrust principles. Some of this is summarized, and I think as Harry First notes, in his outline; some of this is later on summarized, by Judge Taft when he was a circuit court judge in the *Addyston Pipe* case. He sort of summarized it. I say sort of because in fact it wasn't really a summary, but it was a reworking and his own spin on things. And that fact is noted by Judge Bork in the *Rothery* decision. But there is a nice concise revisionist history of state antitrust to be found someplace in the *Addyston Pipe* case, along with its other wisdom.

Now, a number of states—I think it was thirteen—passed antitrust statutes before the Sherman Act in 1890. The first of those was Kansas on March 2nd of 1889, and in the audience is Yanq Chen, the author of an article on that very event. Texas was also one of the first states to pass a statute also in March of 1889. After that virtually every other state, with the exception of Pennsylvania, passed an antitrust statute. And I believe that sometime in the 1990s Pennsylvania finally got around to passing an antitrust statute as well.

In the early days the states were very, very aggressive in the enforcement of these statutes; I think somewhat more aggressive than the federal government. They were very big picture cases, like the *Ohio AG v. Standard Oil*, but due to what are now obsolete notions of the state's inability to challenge private conduct in interstate commerce—which would not be good law now but was good law then—many of these efforts were unsuccessful. Standard Oil simply went across the border and reincorporated in other states.

After some of those early failures, because of jurisdiction or standing issues, the states pretty much receded for many, many, decades. There were some exceptions. One of the important exceptions, which is not much talked about, is the fact that the ultimate way that oil companies and refinery companies competed in the United States was probably more shaped by the actions of the Texas Attorney General than it was by the Standard Oil case. In the period around 1900 to 1910 three successive state AGs in Texas engaged in a series of antitrust actions which ultimately led to Texaco, Gulf Oil, Sun Oil and the American operations of Shell all remaining separate from each other and from Standard Oil, which had sought to gobble them up. A very, very important series of cases. To a large extent it was motivated by a kind of Texas xenophobia, but nevertheless important. All of this came on the heels of the huge discovery of oil at Spindletop near Beaumont, Texas. With some exceptions, the states really did recede after the turn of the century. Didn't do very much. Pretty much handled small cases, local cases, cases which were in intrastate commerce and let the feds do the big work. That continued until the '70s. In the '70s a couple of things happened. The Hart-Scott-Rodino Act was passed, and part of the Hart-Scott-Rodino Act was the so-called "parens patriae" reforms. Parens patriae made the attorney general in every state in the country a precertified class representative for every natural person-consumer in his or her state. That emanated, to some degree, from dissatisfaction with the way that the class action bar was handling plaintiff's antitrust cases, so they put the state AG in a superior capacity in those cases. At the very same time they gave the states some money to tool up their offices under the Organized Crime Control Act. So virtually every state in the country increased the size of its antitrust staff; some of the states that didn't have any antitrust staffs got antitrust staffs. That was supposed to herald a new age of antitrust in the states; it was supposed to be a renaissance. But it didn't really happen, and the reason it didn't happen is because one year after the money was given and the parens patriae reforms were passed the *Illinois Brick* decision came down. And in the very cases where you would expect a state AG to go into court and seek treble damages on behalf of millions of consumers in the state, the Illinois Brick rule stood as a difficult impediment to the realization of that goal. All of the wars over specific state Illinois Brick repealers were still some years away.

Then the most important thing happened, which was the federal election in which Ronald Reagan became President. And when President Reagan came in and Bill Baxter was appointed the head of the Antitrust Division and Miller the head of the FTC, the federal government basically pulled out of antitrust enforcement in the Unit-

ed States. Now there used to be a debate about this, but now virtually no sane person would really quibble with my characterization. But just so that we can relive some old history, I should probably go through the highlights of those events.

Baxter started what was called (and I realize that I am speaking about a recently deceased colleague; he was a friend of mine, but this is just history) an amicus intervention program where the federal government intervened on the side of price fixers to argue they should get more lenient treatment, ultimately leading to a funding restriction by the federal government on that activity. To circumvent the funding restriction, the Antitrust Division came out with its so-called vertical restraint guidelines in January of 1985, which were roundly condemned by Congress. For more than ten years the federal government did not bring a single case in the vertical area, price, nonprice, tying or anything. For more than ten years the federal government did not bring a single case; neither the FTC nor the Department of Justice brought a single case in the area of § 2, a monopolization case or attempt or conspiracy case. With one exception, the American Airlines case, which was in fact a solicitation to collude case, which was dressed up as a § 2 case, and I think in fact an excellent case and very inventive use of the power by Bill Baxter. But with that exception there were no § 2 cases for more than a decade.

Merger enforcement in the United States—I owe the quantification to Bob Pitofsky who quantified the activity in the merger area as being roughly one fourth to one sixteenth of what it had been under previous administrations. And probably most importantly, the administration went to Congress and tried to finally bury the antitrust laws. In 1986 they offered a package of legislation which included repeal of treble damages, repeal of joint and several liability, repeal of § 7 of the Clayton Act and exemptions for any industries that were distressed by virtue of foreign competition. Now that may sound to you like these were all sort of quixotic attempts, but at the time they were thought to have a good chance of passing, and they thought they would pass them. For example, the joint and several liability bill had the benefit of a road show that was put on by Griffin Bell and Ira Millstein who ran around the country saying this would be good for the country. Remember, in 1986 the Republicans then, as now, had a majority of the Senate; the antitrust subcommittee had been disbanded, and all the hearings were held in the full judiciary committee. I recall that at virtually every one of those hearings I was the only government witness to testify against that wonderful package of bills. I remember Eleanor Fox coming down to testify against them as well, but it was a pretty lonely period of time during those days. We felt that all or most of that stuff would pass, but none of it did pass, in large measure due to Senator Metzenbaum's ability to manipulate the Parliamentary Rules.

There were other things in this war as well. The FTC tried to keep information away from the states, two big cases in those days, *FTC v. Lieberman* and *FTC v. Maddox*, which involved the attorneys general of Connecticut and Texas. It was a war. It was really a war. It was a lot of fun, but it was a war. What was the states' response? Well, in March of 1985, around the time that I became the head of the Antitrust Task Force of the National Association of Attorneys General, I held a meeting in Denver, Colorado, and we decided that we would form what was de facto a third antitrust enforcement agency. But we decided it wouldn't be a good idea to substitute a balkanized 50-state enforcement for a lack of enforcement at the federal level, so we decided to get our act together and agree on some things. So in December of 1985 we published Vertical Restraints Guidelines of which I was the principal author. In December of 1986 we published a Model Antitrust Act, and in fact three or four of those provisions ultimately passed, including a provision giving the federal government treble damage authority. We thought if the federal government got treble damage authority, they might start acting like they were lawyers instead of two-headed economists.

In March of 1987 we published Horizontal Merger Guidelines, of which I was the principal author, and in March of 1988 we established the Premerger Disclosure Compact. All of these have been revised, and on some of the revisions I think Bill Rubinstein was a major contributing author. But in any event, we put together all of these methodologies, and all of these methodologies and policy statements were agreed to by between 48 and 50 states. In some cases there were one or two dissenters. Then with the agreed-to methodology in place we brought a series of cases. National price fixing case against Minolta I think involving 37 states, the national price fixing case against Panasonic involving 49 states. Hawaii was part of a different region of the world according to Panasonic. Mitsubishi, all 50 states; all of those being price fixing cases, vertical price fixing cases. There were a series of cases involving mergers involving the department stores, Federated, Macy's, Campeau. There was case involving 15 states against Visa and Master Card. There was a case involving 30 some states against Sandoz Pharmaceutical, which Bob Hubbard was heavily involved in. There was a case involving 19 or 20 states (one state, Texas, was on its own in a separate case); 19 states v. Hartford Fire Insurance, Aetna, CIGNA, Allstate, all of the syndicates of Lloyds of London, and all of the big foreign re-insurers and retrocessional re-insurers, which ultimately went to the Supreme Court in '92 or 93. It was originally filed out in northern California before our good friend Bill Shwarzer. And then the American Stores case and Arc America case which were important both as multistate efforts but because they both went to the Supreme Court and both resulted in unanimous Supreme Court decisions and one confirming that states could adopt separate, different, stronger, antitrust

enforcement remedies. And in this particular case a remedy which would avoid the rigors of Illinois Brick, and in American Stores the Supreme Court confirmed that state attorneys general had the right to obtain divestiture in Clayton § 7 actions. In that particular case the California AG secured the divestiture of a couple of hundred supermarkets after the FTC had whitewashed an investigation of the same merger and had taken some kind of a token divestiture.

All of that I think constituted the establishment of a de facto third national enforcement agency but one with criminal powers, and one with two different kinds of parens patriae powers, both common law parens patriae and statutory parens patriae. What happened then? Well, the feds responded; they capitulated. They actually gave up. They started doing things that at first they hated doing. The FTC brought a vertical price-fixing case, in a very important industry involving pool robots, against the Kreepy Krawly Company. The FTC also, after the states had sued Sandoz Pharmaceutical, brought a tying case—perish the thought—they brought a tying case against Sandoz, which was pretty much a cut and paste of the states' case. And I guess one of the greatest moments for me was when Jim Rill, the new head of the Antitrust Division, asked to meet with me in Asheville, North Carolina. We had an investigation of the cable industry which became the K-Prime investigation, which became the Prime Star investigation. He said "We want in. We need time. We want to catch up." "Hold back for a while, and within six months we will catch up with you and we will do a coordinated investigation." In 1988, at a speech that I did with Rill and Janet Steiger at Harvard, I proposed to end the hostilities and start something called the Executive Working Group for Antitrust. That proposal was accepted, and the Executive Working Group for Antitrust was established in 1989, and is still operating.

And that is when Bill takes over.

WILLIAM M. RUBENSTEIN, ESQ.: I guess what we are doing is stage setting for what the real discussion is and set some context here. There is no doubt that antitrust enforcement by state attorneys is really an increasingly important part of the antitrust enforcement landscape. States have clearly both widened and lengthened the path that Lloyd and his brethren blazed and that he so graciously told you about.

