NEW YORK STATE BAR ASSOCIATION

1987 Antitrust Law Symposium

A Report from
the Annual Meeting of the
Antitrust Law Section
January 28, 1987

1987 ANTITRUST LAW SYMPOSIUM

FORWARD

The 39th Annual Meeting of the Antitrust Law Section of the New York State Bar Association was held on January 28, 1987, at the Marriott Marquis, New York City.

The annual business meeting was held at 2:00 p.m. Chairman Barry E. Hawk first read the report of the Nominating Committee, which was composed of Sanford M. Litvack, Kimba M. Wood and Prof. Hawk. Pursuant to the Nominating Committee's report and upon motions duly made and seconded, the following Section members were unanimously elected to the indicated offices for the year 1987-1988:

Chairman:	Vernon E. Vig
Vice Chairman:	Norma B. Levy
Secretary:	Lloyd Constantine
Section Delegate:	Walter Barthold

The foregoing officers, together with Prof. Barry E. Hawk, James T. Halverson, William T. Lifland, Sanford M. Litvack, Irving Scher and Kimba M. Wood, were elected members of the Executive Committee.

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

The Section wishes to express its appreciation to the editor of this Symposium, Professor Mark Davies of Fordham Law School.

Barry E. Hawk

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WELCOME AND INTRODUCTION

CHAIRMAN VERNON E. VIG: Welcome to our annual meeting of the New York State Bar Association Antitrust Section.

We have three parts to the program this afternoon, three interesting subjects: Antitrust and the Rehnquist Court; Antitrust Compliance; and Antitrust and International Trade/Gray Market. A speaker will lead off each part, followed by a panel discussion. The moderator of the first part of our program is Bill Lifland.

PART I

ANTITRUST AND THE REHNIQUIST COURT

Speaker: Prof. Harry First

Moderator: William T. Lifland

Commentator: J. Paul McGrath

MR. WILLIAM T. LIFLAND: Thanks, Vernon. My first task is a very easy one and that is to introduce Harry First to you.

Harry teaches law at New York University and has done so since 1976. Before that, he was at the Justice Department in the Antitrust Division, from 1970 to 1972. He is counsel to Loeb and Loeb and Hess of New York City. Harry is the author of many articles and is also a co-author of a leading casebook in the field of antitrust.

PROF. HARRY FIRST*: I have been assigned a wonderful and humbling task today— prognostication. It is wonderful because it allows me to indulge in some guesswork, which no one can claim is "wrong." On the other hand, it is humbling because predictions of the future are always wrong. There is no way to know what events are lurking out there which will have an important effect on us, and even on our little world of antitrust. Who could have predicted, for example, that the delivery of a cake and a key to some politicians in Iran would affect who is in charge of the Antitrust Division?[1]

I will divide my remarks into four parts. First, before we can talk about the future, we have to talk about the past. I will begin my remarks, therefore, with some observations on how the Supreme Court currently views the antitrust laws. Second, I will venture my views on whether the recent changes in the Court—the appointment of Justice Scalia and the elevation of Justice Rehnquist—are likely to make any difference in how the Court views antitrust. Third, I would like to address the question whether the Supreme Court's view of antitrust is going to matter very much. Is the Court likely to have any antitrust to view? Finally, I will venture some observations on the future of antitrust. My conclusion will be a hopeful one, at least from our point of view, because I think that there really is a future for enforcement of the antitrust laws.

I

If I had to characterize the current Supreme Court's view of the antitrust laws, I would characterize it as "intellectual schizophrenia." I think that there are two views of the antitrust laws which are vying to capture the Court's mind in antitrust cases. Sometimes one wins, and sometimes the other. Neither has established

* I would like to thank Lisa Schwartz, my research assistant, for her help in the preparation of this speech.

[1] See "White House Decision on Policy, Staffing Delayed As Officials' Energies are Diverted by Iran Affair," Wall Street Journal, Jan. 16, 1987, at 46 (scandal has delayed filling vacancy in Antitrust Division).

dominance. One view I will call the "traditional" view of antitrust; the other I will call the "theoretical" view of antitrust. To illustrate the two views, I will offer four recent Supreme Court cases. From the traditional camp, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[2] and *FTC v. Indiana Federation of Dentists.*[3] From the "theoretical" camp, *Matsushita Electric Industrial Co. v. Zenith Radio Co.*[4] and *Monsanto Co. v. Spray-Rite Service Corp.*[5]

The "traditional" view of antitrust is most clearly articulated by Justices Stevens and White. By "traditional," I do not mean unchanging. Both Stevens and White have written important majority opinions which have changed the way we analyze antitrust problems. I point to *BMI*[6] and *NCAA*[7] as good examples. I use the term "traditional" in the sense that their opinions are consistent with the traditional way of approaching antitrust problems and the traditional values of antitrust. By this I mean that competition is viewed as a beneficial process of rivalry, beneficial not only because it leads to efficient economic behavior, but also because it increases diversity and provides consumers with choices. We have always assumed that consumer choice is valuable in itself, something which consumers desire. The ability to choose is embedded in our idea of a pluralistic economy and society.

This traditionalist emphasis on antitrust as enhancing consumer choice is a dominant theme in both *Aspen Skiing*, authored by Justice Stevens, and *Indiana Federation of Dentists*, authored by Justice White. In *Aspen Skiing* the monopolist suspended a cooperative "all-Aspen" ticket which had allowed consumers freely to choose among all four mountains in Aspen over a six-day period. The evidence showed that "skiers demonstrably preferred four mountains to three."[8] The four-area ticket "provided convenience and flexibility, and expanded the vistas and the number of challenging runs available to ...[the consumer] during the week's vacation."[9] No business justification existed to balance this deprivation of consumer choice and the exclusion of a rival to the monopolist. Indeed, in response to the monopolist's argument that the plaintiff's services were "inferior," Justice

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[2] 105 S. Ct. 2847 (1985).

[3] 106 S. Ct. 2009 (1986).

[4] 106 S. Ct. 1348 (1986).

[5] 465 U.S. 752 (1984).

[6] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (blanket license created by performing rights societies was "a different product" which no single composer could offer to consumers; dissatisfied consumers are still free to go around the blanket license and negotiate with individual copyright holders).

[7] National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 104 S. Ct. 2948 (1984) (restriction on member schools created nothing new; result of restraint was that price and output were "unresponsive to consumer preference").

[8] 105 S. Ct. at 2859.

[9] Id.

Stevens noted that it was the all-Aspen ticket which "allowed consumers to make their *own* choice on these matters of quality."[10]

In *Indiana Federation of Dentists*, a group of dentists established a boycott to keep insurers from getting x-rays that the insurers believed could help reduce the cost of claims. This refusal to compete on the "package of services" consumers desired, Justice White wrote, impaired the ability of the market to advance social welfare by ensuring that "desired" goods and services are provided at a price close to economic cost.[11] No adequate justification was offered to balance this adverse effect, and it did not matter that there was no proof that the boycott acted to increase the price of dental service. The Federation of Dentists "is not entitled to preempt the working of the market by deciding for itself that its customers do not need that which they demand."[12]

Let me contrast the approach of these cases with the "theoretical" approach. By the way, I do not *mean* to say that the *traditional* view has no *theory*. The difference I want to emphasize between the two views is that the theoretical view is infatuated with theory, specifically microeconomic price theory. The theoretical view emphasizes this theory both as a way to decide cases (it explains behavior) and as a prescription for antitrust. The only concern for antitrust, under this theory, is with price-raising behavior.

The two most recent examples of the theoretical view of antitrust are *Matsushita* and *Monsanto*, both authored by Justice Powell. In *Matsushita*, the Court decided that no "rational" fact finder could infer the conspiracy alleged by plaintiffs, that is, a conspiracy among the defendant Japanese television manufacturers to predatorily price their products in the United States so as to drive the United States makers from the market. The Court first decided that "predatory pricing" schemes "are rarely tried, and even more rarely successful."[13] The Court then decided that, from its point of view, it seemed unlikely that the defendants could have recouped the costs of predatory pricing in this case, because the Court was unable to figure out how such a scheme could have "paid off" for the defendants. Because the Court could not explain the behavior alleged, at least under price theory, the Court decided that the defendants could have had no "plausible motive" to engage in it.[14]

Key to these "findings" was a theory advanced by those who have analyzed predatory pricing from the viewpoint of the rational profit-maximizing firm. Under this theory, predation is an "investment" which the firm, by definition, will incur only if it will pay off.[15] Now, there is nothing logically wrong with this

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[10] Id. at 2861.

[11] 106 S. Ct. 2009, 2018 (1986).

[12] Id. at 2019-20.

[13] 106 S. Ct. 1348, 1357-58 (1986).

[14] Id. at 1361 (1986).

[15] The Court relied here on the writings of then-Professors Bork and Easterbrook. Easterbrook wrote specifically about the Matsushita case: the Court labeled Easterbrook's assessment "sensible." 106 S.Ct. 1359 n.15, citing Easterbrook, The Limits of Antitrust, 63 Texas L. Rev. 1, 26-27 (1984).

theoretical view. The only problem is that the theory's premises and conclusions might be factually wrong in a particular case. Firms might have a broader range of objectives than profit-maximization; or firms could miscalculate and engage in behavior which turns out to be more costly than expected.

For those who believe in microeconomic price theory, however, firms only profit-maximize, and they do not engage in incorrect behavior (or, if they violate either tenet, the market will penalize them; the behavior is "self deterring"). The Court in *Matsushita* believed. As a result, a jury was never allowed to examine the argument, put forward not only by the plaintiffs but by many observers of Japanese industrial policy, that the Japanese approach to the U.S. market was the well-coordinated effort of a cartel to drive out U.S. producers and obtain for itself whatever oligopoly profits existed in the U.S. television market.[16]

The other example of the theoretical view is *Monsanto*.[17] There the Court stated that a jury could not infer concerted action when a manufacturer terminates a discounting supplier following complaints from the discounter's competitors. But why should the fact-finder be barred from deciding that this particular behavior demonstrates an agreement to engage in vertical price-fixing? The answer given by Justice Powell is that allowing such a finding could interfere with the Court's theory of what the manufacturer *might be* doing. In the Court's view of the distribution process, a manufacturer could have a legitimate desire unilaterally to further a "marketing strategy" of high resale prices, pursuant to which strategy the manufacturer will allow its distributors to "earn sufficient profit to pay for programs such as hiring and training additional salesman or demonstrating the technical features of the product, and will want to see that 'free riders' [*i.e.*, discounters] do not interfere."[18]

Like the theory in *Matsushita*, this theory is not an implausible one. But also like the theory in *Matsushita*, this theory might not describe what is actually happening in a particular case. Like *Matsushita*, observers suggest that discounter terminations might have more to do with keeping high-price retailers happy than with the premium distribution system/free rider theory the Court accepts.[19] Surely the jury in a dealer termination case could decide whether the manufacturer had

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[16] For a good articulation of this view, see Yamamura, Caveat Emptor: The Industrial Policy of Japan 178-85, in Strategic Trade Policy and the New International Economics (P. Krugman, ed., 1986). The industry's efforts are further described in Millstein, Decline in an Expanding Industry: Japanese Competition in Color Television, Ch. 3, in American Industry in International Competition: Government Policies and Corporate Strategies (J. Zysman & L. Tyson, eds., 1983). Note that the Supreme Court's opinion does not rest on viewing the plaintiffs' argument as being that the defendants priced below cost in the sense that the defendants were not covering their marginal cost. See 106 S.Ct. at 1355 n.8. Indeed, the plaintiffs claimed that the defendants were pricing below market levels, but not below marginal cost. See In Re Japanese Electronic Products Antitrust Litigation, slip op. at 7 (3d Cir., Dec. 12, 1986) (on remand).

[17] 465 U.S. 752 (1984).

[18] 465 U.S. 752, 762-63 (1984).

[19] See, e.g., Gerla, Discounters and the Antitrust Laws: Faces Sometimes Should Make Cases, 12 J. Corp. Law 1 (1986).

unilaterally embarked on a premium distribution system to provide pre-sale and post-sale services, or was just trying to get rid of discounters.

What we have, then, are four important cases, decided within the past two years, which are at war with each other. Under the approach of the Court in *Matsushita* and *Monsanto*, the theory decides the facts. In *Aspen Skiing* and *Indiana Federation*, by contrast, the Court looks first at the facts, and then lets the facts inform the law.

As for the goals of antitrust, in *Matsushita* and *Monsanto* the Court sees only price theory. In *Matsushita*, the defendant's behavior will not harm "competition" because it would not likely raise prices. The Japanese manufacturers' behavior was just as consistent with hard price competition which would drive price down, and could not likely have given the defendants any long-run power over price anyway. To the Court in *Monsanto*, the manufacturer is presumed to implement a particular distribution system only if it is a more "efficient" way to compete. The manufacturer will obtain no greater market power in the process and, therefore, will have no power to raise prices to achieve monopoly profit.

On the other hand, the traditional view reflected in *Aspen Skiing* and *Indiana Federation* realizes, to paraphrase, that there are more things to competition than are dreamt of in price theory.[20] Competition needs competitors; it needs the Aspen Highlands Corporation. Competition requires access to markets and opportunities to compete; Aspen Highlands cannot be excluded for no good reason. Competition involves widening consumer choice to include price, quality and service. Insurers should get their x-rays; skiers should get four mountains rather than three.

How could the Court that unanimously decided both *Aspen Skiing* and *Indiana Federation* have decided *Matsushita* and *Monsanto* as it did? Why is there no concern in *Matsushita* for the possible exclusion of U.S. manufacturers from the U.S. television market? Why did the Court in *Monsanto* express no concern that its conspiracy rule might have the effect of making it too easy to cut off discounters, thereby reducing the choices available to consumers in terms of retail prices and services?

But, turn it around. Decided by the rigors of price theory, how could we condemn the "hard competition" in *Aspen Skiing*? Could it be inefficient — price raising — for a monopolist to refuse actively to assist its competitor? *Indiana Federation* is worse. The FTC defined no markets; not is it easy to see how the dentists could have had enough power to raise prices in the dental market through concertedly refusing to turn over x-rays to the insurance companies (when the insurance companies could have obtained them on their own).

II

If you agree with me that these cases express very different approaches to antitrust and that the Court can't seem to make up its mind on how to view anti-

[20] With apologies to Shakespeare, Hamlet, Act I, Scene v ("There are more things in heaven and earth, Horatio,/Than are dreamt of in your philosophy.")

trust, will the change in Court personnel make a difference? This brings me to the second part of my remarks. Will the changes on the Court cure the schizophrenia? Will it matter that majority opinions will now be assigned by Chief Justice Rehnquist, rather than Chief Justice Burger? Will it matter that Justice Scalia will be writing opinions rather than Chief Justice Burger? I think the most likely answer is that neither change will produce a major shift in the Court's view of antitrust.

First, I see no reason to assume that Rehnquist will assign opinions much differently than Burger did, because I do not think that Rehnquist himself has any burning interest in antitrust. An examination of Rehnquist's antitrust opinion writing record, for example, reveals no embrace of microeconomic theory equal to *Matsushita* or even *Sylvania*;[21] instead, his opinions reveal a stronger interest in other values such as federalism.[22] His voting record generally casts him with the more conservative members of the Court on antitrust (which, of course, has not necessarily meant being anti-enforcement); even here there are some curious exceptions, such as his joining Justice White's dissent in *NCAA*, which dissent emphasized the "legitimate noneconomic goals of the colleges and universities."[23] Thus, I see nothing that would lead me to predict either that Rehnquist will now reach out for more antitrust opinions for himself or that he would assign fewer majority opinions to Justices Powell, Stevens, or White.

What can we say of the substitution of Scalia for Burger? Here, prediction is more treacherous. Scalia has written no antitrust opinions, nor has he authored any antitrust articles. He has been closely identified with the "deregulation" movement. As a law teacher, he taught administrative law and regulated industries, and edited the American Enterprise Institute's magazine *Regulation*. Still, I would characterize him more as a "conservative" than as a free market ideologue.

For example, after President Reagan's election, Scalia wrote two short pieces for *Regulation* magazine in which he made some suggestions for changes in the FTC and FCC.[24] With regard to the FTC, he did express his dismay at the "novel antitrust theories" the Commission had been pursuing, but he was at least as concerned with the Commission's "excessive consumer protection require-

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[21] The closest embraces are in two dissents from denials of certiorari. See National Football League v. North American Soccer League, 459 U.S. 1074 (1982) (arguing that NFL ban on cross-ownership is reasonably "ancillary" to the joint venture; restraint helps NFL compete in entertainment market); Eastman Kodak Co. v. Berkey Photo, Inc., 444 U.S. 1093, 94 (1980) (questioning that part of Court of Appeals decision holding that failure to predisclose innovation could violate Sherman Act; "notion that a statute designed to foster competition requires one competitor to disclose to another, in advance.....is difficult to fathom").

