# NYSBA

## 2003 Antitrust Law Section Symposium

**January 23, 2003**
**New York Marriott Marquis**

**NEW YORK STATE BAR ASSOCIATION**
**ANTITRUST LAW SECTION**

# ANNUAL MEETING

**Thursday, January 23, 2003**
**New York Marriott Marquis**
**New York City**

**Section Chair**
**STEVEN M. EDWARDS, ESQ.**
Hogan & Hartson LLP
New York City

**Program Chair**
**PAMELA JONES HARBOUR, ESQ.**
Kaye Scholer LLP
New York City

**Dinner Speaker**
**ORSON SWINDLE**
Commissioner
Federal Trade Commission
Washington, DC

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

**MR. EDWARDS**: Okay, we are going to begin. It is my job to call the business meeting to order. We are a very flexible and informal organization. Normally at a business meeting like this you start with the reading of the minutes and then the approval of the minutes, but nobody can find the minutes, so we'll dispense with the minutes. And I guess my only role here this morning is to introduce the incoming Chair, Pamela Jones Harbour.

**MS. JONES HARBOUR:** Thank you very much, Steve.

It is my pleasure to be incoming Chair, and also Program Chair of today's Antitrust Law Section's Annual Meeting. Before we begin our program, we are going to take just a few minutes to conduct Section business, and I would like to ask Meg Gifford, a member of the Nominating Committee, to read the report on the election of the officers and new Executive Committee members. Meg.

**MS. GIFFORD:** Thank you, Pamela. Thank you, Steve.

Good morning. This is the report of the Nominating Committee. The committee nominates the following current members of the Executive Committee for reelection to a one-year term to end on the date of the Annual Meeting in 2004. Bear with me, I need to read a long list of names.

Barbara Anthony, Kevin Arquit, Michael Bloom, Linda Blumkin, Molly Boast, Barry Brett, Edward Cavanagh, Bruce Colbath, Lloyd Constantine, John Desiderio, Steven Edwards, Howard Ellins, Harry First, Lawrence Fox, Martha Gifford, Ilene Gotts, Pamela Jones Harbour, David Hayes, John Herfort, Stephen Houck, Robert Hubbard, Norma Levy, William Lifland, Joseph Lipofsky, Kenneth Logan, Stephen Madsen, Saul Morgenstern, Kenneth Newman, Bernard Persky, Bruce Prager, Yvonne Quinn, Moses Silverman, Steven Tugander, Vernon Vig, Michael Weiner, Alan Weinschel.

The committee also nominates the following individuals to be newly elected to the Executive Committee to serve one-year terms to end on the date of the Annual Meeting in 2004. David Copeland, Dara Diomande, Susan Raitt.

If I could have a motion from the floor from a member of the Section to nominate those individuals.

**AUDIENCE MEMBER:** So moved.

**MS. GIFFORD:** Second?

**AUDIENCE MEMBER:** Second.

**MS. GIFFORD:** All Section members in favor of the election of those individuals, please say aye.

(Members voted aye.)

**MS. GIFFORD:** Thank you. Now, finally, the Nominations Committee also nominates the following members of the Executive Committee for election to one-year terms in the offices that I will identify. And I will ask each of the nominees for an office to stand briefly. Pamela Jones Harbour for Chair of the Section. Barbara Anthony, Vice Chair and Program Chair. I believe Barbara is not here yet. And Steven Tugander, Secretary. Thank you. May I have a motion to elect those individuals to those offices.

**AUDIENCE MEMBER:** So moved.

**MS. GIFFORD:** Second?

**AUDIENCE MEMBER:** Second.

**MS. GIFFORD:** All in favor?

(Members voted aye.)

**MS. GIFFORD:** Thank you very much and congratulations to everyone.

**MS. JONES HARBOUR:** Thank you, Meg. The report of the Nominating Committee has been adopted.

# Annual Review of Antitrust Developments

**MS. JONES HARBOUR**: In my first official act as Section Chair it is my pleasure to present to you three excellent programs today. You'll note that the familiar half-day format has been replaced this year by a full day of programs.

Our first panel is the Annual Review of Antitrust Developments. Our panel consists of Bill Lifland of Cahill, Gordon & Reindel. Earlier in his career, Bill clerked for United States Supreme Court Justice Harland. He is currently an adjunct professor at Fordham Law School where he has taught for more than 20 years. Bill was the first recipient of the Section's Service Award and has been presenting the Annual Review for us as a perennial favorite for many, many years.

Steve Houck will provide commentary during Bill's presentation. Steve is a former partner of Donovan Leisure. He is a past Chair of this Section. Steve served as Chief of the New York State Attorney General's Antitrust Bureau where he was originally trial counsel for the 19 plaintiff states in the Microsoft litigation. Steve is currently a partner with the law firm of Reboul, MacMurray, Hewitt, Maynard & Kristol.

Also providing commentary will be Ned Cavanagh. Ned is a professor of law at St. John's University and of counsel to Morgan Lewis & Bockius. He is also past Chair of this Section. Ned is a reporter for the Eastern District of New York's Special Committee on Ethics. He has published many articles focusing primarily on antitrust and federal practice issues.

I will now turn the podium over to Bill Lifland.

**MR. LIFLAND:** Thank you, Pam. This part of the program highlights a group of about 30 cases that are included in the endnotes. We can't go deeply into all of them, and we won't even mention some of them, but they serve as one version of the most significant cases of the year. The selection is more or less arbitrary, so please do not be offended if your favorite case, particularly one you've won, has been omitted.

We have tried to include some cases on monopoly, some on conspiracy, some on foreign commerce and so on.

## Monopoly

Everyone will agree that a key building block of an antitrust case is a properly defined relevant market. That tends to be true in monopoly cases as well as in acquisition cases, and even in some conspiracy cases. Market shares based on the wrong market definition are meaningless at best and can in fact be highly misleading. A number of courts appear to recognize this basic principle and have chosen to focus on market definition in monopoly cases.

In one case the Ninth Circuit ruled that the product market in issue could be limited to branded goods and exclude unbranded goods where customers recognized the branded goods as a separate economic entity for which they would pay more money.[1] This was a case involving tires for vintage cars.

Not everyone would go so far as to say that because customers were willing to pay more there was a separate market for the branded product, as a brand preference does not a market make. But there appear to have been other cases, such as a Tenth Circuit ruling[2] that also adopted a market-limited approach.

Much more common than rulings approving restricting the market are rulings criticizing proposed restrictive definitions which serve to exaggerate the market influence of the challenged party.[3] Those kinds of definitions inflate market share and urge courts to find power where none exists.

An example is a case involving retailers of jeans and T-shirts in a relatively small area of Chicago. The Seventh Circuit described the market as "absurdly small" and was unwilling to assume that Chicago consumers would disappear into a "black hole" once they left their regular neighborhoods.[4]

Some other courts seem unwilling to draw inferences from statistics not clearly pertinent. Witness the Eleventh Circuit's upholding a directed verdict for a brewer with a 48 percent market share that was charged with restraining trade by prohibiting public ownership of its distributors. The court said that market power as to beer did not automatically translate into market power as to ownership interests in beer distributors unless the two markets were connected.[5]

There was another Eleventh Circuit ruling that cast doubt on the proposition that an elevated return on assets could be used as an indicator of market power. The evidence was that defendant's estimated rate of return on its assets for a two-year period was substantially greater than the average rate of return for Fortune 500 companies. The court said that even if return on assets could be used to measure market power, the appropriate comparison would be between the predator's return and the return of similar firms in the same or similar industries over the course of several years.[6]

Once satisfactory allegations of power were made, the 2002 decisions included some notable successes for plaintiffs in monopoly cases. The Second and Eleventh Circuits reversed dismissals where the allegations could

support an antitrust claim under the "essential facilities" doctrine.[7] In another case, a trial was held and the Sixth Circuit affirmed a billion-dollar judgment based largely on a monopolist's removal of competitors' racks and advertising materials from retail locations. The court stated that such conduct in a central marketplace battleground for the particular product, which was a variety of smokeless tobacco, was sufficient to find willful maintenance of monopoly power.[8]

In a contrasting case a panel of the Third Circuit reversed a $68 million budget based on a monopolist's use of bundled rebates rewarding customers for buying only from the monopolist.[9] The court noted that the defendant's prospect of increased sales provided business justification for the bundling, and the plaintiffs had not shown predatory pricing or inability to compete. But *en banc* re-hearing has been granted, so that the plaintiffs' prospects may be brighter.

The case which has continued to draw even greater attention is the litigation between Microsoft and the states who have rejected the settlement negotiated with the federal government.[10] The settlement has now been approved by the district court without significant modification, and the controversy has moved to the next step. Two states have appealed. Steve Houck played an important role as counsel for the State of New York in this particular case, and I wonder if he'd like to comment.

**MR. HOUCK:** You wonder correctly. I have a Pavlovian response when I hear the word Microsoft, like I have to say something. So I will interject a few comments. And I have prepared a written piece that's in your materials because I don't want to cut too much into Bill's time, and also to ensure you get CLE credits for showing up this early in the morning today.

Actually, there have been some very important recent decisions in the Microsoft case at the end of the year. In the last two months there were four major decisions. Two in the government action by Judge Kollar-Kotelly. As Bill said, she approved essentially without modification the consent entered into by the U.S. and half the litigating states. And she also issued a very long opinion, after a 32-day trial, in which she rejected most of the far-reaching relief sought by the remaining nine states. Although she did make some changes that I think are not insignificant, including strengthening various of the provisions in the consent decree and creating a compliance committee of independent directors on the Microsoft board that will have ultimate responsibility for assuring compliance.

So what we have here is kind of an unusual situation where there's a consent decree and judgment that are largely similar, but they differ somewhat in the enforcement regimes, and also in the substance of the provisions. It will be interesting to see how that plays out in the coming year.

Also, there is major follow-on private litigation pending before Judge Motz in Baltimore. There are five cases consolidated there: all the indirect consumer class action cases filed in federal court and four large private lawsuits for damages, the biggest ones being by Netscape and Sun. Judge Motz issued in December two important decisions, one on the collateral estoppel effect of the findings of fact in the government action, where he held the plaintiffs were entitled to benefit on most of the findings of fact, 395 found by Judge Jackson at trial. And he held that the standard was whether or not the findings of fact were supportive of the Court of Appeals decision, not indispensable to it, as Microsoft had argued.

And then as well, Judge Motz recently issued a very interesting decision, in fact I think it is the most interesting of the four. If you have time to read just one of them—and you might because these are all pretty long decisions—I would read this one. It is a preliminary injunction decision in which he granted Sun's application for a must-carry order for its Java virtual machine, something Judge Kollar-Kotelly had rejected as one of the remedies the states had sought. I think though it was particularly interesting because he engages in a discussion of tipping and network effects. These are very important economic phenomena in high-technology industries, and he does this in the context of a preliminary injunction ruling where he says that although tipping is not imminent, and indeed he couldn't ascertain when it would occur, it was sufficiently likely in his view that it justified the granting of the injunction.

I thought his reasoning was very interesting and in a portion of his opinion where he discusses why he chose to enter a preliminary injunction rather than allow the case to proceed to damages, he dropped a footnote that has very ominous implications for those of us here in this room and our economist friends. He said from an economic point of view it makes far more sense to invest resources in actual competition which will enhance the performance of the competing products and bestow benefits upon consumers than in compensating economic experts and lawyers for constructing and arguing about hypothetical scenarios.

Since I wrote my paper, which was a few weeks ago, there have been a couple of other developments I wanted to bring your attention. There is a very large $1 billion settlement in the state court consumer class action in California where they have an *Illinois Brick* repealer in the Cartwright Act. Indeed, the settlement out there is $1 billion and is about the same amount as the nationwide settlement that Judge Motz earlier had rejected. And then finally, as Bill implied, two of the states, Massachu-

setts and Florida, have filed appeals from Judge Kollar-Kotelly's decision. And there also has been a motion for leave to appeal made in her Tunney Act decision by several trade associations represented by Judges Bork and Starr. Judge Kollar-Kotelly recently denied their motion for leave to appeal and it will be interesting in the following year to see whether they do have an opportunity to get their case up before the D.C. Circuit.