Today's reality is that state attorneys general and federal enforcers really have to be treated with equal regard, and deservedly so. These are hard-fought battles and lots of scars and lots of animosity along the way. So over the past two decades state attorneys general have been able to increase their own enforcement efforts; they have broadened the scope of their efforts; they fully coordinated their efforts among themselves and with federal enforcement authorities. So today we have really a high degree of coordination and communication among the states as well as coordination and communication between the states and the federal government. That is all to the good, but it is not the end of the story or probably the goal. Because really, despite this coordination and communication that everybody is going to talk about at length, there remain significant areas of enforcement philosophy and strategy that differ significantly between state attorneys general and the federal authorities.

If we just look back over the past year or two, we are going to see instances of antitrust enforcement just by the states operating on their own on a coordinated basis. We are going to see instances of states and federal authorities operating together on a coordinated basis. We are going to see actions by individual states without coordination with other states or the federal enforcers. And most importantly, and it has to be really underscored, there are instances of significant divergence between state and federal enforcers where even in the past year or two they end up on the opposite sides of the same case. That presents a lot of risk for the kind of discussion that we are going to have today. This combination of possibilities with the various ways in which the enforcement authorities act really increases the complexity of antitrust planning. So it is not just a policy decision, but for us counseling-type lawyers, it really adds to the work that we have to do. There is no doubt that both federal and state antitrust enforcement policy has to be considered in structuring any transaction today.

What I want to do is maybe add a little flesh onto the bones of the beginning of coordination among the states that Lloyd laid out. I think it is important to fit some of that together to see where we are today. Lloyd well capsulized the events of the 1980s and what reawakened state antitrust enforcement and the confluence of events that did that. The NAAG multistate task force that was set up really was the springboard, the vehicle for the states to share enforcement objectives, to develop enforcement policies, jointly investigate and prosecute. Lloyd told you about the insurance antitrust litigation which really was a significant event. He talked about a lot of the resale price maintenance cases which ultimately were joint investigations but ended up in early on consent resolutions, even before the case got started. The insurance antitrust litigation was really the first multistate antitrust case that started out as a hard-fought piece of litigation. In fact, it fought its way all the way up to the United States Supreme Court and back with the states holding together as a fairly coherent litigating group. While that case is still one of the leading cases with regard to jurisdiction over foreign entities—amazing a state case having implications for extraterritorial jurisdiction—what its significance for today's discussion of that case is that the states proved they found an effective way of expanding their limited resources to deal with national and even international conduct; that is a way to collaborate and coordinate on a multistate basis that worked.

The task force though does more than coordinate, as Lloyd said, investigations. What it does is facilitate a consistent enforcement policy among the states, which Lloyd referred to. What the danger of Balkanization would be if we ceded federal antitrust authority to 50 different state regimes, is an issue worth talking about today. But the NAAG task force was at least able to facilitate a consistent enforcement policy and the guidelines that emanated from it in the two critical areas, vertical restraints and mergers and acquisitions, really proved the point.

The vertical restraints guidelines are in your materials, and I commend them to you, both the vertical restraint guidelines and merger guidelines. What those guidelines do is set forth enforcement policies and goals of states attorneys general, and I must say that particularly relevant to today's discussion is they generally take a more expansive enforcement view than is put forth through DOJ or FTC enforcement guidelines. DOJ did issue their vertical enforcement guidelines in response to the states' activity in that area. They have since withdrawn those guidelines but still have consistently taken a narrow view of vertical restraint enforcement. States obviously have been vigorous enforcers, returning millions of dollars to consumers over the past ten or fifteen years as a result of that. But I must say, just in the past month or so, the federal authorities have again moved back with a vengeance into the vertical restraint area. The FTC with its Mylan case, which is a vertical restraint case, exclusive dealing case, filed that action. States also have filed an action together with the FTC, and for our purposes today that case is an interesting lesson because it is a case where the FTC is seeking monetary relief. In some sense, states could be sitting back thinking here is the federal government, Johnny-come-lately in the vertical restraints area, poaching on what the states do best, which is get money. Not that states don't serve other valid enforcement purposes, but of all the enforcers that is a role that has been uniquely placed in the hands of state government. The FTC now could be seen as poaching in that area. DOJ is no exception to kind of rush back to the vertical restraint area. Just this month they have also filed an exclusive dealing case in the Dentsply case, so what we say is the states coordinated enforcement policy dragging the federal government back again into areas that they have long not looked at.

The merger guidelines, the NAAG merger guidelines—issued originally by Lloyd and his crew back in 1987—were revised in 1993. The 1993 revisions really went a long way to harmonizing the states' analytical framework with the federal government's analytical framework. But make no mistake, even with that harmonization there are significant policy distinctions between the states' merger guidelines and the federal merger guidelines. Examples are the extent to which states are willing or unwilling to recognize the efficiencies of a transaction as counteracting anticompetitive potentials. States are more explicit and vigorous in their assertion about special scrutiny for mergers involving leading firms and market innovators. So these policy distinctions are real, palpable and they remain.

I want to bring us up to date a little bit on what these coordinated efforts between states are. Just as coordination among the states enhanced enforcement efforts and brought a stronger sense of enforcement and competition with the federal agencies, there is a concomitant coordination that has been building and building between state authorities and the feds. Lloyd alluded to the Executive Working Group; for those of you who aren't familiar with that group, it is made up of a NAAG representative, the Chairman of the FTC and the Assistant Attorney General in charge of DOJ's Antitrust Division. It is a very high level working group, and it creates a face-to-face informal mechanism to discuss some of these antitrust federalism issues and coordination and communication issues. It is a very important piece of the puzzle because it propelled forward cooperation and coordination between states and the federal government. In 1992, as a result of the Executive Working Group and NAAG task force, both the FTC and DOJ adopted formal protocols which would allow states and the federal authorities to share information regarding merger investigations. Lloyd referred you to *FTC v. Maddox* and *FTC v. Lieberman* where the states and feds were exactly on the opposite side of the fence; that is the states were being denied access to confidential information regarding merger investigations. So we came a long way from 1987 or the late 1980s to 1992. The premerger disclosure compact, which is also in your materials, was designed by NAAG to help facilitate that exchange of information.

Now, why is all this significant now, here it is six or seven years later? What happened is that because of these early protocols there was a sharing of information between state and federal authorities. That sharing of information really turned quickly into sharing of ideas and enforcement philosophy, and there was a dialogue that began—a constructive dialogue—between federal and state enforcers. And this dialogue was not about creating competing abstract guidelines about policy, but rather these discussions took place in the context of applying policy to real cases. Both enforcers, state and federal, were looking at a set of facts, a common set of facts, and discussing what the application of policy ought to be to those facts. There was a cross-pollination of ideas; information sharing turned quickly into joint investigation; joint investigation turned fairly quickly into joint prosecution between the federal and state authorities. Some would say that was a good thing, and some today will say it is a bad thing. Some will say what it effected was not a rich diversity of view to a common good but a co-option of each's view to a lesser result. That remains to be discussed. But there was a formaliza-

tion of this move from sharing of information to actually sharing of application.

Just this past year, last spring, DOJ and NAAG and FTC announced a protocol for coordination of merger investigations; that protocol is also in your materials, and I commend it to you. This protocol is an agreement that governs the confidentiality, investigatory materials, joint strategic planning with regard to legal and economic theories; it governs coordinating the request for review of documentary materials, that is coordinated discovery, the development of witnesses, the coordination of experts between the federal and state authorities, and significantly, collaboration and settlement negotiations. So what we see is the federal authorities and the state authorities are really merging enforcement mechanisms, when they can, into a single entity. What that means is there has been a record number of joint investigations; the trend for that is sharply upwards.

The close coordination between state attorneys general and federal agencies does not, however, mean that what we have arrived at is a uniformity of ultimate enforcement actions. Recent history has produced really mixed results in this regard. The states and federal authorities do investigate, they litigate, they resolve many matters together, but disagreements and serious disagreements remain. At times state and federal agencies take different enforcement views and state attorneys general may decide action is warranted while the federal agencies don't, or vice versa. Although we can chalk some of that to efficient allocation of resources between sovereigns, which is appropriate, it does sometimes reflect serious differences in enforcement policy. Also there may be agreement that enforcement is warranted but disagreement over the remedy, and states and federal authorities can take widely divergent views about what the appropriate remedy in an enforcement action is. And I want to repeat that it happened in recent history, and I will give some recent examples where state attorneys general and federal agencies ended up on opposite sides of the same matter.

On the merger front, state attorneys general have been more active than ever before, and the joint activity that they undertake with the federal government has ended up with joint resolutions, and the number of those transactions are pretty legion. Examples in the recent year or two are the Cineplex-Odeon-Sony Corp. acquisition in the movie theatre industry, jointly resolved by the state authorities and federal government in a single consent decree; the Shell-Texaco joint venture, which principally involved gasoline refining distribution on the west coast, resolved jointly by the states and the FTC. First Union Corp. states bank merger; Pennsylvania and DOJ jointly resolved those issues. U.S.A. Waste Services-Waste Management transaction, 14 states joined with the DOJ to resolve those issues. So state agencies and federal enforcement authorities have a lot of congruent ideas. In fact, the states take on other roles in reinforcing federal enforcement policy. States actively file amicus briefs in support of federal actions that they believe are appropriate. The most recent example is the states filed an amicus brief in support of the FTC's challenge to the wholesale drug mergers, Cardinal Health, Brunswick and McKesson-Americorp, 33 states supported the FTC in that action; preliminary injunction issued. So there is close coordination, but states and federal authorities do march to a different drummer in merger investigations and how they deal with mergers as well. In the Tasco-76 Products Transaction the federal authorities opted not to challenge; Washington state took the opposite view and sought divestiture. What is interesting for today's purpose I think is that Washington state did something different in that case than the feds would have done. The federal government normally, if they have a problem with the transaction, insists on the problem being remedied before they can allow the transaction to go forward. Washington state allowed the transaction to go forward while it continued to negotiate with the parties after the transaction and ended up with the divestiture consent order after the fact. That is a huge difference between Washington state's enforcement policy and what the federal authorities' enforcement policy would be.