[22] Justice Rehnquist's decisions on "state action" issues illustrate this point. See, e.g., Rice v. Norman Williams Co., 458 U.S. 654 (1982) (upholding State "designation" statute against Sherman Act preemption claim); Community Communications Co. v. City of Boulder, 455 U.S. 40, 60 (1982) (state action doctrine should be available for home rule municipality's legislation)(dissenting opinion); Cantor v. Detroit Edison Co., 428 U.S. 579, 614 (1976) (pervasively state regulated utility) (dissenting opinion).

[23] 104 S. Ct. at 2977.

[24] See 4 Regulation, Nov.-Dec. 1980, at 18-20, 27-28.

ments." He did not urge, however, that the excesses simply be undone by new regulators. Rather, he urged that the proper solution was to have Congress amend the Federal Trade Commission Act. With respect to the FCC, Scalia was positive in his review of the deregulatory efforts of the FCC in the 1970's. But here, too, he urged that the proper approach was to have the legislature, rather than the regulatory agency, rewrite the Act. Thus, even though Justice Scalia taught at the University of Chicago Law School, he does not appear to have reflected that faculty's outlook. I would not predict that the substitution of Scalia for Burger will add a Justice intent on pushing the Court toward a more consistent articulation of antitrust philosophy (either traditional or theoretical).

Even if Scalia does not come to the Court with a particular antitrust outlook, could we predict that his vote (rather than Burger's) could alter some of the close areas in antitrust today? Here, I would identify three important doctrinal areas as possible candidates for change: tying , vertical price-fixing, and maximum horizontal price-fixing. But, again, change does not seem likely.

With regard to tying, *Jefferson Parish*,[25] although unanimous for the result, split the Court 5-4 along the exact philosophical lines I have attempted to describe earlier (with both Burger and Rehnquist in the minority). One might guess that the next part of tying law to be amputated will be the equation of a copyright with market power. Justices White and Blackmun, however, have already hinted at their dissatisfaction with current law.[26] Even if Scalia agrees with them, his vote will not likely tip the scale.

On vertical price-fixing, the Court has attempted to maintain the price/nonprice distinction, although dicta quoted above from *Monsanto* must lead one to wonder whether a majority of the Court still believes in the distinction. Nevertheless, the distinction still commands unanimous support from the Court, based on written opinions.[27] Further, there is a good "settled law" argument here for leaving this change to Congress, including implications to be drawn from Congressional repeal of fair trade.[28] This is very much an argument that might appeal to a conservative jurist like Scalia, particularly given Scalia's emphasis on the institutional importance of legislative change.

As for horizontal maximum price-fixing, Burger dissented in *Maricopa*,[29] along with Powell and Rehnquist. Justices Blackmun and O'Connor did not participate. If Blackmun joins the "traditionalists" (as he did in dissent in *Matsushita*), the law will not change, even if Scalia could be convinced to overrule *Maricopa*.

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[25] Jefferson Parish Hospital District No. 2 v. Hyde, 104 S. Ct. 1551 (1984).

[26] See Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), cert. denied, 105 S. Ct. 3534 (1985) (White and Blackmun, JJ., dissenting from denial). But cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 25 (1979) (Stevens, J., dissenting).

[27] See Monsanto, 465 U.S. at 763; Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977).

[28] See Monsanto, 465 U.S. at 769 (Brennan, J., concurring); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1977).

[29] Arizona v. Maricopa County Medical Soc., 457 U.S. 332 (1982).

III

This brings me to the third part of my remarks. With no clear immediate change in the antitrust philosophy of the Rehnquist Court, what can we say about antitrust in that Court in the near future?

The first question is the extent to which the Court has any antitrust litigation at all. I start with the obvious. If the Supreme Court antitrust docket were dependent on Reagan Administration Justice Department enforcement, this could have been a much shorter talk. There would have been nothing to say.[30] The bulk of Justice Department litigation efforts today go into criminal price-fixing, a worthy target, but one which does not engage difficult issues of antitrust policy. In 1985 the Justice Department brought only two civil restraint of trade cases. There is still some merger enforcement, but litigated cases represent only a small fraction of the mergers noticed to the government (seven merger cases were filed by the Justice Department in 1985, out of 1604 mergers noticed). The bulk of antitrust litigation has been coming from the private bar.

What about the near future? My guess is: less of the same. On the government side, the Administration has no grand plans to increase antitrust enforcement. On the private side, the volume of private litigation will likely continue to drop. The courts of appeals have given a too-willing embrace to *Monsanto's* conspiracy requirements (in more than half the post-*Monsanto* decisions, the court granted the defendant's motion for summary judgment or directed verdict[31]); the Supreme Court continues to view private standing restrictively, as shown in *Monfort*;[32] and Congress has remained willing to heed pleas from particular groups for antitrust exemptions (physician peer review being the latest[33]). Should Congress adopt the Administration's "reform" package of antitrust legislation, the private right of action will be cut back even further. The Rehnquist Court may become progressively more quiet on antitrust.

There is a second point I would like to make here with regard to a diminishing impact for the Supreme Court in antitrust. This relates to the role of the courts of appeals. Although the courts of appeals have reviewed all antitrust cases since 1974, their impact has dramatically increased of late with the appointment of a number of judges who are free market ideologues. These judges - the Chicago Circuit - are acting as if they are the Supreme Court in antitrust cases. They accept

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[30] Note that the Federal Trade Commission filed the petition for certiorari in Indiana Federation of Dentists without the support of the Department of Justice, for the first time in the FTC's history. See 48 Antitrust & Trade Reg. Rep. (BNA)(no. 1216, at 874 (May 23, 1985).

[31] See Flynn, The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Service Corp., 71 Cornell L. Rev. 1095, 1102-03 (1986).

[32] Cargill, Inc. v. Monfort of Colorado, Inc., 107 S. Ct. 484 (1986) (competitor challenging merger who showed only the potential for lost profit due to price cutting, but neither alleged nor proved that the merged firm would sell below cost, has not demonstrated antitrust injury; no standing to seek injunction).

[33] See P.L. 99-660, 99th Cong., 2d Sess. (immunity only against private suits for good faith peer review).

the arguments in favor of viewing vertical price-fixing under a rule of reason;[34] they hold *Aspen Skiing* to be "narrowly written," based on "unusual facts";[35] they have overruled *Klor's*,[36] *Topco*, and *Sealy*;[37] they have decided that the purpose of the antitrust laws is solely to advance "efficiency," in the limited sense of reduced output and higher prices.[38] Propositions are stated to be "well accepted," with citations either to their own decisions or the decisions of their colleagues with whom they agree, even though these propositions may not be so well accepted.[39]

I think that the Chicago Circuit is having a profound influence on judicial developement of antitrust. These judges write their opinions as they wrote their law review articles: the opinions are well-written and well-argued; the views are coherent, and one-sided. These judges are seeking to shape the antitrust laws in line with the views they expressed in their academic writings. They have an agenda.

I think that there is a great chance that the continuing efforts of this group of judges will substantially alter the direction of the antitrust laws unless one of two events occur. One would be that the Supreme Court begins reviewing and reversing these opinions. I think that is fairly unlikely; it would require the Court to pursue an aggressive policy in favor of the traditional view of antitrust, and the current Court does not seem so disposed. A second possibility is that other courts of appeals judges will begin to articulate more forcefully the traditional views of antitrust. This has happened,[40] but it does not offer prospects which are substantially more promising than Supreme Court review. After all, most judges do not see themselves as having a mission to write their views of antitrust into law. They decide cases.

IV

I promised a hopeful ending (at least hopeful to those who want to see antitrust continue). The hopeful ending is a slightly longer-run scenario. It sees a revitalization of government antitrust enforcement, brought before a conservative but not

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[34] See Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F. 2d 722 (7th Cir. 1986) (Easterbrook, J.).

[35] See Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 379 (7th Cir. 1986) (Posner, J.).

[36] See Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Co., 682 F.2d 660, 665 (7th Cir. 1982) (Posner, J.).

[37] See Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F2d 210, 226 (D.C. Cir. 1986) (Bork, J.).

[38] See, e.g., id.

[39] See, e.g., Olympia Equipment Leasing, 797 F.2d at 375 (purpose of antitrust laws today is to promote economic efficiency, citing, inter alia, opinions by Posner and Easterbrook); id. at 379 ("antitrust commonplace" finding hostility to competitors irrelevant, citing opinion by Easterbrook).

[40] See Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 230 (D.C. Cir. 1986) (Wald, J., concurring); cf. FTC v. Coca-Cola Co., 641 F. Supp. 1128 (D.D.C. 1986).

an ideological Supreme Court. This revitalization could occur without regard to which party wins in 1988.

An antitrust revitalization could be fueled, first, by the current belief that there is no antitrust enforcement. It would not surprise me if this belief, on the part of business people, is now producing an increase in actual collusion. I also think that this belief is encouraging more aggressive, competitive behavior, which may likewise trigger future enforcement.

Second, there may be a revitalization of antitrust enforcement arising out of old populist strains, filtered through our current economic problems, particularly problems in dealing with foreign firm competition.[41] This could surface in a reconsideration of our current policy of benign neglect toward large firm mergers, at least if industry concentration is affected. It could surface in a closer review of foreign firm acquisitions in the United States, or a closer review of those distribution, joint venture, and technology cross-licensing agreements that seem designed to moderate competition with foreign firms both here and abroad. These are not unfamiliar antitrust concerns, but I think we might also see some new uses of antitrust in league with trade policy. We might see, for example, an interest in using the antitrust laws to attack foreign cartel efforts to capture U.S. markets through unduly exclusionary behavior. In another administration, *Matsushita* might be a government case.

I think there are interesting times ahead for the Rehnquist Court in antitrust. Antitrust is our continuing effort to organize an efficient and democratic economy. Like the state, it will not wither away. Thank you.

(Applause)

MR. LIFLAND: Thank you very much, Harry for a clear and thoughtful presentation.

Our principal commentator this afternoon is, appropriately, Paul McGrath, who served as the Assistant Attorney General in charge of the Antitrust Division for a good part of the recent period which Harry described. And I'm sure Paul will have some contrasting views to put before you. Paul.

MR. J. PAUL McGRATH: Thank you very much, Bill. It was a safe prediction that I don't quite see antitrust exactly the same way that Harry First does. I don't mean to suggest that I'm a free market ideologue. I would hate to be captioned as such.

I was noticing on my calendar the other day that the next presidential election is about 92 weeks off, which in terms of political cycles is really not very far. We all know that there is a certain anxiety in corporate America that maybe the results of this election will abruptly bring to a halt what I would regard as the golden era of antitrust enforcement. But I would suggest, and if you have clients that have that same anxiety you might suggest to them, that any fears along these lines are really based, first, on a misconception about who has really changed the rules of antitrust

[41] See "Treasury Official Assails 'Inefficient' Big Business," N.Y. Times, Nov. 8, 1986, at 1 (Deputy Secretary of Treasury Darman Attacks "corpocracy").

and, second, on an exaggerated view of the role the government enforcers have played in this change. The fact is that the courts, and especially the Supreme Court, have taken the lead in rewriting antitrust policy.

The Court has generally during the past few years discarded or at least ignored the more unfortunate decisions of the Warren Court. The Supreme Court has now adopted what I would regard at least as a more sensible economic approach toward antitrust, and I have no reason to believe that the Rehnquist Court will retreat to the days of *Topco* and *Von's* and *Utah Pie* and *Klor's* and *Sealy*, to mention a few sad examples of the Warren Court era.

I don't base these views on just wishful thinking and I would like you to consider a Supreme Court case that Professor First mentioned but didn't discuss in detail, a very recent one, the *Montfort* case, which I do not bring up because its holding was particularly exciting. It basically narrowed the rights of private plaintiffs to attack mergers, to seek injunctions of pending mergers. I don't think that result was particularly surprising or radical, particularly given the general narrowing trend in the areas of standing and justiciability that the Court has exhibited in the last few years. I do think, however, that the *Montfort* case is interesting for several other reasons.

First, I think it illustrates that we probably no longer have the same liberal/conservative split that some of us used to think we had in antitrust. The *Montfort* case, which I would regard as a conservative antitrust opinion, was written by that old conservative, Justice Brennan. The opinion was joined in by Rehnquist, Scalia, O'Connor and Powell, not very surprisingly, but it was also joined in by Justice Marshall. And I would suggest that that split is probably significant in itself. It probably mirrors to some extent what you see happening in Congress, with many individuals who you'd regard as liberals in many other areas not being traditionalists in the antitrust area and with some who you'd regard as conservatives in many other areas not being what I would regard as conservative in antitrust.

Second, perhaps more important, is the philosophical approach taken by the Court in *Montfort*. If you go back to the 60's and you look at *Brown Shoe* and *Von's*, you see very clearly an expression by the Supreme Court that the purpose of Section 7 of the Clayton Act is not a narrow economic purpose. It is not simply to foster economic efficiency. Rather, to quote the classic sentence, "It was to protect small businessmen and to stem the rising tide of concentration in the economy." And that was the purpose, at least for Section 7 of the Clayton Act, that the Court gave, over and over again, for the next decade and a half.

Look at *Montfort*. Look at what Justice Brennan said in *Montfort*. He referred to the plaintiff's claims in that case that the purpose of Section 7 was to prevent economic concentration in the American economy by keeping a large number of small competitors in business. He referred, in footnote eleven, to their claim that the purpose of Section 7 was, and again to quote, "to keep small competitors in business at the expense of efficiency."

Having noted these claims by the plaintiff, claims taken word for word out of *Von's Grocery* and *Brown Shoe*, Justice Brennan's reaction was, first, to note that

these are propositions about which there is "considerable disagreement." And then in analyzing the opinion itself, he proceeded to completely ignore that kind of philosophical background. He analyzed the whole issue in the case in terms of economic efficiency and totally ignored what trends toward concentration clearly were present in the industry in question, and he ignored the fact that the case completed the virtual demise of small competitors in the industry in question.

Indeed, this analysis didn't escape Justice Stevens, who wrote the dissent. He noted that the majority opinion had expressly stated that the antitrust laws require the courts to protect small businesses only against the loss of profits from practices that themselves are forbidden by the antitrust laws.

Beyond this general philosophical approach, the majority opinion in *Montfort* and its, analysis, to me at least, goes a long way to help predict the approach of the Rehnquist Court on a variety of key antitrust issues. One issue that I regard as much more important than things like tie-ins or resale price maintenance is the issue of the significance of size or bigness. Is the dominant firm under some kind of handicap? Can an IBM vigorously and aggressively introduce new products? Can an AT&T, when it used to be monopolist, introduce aggressive pricing packages? Can a company that has a patent monopoly aggressively extend its position in the market through patent licensing and other matters?

It is probably fairly clear today, on the basis of other cases that have been decided, that indeed even dominant firms in a market are free to vigorously compete on the same basis as other firms. If that wasn't clear before, it certainly was stated by Justice Brennan in the *Montfort* majority opinion, where he expressly said that, in the interest of competition, even dominant firms — and that's his phrase, dominant firms — may engage in vigorous competition, including price competition. It's also clear, I think, from *Montfort* that the rules governing predatory conduct are quite different today than one might have thought ten or fifteen years ago because the *Montfort* case involves a very close economic analysis of the alleged possible predatory conduct and focuses expressly on issues such as the market share of the would-be predator, the entry barriers, and the analysis of the cost issues, and concludes, consistently with the earlier decision in the Japanese electronics cases, that the possibility of price predation at least is a very rare thing indeed.

My forecast, again barring significant, very unforeseen occurrences, is that in the future, at least the foreseeable future, there will broad support in the Court for applying antitrust restraints on the decisions of business executives only when the business conduct presents a very clear risk of harm to competition.

Second, there will broad support for basing the decisions of the Court on what I would regard as modern economic analysis, the Chicago Circuit analysis if you will, and focusing specifically on whether economic efficiency will be damaged by troublesome effects on price.

And third, I would think that there will be a continuing skepticism on the part of the Court toward claims by plaintiffs that the new kind of conduct by their competitors has restricted competition.

Is this to say that the next election can't have any impact on antitrust? Of course not. Government agencies have a range in which they can choose whether to bring actions or not to bring actions. This is particularly clear in the merger area, where the courts have very little to do with merger enforcement under the Hart-Scott-Rodino regime; in the vast bulk of cases, once the government agency indicates it's going to challenge the merger, the merger isn't going to happen. So the courts are not going to have any more meaningful a role, I don't think, in merger analysis than they have had in the last six years and that they had in the years before that since the Hart-Scott type regime has been in effect.

