NYSBA

2002 Antitrust Law Section Symposium

January 24, 2002
New York Marriott Marquis

NEW YORK STATE BAR ASSOCIATION
ANTITRUST LAW SECTION

ANNUAL MEETING

Thursday, January 24, 2002
New York Marriott Marquis
New York City

Section Chair
KENNETH R. LOGAN, ESQ.
Simpson Thacher & Bartlett
New York City

Program Chair
STEVEN M. EDWARDS, ESQ.
Hogan & Hartson L.L.P.
New York City

Dinner Speaker
CHARLES A. JAMES
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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Section Business Meeting, Election of Officers and Members of the Executive Committee

MR. LOGAN: We are going to have a vote of the officers of the Section as well as members of the Executive Committee. The nominating committee consists of Meg Gifford, Barry Brett and Alan Weinschel. So Meg Gifford will go forward.

MS. GIFFORD: Good afternoon, everyone. I will make this quick. I'm going to do this in two motions, one for election of members to the Executive Committee and a second separate motion for election of officers to the Section.

The Nominating Committee nominates the following current members of the Executive Committee for election to a one-year term to end on the date of the annual meeting next year in 2003, and those individuals are: Barbara Anthony, Kevin Arquit, Michael Bloom, Barry Brett, Edward Cavanagh, Bruce Colbath, Lloyd Constantine, Steve Edwards, Howard Ellins, Harry First, Lawrence Fox, Martha E. Gifford, Ilene Gotts, Pamela Jones Harbour, Stephen Houck, Robert Hubbard, Norma Levy, William Lifland, Joseph Lipofsky, Kenneth Logan, Stephen Madsen, Saul Morgenstern, Bernard Persky, Bruce Prager, Yvonne Quinn, Moses Silverman, Steven Tugander, Vernon Vig, Michael Weiner and Alan Weinschel.

Contrary to rumor, that is not actually every antitrust lawyer in New York City.

And the Nominating Committee also proposes the following individuals who have not previously served on the Executive Committee to serve one-year terms to end also on the date of next year's annual meeting: Linda Blumkin, Molly Boast and Kenneth Newman.

Do I have a motion to accept the proposal of the Nominations Committee?

PROFESSOR CAVANAGH: So moved.

MS. GIFFORD: Second?

AUDIENCE MEMBER: Second.

MS. GIFFORD: All in favor?

(Aye)

MS. GIFFORD: Opposed?

(None)

Abstentions?

(None)

Finally, the Nominating Committee proposes the following members of the Executive Committee for election to one-year terms: Steven Edwards, Chair; Pamela Jones Harbour, Vice Chair and Program Chair, and Barbara Anthony, Secretary.

Can I have a motion to nominate the individuals?

AUDIENCE MEMBER: So moved.

AUDIENCE MEMBER: Second.

MS. GIFFORD: Second. Thank you.

All in favor say aye.

(Aye)

Opposed, abstentions?

(None)

Thank you very much.

Annual Review of Antitrust Developments

MR. STEVEN M. EDWARDS, ESQ: I want to welcome everybody to this year's program. Let me just say that if there are people in the Section who are interested in joining the Executive Committee, they should let me know. We always have room for more. And also, as we meet throughout the course of the year, we are going to be inviting people from the Section generally to come to some of the meetings where it looks like there are going to be interesting discussions. So we hope to see some of you there.

Our first discussion today is a tradition with a slightly new twist. It's the Annual Review of Antitrust Developments with Bill Lifland, whom most of you know. He's a senior member of this group and has done this for many years. Bill is with the Cahill, Gordon & Reindel firm.

This year we are going to have two people doing the color commentary during the course of Bill's presentation. To my right, we have Steve Houck. Steve, I believe started out at Donovan, Leisure, did a tour as head of the Antitrust Bureau of the New York State Attorney General's Office, and now he's with the Reboul MacMurray firm.

To my left is Ned Cavanagh, who also started out at Donovan, Leisure and was actually with my firm for a while. He is now Professor of Law at St. John's University and of counsel at Morgan, Lewis and Bockius.

I will now turn the lectern over to Bill Lifland.

MR. WILLIAM T. LIFLAND, ESQ.:

Monopoly

The most widely discussed antitrust decision in 2001 was the D.C. Circuit's ruling in the Microsoft monopoly litigation.[1] Steve Houck played an important role in that litigation and will offer us his comments on the decision.

MR. STEPHEN D. HOUCK: This was one of the two D.C. Circuit cases that I picked to comment on. I think the primary long-term importance of the Microsoft case is that it resuscitated Section 2 enforcement, which basically had been moribund since the IBM case. It also stands for the proposition that tried-and-true antitrust principles can be applied even in high-tech industries.

But what I wanted to talk about a little bit this afternoon was the tying portion of that case, because I think it highlights an area of antitrust law that is somewhat unsettled, indeed in part because of this case.

One of the things to note is that commingling of software code, which was at the heart of the case, was held to be one aspect of Microsoft's predatory conduct, supporting the Section 2 violation.

Then the court also went on to analyze the same conduct as a Section 1 tying violation. And the Court of Appeals, I think, did something unusual, because it departed from relatively recent Supreme Court doctrine, *Jefferson Parish* and other cases, which say that tying is a *per se* offense. The Court of Appeals analyzed tying under the rule of reason and suggested that, at least with respect to operating system software, that was the appropriate mode of analysis. It did so in a very tightly, densely reasoned portion of its opinion which undoubtedly was written by Judge Ginsberg, who was a member of the unanimous panel.

I think it bears your looking at because it is part of a trend among some cases and commentators to depart from per se rules. It bears watching whether tying will be one of those areas. So I think that portion of the decision is significant for that reason.

When you look at it, you should also keep in mind some of the benefits of the *per se* rule, which stand out to me when you look at that decision, because you appreciate how difficult it is to try a rule of reason case. Also, even advising your clients whether their conduct is improper can be very difficult under the rule of reason.

I wanted to make a couple of other observations about the impact of that part of the decision on the case as a whole. There was an earlier D.C. Court of Appeals ruling in the Justice Department's consent decree case, in which the Court of Appeals suggested that tying might be appropriate as long as there was a plausible justification for it. And this part of the court's ruling wasn't necessary to its decision in that case and created all sorts of havoc in the actual trial of the case itself because Judge Jackson, the trial judge, felt the Court of Appeals was wrong, and that its opinion was inconsistent with Supreme Court law. This earlier decision underscores how important it is for appellate courts to stick with the issues before them and not reach out because in their ultimate decision they did something very different—something that I think was unpredictable to the parties and to Judge Jackson.

It also probably impacted the parties' calculus as to whether or not the case should be settled because that earlier decision gave Microsoft what turned out to be unjustified hope that it would have a much more sympathetic hearing in the Court of Appeals than it actually got. And then finally, with the recent filing of the Netscape lawsuit, I guess yesterday or the day before, you know this particular issue remains front and center.

PROFESSOR EDWARD D. CAVANAGH: I would like to ask Steve one question. With the settlement, Steve, about half the states have gone their own way, fairly significant states, California and Connecticut, what's the impact of that going to be?

MR. HOUCK: I think the long-term impact is defendants should recognize that each state is a sovereign, and just because the Department of Justice decides to settle a case involving other states, it doesn't mean that the states will or that even some states decide to settle. So you have to treat each as a separate party.

MR. LIFLAND: The *Microsoft* case was not the only governmental monopoly case last year. There was also a proceeding against American Airlines. It was charged with violating Section 2 of the Sherman Act by increasing flights and matching fares of lower cost carriers attempting to enter American's core routes. The district court entered summary judgment for American. The court found that the American fares were above average variable cost and did not undercut competitive fares. It also found that recoupment of alleged losses from reducing fares had not been proved and was not likely.[2]

PROFESSOR CAVANAGH: Thanks, Bill.

Interesting. A government win and a government loss. What struck me about this case, and I think is worth noting, is that it's an almost verbatim recapitulation of *Brown & Williamson* earlier in the decade. The court made clear that before there can be predation within the meaning of Section 2, you've got to have pricing below some measure of cost. And here there wasn't any. It was just that American, at worst, was matching fares with low-cost carriers. And second, there has to be some showing of some plan of recoupment, which they had utterly failed on.

The government tried to make up for this by offering a sort of surrogate; basically it was predation by reputation, or reputational predation. In other words, everybody knew that American would come in and flood the market. The court rejected that and said that is not a substitute for the basic requirements of a showing of below-cost pricing and some measure of recoupment.

In addition to that, so that the basic outlines of *Brown & Williamson* are in place, but also as a matter of proof, the court pointed out that in the last couple of years American's market share in the Dallas-Fort Worth area had fallen. It hasn't gotten any greater. So if it was a predator, it wasn't doing a very good job. And they used that to basically show that American's competitive tactics had effectively created a situation of robust competition around the Dallas-Fort Worth marketplace. So ultimately, it is another loss for the government, but it is basically a reaffirmation of what the Supreme Court had earlier held in *Brown & Williamson*.

MR. LIFLAND: This case is now on appeal. The government's brief has been filed and appears on its Web site.

A private case bearing some similarity to *American Airlines* was decided by the Second Circuit.[3] The court affirmed a summary judgment for British Airways. The complaint, among other things, alleged attempted monopolization, based on flying additional flights below cost. The evidence was ruled inadequate to establish below-cost pricing or recoupment of losses. An interesting point was the court's reaction to the monopoly leveraging claim put forth by the plaintiff. Monopoly leveraging, that is, the effort to extend a monopoly from one market to another, so as to obtain a competitive advantage in the other, had been viewed as illegal in the Second Circuit since its 1979 *Berkey* case.[4] The court stated that it was not necessary to reach the issue, but commented that it had questioned the earlier ruling where the monopolist had not sought to monopolize the leveraged market.

Another monopoly case reminds us that all cases do not turn on the extent of market foreclosure.[5] The First Circuit affirmed summary judgment for defendant, which controlled over 90 percent of the billboards in the Boston area. The defendant was charged with monopolization by disparaging the plaintiff's ability to get regulatory approvals to erect billboards if landlords made the sites available to him. The court assumed that the disparagement was exclusionary, but determined that the plaintiff had not suffered antitrust injury as the result of the conduct. Instead the court ruled that plaintiff's exclusion from the market was due to the regulatory requirements for erection of billboards rather than the defendant's conduct in making landlords aware of these requirements.

Acquisitions

The FTC was successful in obtaining a preliminary injunction against the merger of the second and third largest baby food producers,[6] and the transaction was subsequently abandoned.

MR. HOUCK: I'll be very brief because I don't want to impinge on your time, Bill. But I wanted to highlight this case, because I think it, like the Microsoft case, is an area of antitrust law that is perhaps unstable or in the process of development—and that is how you measure efficiencies and apply efficiencies doctrine in a merger context. This is one of the first major cases since the guidelines were amended in '97 to clarify the role efficiencies play in the government's merger analysis.

There are a whole bunch of difficult issues as to what kinds of efficiencies count, fixed variable costs, promotional costs, managerial costs, et cetera, how you measure them, how substantial they must be, how they get weighed against the anti-competitive harm. All this, I think, remains to be developed. But what the Court of Appeals said here was that there would have to be significant efficiencies, at least in the circumstances presented by this particular merger of two of the three competitors in the market.

In combination with the Microsoft case, it suggests that at least in the D.C. Circuit, once the government has established a *prima facie* case of competitive harm, the defendants have to be prepared to rebut that with probative, concrete, specific evidence of countervailing pro-competitive benefits, which the Court of Appeals found lacking here. I think it's fair to say that Chairman Pitofsky has set to sea the efficiencies ship, and where it is going to be driven in large part will depend on the Muris Commission. Chairman Muris is very interested in this area, and in fact, I think, advised the defendants in this particular case. How the law develops in this area bears watching over the next several years.

PROFESSOR CAVANAGH: This decision has been highly controversial and almost universally criticized. I think a couple of things should be kept in mind. First of all, it is a merger that takes the industry from three firms to two. And a guiding principle with Chairman Pitofsky and the FTC, I think, was a concern that were the Commission to give its imprimatur to a three-to-two under these facts, that it would be very, very hard. It would be the classic camel's nose in the tents. It would open the floodgates to three-to-two mergers of even greater anti-competitive concern.

The second thing is this: There was, as Steve pointed out, a lot of debate about the efficiencies that would be generated, and a lot of debate on whether or not the efficiencies were properly measured or how you measure them. And I think all of that has to be worked out.

But I think the major problem here was that the identified efficiencies that the proponents of the merger had come up with were not sufficiently merger specific. And that's a *sine qua non*. Under the guidelines, the mergers have to be merger specific. But unfortunately, the merging parties did not come forth with those sorts of efficiencies, and I think ultimately that's what torpedoed this merger. There are a lot of issues that are going to have to be worked out.

I often wonder how much longer that Beech-Nut plant up in the upstate area, how much longer that plant is going to be in business. If you read the opinion, you'd think it was going to be out of business pretty soon.

MR. LIFLAND: The government was less successful in its effort to get a preliminary injunction barring the acquisition by a competitor of a firm offering shared hot site recovery systems.[7] A hot site recovery system is a computer facility located away from a client's computer, to which the client may rush its back-up software in case of a systemic breakdown, and quickly replicate the non-working system. The facility is described as "shared" when it is rented to multiple clients on the assumption that only one client will need to use it at a particular time. There are of course other ways of recovering from a computer breakdown besides using shared hot site recovery systems. The most pertinent, for this case, is a so-called "internal" system, which is designed to serve only a single firm. The court ruled that the government had failed to carry its burden of delineating a relevant market because it had not produced enough evidence to exclude the "internal" systems from the market. The government had produced letters from 50 users saying that they would not switch from shared to internal systems in response to a small price increase. The court found this evidence inadequate for several reasons:

- there were 90 contrary statements from other users.
- it was not clear that all users were addressing the precise issue.
- it was not clear that the 50 users quoted were representative of the 7,500 clients served.
- it was not clear that the number of users who would not switch was large enough to make a price increase profitable.

The court also noted that computer technology was evolving so rapidly that it was impossible to accept an overly-narrow market definition.

Another interesting acquisition case, which actually came down in 2000 rather than 2001, involved the merger of two loose-leaf chewing tobacco producers.[8] A product called "moist snuff" was found to be functionally interchangeable with loose-leaf chewing tobacco. You might have expected that moist snuff would therefore be included in the relevant market. The court ruled, however, that there was only limited price-based competition between moist snuff and loose-leaf chewing tobacco. This made it possible to exclude the moist snuff from the market, with the result that the parties' combined market share was in the range of 60 percent.

Restraints of Trade

The Third Circuit ruled that it was not an unlawful restraint of trade for parties to include in a sale-of-business agreement a stipulation that the seller would not rehire any of the business's employees for an eight-month period.[9] This provision is similar to sellers' non-compete covenants, which when properly limited have been upheld for hundreds of years. Here the court indicated that the rule of reason applied and was satisfied, given the purpose to insure a successful sale of a business.

An interesting wrinkle was introduced by a Wisconsin appellate court, which applied state law to invalidate a similar but somewhat broader covenant.[10] The court said that the employer was trying to do indirectly what it could not do directly through restrictive covenants with its employees. The court noted two respects in which this was so: first, that the restraint went farther than would have been permitted in an employer-employee agreement, and more importantly, that the restraint was imposed without the consent of the employee. Employee consent would, of course, have been inherent in an employer-employee agreement.

If other states should rule that no-hire clauses are invalid without employee consent, many no-hire covenants will have to be deleted or re-written despite the fact that the Third Circuit has found them lawful under federal law.

Moving to another subject—the exchange of salary data among competitors—the Second Circuit ruled that a challenge to the information exchange stated a cause of action.[11] The court did not rule that such a data exchange was *per se* illegal but stated that it could be found improper in the right circumstances. The rule of reason was to be applied. The particular data exchange was effectuated through the intermediary of a consulting firm. The case will no doubt be closely watched, given the fact that benchmarking studies are commonly used by employers wishing to find where the labor market stands at particular times.

An example of the application of the rule of reason in a vertical context appeared in a Sixth Circuit decision holding that a beauty product manufacturer could lawfully require its distributors to resell only to customers deriving at least half their revenues from beauty services.[12] Presumably this was to enable the manufacturer to confine the outlets for its product to beauticians rather than all retail outlets. The court's ruling, under the rule of reason, was that there was no evidence of an adverse effect on interbrand competition. This differs somewhat from the usual statement of the rule of reason in a vertical context, namely, that a restraint is valid if the positive effect on interbrand competition outweighs any negative effect on intrabrand competition. Perhaps, however, the court meant the same thing.

There were also last year a number of cases applying the principle that there can be no conspiracy without a conscious commitment to a common scheme.[13] This principle seems to underlie a decision that offering incentive discounts to customers dealing exclusively with the seller was to be considered as unilateral rather than conspiratorial conduct.[14] Another principle often invoked in antitrust decisions is reflected in the high fructose corn syrup litigation: pricing on the same basis as a competitor is not to be considered as conspiratorial conduct because conscious parallelism does not tend to exclude the possibility of independent action.[15]

Exclusivity

The leading decision on the subject of exclusivity coming down last year was the *Visa and Mastercard* case decided by Judge Jones in the Southern District. The court held it was unlawful for the bank card associations to bar their members from issuing Discover and American Express cards.[16] According to a recent article in the *American Banker*,[17] notices of appeal will be filed in February. Counsel for one of the associations is quoted as saying that the associations, being joint ventures owned by their bank members, require some degree of cooperation among otherwise competing issuers, and preventing opportunism and promoting loyalty are self-evidently related to achieving the pro-competitive ends for which the venture was created. The government's chief litigator on the case, now in private practice, was quoted as countering that joint ventures cannot be used as a subterfuge for anticompetitive activity. Next year we may learn what the Court of Appeals thinks.

Tying Arrangements

The Second Circuit held that a Yale requirement that unmarried students reside in college dormitories for their first two years was not unlawful tying of housing to Yale education.[18] The court indicated that a fine education could be obtained from other institutions. If time permits, we will take up this case further at the end of our discussion.

Exemptions

The Fourth Circuit ruled that the secret financing of litigation was to be viewed as within the exemption for petitioning of government, and not as sham litigation, because a successful outcome from the litigation could reasonably have been expected.[19]

The Seventh Circuit found no objection to the Illinois prison system's practice of giving exclusive franchises for telephone service in return for half the revenue generated by the franchised carrier. The court noted that public agencies may charge fees that exploit their monopoly and it was not a recognized species of anticompetitive behavior for their concessionaires also to charge high prices. This observation will doubtless ring true to many persons who have visited governmentally-financed sports stadiums.[20]

Standing

A Sixth Circuit case illustrates the reluctance of courts to confer standing on plaintiffs who were not primary beneficiaries of the underlying pro-competitive policies of the antitrust laws. In denying standing the court observed that plaintiff's harm was suffered in the capacity of a competitor rather than a defender of competition.[21]

Another Sixth Circuit case further indicates the tendency of courts to refuse standing where the harm alleged would have been suffered with or without the alleged antitrust violation.[22]

Class Actions

Two class action decisions should be noted. One relates to the debit card antitrust litigation, in which the Second Circuit upheld certification of a class of four million merchants.[23] Ned, would you like to comment?

PROFESSOR CAVANAGH: Sure. Visa and Master Money was a tying case, and the essential allegation was that in order to get the Visa credit card you also had to accept the Visa or Master Money debit card. And it was much more expensive for merchants to process debits than credits. And so you had this class of plaintiffs, a large class, including, among other things, Wal-Mart, with a significant financial clout there.

The case has been pending in Brooklyn for several years. And at the beginning of last year the class was certified. There then was an appeal of the certification determination pursuant to Rule 23(f), which was adopted or made part of the rules in 1998 to give an opportunity for an appellate court to review certification decisions. Since 1966 the appealability of those orders has been in doubt. There's been a lot of various theories of the so-called death-knell doctrine, ultimately rejected by the Supreme Court collateral order doctrine. A lot of creative ways of trying to get these certification decisions into the appellate forum. And from both the plaintiffs' and defendants' side it seemed to be in their interest.

From the plaintiffs' side, frequently, if the case wasn't certified, the case would go away. You know, the classic death-knell argument. From the defendants' side, if the class is certified, there would likely be a settlement. And on the plaintiffs' side too there would likely be a coercive settlement. The idea of Rule 23(f) was to get that into the appellate forum quickly and have that case resolved.

There is another case that Judge Easterberg decided out in the Eighth Circuit. But this is one of the few appellate decisions under Rule 23(f), and the first major one in the Southern District. One thing that I found interesting about this case was 23(f) is designed to expedite and move things along. And it took eight-and-a-half months for the Second Circuit to resolve this case. So it kind of undermined the basic principle. Just the time it took the court to decide this sort of undermined the basic principles of expedition that underlie 23(f).

Secondly, it should be noted that there is a tremendous deference; the court reviewed the trial court Judge Gleason's decision under an abusive discretion standard. So there's tremendous deference being paid to the trial court decision, and it makes it very, very difficult to reverse. Of course, you can only reverse for abuse of discretion, which is to say that the trial judge acted unreasonably. That's a very difficult standard to meet.

And the other thing that struck me as being very, very interesting about this case was that expert testimony was entertained and held appropriate under the *Daubert* standards on the issue of class certification. And what you had here was a battle of the experts; Dennis Carlson for the plaintiff against Richard Smalty for the defendants. And Carlson is the one who won out in this case. But even certification decisions or certification issues in a class action context are now going to be subject to *Daubert*, under expert testimony.

MR. LIFLAND: The other class action case relates to one phase of the widely reported antitrust conspiracy between two famous auction houses, Sotheby's and Christie's, with respect to the commissions charged to their clients.[24] Ned?

PROFESSOR CAVANAGH: Well, we all know the ultimate result in the auction house decision described in the criminal phase.

What's interesting to me in the civil class action phase, before Judge Kaplan, is that in choosing the class representative, the attorney for the class representative, Judge Kaplan used a competitive bid scheme.

Interestingly, when I do class actions with my antitrust class, I always say who should the class representative be? And, fortunately, my students read the rules and they tell me the person who filed first, the person with the best case, the most competent attorney, the client who is going to help the best. And I also listen to that with some patience, and I always end up telling them you're the one who is going to be the attorney for the class. Because if you're not, you're not going to be doing any work, you're not going to be doing any billing. And we always have to go back and fill for these other reasons, but you always have to start out with the position that you want to be the class representative.

And there's an interesting twist on the approach Judge Kaplan did. What he did was ask the various attorneys to submit a figure which would be the attorneys' fees that they would accept in the case. And he ended up accepting the lowest bid, which was made by David Boies, lowest by quite a bit by David Boies for his firm. And, as a result, David Boies became the class representative. And in Judge Kaplan's mind, by using the bid scheme, he saved the fund that is being created as a result of the settlement, saved the fund a significant amount of money. Because Boies obviously discounted his attorney's fees in order to get the class representative position.

That to me raises a number of questions, Bill, as to whether or not—how we should go about doing class representatives. The appropriateness of the auction process. Of course, Judge Kaplan is a brilliant judge, and he spent a lot of time discussing these issues. I'm not sure that he's convinced a lot of people. Jack Coffey certainly hasn't viewed it. It was in the *Law Journal* recently, which is a stance I think is at odds in many respects to Judge Kaplan's position.

The other thing I wanted to mention is this concept of auctions. And it is being picked up by the proposed amendments to the Federal Rules of Civil Procedure. Rule 23 is being considered for major overhaul as we speak. On Tuesday there were hearings before the Advisory Committee in Washington, among other things, in talking about what the proposed amendment is trying to do to clarify and to specify the standards for selection of class counsel. You know, they are fairly vague now.

One of the things that the proposed amendments say that you can take into account in the selection of class counsel, is attorneys' fees you can look into, and the amount and nature of the fees that are going to be charged by the attorneys. So I think Judge Kaplan's decision may find itself into being codified as part of Rule 23 as proposed.

MR. LIFLAND:

Tying

We return now to the case on which the Second Circuit appeared to rule that a Yale education could not plausibly be regarded as a tying product because of the existence of many other institutions of higher learning. It should be noted that the plaintiffs—women whose religious beliefs allegedly forbade them from residing in a co-educational dormitory—sued primarily on non-antitrust grounds, relying primarily on the Constitution and the Federal Housing Act. The antitrust claim receives less space in the court's opinion. But to Yale graduates, such as myself, the court seems wrong in implying that a Yale education has insufficient forcing power to compel Yale students to reside in college-owned dormitories. Residence in a dormitory, however uncomfortable or overcrowded, has traditionally been accepted as a small part of the price of a Yale education. Nor is this a matter of Ivy League chauvinism; a well-known West Coast university has even compelled college freshmen to live in trailer parks. It seems quite plausible that plaintiffs in fact could have made a case for the proposition that a Yale education has sufficient "forcing power" to coerce students to rent from Yale housing they would have preferred to buy elsewhere.