Another recent disagreement between the states and the feds on a merger matter occurred right here in New York and is probably near and dear to a lot of you, the *North Shore Health Systems-Long Island Jewish Medical Center* case. The then Attorney General believed the anticompetitive concerns of the merger could be alleviated by an agreement regulating the conduct of the merged entity, most principally some limited pricing restrictions. DOJ thought the merger ought to be banned outright. The Attorney General of New York entered into an agreement which imposed this pricing regulatory regime on the hospitals, and DOJ filed suit. DOJ ultimately lost the preliminary injunction action and therefore lost its challenge to that transaction. The Attorney General's agreement remains in effect. We can debate who had the better view and probably will, but it is a fact that only one got their remedy in that case.

Beyond merger enforcement, the state attorneys general remain vigorous enforcers in a whole wide range of areas, and here too, in some instances, the states have proceeded collectively with other states, they have proceeded together with the feds, they have gone their own separate ways. You know a lot about these cases. Forty-four states, the District of Columbia and Puerto Rico filed a joint complaint against Toys "R" Us. The FTC had already acted against Toys "R" Us. The 23-state complaint against manufacturers of contact lenses continues to be litigated by those states vigorously down in Florida. But probably the most significant case filed recently where states and federal agencies joined together is the Microsoft case, which is in trial now; Steve Houck from

the New York Attorney General's Office is an active participant there. It is a significant case for our purposes, aside from the substantive issues that are represented there. It is important because it is really the first case that represents the full melding of state and federal antitrust enforcement; that is the states and federal government are actually litigating a case in trial together, side by side. Whatever the result of the case, there will be a strengthening in coordination and communication between them no doubt. Although for our purposes today there is another interesting development in that case, and that is that the state of South Carolina, which had joined their sister states in filing the action, withdrew from the action articulating an enforcement policy split with their sister states; and so that is out there to talk about as well. There are philosophical differences on the antitrust issues between the states and feds, as I have said. Those were highlighted I think most clearly in *State Oil v. Khan*. Thirty-three states filed an amicus brief in state court arguing for the retention of the per se rule against the setting of maximum resale prices. And I want to acknowledge today New York State's leadership role in the creation of that brief. I know Bob Hubbard will probably not tell you, but he was really heavy on the laboring oar with regard to that brief. DOJ and FTC of course filed an amicus on the other side. And the dueling briefs really clashed over the economic consequences of tolerating maximum resale price agreements and the enforcement difficulties engendered by loosening per se rules. While the Supreme Court ultimately rejected the states' amicus position, it is really significant. This case articulated a pretty clear doctrinal split of enforcement philosophy between state and federal enforcement authorities. And the other important aspect for purpose of our discussion is that the case—contrary to dire predictions at the time the states filed the amicus—actually elevated the stature of the states in the antitrust enforcement debate. It did that because the states articulated a very cogent position in the face of a very serious opposition, and the Supreme Court granted the states the ability to argue in that case as amicus. Now that is fairly standard fare for the federal authorities, for the Supreme Court to want to hear the federal antitrust enforcement views, but the Supreme Court wanted to hear the states' enforcement views based on the strength of the positions taken in the brief. I might also take this opportunity to mention that that position was ably presented at oral argument to the Supreme Court by Pamela Jones-Harbour, who happens to be here today, and it is a significant piece of state antitrust enforcement history that should not go unnoticed.

The states continue to pursue opportunities to provide their own antitrust views wherever they can, not just those that are congruent with federal authorities. The states file amicus briefs in private antitrust actions. Last year they filed one in the Eighth Circuit, *Midwestern Machine v. Northwest Airlines*; 25 states filed comments before the United States Department of Transportation urging adoption of enforcement policy guidelines regarding exclusionary conduct in the airline industries. The states are out there vigorously asserting their own enforcement views with increasing regularity, increasing vigor and increasing acceptance. The states, of course, are out there individually prosecuting antitrust cases. The State of New York sues ten major grocery manufacturers for limiting the availability of coupons; it sues two hospitals up in Poughkeepsie, New York, on a price-fixing theory. States continue to do their normal garden variety of bid-rigging cases in all sorts of product areas. So that aspect of state enforcement remains intact.

So what we clearly see is there has been a steady increase in state antitrust enforcement since the '80s, culminating now in this ubiquitous involvement of state attorneys general in all facets of antitrust enforcement. They have arrived; they are no longer the stepchildren of antitrust authorities. They have their own stature, which is important. They are full, independent antitrust enforcers, and they have been accepted as such by courts and administrative agencies and the feds as well. What all this means of course is that it is more important than ever to consider the enforcement philosophies of states in structuring transactions and understanding the doctrinal differences between state philosophy and federal philosophy, and it is a complex task.

Now of course, this all begs the question, the question of whether there needs to be a restructuring of antitrust enforcement authority to create more certainty and more transparency for businesses looking to plan their business lives. That is if there is a plethora of antitrust enforcement philosophy out there, how do we decide what the most prudent course is for those clients of ours who are tremendously risk averse and still get our business done? The question I guess is must we establish clear rules about which enforcer has primary policy and enforcement authority, and if that is desirable, is there a workable way to do that? I am hoping to hear Professor First's exposition on those kinds of issues.

PROFESSOR HARRY FIRST: That was a great segue, as if I had an answer. But I don't. What I have are some questions and some observations.

The first question that I would like to put out is to think about what the model of antitrust enforcement might be. Now in antitrust we have two basic models: there are cartels and there are competitive markets. Do we think of antitrust enforcement as a policy cartel in which various players divvy up the market? I heard Bill talk about poaching on our territory, that the feds were somehow extending in and poaching, bringing vertical cases perhaps. Well, there are some good reasons for dividing responsibility, but calling it a "cartel" reminds us that dividing the territory is not always optimal. The

other model is a competitive market where everyone goes out and competes vigorously, reaching out for all sorts of cases.

I would like to suggest, as you step back from this, that what we may see happening—and why I say we are going to a more complex world—is what people sometimes refer to as a paradigm shift. We are now, I think, moving into "networks" of antitrust enforcement authorities that will simultaneously—just as we see with business firms—simultaneously compete and cooperate. This doesn't say when you should do either, but almost without regard to hierarchical jurisdictional levels, with the states and the federal government in a sense participating as equals. What I also want to throw into this mix is the international field, because international antitrust enforcement is also a major overlay on this and will affect federal enforcement, and will inevitably affect state enforcement as well. This network comes from an increase in formal and informal connections among all sorts of enforcement agencies. So in addition to the formal provisions which we now see being adopted—and which Bill has mentioned are in your materials—on the state level, the states have a lot of informal contacts with federal enforcement officials, and we see the same thing on the international level as well.

Stepping all the way back, as we think about conflict, the idea that conflict is something unusual is clearly wrong. There has never been a single antitrust law, and there has always been conflict between various antitrust laws in the United States and various antitrust enforcement agencies. We should keep in mind that we have a problem both of substantive law and of enforcement institutions, and either or both can be in conflict. There is the federal and state conflict, which we've been talking about, which again can go institutionally as well as in terms of substantive law. On the federal level, of course, there have always been conflicts. There are potential conflicts between the Department of Justice and the Federal Trade Commission; there are conflicts among federal agencies; there are substantive conflicts between antitrust law and other statutory regimes. Of course, again, as you go out towards the international, there is conflict between U.S. law and non-U.S. law, U.S. institutional enforcement and non-U.S. institutional enforcement. Then, throw into the mix private enforcement, which can conflict with everybody and everything. We also have another sort of conflict, which is somewhat new for antitrust on the federal level, which is intercircuit conflict because we have a lot more cases being brought to courts of appeals.

There are, as with everything, costs and benefits to this sort of competition. And we shouldn't, in the euphoria of state activity, forget that there are some costs, and I think Bill did mention some of them. There is a lack of uniformity in rules which can exist, leading to planning difficulties for business firms and possibly inconsistent public policy effects. Some might call a federal remedy in a particular use a "whitewash," or it could be viewed as the right remedy, and the states' remedy could be viewed as the wrong one, but somehow one they got away with. There is also the potential for forum shopping, which all lawyers love to do, both in terms of substantive rules and in terms of taking advantage of the way different agencies operate, different timetables for operation, different kinds of relief that they might accept, different institutional competency. So with the increase in this networking, there is a chance for those kinds of forum shopping.

Of course, we do have benefits from competition, and a major benefit which I think comes through—and Lloyd in a sense really began it and said it without saying it directly—is that you get the chance to correct bad non-antitrust or bad non-enforcement, a chance to correct weak or politically motivated failures to bring cases. If you are a member of the ABA Antitrust Section and you get the journal called Antitrust, which I hope you all do, there will be an interview in the next issue with Kevin O'Connor who heads NAAG's antitrust efforts. As he puts it: state enforcement provides the opportunity to avoid the false negative. It gives the states the chance to correct the mistake of not bringing a case by the federal agencies. And of course, you can have competition in public policy approaches. The Supreme Court argument in the *Khan* case may be a great example of that, where the states and the federal government took different positions. This was an effort through litigation to develop the best rule, although we could argue whether that was the result in *Khan*. Finally, the competition on an institutional level can lead to procedural innovations where various agencies may come up with better ways of handling issues, whether it is guidelines or simply ways of engaging in investigations.

Lloyd described quite well the federal-state conflicts and the early history and not-so-early history of the development of state antitrust enforcement. I would urge you to reread Addyston Pipe. What I think is most interesting, however we want to look at Taft's casting of the rule of reason, is the way he looked at antitrust decisions across jurisdictions, not hierarchically; if one was more important than another, it was purely in terms of the power of the reasoning, and he looked at cases on both sides of the issue. It was not just state decisions that he looked at. He looked at decisions from England, from Canada, from Australia, from Wisconsin, as if they were all the same. A very interesting common law approach, and in some sense it may be the approach that we are starting to return to in looking for correct antitrust principles, sometimes without regard to the exact language of statutes, and certainly crosscutting jurisdictions.