I don't think that the number of cases the Department of Justice itself brings is very significant in antitrust enforcement. The most significant role of the Department of Justice lies in the positions it takes as amicus, and I think that has been generally true in various administrations over the last 15 years.

I think that the principal changes of the last decade are here to stay, including a much more hospitable approach toward vertical restraints (at least nonprice vertical restraints), joint ventures, and mergers, (to the extent merger cases get to the Supreme Court), and a continued narrowing of the old per se rules. Over the last few years, various kinds of conduct that have been thought to be per se no longer are per se — tie ins, vertical restraints, joint ventures, refusals to deal, concerted refusals to deal.

And, finally, I *think* there will be a continued reluctance to expand private remedies in antitrust and in other areas.

I don't think that you can look to other parts of the government to change this very much. For instance, I don't think that there's very much political support in Congress or among the public generally to reverse the trend of the last few years. Thank you.

(Applause)

MR. LIFLAND: Thank you very much, Paul. I was asked to make a few comments, and I'll try to do that very briefly so as to give Harry a chance to shoot us both down before the next program begins.

First, with respect to mergers, I agree with Paul that we are not going to see many merger cases in the Supreme Court. The process has changed somewhat. Before 1975 the Expediting Act provided for a direct appeal to the Supreme Court in civil cases brought by the government under the antitrust laws. That isn't happening now. Those cases go through the courts of appeals. Also, more anticompetitive issues with respect to mergers are now resolved before cases are actually filed, as a result of the change in prenotification procedures. Finally, private merger enforcement has always been relatively rare and as a result of the *Montfort* case [*Cargill, Inc. v. Montfort of Colorado, Inc.*, 107 S. Ct. 484 (1986)]; it's likely to become rarer still.

Second, with respect to resale price maintenance, there is a great deal of debate as to whether the Court is likely to change the rule of per se illegality. But as a practical matter, that really isn't all that important. We can have resale price maintenance today as long as it is conducted within the framework of the *Colgate*

case, authorized by *Monsanto*. And a number of the post-*Monsanto* cases have upheld conduct that in pre-*Monsanto* times many lawyers would have counseled against as too risky. [See, e.g., *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir. 1986); *Garment District, Inc. v. Belk Stores Services, Inc.*, 799 F.2d 905 (4th Cir. 1986)]. But today it is actually happening, with the result that resale price maintenance as practiced in that fashion is per se legal. You don't even reach the question of rule of reason.

The third comment I'd like to make relates to the *Matsushita* case. You can read *Matsushita*, as Harry did, and regard it as indicating the ascendancy of a theoretical approach over the factual inquiry approach. You can also look at it from a slightly different angle, and regard it as a quantum of evidence case. That is: how much of evidence of conspiracy must be presented to get to the jury, particularly in cases where there may conceivably be some element of juror prejudice involved (because of foreign defendants and domestic plaintiffs, for example), or in cases where the conduct challenged may conceivably be procompetitive, and thus in the public interest.

You might even view the Powell opinion as indicating the ascendancy of experience over speculation, in the sense that the experience in the particular case was that the plaintiffs had not been excluded from the market whereas the speculation — and that's the Court's word — was that there was a conspiracy. Possibly the key language in the *Matsushita* opinion is the statement that "in *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct."

Well, to say that a jury should not be permitted to make an implausible inference is really not all that startling. That's basically what judges decide has happened when they overturn jury verdicts. They say that the verdict was implausible. They use more technical language but, I think that's what most of us would regard them as deciding.

Now, in this case, the Court did say that on remand the court of appeals was free to consider other, sufficiently unambiguous evidence that would permit the jury to find conspiracy despite the absence of an apparent motive for conspiring. That statement supports the view that *Matsushita* should be considered as a "quantum of evidence" case. You could also conceivably regard it as an example of the trend away from applying per se rules in unusual cases. You might even read it as an instruction to the lower courts to look at the situation dynamics closely in those cases, rather than mechanically applying traditional rules.

Having said that, I think it should also be recalled that this was a very close case, a 5-4 decision. It really turned on the interpretation of the evidence before the district court. I think it may be risky to read too much into the opinion. In particular, I think it is rather unlikely that that case can safely be read to indicate that in the garden variety price-fixing case—where the jury has traditionally been permitted to infer a conspiracy from evidence of a meeting at which prices were discussed followed by an increase in prices—the plaintiff will have to adduce much more evidence in order to get to the jury.

Now, I'd like to turn the podium back to Harry to shoot us down.

PROF. FIRST: I can just make a few comments from here. I don't have that wide a disagreement. I'd say I do not include Paul McGrath in with Baxter and Ginsburg by any means, even though he was sandwiched in between the two.

I agree with what Paul said about change. I think everyone's changed in antitrust. The courts have been very much involved in the change. It has not been solely the result of an election or different enforcement people in the Justice Department. I think there is a skepticism about some of the plaintiff's stories that were accepted in the 1960's. Closer economic examination of behavior is occurring. I think there is a recognition that we are often in a very dynamic business and competitive environment in which we don't have to worry quite so much about what some dominant firms do. My only concern is whether that sense of realism, and I think it is a sense of realism, will continue, so that when there are problems in that environment, when it's not a dynamic competitive environment, the courts will be willing to see it; or are they going to simply filter everything through the lens of price theory.

As for the *Matsushita* case, which Bill mentioned, I think he's quite right that that is, in a very direct sense, a rule of evidence case. Was there sufficient evidence to allow the case to go to the jury? I guess my argument is that I didn't find the plaintiff's story quite so implausible as the Court found it because, unlike what the Court apparently thought, I don't think that the view of what Japanese firms do is correctly told by Frank Easterbrook. And I think Easterbrook's view just doesn't conform to what a lot of people say are the facts. I think that it's a bad sign for the antitrust laws when we start moving away from the facts out of a concern, which is legitimate, that we will otherwise dampen aggressive price cutting.

As for *Montfort*, an interesting case, I was just thinking about it again as Paul was mentioning it. I decided that the best way to explain it is that Brennan wrote the text and Powell wrote the footnotes. That's the only way I can figure it out. And they gave that one footnote to Brennan and that was it. I'll read you the text of the sentence.

Brennan says, "While firms may engage in the practice of predatory pricing only infrequently, there is ample evidence suggesting that the practice does occur." And he has a footnote, footnote 16, to an article called "The Myth of Predatory Pricing: An Empirical Study." In some sense that's not an astonishing statement, but after *Matsushita*, where the Court seemed to dismiss that as impossible, this in some ways is saying it still can happen. Like I said, they gave Brennan that one footnote. All the other footnotes express skepticism and long quotes from *Matsushita*, which, of course, Justice Brennan dissented from. So I can only figure out that they let Powell write these long footnotes about how unlikely predatory pricing is.

As for whether there is such a change, of course Brennan wrote *Pacific Stationers*, which quite properly deserted the per se rule in a situation one could have called a boycott. And of course, if we go back to *Brunswick*, that was written by Justice Marshall who jumped ship in *Matsushita* and joined the majority to make it

5-4. So I think that probably goes along with the comment that these changes are not so recent and have been going on for a while.

I would conclude with one final point about *Montfort*. The Court did say there could be standing. That's different than what the Justice Department had urged, and I think an important point to keep in mind when trying to figure out what *Montfort* means.

MR. LIFLAND: Thank you, Harry. Thank you, Paul. We are now ready to go on to our next panel.

PART II
ANTITRUST AND THE GENERAL COUNSEL - A FRONT-LINE VIEW ON COUNSELING AND COMPLIANCE IN THE CURRENT ENFORCEMENT CLIMATE

Speaker:	James I. Wyer
Moderator:	Kenneth N. Hart
Commentators:	Samuel W. Murphy, Jr. Walker B. Comegys

MR. VIG: Our second section of the program deals with compliance in the current enforcement climate as seen by a general counsel. I had wanted to have a general counsel in this program for two reasons.

First, many of our members are attorneys who practice in-house, and I would like to urge greater participation in the activities of the section by all of them. And, second, it has occurred to me that particularly today, when not every antitrust question is viewed as an earth-shaking event, in-house lawyers are perhaps seeing more antitrust questions than some of us in the law firms.

Our moderator for this section of the program is my good friend, Ken Hart.

MR. KENNETH N. HART: Thank you, Vern. This one-third of the program will probably be a distinct change of pace from the prior session, which dealt with policy and what the fellows in the Supreme Court were thinking, as well as those in the Chicago Circuit. Now we're going to try to deal with how the people out in the trenches are dealing with the perceptions of the antitrust laws and what the assessments of inside and outside counsel are as to what the antitrust risk might be. We are fortunate today to have on the program with us, our featured speaker, Jim Wyer, who for many years was general counsel at American Cyanamid Company, throughout a period in which Cyanamid probably had as many antitrust difficulties as any other large American corporation. Jim is now counsel to the Robinson Wayne firm in Newark, New Jersey. He will speak on "Antitrust and the General Counsel - A Front-Line View on Counseling and Compliance in the Current Enforcement Climate."

To comment on Jim's comments, we're fortunate to have Walker Comegys who has practiced law up in Boston for over 30 years and who was with the Antitrust Division form 1969 to 1972 and was Acting Attorney General in Charge of the Antitrust Division.

And to my left, Samuel W. Murphy, who was in private practice with me at Donovan Leisure for over 25 years and who is currently with the Davis, Markel & Edwards firm. Between those two tours, he was with Gulf as general counsel for a year and a half and then with RCA for another year and a half.

So we have a panel here that has had broad experience in private practice and counseling and also broad experience in the general counsel's chair. Jim, would you go ahead.

MR. JAMES I. WYER: Thank you very much, Ken, for that kind introduction. Good afternoon, ladies and gentlemen. I like to think that the antitrust difficulties that I lived through were not of my own making, contrary to the implication that might have been given. (Laughter) And in some way maybe I can help contribute to their solution.

Your creative program chairman has asked me to give a general counsel's view on compliance and counseling in today's enforcement climate. This I shall try to do, emphasizing perspective and a general approach rather than the nitty-gritty details. You won't hear much about cases or Supreme Court philosophy from me. However, contrary to what you might have thought from the conclusions of the prior panel, let me say right up front: my general thesis is that the general counsel's job today is more difficult than in earlier years, those years that I refer to as the halcyon years of antitrust enforcement.

The antitrust law may or may not have reached the stage of the law in western Kentucky that I heard about recently when a sheriff rapped on the door of one of his farmer friends up in the mountains and said, "Zeke, I've got here a search warrant that says I've got to search your place."

The farmer said, "Come on, take a look around. I've got nothing to hide."

So half an hour later, the sheriff comes back and he says, "Zeke, I've got to charge you with a crime. You're violating the law."

Zeke says, "How come?"

The sheriff says, "Well, you've got a still out in the barn."

Zeke says, "I know, but that still ain't been used since me grandpappy used it a long time ago."

The sheriff says, "I know, but the law says if you've got the paraphernalia, you're guilty."

Well, two days later he goes in to plead before the magistrate. The magistrate says, " Zeke, how do you plead?"

He says, "I plead guilty. I plead guilty to rape."

The magistrate says, "Now wait a minute , Zeke. You aren't charged with rape."

He says, "I know, but I've got the paraphernalia." (Laughter)

Whether the antitrust laws have reached that state of affairs or not, today's general counsel has a tougher job in the antitrust area than his predecessor. Let me outline a few of the reasons.

First there is the press. Reading the news, one could easily get the impression that the Germans, then the Japanese, Koreans, Taiwanese, plus the Chicago School, have repealed the antitrust laws. And chief executive officers read the news, too. They may think that Section 7 has been repealed, the FTC is closed, and the Antitrust Division is only interested in bid rigging on highway construction or collusion in price-fixing on large construction contracts. Certainly, the

current takeover/merger/restructuring climate fosters this notion about Section 7. Many large, financially profitable deals sail through.

So when the general counsel mentions the possibility of an antitrust problem, the CEO's initial reaction is, "You've got to be kidding!" This attitude makes our job more difficult and at times, more dangerous - more dangerous because of the temptation to become lax about strict compliance, which only leads to trouble.

Perhaps the most analogous times in the past, which many of you will remember, were the 1930's. That was the time of the Great Depression, a time when foreign imports were pouring into the country, hurting U.S. industry, a time of high unemployment. Sound familiar? One response was the Smoot-Hawley Tariff Act, with all of its undesirable consequences. Another was the encouragement, by the government itself, of what was called "cooperation" throughout the business sector. To this end, the National Recovery Act was passed and NRA codes established. Later, of course, this statute was struck down by the Supreme Court, but against this background followed one of the most vigorous antitrust enforcement programs we have witnessed, under the direction of Thurman Arnold, the first head of the Antitrust Division. Arnold proceeded to gather in the scalps.

Second, the character of management has changed. We don't have people in our top management today who sweated bullets in the '50s and '60s and '70s. Hardly a man is still alive (in management, that is) who remembers the General Electric executives who did time for price-fixing. That was the first time, as I recall, that jail sentences were meted out in addition to substantial fines. The impact was electrifying, if you'll pardon the pun. It got all executives' attention, and stepped-up compliance programs that became the order of the day. But who remembers that today?

In my former employer, we have a very talented executive vice president running the medical business. He's 52 years old. When the antibiotics criminal indictment came down in 1961, this fellow was barely out of school. I submit that this sort of pattern is not unique.

In addition, our system for rewarding corporate management encourages taking initiatives, achieving results, being innovative — all those current buzz words that you've heard. What is wrong with calling up your competitor and having a heart to heart talk about the level of advertising in the business, or selling to bad credit risks, or his production capacity? *We* all know such calls are wrong. What I'm suggesting is that such a question comes up more than it should.

Third, in today's climate antitrust compliance programs must fit in with a whole retinue of other important compliance programs. I need only mention a few to help put you in the chair of the general counsel and see it from his prospective: insider trading; environmental programs and procedures; product safety and efficacy; safety and conditions in the workplace; nondiscrimination in employment; conflicts of interest; political contributions; and proper accounting practices, including possibly improper foreign payments. It even extends to the proper use of the corporate aircraft.

What I've reviewed rather briefly suggests to me that antitrust counseling and compliance programs are today more important than ever — albeit against a more

difficult backdrop perhaps than in the past. Certainly we as general counsel cannot allow them to become too loose, for the seeds of tomorrow's troubles are invariably sown today. Particularly is this true as to what I'll call the "hard core" offenses. By that I mean, most obviously, predatory pricing, price-fixing, bid rigging, and unlawful monopolization (such as obtaining a patent through fraud). You know them better than I.

There's no question that the enforcement authorities direct their rigorous attention to this area. And despite what I said earlier about the attitude of CEOs, they generally support rigorous compliance in this area. The mention of spending time in a nice place is quite effective. Not to be forgotten in this "hard core" area are the stepped up enforcement efforts being made by the various states.

In what I'll call the "soft core" area, I have detected what might be a less rigorous attitude on the part of business. More risks are being taken and, as was mentioned earlier, people are getting a little bit more aggressive. These areas include reciprocal dealing, Robinson-Patman requirements contracts, tie-ins, vertical pricing, and, as I mentioned earlier, in some instances, Section 7. Some spokesmen for the Antitrust Division have also taken pains to back away from the nine "no-no's" in patent licensing. However, there does appear to be a reason for what we are observing: The economic basis for some of these offenses cannot be sustained, as contrasted with the hard core offenses. Nevertheless, there is still life in the enforcement authorities. Look at the *Coke-Dr. Pepper*, *Hughes-Baker* deals. And the risk for the general counsel is still real; it just may come from competitors who will try to regain that lost market share — or whatever — through private action. This again suggests the need for a rigorous counseling and compliance program.

What does such a program consist of? Most of you know the basics, but at the risk of boredom, I'll run through some of them, without attempting to be exhaustive.

1. Printed materials that are required reading and that contain a general description of the laws in language the business person can understand. I emphasize the latter. When you look at the statistics about the reading ability of the people coming out of our school system, you begin to appreciate the problems that we all face. These materials should outline acceptable and unacceptable behavior in conducting business, particularly with competitors, at trade association meetings, and in other sensitive situations.

2. Periodic talks by lawyers at management meetings, sales meetings, meetings of purchasing agents, meetings of licensing executives, any group that you can get yourself in front of. Anytime a general counsel can get himself or one of his lawyers on the podium, he ought to do it.

3. Routine contract and transaction review — very important. This is where a lot of the "soft core" work occurs. As Vernon mentioned, it may be because of this in-house review that you don't see very much of this, those of you who are in private practice. Every contract must be reviewed for antitrust problems: Section 3 problems, Robinson-Patman problems, in addition to the hard core problems. Every price list should be similarly reviewed. Special authorization should be

required for any sales off list price. Licenses fall into the same category. Foreign transactions and contracts require consideration of foreign antitrust laws, most notably the German, British and EEC. One of the reasons, as I mentioned, that lawyers in private practice might not see as many problems in these areas is that so much of it is done in-house. I'll give you one extreme example, and that's a Section 8 problem.