That is not to say that the plaintiffs' antitrust claim was necessarily well-grounded. A requirement for proving a tying claim, at least in the Second Circuit, is proof of anticompetitive effects in the tied product market, in this case a rental housing market in or near New Haven, Connecticut. It does not seem realistic to expect Yale's requirement that unmarried students spend their freshman and sophomore years in co-educational dormitories would have much practical impact on this market. In the absence of such a requirement how many such students would have chosen to live off-campus? Would they have made a dent in New Haven's housing supply? These are factual questions, but it seems likely that most students in their first two years would have preferred to live in dormitories. That would put them closer to more friends or potential friends, and give them easier access to the social life of the college.

It is respectfully submitted, therefore, that the court may have been right in rejecting plaintiffs' antitrust claim, but not because of the reputed existence of other institutions of higher learning capable of providing educational opportunities similar to Yale's.

That concludes our summary, ladies and gentlemen. Thank you for your attention.

Endnotes

1. *United States v. Microsoft Corp.*, 2001-1 CCH Trade Cas. ¶ 73,321 (D.C. Circuit upholds ruling of monopolization of Intel-compatible PC operating systems while rejecting rulings of attempted monopolization of PC browsers and unlawful tying of browsers to operating systems; nine states refuse to accept proposed settlement agreeable to Antitrust Division).
2. *United States v. AMR Corp.*, 2001-1 CCH Trade Cas. ¶ 73,251 (D. Kansas) (district court grants summary judgment to airline charged with violating Section 2 of Sherman Act by increasing flights and matching fares of lower-cost carriers entering its core routes where (1) challenged fares on core routes were above average variable cost and did not undercut competitive fares, and (2) recoupment of alleged losses from reducing fares was unproven and unlikely; airline's alleged reputation for predation found not to deter entry and in any case insufficient basis for liability; allegations of anticompetitive effects in markets where defendant did not have or seek monopoly power did not plead violation of Section 2).
3. *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 2001-2 CCH Trade Cas. ¶ 73,351 (2d Circuit affirms summary judgment for defendant airline accused of attempted monopolization based on flying additional flights below cost in response to plaintiff's entry; evidence ruled not to establish below-cost pricing or recoupment of losses; *dictum* that while unnecessary to reach plaintiff's claim of "monopoly leveraging" court had questioned its earlier ruling that use of such leverage violated Section 2 of Sherman Act unless the monopolist sought to monopolize the leveraged market).
4. 603 F.2d 263, 275.
5. *RSA Media, Inc. v. AK Media Group, Inc.*, 2001-2 CCH Trade Cas. ¶ 73,372 (1st Circuit affirms summary judgment for defendant controlling over 90% of billboards in area and charged with monopolization by competitor; district court assumed that defendant had engaged in exclusionary conduct by discouraging property owners from dealing with plaintiff because of difficulty plaintiff

would face in obtaining regulatory approvals to build additional billboards; appellate court ruled that plaintiff's exclusion from market was due to regulation rather than defendant's conduct).

6. *FTC v. H.J. Heinz Co.*, 2001-1 CCH Trade Cas. ¶ 73,243 (FTC obtains preliminary injunction against merger of second and third largest baby food producers with combined market shares of 33%, although most of balance held by largest producer; court held that concentration data established FTC's *prima facie* case and was not rebutted by evidence of limited pre-merger competition and significant prospect of post-merger efficiencies and product innovation; court emphasized that FTC might ultimately accept parties' arguments but was entitled to injunction since a fair ground for thorough investigation had been established).

7. *U.S. v. Sunguard Data Systems, Inc.*, 2001-2 CCH Trade Cas. ¶ 73,493 (D.D.C.) (district court refuses to enjoin merger of firms providing alternate multi-client computer installations for use in emergencies; key issue is whether relevant market includes one-client installations as well as multi-client installations; court rules that evidence conflicting as to whether price increases at multi-client installations would provoke shifts to one-client installations in sufficient numbers to "discipline" price increases).

8. *FTC v. Swedish Match*, 2000-2 CCH Trade Cas. ¶ 73,122 (FTC obtains preliminary injunction against merger of loose-leaf chewing tobacco producers with combined market shares of 60%, although another form of smokeless tobacco—moist snuff—was "functionally-interchangeable" with loose-leaf chewing tobacco, court stating that there was only limited price-based competition between the two products, new entry was unlikely and evidence of efficiencies insufficient).

9. *Eichorn v. AT&T Corp.*, 2001-1 CCH Trade Cas. ¶ 73,241 (3d Circuit rules that it is not antitrust violation to include covenant in agreement to sell business that seller will not rehire any of the business's employees for eight-month period; rule of reason held applicable; purpose found to be to insure successful sale of business).

10. *Heyde Companies, Inc. v. Dove Healthcare, LLC*, 2001-2 CCH Trade Cas. ¶ 73,506 (Wisc. App.) (Wisconsin appellate court rules no-hire agreement is attempt by current employer to do indirectly what could not do directly; court notes that no-hire agreement exceeds scope that would be permitted for valid covenant in employer-employee agreement, and also that no-hire agreement imposes restriction on employee's opportunities without employee's consent).

11. *Todd v. Exxon Corp.*, 2001-2 CCH Trade Cas. ¶ 73,518 (allegation of exchange of data on salaries paid to certain grades of employees held to state claim under Section 1 of Sherman Act; rule of reason held applicable; defendants' market power held "important factor" which is plausibly demonstrated by collective market shares of 80-90% of concentrated market; "suspicion aroused" by extent of disaggregated data, absence of public dissemination and frequency of data exchange).

12. *Ezzo's Investments, Inc. v. Royal Beauty Supply, Inc.*, 2001-1 CCH Trade Cas. ¶ 73,207 (6th Circuit affirms summary judgment for beauty product manufacturer charged with unlawfully requiring distributors to resell only to customers deriving at least 50% of their revenue from cosmetology services; 50% requirement viewed as non-price vertical restraint to be assessed under rule of reason and no evidence presented indicating adverse effect on interbrand competition).

13. *Toscano v. Professional Golfers' Ass'n*, 2001-2 CCH Trade Cas. ¶ 73,365 (9th Circuit upholds action of golf tournament sponsor in applying PGA eligibility rules; no commitment by sponsor to a common scheme to act in restraint of trade and no involvement in establishment of rules); *Lantec, Inc. v. Novell, Inc.*, 2001-2 CCH Trade Cas. ¶ 73,448 (D. Utah) (evidence insufficient to find conscious commitment to common scheme).

14. *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 2001-2 CCH Trade Cas. ¶ 73,351 (2d Circuit affirms summary judgment for airline accused of unlawfully offering incentive discounts to customers and travel agents; arrangements ruled to constitute unilateral conduct insufficient to satisfy Section 1's joint action requirement).

15. *High Fructose Corn Syrup Litigation*, 2001-2 CCH Trade Cas. ¶ 73,395 (N.D. Ill.) (district court dismisses price-fixing claim, finding evidence suggested only conscious parallelism, not tending to exclude possibility of independent action; evidence included setting price of one product as a percentage of price of another product, issuing revised prices quarterly rather than annually, and announcing near-identical prices).

16. *U.S. v. Visa U.S.A., Inc.*, 2001-2 CCH Trade Cas. ¶ 73,440 (S.D.N.Y.) (district court holds unlawful bank card associations' rules against issuance of American Express and Discover cards by member banks).

17. *American Banker*, Jan. 11, 2002, p. 7.

18. *Hack v. President and Fellows of Yale College*, 2001-1 CCH Trade Cas. ¶ 73,127 (2d Circuit holds that Yale University requirement that students reside in college dormitories during first two years not unlawful tying of housing to Yale education because education at a particular college, while unique in a sense, does not constitute an antitrust market).

19. *Baltimore Scrap Corp. v. David J. Joseph Co.*, 2001-1 CCH Trade Cas. ¶ 73,144) (4th Circuit holds that secret financing of litigation designed to maintain zoning requirements preventing plaintiff's competition was sheltered conduct; litigation not sham because reasonable litigant could expect successful outcome).

20. *Arsberry v. State of Illinois*, 2001-1 CCH Trade Cas. ¶ 73,205 (7th Circuit rules that state prisons may grant exclusive franchises for telephone service in return for half the revenue generated; public agencies may charge fees that exploit their monopoly and action of state concessionaires charging high prices not "recognized species" of anticompetitive behavior).

21. *Indeck Energy Services, Inc. v. Consumers Energy Co.*, 2001-1 CCH Trade Cas. ¶ 73,274 (6th Circuit affirms dismissal of co-generator's complaint over loss of substantial business to regulated utility; plaintiff's harm suffered in capacity of competitor rather than defender of competition; damages speculative and no allegation of customer injury).

22. *Watkins & Son Pet Supplies v. IAMS Co.*, 2001-1 CCH Trade Cas. ¶ 73,313 (6th Circuit affirms summary judgment against distributor's claim that manufacturer unlawfully gave extra discount to distributors handling manufacturer's product exclusively; damage suffered from termination would have occurred with or without alleged extra discount; damage suffered after termination when plaintiff distributed a rival brand, was not antitrust injury since discount enabled more aggressive promotion and resulting losses to rivals were not antitrust injury).

23. *Visa Check/Master Money Antitrust Litigation*, 2001-2 CCH Trade Cas. ¶ 73,459 (2d Circuit upholds certification of class of four million merchants in suit alleging that bank card associations unlawfully force merchants to accept debit cards along with credit cards; common questions predominate over individual issues).

24. *Auction Houses Antitrust Litigation*, 2001-1 CCH Trade Cas. ¶ 73,170 (S.D.N.Y.) (district court conditionally approves settlement of class action antitrust suit, including provision of certificates redeemable for services as partial alternatives to cash payments to class members).

Preparing and Presenting Experts: Practical and Ethical Issues

MR. EDWARDS: The next panel should be a great panel. It is on the preparation and presentation of experts.

When I started out at Cravath in 1972, I told them that I hadn't taken any economics courses, but I had taken a lot of creative writing. So they assigned me to a big antitrust case and put me in charge of the economists. And I spent three years getting a personal education from Frank Fisher of Charles River Associates. He started out by saying, "Did you hear about the economist who had drowned?" And I said, "No." He said, "Well, this economist calculated that the median depth of a river was four feet and he tried to wade across it."

Economists can be great, experts can be great. They can be brilliant. They can be very helpful. They can also backfire. And here to talk about that is Saul Morgenstern of the Dewey Ballantine firm. Saul.

MR. SAUL P. MORGENSTERN, ESQ.: Actually, I'm not going to talk about it at all. I'm going to let our panel talk about it. I'm just going to talk about them. Although I will say, even though I am considerably younger than Steve, when I started at Dewey Ballantine, I, too, was sent off for a tutorial by Frank Fisher. He told me the exact same story.

In any event, welcome to our panel. We have an impressive group of panelists today. We have Judge Thomas P. Griesa of the United States District Court for the Southern District of New York; Deputy Assistant Attorney General Deborah Majoras from the United States Department of Justice; Joe Angland, my litigation partner at Dewey Ballantine, whose practice is focused particularly on antitrust litigation and counseling; Bruce Green, director of the Louis Stein Center for Ethics at Fordham University School of Law; Dr. Stephen Kalos, an economist and expert witness at Charles River Associates in Boston; and Bob Schlossberg, an antitrust partner at Morgan Lewis in Washington, D.C., who has extensive experience in merger and acquisition antitrust.

We'll lead off this afternoon with Joe, who will give us the background on the law as it applies to using experts in litigation. He will also provide some practical tips on how one can best prepare and use experts at trial so their testimony can be admitted into evidence and they can actually speak.

Professor Green will then offer to us some comments on the ethical issues that may be implicated in helping experts getting ready to testify. He will also discuss some recent developments with respect to document creation and retention, as well as the normal considerations of just how much of the experts' testimony should be influenced by lawyers, and how much should be generated completely by themselves.

Professor Green advises me there are actually no ethical rules that apply specifically to the use of experts and, as a result, there are no hard and fast answers. He will explain how we approach analyzing situations as they come up.

Judge Griesa will then offer some of those insights that only a long period of time on the bench can give one about what works and what doesn't when you show up in court with an expert witness. From the vantage point of an experienced expert, Steve Kalos will tell us how we, as lawyers, can best help the experts do their jobs effectively.

Deborah Majoras will then give us a slightly different perspective. We thought it would be useful to talk about something other than just litigation on this panel and to talk about what works when one brings experts to speak to government agencies, either in prelitigation context or in premerger situations. She will offer some thoughts on when it is wise to use your experts as speaking players in your presentations, when you should do the talking for them, and all that falls between.

And finally, but not least, Bob Schlossberg, who does an enormous amount of merger work, will talk about the best way to use experts in analyzing mergers, to determine how to get your mergers through, and to identify what adjustments to your clients' business plans may be necessary to get them through. So with that, I'll hand the podium over to Joe. Thank you.

MR. JOSEPH ANGLAND, ESQ: Good afternoon. As Saul said, I'm going to give a sort of a general overview regarding experts in the litigation context. And I'm going to start by talking a little bit about the *Daubert* decision, the trilogy of *Daubert* cases. I'm not going to spend a lot of time on the Supreme Court cases, because the much more interesting thing for this group is what is happening in the antitrust trenches in light of the three decisions at the U.S. Supreme Court. Let's begin with a brief overview of *Daubert*.

Daubert involved pure science. The issue in *Daubert* was whether or not an expert could testify that Bendectin caused certain birth defects. The most important decision in that case was really something not disputed but just sometimes ignored: that district courts have the obligation under Federal Rule of Evidence 104(a) to make sure that evidence that goes to the jury does satisfy the requisite evidentiary rules, including the expert rules.

Oftentimes district courts had focused upon the relevance of expert testimony, but they had not decided whether it was reliable, which is required by the rules. Whether it was reliable was deemed just a matter for the jury. And the Supreme Court said no, the district courts are required to make that judgment with respect to reliability. So the district courts are the gatekeepers to screen away from the jury expert evidence that's not reliable and therefore might confuse them.

In passing, I should mention that the Supreme Court rejected in *Daubert* the *Frye* test, that said only generally accepted techniques could be used in the courtroom. It acknowledged you could have a new, not yet generally accepted technique that meets all the scientific standards. But it doesn't relate much to the antitrust world, because 99 percent of what's done in our cases is not that new or novel. It is reapplication of old techniques.

Finally, the Supreme Court said that when judging reliability of an expert report one should use a flexible test. The court articulated four nonexclusive factors that one should look at. When you look at those factors, the test is so flexible as to be shapeless. There is virtually no content in the Supreme Court's description of how a district court should go about doing its job.

We'll talk about those factors a little later on, because they are now embodied into Rule 702 or the note thereto.

The next case before the Supreme Court was *Kumho Tire*, and that, first of all, resolved a split among the circuits. There had been dispute about whether *Daubert* applied only to pure science—e.g., people in laboratories doing experiments—or whether it applied to other experts as well. And the court said it applies to other experts as well. In that case it was an engineer who, to us, to lawyers, may sound like a scientist. But there is a big gulf between pure science and engineering.

In this case the Court said we are not making any distinction between any types of experts. The basic principle of *Daubert* applies everywhere. The district court had great latitude in determining how to assess reliability. There is no specific set of rules to determine either what tests it uses to determine whether something is reliable or the procedure it uses. For example, whether it decides it on briefs or after a hearing or during the middle of trial. All that is left to the district court.

Finally, the least referred to, but in my view the most interesting of the three Supreme Court cases, is *Joyner*.

To begin with, *Joyner* says that the abuse of discretion standard is applied on appeal to judge whether evidence was improperly admitted or excluded. So district courts have broad leeway, and as we'll see, they have utilized that.

I do note in passing that while the review is deferential, it is not nonexistent. There have been a couple of major decisions in antitrust cases where courts of appeals have reversed in one case the admission of expert evidence, and in the other case the exclusion of expert evidence. And in both cases it led to a reversal of the outcome below. So while there is broad discretion for the district court, the circuit courts are having their say as well.

Rule 702 of the Federal Rules of Evidence was amended a little over a year ago, and it is designed to reflect the three Supreme Court cases to which I just referred. Given the vagueness of the cases, it is not surprising there is some vagueness to the rule. But I would urge all of you who haven't looked at the rule since December of 2000 when it was amended, to take a look back at it. Because it is a little bit different, and it basically states in summary form the principles we talked about a moment ago.

Now the Advisory Committee note to the rule goes further and tries to give some hint as to how reliability should be assessed. It comes up with a checklist, again nonexclusive, of things one might look for. Many of these don't fit neatly with antitrust cases. They relate much better to pure science.

The first is whether the technique used by the expert is tested or testable. That relates more, I think it is fair to say, to pure science and doing stuff in a laboratory. It is pulled right out of *Daubert*, as are the next four items. Whether there is peer review or publication of the results, this one merits a little pause. A lot of the types of issues that antitrust experts opine on in litigation are not the sort where one would expect to find a peer review publication.

For example, the question of whether the relevant product market includes all lemons or just fresh, as opposed to stored, lemons is not exactly the type of thing that economic journals are looking for contributions on. In sharp contrast, if you go back to *Daubert*, the question was: Does the drug Benedictin have really lousy health consequences? That's precisely the sort of thing one expects to find in the peer review journals.

I think most judges appreciate the difference between types of things which, if true or if reasonable, you would expect to find in the peer review literature and those things that, by their nature, are just not likely to be discussed in the peer review literature. They are not the sort of subjects that typically fill up the literature. So I don't think there are going to be many cases where somebody opines about a relevant market or damages and winds up getting barred on *Daubert* grounds because there's no peer reviewed article dealing with that precise issue. I think that's an unrealistic scenario.

Another factor is whether there is a known or knowable potential error rate. Again, it applies to pure laboratory experiments, and the margins of errors and statistical techniques used to judge statistical results apply less in the antitrust context. Another factor is whether appropriate standards and controls are used. I suppose if I were writing a brief in an antitrust case, I could try to adapt this to this situation, even though I think it is really talking more about pure science.

If some expert witness bases his conclusions on a regression analysis and he controls for some factors but doesn't control for a lot of other factors, on the one hand I could just say that makes this an unreliable regression analysis. I could spice up the brief a little bit by quoting the word "controls" out of the Federal Rule and out of, for that matter, the *Daubert* case. But again, these factors are a little more applicable to pure science.

And finally there's the old *Frye* test. If your expert is coming up with something completely novel, there's more chance it will be barred.

Now Rule 702 goes beyond the cases and lists five other factors. First, it asks whether there is a link to non-litigation work. Simply put, the work is more credible and more likely to be deemed reliable if litigation was not the first time that anybody began thinking about using a technique like this. And that would apply whether the expert himself had done it before or whether other people had done the same or similar things. The fact that something exists independent of litigation guards against litigators introducing junk science.

Another factor is analytic gap. Now let me explain what I mean by that. It was raised in the *Joyner* case, and it was why I thought *Joyner* was so interesting. In *Joyner* the issue was whether certain chemicals caused lung cancer. The expert witness opined that they did. This will have direct application to antitrust cases, believe it or not.

The expert witness said yes, and he based that upon two sets of evidence. The first was empirical studies about the extent to which infant mice contracted cancer or had cancerous cells when given a massive dose of the particular chemicals. The courts below, and it was upheld by the Supreme Court, said, we're dealing with men, not mice. We are dealing with adults, not infants. And we are dealing with low-level exposure over a long time, not a massive exposure in one day.

And the key holding in the Supreme Court here, or rather the holding below that it upheld was that the expert had not shown the link between the animal studies and actual human effects. It said look, animal studies may be perfectly appropriate. We can assume they are in a variety of cases. But in this case do those three differences matter—are those three differences significant so that we can just assume you can take the results of the animal study and say yes, there is an effect on humans. And basically the court said the expert didn't do his job. He did the animal study and then there's a big analytic gap. And he said so I think it causes adverse effects in humans without explaining why it is fair to use mice to reflect men. Why its effects on infants is a good proxy for effects on adults. And why a massive one-time exposure is a good proxy for continuous lower level exposure. The expert hadn't closed those gaps, and as a result the court wound up concluding that it was not a reasonable basis for expert testimony.

Now think for a second about antitrust cases. You can easily imagine somebody basing an opinion in an antitrust case upon some published study which may have been conducted in the middle of the United States. But the case is about a market on the East Coast. For example, the definition of relevant markets in a hospital case. Is it fair to extrapolate how far people—in New York, say, will travel to go to a hospital from evidence about how far people will drive in Kansas to get to a hospital? Maybe not. The dynamics of driving and distance are very different when comparing the East Coast and the middle of the country.

In the old days one would say, hey, the jury can listen to all that and decide how much weight to give it. But in *Joyner* the Supreme Court, and under Rule 702 other courts, may say no, we are going to look hard at this. If it is not close enough—query where you draw the line close enough—we are going to cut it off right here, unless this expert can persuade us that it is not too big a jump.

The second basis of the expert's opinion was relying upon four other studies, non-animal studies, epidemiological studies, all of which showed some evidence that these chemicals in fact produced adverse effects. But the court carefully examined each of the four studies and found that the conclusions were qualified or limited. For example, one study found a positive effect but not one that met the normal test of statistical significance.

Another case study found a significant effect, but said there are other factors it couldn't control for, so it hesitated to draw the conclusion that in fact it was the chemical doing the bad work. The court basically studied this stuff and concluded there was not enough to base the opinion on.

When you think of all the expert testimony in antitrust cases that is based upon studies that other people have done, you can see that *Joyner* may have a lot of application.

The next item, whether the expert has dealt with other explanations for the phenomenon, basically overlaps with what I just talked about. A key factor too is whether the expert is being as careful in court as he is otherwise. And I think it is fair to say "careful" really refers as much or more to methodology rather than to whether he mistranscribed some numbers. If one normally in one's academic work applies certain statistical tests—for example, if you normally require something to be statistically significant at the 95 percent level, if you normally test for weird statistical effects like heteroeskedasticity or autocorrelation—but in litigation you brush it off, that's the sort of factor that a court may be much concerned about.

The final factor is whether the field is known to yield reliable results. That again is not terribly applicable to the economists who will be testifying in antitrust cases. My illustration of this factor is somebody who may follow all the rules of astrology and absolutely faithfully comply with all the astrological conventions. A court could cut it off because the whole science is subject to serious question.

Now, in terms of procedure, very quickly, the court can do pretty much whatever it wants. But I will note there have been at least two reversals of decisions below where the district court did not permit an evidentiary hearing. They're not always required, but two courts—maybe it is a way for the appellate court not to wrestle with a hard issue—wound up saying we needed to hear more than the court below it had. An evidentiary hearing had been demanded and one should have been given. Those are the exceptions, but there are a couple of cases out there.

If you want a good collection of the case law on this, let me refer you to two sources. On the procedural aspects, Judge Weinstein's treatise is my source for those cases, and it has many others. And on the substantive aspects, *Antitrust Magazine*, put out by the ABA, had a symposium last year in one of its issues. That's a very good collection.

Now typically, *Daubert* challenges are raised right before trial, after summary judgment motions. But they can be raised at the class certification stage, when one uses an expert affidavit to show that for example, damages can be computed in a class-wide basis. They are frequently now being used on summary judgment, and they are also invoked at trial after the expert testifies. Indeed, in the *Brand Name* pharmaceutical case out in Chicago, a pretrial challenge to the plaintiff's expert, who was a Nobel Prize winner, failed. But after he testified, a directed verdict, judgment as a matter of law, was granted to the defendants based largely upon the court reconsidering its *Daubert* ruling and excluding the expert's testimony, leaving the plaintiff without enough to go forward.

Now, some lessons from the cases. Ninety-some-odd percent of the time antitrust experts survive *Daubert* scrutiny. They are typically doing well-established type things, and the vast majority of the experts will get through. Basically the reason they get through is that somebody challenges the expert saying he did A, B and C and D wrong and the other side defends A, B, C and D, and in the end the judge winds up saying look, these arguments go to the weight of the evidence not to whether it is reliable.

Now, there's no magic line separating weight and reliability. And what you will find is that judges differ a lot as to how vigorous a judicial inquiry they think is appropriate. A lot of judges think the jury is as good a vehicle as any for sorting stuff out, as long as it is not pure junk science. Other courts, like the court in *Joyner*, have a much more aggressive approach, and you need to know what the story is with your court.

Notable exceptions. There have been major antitrust cases in the last several years where *Daubert* rulings have had profound effects. I mentioned the *Brand Name* pharmaceutical case. In that case there was a directed verdict for the defendants because the Nobel laureate on the other side knew all the general economic principles but didn't know enough about the pharmaceutical industry. The court found that he wasn't able to make the leap from the general principles to his conclusion that there was conspiracy because he didn't understand enough about the way distribution worked in that industry and how you'd expect prices to compare to one another. It was a classic case of an expert with impeccable credentials relying more on those credentials than upon hard work in presenting his conclusion to the jury. And it's something we should all be wary of. We might have a great name out there who is highly respected, but if the proper amount of homework is not done, *Daubert* can be a deadly challenge.