One of the interesting things I noticed in the two other presentations, that I don't think the other speakers pointed out, was the lack of mention of state antitrust

law. All the discussion was of the states enforcing somebody else's antitrust law, which is federal antitrust law. As we are thinking about the costs and benefits of having multiple voices, of course there can be substantive conflicts not just between state enforcement approaches to federal law, and federal enforcement but between state law and federal law, and there are a couple of examples in the outline I gave you. One example is the predatory pricing case that was brought in Arkansas against Wal-Mart for loss-leader pricing which the Chancery Court in Arkansas said was predatory, and the Arkansas Supreme Court said it really wasn't, under the Unfair Practices Act. There is of course the possibility of a conflict, which the Supreme Court has allowed, between Illinois Brick and state indirect purchaser statutes. There is a lot of concern also about state law and its view towards termination of distributors, with the chance that litigants may be able to obtain substantial recoveries for termination in distribution cases that under commonly accepted views of distribution restraints in antitrust would be not a problem.

Another aspect is remedies. Having this multiplicity of enforcers allows choice of a state enforcement agency that might accept what we could perhaps charitably call novel remedies that federal enforcers might not think are adequate but that the states accept, and there have been some interesting ones, perhaps good or not. Maybe these are the procedural innovations that competition will bring us. But in the health care area in particular, states have allowed certain mergers to go forward with some sort of price protection or give-backs promised by those who go through the merger—remedies I don't think the federal enforcers would much favor.

In thinking about the history of the rise of state antitrust enforcement and what might have led to it—and maybe we will be able to think a little bit about this in our discussion part—there is a question about the politics of antitrust and the extent to which they may play out differently on the state level. It always struck me as interesting—and perhaps Lloyd could talk about this since he gets to have the last word.

MR. CONSTANTINE: Not really the last word.

PROFESSOR FIRST: Not really the last word, but the last word after me—a question why during the period of the Reagan administration, during a period of a laissez-faire economic policy of allowing businesses to do a lot more, allegedly at the heart of Republican policy, why Republican attorneys general were very interested in asserting antitrust enforcement. It is a very curious political mix, and quite clearly the attorneys general who were involved in making NAAG work were both Democrats and Republicans. So you get perhaps an interesting divergence in political views, maybe another example of competition. The politics on the federal and state level, as on federal and international level, may, of course, end up playing out a little differently. We could test that as well in the Microsoft litigation, which at the moment we see as a paean of cooperation, but the politics of bringing the Microsoft case on the state and federal level seem to be quite different. Because, for all we can tell or at least if we credit what we read there was very little political—or none says Joel Klein—input into the federal government's decision to bring the Microsoft case. But I suspect a little more on the state level, such as the Texas Attorney General meeting with representatives of the computer industry, such as Dell (which we now find gets better prices from Microsoft than other OEMs do), and that affected his decision I think; and whether the states themselves, by pressing the case, ended up having more effect on the political decision to bring the case and on national policy. So I will give Lloyd another thing perhaps to talk about.

Putting the state-federal conflicts to the side and moving away from them for a little perspective on the federal conflicts and on other conflicts in enforcement, again thinking about how these have been handled over time, and that this is not particularly a new issue. Of course, we have the FTC and Department of Justice conflicts, at times today leading to some, perhaps, division of markets you could say in merger enforcement where there is cooperation and a sharing of cases, some monopolization of enforcement, criminal enforcement is only from Department of Justice, and Robinson-Patman Act—used to be from the FTC; and some joint venturing we can see in the issuing of guidelines by both agencies, part of this interweaving of enforcement efforts since 1992 with the issuance of the merger guidelines by the FTC and the Justice Department health policy statements, intellectual property guidelines and international enforcement guidelines. So all of these are more joint venturing.

As we're thinking about conflicts, we should just keep in mind there are plenty of conflicts between federal antitrust enforcement and antitrust enforcement by agencies other than either the FTC or the Antitrust Division; bank mergers through the banking agencies; the Department of Transportation with authority to prevent unfair methods of competition in the airline industry, making a foray into considerations of predatory pricing, which may be a little different from how the Justice Department views things; railroad mergers subject to the Surface Transportation Board; telecommunications of course very much worked on by the Federal Communications Commission. So once again, if there were ever a thought of a unitary view of what antitrust is, or even of antitrust law, it is not the case even on the federal level.

I would like to conclude by moving up the ladder to the international level, which I think will present in the future much more of a challenge both to federal enforcers and eventually as well to state enforcement, perhaps in ways that neither the federal government or state governments much like. As we know, antitrust has been one

of our great exports. At the moment there are a lot more antitrust laws in the world than there used to be. By the end of 1996 we had 70 countries with some form of competition law, and about 60% of those laws have been passed in the 1990s, which is a very interesting notion about the growth of antitrust. Major laws, of course, include Japan, which passed the Antimonopoly Act in 1947. (And for those of you who chuckle, they are investigating Microsoft as well.) Germany has a law against restraints on competition passed in 1957. And probably the most important non-U.S. antitrust law is the Treaty of Rome which in 1957 established the common market and created the first European enforcement agency. It is that agency in particular whose powers have grown and expanded in the 1980s and now in the 1990s to be a major competitive force for the United States, expanded in terms of its willingness to reach out and assert jurisdiction. That began in 1988 in what is known as the Wood Pulp case where the Europeans asserted jurisdiction over a U.S. Webb-Pomerene Association which had immunity under U.S. antitrust law. And of course there is the EC merger regulation, adopted in 1989, which is becoming quite important for mergers that are transnational.

Now as the Europeans have moved to engage in more vigorous antitrust enforcement, and other countries have as well, mechanisms similar to what have been described on the state level in fact are moving on the international level. So we have in 1994 the International Antitrust Enforcement Assistance Act, which tries to work on ways for U.S. and non-U.S. enforcement agencies to cooperate and assist each other, and it has led to agreements with a number of countries, Australia the first one in 1997, Canada and Germany, and of course the U.S.-EC Cooperation Agreement signed in 1998. That agreement has a formal mechanism for what is called positive comity which allows one agency to request that another agency with the most interest in a particular case go first and investigate. Perhaps something like that might be a useful division of markets or labor, however you want to look at it, on a federal-state level as well. I am not sure. But this is being used. The Department of Justice has made requests, and the first formal one was in 1997, involving an investigation of the European computer reservation system for airline reservations known as Amadeus for perhaps excluding Sabre, a replay of our own U.S. problems but on the international level. But still, the major problem at this point remains conflicts over mergers, and we now have emerging, in a sense, three players: the states, the federal government, and the ECO. We've had references to merger cases where the Department of Justice and the states have disagreed but there are important examples of merger cases where the federal U.S. enforcement agencies and the Europeans have disagreed. The most prominent one was the Boeing-McDonnell Douglas merger, which led to a threat, by the president, of a trade war. In any event, although mergers have been a major problem, other areas have gone quite well. One in particular—because it resonates on the federal-state case now going on—was the case against Microsoft which ended in a decree in 1995 on the U.S. level, and that was going on simultaneously in the U.S. and the EC as well, because there was a complaint filed by Novell in 1993. Eventually all the agencies came to the same decree and the same resolution. They cooperated; Microsoft allowed access to documents by all the agencies, and they worked through some of the practical problems and came to a resolution. This is in some contrast to the old IBM case in which, after Bill Baxter threw the U.S. case out, he then had to fly to Europe to plead with the Europeans that they should do the same. They didn't quite, however.

To conclude my remarks in terms of where things are going, as we see these efforts, this networking of antitrust enforcement institutions, there is at the same time a movement to create some sort of international antitrust enforcement authority. People who have worked in the states may think they've never been paid any attention. Just wait until there is an international authority; they will never pay any attention to you guys. Well, we don't know, but they probably won't even pay any attention to Germany. This is something that may be happening slowly, but it is something that all antitrust lawyers should watch. This is an old effort which began in 1948 with a failed effort, the Havana Charter, to create some sort of international antitrust enforcement authority. But after the Uruguay round in 1994 the Europeans began picking up this idea more and more, perhaps because they were tired of being overshadowed by the U.S. and they would like to control antitrust around the world. So through the World Trade Organization, which has a task force on competition and trade policy, there are now ongoing efforts to discuss some sort of international antitrust code perhaps with some sort of international antitrust authority. I mention in my outline that the WTO working group was supposed to issue a report in November—it is now not November, and they issued it in December actually—saying basically we need more time, we'll study some more, but we are not going away either. If you want to read that report, it is on the WTO website, and it is an interesting window into the steady, persistent movement into some kind of international antitrust law, which again will set up conflicts and perhaps another enforcement agency and move us into an even more difficult, but from my point of view, even more interesting period to be involved with antitrust.

So on that note I hand it back to Lloyd.

MR. CONSTANTINE: I will try to get through this part quickly so that you can ask some questions. Two prefatory points. One thing I do recall when we were putting together this agency of the states, we decided we ought to have a training film, because we didn't trust any of the existing products out in the marketplace. They

all had a Chicago virus in them. We chose two professors to put together the training film, and Harry was one and Harvey Goldschmidt was the other, now the general counsel of the SEC. I recall that was one of the things I thought we should do. The other thing I would like to say is that I was afforded a great degree of latitude when I was the head of the New York office and also when I was head of the NAAG task force, which I don't think is necessarily typical. And some of the things that I am about to say, some criticism—explicit or implicit—may be implied of people who replaced me. That is not the case. I think if there is any explicit or implicit criticism it is of people at the Attorney General level, namely Oliver Koppel and Dennis Vacco.

So what happened? Well, I think to a certain extent what we built in the '80s continued to some degree, but I think to some degree the states receded a bit and receded to a subsidiary role. Certainly not as marginal as the role that they had played prior to the '80s, but not as much as it should have been. I don't think that the progress continued at the pace it should have continued. I would like to illustrate this with five examples, all in the realm of antitrust federalism, all in some way involving this federal-state relationship, this continually evolving federal-state relationship. The five examples I have chosen are the coordinated investigation by New York and the DOJ of the Bell Atlantic-NYNEX merger, the somewhat coordinated investigation which has been referred to by DOJ and New York of the North Shore-Long Island Jewish merger; the fate of the DOJ and the states decrees in the Prime Star inquiries, the fate of the states decree in the Visa/Master Card case of the late '80s and early '90s, and of course *Microsoft*.