How many of deal with Section 8 on a regular basis? Not many, I dare say. But everytime a new director comes on board or anytime an existing director goes on another board, the general counsel has to take a look at it. Of course, I would be the last to suggest that in these "soft core" areas sometimes an opinion from an outside firm is *not* what is desired, but it is a thought.

4. Periodic audits of compliance should be made and reports made to the board of directors. This very often takes the form of an annual or other periodic certification by the heads of the various operating units to the chief executive officer to the effect that the appropriate literature has been read and understood and that the individual has committed no violation and knows of no such violation. This has a trickle down effect: in order to make the certification, he has to ask everybody who works for him some of those same questions. Another way of dealing with this issue is through an internal audit procedure. Most corporations have internal audit groups who audit various operations on a random basis and they're trained and instructed to look for antitrust violations; annual reports or other periodic reports of these types of things are then made to board of directors.

5. Record retention program. Here I confess to complete failure. In my 30 years in-house, I've never been able to develop what I considered a satisfactory record retention program. If it is too cumbersome and complicated (as most are that I've seen), it is impossible to administer, short of hiring a staff to roam around the company doing the job — a most unsatisfactory solution in these days of cost cutting. If it is too simplistic, records may be discarded too early or, worse, no one will believe in the program and it won't be followed. I'm open to suggestions on that subject.

Another thing general counsels do is talk to other general counsels, saying to their competitors' general counsels, " I told my people not to talk to yours, and I hope you've done the same thing." Often communication with another general counsel can sidetrack a potential problem early. An example where communications among competitors present particular risks is in the chemical business, where almost all of the majors are competitors as well as buyers from and sellers to each other; so you have a constant pattern of communication back and forth, and you try to train people so that that communication stays within the proper limits.

Enough for the basics. Perhaps there is still time to offer a few observations on a couple of specific areas, and then some conclusions.

We've mentioned Section 7 and acquisitions, divestments, restructuring, tender offers. With the passage of Hart-Scott-Rodino, one common attitude suggests we can now let the government decide. We don't have to get an opinion or examine it; we'll just file and notify and let the government decide for us. That sounds simple, but in order to prevail we must persuade the enforcement authorities with

solid, usually economic, arguments. This is critical. But the process itself is not without its risks, particularly for a seller.

If the process looks as though it could be lengthy, what kind of shape will the business be in if the deal is turned down? Will you still have your customers, your good employees (you always keep the bad ones), your suppliers? And if the buyer is a competitor, he could — perish the thought — use the very process itself — if lengthy — to ruin your business.

But with this "back to basics" move that we are seeing in divestments, restructuring, and so on, buyers are more likely now to be competitors, and accordingly deals become more risky and counseling more important.

In any of these Section 7 situations, we in-house do review all the other questions: Is the deal hostile or friendly and is that likely to make a difference? Can it be structured to be nonreportable? Can some offending pieces be divested? Should the contract "out" be strong or weak? And, of course, there is the massive amount of work to be done after the second request.

The other area worth a comment is the intellectual property area. I have observed less nervousness today about licensing provisions that may have been questioned in the past; and the courts appear to be upholding patents to a greater degree. Again, I think the economic arguments are critical, but the trend seems positive.

In conclusion, I would have to say that I don't see the general counsel's job getting any easier. The "hard core" cases will be pursued vigorously both by the federal and state enforcement agencies. I don't really see a swinging back of the pendulum to the good old days; I think economic arguments will still be critical, particularly in the "soft core" area, with more and more emphasis on international markets. But two constants or givens should be kept in mind.

First, there has been and is, in this country a built-in antipathy to oligopoly. If such a situation should develop in a given business and the profitability levels become high, or higher than business levels generally, it's time to start looking around for the weak spots to avoid trouble.

Second, antitrust enforcement has not significantly differed regardless of which political party controls the administration. If anything, that enforcement may vary inversely to what you might otherwise *think*.

I promised to be brief, and I'm now open for shots from the moderator, commentators and the floor. Thank you. (Applause)

MR. HART: Thank you very much, Jim. We'll proceed with Sam and Brock by asking them to give their general comments, focusing on two questions that are probably implicit in Jim's overall comments. First, why are we really here? Is there some need that is perceived for antitrust compliance programs, and what do you feel the risks to be? Are there risks of current antitrust prosecution or current antitrust suits? Or are we talking more about something that might happen in the future, when some young Thurman Arnold, after the next election, comes along and institutes another golden age of antitrust enforcement? Second, I'd also ask Sam and Brock in their comments to focus on this: assuming that there is some

need to reduce the risks of antitrust problems within the company, in the current climate, as Jim has outlined, how do you bring the message home to the CEO and other top management people that there really are reasonable antitrust risks that should be dealt with by an effective antitrust compliance program? Sam, would you like to open.

MR. SAMUEL W. MURPHY, JR.: Some of you may well ask why are we here. Generally, I endorse everything Jim said, but I'd go a step further. In my view, while the general counsel's antitrust compliance job may have been made more difficult by the current climate of enforcement, at the same time, as a practical matter, it's been made far less important, and indeed in many ways of somewhat questionable relevance.

I would have to say that the current enforcement climate, coupled with the decisions by what the previous panel called the Chicago Circuit, has removed from the antitrust arena, and from the necessity of being included in a compliance program, many of the things which over the years lawyers have found most difficult to sell to businessmen. Now that antitrust analysis is pretty much reduced to notions of what's economically efficient, our clients can understand that. Indeed, they think they're better judges of what's economically efficient than most anybody else. And in my opinion, all that is really left in terms of the essential component of an antitrust compliance program is: don't fix prices.

To respond to Ken's second question, that's not a difficult question to deal with with one's clients. My own experience as a general counsel, which is even more limited than Ken suggested, is that businessmen, at least in larger corporations, all know that you're not supposed to fix prices. And despite the fact that they're now younger and haven't themselves been through the meat grinder of a criminal antitrust case, they all know what can happen if you do fix prices.

It therefore seems to me that what a general counsel now has to do is to fold his antitrust compliance program into all those other compliance programs which Jim talked about and which are much more directly relevant, much more important right now — employment problems, environmental problems, insider trading problems. And the best way to deal with all of this is to assist as a lawyer in creating a "corporate culture" (as business people like to call it) that includes respect for the law and high ethical standards — and that's management's responsibility. Business people key off what comes from the top. The best that you, as a lawyer, can do is to help, encourage, and sometimes gently nudge the chief executive officer to give out those kinds of signals.

I would just add one or two other brief points to what Jim suggested for an effective compliance program. The best compliance program requires good client relations and lawyers who are on top of, and involved in, the ongoing business of the company. Those of you who have only practiced outside would be surprised to learn that client relations is just as much a responsibility for those inside as it is for those outside. And if you have good client relations, you're probably not going to have too many price-fixing cases.

Finally, I think it critical that people who might be called whistle blowers know, through a written corporate policy, that they can go directly to counsel,

including the general counsel, outside the normal chain of command, to express or report concerns they may have, concerns which will usually be unfounded but which they might not express to their direct superior for fear that they might risk their careers.

MR. HART: Thank you, Sam. Brock.

MR. WALKER B. COMEGYS: Yes, Ken. So we know where we stand, I'd like to say that I agree with almost all of what Jim had to say. As a matter of fact, I had a sneaking feeling that maybe he's been reading some of my stuff.*

Second, I disagree totally with what Sam had to say regarding the relevance of antitrust compliance and counseling today and in the possible future. You have to remember that the Chicago Circuit is only one circuit out of twelve. But, before I get into that, and so that you know where I am on the spectrum, I'd like to put a couple of things in perspective, if I could.

The last time I was here before the New York State Bar Association was fourteen years ago, which goes to prove, I guess, that you can't keep a good man down. At the time of your last invitation, I was Deputy Assistant Attorney General in Charge of the Division. My then boss, the late Richard W. McLaren, was to have been the dinner speaker. I replied to your invitation as follows:

"Dear Sir, thank you for your kind letter of November 24. I would be very pleased to attend the Annual Dinner of Antitrust Law Section on Wednesday, January 26. I am flattered to be invited to sit on the dais. I am even more eager to hear what Mr. McLaren will have to say."

Well, one week after that letter was written and mailed, Dick McLaren resigned as Assistant Attorney General, having been elevated to the federal bench in Chicago. I was substituted to speak in his place as Acting Assistant Attorney General. I began my opening remarks to your Section as follows:

"Regarding Dick's departure, I, as well as others I am sure, am reminded of that tombstone in my native New England which said simply, 'I expected this but not so soon.'" And the conclusion of my remarks were as follows:

"In conclusion, let me assure you that we at the Antitrust Division enter 1972 with conviction in the importance of our work and confident of our ability to carry it out. We regard the private antitrust bar, through its counseling activities, as an ally in this program. Let me assure you that you are not about to enter the ranks of the unemployed." What a difference fourteen years can make!

No doubt it is more difficult today, from the standpoint of both outside counsel and inside counsel, to keep up a good compliance program. And the reason for that difficulty is the words and deeds out of official Washington and the words of the business media, the press. Antitrust dangers are very real indeed, but they have been trivialized by the people in government who make antitrust policy as well as those who report on their activities. The word with the businessman or woman today is that anything goes.

* Editor's Note: A paper prepared by Mr. Comegys for this Symposium is set forth as an Appendix to this report.

I agree with Jim that the hard core offenses are more easily dealt with and that the so-called soft core offenses are less obvious and more difficult to deal with. But my proposition is that the overarching reasons for a solid antitrust compliance program now are twofold.

First is the clear and present danger of antitrust treble damage suits — and here I would especially emphasize the growing importance placed by states attorneys general on both hard core offenses and soft core offenses such as resale price maintenance. Second is the risk of future shock that has been alluded to by all of the panelists here — namely, that some future administration might attack with vigor those very practices which have been given benign neglect or outright approval by this Administration. I can come back to the other points, Ken, later on.

MR. HART: I think we'd also like to cover some really basic things concerning the compliance program itself, in addition to those weighty matters we just covered. Jim, could you give us your views on the extent to which an antitrust compliance program can be successfully implemented by inside counsel and the extent to which you feel, or under what circumstances you feel, outside counsel should be brought in.

MR. WYER: In general, in my experience we have done most of our compliance program in-house, mainly I guess because we have had what Sam referred to as good client relations. I could well imagine the situation though where, depending on the attitude of the top management, outside help might be needed, just in terms of protecting the board of directors. My general philosophy has been that if the board of directors looks like it's going to be on the line for something, I think pretty carefully about getting outside help, even if the legal question is not all that difficult. But by and large, I think in my experience we've been reasonably successful by managing that all in-house.

MR. HART: Sam, I sense from your earlier remarks you would agree with Jim on that score.

MR. MURPHY: It depends on the point in my life at which you ask me the question. (Laughter)

I would bring in outside counsel in this area only when one has concluded that there are reasonable grounds to suspect that something is wrong. And because of the responsibilities that you, as a general counsel, have in terms of public disclosure and to the board of directors when you find out that something is wrong, you're probably better off having some group that's more independent than the inside lawyers could be. But, generally speaking, I think Jim is 100% right.

MR. HART: Just so you won't be kept in the dark, the book that Brock has just published — and I recommend you all run out and get a copy — is his *Antitrust Compliance Manual*. It's just chock-a-block full of good material for both the experienced antitrust practitioner and also for the general practitioner who wants to set up and implement an antitrust compliance program.

Brock, do you have any criteria or standards as to when a company should adopt and implement some type of an antitrust compliance program? Does it depend on some size or share of the market or on the nature of the trade or industry

the company is in? All companies don't need antitrust compliance programs I'd assume.

MR. COMEGYS: It depends upon how you define antitrust compliance programs. The sort of antitrust compliance program that Jim has outlined is a full soup-to-nuts type, a very complete program which would certainly be suitable for a corporation of the size of American Cyanamid Company.

On the other hand, I suppose if you represent a very small car dealership, for example, you might want to discuss with its management at least the hard core areas, such as price-fixing and division of market. For example, a flier came across my desk the other day because we own a popular brand of foreign automobile. The flier said, "Come to our service department. We give the best service. All of the dealers charge the same prices for the service because the prices are agreed upon by both the factory and its dealers. Therefore, come to us." That kind of stuff, from a counseling standpoint at least, sends shivers up your back. You would want, I think, to advise that dealership about the difficulties of price-fixing. Because without that advice, who would think of bucking a routine service slip up to outside counsel.

But that type of antitrust compliance program — addressing a hard core violation — is a very simple thing and might very well be adopted. There is no set criterion or magic elixir except a good nose. A compliance program certainly should be tailored to the needs of the organization.

To conclude, I will say that I remember a time in 1970 when there were only two manufacturers of barber chairs in the United States, and they were about to merge. The staff was wild to go after them with a Section 7 count because here would be a complete monopoly of the manufacture of barber chairs. McLaren laughed. No case was filed.

MR. HART: When Jim made his remarks in pointing out the nuts and bolts of a compliance program, he talked about something that's euphemistically called a documents retention program. He admitted that he had not successfully handled such a program, and he asked for any suggestions. I was wondering, Sam or Brock, do you have any suggestions on how to establish and maintain a good document retention program? What are really the objectives of such a program?

MR. MURPHY: There are two objectives of such a program. First, there are some purposes for which you're required to keep documents. So you'd better have them. And the second purpose, inconsistent with the first, is to get rid of them as quickly as you can. (Laughter)

I have never encountered a large corporation which successfully carried out the second purpose. All you can do is keep pushing people. But getting rid of documents is not apt to be a high priority when you can ship them off to some warehouse someplace — out of sight, out of mind.

The answer to your second question is no. I have no good suggestions.

MR. HART: Brock, are you saving up some good suggestions?

MR. COMEGYS: Well, I would agree with Sam's reasons for a records retention program. I would add a third reason. Not only should documents be

retained because they are legally required to be retained but also certain documents which can be classified and identified and worked into a compliance program are highly useful down the road to explain why certain corporate activity was taken, i.e. a price change. Was this in response to a conspiracy or is it supported by records documenting costs, competition and so on? Why did you drop out of a product line, by agreement or because it was unprofitable? Those types of documents can be identified after an antitrust compliance audit tailored to the company or organization involved.

The second purpose is the primary purpose, I guess. Records retention really means records destruction. If you destroy "hot documents" outside a bona fide records retention program, you may be in hot water. Both the canons of ethics and state and federal statutes prohibit ad hoc destruction of documents under certain circumstances. Better to have a good records retention program that purges corporate files uniformly on a periodic basis.

As far as techniques are concerned, I would agree with Sam that there is no perfect or 100% safe records retention program, probably in any organization, but that doesn't mean one should not be attempted and enforced. And that can be done to a degree. One of the methods used is the "trickle down" effect. People are assigned to review their own files and to discard documents two years, three years, whatever, plus current. Each manager is responsible for his own department. Then on a periodic audit by outside counsel — and this is where outside counsel is useful — if counsel discovers documents that are outside the period described in the program, the employee and his superior are politely told that they have not been engaging in the record retention program. Frequently, the outside counsel will come up with some pretty juicy documents that are illustrative persuaders in that regard.

MR. VIG: Ken, I had promised at the beginning to keep quiet this afternoon, but I've got one comment that might fit in here. We've been talking mostly about the enforcement climate in this country, although Jim Wyer did refer to the fact that there is stronger enforcement in some other places and particularly the EEC. Commissioner Sutherland over there has made a lot of speeches saying that his enforcement policies are going to be strong, and he's been carrying that out.

I noticed on the way over here this morning an article in today's Financial Times that's headed "Commission Makes Raids on Chemical Companies." "The European Commission has made dawn raids on eight European chemical companies looking for evidence of possible price fixing in polyethylene and PVC, two widely used types of plastic. The raids follow last year's similar polypropylene case when 15 companies were fined a record of $55.9 million for price fixing. Companies now being investigated include Hoechst and BASF of West Germany and Dow of the U.S."

This I think is dramatic evidence of, first, the fact that the general counsel's job is complicated by having to look at foreign developments as well as U.S. developments — it certainly points up the need for ongoing vigilance in that area. And, second, it says something about the desirability of a very efficient document retention program in Europe as well.