There was the *Concord Boat* case, which was recently decided by the Eighth Circuit. In that case there was a judgment below for the plaintiff. On appeal it was reversed, and it was reversed on the ground that the district court should have excluded the plaintiff's damage expert on *Daubert* grounds because he did not consider enough of the relevant facts relating to that particular industry when developing a mathematical model, and because his model did not permit the jury to separate out damages from illegal acts as opposed to legal acts. So in that case we actually had a reversal with entry of judgment for the defendant.

In the booksellers price discrimination case, the plaintiff's damages expert's testimony was excluded in the context of a summary judgment motion, and as a result of that exclusion there was simply no evidence left to go to the jury. The court concluded that the expert again had not focused enough upon the peculiar facts of the industry, including, if I recall, the distinction between list prices and actual prices after all discounts were taken into effect.

There are several other cases as well. The point is this: That by and large antitrust experts get through. But not always. And the people who fail don't fail because they are not first-rate economists. Frankly, I'd say the average qualifications of the people who have been killed on *Daubert* grounds in antitrust cases in the last couple of years is way above the norm for the experts who testify. In some cases, at least in the case of the expert in Chicago, it may reflect too much reliance upon prestige rather than work. In other cases, there was a very aggressive judge bringing his particular view of how a study should be done. And as I noted, when *Daubert* motions are successful, they can be devastating; they can be case determinative. So you have to be careful.

So what do we do? Don't place all your eggs in an odd basket. If you've got an expert on some critical point in your case, who is doing something that's a bit tenuous, a bit unusual, bringing a different approach to bear, find some other evidence to support that essential fact. You don't want to get in the situation where literally you are out of court if you get a judge who is too aggressive. You may be able to have another expert's testimony slip over and cover the point. You may rely upon fact witnesses or documents. But don't get yourself in a situation where you're relying upon only one expert and he's doing something that does appear a bit questionable.

Don't stretch your expert too much. It is good advice even without *Daubert*. Don't take an expert in a given area and extend him or her into another area. As you start extending, *Daubert* challenges are much more likely to wind up being successful, because it is probable that the expert will not be applying the proper techniques.

I can't stress this enough. Play devil's advocate. Do not get into the syndrome where you hire an expert, he does a report, and you smile and you say, boy, this looks great. It is your job to be critical of your own expert. Challenge your expert as the process is going on. Pretend you are the other side. What problems would you have with the expert report?

Now, most of the time, good experts will have their answers for you right away. Every now and then, I come up with an argument where the expert says, gee, I hadn't thought about that. So there needs to be some more work done on the expert's end. So don't let your adversary's eye be the first critical eye that takes a look at your expert's work.

Check out the judge. Some are much more aggressive; others are less aggressive on the issue of *Daubert* challenges. And appraise any of these analytic gaps. Again, your expert could have done a great study, but it may be that what you want him to say is a jump from that study. The classic case in the antitrust context is when what you want the expert to say is that defendants conspired. He may have a study about price changes being at the same time and how likely it is or is not at all that these price changes would all occur at the same time. But many times what you would like him to be able to say is a conclusion: This was a conspiracy. Well, judges, I find, look very hard at the jump from the study, which may be very fine, to the actual conclusion.

My practice here is that sometimes you can get around this concern. I know this worked in Judge Weinstein's court a few months ago. He would not allow an expert to say that there was a conspiracy. He did allow the economic expert to say: one, I find the behavior consistent with what I would expect in a conspiracy; two, I find it inconsistent with what I would expect in competition. Before Judge Weinstein, for example, there is a line before going too far into the jury box, and it is one that, if you phrase your questions properly, you can navigate.

Some non-*Daubert* points here very quickly. Be careful about creating documents. Remind your experts that the e-mails they send you may well wind up being discoverable. So you don't want random wild thoughts there. You want the careful, considered opinion of the experts.

Give the experts what they need. Don't spoon-feed your experts only the documents that are helpful for you. You're going to run into trouble either at the *Daubert* stage or at trial itself. Let them tell you what they need and give it to them. Keep track of what you get. Under the rules you've got to produce not only the documents the experts rely upon, but all the documents they considered. And so either they or you need to be in a position to reconstruct that.

Consider the issue of retention of drafts. And I will defer this, because we are going to hear a little bit about this as we may during Professor Green's presentation. There is a decision you should look at, the *Trigon* decision that came down a few months ago in the District of Virginia, where the failure to retain certain drafts by experts wound up leading to adverse inferences being drawn against them. It's a scary decision in some respects.

And study the expert's prior work; your opponents certainly will.

Perhaps you want to use a consultant as well as an expert so that you could have your more candid discussions about some issues with a consultant. They wouldn't be discoverable. Discussions with the experts would.

At trial, simplify. Get out of your *Daubert* mind frame where you have to be sophisticated sometimes and get back into making things appropriately simple for the jury. It can be done.

Obviously, experts are many times only as good as their graphics. So worry about that.

And I strongly recommend when you're putting an expert on the stand that you map out redirect almost as carefully as you do direct. Because with a fact witness on redirect you can sort of work your way through it on the fly. With an expert on redirect sometimes you need graphics to show mathematical concepts. So figure out what the big items are going to be in cross and actually plot it out carefully.

And I'll finish up with the opposing experts. Tactical issue: Consider whether a *Daubert* challenge helps them or hurts them. Remember the old Machiavellian principle that if you go to shoot the king, you'd better kill him. An unsuccessful *Daubert* challenge educates your adversary as to your best cross-examination. So you have to bear that in mind when you're making a decision whether to file the motion.

Consider limited challenges on *Daubert* grounds. Many times most of the expert's testimony will be fine, but you can go in with a narrow motion, you can say: Your Honor, we disagree with the rest of the testimony, but we agree it is admissible; however, this is not admissible.

Convert the opposing expert to your own expert. This is something I don't think is done enough. In an antitrust case, if you're representing the defendant, you've got the plaintiff's expert up there saying there's monopoly power. There are a lot of things, assuming he's a competent economist, that he will agree with you on. Consider asking: Don't you agree that, no matter how high our market share is, if entry is sufficiently easy then we don't have monopoly power? Your adversary's expert may agree with that. Go through your expert's report and find everything that a competent economist will have to agree with. He may disagree with the collusion, but he will probably agree with many of the principles along the way. Review the opposing expert's history. You can often use it against him.

That's it. And we'll now get to hear about some of the issues I skipped, including documents and experts.

MR. EDWARDS: Thank you, Joe.

PROFESSOR BRUCE A. GREEN: I have been asked to talk about ethical issues in working with expert witnesses in antitrust cases. My point of departure is a recent decision, *In re Brand Name Prescription Drugs Antitrust Litigation*.[1]

This case involved an alleging price-fixing conspiracy. Pharmaceutical manufacturers and wholesalers were selling prescription drugs to hospitals and managed care organizations at a lower price than they were selling the prescription drugs to individual pharmacies. The defendants said that the reason for the price difference was because big buyers had more market power. The plaintiffs said it was because of an unlawful conspiracy. The plaintiffs put on an expert, Dr. Robert Lucas, who was a Nobel Prize-winning economist affiliated with the University of Chicago. Both the district court opinion and the Seventh Circuit's opinion in the case addressed Dr. Lucas's testimony at some length.

Obviously, Dr. Lucas was an expert with stellar credentials. But the district court's opinion didn't do very much, I think, to burnish his reputation. "Sad to say," the district judge wrote, "Dr. Lucas' testimony did not measure up to his unique qualifications." This is how the court summarized the matter: "Dr. Lucas reached his conclusions within forty hours of his engagement and before he undertook any substantial or detailed study of the prescription drug industry. Most of the facts upon which he based his opinions and conclusions were supplied by class plaintiffs' counsel, although he admitted he did not expect class plaintiffs' counsel to have made a balanced presentation. His expert's report was redrafted by class plaintiffs' counsel in its entirety and included what counsel wanted. In Dr. Lucas' own words: 'I don't think there's a single sentence in this affidavit that's intact from the first draft I proposed.'"

In its opinion, the court listed six beliefs on which Dr. Lucas based his opinion and said Dr. Lucas "was wrong in his beliefs about every one of them." The court went on to refer to "the falsity of Dr. Lucas' beliefs," his "disdain for reality," and "his ostrich approach to knowledge" characterized by his failure to consider various relevant things, including data that was sponsored by another one of the plaintiffs' experts and evidence introduced by the plaintiff through other witnesses. The court declared that "even economic opinion requires some level of scientific analysis and testing," and concluded that Dr. Lucas's opinion "failed every test of admissibility." On appeal, the Seventh Circuit was less harsh, but it agreed that the testimony was inadmissible or of no value because the witness had failed to consider so many things in forming his views.

Now, this may have been embarrassing for Dr. Lucas. Perhaps he violated standards of academic integrity; or assuming that there are standards of ethics for economists, perhaps he violated those. But what about the lawyers?

One might infer from the district court's opinion that the plaintiffs' lawyers did more than just redraft Dr. Lucas's report. We don't know. The court didn't seem particularly troubled by the lawyers' conduct, however. It didn't address the subject at all in its opinion. Why not? Didn't the lawyers have some ethical duty to make sure that their expert's testimony was based on complete information, or to refrain from relying on testimony that "failed every test of admissibility?"

Suppose for the sake of argument that the lawyers deliberately did not provide Dr. Lucas with particular information that they knew would be relevant to his opinion because they thought he'd reach a less favorable conclusion if he had that information. Suppose they discouraged him from considering data that was available to him or considering questions that might have led him to reach a different view? Suppose they encouraged him to rethink the opinions expressed in his original report, or to form less qualified opinions or to express the original opinions in a somewhat more felicitous way in a report that was drafted by the plaintiffs' lawyers? Suppose that the lawyers deep-sixed Dr. Lucas's original draft and encouraged him to do the same so that he could not be deposed or cross-examined as effectively about the changes that were made. Suppose the lawyers said to each other, "We'll never get Dr. Lucas's testimony into evidence. It fails every test of admissibility." Would any of this present an ethical problem for the lawyers?

Various laws govern the conduct of lawyers in civil litigation. Obviously the Rules of Civil Procedure play an important role. The discovery rules speak to the lawyer's duty to notify the other side of the intent to call an expert witness and to the obligation to produce documents considered by the expert or presented to the expert when he formed his opinion. Other law may also be relevant. It may establish some limitations or obligations upon lawyers in dealing with their experts. Relevant law includes tort law on spoliation of evidence and criminal law on obstruction of justice or aiding and abetting perjury.

But what about ethics as distinguished from law? In particular, what about the disciplinary provisions of the Code of Professional Responsibility by which New York lawyers are governed? Do they add anything to the other law? What do they have to say about lawyers in dealing with their expert witnesses? The answer is, "not much."

Only one rule in the Code, Disciplinary Rule 7-109(C), deals specifically with experts. This is the rule governing payments of fees to witnesses. The rule partly exempts lawyers in dealing with experts from a restriction that would otherwise apply to lawyers in dealing with other witnesses. Generally, a lawyer may not pay lay witnesses in order to persuade them to testify other than to reimburse them for reasonable expenses in attending a deposition or trial. But the rule recognizes an exception for experts. A lawyer may pay them a fee for their professional services, with a limitation that a lawyer may not pay them a contingent fee.

Aside from this one specific rule which talks about expert witnesses, the Code of Professional Responsibility does not speak explicitly about lawyers' relations with their experts. The rules relevant to lawyers and their experts are essentially those that govern the dealings of lawyers with witnesses generally. Furthermore, these general rules do not add very much to such other law as the Rules of Civil Procedure, tort law, evidence law, and criminal law.

For example, some disciplinary provisions essentially codify other law, such as the perjury law: DR 7-102 provides that lawyers may not knowingly present false testimony or participate in creating false testimony. Of course, you wouldn't need the ethics rule to tell you that.

Other disciplinary provisions relating to lawyers' conduct in discovery and at trial simply incorporate other law by reference. For example, DR 7-102(A)(3) says that a lawyer may not conceal or knowingly fail to disclose that which the lawyer is required by law to reveal. So if a lawyer is required by law, including discovery law, to disclose something, she has to disclose it. The rule doesn't add anything to the disclosure obligation that already exists under other law. Similarly, DR 7-106(C)(7) says that a lawyer in a lawsuit shall not intentionally or habitually violate any established rule of procedure or evidence. So if there is a rule of procedure or evidence, a lawyer must abide by it.

How do the disciplinary rules apply to some of the issues suggested by *In re Brand Name Prescription Drugs Antitrust Litigation*? Would there have been anything wrong with the lawyers giving the expert witness, Dr. Lucas, an unbalanced or incomplete presentation of facts and asking for his opinion based upon those particular facts? Would there be anything wrong in encouraging him as he progressed in his thinking to change his views or to change how he expressed his views? The answer is "probably not," unless the lawyer knowingly induced the expert witness to give what the lawyer knew to be false testimony.

That is the lesson of opinions applying ethics rules to lawyers who coach non-expert witnesses. For example, a District of Columbia opinion said, "A lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony. . . ."[2] A Nassau County opinion made a similar point.[3] The Bar Association's Ethics Committee said that in the absence of a specific Code provision, it could not mandate or prohibit specific interviewing techniques in an area so subjective; as long as an attorney in good faith does not believe that she is participating in the creation of false evidence, the lawyer's interactions with the witness do not violate the Code.

Thus, disciplinary provisions in themselves do not have a lot to say about lawyers' interactions with expert witnesses beyond saying that a lawyer may not knowingly elicit false testimony. If the lawyer limits what he tells the expert witness and asks for an opinion based on those limited facts, certainly that raises strategic questions. The opposing party may discredit that expert witness based upon the failure to consider relevant facts if the additional facts are known by the party cross-examining the expert, as they were in the pharmaceutical case.

But what if there are facts to which the other side isn't privy? Must a lawyer present all the relevant facts to the expert? At least as far as the ethics rules are concerned, there is nothing wrong with asking an expert to opine based on a discrete set of facts provided to the expert. As long as the expert is giving his honest opinion—or at least as long as the lawyer is not knowingly eliciting a dishonest opinion—the ethics rules do not provide much restraint. The question is purely a matter of what is or is not competent lawyering.

Would there have been anything wrong with preparing the expert's report and putting things in the report that the expert never told the lawyers, presumably with the hope that the expert would say the additional things and that he would subscribe to the report? Something similar was addressed in a 1993 decision dealing with influencing lay witnesses, *Resolution Trust Corp. v. Bright*.[4] After speaking with a witness, the attorneys in that case drafted an affidavit for the witness that contained a lot of things the witness didn't say and tried to see if the witness would agree with those things. The district judge thought this was bad. The Fifth Circuit disagreed. It said: "It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate. . . . Appellees nevertheless argue that because appellant attorneys attempted to persuade [the witness] to adopt certain statements which she had not expressly made and which she refused to adopt, the attorneys thereby were either making or urging the making of 'false' statements. . . . We disagree. The district court characterized the attorneys' behavior as 'manufacturing' evidence, but there is no indication that the attorneys did not have a factual basis for the additional statements included in the draft affidavit."

The lesson is that, from a disciplinary perspective, as long the lawyer is not knowingly attempting to elicit false testimony from the witness, whether a lay witness or an expert witness, the lawyer is allowed to influence, press, push, or aggressively question the expert as a way of shaping the expert's opinion. Of course, there may be problems with this from a strategic perspective. If the expert opinion goes too far, it may not be credible. It may be more susceptible to cross-examination if it is not balanced. But if the expert says at the end of the day, "this is my honest opinion," and the lawyers don't know otherwise, the ethics rules do not provide any restraint.

An additional question raised by the pharmaceutical case is this: Would it have been permissible for the plaintiffs' lawyers to encourage their expert not to preserve the first draft of his report? It's easy to see why they might be tempted to do so: If the first draft and other preliminary drafts are available to the opposing party, they are fodder for cross-examination. Assuming it is legally permissible to encourage the witness to destroy the drafts, it is almost certainly ethically permissible to do so. Ethics provisions add nothing to the other law. Of course, there may be legal restrictions. If the documents are subpoenaed, it may be obstruction of justice or a violation of discovery rules to suggest that they not be produced. But at an earlier stage, after the expert is retained and as he is first forming his opinion, it may be legally permissible for lawyers to say, "We don't plan to keep your earlier drafts. Can we assume that your routine practice as well is to discard earlier drafts?" If a lawyer says that, presumably the witness will get the point. Now there may be strategic reasons why it is a bad idea to encourage a witness to discard drafts even if it is legally and ethically permissible to do so. Maybe the appearance of discarding early drafts is problematic. But the disciplinary rules do not really enter into the calculation.

Finally, would there be an ethical problem with relying on an expert opinion that arguably "fails every test of admissibility?" The only limitations are those established by the rules governing frivolous arguments. Lawyers may not refer to things they know to be inadmissible. They may not make claims that are unwarranted under existing law. Presumably this includes arguments in support of the admissibility of evidence that is known to be inadmissible. But as we just heard, the *Daubert* standard is pretty fuzzy. In most cases, lawyers can come up with arguments that are at least colorable on why this or that expert testimony is admissible and might be entitled to weight. Therefore, the ethics rules don't provide much restraint. Again, the conduct raises strategic issues. There may be no point in offering expert testimony that is sure to be thrown out.

But as far as the ethics rules are concerned, if you don't "know" for sure it is going to be thrown out, if you have colorable arguments to make, you're acting permissibly.

In conclusion, ethics rules do not have much to say about how lawyers interact with their expert witnesses. These interactions certainly present strategic issues and issues of competence, but the disciplinary rules do not give lawyers much guidance or place significant restrictions on what lawyers can do in dealing with experts. The Nobel laureate's testimony may have raised serious questions from the perspective of his own ethics or questions about his academic integrity, but the testimony did not raise serious questions about the ethics of the plaintiffs' lawyers who presented the problematic expert testimony.

MR. MORGENSTERN: Thank you, Bruce. Judge Griesa.

HON. THOMAS P. GRIESA: The last time I tried an antitrust case was almost 21 years ago in the summer of 1981. This probably says something about the sad state of the antitrust docket in the Southern District for the last, I'm afraid, many years. But let me talk about the 21-year-old case, because it may illustrate some things for our present discussion.

This was a Clayton Act Section 7 case brought of course by the government. It related to a merger between two nation-wide companies in the waste management business. The only thing the government objected to in the merger was the merger as it applied to Dallas and Fort Worth, Texas and Houston, Texas. For reasons I do not understand even today, they brought the case in the Southern District of New York. The name of the case is *United States v. Waste Management*.

There are two very substantial parts in the transcript containing the testimony of two economists. The government called an economist, a man with the Antitrust Division; and the defense called a privately employed economist. And both said that they were experts in the field of industrial organization.

Now, both sides wanted this kind of testimony, so nobody even suggested that it was inadmissible, and it surely was admissible. Both witnesses gave opinions about product markets, geographic markets, degree of concentration before and after the merger, that is, market shares and the ease or difficulty of new companies entering this business. At the conclusion of the direct testimony of each witness there was a question about what would be the effect of the merger on competition? And each witness gave an opinion, and you can guess how they went. Of course, on all points the experts differed, and those differences were consistent with the positions of the two sides.

I should say that I had never set foot in Dallas or Fort Worth, Texas and when the testimony in court was all over, I suggested that I had better do so. So we all went down. And when we got on the scene, we all piled into a great big Cadillac limousine and took a tour of all the trash companies in Dallas and Fort Worth.

Now, trash companies, you know, it's not the usual tourist attraction, and they tend to be located on streets in the outskirts of the city where you buy old hub caps and that kind of thing. So we had this limousine, and we would roll into—some of the companies were very little, just a couple of trucks—- but we would roll into these companies with our Cadillac limousine, and a couple of them said they thought the Mafia had arrived.

I wrote a long decision, and it is reported at 588 Fed Supplement 498. I held for the government. But the thing I want to point out is perhaps somewhat to the discouragement of people here. I don't mean in any way to be disrespectful of expert testimony. The economic testimony was very interesting. I was engaged. There was no jury there, and I was engaged in some questioning, in fact quite a bit of questioning myself. But when I came to writing the opinion, which I'm afraid took me a long time, I have a very clear memory that I never went back to that economic testimony. And it played really no meaningful role in my opinion.

Why? Because the economic opinions in a somewhat theoretical vein were completely overshadowed in my mind by the more earthy and vivid testimony of the people actually in the business down there, people who were employed by the merging companies, people who were competing with them, customers, people from municipal collection departments and so forth.

The trip had meant a lot to me to actually see the area and view trash collection operation, and the operation of landfills and all that. That meant a lot. So that's what played the role, and that's what was important to me in making the findings.

Now, I should say that the case went up to the Court of Appeals, and the Second Circuit really agreed with all the factual findings about the markets and concentration and so forth. They also agreed that despite the fact it was very easy to get into this business—you could set up a trash business if you had a truck, a garage and a telephone—-the little people who set up these little businesses came and went and never usually did anything but stay a little while. So the large companies or the very large merged company, there was very little likelihood that that would be disturbed, even though there was ease of entry. Nevertheless the Second Circuit said, despite all this, there was to be no remedy. Because there was no probability that the merged company could set noncompetitive or monopoly prices, despite the huge market share and so forth.

In the interest of full disclosure, I must tell you that Phil Areeda in his treatise gave the Second Circuit opinion very low marks.

Now, I really don't claim that there's a lot of significance to be drawn from what I did in the *Waste Management* case. Undoubtedly other judges could easily be found who have had much different experiences with experts in antitrust cases, and I'm sure you yourselves as lawyers have probably much more experience than I have had. But I still have a hunch that there should be a cautionary note.

The economics testimony in *Waste Management* was on liability issues. Now, if that kind of testimony is somewhat general, somewhat theoretical, that is, if there's general testimony about what producers in general or customers in general might demand, then the testimony may really not have a lot of weight when viewed in contrast to the particular actual testimony by the people doing the business on the scene.

On the other hand, if the expert tries to recite a great deal of very particular testimony of other witnesses in the case and bases opinions on that, I would think that—and I've seen this to some extent in other areas—that the expert simply becomes a kind of a lawyer summing up. And that can be a disadvantage to the expert, because it turns him into a partisan instead of really an expert with some independence.

I've got a couple more minutes. Let me just say, about *Daubert*: what you have to realize is that any given federal judge may not come across an important issue. I've really never had a case where the *Daubert* problem was raised. But that's what happens, and I think it happens in the life of an individual lawyer. Things may come your way, and they may not. But it doesn't mean that problems about expert testimony haven't existed, even though *Daubert* was not literally raised.

I had a sex discrimination case that I tried, and a woman social worker who dealt with battery problems and all was called to testify for the plaintiff. The plaintiff had a real problem of credibility, because she had gone, I think, to some kind of a counselor. She was employed by Columbia University and she had gone and talked to a counselor. The really lurid events she was testifying about at the trial she hadn't told the counselor, so there was a very big credibility problem. The plaintiff wanted to call a social worker to testify that she didn't tell the counselor these things because people are reluctant to discuss sexual abuse and so forth. That in a theoretical way was okay, but I didn't allow it, because the plaintiff herself had not said that she was too emotionally upset to tell the counselor. And somehow I just felt it wasn't right basically to have this person get on the stand and testify the woman was a credible witness. So I didn't admit it.

The jury came in with a defense verdict. But I was worried about excluding this testimony. There were further proceedings, and I actually allowed the counselor to be called back to see what she would have said. An odd procedure, but anyway it happened. And her testimony was so poor that it erased my worries.

It goes without saying that I've heard a great deal of admissible, helpful and sometimes brilliant testimony. One thing that stands out in my mind is the expert testimony in patent cases. Patent cases now are tried to juries much more than they used to be—-and I have heard brilliant expert opinion with absolutely superb visual aids. There could be no presentation to a jury, and certainly not even to a judge, without that kind of testimony in a technically difficult patent case.

I have heard experts describe the formation of proteins out of amino acids, and the function of certain kinds of proteins in cells; and I've seen the jurors listen to that testimony literally sitting on the edges of their chairs, it's so good. So expert testimony—and we need it—can be beautifully prepared and absolutely essential. I have no conclusion except to say I urge you to bring your antitrust cases in the Southern District of New York. We guarantee that we'll give all evidence the weight it deserves.

MR. MORGENSTERN: Thank you, Judge. And now for some guidance on our experts on how we can help them to avoid the pitfalls that Joe and Bruce were talking about. Steve Kalos.