First, Bell Atlantic-NYNEX. As you recall, there was a somewhat coordinated investigation by New York and the DOJ, which ultimately led to the blessing of that transaction by both the DOJ and the New York Attorney General and the Federal Communications Commission. I think that was probably the low point of antitrust enforcement in this decade—we still have a year to go—but I think that was the low point. Highlights of that low point were—kind of a highlight of a low point—highlights were Dennis Vacco's pledge to Joel Klein that he would definitely challenge the merger with or without Klein, and Klein's pledge to Vacco that he would definitely challenge the merger with or without Vacco. And of course neither of them did. And then Klein and Reed Hundt stabbing each other in the back and blaming each other for the failure to challenge the merger and for the results of that merger. And the results of that were a spate of mergers, what I had sometimes referred to as "serial mergers" and diminished trust between state enforcers and federal enforcers and diminished trust between some federal enforcers and other federal enforcers, and a serious deferral—if not the elimination—of the benefits that were supposed to be achieved by the Telecommunications Act of 1996.

North Shore-LIJ. In that one—there has also been some reference to that—and again, there was a coordinated investigation and there was going to be a coordinated litigation there. But at the eleventh hour—and this was literally the eleventh hour—Attorney General Vacco pulled out of a joint suit, and he actually filed an affidavit which undercut the feds' challenge to that merger and contributed to the feds losing that case. Now there has been some reference to a consent decree which the state took in that case and a quasi regulatory decree, but I think it will probably come to light in the months to come that the supposed benefits of that decree were actually never realized and never will be realized. That further hurt the relationship between state and federal enforcers for obvious reasons. The Prime Star decrees, which I think were in 1993, resulted from investigation that the states began in 1988, and there are two problems with what ultimately happened there. One was the problem with the decrees *themselves* and also what was done with the decrees.

The Prime Star inquiry was an inquiry into what had originally been called K-Prime, which was a DBS which, as you probably know, was sold to Direct TV last week. By the time I left New York in 1991 it was obvious to the people investigating that Prime Star was the cable industry's attempt to preempt the nascent DBS market, and it should never have been allowed to go forward. But it was allowed to go forward, and I think the reason that it was allowed to go forward was because of what I previously cited. The states slowed up their investigation, they waited for the federal government to join in the investigation, and the federal government eventually convinced the states not to stop Prime Star but instead to allow Prime Star to go forward under a consent decree. Now that consent decree did very little in addition to what the 1992 Telecommunications Act had done, and there were some additional window dressing provisions in there and some notice provisions. By 1997 Prime Star had proposed to acquire A Sky B which was the the owner of only one of three full Conis DBS satellite slots which could service the entire continental United States, and owned by the most feared rival of the cable industry, Rupert Murdoch. Now, while the federal government quickly jumped into that foray and ultimately challenged the transaction, the states never called, and I know this because I was representing A Sky B. The states never called, not a letter, not a subpoena, no interest whatsoever, and despite the fact that this was going right into the teeth of a decree. Not that it violated the decree, but it certainly should have been an area of interest. And to me it was a token of the diminished interest in general of a group of 50 states that had signed onto a decree. I don't know whether it was 50 or 45, but it was something more than 40. Ultimately the feds did challenge the transaction;

the result of that transaction is now that there are two DBS services in the United States instead of three. Good competitive result.

The Visa/Master Card decree, which was a 1990 decree which resulted from a 1989 action taken by fifteen states against Visa and Master Card. The decree focused on the debit card industry. The states focused on the debit card industry as being the future of payment systems in the United States, the cashless society, and the states viewed the debit card market as being the one which would have ultimately involved most of the retail transactions in the United States. That prophecy has started to come to pass. They sued over a joint venture called Entree, which was a joint venture between Visa and Master Card. As a result of the lawsuit Visa and Master Card abandoned their joint venture, they abandoned Entree and entered into a consent decree with these fifteen states. Now, by 1997 there were new important developments in both the credit card market and the debit card markets, and the Justice Department began an inquiry; the FTC began an inquiry. The Justice Department ultimately brought suit in October of 1998. The FTC ultimately issued compulsory process sometime in the summer of 1998, and the states did nothing. Absolutely nothing. And the consent decree which they had with Visa and Master Card was allowed to sunset in June of 1997 without any fanfare. The consent decree gave them a hook to get back in, but nothing happened. And now the work that was formerly being done by these states is being done I think on a much less-competent basis by the FTC and by the Justice Department.

Finally, *Microsoft*. In *Microsoft*, the states got involved seven, eight, nine years after the original FTC investigation of Microsoft. I think under those circumstances it was impossible for the states to have an equal role with the federal government. The only significant and useful role that the states could and did play was to play a game of chicken—and this is something that Harry referred to—to play a game of chicken, which forced the Department of Justice's hand. In truth, the current case (and I think it is far superior to the somewhat trivial case which the feds anticipated in 1997) has become a much more important case; it has become a bigger case, and I think, to a certain extent, that is the result of the states getting into that game of chicken with the federal government. But having played that game of chicken, the states filed a broader case with the so-called "Office Suites" claims—which it ultimately withdrew—and it also filed an additional antitrust claim, a monopoly leveraging claim, which I think we all recognize, or the antitrust people out there recognize, was dead on arrival because it was filed in the D.C. Circuit. It might have been viable—might have been—in the Second Circuit or Sixth Circuit, but it was dead on arrival in the D.C. Circuit, but that reality had to give way to the interests of federalism and a co-prosecution. Then there was one other aspect to this federalism issue when South Carolina pulled out of the case, causing a major embarrassment in the case, after a new Attorney General was elected in South Carolina. Microsoft—perhaps confusing New York with South Carolina or maybe confusing Eliot Spitzer with the Attorney General of South Carolina—hired a group of attorneys to hunt down anybody who knew Eliot Spitzer, including me, and tried to get Eliot to do the exact same thing, which obviously was not successful.

Now I think in four of these five cases a superior competitive outcome would likely have been achieved had the states functioned more as a unified national agency and more in the mode that they had operated in the late '80s and the early '90s, an agency separate from the federal government, not the handmaiden to the federal government, not doing these joint and coordinated investigations, but as a separate functioning third antitrust agency. In *Microsoft* I think it is less clear that the states, given their late start, should or could have played any significant role.

Now why did all of this happen? Why this change or this slackening of the pace? Well, one of the reasons I think is that in 1992 there were 22 new attorneys general elected in the United States, and I think between '92 and now there has been a complete turnover from the group of AGs who were in place in the late '80s and early '90s. In 1993 the feds came back and began to vigorously enforce antitrust law again, and, I think very importantly, two of the AGs who changed were the AGs in New York and in California. In New York, Bob Abrams was replaced for a time by Oliver Koppell and ultimately by Dennis Vacco, and in California, John Van de Camp was replaced by Dan Lundgren. And the significance of that may not be obvious to you, but it is obvious to me. The States usually follow a leader who leads by example. You have to have a significant staff of your own to be able to say: This is an important case, I will place attorneys on this case, I will put money into this case. It is very, very difficult to do that when neither the State of California nor the State of New York has at the top—meaning at the Attorney General level— a progressive person who believes in antitrust enforcement. That clearly was not the case under Dan Lundgren, and it was clearly not the case under Oliver Koppell and not the case under Dennis Vacco.

So what should happen? Well, my two cents is that the states should get back to where they were in the late '80s and the early '90s. I think they should operate as as a separate national agency. I think they should find ways to cooperate with the federal government, but they should have their own separate enforcement priorities, their own separate agenda. Why is that? Now the feds have come back, is everything okay, is everything taken care of? Well, the fact of the matter is, if you take the three agencies—all of the States as one agency, the FTC

as a second and the DOJ as a third—there are far fewer attorneys and other professionals in those three agencies today, in 1999, than there were in those agencies in 1980. The economy is several times as large. The number of merger filings alone is exponentially greater. Merger enforcement now is something like a negative lottery; try anything and maybe—maybe— somebody will challenge you. We all know that, because that is the way we counsel. So it is no more the case that the states have to be there to fill the void that federal lack of enforcement has created. It is now the case that you simply need more cops on the beat to begin to try to deal with the massive number of anticompetitive situations out there, both merger and nonmerger. Everybody understands that merger enforcement alone chokes the FTC, and the resources available to nonmerger enforcement are relatively small. So that is the reason for the states to get back to more of a primary role. There is another reason. This has happened once. What happened in the '80s, the attempt to destroy antitrust happened, and it came painfully close to occurring. It can happen again on either level, and that is what federalism is all about. Federalism involves a set of vertical checks and balances which were designed by the framers of the Constitution to deal with these issues, and that is perhaps the most important reason why the states should continue and reaffirm their path as a third, separate, competent national antitrust agency. That is my two cents.

MR. HUBBARD: Do we have any questions from the audience?

SPEAKER IN AUDIENCE: This question is for Mr. Constantine. Isn't there a danger though when you have a third enforcement agency that is not subject to political checks and balances—I mean you gave a couple of examples. But in a case like *TWA v. Maddox*, the state attorney generals through NAAG got together and enforced a system that in effect prohibited price advertising among airlines. If a trade association had done that, they would have been paying treble damages. So there is a danger here that where you have an agency which, for various reasons, decides they don't like price advertising by airlines.

MR. CONSTANTINE: Actually, there are two questions there. In terms of the political accountability, obviously the political accountability of the state AG is much greater than the political accountability of Joel Klein or Bill Baxter or Anne Bingaman or Jim Rill; they have no political accountability. It is very clear to me that Ronald Reagan had absolutely no idea what Miller was doing or Dan Oliver was doing or Baxter was doing or Rick Rule was doing.

PROFESSOR FIRST: Or Oliver North was doing.

MR. CONSTANTINE: I mean we know something about Bill Clinton's ideas on antitrust. He did teach antitrust; he did file some cases. He did file a silly brief in a case called *Worthen Bank*, a Kansas bank case. We know something about Clinton's position. All we know about Reagan's position is when he had a radio show he railed on how important the enforcement of RPM rules were, rules against RPM. There was no political accountability. Dennis Vacco is politically accountable; Eliot Spitzer is politically accountable; Dan Lundgren was; the people that I have mentioned, Bill's old boss, Blumenthal, those people are all politically accountable.