MR. HART: They seem to have a cultural lag over in Europe, Vern. (Laughter)

Let me ask you a hypothetical question that probably we've all thought of from time to time. Supposing during the course of implementing your antitrust compliance program, or during the course of a periodic audit pursuant to that program, you come across what is known as a hot document. How do you deal with that? What do you do? Sam. (Laughter)

MR. MURPHY: Assuming that there is no outstanding demand either in private litigation or some public investigation for your corporate documents, including that one, and assuming that the document is nevertheless one which your corporate retention program says you should retain, I would retain it but maybe not in the general files out of which it came, maybe in my safe, for example. And the next thing I would do would be to try to correct the problem which the existence of a so-called hot document suggests exists.

MR. HART: Brock, would you handle a hot document in any different fashion?

MR. COMEGYS: No.

MR. HART: Jim.

MR. WYER: I think I would emphasize more the correctional aspects of it, and what I did with it might become a trade secret. (Laughter)

MR. HART: That gets us into some rather dangerous waters I think. I think the responses to that sort of question really underscore something about antitrust compliance programs. They are not concealment programs. Concealment of antitrust violations isn't the same as having an effective antitrust compliance program which in essence, as its name suggests, is to try to comply with the requirements of the antitrust laws, and it's more of a matter of prevention than concealment.

VOICE: I'll ask this of any of my old friends sitting up there. Either in implementing a compliance program or in investigating what Sam described as something being wrong, what steps do you take to try to maximize the protection of the attorney-client privilege?

MR. MURPHY: Every possible step. One of the main things is this: on audits the question arises should you use accountants or other people like that or even attorneys if they're acting as gumshoes or detectives. The cases teach us that if you want to take advantage of the attorney-client privilege, the person who's conducting the investigation has to be an attorney and has to be acting as an attorney trying to get information to give legal advice or to prepare for possible litigation. I think the point is a good one, that you should have the privilege in mind at all times.

MR. WYER: Let me just add a footnote to that. There's apt to be an agonizing aspect to that question that a general counsel can face and that is: who is his client? Where do his responsibilities lie? And in protecting the corporate attorney-client privilege, whatever that is, you also have to be very careful and very sensitive about the rights and privileges of the employees and officers with whom you are dealing because they are apt to think of you, quite naturally, as their lawyer; and they don't draw the same distinction that a lawyer might between, say a vice

president in charge of marketing of the XYZ Corporation and that corporation. That, to me, was a surprisingly frequent difficult situation.

MR. COMEGYS: I think a lot of this depends upon the point in time at which one is acting as counsel. If the fat's in the fire and the company's under investigation, the problem that Sam outlined is particularly critical and there's an affirmative duty on you, as counsel, inside or outside, to explain to the employee that it is the corporation you represent. If it later appears that there is a conflict of interest, then you should advise *him* to get his own counsel.

On an audit, where you're not under the gun, then I think that the problem is less serious in terms of conflict of interest but equally serious in preserving the attorney-client privilege. And I think it highly advisable before any attorney, inside or outside, commences an audit to have the CEO write either a memo to inside counsel or a letter to outside counsel saying, "We would like to request your advice with respect to so-and-so and have you audit our company to see that we are in continued compliance with antitrust laws"; then follow all of the things that *Gypsum* and Judge Wyzanski and Wigmore say that one should do to preserve the attorney-client privilege. It's a fragile privilege, but something can be done to strengthen your position.

MR. WYER: It's also nice, as a footnote to what Brock said, if the management people can in good faith also add that this investigation is being conducted in contemplation of litigation. You could well take advantage of the work product immunity of *Hickman v. Taylor*.

MR. COMEGYS: Absolutely. And with a nod to our program chairman, I might say I understand that in Treaty of Rome countries this question of privilege is given the back of the hand, which came as a surprise to a number of American lawyers who were attending a conference abroad representing their U.S. clients who had subsidiaries in the common market. They were informed that there was no such privilege for documents in the hands — correct me if I'm wrong — of their foreign EEC subsidiaries.

MR. VIG: Well, there's two problems at the present time. First, it's not clear the privilege extends to in-house attorneys. And, second, there is a question as to lawyers who are not from EEC countries. On the latter question, the unofficial position of the commission is that they respect the privilege even with regard to American lawyers, but the political issues involved are just too complicated to allow them to bring them up to the European counsel and get it clarified at this point. It is something to keep in mind.

MR. MURPHY: My method of operation has been: yes, try to preserve the privilege. Have auditors report to the lawyers to the extent you can. But basically, I have never felt that I would be successful in defending it. And I operate on that basis. That's the way I've gone at it. You'll be left twisting and turning in the breeze if you try too hard to protect the privilege. That's the way I've operated.

VOICE: I wondered to what extent the RICO Act can be used in antitrust for a plaintiff. In other words, RICO has treble damages, and I understand this is coming more and more into the picture in suing the defendant company.

MR. WYER: Well, in my limited experience you hardly see a complaint today that doesn't have a RICO claim, if they can get one inconsistent with Rule 11.

MR. HART: I want to thank Jim, Brock and Sam very much. We appreciate your attention. (Applause)

PART III

ANTITRUST AND INTERNATIONAL TRADE LAW/GRAY MARKET - WHAT THE ANTITRUST PRACTITIONER NEEDS TO KNOW

Speaker:	Jeffrey I. Zuckerman
Moderator:	William F. Sondericker
Commentators:	Richard Dagen James C. Tuttle

MR. VIG: The third part of our program deals with the interrelationship of antitrust and international trade, along with the internationalization of the economy. In the advent of global competition, I'm sure many antitrust practitioners have started to see related international trade problems, or places where the two overlap. As far as I know, this is the first time the Antitrust Section has included such a subject on its program.

It occurred to me there really isn't any other home that I was aware of in the New York State Bar Association for international trade. But just before the program here, I learned that there has been a committee on international trade and transactions and that the Association presently is studying the feasibility of forming a new section on international law and practice, which probably will include international trade. You may receive a mailing asking some questions about that. Meanwhile, we're going to do it here today, and you can remember that you heard it here first.

We have, again, a group of experienced people who come at the problem from some different perspectives. Our moderator, Bill Sondericker, from the Olwine Connelly firm has been very involved in this, and I'll turn it over to you at this point, Bill.

MR. WILLIAM F. SONDERICKER: Thank you, Vernon. We have three distinguished people with us here today — Mr. Jeffrey Zuckerman, who is the Director of the Bureau of Competition of the Federal Trade Commission in Washington, D.C.; Mr. Richard Dagen, who is the Counsel to the Chairman of the International Trade Commission in Washington, D.C.; and Mr. James C. Tuttle, who is Assistant General Counsel of Antitrust and International of K Mart Corporation in Troy, Michigan. I know that Mr. Tuttle has been personally involved with his company in this problem. I know that Mr. Zuckerman and the FTC are taking a very hard look at it. And I know that the International Trade Commission has been involved, particularly in a case called *Duracell*, which relates to the popular batteries that we see in electronic equipment.

Just a word to put this in perspective. Gray market or parallel imports is primarily a distribution problem. It involves the importation of foreign goods bearing American trademarks, and the question is whether or not a particular authorized distributor or distributors should be the only ones who will be allowed

to import those trademarked goods into this country. In a way, it's a tale of two statutes.

We have Section 526 of the Tariff Act; and Section 526, it so happens, doesn't have anything to do with tariffs at all. We also have Section 42 of the Trademark Act of 1946, as amended, popularly known as the Lanham Act. That particular stature bars infringing goods. The strange point here with these two statutes is that they've been interpreted by the courts in a way that really would seem to indicate that neither one means what it says. Section 526 seems to be per se statute when one reads it literally, and yet the courts have interpreted that, pursuant to a customs regulation, to allow an exemption. On the other hand, the trademark statute seems to be not per se — it pertains to counterfeit goods — but here, we're dealing with the genuine goods which have the genuine trademark.

So with that perspective, I will introduce our principal speaker, Mr. Zuckerman. He has a wide background in antitrust. He was first with the law firm of Sullivan and Cromwell, and he also spent some time with Mr. Baxter's staff at the Antitrust Division. He is now Director of the Bureau of Competition, which is the bulwark part of the Federal Trade Commission that is designed to enforce the antitrust laws and to see to it that competition prevails. Mr. Zuckerman.

MR. JEFFREY I. ZUCKERMAN: Thank you, Bill, and good afternoon to everyone. This afternoon I'd like to talk about more than just gray markets. First, and more generally, I'd like to talk a little about international trade and antitrust enforcement, at least as we see the links between the two when we look at these matters at the FTC.

The FTC's connection with international trade goes back to the Commission's very inception. Section 6(h) of the Federal Trade Commission Act empowers the Commission to investigate from time to time trade conditions in and with foreign countries, where associations, combinations, or practices of manufacturers, merchants, or traders or other conditions may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as the Commission deems advisable. Four years later, Section 4 of the Webb-Pomerene Act of 1918 specifically addressed questions of international trade and made it clear that the proscription in Section 5 of the Federal Trade Commission Act against unfair methods of competition extends to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods of competition are done outside the United States.

The Webb-Pomerene Act is also, and perhaps better, known for establishing an exemption from the antitrust laws for, in effect, associations engaged solely in export activities. These Webb-Pomerene associations, so long as they comply with the single requirement to register annually with the Federal Trade Commission, are entitled to engage in their export activities without being subject to the usual proscriptions of the antitrust laws.

Starting from a general perspective on international trade and the connection with antitrust, I would say the most important point to bear in mind is that, as a general proposition, firms engaging in international trade — firms exporting to the

United States or importing into the United States — are subject to the antitrust laws of the United States, both criminal and civil. Also, the more recent Export Trading Company Act contains a provision for firms which want to engage in export trade to apply to the Department of Commerce and the Department of Justice for exemption for specified activities, which exemption will then protect them even from private litigation.

Several years ago — in the late '70's or early '80's — on a program like this, a major subject would have been the question of extra-territorial application of our American antitrust laws. There were a lot of foreign firms, and at their behest foreign governments, that got their noses out of joint at what they viewed as improper attacks upon their ways of doing business, both by the American government through its antitrust enforcement agencies and by American firms in private antitrust litigation.

This question was specifically addressed by Congress in the Foreign Trade Antitrust Improvements Act of 1982 (Title IV of the Export Trading Company Act), which confirmed that subject matter jurisdiction exists over any acts, regardless of where in the world they occur, that have a direct, substantial, and reasonably foreseeable effect on trade and commerce in the United States or on import trade or commerce with foreign nations. To the extent that our trading partners do not accept the "effects" doctrine, we have just agreed to disagree. Moreover, the United States government has also been very active in negotiating antitrust cooperation arrangements with foreign countries in order to deal with the problem of various blocking statutes that were enacted by foreign countries to block their firms from providing documents to U.S. government agencies or to private law firms. Basically we have developed, I would say, working relations with our competition counterparts in most of our major trading partners — Japan, the Common Market and so forth — the key to which is to explain what we are about in a particular investigation and why.

In short, international trade with the United States is generally subject to our antitrust law when it substantially affects prices in the United States.

One area in which we have had a particular focus over the last six years in antitrust enforcement — where the activity of international trade, the growth of international trade, the many varieties of international trade have begun to play an ever increasing role in enforcement decisions — is in the area of mergers, whether they involve the acquisition of a U.S. company by a foreign firm or just straight mergers of two U.S. firms. The 1982 Merger Guidelines of the Department of Justice and the FTC statement on horizontal merger enforcement, which were issued on the same day in June 1982, both made the point that, in assessing or defining the relevant geographic market (which is a necessary first step in assessing whether any particular merger will lead to a substantial lessening of competition), both actual and potential foreign competition are to be considered in defining the market and in defining who are the players and the potential players in the market. This increase in consideration of foreign competition was a fairly substantial change, at least on paper.

Indeed, a major impetus for the revisions of the Justice Department guidelines in 1984 was the attempt to clarify the extent and manner in which foreign competition would be considered in merger analysis. The threatened challenge to the *LTV-Republic Steel* merger by the Department of Justice was certainly very fresh in the mind of Assistant Attorney General McGrath and was a major impetus in the 1984 revision of the '82 guidelines. The 1984 revision clarified the important role of foreign competition in assessing the likely competitive effect of a merger of two U.S. firms.

We find that as a general proposition foreign competition or potential foreign entrants should be assessed the same way as domestic firms. At the same time, however, there are two differences with which we have to concern ourselves.

First, with respect to foreign competition, whether existing competition or potential entrants, one factor stands out that does not exist with respect to domestic firms: the possibility of its being cut off by trade action, whether through various kinds of voluntary agreements or through action under the various trade laws that can result in increases in tariffs or the imposition of quotas. Such foreign supply can thus be cut off by our good friends at the International Trade Commission, or the Department of Commerce can restrict the flow of foreign produced goods into the United States or cut off or deter future importations into the United States.

So when assessing the likely competitive effect of a merger, we look at the current state of the market — is it a world market, is it a U.S. market — but we also have to look into a crystal ball and try to figure out whether there will be some interference with the international trade in this product in the short or long term. I would say that our crystal ball on that subject is probably even hazier than our usual crystal ball about predicting what will happen in the marketplace.

Another difference with respect to foreign trade when we're assessing the strength of foreign competition in a merger situation is the problem of fluctuations in exchange rates. For example, if one were looking at the question of whether to allow a merger to go through and one was assuming that the domestic producers would raise their prices, one would ask whether there would likely be a substantial increase in imports which would defeat any price increase. If we conclude that domestic competition would increase their supply and thus defeat any such super competitive price increase, then we would conclude that there's not likely to be a substantial lessening of competition and, therefore, we would not likely challenge such a merger.

But when the potential increase in supply is to come from overseas, in addition to worrying about cutoffs or interferences with that supply, we have to consider changes in exchange rates, which can make a big difference. With the decline in the dollar, an increase in a U.S. dollar price in the United States is not as likely today to prompt an increase in foreign supply as it might have three months ago.

Again, this is a difficulty in assessing foreign competition when we do our merger analysis. But while it's difficult, we are nonetheless determined not to ignore the reality of a world market in so many products; and so we simply try to

factor in both the tariff/quota type factors and the exchange rate fluctuation factor as best as we can.

Another way in which the Commission has become quite active in the international trade area is in our participation in trade proceedings pending before the International Trade Commission and the Department of Commerce. Not being an executive branch agency, we take an independent look at these proceedings. We view ourselves as being essentially a consumer protection agency, and we are interested in advocating, as best as we can, the interests of consumers.

Now we think our activities there are particularly appropriate considering that there's a specific federal statute which requires the FTC and the ITC "to act in conjunction and cooperation with one another." We're not sure that all the commissioners at the ITC necessarily appreciate our efforts to act in conjunction and cooperation with them, but we have been doing our best. As a general proposition, we have been working toward having the notion of competition, as it's understood in the antitrust laws, come to be interpreted in a similar fashion in the international trade area.

One of the most significant changes of the past six years in antitrust law has been the general recognition— not just at the enforcement agencies but in the courts — of the crucial distinction between injury to competition and injury to a competitor. Injury to competition is what antitrust law is concerned about; injury to a competitor is not. In fact, when there is competition, it is impossible — inconceivable — for there not to be injury to a competitor; and thus one cannot infer from an injured competitor an injury to competition. This is one concept. The international trade laws have fundamentally different concepts, a much greater concern about injury to a competitor. We have tried our hardest, and continue to try, to move in the international trade area toward a focus on injury to competition as opposed to injury to competitors, within the constraints of the different statutes in the trade area.

At the same time as we have been urging the International Trade Commission not to yield to the protectionist fever in this country, or at least in certain quarters of this country, we've also been concerned with a different sort of anticompetitive use of the trade laws. Specifically, we have been concerned about firms that use or might be using the trade laws as a device simply to gain a competitive advantage over another firm or who use those laws or the threat of a trade proceeding in order to engage in various kinds of anticompetitive practices.

For example, we constantly hear at least anecdotal evidence — and we are investigating some of these instances — of firms that have brought ITC proceedings, particularly dumping proceedings, or have threatened dumping proceedings, simply as a means to deter a foreign competitor about to enter the market. That is not really a good faith institution of litigation but rather simply a delaying device, a deterring device. Now the ITC, we understand, is concerned about this from their own perspective, like any judicial or administrative tribunal would be concerned about someone who abuses it. But we also are concerned about this; and it's a general concern we have about the abuse of courts and various other regulatory agencies, state and federal, as an unfair method of competition.

We have brought one case, not involving an ITC proceeding but involving a related theory, in which we charged the rental firm U Haul of having engaged in abuse of a bankruptcy proceeding involving a major U Haul competitor, Rider Corporation. We are looking at instances where firms are using the International Trade Commission in a similar way.

The other concern we have is firms bringing ITC proceedings or threatening ITC proceedings and then settling them, by agreeing that the foreign firm will raise its prices or enter into some sort of informal market division. If it's part of an actual judgment or government order entered, that may be one thing. But where these are informal inter-firm arrangements, we tend to think of those as straight violations of the antitrust laws. Again, we are investigating some reported instances of this and hope to bring enforcement proceedings if it should turn out to be appropriate.