Bill.

**MR. LIFLAND:** We turn now to another topic:

## Acquisitions

The most significant developments seem to take place in the agencies, both here and in Europe, rather than in court rulings. The Federal Trade Commission closed an investigation of two proposed acquisitions of firms engaged in the ocean cruise industry. In a statement defending its decision, the FTC explained that even though each of the proposed transactions would combine two of the four largest cruise firms, a fact-specific analysis demonstrated that no unilateral or coordinated anti-competitive effects were likely. While the significant increase in concentration in an already highly concentrated market raised a presumption that the proposed acquisitions could stifle competition, the FTC stated that the presumption should not be irrebuttable. It stressed that the market was fast-growing and highly competitive; that there was a complex pricing structure that eluded monitoring by rivals and that the customer demand was highly elastic.[11]

In another case that was litigated there was a rather interesting outcome. The case related to a glassware acquisition. The FTC went to court for preliminary relief, and there was some last-minute restructuring to try to avoid an injunction. The restructuring was to limit the acquisition to the seller's manufacturing assets, thus leaving the seller free to continue competition as a distributor for a foreign manufacturer. I assume that there was such a foreign manufacturer ready to appoint the seller as its distributor, because the FTC's argument focused on the fact that under the restructured model, the seller would have its cost increased by four percent, presumably because it was giving up manufacturing profit.

The FTC argues that this four percent cost disadvantage would weaken the seller's ability to compete, making the transaction anti-competitive. The court went along with that argument, stating that while there were some benefits of the transaction, it could not approve it, given the increase in cost.[12]

It would be tempting, perhaps, to read the glassware case as indicating that seller asset retention is an ineligible method of restructuring, but that would be wrong. Precisely this kind of restructuring was done with agency approval in another case. A settlement agreement required the seller to retain two plants, one in the U.S., one in the Argentine. The plants made gelatin products, and the result of the retention was to give the seller the same U.S. presence as the buyer had previously. In effect, the buyer and the seller switched market positions, and industry concentration was left nearly unchanged.[13] In future cases we might see more of such settlements, but perhaps we will also see the FTC looking for evidence that the seller's costs will not be materially increased by the transaction.

## Horizontal Restraints

These restraints include "combinations" which may violate Section 1 of the Sherman Act. There continue to be questions as to the meaning of the term "combination." There were two especially interesting cases during 2002 on this subject.

The Fourth Circuit ruled on a controversy concerning the mineral vermiculite. One vermiculite processor had reserves in Virginia, and it proposed to sell them to a rival. The parties could not agree on terms, however, and the owner ultimately agreed to give the land to a charity with a restrictive covenant that precluded the extraction of the vermiculite from the land. The disappointed buyer thereupon sued, charging that the arrangement, which was a gift, was unlawful. The court ruled that the mere receipt of a gift by the donee did not constitute concerted action or indicate conscious commitment to a common scheme designed to achieve an unlawful objective.[14]

The First Circuit, however, was much less decisive in another case. The controversy involved major league soccer. That soccer league operates a little differently from other sport leagues, in that the league owns all the team franchises, negotiates all the player contracts, and in effect rents out the franchises to the same kind of people who in other sports contexts would be known as franchise owners. The players challenged the soccer league's method of operation as in essence a conspiracy to impose salary caps. The district court ruled that there was no conspiracy because the soccer league was a single entity and not a collection of separate teams. The circuit court, however, waffled. Describing the case as a "hybrid" arrangement between a single firm and a cooperative arrangement between competitors, the court said it was unnecessary to decide the issue because the jury had already found against the plaintiffs on a monopolization claim, indicating that no relevant market had been proved. The court assumed that the jury would make the same finding with respect to the conspiracy claim, and accordingly it did not matter how the issue of single entity was resolved.[15]

The related question of how much evidence is needed to permit a jury to infer an agreement is discussed in

a Posner opinion for the Seventh Circuit. Reversing a summary judgment, the court ruled that the jury could rely on evidence of a market with few players, some noncompetitive behavior and some suggestion of an explicit price-fixing agreement.[16]

Steve, do you want to comment?

**MR. HOUCK:** Yes, I conceive one of my roles here to be to point out to you opinions that bear your reading. And I think this is clearly one.

As Bill said, it's a Posner opinion, and those are invariably interesting. And this one indeed was surprising, at least to me, because it is very pro-plaintiff in orientation.

As Bill said, he reversed a summary judgment decision on behalf of defendants.

I thought it was interesting for several reasons. One is that it contains a very extensive discussion of the interplay between economic evidence and noneconomic evidence, and also contains a very interesting exegesis of the characteristics of the market structure that are congenial to price fixing. Also I thought it was interesting because at several points—although he doesn't hold this—he suggests that a purely tacit agreement fixing prices may be actionable, and by tacit he means one with no express agreement or even communication between the parties. And he gives as an example a situation where a competitor announces a price increase with the expectation that others will follow. To me that is a fairly extreme position, particularly coming from Judge Posner. As I said, he doesn't hold that to be illegal but certainly suggests that it might be.

Then he also has a very long interesting discussion of the appropriate standard on summary judgment, where he takes issue with the Third Circuit opinion that says there has to be explicit evidence of price fixing, that is evidence requiring no inferences. Judge Posner says that's wrong because the distinction between direct and circumstantial evidence is meaningless. And he writes: "The former, that is direct evidence, is tantamount to acknowledgment of guilt. The latter is everything else, including ambiguous statements. These are not to be disregarded because of their ambiguity. Most cases are constructed out of a tissue of such statements and utter circumstantial evidence."

Then he goes on to give some examples of the noneconomic evidence of conspiracy here and actually makes one wonder why summary judgment was granted. Just to give you some flavor, one example that Judge Posner cites is a statement by the president of one of the alleged co-conspirators where he says, "our competitors are our friends; our customers are the enemy." Judge Posner dryly observes this statement will win no friends for capitalism.

The opinion goes on, and there are several other interesting aspects of it. One is his ruling on an evidentiary issue. One of the former presidents of defendant was in jail as a result of being convicted for participating in another price-fixing conspiracy and invoked the Fifth Amendment. Judge Posner held that his invocation of the Fifth Amendment could be used to draw inferences against his former company, although not the other co-conspirators. I thought that was an interesting ruling. And then he goes on to discuss how the district judge might manage a very complex antitrust case like this one, including a discussion about the desirability of appointing a neutral economic expert to try to make sense out of some of the statistical evidence that apparently was going to be forthcoming.

**MR. LIFLAND:** One of the more interesting rulings on how much evidence is needed to establish a conspiracy was a case in arising out of the auction price-fixing cases. In the course of summation, the prosecutor referred to Adam Smith's famous comment to the effect that competitors seldom meet together without hatching a conspiracy against the public. The use of this quotation was challenged in the appellate court. The appellate court said that the reference was harmless error, since there was adequate direct evidence of conspiracy. The court added that it might have been otherwise in a case in which the plaintiff was relying on circumstantial evidence because a price-fixing conspiracy could not be inferred merely from evidence of a meeting of competitors.[17] This is in accord, of course, with the numerous statements to the effect that in addition to parallel action there must also be some other indication that tends to disprove the hypothesis of independent action.[18]

## Vertical Restraints

In the vertical restraints cases there were some decisions which quoted the "commercial reality" test that comes from the Supreme Court's 1977 *Sylvania* ruling. In one case the Fifth Circuit upheld a dismissal of an exclusive dealing complaint. The complaint had alleged that a city had unlawfully granted exclusive vending rights to a particular soft drink distributor. The court found that the alleged geographic market, which was confined to city facilities, did not correspond to commercial reality and was not economically significant.[19]

In the other case, a fence manufacturer was charged with unlawfully tying sales of nuts and bolts to sales of a particular type of fencing. The manufacturer was alleged to have monopoly power over the fencing. The court allowed the monopolization claim to stand but dismissed the tying claim, saying that it could not ignore the commercial reality which made it impossible to think that the alleged tie could have any anti-competitive effect on the market for items like nuts and bolts which were universally available.[20]

There was another interesting vertical case brought by a beer distributor against its supplier. The distributor alleged that whenever it sought to increase its price, the supplier increased its price as well. This made it pointless for the distributor to try to implement a needed price increase. The distributor claimed that the brewer was in effect fixing the distributor's resale price. The court ruled that absent evidence of a conspiracy or coercion, the distributor's case failed because the brewer's unilateral price adjustments could not be construed as unlawful vertical price fixing.[21]

## Foreign Commerce

There were a number of decisions involving foreign commerce in 2002, and Ned would like to cover them.[22]

**PROFESSOR CAVANAGH:** Thanks, Bill.

In the wake of aggressive enforcement against foreign cartels in recent years, particularly in the Clinton administration, there have been a number of private lawsuits that have been brought—*ADM Vitamins*—private treble damage lawsuits in the civil realm. What's emerged from these cases is a sort of new class of plaintiffs—foreign purchasers claiming treble damages based on transactions that occurred outside the United States. And this raises interesting questions of standing and also of subject-matter jurisdiction under the Foreign Trade Antitrust Improvement Act. That law, the FTAIA, was enacted in 1982.

And think back now to 1982. That was not a period where antitrust enforcement was favored. You'll recall in that time frame that Malcolm Baldridge, then-Secretary of Commerce, said maybe we should repeal Section 7 of the Clayton Act. There was a sense that maybe antitrust laws were being used to the disadvantage of American producers, particularly those engaged in export sales who claimed to be competing with foreign sellers who were not bound up by the same sort of restrictions that domestic sellers were under the antitrust laws. And that gave birth to the FTAIA. The other concern with the FTAIA, if you recall in the 1970s, was the outcry against the United States for exporting its antitrust laws and bringing antitrust suits against behavior that had nothing to do with the United States.

In any event, the FTAIA was passed. Unfortunately the statute is very difficult to read. It is an exemption from Sherman Act coverage with a large exception. And every time I read it I get a headache. But I commend it to you, 15 U.S.C. Section 6A. Basically, allow me just to say—and I think this is accurate—that courts have no subject-matter jurisdiction over foreign trade or commerce unless there are direct, substantial and reasonably foreseeable effects on domestic commerce, and the conduct gives rise to a claim under the antitrust laws. So there's two requirements there.

Now, recent cases address both of these prongs of the FTAIA and I want to talk about several of those cases. First is *Kruman*. This is an outgrowth of the auction house cases in an international conspiracy to fix the prices of buyer's premiums between Christie's and Sotheby's. One of the private cases in *Kruman* involved plaintiffs who purchased at auctions abroad. Some of them were Americans, but all of the purchasers purchased abroad. They sued for treble damages.

Defendants moved to dismiss, claiming that there was no subject-matter jurisdiction. Judge Kaplan agreed and dismissed the case. And Kaplan said that while clearly the conduct has caused an effect on domestic commerce, the sufficient direct substantial and reasonably foreseeable effect, these plaintiffs are not suing based on claims arising in the United States market, because their injury was abroad. In other words, there was no antitrust injury. The Second Circuit reversed. The Second Circuit said that Judge Kaplan confused the Sherman and Clayton Acts, and in effect, as long as there is a domestic effect as a result—as long as there is some plaintiff in the United States who could sue—then foreign plaintiffs may sue. A very broad reading of the statute.

Now, that put the Second Circuit clearly at odds with the Fifth Circuit which in the *Statoil* case had addressed the same issue. In *Statoil,* a majority, over a strong dissent by Judge Patrick Higginbotham, said that the foreign plaintiff had to show that its injury came as a result of the domestic anti-competitive effects. And the Fifth Circuit threw the case out.