Now on the airline case, I remember that real well. It wasn't an antitrust case; it was a consumer protection case. But that was probably the single most effective consumer protection effort in the history of the United States. On one day all the states got together and put an end to incredibly deceptive airline advertising, advertising that said that you can go to London for $99 without disclosing the fact that that was only one way and that you would pay a $69 surcharge for fuel. Again, I have this handicap of a memory on these issues.

Now, the reason that the Supreme Court ultimately quashed that effort was because of an interpretation of a federal statute, which basically preempted or reserved exclusively to the federal government the right to regulate rates and routes, and that was considered to be rate regulation. But it had absolutely nothing to do with the wisdom of what the states had done. During the period of time that those advertising regulations were in effect, we had the cleanest advertising and the most pro-consumer and the most honest airline advertising that we ever had in the United States. To a certain extent that effort has led to, I think, a reformation of the industry which even survived that defeat in the Supreme Court.

MR. RUBENSTEIN: Well, also I really want to point out on that TWA case, if you want to talk about no controls, and that is a case in which the court enjoined the actions of 33 attorneys general on the basis of jurisdiction asserted over them by their filing of an amicus brief in the case. So at the end of this case, the attorney generals had lost authority without even the prospect of litigating it.

MR. CONSTANTINE: And also, one other thing which comes back to me. I saw what was going on in the lobbying on the airline advertising. Dan Oliver and Terry Calvani went to every Republican AG—and this gets into your question—they went to every Republican AG in the United States and said you can't support this, you shouldn't support this, this is against your president. And the Republican AGs at the time said I don't know what you are talking about, okay, this has nothing to do with the president, this has nothing to do with party affiliation; this has to do with an attempt to protect the consumers in my state. And that is exactly what happened in all of these efforts, in every single one of the cases I ticked off, 50 states, 45 states. We had this guy Ken Eikenberry, who was the most conservative Republican, the Attorney General of the state of Washington, he

grabbed me one day and he said this has absolutely nothing to do with my party affiliation. He said, this is my understanding of the interests of my consumers and the general welfare and economy of the state of Washington. And I will not get picked off of this by some appeal to partisan loyalty.

MR. HUBBARD: Yes.

SPEAKER IN AUDIENCE: Don't the states attorney generals' actions on the level that you recommend do a great deal of harm to the interstate commerce clause and what it is supposed to be about, particularly when you are dealing with high-profile cases like the Microsoft case, where clearly the implications for the economy are nationwide and not statewide? Shouldn't indeed the states be shrinking their interest to things which operate on a very local level and impact their state alone? Because otherwise, you are arguing for the third enforcement branch simply because you guys do it better. That is nice, but that doesn't make effective law.

MR. CONSTANTINE: Again, there are two levels to that question. Legally the answer is no, and the issue has been litigated as to whether or not state enforcement of state antitrust law or state enforcement of federal antitrust law—and as Harry pointed out, 99.44% of the time states are enforcing federal antitrust law in federal courts, so the answer on a legal level is no. But the important question is whether or not having so many different decision makers does do damage to the interests of interstate commerce. I would make an analogy to Clayton Act § 7, which is a federal enactment and where the Congress, in its wisdom or a lack thereof, has said, now let's say you have a merger, and let's say it involves 100 geographic markets, you know 100 different markets, and let's say you could prove to a moral certainty that this merger would not only be competitively neutral but would be procompetitive in 99 of those 100 markets, but it is anticompetitive in one of those markets. You can stop that merger. Now you might say that that in some way defeats the interests of a national economy or interstate commerce. But that is a formulation somewhat akin to the way that the FDA deals with a carcinogen, and that is a formulation which the Congress has enacted, and it has put that power not only in the hands of the federal government but it is put in the hands of every single consumer in the United States. And who better to articulate the interests of those consumers than the politically accountable state attorney general.

MR. HUBBARD: Yes.

SPEAKER IN AUDIENCE: I haven't thought about this much, so maybe I am betraying some ignorance, but I get the sense that each state that participates in this third enforcement group somehow loses some of its own sovereignty to the group. If the state elects not to go along with enforcement action that the group wants to do, and the group goes ahead with it, hasn't that state in effect contributed its support up to that point, then it falls back, isn't it in effect losing some of its own sovereignty that was intended in our federal system?

MR. CONSTANTINE: I think it does to some extent lose its own sovereignty. There was a great article written by man a named Peter Yu, who was editor in chief of the Harvard Law Review in 1990, and it raises this very issue of the loss of sovereignty. His conclusion—and he refers specifically to the NAAG merger guidelines and the NAAG vertical guidelines and advertising guidelines which were referenced also as being unprecedented in the annals of collective action by states, and he gives the pros and cons. The pros he gives are basically that the ability to do these things collectively defeats what game theorists call collective action problems. I don't know that I could do justice to what all that means, but I understood it at the time. But as a negative he reflects that there is some surrender of sovereignty. So I think you've made a very valid point.

MR. HUBBARD: I want to comment on that. Sovereignty is always an issue that arises when you work on a multistate case, and there is certainly an inertia toward reaching agreements for things and everything else. But I think that you have to understand that the dynamic that the states operate under is significantly different than the dynamic that the feds operate under. The states have a much more consensus mode of making decisions than the feds, which have a much more hierarchical mode of making decisions. So I think that has some effects about how things happen and everything else. I have heard people refer to some of these multistate actions as if the Articles of Confederation had actually passed. The same sort of problems with sovereignty, with deciding not to go forward, really influence the dynamic. I think state sovereignty, even if part is ceded—I agree with Lloyd, there is a momentum towards ceding that—is still a fundamental fact for state AGs and the recognition of that has an effect on how states think things through.

MR. CONSTANTINE: Quite the contrary. The Articles of Confederation have been given a bum rap. Everybody says they wanted thirteen armies and thirteen currencies and all that. Actually the anti-federalists were motivated by a fear of strong, dominating central government, and there is a lot of very good commentary upon that in the Federalist Papers and something called the anti-federalists papers as well. But no, this is actually just counter to the Articles of Confederation; this is a joining together of the States. You had to be there or you have to be there now to understand how remarkable it is that if you worked in any agency, to understand that Bill could call me or I could call him or I could call an attorney in Texas or Utah or Montana and expect and get the exact same degree of help as you would as if you were going next door to the office of somebody else who had worked with you in a DA's office or AG's office or the

DOJ. It was quite extraordinary and I think somewhat unprecedented, and I think it should not be dissipated.

MR. RUBENSTEIN: I want to add to a point that Professor First alluded to, that is the issue of whether or not there are conflicts of substantive law between the states and federal antitrust law. While there are differences at the margins, I think there is a large degree of congruency between what is substantively prohibited under state antitrust law and what is substantively prohibited under federal antitrust law. Really what we are talking about are policy enforcement decisions, which I think Lloyd pointed out, are pluralistic in nature, whether you involve state attorneys general or not, because we have a couple hundred million private attorneys general under the antitrust laws bringing factual applications to courts to decide what the limits of the antitrust laws are. So I am not sure by states joining together, and sometimes agreeing and sometimes disagreeing, we are talking about giving up of sovereignty issues as opposed to having valid policy disagreements about enforcement.

MR. HUBBARD: Yes.

SPEAKER IN AUDIENCE: Does the potential for the state and federal authorities to undercut each other, like you mentioned in the *Long Island Jewish* example and then again in South Carolina's withdrawing, does that counsel against joint enforcement, joint investigation?

MR. CONSTANTINE: I think it does. I mean it doesn't finally answer the question, but it does counsel against it. It is a downside of it, and it is a downside of collective action even among states who have a very different stake in something. South Carolina has a history of this. I was involved in a case involving West Point Pepperell and J.P. Stevens where they did the same thing. It has something to do with their political tradition in that state. So there are downsides to coordination and cooperation, and I think when where you strike the balance is you find ways to talk, you find ways to agree, you find ways to assist, but you keep independent, and you keep your own independent force in place. You have to be very careful about cooperation. Now I think that there is a high degree of—at least at one point there was a very, very high degree of trust and respect among the states. I would say that in the late '80s and early '90s the respect between the states was far greater than the respect between the FTC and the DOJ. Any of you who have read the commentary coming out of the FTC the week that the FTC-DOJ joint merger guidelines were done would understand what I am talking about. But I think there are downsides to that kind of cooperation. You have to draw the line in an appropriate place, sometimes on an ad hoc basis.

SPEAKER IN AUDIENCE: I want to make a comment as a former assistant attorney general, that with respect to sovereignty, while there are some downsides with the state, I think each state's sovereignty is actually enhanced, because without a lot of these national issues each individual state would not be able to make an individual statement or an individual investigation. By joining together they can actually make their own state interests known, and even when you join onto a multistate investigation, you are not ceding your self interest. In the Hartford Insurance case there were discussions with New York State and the other states about various things that New York State wanted, and there was give and take, and there was always the possibility of a state having a separate brief. So I think on the whole the state's sovereignty is actually enhanced and not decreased.

MR. RUBENSTEIN: And that would be the same kind of cooperative debate that goes on between the feds and the states. They could be viewed as a ceding to each other of sovereignty, but I am not sure that is the right way to look at it. It is more of an assertion of sovereignty, that is you are deciding to go forward together or not.

PROFESSOR FIRST: I would just like to suggest that the sovereignty thing—I mean it sounds good; it does animate people from time to time, but this is really going away in some sense. The U.S. government cooperates frequently with foreign governments on investigations, criminal investigation; it doesn't always work perfectly. People maintain some independence. There are informal contacts between state enforcers and calling up people in the federal agencies looking to discuss economists to talk to or discussing cases. These things are becoming much more blurred. And although I agree with Lloyd, that the states shouldn't just sort of lose their identity, because it is important in a sense for each to keep a competitive identity, there is just inevitably going to be more networking of these investigators and in some sense more agreement substantively on what antitrust means. I think that is happening too.

MR. CONSTANTINE: It will continue until the first time that an important environmental law in the United States is declared in violation of GATT, and then it will end.

PROFESSOR FIRST: We've had it already, and you know antitrust will not be free of problems on the international level as well. So there are lots more conflicts coming I think.

MR. HUBBARD: Yes.

SPEAKER IN AUDIENCE: Given the limited amount of the antitrust enforcement authority resources, when the various enforcement authorities coordinate, is that a most efficient use of our resources?