DR. STEPHEN H. KALOS: Thanks for coming out on this cold and rainy afternoon. A lawyer and an economist were walking over to the courthouse one day, when the lawyer spotted a $20 bill on the sidewalk. He reached down to pick it up, but the economist grabbed him and told him not to bother. If it was really there, someone would have picked it up already.

This is a rather old economist joke which came to mind recently as I was reading through some of these *Daubert* cases and reading *Joyner* and reading about analytic gaps and disdain for reality and so forth.

As most of you are aware, expert testimony can be important if not crucial to your antitrust case. However, sometimes expert testimony can go awry. We have been speaking a lot about *Daubert* challenges today, and certainly expert testimony can be precluded, but it can also fail to persuade the fact finder. It can be ignored by judges. It can be overturned on appeal. And so if you're putting an expert on of any sort, and particularly an economist, it is crucial that that economist, that expert be able to stand up to some scrutiny.

What I want to do today is provide a few examples of the types of problems with expert testimony, and this comes in part from my reading of some of the cases discussed before and in part from many years of experience in working with lawyers. I also want to discuss some things that lawyers can do to minimize the chances of such problems arising.

Finally, Joe referred a little bit to the risks of filing *Daubert* challenges. I must say that Joe covered it well, but I have a few thoughts to add. So hopefully I can finish up quickly and we'll all go and have a drink.

The first potential problem with economic testimony or expert testimony in general is that it may reach opinions or use assumptions that are inconsistent with the facts. As we heard before in the *Brand Name Prescription*

Drugs case, the appeals court suggested or the court suggested that there was in fact a disdain for reality. It's also the case that occasionally, no matter how smart we are, economists will misapply economic tools.

For example, back in the mid-'80s in the *Corrugated Container* opt-out case, plaintiff's expert applied an econometric model to explain pricing over the allegedly collusive period. He then used his model to forecast prices in the period after the conspiracy was said to have stopped and found, lo and behold, that the forecast prices were above the actual prices. He suggested to the judge and jury that this represented the amount of the overcharge. However, the problem was he really misapplied basic economic tools.

The economic model, theoretical model underlying his econometrics was really your basic textbook Economics 101 model of competition. It had nothing to do with conspiracy.

Defendant's expert then reasoned well, since this was really a model of competition, let's take it, estimate it over the period after the conspiracy is supposed to have stopped and then back-cast it. See what it predicted in terms of prices during this so-called conspiratorial period. Lo and behold, it got the strange result of again overstating the actual prices. Meaning if you believed the model, if it had any meaning at all, and you applied it correctly, it said that had competition reigned during the collusive period that prices would have been higher still. Obviously nonsense and obviously implied, or so the defendant's expert reasoned, implied that the model made no economic sense. And the jury in that case found for the plaintiff on liability but found zero damages. They believed that there was no credible basis on which to—no reasonable basis on which to assess damages.

Curiously, both those economists, the plaintiff's and the defendant's, have both recently been on the losing end of *Daubert*-type challenges.

Experts can also get into trouble when they provide opinions without demonstrated bases or rely on assumptions which do not have demonstrated bases. Perhaps at one point it was okay to come into court and basically say, like a harried parent might say to a child, I am the parent or I am the expert, and therefore you should believe me. But it is just not working anymore.

Experts can sometimes—I've seen experts reach opinions or use assumptions that are inconsistent with those of other experts on the same side. I saw this in a recent large antitrust case that settled, but it would have been tried here in New York. You had on the liability side—I should say a lot of this is created by tensions between damages and liabilities. You see that a lot in antitrust counterclaims. But this wasn't an antitrust counterclaim. This was just sort of an old-fashioned exclusion case. There were some tensions between what the damages and liability experts were saying. And fortunately for the society, these were based on some just gratuitous assumptions. It wasn't a fundamental difference of opinion between the two. We would have had a lot of fun on that on cross-examination, had it gone to court.

You see in these cases a lot of reference, and this goes back a ways, too, to failing to keep separate the effects of different conduct. In some cases, it may be keeping separate lawful from unlawful, and in some cases it may be keeping separate the effects of the bad conduct and just what's generally going on in the marketplace at the time. Or it might be that experts failed to differentiate among the effects of different and competitive acts, which can be problematic if the finder of fact finds liability on one of the acts but not others.

Much of economics is based on the assumption of rational behavior. And I think as a result of that economists tend to be relatively smart people. I've known a lot of economists who believe they can rationalize anything. I remember one of my professors in college once remarking this to me. And while that's a very valuable skill in some contexts, it means economists can think on their feet; they can also get into trouble.

I'm reminded of a case when a rather well-known Harvard professor was testifying, and he was testifying to patterns in oil or gas prices. He was shown this particularly remarkable spike in data and asked to explain it. And sure enough, he had a very creative and interesting explanation. Unfortunately, the data point was spurious. His research assistant had copied the wrong page and put the wrong data point in there. And once he had been told that, he was nervous, he lacked confidence, and he didn't do a very good job of persuading that day.

Two more points. Experts can sometimes lack independence or appear to lack independence, and that will cause lack of credibility as we've heard before. And the most egregious case I've seen is a damages expert being asked on cross-examination if he had an opinion on liability. To which he replied yes, I do, not an expert opinion but an opinion. Oh, what's that? Well, I think your client is liable. Based on what? Well, I've read the pleadings. You could see his lawyers just sink down into their seats. So it's really critical that you allow your experts to remain independent.

Finally, I just thought of this while I was sitting here. Another problem I've seen is on damages . . . it is difficult to keep the but-for and actual worlds straight in your mind, but it is just crucial. Trying to argue the but-for world can differ greatly from the actual world, and taking actual facts and using that as a fact as to why something would have been true in a but-for world by itself just often isn't enough.

Okay, so what can lawyers do? First of all, select the right expert at the start. Of course this person should have the relevant expertise, but as Joe pointed out, there's much more than that. The expert should have sufficient time to do his or her homework. That's just crucial if they are going to not fall into some of these traps we've heard about today, and demonstrate a knowledge and apply a knowledge of the facts. Make sure they have a strong support team.

If your case is at least moderately sized, you've got to remember good experts are busy. Typically if they are academics, they have a day job. Even if they are consultants, they have other cases, other consulting they are doing. They are not going to be able to do absolutely all the work. Make sure they have a good team. The strength of their testimony may ride on it. You want to make sure that they have a good quality control process in place too. We have seen lots of problems arise when mistakes get through, like the Harvard professor I talked about before.

As others have mentioned today, make sure your witness is aware of all key relevant facts, including inconvenient facts. You don't want them learning about the inconvenient facts for the first time from the other side.

Allow your expert access to the client and access to the case record. Access—it's important both from the point of view of helping to demonstrate and creating independence really, but also making the expert knowledgeable. I've seen a lot of good things happen when experts have talked to the client and really learned about the industry in ways they might not have in just reading the record or talking with counsel or doing their own research. And I've seen bad things happen when experts haven't talked with the clients, and mistakes of interpretation have slipped through, sometimes with disastrous consequences.

Don't ask your expert to make assumptions that you can't prove in court. This was a big part of the problem, it seemed to me, in *Brand Name Prescription Drugs*. The lawyers apparently gave Lucas a laundry list of assumptions and asked him to reason from those. And whereas his reasoning may have been perfectly good economics given the assumptions, the problem was there were at least a half a dozen crucial assumptions that he was asked to make that turned out to be factually incorrect.

The devil is often in the details, so I would recommend you or someone on your team or independent consultant review your expert's work closely. The theory may be fine, but there may be problems in the details that you won't find out about unless you go through with a fine-tooth comb. And believe me the other side is going to. That's what we live to do. That's what we have fun doing.

Give high priority to coordinating among experts and helping them to make sure the opinions and analyses are consistent. Of course, I don't mean try to put words in your expert's mouth or make them take an opinion that they don't believe is right. But as I say, there can oftentimes be gratuitous inconsistencies between witnesses, say liability and damage witnesses for example. And as Joe said before, don't ask your expert to formulate opinions outside his or her area of expertise. You're just asking for trouble.

Finally, to wrap up, bringing *Daubert* challenges have their down sides as well as their up sides. If you win and get your opponent's expert out of the case, you know, that's wonderful; that can mean winning the case. On the other hand, supposing you go forward and you lose. I've seen experts better prepared for deposition or cross-examination.

One of my colleagues I recently met in the hallway. He was all grins, and I asked him why are you so happy? He said he had just been deposed. I had never seen someone so happy after a deposition. Turns out the other side had issued a *Daubert* challenge several weeks before. He knew where all the hard questions were coming before deposition.

I've also seen cases where experts can fix their problems because of challenges, or if not really fix the problems, appear to by sort of adding a layer of sophistication or science, which doesn't really change anything but seems to. And while I've never seen this happen, I've read references to the possibilities of warnings that it is not outside the realm that the other side may switch experts in response to a *Daubert* challenge. Thank you.

MR. MORGENSTERN: Thank you, Steve. We'll turn to more of a non-litigation focus and hear from Deb Majoras about bringing your experts in to see the government.

HON. DEBORAH P. MAJORAS: Thank you. There's one thing I've learned now that I've been in Washington for some time, and that is how much I enjoy getting out of there.

Well, if you represent clients in matters before the Antitrust Division—and I'm sure the same can be said for the Federal Trade Commission—you spend a lot more time in advocacy before staff lawyers and economists in the Antitrust Division than you do in court. In both merger and nonmerger investigations, we spend a great deal of time in dialogue with the parties, their lawyers, and, in most cases, their economists.

We are investigating. You're telling us why it is we should not be concerned and should not advance to the stage of an enforcement action. Or perhaps you might be bringing in a client who is a third party who has some interest in the transaction, and in most of those cases would like to persuade us to bring an enforcement action.

Economics, of course, is the cornerstone of modern antitrust enforcement. And at the Antitrust Division we have roughly 60 industrial organization economists who are integral parts of our investigating litigation teams. That means that when parties come in to engage us in dialogue, we see a lot of economists coming along as well. And, given the factually intensive nature of our analyses, we sometimes see industry experts as well. I'll get into that a little bit later.

Meetings at the Antitrust Division take several different forms. I think probably most common are meetings in which lawyers and economists come in and meet with our staff lawyers and our economists. Hopefully, and certainly I think if we are doing our jobs right, that will be several times in any extended investigation. There also may be meetings at which the economists are really the stars. While a lot of lawyers on both sides don't feel comfortable allowing economists to have their own discussions, some economists tell me that those are sometimes the most fruitful discussions that they have. When the lawyers aren't present, there's far less posturing, they say, and a lot more work getting done.

And then finally we have the so-called "front office" meetings; those are the meetings which, I suppose you could say, you want to avoid. If you get to the stage of the investigation at which the staff might be getting ready to recommend a case, then the parties and their economists come in and have a meeting, generally, first with the relevant legal and economics Deputy Assistant Attorneys General and the Directors of Operations, and then quite possibly some short time thereafter with the Assistant Attorney General. So those are the sorts of meetings that I'm talking about.

In preparing my remarks today I spoke with several of our experienced staff lawyers and economists to take a nonscientific but nonetheless good sample of what it is that we all agree we're really looking for in these meetings when experts are brought in. It is fair to say that economists and other experts in this context are most effective when permitted to act proactively.

Now, some lawyers take the general approach in our matters that because it's the government's burden to prove a case, their defense will be strictly to act defensively—that is, to sit back and tell us what we are doing wrong in our analysis without offering any of their own analysis. And, that's perfectly fair. It is our burden, and we have to sustain it if, indeed, we wish to bring a case. But, not surprisingly, that's not the most effective way to do it.

When you are meeting with us as a party, you are trying to avoid litigation. Your economists, while undoubtedly there to advocate for your position, nonetheless are also purportedly there to bring an independent voice. If they simply sit there, listen, and offer no opinions of their own, other than to criticize what our own economists are doing, it is not really very helpful.

In contrast, many experienced and effective defense lawyers allow their economists to share with us their own analysis and study, as well as the backup, and that can be very effective in advocating that no enforcement action is needed.

While the substance is the most important thing, nonetheless a failure to engage proactively, especially given that so many lawyers today actually do approach it that way, may send a signal to us that there really is something to hide here, something that we ought to be concerned about. It just may prolong the investigation at a minimum.

Similarly, some lawyers bring economists to meetings—often economists with big names—and they don't let them speak freely. We had a situation recently in which an economist came to a meeting, and every time he tried to speak, a partner at a large prominent law firm would put his hand on his shoulder and stop him. And I kept thinking to myself, "This is so odd. Does he think we don't see this? Does he think we have no idea what's going on here?" It clearly gave the impression, whether true or not, that the economist may have believed something that would be helpful to me and not to that client.

There are also situations in which a party's economist sits by while lawyers make arguments which, quite frankly, are contrary to some basic economic points or basic industry points. And even if the economist is not jumping up and saying that they agree with that, just by sitting idly by, the economist loses credibility, particularly with our own economists.

The bottom line is that if you have an economics point to make, or we have an economics question to ask that you need to respond to, you are much better off letting the economist speak. There's just no question about it. That will lend an air of credibility to the statement that will far exceed what we can get from the lawyers.

Now, having said all of that, here is a caveat. If you bring in one of these big name economists—and I don't mean to sound at all critical, most of them have big names because they are very good—in order to be effective, they have to have done some work. Good economists, especially those who testify, can be very busy. And if you bring in such an economist, and it is clear within the first few minutes that that economist has not bothered to get in there and get his or her hands dirty but is really just speaking on the surface, the presentation will be ineffective. We respect and value the sound analysis that we're hearing at that meeting in that matter, not just the "talking heads." Let the economist who did the work do the talking. We already know that you and your clients can afford high-priced economic talent. We are not afraid. We would like to hear the analysis from someone who actually knows the industry and has done the analysis.

Now, if you decide (wisely, I would say) to take the proactive approach, both in lawyering the matter and with respect to what you allow your experts to do, jump in with both feet. Let the expert work with our economists, exchange the data, talk about the methods by which you reached the conclusions, and discuss industry knowledge, at an early stage.

There is a lot of strategizing in the second request process and even actually in the first 30 days of a merger investigation, let alone in a nonmerger investigation in which CIDs have been issued. There's a lot of to-ing and fro-ing, back and forth about what's going to be produced and what's not going to be produced. And we recognize there are often concerns about burden, the form in which we're seeking data and so on. Those are other issues that we have been trying to address at the Antitrust Division.

But beyond that, the fact is, if your economists have used data and information to do an analysis, we know you have it. We can get it somehow. And if we get it early, our economists are able to use the data to try to replicate the results. If you are confident in your analysis, then it may well be the case, as it often is, that we will reach the same conclusion and we can close that investigation, and your client can get on with business.

Substantively, we obviously want an economist who can "talk the talk." Now by that I mean, for example, bringing in an economist who starts the meeting off by wanting to explain to me why the Merger Guidelines really do not make any sense from an economic standpoint probably does not get you off to a very good start. We are bound to apply the law. The Merger Guidelines are a summary of, we believe, current antitrust law and economic thinking. If the guidelines ever need to be changed, there's another forum for doing that in the long run. You are much better off bringing in an IO economist who has familiarity with the agencies and the way that mergers are analyzed. It doesn't matter how brilliant your economist is, again, if they don't understand the framework within which we're doing analysis. There are matters in which lawyers retain industry expert economists as opposed to IO economists who really have done a lot of work on mergers or other enforcement type actions, and the former have not always been as effective as the latter.

Also on the substance front, beware of relying exclusively on econometric studies. That has kind of been the hot tool in antitrust for a number of years now, and econometrics does have a very important role to play. But even if a study is conducted and presented by an experienced econometrician, its value will be diminished if it is not presented with parallel work showing that the studied results are consistent with what's really going on in the market. That is what we care about most. And the econometrics can be used to supplement it but not in lieu of it.

I have just a few additional points. First, don't save your analysis or presentation by your economist for the meeting with me or with Charles. I've had meetings in which economists have made terrific presentations for me, only to find out that the staff has never heard it. Not only will you make the staff understandably angry, but you may just again serve to prolong the investigation.

Next, just like in court, the economists and the other experts best present themselves when they appear objective, at least relatively so. Contesting every point, no matter how trivial or obvious, or overstating the case is simply unhelpful. Even small admissions can go a long way toward bolstering credibility.

On white papers, we appreciate their submission, particularly when they contain economic analysis as well as your legal analysis. If you intend to submit a white paper, you should get it in as early as you can. I have had white papers handed to me as lawyers walk in the door to meet with me. It is not easy to discuss it when I haven't read it. Further, we can better consider your arguments if the staff has the white paper early. Sound analysis is what will be persuasive; not intimidation by volume, or strategic timing of submission.

One word about industry experts. It may seem as though I have cast them aside in favor of IO economists, but I have not. Industry experts can be quite valuable. For example, industry experts can be especially helpful if a problem has been identified and we are looking for a fix, particularly if you want to present a "fix-it first" proposal for your merger. There, an industry expert can be very helpful to us in understanding industry conditions and what might work and what would not work.

Now, I have been asked whether, when third parties come to us with a complaint or in support of a particular transaction, it is a good idea or a bad idea for them to bring an economist. It can be quite helpful. But more than just being helpful in and of itself, it shows that the lawyers have the client focused on the antitrust issues as opposed to just coming in with a bunch of complaints about what their competitor is doing that they don't like, which may not have much relevance actually to the antitrust problem we are looking at.

And my final point, and I hate that I have to even mention it, but we really do have this problem: Respect the staff; do not denigrate their work, and admonish your experts likewise. We really are trying to get to the right answer, and such behavior does not help in that quest.

I thank you, and I look forward to seeing you and your brilliant experts in Washington.

MR. MORGENSTERN: Thank you very much. Now, last but not least we have Bob Schlossberg to tell us about the nonlitigation context from the private side.

ROBERT SCHLOSSBERG, ESQ.: Saul was asking me to envision all the benefits that come from speaking last, and I'm still working on it.

What I thought I would do just briefly is cover a few of the unique or unusual aspects of using an expert in the merger context before you get to the Antitrust Division and get to see people like Debbie, and then talk a little bit about agency practice. And then I can't help but come back to the litigation context and say a final word on litigating merger cases.

There are lots of things, obviously, that are different about using an expert in a merger context. One is you have a pure counseling role. And when you hire the expert isn't keyed to when the complaint is filed. There's a judgment call there. Experts, like the rest of us, aren't cheap, and there are client sensibilities to take into account. It depends on the posture and whether it is a friendly or hostile deal.

I'll give you one example. Increasingly we are asked to persuade sellers to dance with our clients. People have figured out that competitively challenging deals don't always get done. People like Debbie have a job of challenging deals that are competitively aggressive, and so sellers are now handicapping antitrust risk in lots of different ways. I'll give you one quick war story.

Just last week a seller negotiated a deal with us where we, as outside counsel for the buyer, would receive their confidential information. So we then could turn around and persuade them why they should dance with our client. In that context it was actually very helpful to have hired an expert economist and have that expert economist work with us on their data, and in fact, not surprisingly, help us endorse the conclusion that this deal was doable.

There was a little serendipity at the end when the seller confessed to us that they had also used the same economic consulting firm and taken heart from the fact that we had retained them.

As a general matter, you need to get an expert, as Debbie alluded to, in early enough to be useful. They are not useful if they haven't done their homework or haven't read the documents. They can be very useful in doing the premerger client interviews. You get a lot more out of those client interviews if you have your economist with you. It adds to their credibility. They don't suffer from some of the problems Debbie alluded to. So if the deal can bear it and the client can bear it, getting the economist in early and participating in the interviews is a very helpful step.

One of the standard practices in merger review is jointly retaining economists. You have a common enemy, if I can put it that way, the Antitrust Division or the FTC. Generally the parties have linked arms. There's a lot of value in sharing the fees and jointly retaining an economist. The economist comes in under the joint defense and confidentiality agreement that is normally the staple of outside counsel working together. There are a lot of advantages. You don't want your economist in theory not seeing everything the agency has seen. The agency is getting productions from both sides; it is helpful when your expert can actually read the same documents the agency is seeing. Similarly, it is nice to have only one voice. I don't see anything productive about taking two economists on two sides of the deal into the agency who are inevitably going to see things slightly differently.

While I subscribe to Debbie's view about being proactive, there is proactive and then there is proactive. The fact of the matter is there are a few deals—and I've done this, but not a lot of deals where you're going to see the agency on day one. You filed your Hart-Scott-Rodino forms, and as you all know you produce 4(c) documents. The 4(c) documents do recognize the privilege. And one of the things I've worried about just a little bit over the years is when your privilege log and your Hart-Scott production lists an economic expert. I'd rather not let the agency know that I've spent the last month in the trenches with an economic expert trying to figure out how to defend my deal.

So while I'm a fan of the proactive approach, you want to be careful in the early going about what's privileged, and obviously what's not. What's going to have to get disclosed on the Hart-Scott and the 4(c) log, and how that's consistent with your overall strategy.

When to take the economist to the agency. In most deals, but not all deals, you'll get that initial contact from the agency, and you'll want to go in and tell your story. The level of interest at the agency will help dictate when and how you take the economist in.

Debbie referred to I guess what we were calling unilateral effects analysis. There has been over the last three or four years, particularly in consumer products mergers, just a raft of econometric modeling done with supermarket scanner data where the economists are indispensable. In that type of merger, if you proactively modeled that data, there's absolutely no question you're going to bring your expert economist in. Because most of us are not competent to talk about types of unilateral effects modeling.

Who you bring into the agency. There isn't, as you can understand, a *Daubert* standard per se at the agency, but there is an issue of credibility. Just like lawyers, economists get reputations at the agencies. And it is very important to think through and do a little due diligence on what are the last mergers the economist has handled, what do we think their reputation is at the agency, have they been at the agency themselves? So there are issues of reliability and credibility.

I completely subscribe to the sharing-of-data point that Debbie made. There's a whole debate about subpoenaing third party scanner data providers. But the fact of the matter is, if you've gone ahead and done econometric modeling with scanner data, then the agency is going to want it, and be prepared to give it to them.

The issue of what I call unchaperoned dialogue between the economists really depends on whether it is going to be a two-way street. I've had deals where it has been very productive. The economists talk to the economists. Quite frankly, the practice varies at the agencies. Some lawyers at the agencies get very nervous about unchaperoned dialogue, and that's fine. If the lawyers can chaperone, I agree having the economists talk to each other about what they have been doing is very productive.

I remember in a number of deals I would sit in these meetings with economists and only be understanding every third word. But the only way to get through the econometric modeling and all of those tough issues is to let the economists talk to each other.

One other word, Debbie alluded to the fact of increasing skepticism about the econometric modeling. And it turns out, at least at the FTC, I think by Chairman Muris, David Sheffman is the head economist at the FTC and is reconsidering this whole issue of whether all of this modeling really has the probative value that the economists say it does.

Let me just say a word about noneconomic experts. Debbie alluded to industry experts, and while this doesn't come up a lot, it is worth considering. First of all, we have talked about scanner data and getting it from the supermarkets. I've been in a few deals now where we have conducted and the Antitrust Division has conducted surveys, and there are of course survey experts that are different than IO economists. You need the raw data. You're not going to run a popularity poll. Nobody runs a survey and calls a bunch of consumers and says, well, if the price goes up five percent, what would you do? That's not how you do statistically reliable surveys.

But there is an opportunity to do surveys to develop a data set in which the econometricians can do their modeling. One thing to think about is whether there is a role for survey and survey specifications. We have talked about IO economists. Increasingly, because of this modeling, people are also turning to really pure statisticians. One of the FTC's favorite experts now—and this will take us into the litigation context in a minute—is Professor Ashenfelter from Princeton, who I understand is actually a labor statistician.

The fancy economics has gotten to the point where it is just not IO economics; it is working on the data. So that is something also to consider. Debbie referred to industry experts being useful in the fix context, and I would agree with that. The only other place I've been able to effectively use industry experts is when you're trying to build an entry story.

I had a deal a number of years ago where our principal argument was entry. Entry was easy. And it turned out there was a former employee who had worked for a number of competitors whose job was really to set people up in business. We called him Mr. Entry. He was a consultant that went to people and helped set them up in business. We found he had given credible testimony to the FTC about the ease with which you could get into the business. So there's some role for people on those technical aspects of the industry. I don't think you're going to bring an industry expert in to define product markets.

Finally, in the failing firm context, a defense often tried and that rarely succeeds, in the failing firm context, we were talking about the profit and loss of the company. There may be a role for an accounting expert.

Let me just speak for a minute, so I can keep within our appointed hour, about litigating merger cases. A couple of things. Obviously, given all the reform in the Federal Rules over the years and given how early you get an expert into your merger, the expert that's been with you from day one is not the one you're going to want to have as your testifying expert. I think Joe talked about random, wild thoughts and e-mails. You're going to get those random wild thoughts as you build your case, and it is not the person you want to put on the stand and have all those e-mails discoverable. This tends to mean you're going to a second expert, whether at that firm or somewhere else, so you have the discovery shield.