You have here now I think a case of issues here that is ready for the Supreme Court, and the battle lines were fairly clearly drawn, until last week in the vitamins case. The case is the *Empagran* case; the D.C. Circuit addressed the exact same issue that had come up in *Kruman* and *Statoil,* but came out with a decision that is somewhere in between. It's sort of a muddying situation.

The D.C. Circuit's ruling was a two-to-one decision, and I expect they are going to try to *en banc* this. But Judge Harry Edwards wrote the majority opinion. Clearly in the vitamins case international cartel you had an effect on United States commerce, but you had foreign plaintiffs, and the question was whether these foreign plaintiffs have to show that their claim is brought as a result of adverse effects on United States commerce. The court criticized both decisions and came out somewhere in between *Statoil* and *Kruman*. And basically what the court said was this: We are going to find that there is subject-matter jurisdiction here. But we think that in *Kruman*, the Second Circuit went too far. It suggested if there was any plaintiff that was hurt, we will permit subject-matter jurisdiction only if there is a private plaintiff who could sue. In other words, if there was a governmental or regulatory authority that might be able to sue, that

would not be enough. You have to show that there was a private plaintiff to sue.

Now, I read this opinion a couple of times. The analysis is very unsatisfactory. It seems to me it is very outcome-oriented and there's not a good analytical distinction between *Kruman* on one hand and *Statoil* on the other hand.

And then there are a couple of other cases. These cases that I just mentioned, the question of domestic effects, clear and uncontroverted. Two cases dealt with whether or not there was the sufficient direct substantial effect on United States commerce. *Turicentro*, in the Third Circuit and the *Dee-K* case in the Fourth Circuit. *Turicentro* involved an alleged conspiracy by a trade association of foreign airlines, including four United States domestic carriers to fix and lower the commissions of travel agents in Central America. It was clear that none of the domestic carriers participated in any of the alleged meetings that took place to supposedly fix these commissions for travel agents. All of the travel agents were in Central America. All of the commerce involved flights into Central America, and the Third Circuit said there's no nexus to domestic commerce here, therefore the requisite anti-competitive direct substantial anti-competitive effect is lacking, therefore there is no subject-matter jurisdiction. The court noted the dispute between the Second Circuit and the Fifth Circuit but declined to jump into that thicket.

The last case I wanted to address and I think is somewhat instructive on the issue of whether or not there is sufficient direct and substantial effect on domestic commerce is *Dee-K Enterprises* in the Fourth Circuit. That case involved a conspiracy of foreign manufacturers who were selling to price-fixed rubber thread purchasers in the United States. The conspiracy was hatched abroad. All of the participants were abroad. All of the meetings took place abroad. Most of the sales took place abroad. Only some of them took place in the United States. The court said the mere fact that some sales resulting from this cartel occurred in the United States and that there were some purchasers who were in the United States who were injured by this conduct is not enough to establish jurisdiction under the first part of the FTAIA. The court categorically rejected any sort of simplistic rules and substituted what it considered a flexible and multifaceted inquiry. And the question before the court isn't whether there was no domestic effect at all, but whether or not it was primarily foreign or primarily domestic. And in this case the court said, given the facts that I've just recited to you, this was a primarily foreign cartel, and as a result of that, domestic effect is lacking, no jurisdiction under the FTAIA.

And finally, one wild card in all of this, and Steve is sitting next to me. What about the states? There are very few cases on the limitations imposed, subject-matter jurisdiction limitations imposed on state antitrust authorities. And rest assured there's a case in Texas, a case in Connecticut, where states are asserting broad jurisdiction under state law and are claiming not to be bound by the FTAIA. In other words, they have broader jurisdiction under state law than the federal government does under federal law, and this will be an interesting development to monitor.

Bill.

## Standing

**MR. LIFLAND:** Standing continues to be an extremely important issue in private antitrust cases. One of the more interesting decisions to come down recently involves a suit by copper purchasers against firms that were charged with unlawfully manipulating the price of copper futures. The Seventh Circuit reversed a district court ruling of no standing, relying on evidence that the price plaintiff paid for physical copper was influenced by the artificially inflated prices for copper futures which was attributable to the manipulation.[23]

Ned would like to say a word about the Federal Rules.

**PROFESSOR CAVANAGH:** Not specifically antitrust subject matter but certainly on antitrust, I want to remind everybody that the Federal Rules, the amendments to the Federal Rules of Civil Procedure have gone forward and are now pending before the United States Supreme Court and are expected to be approved in April. If things occur in the normal course, and Congress does not intervene, the amendments will take effect probably on December 1st of this year. The most important changes deal with class actions, and I just want to outline a couple. Again, this is generic to all federal litigation, but it also impacts on antitrust litigation.

Just a couple of highlights of things that we should notice. One, the rules will require mandatory notice in all class actions. Right now mandatory notice is only required under B3. It will be required in B1 and B2 class actions now. The court does make one concession though. Whereas the notice in B3 class actions has to be best notice practicable under the circumstances, the B1 and B2 class action notice can be something less or calculated to reach a reasonable number of class members.

Secondly, the rules will permit a second opportunity to opt out in B3 class actions. You know, initially in B3 class actions you have an opportunity to opt out at the beginning. At the settlement stage you will now have a second opportunity to opt out. The drafters were concerned about the need to protect the members of the class from the forces of inertia and ignorance that may undermine the presettlement opportunity to opt out.

This is great, I suppose, for plaintiffs. Something the defendants don't like; even the defendants today are looking to get out from under, looking to get as many people in the class. And the second opt-out opportunity is going to give tremendous opportunities for strategic behavior, number one, and may open the door to significant discovery at the settlement stage, which could be very, very costly.

A couple of other things to note. The new Rule 23G will codify procedures for appointment of class counsel which, you know, heretofore had been done by case law. Among other things, in appointing counsel for the class, the court can inquire into the fee structure. The rules here are really permeated with the notion that class actions are fee-driven and that fees are an important part of the incentive to bring actions and the important part of being able to retain quality attorneys.

As an example of this, Judge Kaplan in the auction house cases had competitive bidding. And he ended up selecting Boies & Schiller and basically said, you know, give me a number, X, anything below and up to, you actually will not claim attorneys' fees on. You will only get attorneys' fees on the number above X. What happens here with this competitive bidding model is that the judges are hoping to capture more money for the settling class and reduce the sort of leakage from attorneys' fees, which is not something that we as attorneys like to hear about.

The last thing in the amendments I want to call to your attention is that they create a more formalized framework for attorneys' fees. I mean we have got lodestar, we have got percentage recovery method, we have now got competitive bidding, and now the courts are encouraged at the outset to deal with whatever the fee structure is going to be. But a heads-up. These rules are coming, and I think they are going to have a significant effect on all litigation, but particularly antitrust litigation.

Bill.

**MR. LIFLAND:** Two footnotes on procedural subjects. One has to do with the proliferation of electronic record-keeping, which exposes parties to very significant costs in responding to discovery requests. In one of the noted rulings a magistrate weighed a great many circumstances and finally issued guidelines under which plaintiffs were required generally to bear the cost of production and defendants were responsible for review of privileged material.[24]

The other footnote relates to admissibility of expert testimony, which is also an increasingly frequent subject of controversy. In an antitrust suit that was brought by suburban newspapers against competitors, the court excluded the testimony of plaintiff's expert on the ground that the witness's extensive experience in the newspaper business did not qualify him to testify as to relevant antitrust markets because of his lack of experience in economics or antitrust analysis. This decision provides still further incentive for both parties, plaintiff and defendant, to consult their antitrust and economics experts early and often.[25]

Finally, a brief word on arbitration. Perhaps the most significant development in the 2002 antitrust decisions is an apparent trend that will ultimately substantially reduce the number of such decisions. That trend is in rulings upholding arbitration of antitrust disputes. The First Circuit commented early last year that there was no longer any reason to conclude that federal law or policy exempted antitrust claims from the pro arbitration presumption of the Federal Arbitration Act.[26] The court went on to say that it was time to lay to rest older rulings, and antitrust claims were not arbitratable because of the pervasive public interest underlying the antitrust laws. It was noted that several other circuits had questioned or abandoned the doctrine of non-arbitrability.

This view is not universally accepted. The Oklahoma Supreme Court took a contrary view.[27] But the First Circuit's position appears to be in accord with the modern position, at least in the federal courts.[28] The result may be that arbitration clauses in existing agreements will be read to cover antitrust disputes, and in some cases they may be given a very broad interpretation.

Now, if the trend toward greater use of arbitration continues, the bulk of antitrust litigation may ultimately come to be government enforcement cases, plus whatever private disputes are not subject to a preexisting or subsequently adopted antitrust clause. This is not necessarily a good development. Many lawyers believe that arbitration is a useful way of resolving some disputes, particularly narrow factual disputes. But arbitration is not the best means for every case, particularly cases where the issues are broad.

Where there are multiple arbitrators and the meetings of the arbitrators tend to be spaced out over a long period of time to accommodate the various schedules of the arbitrators, the proceedings may also drag on for a long time and become very expensive.

Now, if your client wants all disputes to be arbitrated, he or she may be satisfied with a conventional "all disputes" arbitration clause. But if, on reflection, he or she wants more limited arbitration or even no arbitration, then it would be wise to review outstanding agreements and make any necessary revisions as early as possible.

I think we have about five minutes left, do we, Pam?

**MS. JONES HARBOUR:** Yes, for questions, if there are any.

**MR. LIFLAND:** Are there any questions the panelists would like to put to each other? Any questions from the floor? Well, thank you very much, ladies and gentlemen, for your attention.