MR. RUBENSTEIN: Well, it is. The bill is there to use cooperation and coordination to extend resources, and so when is a decision is made to allow some group of enforcers to move in one direction, freeing up another group of enforcers to move in another direction, or to

spread the burden among sovereigns, that can be efficient, and it doesn't make it inefficient if they end up disagreeing. It seems to me that as a result of all this we end up with more enforcement, but it is a drag. I want to follow up on a point that Lloyd was making regarding where he saw state antitrust enforcement falling down and gave five examples. We ought not to look at each one of those isolated, because you don't look at a point on the line; you want to look at a trend. But in some sense the things that Lloyd was talking about are examples of states being victims of their own success, and that is they have now a larger universe of places that they look and past history in which to keep up with. It is a bigger drain on their resources, and resources haven't come up to that. States also have a problem with continuity over a ten- or fifteen-year period of the same people who brought particular matters all the way through. But it seems to me that the question that you raise about whether or not this is an efficient process, I think that is where it ultimately ended up. There is a division of labor; that happens a lot, and that division of labor enhances everybody's enforcement resource.

MR. HUBBARD: One last question.

SPEAKER IN AUDIENCE: Professor First mentioned the principle of comity on the international level, and I wonder if that doesn't make sense on the state-federal level as well. When you are talking about fifteen, twenty states in the southwest or a geographic area, then state coordination seems to make a lot more sense. But where you have 48 states, unless the federal government has dropped the ball, like the way it did 15 or 20 years ago, does it make sense to have a duplicative nature of three bodies investigating the same issue?

MR. RUBENSTEIN: Well, the federal government drops the ball every day, as do the states, and it is nice to have other people around to pick it up. That is an advantage.

MR. CONSTANTINE: You are in a situation now where you are not engaging in triage anymore. I don't know what the right word is for one in 12 or one in 15, but that is what it has come to because of the number of merger transactions and just the expansion of the economy and the failure to expand the staffs of any of the agencies, and it is just a question of somebody picking up the ball really.

SPEAKER IN AUDIENCE: I am confused, because I hear on the one hand arguments for the states choosing different cases than the federal government is because of the lack of resources, and on the other hand I hear a lot of cheerleading for all jump on the same *Microsoft* and *North Shore Hospital* together because the other guy isn't doing it right, etcetera. And I think it is that situation where the state and the federal are cooperating on the same case that may be what has been pointed out as a problem. Aren't you wasting resources by all of you jumping on the same thing?

MR. CONSTANTINE: I agree with you. The reason I selected those five is that I thought in every single one of the cases a better competitive outcome would have been reached were there simply separate and distinct agencies. I am in total agreement with your statement.

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

Given Posthumously to Professor Milton Handler

ROBERT HUBBARD, ESQ.: First of all, I wanted to introduce everybody on the dais. First is Ralph Giordano, he is the head of the DOJ's regional office here in the city. The next is Alan Weinschel; he moderated the panel on vertical restraints today and is with Weil, Gotchal. Bill Lifland gave another fine rendition of the year in review; he is with Cahill Gordon. Next is Steve Houck; he is the bureau chief of my own Antitrust Bureau and working on *Microsoft* right now. Then we have Irv Scher who is with Weil, Gotchal and who was our recipient last year of the service award. Carol Handler is here to accept the award on behalf of her father. Glad to have you. We go over here, Michael Bloom, who recently joined our executive committee. He is head of the regional office of the FTC. Next is Meg Gifford, and she's now vice chair; that is official now after the dinner. And next Mike Malina, who is the chair currently of the section with Kaye, Scholer. Then Mozelle Thompson, Commissioner, Federal Trade Commission. He will be our dinner speaker tonight. Let me turn it over to Mike Malina.

MIKE MALINA, ESQ.: It is a rather peculiar feeling to be standing here saying nice things about Professor Handler. For everybody's information, the executive committee of the Section decided to give this award to Professor Handler at a meeting last year, before his death, and when the professor died we decided that we would stay with our original plan and give the award posthumously. I know Irv Scher, who is going to be presenting the award, will have a good deal to say as a person who worked closely with the professor for, believe it or not, 38 years. I just wanted to say one or two things. Number one, he left us all a standard to live by and to practice by which is virtually impossible for anybody to satisfy, a standard of total devotion, total focus and most of all total excellence. Nothing was ever good enough. I remember countless documents that I worked very hard on that I thought were really very good, and they would come back with a little note in the corner that just said "recast." And "recast" means this may be A minus, but it doesn't meet my standard, go back and do better. You know you can. Antitrust, to a very large degree has a history in this country which is almost coextensive with Milton Handler's career. He started in antitrust as Justice Stone's law clerk and was helpful to the justice in writing the *Trenton Potteries* decision, which was one of the seminal decisions in antitrust. He represented plaintiffs; he represented defendants. He was a scholar par excellence. There was no area of the field that he didn't touch, although I must admit that he never quite felt comfortable with the Robinson-Patman Act, probably because it never made any sense to him, and as usual he was right. I just want to say that it was a privilege for me to know him and to be able to work with him, and it is a particular privilege to be able to be the chair of the section at a dinner honoring him.

It has become a tradition in the section to have last year's recipient present the award to this year's recipient. In that spirit, Irv Scher, who won the award last year, is going to present the award.

IRVING SCHER, ESQ.: Like Mike, I feel very strange standing here tonight not just for the obvious reason that I am presenting an award to someone who unfortunately isn't with us any longer. Actually I would have felt equally strange if Professor Handler were here, because I simply can't believe that I got this award before him. It is just an impossible thing to me, as it is impossible to think of the history of antitrust law in this country without honoring Milton Handler who was a principal source of the antitrust doctrine that we have today.

As Mike said, Professor Handler started his antitrust career with Justice Stone during the 1926-27 term. When he began teaching at Columbia Law School later in 1927, he pursued his interest in the then relatively new antitrust law and rapidly became recognized as the expert in the field. He published his first antitrust case book in 1937, which established a direction for antitrust analysis that included non-legal readings on the intent and effects of competition. He was, as he acknowledged, a pioneer in recognizing the relevance of economic analysis to antitrust law. This sensitivity to economic concerns informed his teachings, his lecturing and his writing, which among other things, urged that rule of reason analysis should be applied in most antitrust cases. I studied under him during the Warren Court, and he had plenty to say in that regard at that time. So many concepts that we take for granted today, for instance that it is injury to competition, rather than injury to competitors, that the antitrust laws prohibit, and restraints which increase consumer welfare should be permitted under the antitrust laws are concepts which Professor Handler first developed.

Many of the arguments he made, the principles he enunciated and the articles he wrote, particularly during the time of the Warren Court, became the law during the Burger and Rehnquist courts. As FTC Chairman Pitofsky noted last month, Professor Handler's life has been the

essence of antitrust. As a practitioner, Professor Handler was a founding partner of Kaye, Scholer, Fierman, Hays & Handler, which continues to develop some of the finest antitrust lawyers in the country, and I won't exclude Mike, our Section Chair. As a teacher at Columbia he inspired not just those at Kaye, Scholer but many others of us to follow in his footsteps and expand the body of antitrust law, not just as practitioners but as theorists and writers. He continued his interest and awareness of our own achievements until his death, astounding his former students, including me, with his insightful comments on their work. Whenever I would write something, I would receive a comment such as: It is always nice to see my former students doing so well.

As a government advisor, he went well beyond antitrust, assisting the NLRB, the Treasury Department, as well as other agencies. And he even drafted, I have read, the GI Bill of Rights. As a humanitarian he was active throughout his life supporting the needs of the Jewish community and the State of Israel. And tonight the New York State antitrust bar, that he essentially created, is recognizing his lifetime service to our section with this award. Obviously, I wish I could have presented it to him personally. But we have a very capable surrogate in his daughter, Carole, who is carrying on the Handler name and tradition at Kaye, Scholer, who graciously agreed to travel here to accept the award tonight on his behalf.

MS. CAROLE HANDLER: Thank you, Irv, thank you Mike and thank you for all being here.

I know how important the state bar and the organized bar generally was to my father and how important he felt it was that there be an opportunity for antitrust lawyers to meet and to communicate ideas outside of the daily give and take and battle of practice, to move our profession, and our field in particular, to a more intellectual and generalized level where it could be of a greater contribution.

My father's antitrust philosophy—you all know it very well. I will say I knew him longer than Mike Malina worked for him; more than that I won't reveal. But I am very familiar with his antitrust philosophy, and above all, he was against doctrinaire, rigid, philosophical approaches to any situation. His philosophy was balance, reason, application of logic, the pragmatic analysis of different situations and an intensely factual approach to each case, because each case from the facts developed its own logic and its own reason. In short, his was a reality-based philosophy. One reality which Irving touched on, is that antitrust is not merely a set of legal principles but is very much intertwined with a larger society and not merely the economics of our society but other areas as well.

It has not been terribly fashionable in recent years to talk about the social aspects of antitrust, but in some of our last discussions in 1998, one of the areas in which he was particularly concerned was the social impact of mergers and whether or not the wave of mergers that we're all experiencing are ultimately good for society or not. He talked about the job costs, the costs to R&D and these kinds of things and actually threw out these ideas in a speech that he gave at the Sherman Award in Washington so that Bob Pitofsky and Joel Klein would be sure to hear him and hopefully follow his advice.

In my field, antitrust in the entertainment industry, he was always extremely concerned about concentration of economic power and vertical integration in a field that ultimately is fed by ideas, creativity and the creation and purveying of information. Again, this was not a particularly current or popular view, but asked a lot of questions about the interplay of economic forces and First Amendment values in this field. So I think until the very end of his life he went on thinking, he went on trying to explore new boundaries and asking questions.

The best tribute that anyone can give him, in addition to this very appreciated award, I think is to go out and practice and think about these values and try to incorporate them as we go about our daily practice. That is the heritage that he would be proudest of. Thank you very much.

MR. HUBBARD: I also would like to give an award to Mike Malina to for his service to the section as its chair. He has been providing the leadship for the section, moving us forward. We have gotten better and better participation, and better and better things done. We are thankful to Michael for all he has done for the section.