I was interested in Judge Griesa's comments about the *Waste Management* case, because in fact it was very reminiscent of the *Staples* case that was litigated a couple of years ago. That was a titanic battle of experts. Professor Ashenfelter was there for the FTC, and a bunch of other well-known economists. And there was this huge statistical battle, a sampling battle. It turned out the most important thing to Judge Hogan was when he went to a superstore and seeing was believing.

The government had defined a market, you might recall, of disposable office supplies sold through superstores. Part of the problem was—hang on, I don't get it—you can buy envelopes in mom and pop stores, how can there be a market defined as selling that stuff through superstores? Judge Hogan drove around the Beltway and went to number of superstores, and that was important to him. And I think the economists, if I remember the opinion right, never came up.

One final point on litigating, and this is probably not that well-known, is that the *Daubert* principle and *Daubert* itself has reared its ugly head in merger litigation. I don't want to say this has been swept under the rug; it just never came to light. We have seen reference to the *Swedish Match* case or the smokeless tobacco case, I think it was in Bill Lifland's summary, where the critical issue there was, does chewing tobacco compete with moist snuff. And the FTC sued to block the deal. The FTC said loose-leaf tobacco was the product. The parties said it competed with moist snuff. The FTC in that case actually brought a *Daubert* motion against one of the defendant's experts. They talked about whether in fact that expert's testimony was statistically significant. It was an expert that wasn't slowed down by the documents or the testimony. He was a pure econometrician who was working the numbers. And I won't take you through all the particulars, because I couldn't, but the basic point was he admitted at deposition that he didn't satisfy statistical tests. And the elasticities he was coming up with for the product market could just have easily been this side of the line or that side of the line.

Joe had talked about the *Daubert* standard of known or potential error rate. And basically what the FTC was saying is this didn't measure up to that standard. It was also interesting—I think before the amendment to the Federal Rules, I'm not sure—is that one of the FTC's points was he was always much more careful in his academic work than he was in preparing his testimony in the merger context. And there were statistical tests that he did as an academic that he didn't do or that he ignored in his testimony in court.

At the end of the day—and this is sort of an interesting twist on *Daubert*, and I don't believe there's a reported decision—the judge basically said this is a bench trial; I'll hear the testimony and I'll just—it all goes to sort of weight and credibility, not admissibility. So in the end the testimony came in. But suffice it to say, even in the merger context you can't escape *Daubert*. Thank you.

MR. MORGENSTERN: Thank you, Bob. We have, thanks to this series of very meaty presentations, used every minute of our allotted hour and 45 minutes. I was checking and we started ten minutes late.

Should we take a couple of questions before we go on to the next panel? Are there any questions, or have we answered every single thing you can think of?

SPEAKER IN AUDIENCE: I'm wondering, the first two speakers talked about the *Trigon* decision and the drafts, maybe preservation of evidence?

MR. ANGLAND: I'll take a shot at it.

In *Trigon* or preservation of evidence, what happened was the expert witnesses prepared their reports, various drafts. The drafts were sent to the consulting firm that they were affiliated with. The drafts were then not retained after presumably they got suggestions and amended the drafts. The court wound up concluding that under Rule 26, which requires one to produce all documents the expert considered. I guess the theory is in writing your final reports you consider your drafts of the final report, ergo, all drafts must be produced.

In this case the drafts weren't retained, and what the court did there was order, first of all, that a computer expert come in and try to retrieve what they could from the hard drive. And then when in some cases they couldn't retrieve it, the jury would be instructed that there would be an adverse inference to be drawn because the drafts presumably were unhelpful and therefore destroyed.

There is very little law, first of all, on the first issue, as to whether you are required to retain drafts. You can argue that the rule says you must show everything that you considered in forming your opinion. Not in writing your final report, but in forming your opinion. And that in forming your opinion you rely upon underlying materials. Your drafts are reflections of your opinion. They are not something that you rely upon to form the opinion. So to begin with, people are going to have to watch to see whether other courts follow that or not. It is not clear.

Second thing is the court noted in a footnote that it was not saying that every draft necessarily must be retained. It said, for example, we need not decide whether an expert sits at his typewriter and does one draft and looks it over and revises it without anyone else interacting with him in the process. That's sort of worth submitting. The court said there may be good reason not to apply it there.

Here, however, the court said it was sent to other experts; therefore, it rose to the level of dignity that it should be retained. The court did not say whether the retention obligation arose if the expert simply sent it to a lawyer. But frankly, reading the court's opinion, I would think it would conclude yes. So right now, I am a little bit nervous, in light of this new opinion, about having some experts continue their normal practice of only keeping the last operative version of their report.

And one thing I'm going to do—having just read *Trigon* a week ago, it is a relatively recent case—is look around to see what other courts have said on that subject. But right now I am nervous about having any experts do what they traditionally do, which is only keep the current version.

MR. MAJORAS: Joe, what was the court?

MR. ANGLAND: District Court in Virginia, I think the Northern District. The party, by the way, who had the experts that got in trouble for this was the Internal Revenue Service. So one branch of the federal government was paying no deference to the other.

MR. LOGAN: There are decisions in the Southern District that drafts are producible. And I guess if they are producible, then you shouldn't be destroying them, right?

MR. ANGLAND: Well, there is a distinction between what must be produced under the disclosure rule and what can be requested under discovery. As I say, there's an argument that even though, if you save a draft, maybe it has to be produced if you get an appropriate subpoena. But arguably, if it is not included in the pure disclosure rule, Rule 26, then it is up to you whether to keep it or not to begin with. But as I say, I'm growing more nervous.

MR. MORGENSTERN: Yes.

SPEAKER IN AUDIENCE: I'm asking as an expert witness and not as a lawyer, what is the role for a consultant to go to meetings or negotiations with the other side with the concern that that person can then be deposed?

MR. ANGLAND: Is this in the merger context or litigation context?

SPEAKER IN AUDIENCE: The litigation.

MR. MORGENSTERN: So you're talking about bringing a consultant or expert to, say, a settlement context?

SPEAKER IN AUDIENCE: As an inside consultant, that person being identified to the other side as being a potential.

MR. ANGLAND: Well, under Rule 26, it takes extraordinary circumstances to be able to depose a consultant, that is, someone who is an expert but not designated as a witness. That's a pretty high burden to overcome.

MR. MORGENSTERN: We would like to thank you all for coming this afternoon. And I would like to thank this excellent panel for the effort they put into preparing these remarks together and for delivering them together.

We'll take a short break, while the next panel, chaired by Barry Brett, takes the stage. Thank you.

Endnotes

1. 1999 WL 22889 (N.D. Ill.), *aff'd in part and vacated in part*, 186 F.3d 781 (7th Cir. 1999).
2. District of Columbia Opinion 79 (1979).
3. Nassau County Opinion 94-6.
4. 6 F.3d 336 (5th Cir. 1993).

Intellectual Property and Antitrust: A Fresh Look

MR. EDWARDS: Okay, we are about to begin the next panel. I would like to remind everyone that a publication of this section, *Antitrust Law in New York State*, the Second Edition, has just been completed. And it's for sale at a very, very low price, and you can find it on the seventh floor in the registration area.

The next panel is on antitrust and intellectual property. Antitrust, of course, outlaws monopolies and many intellectual property rights grant monopolies. And I think that's the gist of the next panel which will be chaired by Barry Brett of Jenkens & Gilchrist.

MR. BARRY J. BRETT, ESQ.: Thank you, Steve.

Several months after we announced that we were doing this program, the FTC and Department of Justice announced that they are going to conduct hearings on the subject with a catchy title of Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy. The Federal Register notice on those hearings and the related statements appear in your program materials. Those hearings have now been delayed until February and are still in the development stage. I have been in pretty regular contact with the folks working on that. The people planning those hearings expect them to go on for many months, certainly not to be completed before the summer. They have adopted some of the topics that are going to be presented at our program, as they saw our materials, and they have been added to the issues which will be dealt with.

At the same time, in a related development, and Molly will note some more about this, the FTC has initiated 6(b) hearings on issues relating to generic drugs, a subject which has occupied much litigation focus in the intellectual property and antitrust issue.

Now, those are a couple of the indications of how important the subjects we are going to be talking about are. And intellectual property and antitrust have been and will continue to be the most discussed subjects among antitrust lawyers I think in the coming months and probably have the most dramatic effects on competition policy as we move forward.

I also commend to you, in thinking about the subjects, the Carl Shapiro article, which is in your materials.

What we have done for this afternoon is put together a panel which will present to you a view of the practical, legal and theoretical issues affecting antitrust and intellectual property. The panel is deliberately diverse in approach and views. It is designed to avoid something that has permeated a lot of these panels, and that is we are not going to turn it into a discussion of Microsoft or the pharmaceutical cases. I think in the next hour and a half or so you'll probably hear most of what the government is going to spend six months developing.

It is my hope that we will have some time for some questions and interchange after the speakers have completed their presentations. We'll try to initiate questions from the floor. But with that in mind, I would certainly invite anyone who has some questions to bring them up here, and we'll try to initiate them into the discussion. And I'll take credit for any of them which I think are particularly clever.

Let me introduce our panelists to you now in the order in which they are going to speak, and then we won't have to interrupt the flow.

Our first speaker is going to be Eric Harris, who is now the Assistant General Counsel and Chief Antitrust Counsel at Johnson & Johnson. He's a graduate of Syracuse University Law School, where he got his law degree, and then he trained at Cahill Gordon under Bill Lifland, and he's a long-time member of the New Jersey Association of Corporate Counsels. And he will present to us a view of these issues from the trenches of some of us who have to deal with them every day in connection with licensing, trademarking and other related issues and see how they really do impact upon everyday functioning.

Followed by Alan Weinschel of Weil, Gotshal. And from my point of view the most important credential I can tell you is he's a good friend and the first person I called when we decided to do this program because he is a terrific speaker and very knowledgeable in these areas. He speaks and writes frequently on them. He is a member of Weil, Gotshal's Antitrust and Technology and Proprietary Rights Group, another catchy title for us. Alan is a Brooklyn College graduate and graduate of NYU Law School, where he received his law degree with honors. He is a past Chair of this Section.

Alan will be followed by Molly Boast, who we, the New York Bar, are pleased to welcome back to practice in New York from her stint at the Federal Trade Commission where, among other things, she served as Director of the Bureau of Competition.

Molly has recently joined Debevoise & Plimpton as a partner doing antitrust work in their litigation department. She's a graduate of Columbia Law School. And I'm very pleased to tell you that she was this morning elected to be a member of the Executive Committee of this section. She again brings a diverse background and holds degrees in journalism as well as her law degree.

To follow the three lawyers representing the corporate side, the firm side and the government side, we tried to give you a perspective from the theoretical and observer point of view, both from a law professor and an economist. Mark Patterson will address these issues from his perspective as Associate Professor of Law at Fordham. He's also a Research Fellow at the Burton Center for Internet and Society at Harvard. Mark is a patent attorney as well, and he's written widely on the subject and has some very interesting thoughts.

Finally, to set us all straight on the economics of all of this will be Bob Hall, who has been kind enough to join us again. And those of us who have heard him speak before know how much fun he is to listen to and how enlightening he is. Bob is Professor of Economics at Stanford and a Senior Fellow at the Hoover Institution. He is also an academic affiliate of Analysis Group, which is kind enough to be hosting our reception this evening, and they were kind enough to get Bob to join us. Bob's credentials and CV are much too long to even start to go through. They are reproduced in the program materials, and he really does need no introduction either as a speaker or scholar. With that, Eric, if you would begin our program.

ERIC I. HARRIS, SR.: Right now scientists and laboratories at biotech and pharmaceutical companies all over the world are devoting vast resources to projects which will in our lifetime develop the first effective treatment, if not outright cure for Alzheimer's disease, diabetes, heart disease and many other major diseases. The companies that invest in this research will enjoy tremendous financial rewards, but they pale to the benefits that will accrue to society as a whole with this successful research. The avoidance of pain and suffering of these victims on themselves and their families, the economic losses from loss of productivity of millions of our citizens and the costs of treatment are tremendous.

Now, as everyone in this room probably clearly understands, absent the patent system, the vast majority of this research simply would not be done. But this seemingly obvious and seemingly simple idea really has profound economic, social and legal implications that lie at the core of how we ought to think about antitrust law on one hand and intellectual property law on the other.

Now my purpose today is to begin by spending a few minutes exploring the so-called antitrust/intellectual property interface. And in doing so, I found it useful to ask four questions. Why? How? How much? By whom? And by the way, if you have any questions, chime up. Be glad to hear them.

Let me start with the why question. Article 1, Section 8 of the Constitution authorized Congress to pass intellectual property laws in order to promote the progress of science and useful arts by granting inventors and authors the exclusive rights to use their works. Now, this constitutional provision and the patent laws which derive directly therefrom implicitly recognize that absent granting inventors some additional incentive, there would be an under-investment in innovation. So that in order to achieve optimal levels of innovation, Congress and the drafters of our Constitution recognized they would have to provide additional incentive to achieve optimal levels of innovation.

That brings us to the why question. The why question asks why do we need to provide inventors with additional incentive? Why doesn't the invisible hand of Adam Smith allocate the appropriate amount of resources to innovative activities the way it does to manufacturing and other areas of our economy? And the answer to that question has to do with the nature of the intellectual property. And specifically, the ways in which intellectual properties differ economically from other forms of property. And the most important way in which intellectual property differs from other property is what the economists would call appropriatability.

Now, appropriatability refers to the idea that unless an investor or inventor has an expectation of recovering adequate returns from risky research, it would make no sense for them to do it. And the reason is, and the reason that this applies and is particularly relevant to intellectual property, is because the output of innovation is knowledge. That's all it is. And knowledge, once known, can be used again and again at no additional cost. The economists would say that the marginal cost of use approaches zero. That simply means we could use it again and again at no additional cost, unlike other forms of property.

Now, therefore the costs related to IP relate to a creation, the creation of that knowledge rather than its use. And for someone that creates knowledge, in order to capture or appropriate a return, they need to use that knowledge. And once you use that knowledge, inevitably it will be disclosed and others can use it at no cost without having invested the enormous sums required to create that knowledge.

And it's this aspect of intellectual property which explains why, absent some additional incentive, there would be an under-investment in innovative activity.

Now, Judge Posner in discussing the rationale for the nature of intellectual property or the rationale for our patent system put it far more eloquently than I put it. He said the manufacturer will not sow if he won't be able to reap. But there's another economic principle here and that is the one I originally alluded to. The value of this innovation to society as a whole. Curing these terrible diseases is far more valuable than the value that the creator of that knowledge can capture from creating it. And this explains why scholars, practitioners, and policymakers of all political stripes agree that the patent system is appropriate. And in fact, the rationale for our entire patent system is based on the idea that the additional innovation produced by the patent system will have greater value to society as a whole, not to the inventors, than the monopoly costs to society are of providing that subsidy.

Now, having said that, it's both appropriate and necessary to provide inventors and investors with additional incentive in order to reach an optimal level of innovation. The question is how do we do that? Congress could have done it any number of ways, but they chose to do it by granting limited monopolies to inventors. They have exclusive rights to use their invention for 20 years from the filing date. Implicit in this decision is the recognition that in order to create the additional innovation, which is presumably of greater value, there will be some costs imposed upon the competitive system. But the amount of innovation that the creators of our patent system and others sought to create was not unlimited. There has to be a balance. And where one strikes that balance depends upon one's view of how much innovation is desirable and appropriate. And that brings us to the next question, the how much question.

The how much question asks how much innovative activity is optimal? How much do we want? And assuming we know how much we want, how much of a subsidy do we have to give to inventors to achieve that level of innovative activity? And bear in mind that too much of an incentive which creates too much innovative activity will result in misallocation of resources; that is just as costly as too little.

Now, unfortunately, the answer to this question is hopelessly indeterminate. The economists don't have the methodology or the data to answer the underlying question of how much incentive is needed to create any particular increment of innovative activity. They can't answer the question of what is the cost to society of making, expanding the patent right, for instance by allowing patentees to employ title arrangements. What's the cost of that to society? They can't answer that question. What's the value to society, of that additional innovative activity? They can't answer those questions.

However, some judgment has to be made about this balance, and that brings us to perhaps the last and most important question: By whom?

Now, bearing in mind that neither the enforcement agencies nor the courts can tell us with any degree of confidence what the costs and what the benefits to society would be of applying any particular rule of antitrust law to patent law, they can't tell us. Bearing that in mind, I think my view is that basically these are inherently political. These are inherently political judgments that are best made by Congress. At least to the extent that one will consider radical changes to the way we apply antitrust law to the patent field today.

In fact, my suggestion would be that one of the most useful things we could accomplish in the FTC and Department of Justice hearings that are going to be beginning in February is to ask the scholars, the economists, the long-time practitioners to think about developing methodologies that could at least approximate the costs and the benefits of the trade-off in the patent system. The benefit of incremental amounts of innovative activity and monopoly costs to society, absent having some methodology to approximate the answer to those questions, we are just guessing. We are no more than guessing.

Now, there's a perpetual war being waged, a jihad, and that involves the brand-name pharmaceutical companies on the one hand and the generic drug manufacturers on the other. And the battle fronts in this war are largely in the area of intellectual property.

I just want to talk about one specific strategy that brand-name drug companies use to extend product life cycles, and that's the use of add-on patents. An add-on patent is simply obtaining an add-on patent in the context of a drug patent.

When a pharmaceutical compound is patented, generally you get a compound if it is a new composition, a composition matter compound and a patent on the use of that to treat a particular disease. Now, one strategy that a pharmaceutical manufacturer might use is that toward the end of the initial patent they may do the research and discover that when that compound is ingested into the body, it metabolizes, that means it breaks down into two other compounds. Let's say it is compound A; you administer it to a patient, and it breaks down in the body to compounds B and C and you learn that compound B is what's responsible for the therapeutic effect. So you get a patent on compound B, and the court has said those patents are generally appropriate. It is patentable subject matter, and the effect of that is to get another 20-year period of exclusivity on the drug.

Now, some of the enforcement agencies have said and some antitrust lawyers have said that this is predatory patenting, or it somehow violates Section 2. Now, it's hard to see how this conduct could violate the antitrust laws. It's a species in conduct that seems to be recognized in virtually every context as being *per se* legal. You obtain a patent unilaterally based upon your own research, and you simply enforce it. So I would say that this certainly doesn't rise to the level of an antitrust concern. But it is. It is a fair question to say: Is this appropriate policy? Is this an inappropriate extension or expansion of the patent right? That's a fair question. And that question inherently has to do with the standards of patentability and the scope of the patent right.

Again, that question is an inherently political question, which is best answered or addressed by Congress if it needs redressing. Maybe even the Court of Appeals, because this might be a matter of strict patent law. There may be legitimate questions of double patent C or double patent A or the inherent doctrine or even basically the quid pro quo of the patent system. The inventor discloses his invention; he gets a 20-year period of exclusivity. After that 20 years supposedly the public is free to use that invention. That's the trademark.

So to the extent that this particular practice raises questions, I say that they are questions for the political process to deal with or perhaps even the Court of Appeals for the Federal Circuit. But they are not questions for the courts to deal with or the enforcement agencies under antitrust law.

So what I leave you with is when you're back at the desk wrestling with these questions about an intellectual property strategy or licensing practices, you may not get specific answers to your question. But I do say you'll have an analytical framework that may be helpful if you ask the four questions: Why? How? How much? And by whom?

Thank you.

ALAN J. WEINSCHEL: Eric talked about politics, and I'm going to talk about religion.

In the early days of my practice we had to contend with the vaunted "nine no-nos" in patent licensing, and thankfully we have progressed past that point to a more rational discourse on the interplay between patents and antitrust. But I think there's still a long way to go. Hopefully, the hearings that the FTC and the DOJ are going to conduct will serve to inform. But I'm not sure that the lines between intellectual property and antitrust will ever intersect. Because it is essentially to me a religious argument. Why do I say it is a religious argument? There are very strong beliefs that are faith-based. What I mean by faith-based is that the intellectual property community believes that the way to increased innovation is through rewarding the inventor. The antitrust community believes that the way to increased innovation is through increased competition. Now, surely those aren't binary propositions. But what happens when one tries to trump the other is a balancing act. Antitrust lawyers tend to think that competition policy ought to trump the patent laws, and patent lawyers tend to think that patent laws ought to trump the antitrust laws. We have incantations like religion. "Innovation" is one and "competition" is another. They sometimes work and they sometimes don't. Microsoft incanted "innovation" throughout its litigation. It didn't do it much good and "competition" gets preached in many of these cases as the overriding public policy. We have leaders who preach, and we'll talk about that in a minute. We have Tim Muris who has taken on the task of setting up the hearings. Bob Pitofsky, when he was the chair of the FTC, took pains to take issue with the way that the Court of Appeals for the Federal Circuit was dealing with patent issues. And there are attempts at conversion which I think is perhaps part of the hearings (I'm going to try to convert Molly by the end of this session today).

Now, innovation is at the heart of the process here. But innovation is something that, as Eric said, is impossible to define, difficult to measure, certainly difficult to measure changes in innovation, whether we've got more or less at any given time, and what presumptions we apply, and as I said, what discipline trumps the other.

Well, I'm not going to talk more about religion. I'm going to talk about some of the cases, particularly at the Federal Circuit and comparing the Federal Circuit with other circuits, and comparing it with the way the FTC has handled particular issues to see how these issues play out and why one trumps the other, depending on the forum that's been selected.

Before I do that I thought I'd mention that the way I look at the intellectual property system, there are four different incentives that are at issue in the system. One is obviously the primary one, which is the incentive to invent and be rewarded for the invention, for the innovation. The second incentive that's created by the system is the incentive to invent around. And that is, once someone has a patent there is an incentive that is created on the part of competitors to get around that patent. There are very few patents—and perhaps pharmaceuticals may be one of the exceptions—but there are very few patents which are so basic they can't be invented around. And there are real incentives for people to avoid the patents held by others. There are also incentives to challenge the monopoly that's granted by the patent, which of course is not an economic monopoly but a patent monopoly. And there are incentives to appropriate or steal intellectual property. Because as Eric said, that's easily and cheaply done, and if you can get away with it, there are enormous free-rider advantages. Those are all things we try to deal with in looking at competition v. antitrust.

The intellectual property community has some advantages in this process. First, there is a Constitutional dimension to intellectual property.[1] Second, there's a Federal Circuit. The Federal Circuit has jurisdiction over cases that involve in whole or in part patent cases. And it has asserted its jurisdiction to cover antitrust issues that are related to the procurement or enforcement of patents as a matter of Federal Circuit law. So we have a unified national court that determines these issues. Other issues, such as copyright issues and non-patent related antitrust issues, will be determined by the Federal Circuit as a matter of the circuit law from the district from which the case is appealed. But the Federal Circuit is somewhat biased toward the intellectual property system. It was intended to strengthen patent claims and avoid the balkanization and the forum shopping that had gone on before its formation. It has expressed some suspicions about antitrust claims and patent cases, sometimes characterizing them, counterclaims for example, as knee-jerk reactions to patent claims. It has expressed a desire implicitly not to turn every patent case into an antitrust case. It has expressed deference to the rights of a patent holder, and it has also expressed some concern for the integrity of the patent system. The deference for the patent system has resulted in the use at the Federal Circuit—and this is one of those incantations—of terms like "immunity" from antitrust for certain actions that a patent holder may take to enforce its rights.

There are also very high hurdles that have been established to assert an antitrust claim even where there is an abuse of the procurement process. "Walker Process"[2] claims are very difficult to prove. I commend the *Nobelpharma*[3] decision to you in the Federal Circuit. It really lays out the law with respect to fraud on the Patent Office, which is very, very difficult to prove. Inequitable conduct isn't enough, and the court has applied *Professional Real Estate Investors*[4] to claims knowing enforcement of an invalid patent, meaning that litigation has to be objectively baseless and motivated subjectively by anti-competitive concerns before you can reach the conclusion that there's an antitrust violation. And if it is not objectively baseless, you never get to subjective intent. A very difficult standard.

We are going to talk for a few minutes about refusals to deal, which is one of the subjects that is raised in the notice with respect to the hearings. What I'm going to do is contrast the Federal Circuit in the Xerox/CSU case[5] with *Kodak* in the Ninth Circuit[6] and the Federal Circuit in the *Intel-Intergraph* case[7] with the Federal Trade Commission in the *Intel* case[8]and you'll see how preconceptions that people bring to this lead to completely different results.