**MS. JONES HARBOUR:** Thank you, Bill, Ned and Steve for your insightful commentary.

## Endnotes

1. *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.,* 2002-1 CCH Trade Cases ¶73,524 (9th Cir.) (summary judgment for defendant reversed; plaintiff's evidence suggested that customers recognize branded product as separate entity commanding higher prices).
2. *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.,* 2002-2 CCH Trade Cases ¶73,801 (10th Cir.) (damage award affirmed; cellular phones not part of relevant market in monopoly case alleging that local carrier acted illegally in binding location-owners to long term leases).
3. *Fresh Made, Inc. v. Lifeway Foods, Inc.,* 2002-2 CCH Trade Cases ¶73,779 (E.D. Pa.) (complaint dismissed without prejudice; complaint did not allege facts indicating that the alleged market for specialty Russian dairy products was distinct from the market for yogurt, other drinkable yogurt products or other dairy products in general; complaint did not indicate whether there are reasonably interchangeable alternatives for the specialty products and made no allegations regarding the price of products in the alleged relevant market relative to other dairy products).
4. *42nd Parallel North v. E Street Denim Co.,* 2002-1 CCH Trade Cases ¶73,570 (7th Cir.) (dismissal affirmed; alleged geographic market—apparently a particular neighborhood in the Chicago area—was "absurdly small").
5. *Maris Distribution Co. v. Anheuser-Busch, Inc.,* 2002-2 CCH Trade Cases ¶73,788 (11th Cir) (directed verdict for defendant affirmed; defendant's 48% share of the market for beer should not be imputed to the market for the purchase and sale of ownership interests in beer distributors unless there was some "connection" between the two markets).
6. *Bailey v. Allgas, Inc.,* 2002-1 CCH Trade Cases ¶73,607 (11th Cir.) (supracompetitive oligopoly pricing not shown merely by evidence that defendant's estimated rate of return on its assets for a two-year period was substantially greater than the average rate of return for Fortune 500 companies; even if return on assets could be used to measure market power, the appropriate comparison would be between the predator's return and the return of similar firms in the same or similar industries over the course of several years).
7. *Law Office of Curtis V. Trinko LLP v. Bell Atlantic Corp.,* 2002-2 CCH Trade Cases ¶73,719 (2d Cir.) (dismissal reversed; complaint alleged conduct that may support an antitrust claim under the "essential facilities" doctrine, which may impose a duty to deal with competitors—or on "a monopoly leveraging" theory, which might bar use of monopoly power in the wholesale local telephone services market to gain a competitive advantage in the retail market); *Covad Communications Co. v. Bell-South Corp.,* 2002-2 CCH Trade Cases ¶73,761 (11th Cir.) (dismissal reversed; complaint sufficiently stated Sherman Act violations based on multiple theories: denial of access to "essential facilities" on reasonable terms, "refusal to deal" with a competitor by a monopolist and creation of a "price squeeze" by setting its wholesale price charged to competitors too high for the competitors to earn adequate profits at prevailing retail prices).
8. *Conwood Co., L.P. v. United States Tobacco Co.,* 2002-1 CCH Trade Cases ¶73,675 (6th Cir.) (billion-dollar judgment affirmed; principal exclusionary activity alleged was removing racks and advertising materials of competitors from retail stores; evidence considered in the context of plaintiff's theory that defendant engaged in a concerted effort to shut plaintiff out from effective competition through elimination of its racks and in-store advertising in a market in which such advertising was the "central market-place battleground"), *cert. denied,* Jan. 13, 2003.
9. *Le Page's, Inc. v. 3M,* 2002-1 CCH Trade Cases ¶73,537 (3d Cir.) ($68 million judgment reversed; claim of monopolization based on a dominant competitor's use of a bundled rebate program which rewarded customers for purchases of multiple product lines; court stated that holding for the plaintiff would risk curtailing price competition and discouraging a method of pricing beneficial to customers), *en banc* review granted.
10. *U.S. v. Microsoft Corp.,* 2002-2 CCH Trade Cases ¶73,851 (D.D.C.); *see also State of New York v. Microsoft Corp.,* 2002-2 CCH Trade Cases ¶¶852-73, 854 (settlement with modification comports with public interest).
11. *Royal Caribbean Cruises, Ltd.*, CCH Trade Reg. Rep. ¶15,310 (2002).
12. *FTC v. Libbey, Inc.,* 2002-1 CCH Trade Cases ¶73,650 (D.D.C.) (preliminary injunction granted; evidence indicated that there could be some positive results of challenged acquisition, but these results were not believed to outweigh the potential harm given the absence of evidence to establish that the retained business would be able to compete effectively despite higher costs).
13. *Deutsche Gelatine-Fabriken Stoess AG,* CCH Trade Reg. Rep. ¶15,228 (settlement would require the selling party to retain two of its plants—one in the United States and one in Argentina—so as to give the selling party virtually the same United States presence as the buyer had before the acquisition).
14. *Virginia Vermiculite Limited v. Historic Green Springs, Inc.,* 2002-2 CCH Trade Cases ¶73,823 (4th Cir.) (donation of land with a restrictive covenant prohibiting use of the land for vermiculite mining held unilateral action not falling within Section 1 of the Sherman Act).
15. *Fraser v. Major League Soccer, L.L.C.* 2002-1 CCH Trade Cases ¶73,620 (1st Cir.) (soccer league a "hybrid arrangement" somewhere between a "single firm" and a "cooperative arrangement between existing competitors").
16. *High Fructose Corn Syrup Litigation,* 2002-1 CCH Trade Cases ¶73,711 (7th Cir.) (totality of the evidence would be "enough to enable a reasonable jury to infer" an express price-fixing agreement)**;** *SmithKline Beecham Corp. v. Eastern Applicators, Inc.,* 2002-1 CCH Trade Cases ¶73,709 (E.D.) (no summary judgment for defendant; evidence, while inconclusive, was sufficiently persuasive to permit an inference of collusion); *Alakayak v. British Columbia Packers, Ltd.,* 2002-2 CCH Trade Cases ¶73,726 (Alaska Sup. Ct.) (summary judgment reversed; evidence of "plus" factors tended to exclude the possibility of independent nonconspiratorial action).
17. *United States v. Taubman,* 2002-2 CCH Trade Cases ¶73,753 (2d Cir.) (conviction affirmed; quotation from Adam Smith troubling but harmless in this instance because of the substantial direct evidence of conspiracy, result might be different in a circumstantial evidence case, because the quotation improperly suggests that a price-fixing conspiracy can be inferred merely from evidence of meetings among competitors).
18. See cases cited in note 16 above.
19. *Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.,* 2002-2 Trade Cases ¶73,769 (5th Cir.) (dismissal affirmed; alleged relevant geographic market—limited to the 27 facilities owned by the city—was insufficient as a matter of law because it did not correspond to the commercial realties of the industry and was not economically significant).
20. *StunFence, Inc. v. Gallgher Security (USA), Inc.,* 2002-2 CCH Trade Cases ¶73,789 (N.D. Ill.) (tying claim dismissed; impossible for the alleged tie to have an anticompetitive effect on the market for everyday products).

21. *Lubbock Beverage Co., Inc. v. Miller Brewing Co.,* 2002-2 CCH Trade Cases ¶73,767 (N.D. Tex.) (partial summary judgment granted; brewer's unilateral changes in its own wholesale price in response to the distributor's resale price adjustments did not constitute unlawful price fixing).

22. *Kruman v. Christie's International PLC,* 2002-1 CCH Trade Cases ¶73,600 (2d. Cir.) (dismissal reversed; antitrust laws apply to conduct directed at foreign markets only if the conduct injures domestic commerce by either reducing the competitiveness of a domestic market or enabling anticompetitive conduct directed at domestic commerce)**;** *Turicentro, S.A. v. American Airlines, Inc.,* 2002-2 CCH Trade Cases ¶73,795) (3d Cir.) (no jurisdiction where defendants were not involved in "import trade or import commerce" by using the services of foreign travel agents to sell airline tickets abroad and the alleged collusion did not have any "effect" on United States commerce); *Crompton Corp. v. Clariant Corp.,* 2002-2 CCH Trade Cases ¶73,799 (M.D. Louisiana) (no dismissal where alleged damages were for products purchased and delivered abroad and court found that the challenged conduct could injure the U.S. economy)**;** *Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.,* 2002-2 CCH Trade Cases ¶73,756 (4th Cir.) (judgment for foreign defendants affirmed because conspiracy had no "substantial effect" on U.S. commerce).

23. *Loeb Industries, Inc. v. Sumitomo Corp.,* 2002-2 CCH Trade Cases ¶73,813 (7th Cir.) (standing found to exist for purchasers of physical copper to seek damages for manipulating price of copper futures contracts; physical copper prices influenced by futures market).

24. *Rowe Entertainment Inc. v. William Morris Agency Inc.,* 2002-1 CCH Trade Cases ¶73,567 (S.D.N.Y.) (magistrate found factors tipped heavily in favor of shifting to the plaintiffs the costs of discovery of e-mail evidence; plaintiffs generally were to bear the cost of production, but defendants were responsible for the expense of review of privileged or confidential material).

25. *Berlyn, Inc. v. Gazette Newspapers, Inc.,* 2002-2 CCH Trade Cases ¶73,788 (D. Md.) (expert ruled unqualified to testify on relevant markets despite extensive industry exposure; expert lacked experience in economics or antitrust analysis).

26. *Seacoast Motors v. DaimlerChrysler Motors Corp.,* 2001-2 CCH Trade Cases ¶73,492 (1st Cir.) (earlier rulings that antitrust claims were not arbitrable because of the pervasive public interest in enforcement of the antitrust laws should be laid to rest).

27. *Cardiovascular Surgical Specialists Corp. v. Mammana,* 2002-1 CCH Trade Cases ¶73,654 (Oklahoma Sup.) (parties could not "waive" statutory benefit by agreeing to submit issues to arbitration).

28. *Automated Technology Machines Inc. v. Diebold Inc.,* 2002-1 CCH Trade Cases ¶73,699 (E.D. La.) (listing rulings that antitrust claims may be arbitrated).

# *United States v. Taubman* and Beyond: Recent Trends in Criminal Enforcement

**MS. JONES HARBOUR**: May I ask you to come in and take your seats. We are about to begin our next program. Thank you.

This next panel will explore recent trends in criminal antitrust enforcement, including the widely reported antitrust conspiracy between two famous auction houses, Sotheby's and Christie's in *U.S. v. Taubman*.

Our eminent panelists include attorneys from the criminal defense bar, an economist and Antitrust Division prosecutors. They will provide guidance on handling international cartel cases, the various aspects of a criminal antitrust investigation, and the economic consequences of global criminal antitrust conspiracies. There will also be a discussion of the corporate leniency policy and the pre-indictment presentation to headquarters.

Here to moderate this program and to introduce its speakers is Steve Tugander. Steve is a trial attorney in the New York field office of the Justice Department Antitrust Division. He is a 1986 graduate of the University of New York at Stony Brook, and a 1989 graduate of Hofstra University. Steve has been with the Division since 1989, working primarily on criminal matters. Steve.

**MR. TUGANDER:** Thank you, Pam.

As Pam noted, we are going to spend the next hour and 45 minutes talking about some of the latest trends and developments in federal criminal antitrust enforcement. I want to note that we are going to leave time at the end for some questions, about ten to fifteen minutes, so I'll ask that you hold your questions until then.

Our panel this morning is a very experienced group. They come from both government and private practice. John Greene is an attorney in the Antitrust Division's New York field office. John has extensive experience prosecuting antitrust criminal cases, and he was the lead prosecutor in *U.S. v. Taubman*. Welcome, John.

Ralph Giordano is the Chief of the Antitrust Division's New York field office. The New York field office is responsible for criminal antitrust prosecutions in the northeast region of the U.S. Prior to becoming Chief, Ralph worked in the New York field office as a trial attorney and worked on various civil and criminal antitrust matters. Welcome, Ralph.

Scott Hammond serves as the Antitrust Division's Director of Criminal Enforcement in Washington D.C. Scott has supervisory authority over all of the Division's criminal investigations and prosecutions. Scott's responsibilities include reviewing all requests for amnesty under the Division's leniency policy. Welcome, Scott.

Joe Linklater is a partner with Baker & McKenzie in Chicago, specializing in criminal and complex litigation. Joe has been involved in several international criminal antitrust cases, and those cases have been in the U.S., Canada and Europe. Joe represented Christopher Davidge, a key government witness in the *Taubman* trial. Welcome, Joe.

And Gary Spratling is a partner with Gibson, Dunn & Crutcher in its San Francisco office and co-chair of the firm's antitrust practice group. Prior to joining Gibson, Dunn, Gary spent 28 years with the Antitrust Division, most recently as Deputy Assistant Attorney General.

As deputy, Gary was responsible for all of the Division's criminal cases. Gary was also responsible for spearheading the Division's increased prosecution of international cartels and enhancing cooperation among international antitrust authorities. Welcome, Gary.

And finally, Dr. Stephen Prowse is a principal in KPMG's Dallas office. Dr. Prowse has a Ph.D. in economics from UCLA and is a chartered financial analyst. Dr. Prowse has extensive experience in providing litigation service to clients involved in antitrust litigation and has provided economic analysis in a variety of industries. Welcome, Dr. Prowse.

Before we turn to our panelists, just a little background on the *Taubman* case. I'm sure as most of you are aware, in December of 2001 a jury in the Southern District of New York convicted former Sotheby's chairman Alfred Taubman of violating Section 1 of the Sherman Act. Taubman was convicted for his participation in a conspiracy among the auction house competitors, Sotheby's and Christie's, to fix commission rates charged to sellers. Taubman was sentenced to a term of one year and one day in prison and a fine of $7.5 million.

Now the trial was preceded by a thorough investigation of the fine arts auction industry. Prior to the *Taubman* trial, Sotheby's pleaded guilty to a similar Section 1 charge and received a fine of $45 million. Christie's was not prosecuted by the Antitrust Division but instead cooperated pursuant to the Division's corporate leniency program. Parallel civil class action litigation resulted in Sotheby's agreeing to pay over $500 million in damages.

At trial the government's case consisted mainly of the testimony of two key witnesses, Christopher Davidge, the former CEO of Christie's, and Diana (Dede)

Brooks, the former CEO of Sotheby's. The case was also bolstered by incriminating documents. After trial Dede Brooks was sentenced to six months home detention.