MR. MALINA: Thank you, Bob.

MR. HUBBARD: I have the pleasure of introducing Commissioner Mozelle Thompson. He has a stellar background. He has graduated from Columbia; he has worked in the government for many, many years. He has done financial planning. But I think you should all know that the important thing, from my perspective, is when we were office mates in the same office of Skadden Arps. It is strange to me now to actually know a commissioner and to be able to introduce a Commissioner of the FTC to such an illustrious group. You'll find that his thoughts are refreshing; he looks at things in new ways, not by some sterile antitrust theory, but by looking at the financial impact and thinking things through. Part of the renaissance of the FTC, I proudly introduce Mozelle Thompson.

Dinner Speaker:

MOZELLE W. THOMPSON, ESQ.
Commissioner, Federal Trade Commission
Washington, D.C.

Thank you for inviting me here tonight to address this important and impressive gathering. As you may know, New York is home for me, and I thank you for your warm welcome. Lately I often find myself talking to Washington lawyers who seem to believe that all antitrust practice takes place in Washington. And by looking at this room, I can say that there are a number of others who may disagree with them. It is good to see you all here.

Before I begin, I have to tell you—at least the general counsel tells me I have to tell you—that my views are my own. They are not necessarily the views of the Commission or other Commissioners. But the conference organizers gave me broad leeway to speak about whatever I thought was appropriate, and if you talked to Bob, he probably told you that is a mistake. I could focus on a number of important cases that we've addressed over the last year or talk about how the Commission has changed with the addition of several new commissioners over a relatively short period of time. But I think what more or less sums up my experience so far at the Commission took place on Halloween, of all times. I wanted to be sure that we, the Commissioners, stayed pretty close to our staff and that they felt comfortable with us. So I have a cadre of advisors, and we decided on Halloween that we would go across to our annex building and visit the lawyers and bring them candy. So we knocked on attorneys' doors, and they looked at us with various degrees of skepticism—much how they view you when you come down there. And I knocked on the door of one woman who has been with the Commission for several years, and she looked at me, and my advisors all standing in back of me, and I said, trick or treat, please have some candy. She reached in, grabbed a handful of chocolate and said, oh, just one question. And I said, yes? She said, who are you? And I said, I am Mozelle Thompson. Now my advisors are a cross between laughter and horror, and she looks at me and then she goes, oh, my God, I have been meaning to get to a Commission meeting but I haven't quite gotten there yet. That more or less said to me it has been a very interesting first year.

Tonight I would like to try something a little bit different. I thought it might be helpful to give you a little bit of my insight into the larger view of how the economy is changing and what I think that means for us all in the coming years. This is a very exciting time for me and for most Americans, including everybody in this room who plays a role in shaping the American economy. Who would have guessed just three years ago that we would be talking about the convergence of global financial markets where the worldwide corporate decision-making process takes place in an instant, or that we would be on the verge of embarking on a whole new electronic economy?

Now, the FTC is at the cutting edge of how we look at markets and can see how industries have changed and the impact of those changes. Since I came to the Commission, about a year ago, the Commission has revisited classic antitrust principles in trying to determine why they are still important. The challenge for industry and for those who provide it with advice is to help them to adapt and embrace the promise of the new economy and to provide consumers as well as investors with maximum value.

Now let's take a little bit of a look at what the Commission has gone through in the past year. 1998 capped our fifth straight year of increase in merger files. The value of these mergers exceeded $1 trillion. So for fiscal year '98 we had a record of 4,728 Hart-Scott filings, an increase of 28% from the previous year, and a threefold increase since 1991. But we also recognize that the mergers today are a little bit different than those that took place when Bob and I were in a cubicle over on the east side. Unlike some of the mergers of the 1980s, today's mergers are more likely to be led by fundamental developments in a rapidly changing market and reflect more closely some of the more traditional corporate goals of efficiency and competitiveness. There are a couple of factors that sort of jump out at me, and one is the globalization of competition, because many of the largest and most important product markets for American consumers have become much more global in scope. We have transactions like Chrysler, where a firm seeks to better compete in worldwide markets. You see them trying to seek cases where they can find rapid access to distribution systems or knowledge of local markets and economies of scale. There is also the impact of deregulation taking place in industries like electricity, telecommunications and financial services, where the traditional barriers to combinations are being eliminated. Yes, there still exists substantial industry downsizing and consolidation, and one of the more interesting areas is the impact of technological change and mergers that may be a response to that change or contribute to it. So these strategic mergers are more interesting and in some cases can be problematic. When firms are increasingly concerned about being number one in their markets and

perhaps even dominate, that can drive to mergers that are intended to boost market share but also eliminate competition, if not within their own markets, in related new markets. We have also seen a trend toward the use of new corporate vehicles. So you see not only the merger wave in things that we see Hart-Scott filings on but also increased activities in joint ventures and limited liability corporations and strategic partnerships and alliances.

Now, in the face of this complicated world, I made the following pretty basic observations. First, that mergers, including mega-mergers, are not in and of themselves bad for the economy, markets or investors. In fact, they can be good if they benefit consumers by making the companies more efficient and effective competitors. But in reviewing those transactions, it is important that we still keep in mind that our function at the FTC is to determine whether consumers will be helped or harmed by the proposed transaction, recognizing that still strong market competition results in consumer benefit. And that analysis doesn't change whether it is a tiny merger or a huge merger.

Now fortunately, most mergers aren't problematic. So of the nearly 5,000 filings that we reviewed last year, only 46 went to second request, and only 26 resulted in Commission action. Now all of you out there have one of the 46 somewhere.

We also see an increased interest on the investor side in trying to determine some of the basic issues in these transactions, still based on the fundamental analysis of price, equity, earning potential, return to shareholders, industry health. While these evaluation areas haven't changed, we find it interesting that how people measure and weigh future performance may indeed change, and one of those areas I think people talk about a lot is high tech, when people are questioning how do you measure profitability, and how long will it take to recoup the costs of a transaction.

So what does that mean for us and the future of antitrust enforcement at the FTC? In the first place, we've increased our understanding of what drives markets, and that is an area that I am particularly interested in, where the pushes and pulls on capital are sometimes whether a transaction is driven by tax interests, what exactly are the underpinnings of exchange in a corporate structure. That requires increased sophistication of the antitrust analysis and the reexamination of how old principles apply to new facts, so that we move beyond simple presumptions based on market share data to a real sophisticated analysis that takes into account the dynamic nature of competition in the real world and even recognizing that in many cases that dynamic is global. So we are called upon to look at competition in the context also sometimes of competing public policy goals, and in those areas particularly we undertake antitrust scrutiny with the highest degree of sensitivity. Areas like high tech markets, where you have certain traits like the rapid pace, the importance of innovation, intellectual property, network effects and information effects, and in deregulated industries where the new players aren't always familiar with the guideposts that people commonly think about as existing in antitrust. There may be also competing interests, whether it be service delivery, quality of care. So I think in part that puts it on us, the FTC, to provide markets with those guideposts to help them distinguish tough competitive behavior from improper tough competitive behavior. That means—and I think you see it in some of the work we've done in the past year—better crafted remedies, recognizing that complex issues may require unique solutions, and antitrust remedies targeted to specific competitive problems. In that regard, I will just say one thing to you all. If you see yourself having a complicated competitive problem that is going to require creative analysis, it is a good idea to give us more than a few days to look at it, because I think we are trying very hard to work with all of you to understand the issues that you think are important.

Another area where I think we are changing is having stricter enforcement and tougher penalties to ensure that adequate relief in our consents ensures viability and remedies the harm to competition. We also are looking at compliance with legal obligations under our laws and rules. Let me give you a couple of examples. I think people know that recently, in a matter involving Columbia HCA, we recently obtained a $2.5 million civil penalty because the company did not divest in the manner they said they would and at the time they would in a consent. I think you are also going to see some activity with regard to us looking at not only corporate obligations but also individual obligations to meet their requirements of Hart-Scott, including to produce 4C documents. Whenever I say that to a group of people there is a hum that goes over the room, and everybody looks at the person next to them.

What I also think is important is that we educate the public, including all of you, about what we're doing and why. I think many of you have visited our website, FTC.gov, which provides a pretty good and comprehensive view of the things that we are working on and the cases that we think are important, including the advisory opinions and advocacy papers on competition. I also think it is important to minimize burdens. Since the majority of mergers don't raise anticompetitive concerns, we think they should be reviewed quickly and allowed to proceed. Last year we adopted five new rules to exempt certain mergers from HSR reporting and waiting period requirements, and that gets to where I want to be right now.

As we look at these new challenges, you all play a really important role that I think we are trying very hard

to be much more transparent. We've asked all of you and industry and consumers for help in enabling us to develop better market responses, drawing a better connection between the FTC and the public and also both important parts of the FTC, consumer protection and competition. I predict you will see much more of a nexus in those activities in the future, and that means also your help in providing guidance on new areas for review. Some of you have been helpful to us in providing comments with regard to our Joint Venture Task Force and with regard to some of our recent statements on limited liability corporations. We also ask you to understand our vigilance in pursuing non-merger enforcement, including vertical arrangements, invitations to collude, etc. I think both we and DOJ welcome your input in talking about what the appropriate types of guideposts are to guide industry and initial input on how we can streamline our processes.

After going through all that, I was sitting on the train thinking about what is the right way to conclude this talk, and I wanted to share with you one final observation that talks a little bit about who we are and how we work with others. I read something in a little e-commerce business magazine called the Industry Standard, and I thought it was very interesting. It reported that a 16-year-old girl in Cork, Ireland, presented a faster new protocol for encrypting e-mail. And she says that she might not patent it because she wants the algorithm to be available to everyone. Now here is a young woman who could be one of the future captains of industry, and that causes me to reflect on the following. In order for competition to work and for our economy to grow and for innovation to continue and to make all Americans better off, we need to recognize the importance of new ideas and value them without regard to artificial barriers like race and age and gender. The world is indeed changing and some of our best new ideas are coming from unexpected places. And yes, maybe every once in a while in a small town not in New York. Thank you very much.

MR. HUBBARD: Thank you very much Mozelle, and thank you all for coming.

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Thursday, January 27, 2000

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Antitrust Law Section Symposium

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