First, *Kodak*. I'm assuming that most people are here are familiar with the Supreme Court's *Kodak* case. But there's a line in the Supreme Court's *Kodak* case which I would like to highlight: "the court has held many times that power granted through some natural and legal advantage, such as a patent can give rise to the liability if the seller exploits his domination in one market to expand his empire into the next."[9] That's not quite a leverage theory, but it is certainly expressing some concern about taking the patent grant and expanding it beyond that which was intended by Congress.

Kodak was a summary judgment case that ended going up to the Supreme Court and back down to the trial court, as the Supreme Court held that economics wasn't going to trump the facts, and that the court was entitled to look at, and the plaintiff was entitled to make his case on, the facts.

On retrial of the case, the plaintiffs, which were service organizations for Kodak copiers, dropped their tie-in claims. That's important. They dropped the claim that Kodak had tied service and parts. Instead what they argued was that Kodak was attempting to monopolize the service market by reason of its use of the refusal to deal in the parts market. There was a retrial, and the plaintiff won, and a judgment was entered for the plaintiff. The case went up to the Ninth Circuit, and one of the issues in the Ninth Circuit was whether the instructions to the jury were appropriate. Kodak, for the first time, in the Ninth Circuit, after all the years this case had been argued, argued that the jury should have been instructed to the effect that Kodak's parts were patented, that Kodak was justified because of that in not dealing with the plaintiffs. Kodak argued it had an absolute right to refuse to sell patented parts to the independent service organizations and that under *Aspen Skiing*[10] or any other construct of Section 2, that that was a legitimate business justification.

The Ninth Circuit—and I've only put this quote up because there's a contrasting quote from the Federal Circuit later on—said, well, okay, there's tension between antitrust and patent laws. One seeks monopoly, one tries to attack monopoly, but a patent holder or a copyright holder is not immune from antitrust liability. And they may refuse to license their work, and we can't find a case which imposed liability when someone simply refused to sell a patented product.[11]

But, citing the Supreme Court in *Kodak*, (the language that I just put up on the board), that the patent law doesn't allow the extension of a monopoly from one area to another, and exclusionary conduct can include a unilateral refusal to deal, except that the patent holders' desire to exclude others from its patented invention is a presumptively valid business justification. Well, that sounds okay, but "presumptively valid," however, means that the presumption can be overcome. What the court held was that the district court's failure to instruct was in error, but it was harmless error, because in the context of this case the jury would have found that the proffered patent law justification was pretextual on Kodak's part. Why? Because there were only 65 parts out of thousands that were patented and because none of Kodak's internal documents had indicated that its desire to protect its patents was the rationale behind its refusal to deal with the independent service organizations. The court held that the jury would have concluded that this was a pretextual afterthought on Kodak's part. Given the procedural history, it very well may have been. There was no consideration under *Professional Real Estate Investors* of the legitimacy of Kodak's patents claims, whether they were sham or real or the strengths of Kodak's patents or anything like that.

Now let's look at *Xerox* in the Federal Circuit. Xerox and Kodak were in the same business, selling copiers and high-end printing machines, and at around the same time, 1984, they both refused to sell parts to independent service organizations. Xerox also refused to sell copyrighted manuals. There was a class-action antitrust case that was brought against Xerox that was settled, but there were a number of opt-outs, and the opt-outs chose to proceed on their own, and they sued Xerox, which counterclaimed against the opt-outs for patent infringement. That became very important, as we'll see. The district court entered summary judgment for Xerox on the theory that Xerox had an absolute right not to deal.[12] It had patented parts, and it had an absolute right not to sell them to anyone, regardless of its motivation and intent, which were irrelevant.

The reason that the counterclaim is important is because *Xerox* was appealed to the Federal Circuit, and the Federal Circuit applied its own law to the question of whether a refusal to sell patented parts—and you'll see this language here—is sufficient to strip a patentee of its immunity. That's fairly strong language from the antitrust laws.[13] The Federal Circuit applied Tenth Circuit law to the question of the refusal to sell copyrighted manuals.[14] What does the Federal Circuit say? This is a balancing test, but from the Federal Circuit standpoint, it says while the intellectual property laws confer no privilege to violate the antitrust laws, by the same token, the antitrust laws don't negate a patentee's right to exclude.[15]

Remember the Ninth Circuit said the patent laws don't mean you can violate the antitrust laws. The Federal Circuit comes from a different angle, and it cited Section 271(d) of the Patent Law in which Congress said refusing to sell or license a patented product or license, can't be misuse as an extension of your rights under the patent.[16] And so that was another string in their bow. The Federal Circuit also went back to the language that I just put up on the *Kodak* case, and said this has nothing to do with this.

If you've got patented products and all you are dealing with is a refusal to sell patented products, you are immune from antitrust prosecution. The Federal Circuit specifically declined to follow the Ninth Circuit decision in *Kodak* because it would require an inquiry into subjective motivation on the part of the patentee. The Federal Circuit did cite *Professional Real Estate Investors*, and says if an infringement case—and remember there was an infringement claim here and there was no infringement claim in *Kodak*—if the infringement claim is not objectively based, you never get to subjective motivation. End of case.

And here is language that now was picked up by Bob Pitofsky and others later on as evidence that the Federal Circuit is being too limiting. I'm not sure this language is actually as limiting as one thinks, but it can be read to mean that in the absence of tying, fraud on the patent office or sham litigation, the patent holder can do whatever it wants basically to exclude others. As long as you're not extending your rights beyond the statutory grant. That is a clearly patent oriented approach to the intersection of antitrust and intellectual property.

I'm going to talk about Intel just for a couple of minutes because I know I'm probably running long.

MR. BRETT: I'm finding it fascinating.

MR. WEINSCHEL: Intel had a program under which it provided advance information and special treatment to OEMs who were building computers, as long as they provided their own intellectual property on microprocessors back to Intel so Intel could use it in whatever chips it was building. Intergraph had something called Clipper technology which was microprocessor technology. Intergraph alleged that Intel was infringing the Clipper technology and threatened to sue some of Intel's customers. The Intel customers went to Intel, asking that Intel indemnify them from infringement damages pursuant to the terms of their licenses with Intel. So Intel then steps into those cases, and Intel said well, you know, Intergraph, if you're suing me to try to enjoin me from producing my chips, guess what, I'm not going to provide you with all that special information anymore, and so you're going to just have to make it on your own.

Intergraph goes to the District Court and gets a preliminary injunction, which mandates that Intel treat Intergraph the way that it treats all of its other OEM customers.[17] Intel appeals to the Federal Circuit (it is an infringement case again). In the meantime, the FTC is investigating Intel for the very same kinds of acts. And the FTC alleges that the effect of Intel's program was to entrench Intel as the dominant microprocessor seller because it would get all the technology that anybody else had to offer essentially free in exchange for all of these special favors that it was giving to the OEMs.[18] Now Intel argued back and forth with the FTC and argued literally there were thousands of patents that bore on microprocessors; that unless you could aggregate them all, nobody would be able to sell any microprocessors, and since everybody was getting Intel's property back, this was actually procompetitive. The FTC didn't agree, and ultimately the FTC and Intel settled with a consent order that essentially said that Intel can't refuse to either sell chips or withhold information for reasons relating to an intellectual property dispute with a customer.[19] If, however, the customer is seeking an injunction to stop Intel from selling its chips, Intel was off the hook. So that if all the customer wanted was royalties, Intel was mandated to continue to sell. But if the customer wanted to enjoin Intel, then Intel could stop supplying to the customer. There were also some other valid reasons for refusing to deal, including deadbeat customers and things like that. Intel could, under the consent order, require that the information that it provided be used solely for systems that incorporated its microprocessors. So you couldn't take the Intel information and use it in a machine that used an AMD chip. That's simply protecting Intel's rights.[20]

After Intel settled with the FTC, the Federal Circuit decided the *Intergraph* case,[21] and it throws out the preliminary injunction. The court goes through a competitive analysis that was much more detailed than the one that accompanied the FTC order. It found no competitive effects at all here in the OEM market in which Intergraph competed. There's no antitrust claim against Intel, therefore, because there are no anticompetitive effects. Intel, the Federal Circuit said, is not an essential facility. Even though it has dominant market position in microprocessors, it's not a competitor of Intergraph. And it threw out the whole case. If Intel was playing hardball, that's not a matter for the antitrust laws. And the owner of proprietary information (does this sound familiar?) has no obligation to provide it whether to a customer, supplier, et cetera. There is great deference paid to Intel's rights under its intellectual property.

Then there was an allegation that Intel had been trying to get into the graphics subsystems market which Intergraph was in. The court threw that out on the theory there was no allegation that there was any prospect that Intel could monopolize that market.[22] "Monopoly leverage" was not going to be accepted by the Federal Circuit as an antitrust theory.[23] And, finally, it rejected the notion that you could put together a whole bunch of claims against Intel based on half-claims. Saying that you can't take a half of a cause of action, and a quarter of a cause of action and have it add up to one cause of action.[24] So again, you have a real bias toward intellectual property.

Now, what's left after the Federal Circuit refusal to deal cases, and some of the issues that are going to be considered in the hearings? Well, clearly the way the Federal Circuit has described the law, a unilateral unconditional refusal can't violate the antitrust laws, under ***any*** circumstances. And you don't get to subjective intent unless there is a sham.

Well, what about conditional refusals? This issue was raised in an article that was written by Bob Pitofsky.[25] What about a refusal to sell a patented product or refusal to license on condition that the purchaser not buy from a competitor? It is unknown how the Federal Circuit would decide that. What about the second bullet, the inventor licenses five firms under a process patent, and one of them turns out to be a price-cutter, and is ultimately terminated by the licensor. Are you entitled to inquire into whether that was unilateral action or whether there was joint action there among the competitors to cut off the price-cutter?

What if the refusal is in connection with a standard setting situation? That's the *Dell* kind of situation[26] that came up several years ago. And how do you determine when an offer to license is actually a refusal, because the patent laws allow you to charge a monopoly price for your patented product? If I want to charge you a hundred dollars for my little widget that goes into a copying machine, is that tantamount to refusal to deal? The answer, I think, even in the *Kodak* situation is "no," because even there the court did not want to get involved in regulating the prices charged by the patentee for its products or for licenses. All of these are going to come up in the hearings in the next several months.

Barry asked me to talk about the Guidelines,[27] and I will take one minute or two minutes on them. They were useful at the time they came out. They are obviously not law, but simply statements of how prosecutorial discretion will be exercised. They explicitly treat intellectual property like any other kind of property. And as we have seen, there are some real differences. Licensing is procompetitive. There are 20 percent safety zones. All of that is great, except that the Guidelines haven't really been used for the purpose for which they were promulgated, which was licensing transactions. Instead, the notion of an innovation market has been used mostly in the merger context and mostly against pharmaceutical companies where what's in the pipeline in research and development is transparent, because of the FDA filing process. And even Rich Gilbert and Will Tom, who are some of the architects of the IP Guidelines, now concede that maybe intellectual property isn't like other kinds of property.[28] Why? Because there are many more disputes about the boundaries of this kind of property, and because you need a lot more intellectual property to put together a product than other kinds of property.

Merger challenges, as I said, have mainly been in pharmaceutical cases. Another case that I found involved devices that are used to signal when someone is walking out of a store with an item that they didn't pay for. And that was *Sensormatic* and Knogo.[29] And the reason there was an innovation claim there is because one of those companies wasn't actively engaged in the United States and had no present plans to enter the United States. So the only way the government could challenge it was by looking at the innovation effects between two companies that were the prime sellers in developing new technology for that kind of a market.

The last thing that I have to say is about settlements. Settlements—this is in the Guidelines—are useful in the patent context.[30] Obviously, it seems to me that there are a couple of things to look at in the context of settlements. One is whether the *Noerr-Pennington* doctrine[31] applies to settlements in patent cases. And I've heard fairly extreme notions on this. One notion I heard was if you had a patent case, and it settled and the court approves it, that is petitioning the government, and it is protected activity under *Noerr-Pennington*, which I think clearly goes too far. That means you could quote a completely anti-competitive agreement and be immune from antitrust prosecution under *Noerr-Pennington*.

That can't be the law. We have the capability in our system of dealing with settlements that are sham or legitimate. Does that mean that we have to assess the strengths or the relative strengths of the parties in a patent litigation in the context of an antitrust case? Do we have to have a mini-trial on the patent issues in an antitrust case to determine whether on balance a settlement was procompetitive or not? And obviously, if it is non-exclusive, it is hard to see that it would raise any issues. But fundamentally, if I have two companies, A suing B for infringement and A has got legitimate patent rights and could exclude B completely from the market, then any settlement that permits B to sell under any terms ought to be seen as procompetitive. Assuming that there's any legitimacy to the intellectual property underlying the case.

The difficulty, of course, is making judgments about good intellectual property and bad intellectual property, and that's why cases get settled. I consider this to be one of the thorny issues. I think it is intimately related to what's been happening with Hatch-Waxman, which I think Molly is going to talk about. And I'm not sure how to resolve it. Hopefully the hearings will help us do that.

Thanks.

MOLLY BOAST, ESQ.: When I was at the FTC I specialized in being the low-tech speaker. And this time I've really outdone myself. My first disclaimer here is I left my prepared remarks in the office, so you'll get the extemporaneous version of what I have to say. And the only benefit that you'll get from that is I won't have the quotes from cases to read to you.

My second disclaimer is I'm here of course today in my capacity as private lawyer back on the dark side. When I spoke when I was at the Commission I reminded people that I wasn't speaking on the Commission's behalf. And that's even more true here.

Having said that, I think for purposes of sort of crystallizing this conversation and having some fun with it, I should take a position that is largely what I believe, and that's pretty pro-enforcement and pro-competition law.

Let me, since someone suggested I would cover different subject matters, just spend two minutes giving you the context in which we dealt with intellectual property issues at the Commission. In essence, it permeated much of what we did. As Alan mentioned, the pharmaceutical mergers, and indeed mergers in other product markets such as medical devices and some other surprising areas, often raised intellectual property issues.

I would suggest, as a little bit of a footnote here, that they didn't always involve an innovation market. The only case that I can think of in which the Commission alleged an innovation marked was the *Ciba/Geigy Sandos* case, where the merger would have combined two research operations on a specific product. That was both a competitive problem and the synergy after merger. Otherwise in the merger cases in which innovation was considered, the concern was competitive effects. Reduced innovation was part of a competitive effects analysis, not a market analysis.

As Alan also mentioned, we dealt with intellectual property in the drug settlements cases that I'll talk a little bit about, and in standard setting cases like the *Dell* case he mentioned. Both of these are areas that Chairman Muris and Bureau Director Joe Simons, have said they have continued interest. There has been some recent publicity about some of their actions in the drug area that's new. And in the standard setting area, they have made it clear that they are looking at other settings in which failure to disclose intellectual property that might be infringed if a specific standard is adopted, might be an antitrust problem.

We dealt with intellectual properties issues in remedies. One of the most thorny parts of dealing with some of the mergers was trying to figure out how to separate or license intellectual property when a divestiture had to be made. I actually hoped that Chairman Pitofsky would have conducted the upcoming hearings on his watch, so I could have been part of it. But it is too large a topic to squeeze into the little time we had remaining when we started to talk about it. From what I understand, this will be a very, very full-blown event. I don't assume magic answers will come from this. The Commission tends to use these hearings both as a way to get information and views out to the public and also to educate itself.

And finally, as Barry mentioned, the Commission has underway a study under 6(b) of its powers through which it is collecting information from major pharmaceutical companies about agreements that they have. This might help the Commission determine whether some of the agreements that have been challenged are part of a larger pattern or just a drop in the bucket. Congress in particular has expressed interest in this exercise. The authors of the Hatch-Waxman Act have raised a question whether the statute requires amendment, and are counting on the Commission to help them answer that question by sharing with the Congress the results of that study.

As everyone has noted, there's been a great deal of ink spilled about the interface between competition and the competition law regime and the intellectual property regime. I think there was more ink on that topic, until *GE-Honeywell* came along and that seemed to trump everything.

So I start with three propositions. The first is that I don't think there's any disagreement that both legal regimes are intended to and do spur renovation. The second proposition is that I don't think there's any disagreement that we don't have any reliable way of measuring which regime spurs more innovation. We can't determine which one is making greater contributions. And the third area of agreement is that there seems to be a cry and a need for greater certainty in figuring out the road rules here. Under these circumstances I would submit that enforcement action by the agencies and subsequent judicial decisions is precisely what we should be doing. We ought not to be exercising restraint; we ought to be going forward.

What you see if you look at the cases in which the courts have addressed the private actions that have flowed from the FTC's drug settlement efforts is that the courts don't seem to be having problems with these issues. And this is where I'm unable to quote you the specific language from the cases. But the approach that the Federal Circuit espoused, that Alan went through I think in very clear detail, is simply not taking hold in the district courts and the courts of appeals. You can look at the Eastern District of Michigan's decision in the Cardizem litigation; Judge Trager's decision in the Cipro case, which was actually a remand motion, but he had to address some of these issues; Judge Buchwald's decision in the Hytrin case, and the D.C. Court of Appeals decision in the Andrx litigation. The courts say things like the scope of the patent is really irrelevant to conduct such as what is at issue in those cases, which were agreements outside the patent to delay entry. There's no special policy preference that should require that the patent issues be resolved before generics can enter, and things of that sort. So as I said, I apologize for being unable to give you chapter and verse, but it probably would be too boring anyway.

Let me step back and talk a little bit, since not everybody in the room may be familiar with these cases, but with what the FTC was doing and what the underlying premise was. Because I think it is not always that clear.

The Hatch-Waxman Act is a statute that amended the Food, Drug and Cosmetics Act, and it was intended to encourage generic entry. It basically allowed a generic manufacturer of a pharmaceutical product to use some of the information that had been filed by a pioneer firm to file a shorter form drug application. When it did that it was required to certify to the holder of the pioneer patent that the drug didn't infringe the claims of the patent. I'm overgeneralizing, but that's essentially it. The statute gives the pioneer firm a window of time, I think 30 or 45 days, in which to initiate a lawsuit to enforce its patent if it chose to do so.

Once that lawsuit is initiated the statute imposes a maximum 30-month stay on FDA approval of the generic firm's drug. And I think the idea was that that's ample time for the courts to sort through the infringement litigation and allow us to know whether the generic firm should enter or not.

Once the first filing generic firm is given FDA approval and can go to market, it receives, as a reward for having been in there first and having indeed fought this litigation, a 180-day period of marketing exclusivity after which other generics can enter. And while I wouldn't say that the statute is perfect, I frankly think it is a pretty remarkable creation in its effort to bridge the desire for generic competition and protect intellectual property rights.

If you were to take a look at some of the numbers in some of these markets, you would see that many of these drugs in which the FTC has been interested involved millions of prescriptions a year, 7 or 8 million prescriptions a year, and revenues of over a billion dollars a year. When a generic firm enters, I think the price hit is usually about 40 percent in the first few months and then it can grow as large as 60 percent. So you can quickly see on an annual basis how much consumer harm or help is at stake.

What was happening when the FTC got interested is that after these litigations under the Hatch-Waxman Act were initiated, the generic firms and the pioneer firms who were fighting out the patent issues were settling their differences with payments being made from the pioneer firm to the generic firm. The Commission's concern, reflected in its allegations, is that those payments were made to delay entry that would otherwise have taken place earlier. That's the nub of the argument. It is essentially a market allocation argument. But the premise that I think doesn't get articulated all that clearly and all that often, but it does tie together these several cases, is that the incentives to negotiate a normal kind of settlement are skewed once the pioneer firm offers to share these large monopoly profits with a generic firm that has nothing. It makes more money by staying off the market, and the pioneer firm knows that. So that's what the concern has been.

Now, these cases tended to generate a lot of arguments that I think at the end of the day will be viewed both by the courts and by reasonable people as red herrings. But they are all efforts to elevate the intellectual property component of this over the competition component. And let me just give you a couple of examples.

One is the argument that a patent is presumptively valid. So shouldn't that be given more weight both in the enforcement analysis and in the judicial treatment of it? Well, my answer to that is no, not really. A presumption, first of all, is a judicial tool of convenience. You've got to start somewhere. And I would make the argument that in giving a presumption of validity to the patent, you've already given primacy to the intellectual property rights.

It would be inappropriate to go further. And in any event, the presumption of validity has no application in a claim of noninfringement by a generic firm where the patentee bears the burden of proof in any event.

Another argument is along the lines of what Alan was outlining: a patent holder has the power to exclude. And therefore any arrangement, any one of these agreements that takes place within the life and scope of the patent ought not to be actionable.

The problem with that argument for me is that it gives a durability and permanency to the patent that in most instances it doesn't deserve. A patent is only as good as its ability to be defended against a claim of invalidity, for lack of a more elegant phrase. And this whole approach gives it a sort of permanence. In the settlement context, we presume the settlement is taking place because somebody is afraid they are going to lose something. This argument simply isn't warranted. And this is one argument the cases that I can't quote to you have specifically rejected.

And the third argument, where again, the intellectual property tool is being used, was that the plaintiff has to prove the but-for world in order to show there was any injury to competition. Now, as I understand it, this argument stems from the premise that the settlement of these patent disputes between the pioneer firms and the generic firms really mirrored the likelihood—the firms mirrored the likelihood and the risk assessment in the underlying litigation. And therefore, if you couldn't show that the arrangement delayed entry beyond what would have occurred after the outcome of the litigation in some kind of mathematical sense, there was no harm, no foul.

Well, my first problem with this is that by definition the case has been taken out of litigation by the settlement, so the whole notion that we should have to then go back in order to test the antitrust legitimacy of the settlement is a very circuitous route to what can be treated as a straight horizontal agreement. And I have found no case where the court has imposed this requirement.

The second problem I have with this argument, lies in my explanation of the underlying theme, the skewed incentives the Commission believes reside in some of these agreements. If that is correct, then there's really no reason to assume that the settlement agreement in fact reflects litigation risk. It might just reflect these skewed incentives. So it is the wrong measuring stick. And the courts haven't bought this argument, either as I mentioned. So I don't want to be heard to devalue the intellectual property. There was nothing that Eric said up until the last three minutes that I would have disagreed with in his discussion of the contributions that were made. I disagree with him about what the remedy ought to be to some of the current problems. Congress has already spoken on this. We have the antitrust laws, we have the intellectual property laws, and indeed we have this unique Hatch-Waxman and its progeny. We also have a common law system that for decades has taken areas of law that were considered unsettled and turned them into, using the shopworn phrase, well-settled law. And I see no reason why over the course of time the same thing won't happen here.

I think imposing artificial restraints on the enforcement agencies or imposing different statutory requirements that lead the courts to undertake a different kind of analysis is inconsistent with the way we practice law and would probably lead to the wrong result. Thank you.

PROFESSOR MARK R. PATTERSON: I'm going to talk about the quality of intellectual property law in two sentences. First, the substantive quality of intellectual property law is an incentive to recreate intellectual property as opposed to the reasons we grant other property rights, which are somewhat more general. Also the procedural quality of intellectual property law and decisions in the courts as they are affected by some recent statutes like the Hatch-Waxman Act and the Intellectual Property Act.

So beginning with the intellectual property law, as a promoter of a couple of our panelists. Intellectual property is essentially comparable to other property. But at least one of them said that's not entirely true; that they are essentially comparable. Intellectual property is very specific purpose, intended to promote or provide an incentive for the creation of information. Whereas other property rights that we have are somewhat more generic, a little harder to pin down exactly what their purposes are. So the implication I would say of this is there may be a reason to put an additional restraint on the exercise of intellectual property law that is not present for other property.

Antitrust, broadly speaking, subjects all property to constraints on the use or acquisition of market power—that are not abuses of market power or intended to acquire market power nor would in fact acquire market power. And I would say we could put another requirement on intellectual property law, that the use to which it is put should be use that relates to its intellectual contribution. That is in the recreation of invention or to the creation of expression, if it is a copyright, invention, if it is patent.

The response that one might make to this, if one is a true-blue patent believer, greater return, more innovation. Well, as Eric pointed out and I think as Alan and maybe Molly too, all affirmed there is no good empirical evidence of what the proper incentive level is. As a result, I would say that in current law what you have is kind of a mess. We don't exactly know where the standards should be, so we don't really have a good principle for defining where the limits of IP are. And I would say that what we could think about doing is applying a limit based on the relationship to the intellectual contribution. And that ties into the purpose for which we have intellectual property law, and therefore the limits it places should not, I would hope, interfere with the incentive but would only cover things that actually in fact do not provide an additional incentive for creation of intellectual property.

What does this mean? *Xerox*: Alan gave you the facts of *Xerox*. I would say you have a situation there where Xerox denied its parts to competing service organizations who didn't do anything with those parts but install them in Xerox equipment owned by other third parties. Now, those third parties could have bought the parts themselves. Xerox would sell to them. So you've got a situation where Xerox is discriminating among its licensees or purchasers on a basis that has nothing to do with the use of its intellectual property. And I would say that should not be permissible.