Finally, I will turn to the problem of the gray market. While the term itself is thought of as being an international trade matter, it is a notion that is familiar to antitrust practitioners involved with vertical restraints problems. A gray market exists where a manufacturer has established a system of exclusive territories and, from time to time, those who have one territory decide to ship product into another territory which is not their own and sell the product at a lower price than the firm having that territory. There are various reasons why they will sell at a lower price. It could be a matter simply of free riding, where the existing firm in that territory is providing various services, such as warranty service, has advertised, has promoted the product, which the firm from outside that area will not be providing for people within its new target area and thus its costs of doing business there will be lower than those of the existing firm; and thus the new firm can sell the goods for less. Alternatively, the manufacturer might be engaging in price discrimination between two different areas; and thus selling into the new area is arbitrage which will defeat the price discrimination.

Gray markets, in the international trade area, are just an international form of the same transshipment phenomenon. A gray market can exist where a manufacturer has established a system of distributors in different places; in this case the exclusive territory may be established through a trademark licensing scheme for distributors in different areas. The trademark is used to establish an exclusive territory scheme.

There was a time when the Supreme Court ruled that an exclusive territory scheme in the United States was per se unlawful under the antitrust laws. Shortly after that decision, the Antitrust Division people ran to the Treasury and said, "See how terrible this is. You ought to do something about the use of these trademark schemes in order to put an end to international exclusive territories." Ten years later, however, the Supreme Court reversed itself with respect to domestic exclusive territories and recognized that they are not per se unlawful, should not be per se unlawful, and indeed more often than not provide substantial benefits for consumers and enhance competition.

In the gray market area, debate really ought to be focused on the same question. Is it a benefit to consumers or is it somehow a restraint on competition? Here

again we run into problems of short term benefit versus long term benefit, where generally, breaking down an exclusive territory can confer a short term benefit on consumers while at the same time creating a long term injury.

We are studying the gray market phenomenon. We have pointed out that in general we see no particular reason for government being particularly exercised in the international area as opposed to the domestic area. With respect to domestic exclusive territories, firms can enforce their exclusive territories. If they have contractual arrangements, firms can enforce them throughout the courts. And we would submit that firms can enforce their international exclusive territories similarly through judicial proceedings.

On the other hand, it has been suggested by trademark holders in the U.S. that as long as there is a Customs Service it's far more efficient to have the Customs Service enforce the exclusive territory right at the border. Customs inspects all goods in the first place, and why not just inspect them a little bit further to determine whether a person bringing them in has the right to do so; that simply is a more efficient way of doing it than having a subsequent judicial proceeding.

It is an area that we are studying and are reviewing. I'm afraid I can't be any more definitive than that or definitive at all about the Commission's views at this point with respect to the so-called gray market.

In any event, I would just conclude by noting the international trade area is one that the Commission has focused a lot of attention on. As international trade has increased as a part of our general economy, the Commission has increased its attention in this area; and we intend to continue to be active, both in terms of enforcement and in terms of trying to promote rational trade policy. Thank you. (Applause)

MR. SONDERICKER: Thank you, Jeff, for your elucidation of the Federal Trade Commission's present enforcement program in the area of international trade. I think it was useful for everyone to listen to that.

Mr. Dagen is our next speaker. As I said, he is from the International Trade Commission. He has personal experience in a gray market problem that is of particular interest because of the particular situation involved — namely, the Duracell proceeding, which, unlike the problem that Mr. Zuckerman spoke about before, was of high interest for one singular reason. Duracell makes batteries both in this country and abroad. An ITC proceeding, a Section 337 proceeding, was brought as a result of the importation of batteries by firms other than those authorized to bring them into this country. I'll let Mr. Dagen explain more of the facts to you and how it came out. Mr. Dagen.

MR. RICHARD DAGEN: I'm currently counsel to the Chairman at the Commission, Susan Liebeler. Anything that I say can't be held against her or the Commission.

The ITC does have jurisdiction under Section 337, that's in Title 19, over unfair methods of competition and unfair acts in the importation of articles into the United States that substantially injure a domestic industry. We also have a seldom

used provision which involves some antitrust authority and which deals with restraints of importations which would restrain or monopolize trade in the United States. That's seldom used, although we do have a Section 337 investigation going on right now in which the FTC, I believe, is intervening.

We've had two gray market cases at the Commission. One was *Duracell*. It involved Duracell Batteries, which did involve a domestic manufacturer with a Belgian subsidiary. The Belgian subsidiary manufactured the batteries in Belgium. A third, unrelated party imported the batteries into the United States. A case was brought before the ITC. The Commission unanimously found that the importation of the batteries violated the Lanham Act. In addition, my boss, who was then Vice Chairman, found a violation of Section 526, which we were talking about earlier, finding that the plain meaning of the statute clearly was more authoritative than the customs regulations under Section 526, which has a related parties exception. Under that exception, if the trademark owner in the United State is related to the foreign company which is producing the imports, the trademark owner has no rights under 526. But Chairman Liebeler found, as recently did the Court of Appeals for the District of Columbia in *Copiat*, that the Customs regulations were outside of Customs authority.

In October, when the FTC promulgated its comments on gray market options facing the Customs Service, the FTC did have a slightly firmer position, which was that private contracts were the proper method of enforcing any problems that might result from the free rider problem.

In *Duracell*, there were certain allegations of inferior quality of the foreign Duracell batteries. They were shipped perhaps with not the same handling. So consumers in the United States would buy the Duracell batteries even though they would be properly labeled as being manufactured in Belgium. They would buy the batteries; and if they lasted, say 10% less than one would normally have expected, they would blame Duracell because the Belgium-made batteries were present on the same shelves with the other Duracell batteries and there was really no indication that the parent corporation in the United States was saying that we're not making any representations as to those Belgium made batteries.

So the FTC in its position paper at that time said that, with respect to deception, the FTC under Section 5 would have authority. So they were recommending either private contracts or Section 5 enforcement.

One problem with private contracts, as Jeff was saying, is that they are very costly to enforce. There can be any number of importers coming in. To get personal jurisdiction over every importer is extremely difficult. In addition, there could just be a shell corporation doing the importing, making damages very difficult to get.

You could say that the domestic corporation and the foreign corporation should just use different trademarks. That begs the issue. There is a reason for trademarks. They incorporate a lot of information, and there is good reason to encourage the use of one trademark. There are economies of scale. They also provide information to travelers who want to purchase the same goods overseas.

You can use similar advertising in both countries. So we would like to encourage people to be able to use the same trademark if they choose.

Restricting the importation of gray market goods is similar to any type of vertical restraint in the domestic industry. As long as the producer does not have a monopoly in the United States and has no market power, then it's essentially a vertical restraint case and the producer should be entitled to the most efficient mechanism for protecting its rights.

Another problem with the private contract remedies: people say, well, you can contract with your overseas manufacturer and prevent them from manufacturing your goods under the trademark or prevent them from selling to third parties that are going to import. Or you could cut off their franchise or their license.

Apparently there are people with more expertise than I have in EC law, but my understanding is that the state of the law currently under the Treaty of Rome is similar to what we had prior to the *GTE-Sylvania* decision in 1977: Vertical restraints are not treated as leniently as they are in the United States, so you couldn't have provisions which prohibited them from selling to other people outside of there. You also could not put export restrictions in your licensing agreements.

One other problem with foreign law is that some countries don't have the same intellectual property rights protections that we do in the United States. In order to reap any benefits in some Far Eastern country, you might have to go there and manufacture, just to compete with, say, straight-out counterfeit goods, in which case your price will have to match the low-priced goods in those countries; and then they can turn around and sell back in the United States.

The FTC cited a lot of empirical data showing that there weren't free rider problems because the gray market problem had just started in 1981. But if you look back, there have been cases — they've been around for quite some time, starting with the *Bourgeois* cases. Customs has been changing their interpretation of their rules and regulations throughout this entire time, making it more and more likely that you'll be able to import gray market goods, which could have aided the growth in this market.

One final thing is that we did have the *GTE-Sylvania* decision in 1977, which allowed vertical restraints in the United States. It may have taken some time before domestic manufacturers took advantage of *GTE-Sylvania*, that is, before they began providing additional services in the United States. These additional services would increase the relative value of the good will in the United States and, therefore, increase the benefits of free riding in these situations. We would thus observe an increase in gray market imports subsequent to 1977, all things constant. Thank you. (Applause)

MR. SONDERICKER: Thank you, Richard. I'm going to ask Jim Tuttle to please describe for you briefly how K Mart looks at this problem — how he looks at it — why from his perspective it's better to have several sources of supply as a retailer buying for resale to the consumer, and why he thinks that genuine goods cannot infringe a trademark when they have the same genuine trademark on the those goods.

MR. JAMES C. TUTTLE: Thank you, Bill. You know, I can't help but remember that two or three years ago many of us lawyers thought "gray market" was something that had pinstripes in it and you wore it on your back every day. Now, it's a subject of discussion and debate in the courts and certainly in the import/export trade houses of this country.

Bill put it so well when he spoke of the need of retailers and, for that matter, independent dealers of all sorts to maintain a variety of supply sources. I might collect my comments around several things which Jeff Zuckerman has said and also Rick Dagen from the ITC standpoint.

First it's wonderful to see the Federal Trade Commission — the staff at least and Commission itself I think — positioning itself toward providing commentary and analysis on import/export trade issues as they have not done, it seems, through the early 1980s. I refer especially to the October 17, 1986, staff statement which went to the United States Customs Service. Both Jeff and Rick have cited to it. This statement was prepared by three of the Commission's bureaus — the Bureau of Competition, the Bureau of Consumer Protection, and the Economics Bureau — and it said several things.

Without dwelling on them or reiterating what Rick has alluded to, it seems to me the two most important points made in the Commission staff statement to the Customs Service was that, first, there are no empirical data demonstrating the existence of a free rider phenomenon, let alone any attempt or ability to measure it. I suggest indeed that there is no such thing as a free rider phenomenon in the marketplace or anywhere else, any more than there's any free lunch in this economy.

Second, the aim of the antitrust laws is the allowance of several competitive sources of supply in a two part marketplace, one part being the system of independent distribution and the other part of the market, as we see it in this country, being vertically controlled or restrained distribution. I'm speaking now of nonprice aspects to market distribution.

I suggest to you there's no such thing as a "gray market." The current parallel importation restriction proposals are basically an aim, an attempt, at price engineering. We cannot really dodge the fact that the price mechanism is the quintessential facet of a market economy and modern Western distribution system. Therefore, my own feeling is that both the courts and the administrative agencies will continue to authorize proper parallel importation of genuine competitive merchandise under the customs regulations — that's 19 CFR Section 133 — as they have done for the last 50 years. Thank you. (Applause)

MR. SONDERICKER: Thank you very much to my speakers here tonight. I might say that I've seldom seen a topic that has generated more polarized viewpoints among usually rational people than this one.

For those of you who are interested, there is a case which the Supreme Court of the United States has accepted for review. It's call *Copiat v. U.S.*. It's being briefed now. It will be argued probably in October, and it promises to perhaps settle this issue once and for all. The courts of appeals in the various circuits are widely split. There's a 2-1 decision one way here in the Second Circuit; there's a

case in the Federal Circuit that goes another way; and there's yet this other case, *Copiat*, which goes still a third way. So, as I say, there have been many different views and great polarization on this issue. For those of you who are interested, you can follow that case. Thank you very much. (Applause)

ANNUAL DINNER AND ADDRESS

PROFESSOR BARRY E. HAWK: Let me welcome you to the 110th Annual Meeting of the New York State Bar Association. The Antitrust Section doesn't go back quite that far although our main speaker, Rick Rule, has persuaded me that following his talk this evening we will all know why the Antitrust Section will go on for at least another 110 years even if the New York State Bar Association doesn't. We look forward to that talk.

My first duty is to introduce the dais. Let me start on my left. Kimba Wood is a member of our Executive Committee. Bill Lifland, who was on our program today. Ed Schumsky, who's the head of the New York Office of the Federal Trade Commission. Rich Dagen, who was also a speaker today, is Counsel to the Chairman of the International Trade Commission. Norma Levy, whom I'm happy to announce will be the Vice Chair of the Antitrust Section beginning in June. Harry First from NYU, who was out lead off speaker. Eleanor Fox, who is on our Executive Committee. Vernon Vig, who is presently Vice Chair, but I'm also happy to announce is Chairman Elect and will be Chairman of the Section beginning in June.

On my immediate right, Rick Rule, our main speaker. Paul McGrath, who was one of our speakers this afternoon. Brock Comegys from Boston, who was one of our speakers. Lloyd Constantine from the New York Antitrust Office, who, I'm happy to announce, was elected Secretary of the Antitrust Section beginning in June, so he's our new officer. Jim Wyer, formerly with American Cyanamid, who was one of our speakers. Ken Hart from Donovan Leisure, who was one of our speakers this afternoon. Ralph Giordonno from the Antitrust Division, New York Office. And Walter Barthold, who is our section delegate to the New York State Bar Association House of Delegates.

My next job is to present the plaque to last year's Chairman, Sandy Litvak. Sandy at the last minute was unable to join us. That saves you the 15 minute introduction I was going to give with respect to Sandy.

Paul McGrath, his new partner, has very kindly consented to accept the plaque on Sandy's behalf. So I'll present the plaque to Sandy's predecessor plus one. Paul says that it's in safe keeping with him. Maybe.

Let me turn to what I'm sure you've all been looking forward to, and that's Rick Rule, who's our main speaker this evening. I think it is interesting that we would have had Sandy Litvak and then we've got Paul and now we have Rick Rule. So if you exclude a couple of law professors, we've got the predecessors and the heads of the Antitrust Division for the last six or seven years.

Certainly the common perception is that, if you look at that history, antitrust enforcement has been somewhat relaxed or has become increasingly relaxed. That perception is not entirely accurate when you consider two criticisms brought against Sandy Litvak and now Rick Rule. Each criticism is somewhat surprising given this common perception of increasingly relaxed antitrust enforcement. You might recall that Sandy's criminal action with respect to resale price maintenance

was roundly criticized by many members of the defense bar as being totally inappropriate given the disagreements about vertical price restraints. I think it's even more interesting to see that Rick Rule is being roundly criticized by one of the giants of the plaintiffs bar for bringing criminal actions with respect to what looks like, to a lot of people, horizontal agreements to divide markets in the movie business, which are known a splits agreements. I don't know whether that's just a perverse change in criticism or whether it's nothing but an isolated incident, but at least if you're not involved in it it's somewhat amusing.

Let me turn to a brief introduction of Rick, who very kindly came up from a very busy schedule this week. Rick, as you all know, is the Chief Deputy Assistant Attorney General in charge of the Division. As deputy, he was in charge of regulatory affairs. He's now responsible for the Division's competition advocacy program, which promotes deregulation and competitive alternatives to government intervention in the marketplace. In addition, Rick is in charge of the Division's law enforcement activities in various areas, ranging from health care and entertainment to communications and transportation.

Now as many of you, or most of you will recall, from April to September, 1985, Rick served as Acting Assistant Attorney General in Charge of the Antitrust Division, and prior to that he was appointed the Deputy Assistant AG in Charge of Policy, Planning, and Legislation. Before that appointment, he served as Special Assistant to one of the law professors, Assistant Attorney General Baxter.

Rick holds a bachelor of arts degree from Vanderbilt and —this is the one thing he wanted me to emphasize — a juris doctor from the University of Chicago. He also served as law clerk to Judge Friedman of the U.S. Court of Appeals for the Federal Circuit.

Without further ado, it's an honor and a personal privilege to hand over the podium to Rick Rule. (Applause)

MR. CHARLES F. RULE: Thank you. I appreciate that very kind introduction. I see that I've given you an old bio, but that's okay. It's good, and I must have given that bio a long time ago because Barry is the kind of guy who really plans ahead.

We were talking at dinner, and Barry was telling me a little story about his wife. Apparently the other day he was thinking — I guess because of his arm injury and the morphine — contemplating the great beyond and what would become of his family when he passed on. He was sitting down to figure out how to divide up the spoils and he asked his wife, "Gee, when I die you'll probably want to sell this house because you'll probably marry somebody else and this house has a lot of memories from our being together."

His wife looked at him and said, "Gee, Barry, you know, I kind of like this house. It's a good house and it's going to last for a long time. I don't really see why I'd need to sell it. I mean I'll have your memories and I'll build new ones with the next guy,"

He said, "But we've got that great Volvo out in the driveway and I know when I pass on you're going to want to sell that because it has a lot of memories and you'll want to get a new car."