John, first turning to you, could you tell us in general terms where the investigation stood at the time Christie's applied for leniency in late 1999?

**MR. GREENE**: Well, the investigation basically started in the spring of '97. The Division had received an allegation that Christie's and Sotheby's had been fixing prices. I think it is fair to say the allegation was very sparse. It had really no details in it. Of course, we were very familiar with the auction industry because we had prosecuted numerous dealers for collusion at auctions. We were also aware from public information that Christie's and Sotheby's in late 1992 had announced an almost identical increase in their buyer's premium on or about the same time. Sotheby's went first, to be followed by Christie's. We were also aware that in the spring of '95 both companies had made changes in their sales commissions and had announced them in close proximity to each other.

The investigation proceeded in the normal way that antitrust investigations do. We sent out document subpoenas. We questioned lower management officials and the administrative assistants to higher management. We reviewed the documents we got in response to the subpoenas. Based on this information we concluded that the companies certainly had the motive and the opportunity to collude. The documents revealed and the answers of persons questioned told us that management of the companies had extensive contact with each other, this in a market that was really dominated by two companies. So that obviously was of interest to us.

Counsel for both companies and indeed all the employees we talked to and their counsel frequently reminded us that these companies were mortal enemies of each other, that they fought like dogs over every piece of business and that no rational person would think that they would fix prices. But nevertheless we were unpersuaded by that, bearing in mind the words of that famous Scottish economist. So we proceeded. (Laughter.)

In late 1999, it was upper management's turn to explain to us how they came about making these pricing decisions. As the papers filed in the case reveal, at that time a number of people at Christie's went and talked to outside counsel and told them things that I'm sure they did not like to hear. And the rest is history.

Christie's applied for amnesty, and I think it is fair to say that, at the time Christie's applied for amnesty under Part B of the amnesty program, we did not have evidence that we believed would result in a sustainable conviction, so they qualified under that prong of the amnesty program.

While not in direct response to the question, I would like to note that in the subpoena responses of the companies we had, as most antitrust subpoenas do, asked for the identification of all key price decision makers, and the subpoenas called for the companies to produce their diaries and calendars. Neither Christie's or Sotheby's in the initial response to our subpoenas identified Anthony Tennant or Alfred Taubman as having any role in the pricing decisions of the company. As events turned out, that did not turn out to be true.

My only point in bringing this up is that if you are responding to one of our subpoenas, I think you should not only canvass anybody who might have knowledge on the subject of who makes pricing decisions, but look carefully at corporate documents to see what they reflect with regard to who actually participated in pricing decisions. I think if that had been done in the auction case, the result might have changed somewhat.

**MR. TUGANDER:** John, now the civil suits were filed immediately after the press reported on Christie's amnesty application. What effect would you say the civil suits had on the criminal prosecution?

**MR. GREENE**: Well, I would say they complicated it, because at that stage the investigation was still ongoing. Nobody had been indicted and nobody had pled guilty. The suits were filed almost immediately after there were press reports of Christie's application for amnesty. They were filed both in state and federal court. The federal cases were eventually consolidated in front of Judge Kaplan here in the Southern District. The suits also named Alfred Taubman, Christopher Davidge, Tennant and others as defendants. Almost immediately after the cases were consolidated into a class action, the parties began to engage in extensive discovery under the more liberal Federal Rules of Civil Procedure.

The first wave of discovery was, of course, document demands. We were concerned because the document demands called for any documents that were turned over by Christopher Davidge and Christie's to the government. We were concerned that if the contents of these documents became public, it might have an adverse impact on our investigation. We moved to intervene in the civil case and asked for a stay of discovery for a very limited set of documents, basically the Davidge documents, which were contained in two redwelds.

Judge Kaplan decided that he would only give us a rather limited stay. I think he gave us two or three months, and those documents were eventually released to the defendants and obviously to the world at the same time. We had not indicted anybody and we had no plea agreements.

The next wave of discovery was for the depositions of key people. Most of this discovery was sought rather aggressively by defendant Taubman, basically of his co-defendant Christie's. They noticed for deposition a number of people who we thought were possible witnesses in a government case should we file one against Taubman, and again we moved for a stay. Judge Kaplan gave us a stay of approximately six months, but then there was a tentative settlement in the civil case which cut off Taubman's use of the civil discovery rules to prepare his defense for a very likely criminal case. So that ended the problems caused by the civil cases. I hope that answers your question.

**MR. TUGANDER:** John, in October 2000, several months after Christie's began to cooperate, Sotheby's and Christie's pleaded guilty. And obviously Brooks' testimony would be essential in a trial against Taubman, but she came with some baggage. What steps did you take in plea negotiations with Brooks' counsel to minimize the inevitable attacks on credibility that she was facing at trial?

**MR. GREENE**: Well, I think it is important to start out by clarifying what baggage she carried. That word has negative connotations. Sotheby's internal counsel and its outside counsel, once the subpoenas were issued, approached Brooks and asked her certain questions regarding what she might have known about the pricing decisions that the company made. It is obvious she didn't tell them at that time that she indeed had pricing agreements with Christopher Davidge. There is a lot of testimony in the transcript about whether or not she was asked a direct question on that point.

She had also been interviewed many times in connection with a British investigation of possible collusion in the '95 pricing announcement—I take that back. She wasn't interviewed but she played a very active role in preparing the company's response to our British colleagues who were investigating the exact same activity. So the argument of defense counsel we expected was that she lied to the British, she lied to corporate counsel, she lied to outside counsel. We anticipated that they would cross-examine her extensively about that.

We knew that their claim would be that she lied to get out of jail by incriminating Taubman. In fact, that claim came right up front, early in the opening statement. Her testimony against Taubman was, they claimed her get-out-of-jail card. So, in our plea negotiations, we wanted to make sure we didn't give her a get-out-of-jail card.

So in the plea agreement that finally resulted, the government agreed that it wouldn't make any specific recommendation regarding the sentence for Brooks. We left it up to the discretion of the judge who, at that time, was completely unknown to us. We could deflect any argument that we give her a get-out-of-jail card as a result of that provision in the plea agreement.

**MR. TUGANDER:** John, moving to the trial, in your closing argument you talked about Taubman's use of a dumb-and-hungry defense. Could you explain what you were referring to and also how you countered this and other defense arguments raised by the *Taubman* team?

**MR. GREENE**: Well, I characterized it that way because one of the themes in his defense was that Alfred Taubman, a semi-retired multimillionaire, who had made his fortune basically in the real estate business and in mall development, really did not have a significant interest in Sotheby's. It was almost like a hobby to him. The defense was that he wasn't involved at all in the financial management of the company; he was basically uninterested in its financial performance. Sotheby's represented only a very small part of his portfolio. According to the defense, the only interest he had in the company really was in the physical attractiveness of its showrooms and in its catalogs. Taubman also had a very personal interest in making sure that the company treated its clients very well.

In the past, as a customer of Sotheby's and Christie's, apparently Taubman had been treated very curtly whenever he went to their houses to do business. He found the staff condescending to people who were not part of the art scene, and he wanted to change that. That was the theme of the defense; he was never really interested in its financial affairs. The government had, in its argument, brought up the point that Sotheby's, at the time the agreement was entered into, was suffering financially, and that was the motive he had to collude with Tennant.

To establish this defense, they put on several witnesses, mostly employees of Sotheby's. One of them testified that, in his recollection, at board meetings Alfred Taubman frequently fell asleep and he would wake up and say what's for lunch? So basically that was how the dumb-and-hungry caption came about.

Obviously, to rebut this defense we put in evidence that Taubman was very actively involved in making pricing decisions. There was evidence of this in the company's own documents. We had minutes of board meetings where he was actively involved in considering whether or not to raise prices, and which showed his okay was needed effectively to raise prices.

Taubman obviously did have a rather large financial stake in the company; he was a very wealthy man. He had many millions of dollars invested in the company. He was a director of a number of large public companies, including banks. We made the argument that banks would not have somebody who was dumb and hungry and who fell asleep at their meetings on their boards of directors.

The argument that he was financially unsophisticated I thought was ridiculous. I mean intuitively, somebody who had grown up in a rather modest background, to become a billionaire, has got to have some financial acumen. Plus, we pointed out that around '92, Taubman's other businesses were not really faring too well and that Sotheby's was also heading south. He was in financial difficulties. But that was basically our defense to that argument.

Their other defenses. Of course, their principal defense was that Dede Brooks and Christopher Davidge were basically not credible. What I call their baggage argument. According to Taubman, they had lied to in-house counsel, they had lied to outside counsel, they had lied to the British government. In their filings with the SEC they had made false statements regarding the state of competition. Our argument against that was basically the fact that Brooks initially denied it was a normal human reaction of somebody who was caught. She had no reason to believe that the government would ever discover the truth. The only ones who really knew about it were Alfred Taubman, Anthony Tennant and Christopher Davidge. And she knew or thought she knew that they weren't talking, so why would she immediately tell these people what she had been doing with Davidge and Taubman and Tennant? To admit the crime right up front would result in personal disgrace, the loss of her job, financial ruin and criminal charges being brought against her. So we used that argument to explain to the jury why initially she didn't tell the attorneys basically what she had been doing.

Of course, Davidge's testimony corroborated her to a certain extent. The documents, Taubman's diaries corroborated her, and finally the notes that were taken by Anthony Tennant concerning his meetings with Taubman corroborated Brooks' testimony.

We also knew that as a witness her demeanor would stand up well under cross-examination. Obviously, she was a very accomplished executive. She was used to pressure situations. She was a hard bargainer. She was used to being on the hot seat. And she had an excellent attorney. So we had confidence that she would withstand cross-examination.

And the same thing is true with Davidge. He basically had the same baggage as Brooks, with an added problem that he had a severance package of 5 million pounds. They claimed that if Davidge didn't testify the way Christie's wanted him to testify, Christie's wouldn't get amnesty, and he wouldn't get his severance. So that and his prior lies was the baggage he was carrying. Again, our rebuttal was really the same as we had for Brooks. What did you expect him to do when he was asked these questions? He never expected to be found out. And again, like Brooks, of course he was ably represented by counsel who prepared him for cross-examination, and he knew what to expect. And again he was somebody who had spent his life on the hot seat. He had risen from being, I think, a janitor at Christie's to become the chief executive officer. So as we expected, he did acquit himself very well on cross-examination.

Another defense that we anticipated was, according to our evidence, Taubman and Tennant reached this agreement in April of '93, but the commissions were not changed until the spring of '95. We had argued that Sotheby's was in dire financial straits and that Taubman wanted to change it. Their argument was: Would Taubman wait two years for Dede Brooks to do what he told her to do? That was their argument to the jury.

Our counter argument to that was: At the time that she got her marching orders from Taubman to go and fix prices with Davidge she wasn't the chief executive officer of the company. She didn't get that position until early 1994. She was new to having responsibility for worldwide auctions. She knew that Davidge had been on the scene for many, many years and was very well acquainted with the international market. She wanted time to come up to speed, to his level of knowledge. She didn't want to meet with him right away.

Not only that, she realized, as Davidge did, the change in the seller's commission, unlike the buyer's premium, was a very complicated task. Because, especially with respect to large consignments, it was negotiated on a deal-for-deal basis, and it was rather complicated, and they had to make provisions to prevent cheating. Plus, they were aware that Christie's and Sotheby's had increased prices at the beginning of '93. They increased the buyer's premium. They felt that the market would not sustain a second price increase shortly thereafter. So these were points we made to the jury to rebut their argument that the gap showed that there was no collusion.