In other words, *Kodak* had it right. That was a sham. Xerox was not actually using its intellectual property, and Kodak was not actually using its intellectual property. *Xerox* was wrong use, the subjective tests for all the reasons we subject to subjective tests; they are too difficult to administer. Intellectual property, if they are the same, *Xerox* or *Kodak* should not be able to discriminate among them. And in both of those cases they were for the most part the same. Although some of the property at issue in *Xerox* was specifically the copyrighted manuals. One could make the argument that there were differences in the use. But at least that's the standard I would recommend that I think might provide some sort of principle and some substance to the tests here.

Another example, patented inventions as part of industry standards. I would say a patentee is not entitled to return from standardization but only to the return from the technical contribution. So if the patented invention makes the products more useful because it is technically better, the patentee is entitled to revenue from that. If the actual demand for the invention though is a demand actually because of the creation of the standard, the patentee is not responsible for the standard. The industry as a whole or the industry standard setting is responsible for the standard, and therefore the patentee shouldn't be entitled to any of that return.

Many of these cases, such as the *Dell* case that was mentioned, involved a misrepresentation where the patentee arguably hid the existence of its patent until the time standard was adopted, then said okay, everybody now has to pay us licensing fees. That's a separate problem. But even if there's no misleading acts on the part of the patentee, it is still true they are not entitled to the return based on the standardization. I would say this is maybe in many cases a hard rule to administer but it is workable in some circumstances.

I'm actually working on a paper on this for another conference in April on patents and standard setting. And there are circumstances where you can distinguish the two sources of demand and the two sources of return and try to say what the patentee is entitled to and what it is not.

Let's talk a little bit about the drug settlements for a moment. In this case, can you think about this intellectual contribution from the point of view of the producer? The brand-name manufacturer is the one that created the drug and the drug that will remain in the market after the settlement in these contexts.

The generic manufacturer made no contribution to the production of that drug. So it is not clear at all why it should get a return that is a payment in the context of the settlement from the brand-name manufacturer. It made no intellectual contribution to what is going on there. What its contribution was is not to use in fact the intellectual property. If we want to treat it as intellectual property, it shouldn't be entitled to payments from the brand-name manufacturer.

It is different for most cross-licensing settlements. In most cross-licensing settlements where there is litigation it is often unclear which of the two parties is entitled, which of the two parties truly invented the material or invented or created the invention, or which of the two will say we now have interference proceeding before the patent offices. In those cases they both have arguably made an intellectual contribution. We don't know that one of them hadn't, so it makes sense in those cases for payments maybe to go one way or the other. Patents pool similarity already. In a patents pool all the parties to the pool generally have made intellectual contributions. At least if the admissibility to the pool is limited to essential patents, as generally they are by the agencies and by the European Commission.

Okay, that's my substantive discussion. I'm trying to move this through fast so we have some time for questions.

The next set of observations I want to make on only the procedural quality of intellectual property law. And I would say here the multiple layers of intellectual property that we started to get with the enactment of various statutes, such as the Digital Millennium Copyright Act and Hatch-Waxman Act, are a real problem to provide clear limits for courts to make decisions on. These you've got to have clear underlying principles for what's going on with the particular body of intellectual property that's at issue. When you have overlapping and inconsistent IP regimes, you don't have those sorts of underlying principles. So the decisions are likely to be unsatisfying, as I would contend many of them in this area are.

So I wanted to sort of do a picture of the antitrust IP interface and show what a couple of these new statutes have done. The oval here is anti-competitive practices inside the oval, practices that would be anticompetitive in the usual. Generally sort of carves out some of those what would otherwise be anti-competitive practices. It promotes innovation. It is a different sort of efficiency.

So we have this line in the intellectual property antitrust area, which is sort of the misuse boundary which we have to have the courts try to define where that line is. Well, some changes to intellectual property law just move that line. That's perfectly straightforward. This is the amendment of the misuse provisions, extension of copyright term. Which I personally think is an unfortunate thing but at least it doesn't make the copyright decisions more difficult.

Let's compare that to the Digital Millennium Copyright Act. Here we have an area that includes both antitrust issues and fair use principles. Well, the Digital Millennium Copyright Act created this. It can potentially be broader than the Copyright Act. So in that area, sort of in the larger oval but not in the smaller oval, how does a court decide a case like that? In other words, if the anticircumvention right is existed to prevent something that would be a fair use or antitrust violation, or were it done before the Digital Millennium Copyright Act, in other words it wouldn't have been permitted. Had anticircumvention rights existed, and you have to look at that and you say well, copyright might still prevent that. On the other hand, Congress was perfectly aware when it created the anticircumvention right. So aspects of fair use or some aspects of what might be copyright misuse, there's no way to know. I don't think there's any way to decide a case in that middle area. What you in fact do is you just create another form of misuse by creating this new sort of intellectual copyright. An academic colleague of mine is writing a thesis on anticircumvention. Now we are going to have anticircumvention right misuse. It is a trade for lawyers. It proliferates the varieties of misuse and creates more cases, but it is not good for principled decision-making, I would argue.

The Hatch-Waxman Act has similar problems. So we have the antitrust area here and then brand-name patents or the intellectual property issue. And then as Eric said, we often have follow on patents not only that we have then the generic 180-day exclusivity period that is provided by the Hatch-Waxman Act—and I've made that a hexagon because it is not really an intellectual property right, but it functions just like one. It is a right to exclude for 180 days for a limited period, just as a patent has a right to exclude.

Then we have paragraph IV certification. Paragraph IV that the brand-name manufacturer can get if it files suit after the paragraph IV certification by the generic manufacturer. So you have this hodgepodge of rights, and the FTC says that the settlement between the hexagon and the two ovals is a violation because they are horizontal competitors. Well, that's true. But it is also true that all of this is fairly easily contemplatable because of the structure of the statute. This 30-month stay connects those two things. And one could sort of argue that that's part of what we had in mind was providing the settlement.

I think it's difficult to say, given the structure of the statute, that Congress didn't want that. You know now, the various congressmen that promoted it are saying they didn't want that. But it is difficult to say that that wasn't sort of part of the statute and isn't a legitimate use of the statute by the brand-name manufacturers and the generics. I would also say that it is difficult at this point tinkering with the statute. And some of the proposals suggested I don't think it is going to work. I think it is an inherent problem when you have these sorts of overlapping intellectual property regimes that you're not going to be able to make principled decisions about deciding what is misuse and what is not.

So here's my solution for the Hatch-Waxman Act. It will not work. It cannot be made to work in a sensible way, I would say. But we will see. Maybe someone will come up with a proposal that will make it work. I hope so.

So in conclusion, I'd say there are two problems I want to mention. A clear and consistent relationship between antitrust and intellectual property requires two things: A clear principle for limiting exercise of intellectual property, which I think we do not have now in many cases, but we could use it from a principle of the promotion of the intellectual contributions to the intellectual property. I think that would help clarify some of these matters. Not all cases, but at least some. And finally, we need a nonproliferation of inconsistent types of intellectual property, sort of overlapping inconsistent layers of intellectual property that make it difficult to decide what tactically Congress did have in mind when they passed those different varieties. Thank you.

PROFESSOR ROBERT HALL: I used to be a professor, but now I'm a book salesman. I've just written a book called *Digital Dealing* that touches on many of today's topics, which you can get over at the Barnes & Noble on Fifth Avenue. It focuses mainly on online markets, and has a chapter on these antitrust issues.

What I want to talk about today, though, is a fairly focused topic. And that has to do with the way the information products tend to reach the market and in particular the fact that the information products are very frequently bundled or tied. I'm just going to use the term "bundling" because I recognize the word "tying" to be a sensitive legal topic which frankly is a mystery to economists. But I don't want to delve into that question.

What I do want to talk about is how the science of competition as developed by economists bears on the way that information products are brought to the market. The information products I'm talking about are software, music, videos, books, and news and magazine articles. All kinds of things like that. And more and more, as they are distributed in digital form, the issues I'm going to talk about become more important. Because those issues arise most acutely when the distribution costs of the product are driven to zero. That's what we have seen in music, for example—online music where the sudden arrival of the method for distributing music for free results in a gigantic proliferation of music distributed through a new channel. That's ultimately going to give rise to a lot of the same issues that we see in other markets.

Competition policy faces new challenges from the extension of this problem, which has actually been a problem in a number of areas already, into many new areas where it didn't exist before.

Bundling is a natural way to market information products. For example, the *Wall Street Journal* bundles all of its news products into a single bundle which you can buy for $30 a year if you're already a print subscriber, and that's a bundling of everything. Instead of selling articles one by one, you can simply buy the entire bundle. So you see that all over the modern economy.

As music moves to legitimate online outlets—that is, legitimate in a copyright sense—we'll see a lot of bundling of music. In fact, it is already there. There are many strong hints of that. You'll subscribe for $9.99 a month to a service that gives you access to a very large catalog of music and you can download as much as you want for $9.99 a month. There are many startups with that business model today.

Now of course in software the bundling policies of Microsoft have been challenged in many areas. Microsoft Office is a bundle; Windows is a bundle. And the decision to bundle Internet Explorer with Windows is obviously the single most controversial commercial bundling decision that has been subject to competition analysis.

What should be the rules for governing the bundling process? When is it good? When is it bad? That's a topic that economists, including myself, have undertaken to analyze and have made some progress. As in almost every topic in competition analysis there's a plus and a minus. Everything is balancing. There are no simple rules that tell you how to resolve that question.

But there are some economic principles that are very helpful and to me they create the general sense that bundling is a pro-competitive force, that bundling by itself should be seen as probably good for the consumer. But we need to recognize that it could come along with other policies that are harmful to competition.

The first thing I would like to share with you as far as the economics of bundling is that it is generally the case, especially if the bundling is done by a monopoly, that the prices of the elements of a bundle are cheaper than they would be if they were sold by two independent monopolists. And I stress that this is strongest when there's a monopoly. It is also stronger the more the two products work together as complements. Molly mentioned Honeywell. Barry Nalebuff, who is the economist authority on bundling of complementary products, made a strong argument before the European Commission. His testimony as far as I know was completely persuasive. Of course the Commission went the opposite direction, but that often happens.

I think the issue of bundling of complements starts off looking procompetitive. Again, there could be other factors in the analysis, but the starting point is that you want a monopolist or a company with market power to recognize that selling one product sells more of another product, and to build that into pricing and that will lower prices. So that's probably the single-most important principle of bundling.

A related proposition is the promotion of volume. Information products which have an incremental cost of provision of zero or close to zero generate hydraulic pressure toward more volume, toward bigger bundles, toward allowing people to choose from an even larger set. Take as much as you want, all you can eat. That's the result of the fact that it is free to produce. And you see that all over the place. As much music as you want, as many articles from the *Wall Street Journal* as you want. As many patents from a patent portfolio, because this theory also applies to the bundling of patents from a patents portfolio. So all over you see this all-you-can-eat pricing policy, and it is driven by the information that says if you're pricing each product at a positive price and somebody comes along who is willing to pay somewhat less than that, but not your price, it always pays off to lower your price to sell that product to this person at the price that that person will pay. And that pushes you hydraulically to all-you-can-eat marketing.

This promotion of volume actually goes beyond the fact that pricing of complements is reduced. It tends to give this entry price to get a very large bundle, one price to license every patent, one price to listen to every song, one price to read every article. Again, you see it all over the place.

So that's the positive side and I see the positive side as very strong.

The negative side, and you hear about this all the time, is that zero incremental pricing creates a barrier to entry for somebody who wants to sell just that product. This is basically the Netscape against Microsoft configuration. Netscape finds it very hard to sell a browser for a positive price against a browser which is bundled with Windows, where the incremental price of the Microsoft browser is zero. Now that's a barrier to entry, no question about it. It is an interesting topic, and I'll say a little about this, but I can't go into too much detail. The reason Microsoft did it is consistent with this analysis, and so is the reason that Netscape didn't like it.

Competition in a bundled market will always take the form of a bundle against bundle. It's very important to understand that. The competition that would matter in the office suites market or in the desktop operating system market is going to be another bundle that equals the features. You cannot expect to see the competition from a Netscape with a stand-alone product. But it does make it possible to compete with a bundle. So you'll see in these markets bundle against bundle, not bundle against a set of products offered separately.

Let me say a little bit about some of the areas where this has arisen. Music is one in which this topic has been alive for most of the 20th Century because of the fact that the licensing of music, performance rights to music, has been done in a bundled fashion since early in the century. Strong forces have resulted in the creation of performance rights organizations that basically sell a bundle. In the future, of course, we'll see the same thing in the marketing of online music.

In this setting it is important to understand that there are standard antitrust issues of concentration. The fact that the performing rights organizations concentrated that market is just a standard market concentration issue. And I don't want to ignore that issue. I think it is an important one, but it is actually not the bundling issue. The courts of course took great hostility to the bundled pricing of ASCAP-BMI, and in fact intervened in an unusually powerful way. It is one of the few cases where courts set price. When courts thought of intervening in Microsoft, that would require telling Microsoft how much, what positive price they had to charge for Internet Explorer, and courts seem to be unwilling to do this.

But in music when this issue arose, the court mandated pricing similarly to be a standard, and of course judicial hostility of the bundle has taken the form of compulsory unbundling, what is called per program licensing in the music business. So that's an aggressive judicial posture with respect to music. I don't think we are going to see that in the future, because I think the pro-bundling analysis that I'm describing is becoming more and more influential and is probably not going to see a similar regime imposed elsewhere.

Just to mention briefly that the electronic versions of scientific journals are evolving in very much the same way as music did. The electronic journal market or the scientific journal market in general has been strongly concentrated by a single publisher. It comes to Stanford and says you must pay $3 million a year. You get the entire bundle, take it or leave it. It is similar to the challenges of ASCAP and BMI and it has the same analysis. The bundling is perfectly natural. The high price is conceivably the result of the concentration of that market. And reversing the concentration I think is better than an attack on bundling.

I will mention, and I won't proceed further, that the same issue arises exactly in patent portfolios. The natural way to exploit the value of a patent portfolio in a licensing market is to license the bundle. And of course the licensees look at your bundle and say a thousand patents for $10 million a year. And they say, gosh, we only want one patent. We would like to pay you $10,000 a year just for one patent. And of course the patent holder says no, that's not the way the deal works, and then a lawsuit arises because there's tying of one patent to another. But the economics promoting the licensing in bundled form is very strong. It is a natural outcome to the patent situation to see that patents are bundled.

One of the ways you see that all the time is when a plaintiff challenges a bundled portfolio and brings a case saying we just want that one patent. We think we should pay less for that one patent. The result in every case that I'm familiar with is a license to the entire portfolio. The settlement always takes the form of a bundled license. And the plaintiff gains to the extent they had a good case by getting a lower price for the bundle. But they always get the bundle. And that's because there's a hydraulic pressure towards making these deals in terms of bundles.

Finally, I want to say a bit about the application of this to software, because I mentioned before that software inherently involves selling a bundle. All software packages are the aggregation of bundles of separate functions. And we have seen all packages, not just Microsoft packages, gain more and more features sold as a bundle. That's a completely healthy, good thing. I think almost everyone recognizes, for example, it is a good thing for the consumer that desktop software is sold in suites. There are competing suites. Many of us wish there was more competition, that there was more successful competition to Microsoft. We'd have even better suites, even cheaper. But competition in the form of suite against suite, bundle against bundle is the right way to go. But there are controversies.

Windows XP, which came out in October, is of course an even bigger bundle than ever. All kinds of nifty new things in it. And there was an interesting controversy which precisely illustrates the things you have to think about. I don't actually have an analysis about which way this should come out. Digital camera makers, especially

Kodak, discovered if you plug your Kodak camera into your Windows XP computer without installing the software, then Microsoft software gets installed as soon as you plug it into the USB port. I have a new scanner and discovered this. Now what you have to do, if you're selling products to Kodak, is you have to put tape over the USB jack, and the tape says, "Do not plug in into the computer until you install the software," because otherwise you'll get the Microsoft software. Microsoft put in this nifty new thing, which is that you can plug any digital camera into an XP machine without any software. This is a very interesting little battlefield that's taking place and basically is a very good thing. You're basically getting a choice, a choice between two companies' software for that function. Why is there money in this? Because the software doesn't matter, but that software then directs you to photo processing Web sites, and that's where the money is. So it is generating choice in photo processing Web sites.

There was pressure from Kodak. Kodak wanted the government to say, "Microsoft, you can't bundle that new feature into Windows XP" But as far as I know the feature remains in XP and the consumer has a choice.

So, to my mind, we need to be sensitive to the barriers-to-entry issue. And certainly in the Microsoft case that was quite properly part of the government's case. But we also need at all times to be very conscious of the underlying economic benefits of bundling. It was beneficial that Microsoft bundled new features, including the browser, into Windows. It was beneficial that Microsoft started competing with Netscape in the browser market. Those are two big benefits that came from that step.

Now, the government brought a case, and not a stupid case, based on the Microsoft e-mails, which said, well, that wasn't really the motivation for it. Rather, the government contended that the motivation was to kill potential entry to the operating system market. But that case needs to be weighed against the strong benefits that you get from bringing new product, new competing software product in, and also from bundling it, because bundling has these price-reducing benefits. So always keep in mind before saying, "Oh, it is an illegal tie," that there are fundamental economic benefits that underlie this type of process.

I leave you with the following thought. I know that many lawyers, including the D.C. Court of Appeals, disagree strongly with this, but here's what I believe: I believe that when you think of a remedy in this area—or in fact other areas, but let's focus on a remedy for bundling, such as mandatory unbundling—you must perform a but-for analysis. You must check and ask if the world were made different by this remedy, or if the world were different because you're thinking about how it would be without a challenge to the bundling act. Then check to see whether prices would have been higher or lower. The forces that I am describing are forces that would cause prices to rise if we prevented bundling. And that's harm to the consumer.

Now we'd have to think again of other aspects. That's not the end of the story, because this question to entry and barriers to entry is important. If you could be satisfied that was not an issue, generally speaking performing your but-for analysis would give the answer; it is the right way to think about this. I believe that every antitrust case, even a government case for which the damages are not being sought, should have a but-for analysis.

It is sad that the D.C. Court of Appeals said the exact opposite in Microsoft. But I really think that's the right way to clarify your thinking. If that shows that prices will rise but-for the challenged conduct, then the challenged conduct is pro-competitive.

Thank you.

MR. BRETT: I'll quickly try and wrap up a couple of quick observations.

Molly, I think I heard during the course of the program a suggestion that maybe the Commission really doesn't like Hatch-Waxman all that much, and perhaps the 24-month or 30-month exclusivities and the six-month exclusivities. Would you like to see the Hatch-Waxman repealed? And I do gather we have a consensus that the guidelines are pretty well useless at this point?

MS. BOAST: Let me talk about Hatch-Waxman again just from my personal point of view. I'm actually quite frankly of two minds, and I think that probably is where the Commission is on this, and that's exactly the reason they decided to do the 6(b) study. Because the goals are very worthy. Nobody disagrees with that. And the mechanism may not be perfect, and the question is can you improve the mechanism without wreaking more havoc and creating more uncertainty.

My problem with Hatch-Waxman stems from the observation I made about treating a patent as though it were somehow inviolate. That 30-month stay does that. And so it gives it, you know, a certainty that it probably isn't entitled to, and that's where I have a problem.

But I can't say. What I think will happen, a couple of things. One of my last official acts actually was testifying before a judiciary committee where it was the day that the Republicans lost power in the Senate. So it was a very unusual day. But then Chairman Hatch was there. And he expressed some concern about his law—which I mean he's been very, very proud of his law, and urged the Commission to help him figure out what to do. I frankly think the chances that anything dramatic will happen are slim. Because there's concern that you are opening a Pandora's box. Those who believe that competition ought to be promoted will lose ground.

I think that Mark's point about the little boxes and squares and geometric shapes is quite interesting. My problem with all of the add-on statutes has always been that it seemed to me that if you were a manufacturer of a drug that lent itself to a pediatric indication or a new delivery system, as your patent neared expiration or even before, you would have every incentive in the world to make those improvements and try to expand your market share before you lost the market protection. With those add-ons the best business strategy is to wait until the absolute last business day and introduce those products and gain the added protection. Sort of a long-winded way of responding.

MR. BRETT: There are a number of statutes bouncing around to amend Hatch-Waxman, most of them politically are at least trying to promote generics and cut down the monopoly of Big Pharmaceuticals, but of course if they do move forward, there should be some strong lobbying going the other way.

Why don't we see if there are any questions from the floor. Sir.

SPEAKER IN AUDIENCE: There's a lot of concern in the free software and open source communities they are going to find themselves under attack from holders of large software portfolios. Is there any economic analysis looking at how the notion of all these small cooperating individuals and entities that don't really exist in the context of a large commercial venture that don't have patent portfolios of their own are going to come into play in terms of promoting the development of more intellectual property?

MR. BRETT: Is that something you want to take a shot at?

MR. HALL: Well, of course if they are small enough they are judgment-proof, right. We have certainly seen there's all kinds of software floating around. If you think this is a big issue in the DMCA where the principle, anti-circumvention principles of the DMCA are Bear software. The DMCA is going to be successful through its controlling software, not hardware because you really can't get at these guys. I think it is—where patent protection software is just totally up in the air in terms of its actual enforceability. And there are many, many people in the software business who think that software patents are just a terrible impediment to progress. That so far has not proven to be the case. But I think there the evolution of patent law is something you have to watch carefully to see how much friction software patents create.

MS. BOAST: I would like to note for the FTC staff in the room that Professor Hall has said that all of these new online music services are going to be priced at $9.99, and I wonder why that is?

Endnotes

1. U.S. Const., Article I, Sec. 8.
2. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965).
3. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998).
4. *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).
5. *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000).
6. *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997).
7. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999).
8. *In the Matter of Intel Corp.*, Docket No. 9288 (FTC March 1999).
9. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 n.29 (1992).
10. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).
11. *Image Technical Servs.*, 125 F.3d at 1215 (citing *U.S. v. Westinghouse Elec. Corp.*, 648 F.2d 642, 646 (9th Cir. 1981)).
12. *CSU, L.L.C. v. Xerox Corp.*, 23 F. Supp. 2d 1242 (D. Kan. 1999).
13. *In re Independent Service Organizations Antitrust Litigation*, 203 at 1325 (quoting *Nobelpharma*, 141 F.3d at 1068).
14. *Id.*
15. *Id.* (citing *Intergraph Corp.*, 195 F.3d at 1362).
16. 35 U.S.C. § 271(d) 1999.
17. *Intergraph Corp. v. Intel Corp.*, 3 F. Supp. 2d 1255 (N.D. Ala. 1998).
18. *In the Matter of Intel Corp.*, Docket No. 9288, see attached "Analysis of Proposed Consent to Aid Public Comment," at "Complaint," part I.
19. *Id.* at "Order," part II.
20. *Id.*
21. *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999).
22. *Intergraph Corp.*, 195 F.3d at 1355.
23. *Id.* at 1359-60.
24. *Id.* at 1367 (quoting *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 991, 928-29 (2d Cir. 1981)).
25. Robert Pitofsky, *Challenges of the New Economy: Issues at the Intersection of Antitrust & Intellectual Property*, 68 Antitrust L.J. 913, 920-21 (2001).
26. *See In re Dell*, slip op., No. 931-0097 (LEXIS, Trade Library, FTC File).
27. U.S. Dep't of Justice & the Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995) (hereinafter "The Guidelines").
28. R. Gilbert & W. Tom, *Is Innovation King at the Antitrust Agencies? The Intellectual Property Guidelines Five Years Later*, 69 Antitrust L.J. 43, 73 (2001).
29. *Gilford Partners v. Sensormatic Elec. Corp.*, No. 96-C4072, 1997 WL 757495 (N.D. Ill. Nov. 24, 1997).
30. The Guidelines, *supra* note 27 at § 5.5.
31. *E.R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Antitrust Dinner

Astor Ballroom 7th Floor

DINNER SPEAKER:
Charles A. James
Assistant Attorney General
Antitrust Division
United States Department of Justice

MR. KEN LOGAN: I just want to welcome everybody to a dinner that will conclude a very, very nice day that we've had. This is the 125th Annual Meeting of the New York State Bar Association. And I think probably for the Antitrust Section, it's probably 65 or 70 years that this Section has been meeting.

Bill Lifland told me today that the New York State Bar Antitrust Section predates the ABA Antitrust Section. So there's a long tradition.

We are particularly proud tonight to have Charles James here, who will be speaking later on. And he's following a tradition. Every assistant attorney general in charge of the Antitrust Division and every chair of the FTC has at least once come to our Annual Dinner and spoken to the group. So it is a great privilege to have Charles here, and I'm sure we will enjoy hearing from him later.