She said, "No, no, I'm not sure, Barry. Sure a lot of memories but Volvos last a long time. You've seen those commercials. They're going to last into the 21st century. I don't see why I should sell it. We can use that car and we'll still have our memories and there will be others."

"Gee, what about my golf clubs? You know, those are great golf clubs. I've had those golf clubs forever."

"Oh, don't worry, Barry. He'll be left handed." (Laughter)

But, Barry does plan ahead and he won't have to worry about the golf clubs.

It is a pleasure to be here. I want you to know I wanted to be here so badly that in trying to plan my schedule in order to take advantage of the wonderful weather we're having in Washington, I had a choice to either put off a trip to the Bahamas or put off this trip. I chose to come here. I think I'm working too much.

But we are very busy in Washington these days. As you may have heard at the end of last year we had what I will call a merger surge, not really a wave, just sort of a little wavelet. We are trying to complete the AT&T report to Judge Green. I think it's going to be out the beginning of next week. We've been working with our colleagues around the Administration on the competitiveness legislation that the President has discussed.

We've also been preparing for a change in the Senate, and of course, we have our normal enforcement activities. We've been doing it a little shorthanded. Assistant Attorney General Ginsburg, who was actually Paul's successor, is now a judge on the Court of Appeals for the D.C. Circuit. Steve Cannon, who was also with him last year when Doug gave his speech, is now in private practice. But everybody has been pitching in, and we've all been managing to do what has to be done.

I thought tonight that rather than talk about the legislation or a lot of other possible topics, about which I'll be happy to answer questions, given that this is a dinner speech and that I didn't have much time, I'd use a bad pun and say that I was going to talk about the bread and butter of our enforcement policy. And that bread and butter really is the merger review and criminal prosecution — the things we are doing as opposed to what you hear we aren't doing.

Along that line, the Administration, when they sent their budget up the first of January, indicated that we were asking Congress for a $2 million cut in our budget and a hundred person cut. We actually did that on our own, volunteered it. And the reason we volunteered it is because we think that everybody should take a look at themselves in these days of Gramm-Rudman and see what can be cut. But when we were doing that and when we made those recommendations, we were very careful to make sure that the bread and butter of antitrust was not cut, that we could maintain and increase our current level of activity as a result of some increased learning. And if any reduction had to occur in what we were doing, it would occur in less direct responsibilities that we have, areas like competition advocacy,

maybe some of the general economic analysis, and management and administration.

I'm still confident that we will be able to maintain our core activities. There is a commitment on the part of those of us in the Antitrust Division, those in the Department of Justice and those in the Administration to make sure that those core activities — merger review and criminal enforcement — are not impaired in the budget process and to maintain vigorous enforcement in those areas. So let me turn to them.

The first one I want to talk about is merger enforcement and really give you a little bit of an update about what's been going on. As I mentioned, at the end of last year we had what might be called a merger surge. There were 1301 Hart-Scott-Rodino filings in the months of October and November. I think if you add in December you get to 1647, and if you add in September you get above 2000. The 1301 filings in October and November compare to 586 for those two months the previous year, which was probably one of the busiest periods that we'd had in the past.

The reason for that surge really had very little to do with antitrust. It primarily, as most of you know, was the result of the change in the tax law, as individuals tried to take advantage of the old tax laws before the new ones kicked into effect. I think for that reason a number of merger filings that we saw, really raised no competitive issue, because firms frankly were being counseled — at least the wise ones were, I think — to try to stay away from competitive problems so that there would be no hold up on our end and the firms could go ahead and merge and take advantage of the tax breaks.

We did, as you may have heard, in December have to institute a temporary measure to try to relieve our attorneys, who were at that point involved in a number of major investigations, of the task of initially screening Hart-Scott-Rodino filings, by having the economists during the month of December go through the filings first and cull out those that raised no possible competitive problem, because there was no overlap, and then send on the rest of them for screening by the attorneys. That process worked fairly well. It was supervised by the Office of Operations. There were no problems. But as a result of some concern and the fact that we're back down to normal numbers, we've now gone back to the old process where both the attorneys and the economists initially screen mergers.

But as a result of that process, and frankly some very hard work on the part of a lot of people in the Division, people such as Ralph and his cohorts around the country and in Washington, we were able to handle the crush. Even though we got a number of filings in December asking for early termination — I think something like 31 — we were able to give early termination to all but one of those matters. And I'm confident that we did so in a way that didn't allow any anticompetitive mergers to go through.

We've investigated a significant number of the mergers that came through during that period. And as you may know if you've been reading the papers recently, we have over the last six weeks announced challenges to four of those

mergers and we are continuing to investigate several others. Let me just run down the four that we announced we would challenge.

On the 10th of December, we indicated that we would challenge Technicolor's acquisition of Metrocolor Film Processing Lab. In effect they're two of the three companies that process so-called wide-release films for public exhibition. After we indicated our challenge, the firms abandoned the deal. But for a lot of reasons that I won't go into, the party that at the time owned Metrocolor didn't want to keep it and so they're currently trying to sell Metrocolor to an independent party, and we have a TRO forcing them to do that.

Our second announcement occurred on the 13th of January, when we indicated our intention to challenge Domtar's acquisition of Genstar Gypsum. That case created problems in the southwestern part of the United States in the product market for gypsum board. When we announced that challenge, the parties entered into negotiations to try to solve the problem, and we're currently still talking to them.

Three days later we indicated that we would oppose Rheem Manufacturing's acquisition of Bradford-White. Bradford-White was exclusively in the business of making residential water heaters, a market where Rheem was also strong. We saw that as a problem. Subsequently, the parties have abandoned that transaction.

And finally, on the 25th of this month (actually Sunday because of the snow), we announced a challenge of Hughes Tools' merger with Baker International. Those companies are in a wide range of markets involving oil field products and services. We indicated we would challenge the merger in two of those markets — rock bits, essentially steel, non-diamond, drill bits that are used to drill for oil; and electric submersible pumps, which are used to pump oil. We're currently negotiating with the parties in those two markets to get a resolution of that deal as well.

There are three things that I think are worthwhile to point out about those mergers:

First, all of them were, as one might imagine, significantly over the Merger Guidelines' HHI threshold. And obviously, looking at the HHI threshold is still an extremely important starting point in merger analysis.

Second, in two of the mergers — the Baker-Hughes merger and the Metrocolor acquisition — the merger would have created dominant firms in the relevant market, firms that would have had the ability, we believe, to unilaterally raise prices, and that was a concern.

In two other cases — the Rheem and Domtar cases — the industries had a history of criminal price-fixing activity. Even though dominant firms weren't created, what we were concerned about there were increases in concentration that were over the Guidelines' threshold but perhaps not as significantly as one might have imagined; we were concerned because of that history of price-fixing and the rather recent history of criminal prosecutions in the industry. Therefore, we felt it was important to stop the mergers.

I also want to make two more general points as a result of the experience with those cases and the "surge."

First of all, I think perhaps some have misread the significance of four merger challenges in six weeks. It seems like a lot of cases. As a lot of people are wont to do in areas like this, they see the four cases in six weeks and say, "My goodness, that means you're going to challenge 45 mergers this year." I doubt that's going to be the case. The fact is, when you look at the number of challenges, you have to compare it to the number of merger filings that came in; and what you see is that we've challenged about a quarter to a third of one percent of the mergers that came in.

I think our ability to handle the surge and to pick out those mergers that were really problems suggests two things, one about our ability to look at mergers and another about the parties who are merging.

First, I think our ability to handle the surge and to pick out the troublesome mergers indicates that the staff now is even more able than they have been in the past — and will be even better able in the future — to deal with and apply the Merger Guidelines quickly, to understand what they mean, and to understand when there are potential problems and when there aren't. When we redid the Guidelines under Paul's leadership in 1984, there was an effort to work out some bugs. And I think that that effort, along with our experience in subsequent years, has proven very beneficial for our implementation of those Guidelines; and I think we are able to use them very well.

The other point has to do with the businessmen and women who are trying to operate with the Guidelines as a background. I think that as a result of the business community's experience with the Guidelines, it has become increasingly clear what the dividing lines are between legal and illegal mergers. As a result, a great number of those mergers, as I indicated, that came across our desks really presented no problem because the people who were involved knew how to stay away from antitrust problems, knew how to form a merger that would satisfy their tax concerns, their efficiency concerns, or whatever, without running afoul of the antitrust laws. Again, all we're concerned about is stopping those mergers that are anticompetitive. So I think folks out there are beginning to understand the Guidelines much better. While there are four cases that we had to challenge and there are others that we had to look at very intensely before we concluded there was no problem, those cases, the number of cases in the gray area if you will, is shrinking all the time; and I think that's a good thing because there was always an intent and a hope that the Merger Guidelines would become self-enforcing in that way.

The final observation I want to make as a result of that experience is an attempt to clarify what seems to be some confusion about entry analysis under the Guidelines. A lot of people have come in trying to persuade us that a merger's not a problem even though the numbers may be very high and have urged us not to sue on the ground that, well, you really can't find a Stiglerian, as they like to say, barrier to entry — that is, there may not be any patents, there may not be any government regulation, or that sort of thing. As a result, somebody eventually can enter. It may just be that they'll have to incur the same costs that the incumbents have already incurred in the market and, therefore, there's not a barrier to entry and therefore, we should allow the merger to go through.

There's a fundamental problem with that. While that is sound industrial organization theory, it is poor antitrust policy. The Guidelines avoid barriers to entry. I like to avoid barriers to entry because that is not what we are looking at. What we are looking at when we look at entry conditions is how long it takes for others to enter the market and basically erode a supercompetitive price increase by the incumbents. And it may be that it's clear that somebody will enter; but if it takes a long enough period of time, if it takes ten years, if it takes five years, that's five years of consumer welfare lost that costs society dearly and that we think is not something that can be tolerated under the antitrust laws.

So as a result, when Bill Baxter was originally doing the Guidelines, two years was chosen as the cut-off date. It's still the cut-off date, and it's what's reasonable. And if you are out there as practitioners and you're coming in trying to convince us that even though concentration is very high in the market and will be increased by the merger we shouldn't challenge you because of entry, remember what we're doing. We're looking at the temporal aspect. We're looking at how long it would take for somebody to come in and erode that price increase, not whether they would ever come in at all.

I think there has been some confusion there, and hopefully, over time, more people will actually read the Guidelines. We're sometimes surprised at how often practitioners come in and have not carefully read the Guidelines. But it's a good place to start. For those of you who may have read them three years ago, I recommend going back and perusing them again because it can be very helpful in talking to the staff and in talking to those of us who ultimately have to make the decision, because indeed we do make our decisions on the basis of those Guidelines.

Well, having said something about our merger enforcement, let me turn to what I think is the most important thing that we do in the Antitrust Division, what Barry indicated we get criticized for sometimes as being too vigorous, and that is criminal enforcement. Despite all the things that are sometimes said about the Reagan Administration's failure to enforce the law, about the President's lack of concern with antitrust, the fact is that if you look at our criminal enforcement record I think you will see a very vigorous pro-enforcement Administration during the entire six years that Mr. Reagan has been in the White House.

I think this is appropriate. I think it's the right place for us to put our emphasis. The reason, first, is that we have a comparative advantage in criminal enforcement areas. We have grand juries. We have subpoenas. We have the FBI and other investigative agencies at our disposal. We have things that private litigants simply don't have. We have the wherewithal that the states don't have, and we have jurisdiction that the FTC doesn't have. So if we don't do it, it frequently won't get done. For that reason, it's important for us to make sure, first, that we are taking care of that very important responsibility.

Second, from a cost-benefit or economic analysis, it makes a lot of sense for us to be heavily engaged and very vigorous in this area because what we attack is price-fixing, price-fixing that has no potential gain to society, that involves no integration, and that can be very costly to society. Even if a particular incident of price-fixing may not have raised prices, the deterrent effect that a criminal pro-

ceeding has against even an attempted price-fix is, I think, well worth the criminal enforcement effort.

The return that generally we get from our criminal enforcement effort is rather spectacular, particularly when you put it against all the other things we could be doing with our money. I think that, even though we have shrunk over the last few years, we are probably doing far more today with the real dollars that we are spending, even though they're less than in the past, than we did in the past, in going after other types of violations.

If you look at the record, you will also see that the number of cases is up. Paul was the AAG in the year where we had the best record, and that was 100 cases, I think, in fiscal year 1984. In 1985 and 1986 we had 100 criminal cases. We indicted 96 individuals and 119 corporations. In the first four months of 1987, we're getting close to the pace set when Paul was there in 1984. We've already indicted 26 individuals and 26 corporations. We currently have 138 grand juries open. That's an increase of about ten in three months. We're continuing to open them up.

The industries that we have investigated and against which we have sought and obtained indictments include highway construction, of course (although I think that cycle is about to come to an end); electrical contracting; dredging; public utilities construction; movie exhibition (the so-called "splits" agreements that Barry talked about); moving and storage, particularly moving and storage conspiracies against the government; waste hauling; soft drink bottling; and most recently in our Philadelphia office, a series of indictments against collusive bidders at antique auctions. We think that that last effort will lead to even more indictments in other types of auctions.

Our federal government procurement initiative also continues. That was something that Doug Ginsburg announced when he came in, and resulted in cases dealing with dredging and moving and storage. We've got increasing numbers of grand juries opening. We have been cooperating with the Defense Department and other agencies, and I think we're having an effect there.

In addition to spreading out our effort to different industries, we've improved our investigative techniques. We are increasingly utilizing the resources of the FBI and other investigative agencies, using them for such things as handwriting analysis and fingerprint ID but also for interviewing witnesses, instead of using the grand jury all the time. We're increasing our use of consensual monitoring of informants' telephone calls and getting some good taped information there. We also are increasing our use of body wires and hidden video cameras, that sort of thing. It always seems to have a nice effect on a jury when we can show those little tapes.

We're also more aggressive in terms of our actual prosecution of the crimes. It used to be, I am told, that in the Antitrust Division when a price-fixing conspiracy was uncovered, there was a tendency to bring maybe one count against the corporations involved, but perhaps not go as vigorously against the individuals, sort of a "gentlemanly" approach, one might say, to criminal prosecution.

Well, over the last few years we've taken the gloves off and we have no hesitancy at all in bringing multiple count indictments against all persons in-

volved. We relish going after individuals because we think that that's where the deterrent effect is the greatest. We also, as opposed to what used to be the practice in the Division, are increasingly looking for violations of other laws and using those added counts in our indictments. We have, for example, increased the use of mail and wire fraud charges. We have brought recently a number of perjury and obstruction of justice indictments, and we are increasingly vigorous in that area. We've begun to use RICO when we feel that that statute is appropriate. And we've even in the past brought some tax evasion indictments.

Another area that we are looking at is indicting individuals who thought when they were given immunity and appeared before the grand jury that that gave them a pass and that they could go before the grand jury and either claim conveniently that they had forgotten or lie and then forget about it. Well, as most of you know, the way the immunity system works under federal statutes, we gave "use" immunity and not transactional immunity. You only get immunized for what you say before the grand jury. If we develop other evidence against those parties who were immunized and they're not protected by the immunity, we'll go after them for violating the antitrust laws. In addition, if they haven't told us the truth and if we can prove that, we'll certainly go after them for perjury. Even though that does require the Attorney General's approval, he is ready, willing and has in the past on every occasion we've asked, given his approval.

In addition to being more aggressive in who we go after and how we go after them, we're also more aggressive, I think as you know, in sentencing. We perhaps have been more aggressive than the courts have been willing to tolerate, although I think that situation is improving.

In fiscal years 1984, 1985, and 1986, we had 176 individual defendants sentenced. We recommended incarceration for 130 of them, about 75%, and for all but one of the rest we just stood mute — we made no recommendation as to sentence. Only 59, however, of the individuals, about 46% were actually sentenced to prison. And the average jail sentences for those who went to jail was only about 141 days.

As I pointed out, I think we are having some beneficial effect on the courts, as a result of our being more vigorous in terms of seeking jail terms. In 1986 we had 50 individuals sentenced. We sought jail terms for 23; 17 received jail terms, and the average jail sentence was 280 days. For perjury and obstruction, the average jail sentence was 365 days.

So from our standpoint, things are improving. It's not a particularly good time to be an antitrust defendant, but I think that's a good thing because that means that we're having a beneficial effect.

We also are carrying, and have carried, that message to the Sentencing Commission. We've urged them to insure that individuals get jail terms, that corporations pay stiff fines, and that creative sentencing be avoided at all costs. And I think we're having a positive effect there.

Although many will talk and have talked about our antitrust legislation, all of which I think is very important in terms of clarifying, some aspects of the antitrust law that need clarifying, and improving some areas of the antitrust laws that

needed improving, many people overlook the fact that we also have urged Congress to increase from actual to treble damages the damages that the United States is entitled to when it's injured by an antitrust violation. Again, we think that will increase deterrence, and we think that's beneficial from the standpoint of antitrust law enforcement.