Another argument was basically that Davidge and Brooks cooked up this conspiracy on their own; they had no guidance or involvement from Taubman. The evidence they adduced to make this point was that, in their view, 1994 had been a disaster for Sotheby's and Christie's. It was the first year that Brooks was actually a CEO, being promoted in early 1994. She had a large number of stock options and so did Davidge. So, to rescue their fortunes, they got together and colluded. They pointed out that in their past history Davidge and Brooks had communicated through subordinates on the buyer's premium. So, they argued she didn't need any guidance or direction from Alfred Taubman to engage in a price-fixing conspiracy. She was willing and able and motivated to do it on her own.

Our counter argument was that the documents showed that Tennant and Taubman had made this agreement in 1993. And we disputed the fact that 1994 had

really been as big a disaster as they said it was. Of course, we pointed out that Taubman's fortune is much more tied to Sotheby's than Dede Brooks' fortune was.

The only other argument I want to mention is the Lord Camoys' matter. The defense pointed to Lord Camoys as Tennant's contact at Sotheby's. Lord Camoys was somebody Brooks hired in late 1993 or early 1994—I don't recall—as a director of Sotheby's in England. There was some documentary evidence that there was contact between Tennant and Camoys regarding something about pricing. So they tried to make the argument that the person with whom Tennant colluded was not Taubman, it was Lord Camoys. Our counter argument to that was basically that Camoys didn't really come on the scene 'til 1995. The documents were dated 1995, and at that time the draft price arrangements had already been made. So that he couldn't have been a major player in any event in what was going on. He was a subordinate to Brooks. Both she and Davidge said he wasn't involved in the conspiracy. That was our basic rebuttal to it.

**MR. TUGANDER:** Well, I think that covers most of the major defenses. Thanks, John.

Joe, I want to turn to you at this point. You represented Christopher Davidge in the *Taubman* trial. You represented individuals and corporations in a number of significant antitrust cases. At what stage of the investigation is it a good idea for corporate counsel to bring in separate counsel for individuals?

**MR. LINKLATER:** That's an interesting question, Steve, and not necessarily an easy one to answer. I think you can give some guideposts and probably every lawyer at the table has a different view on it. Maybe the most fundamental one is the lawyer's duty not to mislead an unrepresented person. So when you're the lawyer for the company dealing with an unrepresented individual, we all know you have to give what we refer to loosely as *Miranda* warnings, although it is a completely different situation. You have to tell him or her about her right to have independent counsel if she chooses.

That said, in most cases that may not be the first thing you want to do. If you encounter the individual employee who you feel isn't being forthcoming with you, not being helpful, not giving you information that you're sure he or she has, you may do better getting them in the hands of a good lawyer who can facilitate information gathering and information sharing, and particularly if it is somebody who is an antitrust lawyer and someone you know and have confidence in.

If you're in an amnesty situation, it is a little easier to gain the confidence of the employees, because you can tell them that if they are forthcoming and straightforward with you, the company will do well and they will do well. They will get out, they will get amnesty along with the company.

In that sort of a situation—I happen to be in one now, and we have kept the employees in a very long time, kept all of them in. And we have told them what we are doing, and they are intelligent, sophisticated people who have made the decision to stay with us. It's helped us advance our amnesty application dramatically, because we can get information much more quickly than we could even through skillful, cooperating individual lawyers under a joint defense agreement.

So while you may want to bring in separate counsel in some cases, you may not in others. And I think you really have to weigh all the alternatives and look at the facts of each situation. Of course, as a lawyer who represents individuals occasionally, I encourage everybody to get lawyers for their individuals right away.

**MR. TUGANDER:** Scott, Taubman was indicted along with—I'm sorry, Taubman was indicted along with former Christie's chairman, Sir Anthony Tennant, who is a foreign national and did not submit to U.S. jurisdiction. What are the consequences of being a fugitive in an Antitrust Division criminal prosecution?

**MR. HAMMOND:** Well, the consequences of being a fugitive continue to escalate. Obviously, it is a very intense and personal choice for a foreign business executive under indictment to decide whether to submit to U.S. jurisdiction, plead guilty, cooperate and do time in a U.S. prison. The alternative is to stay outside the United States and look over one's shoulder for the rest of his or her life and hope to avoid prosecution.

I think in the past there may have been a perception that this wasn't such a tough choice. If you were content to stay out of the United States and, say, go to Euro Disney instead of Disneyland, you would do just fine. I don't think it's that easy anymore.

Attitudes are continuing to change abroad on cartel enforcement resulting in new laws and new enforcement tools. Changing attitudes of foreign governments are making this decision much tougher for foreign nationals because they are facing an increasing risk of detainment, arrest, and extradition.

In recognition of this, the Division implemented a policy of putting our international fugitives on what's referred to as the Interpol "Red Notice Watch." This is the highest notice status that Interpol uses. For those of you who aren't familiar with Interpol, its has roughly 180 member countries. So, when someone is put on the Red Notice watch, all of the member countries are notified of this event, and are asked to detain the fugitive for possible extradition. So, we are doing everything we can to bring these fugitives back to the United States for trial.

**MR. TUGANDER:** Thanks, Scott.

Gary, turning to you from the defense side. Let's assume you represent a target who is a non-U.S. citizen residing in a country that does not extradite its citizens for antitrust offenses. What factors are important to your decision or your client's that he come to the U.S. to cooperate or possibly even plead guilty?

**MR. SPRATLING:** If my client is in the circumstances you described, that is a target, non-U.S. citizen, jurisdiction where there's no extradition, before the client sets foot in the United States it is going to be pursuant to an understanding with the Antitrust Division as to how the client is going to be treated. What he gets in exchange for cooperation and that he can return at his pleasure to his home country where he can't be extradited.

But having said that, what are the factors that would persuade you to come and cooperate with the Antitrust Division and to submit to the United States jurisdiction? I think there are four. There's a lot of subcategories, but in analyzing this there are four major factors. The first is: Can my client avoid jail? Scott just talked to you about the number of foreign individuals who have submitted to jail. If my client is a target, most likely there's somebody already in, there's a company in and those executives are cooperating. It might be pursuant to an amnesty agreement. The company might have come in a little later and might not be able to get amnesty, the company might have entered into a plea agreement and its cooperating individuals have immunity. But if I'm in that stage and the second round of people are cooperating, no matter how quickly I move, I am at risk of this person being in the target zone for jail. In fact, some would say it is probably likely, the way the Division is pursuing matters now, that my guy is going to be targeted for jail. Obviously, I would try to get immunity and make that argument. But it is likely the Division is going to insist on him accepting responsibility. And if that's the case, what you need to do is to try to get your client into a situation where he's not going to go to jail. And there are a couple of possibilities for that: extraordinary cooperation, extraordinary value to the decision on the instant product, or another possibility which we may talk about later today is just, you know, cooperation on the instant product that he may always be able to give. Might not be able to get into that other division. But also giving information on a new product or on a new violation.

The second conversation is: What is my client's interest in international travel? We are in a world community. The fact is that most people travel internationally now, and there may be very strong interests, either professional or personal, for wanting to travel internationally. And you know, when you go into a case, which one is going to be the stronger interest, professional or personal? Obviously if this is a client who wants to come to the United States frequently or to its sister to the north, Canada, then there are some serious problems. Or if it is a jurisdiction that the enforcement authorities have a particularly strong cooperative relationship with, and of course you have to talk to Joe and me about what those jurisdictions are to identify them, because Scott and Ralph aren't going to tell what you those jurisdictions are. But if it is one of those jurisdictions where they have a really close relationship and there are some deals to be worked out with respect to people in the country, then you're going to want to stay away from those too.

The overlay of this is the Interpol notice watch, as Joe just mentioned. That really ups the stakes. It just depends how much the person wants to travel. People in the audience and people on the panel are aware of several situations that have driven the conclusions in cases. One, a business executive whose daughter was in a long-term school situation in the United States wanted to be able to visit. Another executive where his son had moved to the United States, family was here, wanted to be able to visit, a very important consideration. And quite distinguishable from the situation where a retired executive who is living at his cabin on a lake in Switzerland and doesn't care about coming to the United States, a much different factor.

I think the third factor for me is: What does the client's company want him or her to do? Is this client employed, and does he want to stay employed? Is he going to lose his job or lose his benefits if he doesn't do what the company wants him to do? And a sub-consideration of that is: How serious is that going to be? We all have clients who are in a financial situation month-to-month, other clients who might have a year's savings, a year's salary put away in savings, and they can be a little more reflective in what they are going to do and use a little different type of judgment.

But there are four situations and one of them is really a problem. If the client wants to cooperate and the company wants them to cooperate, no problem. Client doesn't want to cooperate, and the company doesn't want to cooperate, no problem. If he doesn't want to cooperate and the company does want to cooperate, a little bit of a problem in reconciliation. The big problem is he wants to cooperate and the company doesn't want him to. It is a big problem and can drive this decision.

I think the last factor is totally independent from the other three. It may be linked but may have nothing to do with it. What does your client in his heart of hearts want to do? Does he want to come forward? Does he want to cooperate? Does he want to get this matter behind him? Does he want to make a clean slate of things? Does he want to admit what he did? In those situations, in a matter that was disposed, a disposition not long ago, where I thought the Division put a very tough number on the table for the individual that was represented by co-coun-

sel that we had brought in to represent the individual, this individual was so interested in getting it behind him I think the number could have been almost anything, because it was a tough sentence, but he wanted it behind him. On the other hand, we all know people who, irrespective of their culpability, are of the view that the Antitrust Division attorneys can go chase themselves, they just don't care. So I think those are the four factors.

**MR. TUGANDER:** Thanks, Gary.

Joe, do you have anything to add to what Gary said?

**MR. LINKLATER:** Just a little bit maybe, Steve.

There's one thing I should add to my last response (I was hoping one of you guys on the other side of the table would jump on me for it): The one time you can set an outside limit for when somebody has to have counsel individually is when the person is called in for that first interview and has the subpoena. I think you're obliged to get him a lawyer. Everybody wants the same thing at that point. They want information, and it ought to be up to the individual to decide how he or she is going to trade off for that information, if at all.

But back to your question. I agree that Gary has listed the factors. It is a very interesting calculus. It is really human nature at its most interesting. You're faced with a criminal conviction, possibly going to jail in a foreign country, a place you might want to go for business or personal reasons. Everybody jokes, as Scott did, about Disneyland, but Disneyland it turns out actually matters to a lot of people. Kentucky Derby, yacht racing, golf, the Mayo Clinic. All of these things have played factors in cases I've been involved in, and Gary.

I had one fellow who stayed outside of the United States for 14 years. It turns out that's a very expensive proposition. Because as Gary alluded to in his first factor, the United States has cooperation agreements with other countries, and every time I would meet this fellow outside the United States I had to get past his bodyguards because he was always in fear of being picked off somewhere by U.S. or cooperating country agents. That's a tough way to live your life and an expensive way. I had another fellow in a case who literally disappeared into Asia. Gave up his passport, disappeared, and nobody knows where he is at the moment. I assume he's still alive.

And on the far end of the spectrum, I had a retired well-to-do European executive voluntarily come back and serve time. He had social relationships in the United States. Those he could have probably changed. He had some concern that he would not be able to travel as freely as he and his wife would like to travel in retirement, even outside the United States. But I think most of all, after talking to his wife and his family about it for a long time, he really wanted to put it behind him. And at the end of the day I think that becomes the driver. With the first two fellows that I mentioned, they didn't care about putting it behind them. They wanted to put a vulgar gesture in front of them to the government. But this last fellow I think took the approach that more people than not take: that he was going to put it behind him. And my job at that point was to get him the best deal I could.

**MR. TUGANDER:** Thanks, Joe. Scott.

**MR. HAMMOND:** Yes, I'll add two more cents on this topic. I don't want people to leave with the impression that the deals with the foreign nationals are tied together with the company plea agreements, that is that a company reaped some benefit because one of its executives agreed to go to jail. These individuals were carved out of the corporate plea agreement and separately represented, and in almost every case, the individuals entered into plea agreements after the company had already pled guilty and paid its fine.