We had also a very good afternoon. There were three panels. One chaired by Bill Lifland on antitrust law developments that was excellent; a second panel chaired by Saul Morgenstern, and Debbie Majoras participated in it, on the use of experts, primarily economists, in antitrust litigation, which I thought was exceptionally high-caliber and really very well done. And the third was also very, very well done, and was chaired by Barry Brett, on intellectual property issues and antitrust, trying to take a fresh look. And I think they did take a fresh look.

So I think we were also encouraged that we had somewhere between 125 and 150 people who came to the session this afternoon, which was a very, very strong showing.

In addition, before we get started, I want to thank The Analysis Group—and Bob Hall is here on the dais from The Analysis Group—for underwriting the costs of the reception. We have a little competition each year. We joke about it among the consulting firms as to who will win the bid to underwrite the reception. And this year they won the bid.

We are going to have everyone just eat and enjoy your dinner. We will introduce everyone on the dais a little bit later on. And then we will hear from Charles. Thank you.

MR. LOGAN: One of the nice things about this dinner each year is we all get down to business quickly. And we are really all here to hear from Charles, so once we get through the rest of the preliminaries, we will move forward to that. What I would like to do is be sure you know who is up on the dais. I think you probably know most of these people, but in case you don't, let me work from my left over to right.

On the far left is Bob Hall from Analysis Group, who was a participant on the IP panel this afternoon. And we're glad to have Bob here.

Next to him is Saul Morgenstern, from Dewey Ballantine, who put together the experts panel today. I thought it was a particularly good panel.

Next to Saul is Barbara Anthony who, as I think many of you know, is the Regional Director for the FTC. Her latest achievement is to be elected today as the secretary of this Section. And so she will make the succession of various positions and will be chair of the Section in a couple of years. Barbara brings great energy to what she's doing, and she is a great asset to everybody.

Next to Barbara is Pamela Jones-Harbour, who has formerly been in various positions in New York State government, including the Antitrust Bureau and is now with Kaye Scholer.

Next to Pamela is Steve Edwards, who is as of today the Chair of this Section, and he's really the person who put together today's set of programs. He deserves a lot of credit for that.

Charles we will hear more about in a few minutes. Working this way, Barry Brett at Jenkens & Gilchrist put together the IP program, which was just superb.

Debbie Majoras, whom we mentioned earlier, was part of the expert program. She is the Deputy Assistant Attorney General and I think very much responsible for getting the work out the door every day.

Next to Debbie is Jay Himes, who is the head of the New York State Antitrust Bureau. Next to Jay is Bill Lifland. For many years in a row Bill has been providing the antitrust developments presentations at these sessions. He also writes for *The Law Journal*. He has probably taught many of the people in this room what they know about antitrust.

Next to him is Ralph Giordano, head of the Antitrust Division's Regional Office, who has been very active the last couple of years on high-profile cases and has done a wonderful job.

So we're glad to have everyone here. We are also glad to have all of you here as well. What I would like to do is introduce Steve, who will introduce Charles.

MR. STEVE EDWARDS: Thank you, Ken. Before I introduce Charles it is traditional for the incoming Chair to give the outgoing Chair a gift.

As I understand it, this is a barrister's wig. And Ken, you can really use it.

MR. EDWARDS: I've actually known Ken Logan for 30 years. We were on opposite sides in a case shortly after graduating from law school in 1972. We were out in California on a major document production, and there was some sort of dispute, and Simpson Thacher decided to suspend the document production and put in a call to the judge. So while we were waiting for the judge to respond, we all decided to go off—actually, I think we went to a topless bar or something like that, men and women, and while we were there all of a sudden the phone rings, and the bartender says is there somebody here from Simpson Thacher? As I understand it, Ken took the call. I actually wasn't there personally. It was Judge Palmieri on the phone, and when Ken took the call, supposedly Judge Palmieri said, What the hell is going on?

Antitrust was very exciting back then, but there have been some changes over the years. As the years progressed, I guess in the 1980s, when Ronald Reagan was elected President, William Baxter became head of the Antitrust Division. And all of a sudden all of the arguments defense lawyers had been making for years were the official policy of the United States government. I think a lot of the people in this room wanted to say wait a second, not so fast. But in any event, the pendulum swung in a different direction, and many of us learned a lot about RICO and other types of law.

In the last few years the pendulum has begun to swing back, and we've all been waiting with great anticipation to see what happens with the present administration. You know, traditionally the Republicans were always the pro-enforcement party. Teddy Roosevelt, Richard McClaren. The idea was if you wanted to avoid government regulation, you had to have markets that operated in a competitive fashion.

In any event, we're very honored to have Charles James, the head of the Antitrust Division, with us tonight.

Charles is a 1976 graduate of Wesleyan. He got his law degree in 1979 from George Washington University. Then he served at the FTC and did a stint as the Assistant to the Director of the Bureau of Competition. I believe it was Tim Muris, who actually is now Chair of the FTC. Then he went to Jones Day for a few years. Returned to the Antitrust Division in 1989, and actually served as interim head of the Antitrust Division for a period of time in 1992. Went back to Jones Day again in 1992, where he was head of their Antitrust and Trade Regulation Group, and then on June 14, 2001, he became the head of the Antitrust Division. The rest is history.

We're all looking forward to hearing what Charles has to say about what he has in mind for antitrust over the next few years. Charles.

MR. CHARLES JAMES: You know, after hearing that introduction again, particularly where he went with Steve, I was pleased that I met him tonight.

In all seriousness, at least partial seriousness, it is my great pleasure to be here tonight, and in particular to be in New York City, in particular to see that there are this many antitrust lawyers in New York City alone. Which means that business must be good, and which means that I probably can do a great deal to make it better for you.

This is, I believe, my second trip to New York since September 11th. I came up earlier from the Fordham Antitrust Conference. Interestingly, on September 11th itself, just as the first plane was hitting the World Trade Center, I was about to get on a train to come up here to begin our senior litigator's conference at the Marriott World Trade Center, which was supposed to convene at 4 o'clock that day. Unfortunately, we had a number of Antitrust Division employees who were staying in the hotel that day, but fortunately they were not all injured physically. Although anybody who was close to those events has been injured I think in other ways.

I say all of that and after all of this joking, I want to say that coming into New York today and seeing I think 400 mayors descending on the city for a conference of mayoral events, New York City City Bar meeting today, and seeing all the people on the street, I really want to salute the city of New York. I think this city and the state have shown the world what Americans are made of: amazing resilience and passion.

To New Yorkers I say: Thank you for conducting yourself in this way.

As you can see from the chronology I guess you could say I celebrate my six-month return to the Antitrust Division. And it has been quite a six-month period. I am blessed really to live in interesting times. Unlike my predecessors, I do not have a merger waiver on the horizon, but I do have some interesting issues on my plate. And I cannot seem to avoid people taking my picture and seeing myself everywhere. So I guess that's one of the reasons there are so many antitrust lawyers, because the world is good at this present time.

I think about my first month in office. When I first arrived, we were just in the last stages of the GE-Honeywell matter, but the EU was the in the midst of its review. One week after I arrived the Court of Appeals of the District of Columbia Circuit sent me a present called the Microsoft decision. And I think somewhere around there General Dynamics announced its plan to take over the Newport News Shipyard.

So we have had some interesting things and I'll talk a little bit more about those cases in a few minutes. We have had some interesting things to deal with during the six-month period. I say to myself sometimes it seems like six months, and sometimes it seems like six years. But we're getting through it. And I think interesting times are ahead of me as well.

I know a lot of you come to these programs to hear the next great policy announcement. I'm afraid I'm going to disappoint you in that regard from my perspective, and I think the perspective of lots of other people. We really have a sound set of antitrust laws in the United States. Our courts are deciding them by and large in a very appropriate fashion. People understand what this is all about. And so there's really not a big mandate, to my way of thinking, for major changes in antitrust law or antitrust enforcement policy.

However, I am here, and for the price of your dinner tonight I thought I would try to give you a little insight into our general enforcement view and what you might expect from the Antitrust Division over the foreseeable future. I say foreseeable future because I serve at the pleasure of the President, and so I don't want to make any predictions.

But coming to New York and thinking about my speech, as I did this morning, while I was watching "Sports Center," I thought that it struck me that my view of the antitrust laws and I think the view that is dictated to us by our courts can really be illustrated by reference to three really very recent NBA basketball games.

Before I begin I will tell you I was born in New Jersey, the home of the New Jersey Nets. Not the home of the New York Knicks, which have not performed very well this year. And on Monday night they played a game that resulted in their worst-ever home loss. Some people talk about people throwing bricks, shooting bricks. It looked like the Knicks were shooting cinder blocks. Latrell Sprewell, who is ordinarily a very great player, scored zero points on something like 25 shots and the Knicks lost very poorly.

On Tuesday they had an interesting practice, and on Wednesday they came out and played the Toronto Raptors, which is a fairly good team. And they played good defense and they hustled and they won.

Meanwhile, on the west coast the Los Angeles Lakers, who are the dominant team in basketball, were playing the Los Angeles Clippers, a perennial doormat in the NBA. And the Los Angeles Lakers came out with Kobe Bryant and Shaquille O'Neal and put on a spectacular first-half performance. Lots of "Sports Center" highlights, plenty of slam dunks and went out to a half time lead of 14 points and then promptly went to sleep. And the Clippers beat them in their own house by a commanding score.

Now it seemed to me, as I was thinking about these two basketball games, the NBA could resolve all these problems. They could come to a view that the world would be a better place if all the teams were competitive with each other and every game was close and every team is close to make the playoffs, and there was a championship race in each division every time. But I would argue if they did that, NBA basketball would be less exciting. That people wouldn't have the incentive to play it as they do, and there won't be any such thing as Allen Iverson or Shaquille O'Neal or Michael Jordan.

So as I was thinking about that, so it is with antitrust policy and enforcement of antitrust laws. We value antitrust for the discipline that it provides to our markets and to the incentives it provides for excellence. And we don't do it necessarily because we expect particular results in individual competitive situations.

Competition can be a very cruel thing from time to time, but it is the way that we have chosen to organize our economy. And I think a lot of people would argue to you it is the reason that our economy is as successful as it is.

So I regard these antitrust laws as a very important thing. I take them seriously, and I take the mission from the Antitrust Division very seriously. That said, the Antitrust Division does not regulate competition. I can't count the number of times that lawyers have been in my conference room and they say, well, Charles, we understand your job is to regulate competition. And somebody says, stop, you're about to make him mad. And it is true, because I don't view myself as a competition regulator. We are not—we are an enforcement agency, a law enforcement agency. We are content to enforce the laws as they have been specified. We are not attempting to move industries in directions that we favor. We are not trying to dictate market results.

To paraphrase Thurman Arnold, who was certainly one of the great heads of the Antitrust Division, we are like a referee. We enforce the rules of the game, leaving the results to the actual competition of the market. That's our role. It is relatively simple. And our focus on competition is a myopic one. It is competition, competition, competition. Protection of the competitive process for the benefit of consumers. No other factors enter into the equation, because we don't have a mandate to do anything other than protect competition for the benefit of consumers. That's what we do.

Now I think three of our cases, the ones that I mentioned, are the ones that came to my immediate attention during my first few weeks at the Antitrust Division. They really point out the primacy of competition in our approach to antitrust enforcement. GE-Honeywell, as most of you know, was a proposed merger between largely complementary companies. GE makes aircraft engines; Honeywell makes avionics and systems.

We reviewed the transaction, there were some horizontal overlaps. We addressed those overlaps through that proposed consent decree. We analyzed the vertical issues associated with the transaction. We didn't determine or we didn't discover that there were any issues of competitive preclusion or foreclosure or things that other companies would need to compete. It was largely a complementary transaction.

As we looked at the synergies created by the transaction—and the companies are not shy about arguing efficiencies in the United States—we came to the conclusion that those aspects of the transaction were actually pro-competitive. The concept of the DO, and certainly the evidence that we reviewed indicated that GE, filing the transaction, would be able to assemble attractive packages of products and services and offer those to their customers at lower prices than they would have offered them prior to the merger. That, we thought, was the essence of competition. And it's certainly not a problem under the terms of our antitrust laws.

Now, during the course of the investigation, I'm told, because I was not there, we saw a parade of competitors of GE who came in and explained to us that a more effective GE would be a big problem for them. We considered the information that they provided. But because we didn't see foreclosure, preclusion or other kinds of effects that are cognizable under the antitrust laws, those complaints were not significant to us in our determination, and we allowed the merger to proceed.

The opposite was true in Europe. The EU complained that a more effective GE, offering more desirable products to consumers, actually threatened competition because it would make the world very tough on GE's competitors. And in that respect they looked to the concept that if as the world got tough, people might decide that they didn't want to be in these businesses anymore or they decided to take their primary investments elsewhere. So instead of having another practice and coming out and playing better defense, they might give up, and as a consequence that would be an anti-competitive effect.

Now, since the announcement of that transaction, we in the United States have been fairly open in discussing the divergence between the U.S. and the European community now. We discussed it not because we think of this as a trade issue. Many of the companies, if not most of the companies that were complaining to the EU were in fact U.S. companies. So this wasn't a favoring of the U.S. or the European businesses over the U.S.; we haven't said this because we want to embarrass the EU or complain about their law. They are a sovereign, and I think that their law is different than ours. And I think that they were seriously and in good faith trying to enforce it by its terms. And we certainly are not saying it because we are trying to reverse the decision. That's a decision that's made by a competent jurisdictional authority, and it is not our perspective to try to reverse it.

We have been open in talking about this because we see it as a policy issue. We think a healthy debate on these issues actually will improve the antitrust process. We think if we can encourage people to study and talk and write about these issues, and the EU and U.S. antitrust authorities are smart enough to listen to the best thinking on these issues, actually over a period of time our policies will converge. So we think it is important to discuss these issues, and it has been an interesting process since the decision and a big important part of what we're doing.

General Dynamics-Newport News was a merger of the two remaining producers of nuclear submarines and related systems and services. These two companies have earlier attempted to merge and as a result of a political process that took place legislation was passed to put them in a teaming arrangement to share production of the Virginia class of submarines up to a point, up to a certain number of submarines. It was widely reported at the time that there were certainly elements within the Navy that favored General Dynamics and that liked the merger because of their preference for General Dynamics' boats, personnel, things of that nature.

The defense that we heard from the parties was in large part that the teaming arrangement had all but eliminated most of the competition that would have otherwise existed between these two companies. And what additional competition was being taken care of by the Navy's preference in procurement policy favoring General Dynamics.

We also heard that the Navy could in fact manage a monopolist and that they had various means at their disposal to control costs, even though they would be the only now present and future supplier who was capable of actually building and designing a submarine. And we were told that even though there would be a submarine monopolist, that monopolist would have incentives to compete and keep costs low because of mission competition between submarines and other weapon systems. And these were all respectable arguments that we took very seriously and analyzed to substantial degree.

Our staff, however, worked very closely side-by-side with Department of Defense personnel, and fought really hard to establish the proposition that the preservation of competition for upgrade, services and in particular the migration of the submarine technologies onto the surface was something that was worth preserving. And it was an important thing, and it was a particularly important thing since everyone acknowledged that once this merger took place, there would not be in our lifetimes or in the foreseeable future another submarine construction facility. There just would be one. So this was a permanent change. Ordinarily we think of competitive effects in narrow time frames. But when procurement cycles are much broader, I think it is important we at least take cognizance of that.

In the end the Department of Defense and Department of Justice worked together in our opposition of the transaction. And the parties relented when we filed our complaint in federal district court.

Now, finally, there is the Microsoft case. Whenever I talk about Microsoft I say there are two Microsoft cases. One is the case that we actually litigated in court, and the other is what I call the Microsoft public spectacle, of which almost everybody is a plaintiff or defendant and almost everybody is an interested party. It is the most amazing thing I've ever seen. I think that they are radically different things, at least they have been in my experience, and I would like to talk a little bit about the real case.

In the real case, the Department had a very long, detailed speaking complaint that talked in great detail about how Microsoft conducted itself in the market, various practices that it engaged in and then capped the complaint off with four very specific theories of liability. There was tying the browser to the operating system, attempting to monopolize the browser market, exclusive dealing with regard to browsers, and finally, a count dealing with maintenance of the operating system monopoly by impeding the emergence of browsers as a middleware platform threat. On substantially the same conduct, the 19 state plaintiffs had two additional theories of liability. One was monopoly leveraging, leveraging the strong position of the operating system market into the browser market, and the other was monopolization with regard to Microsoft Office.

Now, in proceedings before Judge Jackson, the case compressed a little bit. Two state counts were resolved before trial. Actually the monopoly leveraging claim was subject to summary disposition. And the states voluntarily withdrew their claim of monopolization with regard to Office. Then at the conclusion of the trial the judge dismissed the claims about exclusive dealing with Webware browser.

On appeal to the D.C. Circuit only a portion of the monopoly maintenance case was sustained. The attempted monopolization claim was dismissed. The tying claim was reversed. The monopoly maintenance claim alleged a series of specific practices, and a course of conduct. And the court initially began by throwing out the notion that there was a course of conduct violation. That the specific practices had to be judged on their individual merit.

The Court of Appeals reviewed, I think, 20 specific practices and sustained the government's position on twelve of them. So from the time that you had the six counts in the case to the time where before the Court of Appeals decision, to my way of thinking, there is a substantially different case to be dealt with.

In Microsoft the public spectacle, however, it often seems to me it is as though the Court of Appeals never ruled and never issued the opinion that it issued. It is as though in many peoples' mind the mandate for relief is as broad today as it was prior to any litigation of the case. There have really been substantial changes.

Now as we approach the remedial process, we've heard from a lot of people. And it's very clear that Microsoft's competitors would like a very aggressive remedy. They'd like to see potentially the company dismantled for us to revive the structural remedy approach. We have read the Court of Appeals decision and concluded that we didn't think that was a prospect, as did all of the states when we agreed to abandon that remedial approach.

I think additionally they would like very substantial constraints on Microsoft's ability to compete in markets in which they are interested. They would like a tremendous amount of access to Microsoft's intellectual property, and some of them would like requirements that Microsoft actually be required to carry their particular products by name on the Windows operating system. I would say at the beginning I don't blame them. Those are the things I'd want. I'd probably even want more. But that's not really the point. The goal of public antitrust enforcement is not to secure specific benefits for specific companies, but rather this concept of protecting competition.

We have proposed a settlement to the court, which we think embodies an appropriate remedy for the violations actually sustained by the court, that takes very proactive measures to restore the middleware threat to where it would have been but for Microsoft's unlawful activities.

As we look at that, however, we want the market, as manifest in consumer choice, to really determine which, if any, middleware products succeed in competition with Microsoft. We think that's the mandate that we have under the antitrust law. And I think that is really the substance of the disagreement that people talk about on the Microsoft case.

Now, I couldn't be in New York City—it would be inappropriate, particularly with Jay Himes sitting here, not to sort of mention Eliot Spitzer and the position that he took here. From my perspective Eliot was very courageous and honest in joining with our settlement for this reason. Our proposed settlement, if entered by the court, would provide nationwide relief to consumers immediately. And if it is entered, it is going to go into effect with or without the assent of any state government.

So to our way of thinking the Department of Justice really has done, I think, the heavy lifting in establishing that consumers are going to be redressed for the violations. Under the circumstances it would be easy to stand on the sidelines, recognizing relief is going to take place and just throw darts. Eliot, I think, committed a tremendous amount of resources to this case. I see Steve Houck here, who I know was involved in the very beginning. Jay Himes has been involved in it very directly throughout my entire time.

As we approach the settlement process, Jay was one of the state representatives who was there every day in the settlement room. I'm really happy that at the end of the day that Eliot was prepared to stand up and say that he was satisfied with the settlement and thought it was an appropriate resolution of the case. And so I certainly appreciate his support in that respect.

On to the future. I've said that we would enforce the antitrust laws vigorously, and I think our actions in cases like the three we have mentioned, and certainly the two cases I was recused from, I must say, United Airlines, U.S. Airways and Sun Guard, we certainly had taken action when we thought there was a problem.

Looking to the future we are now in the process of taking a number of steps really to position the Division to have a vigorous enforcement program. Specifically we are taking steps to resolve the perennial problem regarding clearance. We are modernizing the structure of the Antitrust Division, and we are improving our investigative procedures through what I call the merger procedure reform issue. And all of these things, to my way of thinking, are very much related.

On the clearance front, I think everybody knows that in general on average things work pretty well. Most transactions are cleared. Based on our experience determination is relatively quick. It is, however, the case that whenever there is a big interesting transaction or a big interesting event, the agencies very often have consultation with each other about which one should do it, and that consultation takes time.

I think in the typical merger investigation probably—the investigation begins from filing the Hart-Scott-Rodino and the resolution and stuff five months. If, as we do from time to time, we spend the entire initial waiting period fighting with each other about clearance, we have eliminated 20 to 25 percent of our investigation time. And I don't think that serves the public.

We are working to achieve what I think is going to be a clear and transparent clearance arrangement that allocates commodities based on historical experiences. I've seen reports that people are shifting things. I don't think that that's really the case. And I think that the net effect of what we're trying to do with this process is increase our investigational time, focus expertise. Focusing expertise helps everybody. It helps us resolve issues more quickly, and more importantly it helps us investigate better. There is less up-to-speed time in the investigational process, which I think most antitrust lawyers, people in this room have had experience where they got a new matter about something they had never heard of before, and two months from now you're an expert on turbine generator sets, or whatever it is. But there is a two-month period, and we think if we can avoid that learning process or have that learning process be cumulative into the investigation, that we are improving the nature of our investigations and therefore serving the public better.

More importantly, to my way of thinking it permits us to have what I call a programmatic approach on industries or sectors. I think one of the things that can occur when experience or responsibilities are diffused, everybody thinks the other guy is focusing on the thing, and people have this tendency to look at Hart-Scott-Rodino or the section case in front of them, and not thinking about the industry as a sector or what-have-you. So I think the sectorial focus—and I come back to this in our modernization—is a very important thing we need to do. I don't think you can do the whole job of enforcing the antitrust laws by sitting in your offices and waiting for Hart-Scott-Rodinos and amnesty requests and complaints. That's not really the job. I think that in today's world, where we see so many strategic alliances, too many contracts—just pick up the *Wall Street Journal* and the specialized press and you see lots of things that probably deserve an antitrust inquiry. And I don't think you're going to get that unless you have this programmatic focus.

Our modernization program is really all about creating this sort of visible what I call community policing approach to the way we deal with the antitrust laws. We want our people to be visible, to be known to people in the industry. We want the world to know who to complain to when issues come up. And we want the person, our chiefs, our lawyers to be responsible for enforcing an antitrust enforcement program.

What we are trying to do is redeploy the resources in accordance with the commodities that we see today. And I know that people say, well, we are moving this shop here and moving that shop there. These things aren't carved in stone. They were once designed because somebody saw the portfolio matters that the agency has handled in a certain way. And guess what? Things change, and it is important for the agencies to respond to change. It is about concentrating expertise, and it is about creating this sort of programmatic responsibility and the accountability that goes with it.

And finally, with regard to our merger process review. It is an effort to bring this all into play and substantively. We want earlier clearances, so we can have more aggressive investigations. We want to have our lawyers focus on the specific investigative issues that are clear in the case of a particular matter, not just issuing standard requests or following general procedures. You know, less procedures, more thinking. More focus. We think we can investigate better. We want our chiefs and our deputies to be responsible for devising investigative plans and carrying out those plans. We think that there ought to be a system to what we're doing.

And finally, and this is the part where you guys come in, willingness to engage counsel for the other side in a meaningful dialogue about what the issues are in the case at an early stage. When I say meaningful, I do mean meaningful. It doesn't mean we tell you what we are thinking, and you go that's very nice and thank you very much, and at the end of the period you send me a white paper, and I'm supposed to sort of believe everything that's written there. It doesn't really work that well. So what we are really trying to do and what we are encouraging people to do is get the game out of this, and let's work together if we can. We are prepared to make specific procedural agreements with people, to make sure that things get done.

All of this, as I said, is with a common goal, making Antitrust Division the most effective antitrust enforcement agency it can be. Focusing on the law as it exists today; not running off and trying to reengineer industries, but really just taking them as we find it. Being that referee. And being what I hope will be and you people on the other side will say is a very formidable and effective opponent to your efforts.

With that I am happy to answer any questions you might have, as long as they are easy. No questions? I'm leaving. Thank you.

MR. EDWARDS: That concludes the evening's program. I would like to remind you again that the Section has a book called *Antitrust Law in New York State*, *Second Edition* edited by Bob Hubbard and Pamela Jones Harbour.

Thank you very much for coming. Thank you, Charles James, for being with us. We look forward to seeing you next time. Thank you.

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2003

New York State Bar Association

ANNUAL MEETING

January 21-25, 2003

New York Marriott Marquis
New York City

Antitrust Law Section Meeting
Thursday, January 23, 2003