So I hope that what I have told you about what we are doing — which frequently gets lost in the media and gets lost sometimes even when we give speeches — has been helpful to you, to let you know that we don't just spend all our time filing amicus briefs. We don't spend all our time giving speeches. I maybe do, but fortunately we've got people who actually are working for a living, like Ralph. He only gets to come to dinner every once in a while. We let him go home and come to occasions like this, but fortunately, he works most of the time and is responsible for a great deal of these statistics.

We will continue that role. I think it's the proper role of the antitrust agencies, of a true criminal enforcement agency, not to engage in some highfalutin' "industrial policy" but simply to rout out criminals who are engaged in what amounts to consumer fraud, imposing costs on society, and do only that job, which is a good job for society, instead of, as has occurred in the past on occasion, actually interfering in the economy and making things worse.

So having said that, I'll stop and be happy to answer any questions that you might have.

VOICE: (Question or comment inaudible)

MR. RULE: Sure. First on the airline merger question, we have indicated our opposition to mergers in the airline industry where we felt they were anticompetitive and where they violated the principles of our Guidelines. So, for example, we recommended disapproval of the Northwest-Republic merger, although frankly, it was a close case; recommended disapproval of the transfer of the Pacific Division from Pan Am to United; and also disapproval of the TWA-Ozark merger.

Our view is that those were anticompetitive. But while I think that the law is becoming clearer, airlines are a somewhat new industry in terms of applying the antitrust laws. There is a good deal of uncertainty. My view is that DOT has been applying its analysis in a good faith manner and they've come to some different conclusions. That's fine, but the current law gives them the authority for making the final decision in the executive branch, and it is a unitary executive branch. Once they make that decision, that's the final decision, from my standpoint, for the executive branch.

VOICE: (Question or comment inaudible)

MR. RULE: No, because that's not their position. Secretary Dole has been very straightforward. Again, this is something that Paul will recall from his days there. DOT never asked for this authority and indeed when the question was whether or not to give it to DOT, DOT took the lead in arguing that it should come to us. Frankly, I would not particularly want the awkward administrative sort of structure that goes with the current 408 and 409 authority. I think the thing just ought to be sunsetted.

Last year when the issue came up before Congress, DOT once again led the charge, with us along side, to try to get 408 and 409 sunsetted as of October of last year. Unfortunately, Congress didn't want to do it. There are a lot of reasons that you can look at, but the commerce committees feel that it's still important to leave it in DOT's hands rather than sunset the law and give it to DOJ. But so far as I know, unless there's been some remarkable change in attitude, DOT would not support, I don't think, any extension of the sunset period. If they have anything to say about it, if this Administration has anything to say about it, it will sunset no later than, I guess, December 31, 1988.

VOICE: (Question or comment inaudible)

MR. RULE: A great deal of credit has to be given to Dan for his willingness to say a lot of things that a lot of people in that sort of job and this sort of job frequently avoid saying. But, I think he's made some interesting comments and some that have provoked a great deal of thought. While you might not agree with all of them, I think that sort of discussion is always healthy and people ought to appreciate that.

On McCarren-Ferguson, we had been asked to testify before the Senate Judiciary Committee, actually the Monopoly Subcommittee, in February as to Senator Metzenbaum's bill that would eliminate the McCarran-Ferguson exemption. We're currently studying that and the Administration hasn't yet reached a position, but there certainly are some very good arguments, many of which Dan has made and many of which Senator Metzenbaum has made, for the repeal.

Well, it's kind of interesting and funny having been in D.C. You might think that the Administration, antitrust enforcement officials, and Senator Metzenbaum are always at loggerheads and at one another's throats, and that's just not the way it's been. We've cooperated very well on a number of different subjects. We've always worked very closely along with Senator Thurmond in beating back the beer bill and I anticipate that will continue. There have been other efforts where we've joined forces. Senator Metzenbaum played a very important role in passing the joint R&D bill and the municipal liability bill. So I think we can work together, and I think we all agree on the ends: a free economy unfettered by governmental or private restraints. It's just that we disagree at times on the means of getting there. But at least in the case of McCarran-Ferguson, that is an area where Chairman Oliver and Chairman Metzenbaum now agree.

VOICE: (Question or comment inaudible)

MR. RULE: Part of the President's competitiveness package will be the detrebling legislation. I think we still have a way to go, obviously, in convincing people that the time has come for legislation that will rationalize the situation. But I think that if it doesn't happen this year, if it doesn't happen next year, I think eventually there will be some legislation that will across the board clarify and make more sensible the damage regime in antitrust.

VOICE: (Question or comment inaudible)

MR. RULE: Again, that's one where we haven't been called upon to give an opinion, but I don't think one has to look very far, given what we have said on the

issue of vertical restraints, to figure out that, if we had a priority list, that probably wouldn't be on it. (Laughter)

I think the best thing that can be said about vertical restraints — I say it with a little bit of glee — is we won. If you look at the cases that are coming down in the vertical area, even though sometimes, for example, Lloyd and I get in nice little debates about this topic, the fact is that the position that Bill Baxter argued a long time ago, with the one exception of *Dr. Miles*, and the positions that are taken by and large in the Vertical Restraints Guidelines are the positions that are being adopted by the courts. And we frankly have not been as vocal or as active in advocating those positions as we once were, but the courts have recognized that that's the way *Sylvania* was pushing the law; they've developed the law in that way. I think *Monsanto* is another, in effect, piece in the puzzle. I think that the puzzle is largely getting solved as a result of cases like *Monsanto* and that the law is improving. I think it would be unfortunate in that area to inject some more uncertainty by trying to change back the standard because any bill, I think, would make it very unclear as to what the standard was if they tried to tinker with *Monsanto*, which the courts really now are only beginning to come to grips with. Thank you. (Applause)

PROFESSOR HAWK: Thank you very much, Rick, for a very open and instructive description of your enforcement, particularly in the merger and criminal areas.

I might just finish very quickly by saying I found it personally instructive to learn this evening that during the last several weeks while I've been benumbed with morphine and other wonderful drugs that, one, I've gotten married and, two, I've become a golfer. (Laughter)

On that note, we'll adjourn the meeting. Thank you very much and thanks to all our speakers. (Applause)

APPENDIX
ANTITRUST COMPLIANCE IN TODAY'S ENFORCEMENT CLIMATE

Walker B. Comegys*

Thank you, Mr. Chairman. I am aware of the ground rules our planning committee laid down when we decided to discuss antitrust compliance in today's enforcement climate — namely that we should avoid telling old war stories. However, I would like to tell you a story about a speech delivered by my then boss, the late Richard W. McLaren, before an ABA national institute at the Waldorf-Astoria in October, 1969.

Dick alluded to our critics, who were many. For example, Fortune magazine said: "McLaren is destroying the last vestige of rationality in the antitrust laws." Dick continued:

> While this may sound a bit harsh at first hearing, the comforting implication, I suppose, is that most of the destruction occurred before I came on the scene and I'm just mopping up.

Dick contrasted this treatment with that of his fan club.

> As some of you know, I have two Special Assistants who work with me on these talks. They got to discussing what we should call the opposition. One said, let's call them the Radicals. The other said, no, that makes us sound like the Establishment. How about the Executioners? No, said the first, they haven't laid a glove on us. How about the Committee? No, replied the second, that sounds like a rock group. Well, my Deputy [there was only one in those days], who had heard all this, could keep silent no longer. He said, "Why don't you call a spade a spade — just call them the Professors?"

I could repeat that refrain today. Four of the five preceding assistant attorneys general in charge of the Antitrust Division are or were indeed professors. It is difficult to criticize, on a public platform, one's successors-in-interest charged with the current responsibility for enforcing the antitrust laws, particularly for a country lawyer from Boston in the glare of the lights of Manhattan.

However, I would like to raise certain problems that we in the private sector face as a result of current enforcement policy, and I believe I can do it without offense to our honored dinner guest, Acting Assistant Attorney General Charles Rule. In fact, others have done so and gotten away unscathed by their daring.

At the 1982 Spring Meeting of the ABA Antitrust Section, Harvey Applebaum of Washington, D.C., was interviewing Bill Baxter. Mr. Applebaum addressed the growing concern on the part of members of the antitrust bar about counseling, when members of the Division were openly challenging, for example, the vertical price fixing *per se* rule.

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* Mr. Comegys is in private practice in Boston. He was a former head of the Antitrust Division of the United States Department of Justice and recently authored Antitrust Compliance Manual: A Guide for Counsel, Management and Public Officials (Practising Law Institute, 1986)

He cited the growing difficulty in explaining to the business community and clients that they must to some extent disregard or not put full faith in what they may be reading daily in *The Wall Street Journal* or in their trade press publications, both because the law of the land still remains to the contrary and because more than ninety percent of antitrust cases are brought in private litigation. Mr. Applebaum asked Mr. Baxter, "What views or comforts could you give us about what some perceive to be this growing counseling difficulty," and Mr. Baxter replied:

> I have heard the comment before, Harvey. I don't know quite what to make of it. I mean the problem does not seem that complex to me. These business units face very high risks of treble damage actions if they fail to follow your advice, and I should not have supposed it was so difficult to convey that message to a presumptively intelligent businessman.
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> I cannot imagine that any client would resist your explaination that there is an unbroken string of Supreme Court cases going back to 1911 which say that price-fixing is illegal per se and, although it it true they have never explained why, the probability of antitrust liability is very high.[1]

The problems in counseling that the antitrust bar had in 1982 continue today — perhaps with a greater force, because the signals businessmen and women are getting out of Washington and through the media have contributed, rightly or wrongly, to a highly dangerous malaise on the part of business regarding overall antitrust exposure. Businessmen and women have been lulled into complacency with respect to compliance.

Uncertainty as to the future of antitrust has even extended to venerable law firms right here in Manhattan. For example, last August, *The Wall Street Journal* reported that the entire seventeen member antitrust department of a major law firm had resigned en masse because of the refusal of the firm to admit four of its associates to partnership. According to the *Journal*, one senior partner of the firm reportedly justified its position as follows:

> Given the current political environment, who's to say what will become of the antitrust work? ... Once you make partners, they are partners for life.[2]

Without passing judgment on the wisdom of the Manhattan firm in declining to make four persons partners because of antitrust's current political climate, let us take a hard look at the present and future hazards of ignoring antitrust and what should be done to avoid them. A hard look is advisable both because of the present and the future dangers of antitrust malaise, and also because once you are branded a felon, you are branded for life.

The first clear and present danger has already been identified in Mr. Baxter's remarks. That is the private litigant. Never mind that the private litigant's job has perhaps been made more difficult by the courts in recent

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[1] Barnett, Hills, Applebaum & Pollock, Interview with William F. Baxter, 51 Antitrust L.J. 23, 39 (1982).

[2] The Wall Street Journal, Aug. 26, 1986, at 4, col. 1.

years. The very fact that there was a strong effort on the part of the Administration in the Ninety-ninth Congress to clip the treble damage litigant's wings is proof of the pudding that the private litigant continues to be an important factor in antitrust litigation. It is important to remember that the private antitrust remedy for treble damages has been part of our antitrust law ever since the Sherman Act of 1890. Private litigants are ever ready as watchdogs who can and do bring actions under the antitrust laws, regardless of the federal enforcement policy in favor at the time. As has been pointed out, private litigants bring over 90% of the antitrust cases. To the extent the current malaise is contributing to sloppy compliance programs and disregard for the law, the present liability of target firms to potential private litigants is greatly increased.

In addition to the private litigant, another factor to be considered at the present time is enforcement at the level of state attorneys general. State attorneys general have been bringing more suits under both federal and state laws as well as engaging in other enforcement activities. State attorneys general, as members of the National Association of Attorneys General (NAAG), not only maintain an antitrust enforcement network (e.g., exchanging information relating to identical bids), but also act as a potent political force.

When the current Antitrust Division of the Department of Justice recently issued a set of "Vertical Restraints Guidelines," NAAG criticized them on the grounds that they did not represent the law and were gratuitous as prosecutorial intentions because the Department of Justice was not bringing any vertical cases anyway. NAAG quickly promulgated its own set of Vertical Restraints Guidelines, which it believes represents the law more faithfully, and incidentally are more favorable to private treble damage plaintiffs, including state attorneys general.

Unlike the Antitrust Division, state attorneys general have quickly implemented their Vertical Restraints Guidelines. Lloyd Constantine, your Assistant Attorney General in Charge of the Antitrust Bureau, joined hands with his counterpart in the State of Maryland and jointly investigated and filed the *Minolta* case, the first national resale price maintenance case since 1980.[3] Thirty-five other states joined in their efforts and arranged for the filing of actions and settlements, while the remaining states were covered by a residual class action. Moreover, during the period 1982-83, New York Attorney General Abrams obtained 46 felony and misdemeanor guilty pleas to charges of vertical price fixing.[4] At present, every state antitrust office is involved in one or more antitrust cases with its sister states.

As Chairman of NAAG's Multistate Antitrust Task Force, Mr. Constantine was instrumental in drafting a proposed bill for introduction before Congress entitled "State Attorneys General Antitrust Improvement Act of

[3] See, e.g., State of Maryland v. Minolta Corp., No. B 86-613 (D. Md. 1986).

[4] Source: Office of the New York State Attorney General.

1987."[5] This bill is in direct response to the Reagan Administration's legislative antitrust reform package that died in the Ninety ninth Congress. You will not be surprised to learn that NAAG's bill will strengthen rather than weaken the antitrust laws.

Quite apart from the present danger of antitrust malaise, there are, of course, future dangers. Antitrust has its ups and downs. Different administrations have different enforcement goals. Different economic schools of thought toward antitrust fall in and out of favor. Membership on the Supreme Court changes and some Courts are hostile to antitrust while other Courts are more expansive. One cannot rely upon the permanence of the present brand of antitrust enforcement or the infallibility and endurance of the Chicago school of economics upon which it is based. Federal antitrust enforcement has been cyclical since the Sherman Act became law in 1890.[6] There is no reason to believe that this cyclical pattern will be displaced. For an organization to let its guard down during any period of antitrust enforcement is to invite a disregard for the law.

By way of analogy, during World War II, the Office of Price Administration was established for the purpose of instituting price controls. The OPA, charged with this enormous national effort, chose to deal with industry advisory committees, some 652 in all. Many of the OPA's elaborate pricing formulas established by its contacts with committees of businessmen became the permanent practice of affected industries. Concerted activity among industry members survived the wartime emergency and continued years after. There are indications that the heavy electrical equipment conspiracies were fostered and facilitated by OPA meetings, and the continuance of such meetings after the demise of OPA was considered to be an acceptable extension of the earlier OPA activities. Indictments and treble-damage liability in the 1960's proved otherwise. The future danger caused by current antitrust malaise is that some subsequent administration will come along and attack with vigor some of the very practices given approval by the current administration.

And if anyone believes there is security in being "small," please be advised that "small" is where the antitrust action is today. The federal agencies are vigorously prosecuting local businessmen for felonies in the construction trades. And not only are there more and more private antitrust suits being filed, the plaintiffs and defendants seem to be getting smaller and smaller. For example, in *Yale-Genton, Inc. v. A.O. White, Inc.*, No. 84-0282-F (D. Mass.), a local retail store in Springfield, Massachusetts, is suing another local retail store right across the Connecticut River for allegedly conspiring with clothing manufacturers to refuse to deal with the plaintiff because plaintiff was a discounter.

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[5] See 51 Antitrust & Trade Reg. Rep. (BNA) No. 1294, at 914-16, (Dec. 11, 1986), for full text of the proposed bill.

[6] See Comegys, Antitrust Compliance Manual: A Guide For Counsel, Management and Public Officials, 12-13, (Practising Law Institute 1986).

In conclusion, let me cite Professor Eleanor M. Fox's answer to a question put to her in ABA Antitrust Section's new magazine "Antitrust." She, among a number of other antitrust notables, was asked the question: "What will be the state of antitrust in the year 1996?" Her reply:

> I believe that in 1996, antitrust will reflower. The boughs that are bending in the 1980's will be nourished by the twin spectors of American businesses' loss of pace and foreign firms' gained ground. Chicago economics will be exposed as the School of the Emperor's New Clothes, and Americans will learn that our best hope is to draw on the talents of our workers and to inspire entrepreneurial incentives to invent.[7]

Taken with the clear and present dangers of antitrust, Professor Fox's forecast certainly argues for shaking off the malaise, no matter how induced, and cranking up your antitrust compliance programs once again.

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[7] What Will Be the State of Antitrust in the Year 1996?, 1 Antitrust 32 (1987).