The second thing is to recognize that we have a plan here, and it is no secret. If you go back and look at international cartel prosecutions beginning in the mid '90s to today with respect to individuals, you'll see a series of developments or steps. First, in the mid-90s, it was a breakthrough when we got foreign nationals to come to the U.S. and cooperate pursuant to "no-jail" deals. Gradually, we began to do move towards obtaining very short jail sentences. Now we are raising the bar again and insisting on longer sentences. We are trying to bridge the gap so that one day we will get to a point where jail sentences are equivalent for foreign nationals and U.S. citizens who conspire to violate the U.S. antitrust laws.

**MR. TUGANDER:** Ralph, let's turn to you now. In addition to *Taubman*, the New York field office has been quite active in filing criminal cases throughout the northeast. Could you talk a little bit about the New York field office?

**MR. GIORDANO:** I will, Steve, thanks. I thought I'd give you a little bit of a rundown on what we do in the New York office, what we are about. And I'll be brief so we can get back to the heavy hitters on this panel.

We are located in the Federal Building in Foley Square, across from the Federal District Court. We are one of seven field offices. The other field offices are located in Atlanta, Chicago, Cleveland, Dallas, Philadelphia and San Francisco. Right now we have 18 attorneys, seven paralegals. We have access to the Division's economic unit in Washington and to its excellent computer and technical support group.

As Steve in his introduction mentioned, our geographic area is New York State, New England, northern New Jersey. We have and will continue to do national and international cartel prosecutions. We are not just lim-

ited to regional or local conspiracies. Generally, there should be some nexus to our geographic area: that is, a conspirator being located in our area or an overt act having been committed in our area, etc.

In New York, essentially our work is criminal. All of the Division's criminal prosecutions at this point are conducted by its seven field offices and one litigating section in Washington, the National Criminal Enforcement Section.

When I say criminal I'm talking about the hard core per se offenses, price fixing among competitors, bid rigging, territorial allocations; however, we will also bring related prosecutions such as tax evasion charges, mail fraud charges, 371 charges, perjury charges, obstruction charges if they are related to what we are looking at, interference with the competitive process. If they are unrelated to that, and we come across them, we will refer them to the pertinent U.S. Attorney's Office.

The field offices will handle a matter from start to finish. By that I mean from the preliminary inquiry stage through the grand jury stage and the trial. Appeals are handled by an appellate section in Washington; however, the field office involved will have input into the appellate brief and into the appellate argument. You can expect that every criminal investigation that a field office conducts will likely have an FBI agent assigned and/or an investigator from the IRS, the Department of Transportation, the post office, DCIS, GSA or some other investigative arm. You should also expect that in conjunction with our investigations there may be consensual taping, which is occurring more and more.

We have been busy in the New York office. Over the past four years we have filed 85 criminal cases and 27 individuals have been sentenced to jail. Total jail time of those individuals is about 32 years. Last year we filed 24 criminal cases and seven individuals were sent to jail.

I'll just mention two things that might be of interest to you that we have done in recent years. In 2001 we filed an information and plea agreement against Moody's, charging it with violating 18 U.S.C. 1505 in that it willfully withheld and destroyed documents called for by a CID subpoena served on it by the Division in a civil investigation. Moody's pled guilty and was fined $195,000. This was the first criminal case filed under the statute by the Antitrust Division.

I will also briefly mention our frozen food and produce investigation. This involves sales by distributors and vendors of frozen food and produce primarily to the New York City Board of Education, but also to the Nassau School Board and to not-for-profit organizations such as, for example, Odyssey House. Thus far in this investigation 33 individuals have been convicted, 15 companies have been convicted; the charges in addition to bid rigging, have included tax evasion, mail fraud, 371. Of the individuals convicted, 21 have gone to jail, four remain to be sentenced. In addition, we have obtained some $30 million in court-ordered restitution in conjunction with these cases.

That briefly is what we have been doing and what we are about, Steve.

**MR. TUGANDER:** Okay. Ralph, you mentioned the U.S. Attorney's Office, you referred to them. Sometimes outside counsel are confused about the relationship between our office and the office of the United States Attorney. Could you clarify what the relationship is?

**MR. GIORDANO:** Well, I'll try. We have authority, as you know, to prosecute criminal violations of the antitrust laws; however, we keep the pertinent U.S. Attorney's Office informed of what we are doing. We try and follow, if appropriate, their practices and policies. We seek their counsel, especially if we have related non-antitrust charges that we are dealing with. And I think by and large we have very good relationships with all of the U.S. attorneys in our area. We have particularly good relationships with the Southern District U.S. attorney and the Eastern District U.S. attorney, and we are conducting a couple of investigations jointly with them.

**MR. TUGANDER:** Ralph, one question that's frequently asked of attorneys in our office is how do your investigations get started? Could you briefly run down the list? And also, what advice would you give any attorneys out there who might come across a potential criminal antitrust violation?

**MR. GIORDANO:** There's a whole host of ways, as you might imagine, that we get leads and start investigations. Victims and industry sources bring information to us; present or former employees of a conspirator will bring information to us. We have started important investigations on the basis of anonymous leads, anonymous complaints written or oral. Treble damage suits are a good source.

We have been fortunate in that one investigation will often give us leads to another matter, and we roll that into another investigation, and that continues sometimes into three or four investigations. Newspaper articles, believe it or not, are a good source: statements in general-circulation newspapers about meetings among competitors, or trade publications. And of course, and this will be discussed I think by our panel as we go on, the amnesty program is becoming a more and more fruitful source of important investigations. Amnesty, and amnesty plus.

Second question, what would I do if I were in private practice? I'm not going to advise you all, as a lot of you are in private, I am not. But sitting where I sit, if I represented a victim, obviously I'd come into our office

and disclose the information, because it would be in the interests of a client, and in the public interest, for us to uncover that violation and prosecute that violation. If I represented a conspirator, what I would do is come in and see if amnesty were available. Even if it's not available, I might be able to negotiate a plea agreement under a 5K(1) cooperation arrangement. Or even if that's not available, one might be able to negotiate an otherwise favorable plea agreement.

Sitting where I sit, and from what I know and have seen over and over again, if you wait too long and sit on information regarding a violation, on behalf of your client, there's a good chance your client is going to wind up in tears and go to jail and not be able to get anything from us.

**MR. TUGANDER:** Okay, thanks, Ralph. Scott, Ralph referred to a trend in the New York field office of bringing non-antitrust counts in situations where the conduct might not be a classic Section 1 violation but nonetheless affects the competitive process. Is this a division-wide trend that we can expect to see more of in the future? And speaking of trends, what do you see as some of the upcoming developments in criminal antitrust enforcement in the Antitrust Division, both domestically and internationally?

**MR. HAMMOND:** Okay, I'm going to have to cover a lot of ground with my answer. But before I do, Ralph, in his typical modesty, talked about his office being very busy. I'm kicking myself now that I didn't come armed with some statistics on the performance of the New York field office because it consistently is one of our highest performing offices. Gary will know this from his days back at the Division, because this is a trend that goes back some time. The New York field office, year after year, files more cases, puts more offenders in jail, and obtains more restitution on behalf of victims than any other office in the Division. I want to thank Ralph and his assistant chief, Phil Cody, and the attorneys and support staff in the New York field office, many of whom who are sitting in the first two rows here. I am extremely grateful for the work they have done.

With respect to recent trends, I have made available a paper for this program that talks about recent trends, so I'll try and be brief. The charging of collateral offenses is something that goes back to the '90s, so I won't say it's been a recent trend. However it certainly has contributed to the recent trend of longer jail sentences. Pursuing collateral offenses, such as kickback and bribery schemes, tax, fraud, and so forth, has been very productive for the Division because it often leads us to Sherman Act violations. For example, if you have a corrupt purchasing agent taking bribes from his or her vendors, there is a good chance that he or she may also be orchestrating a bid-rigging scheme in the process. Working collateral offenses is also very useful for us because it helps us develop productive and cooperative relationships with the FBI and with U.S. Attorneys' Offices and with other investigative agencies, agents, and so forth. These are obviously relationships we can utilize in other cases down the road.

Clearly there's a trend in longer jail sentences. This past year we had a record in the total number of jail days imposed in Division cases, over 10,000 jail days. The average jail sentence last year, also a new all-time high, was over 18 months. So more people are going to jail in Division cases, and they are going for a longer period of time. That is a trend that's existed over the last four years.

The proliferation of leniency programs abroad modeled after the U.S. model is also a trend. As I mentioned before, it seems like every time you turn around you read about a country who has either developed a leniency program, started its own cartel unit or drafted a new law. For example, what's happened in the U.K. in this regard over the last few years is nothing short of remarkable.

One other trend I should mention also involves the amnesty program. Prior to 1993, under the Division's old leniency program, approximately one application for amnesty was made a year. After we substantially revised the program in 1993, applications rose to more than one per month. Over the last two years, it has been more than two per month. And this fiscal year, which began October 1, 2002, it has been more than four per month. So I would like to think that's a trend that will continue.

**MR. TUGANDER:** Joe, turning again to you, in the paper that you coauthored that is part of this program's written materials there's a discussion of the EU's revised leniency policy. Now, the EU policy is much more in line with U.S. policy. As you see it, what are some of the remaining significant differences in the two programs?

**MR. LINKLATER:** Thanks, Steve. There is actually a little chart in the paper that my European colleagues and I prepared for this event, and they are listed there, but I wrote them down here as well and added a couple.

I think from a U.S. practitioner's point of view, maybe the most frustrating is the EU's insistence on calculating the fine on worldwide turnover for the company. That's pretty painful, and it contrasts dramatically with the DOJ or the Division's policy of calculating the fine on volume of commerce. It might be a little more rational if it was European volume of commerce for example. In any event, the EU doesn't have amnesty plus. On the favorable side, perhaps, it doesn't require the company to commit to restitution. The European lawyers would argue they provide a little better certainty of penalty for the second and third people in the door. The EU puts more pressure on you in the ordinary amnesty or leniency situation to provide information

quickly, which can be problematic for practitioners, particularly when you're trying to coordinate a number of jurisdictions and applications or investigations in a number of jurisdictions. If you have to race into the EU—I'm sure some of you have experienced this—and give them information that satisfies them before you get everything together that you'd like to have together.

Also contrasting from a U.S. practitioner's point of view particularly is the EU is much slower to a resolution. You can be hanging around there for a couple of years before you know what's going to happen to you. They don't require the same degree of corporate confession that the Division does. That can sometimes be important to you. If you haven't got somebody around who can make that corporate confession, the EU may be a little easier for you.

Again, on the negative side they require that second, third and further conspirators provide significant added value to the investigation. That can be difficult. And in the past—they seem to be changing this now—they have required you to give information about the entire scope of the conspiracy, the entire term of the conspiracy. And if your client came in a little late, you can have an interesting philosophical discussion with them about how you would provide information about the period of the conspiracy before you joined, and it can get difficult. Those are the main differences.

**MR. TUGANDER:** Thanks. Scott, does the EU's revised leniency policy help the Antitrust Division in any way?

**MR. HAMMOND:** Absolutely. It was the single most important development in U.S. anti-cartel enforcement last year. Like the Division's 1978 leniency program, the EU's old program was flawed—it lacked transparency and predictability. As a result, the private bar and the business community in the EU did not have a great deal of confidence as to how it would be administered and the application rate was low. Fortunately, all that has changed now. They have very good leadership in the EU's cartel unit; enforcers that understand and believe in the merits of a transparent leniency program, and they are committed to its success. The program is for most intents and purposes identical to our own. So that creates an opportunity, if companies want to take advantage of it, where a company can simultaneously apply for full amnesty in both the United States and in Europe. That is precisely what we are seeing done.

**MR. TUGANDER:** Gary, that leads us to a two-part question for you. Because of the increase in the number of jurisdictions in which amnesty or leniency is now available, counsel is often faced with the decision of where to apply first. How do you decide which jurisdiction to approach first? And secondly, assuming a client is not the first amnesty applicant in the door in the U.S., what advice do you give your clients about the benefits of coming in second as compared to coming in later?

**MR. SPRATLING:** Steve, if it is all right, I would like to tag on something that Scott just said before answering your question. That is that Scott mentioned the commitment of the people in the cartel unit at the Directorate General for Competition to make their policies transparent, predictable; to give the same benefits as the U.S. policy, to bring it into alignment. One of the important aspects of that is when you're making a decision with respect to one jurisdiction, it's not a different discussion with respect to other jurisdictions. That is, you're going to have to provide the same types of information and so on. And there has been a lot written about the converging of those two policies, that's the EC policy with the U.S. policy. That was not accidental. There was a lot of work between the two jurisdictions in bringing the convergence.

But one development with respect to the EC that I personally think is as important as anything that's written in the policy is something that's not written anywhere with respect to EC policy. And that is the encouragement of bar associations and the encouragement as I understand of the U.S. Department of Justice, the EC is now willing to approach the amnesty process or immunity process in a paperless fashion like it works in the United States. So that instead of requiring a written submission, as they used to do consistently, require written submission, you can now, as you do with the U.S., make your presentations oral. There's no company admissions, there's no statement of facts, no list of meetings. All these things which, if you submit to the jurisdiction, are discoverable by the private plaintiffs. And so you'd have a situation where you had this contrast where you could go in and do one thing in the U.S., and until quite recently—I mean very recently, in the EU you had to do something else which would expose you to treble damage liability around the world when people would get hold of those. So that tag-on point I wanted to make.

The amnesty decision. The tough thing about the amnesty decision, it is a critical little important decision. It is oftentimes a very difficult decision for the company, and yet you have to make it very quickly. A company cannot decide to go into one jurisdiction without at least considering—it may not be a full-blown analysis, but without at least considering—what the impacts are going to be in other jurisdictions by going into the first. I'm not talking about going into the other jurisdiction, but what are the impacts of the other jurisdiction by going into the first. One of the things I was just talking about was one of the impacts, if you turn into the submission of one jurisdiction and the impacts on the others.

But whether a company decides to go into all jurisdictions and it makes that decision up front or decides to

go into one and is going to continue considering whether or not it is going to go into the other jurisdictions, the fact is—and don't let anybody tell you any differently—the fact is you cannot approach four jurisdictions or three jurisdictions or even two jurisdictions as quickly as you can decide and approach one.

Why is that important? Because we know from what the Antitrust Division has been publishing now for a number of years and their leaders have been saying in speeches for years that there are amnesty decisions not decided by days but by hours. I've been involved in an amnesty decision that was decided by less than one day many times when I was on Scott's side of the table and once since in private practice. So you have to consider the opportunity cost in a simultaneous approach to all jurisdictions.

If you take the time to do a simultaneous approach and to make the analysis about whether or not you're going to go to all jurisdictions, the opportunity costs may be coming in second in the jurisdiction where you most wanted to come in first because you took the time to do that. And so the principle that I have in doing this, and you know others may have other principles, but the principle that I have, is that you decide the jurisdiction where it would hurt you most to come in second, and you go there first. And you go just as quickly as possible. And then you quickly start doing the same analysis with respect to the other jurisdictions. That may mean you move very quickly.

I've been involved in situations where we moved on day one with one jurisdiction and didn't move in the next two to three weeks. But the typical situation you see is there's inertia in the company, inertia to a major company. Because most of these are big corporations involved in international cartels and there's inertia to convince a legal department and a board of directors that has to make this decision that you have to move yesterday. This is a big deal; you've got to do it right now. Well, what do you mean right now? Well, I'm telling you, you have to move right now. Once they get it, then of course you've got this momentum, you've got this train going, and now they want you to move immediately. Two examples from the last year.

I'm walking through an airport, having made a presentation to the board of directors, they called an emergency session. I had to catch a plane before they finished the meeting. When I got to the airport, on my Blackberry I got a note that the board had decided they wanted to move and move in two jurisdictions immediately. I made the phone call while I was sitting in the airport, risked missing my flight because I knew the importance of it. I made the phone call to two jurisdictions to put the marker down. The people in the enforcement authorities could tell you, these calls were almost unable to be heard because I was right next to the PA system in the airport with all this noise going on in the background. But that got the marker down in those two jurisdictions.

Another example is that a company made a decision, took awhile to be convinced that they had to make this decision. But once it made the decision in an emergency session of the board—once again, made it late on a Friday night and wondered if I had the home telephone numbers of the government attorneys to reach them either that night—and this was very late—or to catch them Saturday morning at their homes to make sure that nobody else got in front of them. Because of course the horror of horrors, either as a counsel or as inside counsel which some of you probably are or a member of the board is, you make this decision and you're going to do it whatever the civil consequences, you know, whatever it means to sign up for team USA as an amnesty applicant and so on, it is a big decision. You've made that big decision; you rush in to do it, and somebody tells you that you got beat. That's a horrible situation to be in. Anyway, I've got to jump to the second subject, Steven. I'm sorry I got wound up on that.

The second subject, and I'll cut it very short, is what about coming in second? Are there advantages to coming in second? There are huge advantages in the Antitrust Division process to coming in second. And of course, you explain these to your client before you make an attempt to come in first. And the advantages are both in the treatment of the company. But what a lot of people don't appreciate, a lot of people know about treatment of the company when you come in second versus third, fourth or fifth, a lot of people don't appreciate what happens to the treatment of your individuals who are coming in second. Scott talked about a lot of the deals being separate and the deals being cut and so on, that's all true. But there are tremendous advantages in terms of what people you can get included or who gets carved out and what the likely sentences are going to be.

I mentioned in my paper—I think this starts on page nine of the paper, I'm not going to take the time to go through it. But the Antitrust Division has taken pains to publish the proportionality with which it treats people who come in second, third and fourth. You can figure it out. It is predictable. This is something you can explain to your client with clarity, and it is very easy to see that the people who come in later, the increase in fines might be ten percent of volume of commerce, in some cases twenty percent of volume of commerce, and some people say ten or twenty percent. Folks, twenty percent is the baseline to start with. You're talking about possibly a doubling of a fine coming in later than somebody else.

In an antitrust context where the volumes of commerce are large—a small case is a half a billion dollars, well, twenty percent of that is a hundred million dollars. That's a hundred million dollars. The advantages to coming in early and cooperating are so easy to see in the

dimension of the vitamins cases that most people don't pay any attention to it. And as everybody knows, Hoffmann LaRoche got hit heavily. But what most people don't pay attention to, not only was $500 million the largest fine in history, but its minimum guidelines fine was $1.3 billion. So Hoffmann LaRoche also represents the largest departure for substantial assistance in the United States for cooperation for getting in early, for being number two. And actually, Scott, we were never criticized for being weak pansies on that, such a big reduction.

**MR. HAMMOND:** I wouldn't quite put it that way.

**MR. SPRATLING:** The last point, to full circle on something that Scott mentioned, and that is he mentioned the New York field office. His comments about that office I completely, of course, agree. In the last year I was in the Antitrust Division the New York office brought more cases than all the other field offices combined. So it has that reputation. But if there's ever an office where you're going to see the principle that I'm talking about at work, it is that office. You get in early, you get good deals. And you come in late, and you're going to get hammered. With each person that comes in, it is just a little worse deal.

**MR. TUGANDER:** Thank you, Gary. At this point we are going to turn the program over to Dr. Stephen Prowse who is going to talk about the harm, the economic harm caused by international cartels. Dr. Prowse.

**DR. PROWSE:** Thank you, Steve. Let's see if this technology works. It does. I gave a presentation a few months ago where it crashed on me, so you do have hard copies of my presentation if that should happen here.

Thank you, Steve. I think I am conspicuously different from the rest of the panel in two respects up to now. One, I've been conspicuously silent, so I'm here to tell you my job is not just to fill the other people's water glasses up here, but I am here to actually talk a bit. And two, I'm not a lawyer. I'm an economist.

As Steve mentioned I'm a Ph.D. economist at KPMG's forensic practice, and I'm one of over half a dozen senior-level Ph.D. economists in that practice who provide consulting and expert witness services to clients in a large variety of matters, including antitrust matters where we do the things that you would expect an economist to do: define relevant markets, assess the competitive attributes of certain business practices and calculate damages. We work very closely with outside counsel and sometimes the corporate client in those matters.

Just to echo a comment that was made earlier in an earlier session by Bill Lifland—there have been a lot of insightful comments made this morning, but from my point of view the wisest one was made by Bill when he said you must get your economic experts involved early and often in your antitrust cases. So I'd just like to echo that one as we go.

One of my partners in KPMG's forensic practices, Dan Slottje, helped me prepare this. He can't be here because of illness, so it is up to me to fly the flag today. But today what I wanted to do was to talk very briefly in the time I've got about the recent rise in international cartels, their prosecution by the antitrust authorities in the U.S. and abroad and some of the estimated consequences for consumers who are ultimately the victims of these international cartels in terms of the damages they suffer. And I also want to talk briefly about one of the things that we do in our practice, which is to estimate damages or estimate consumer harm in a lot of antitrust matters.

Little did I know when I first put this presentation together that I would be quoting a person who is sitting right by me on the dais here today. And this was Gary, a comment by Gary when he was at the DOJ back in '97. I think the spirit of this comment remains and is probably even stronger today. And that is that international cartels have become extremely high profile in recent years as antitrust authorities in the U.S. and abroad have devoted much more time and resources into prosecuting them. And we'll see a variety of indicators of that as we go through my presentation.

One of the reasons international cartels have become the focus of much attention by authorities in a large number of countries is their nature. They tend to be very complex; they tend to be very sophisticated, and they tend to be extremely broad in geographic scope. And perhaps most important, they tend to be very large in terms of the affected sales volumes and therefore in terms of damages to consumers.

You are all no doubt very aware of the many recently exposed international cartels, including those that are listed here, involving lysine, citric acid, vitamins, graphite electrodes, construction, art auctions and sorbate products. You may be somewhat less aware of some of the estimates of the economic effects of these cartels on consumers, in that together there are estimates out there that they've affected over $10 billion in U.S. commerce alone, not counting commerce abroad. They have involved overcharges of at least ten percent and in some cases over 100 percent, implying overcharges of at least a billion dollars in the U.S. alone. Again, not counting overcharges abroad, and not counting the other costs in terms of economics that these cartels tend to impose on the economy in terms of dead-weight losses, losses of economic efficiency and losses to indirect purchasers of products that were involved in the cartel. And globally, obviously the damage is even much greater than the $1 billion in the U.S. alone involving many billions of dollars.

To go into a little more detail into some of the recently exposed international cartels, I just want to give you a few details about them. In particular I want to emphasize the estimated economic effects on consumers, where I've been able to estimate them or been able to find out sources where they have been able to be estimated. For example, the graphite electrodes cartel involved producers in three major countries, lasted five years, affected close to $2 billion of U.S. commerce and $6 billion of global commerce and increased prices by as much as 60 percent to consumers who bought graphite electrode products. The lysine example involved international cartels involving the largest producers in many different countries, affected an estimated $1.5 billion almost in global commerce and increased prices an estimated 100 percent at the peak of the cartel's activity.

The art auction cartel has been talked about a lot by the panel. It involved the two houses which took up about 90 percent of the market share of the art auction market. It lasted about five years and resulted in a $500 million settlement with art buyers and art sellers that was also referenced.

The vitamin cartel, which has also been talked about, involved vitamin producers in four major countries, and involved an estimated $500 million in overcharges in the U.S. alone, not even counting non-U.S. countries. And finally, the citric acid example or the citric acid cartel involved six major producers of citric acid in Germany, Switzerland and Japan, affected an estimated $1 billion plus in global commerce on an annual basis, and increased prices in the U.S. by at least 30 percent for the four years that it was in action. So those are some of the high-profile cases in the international cartel arena and some of their estimated effects on consumers in terms of higher prices or overcharges as a result of those cartels.

Not surprisingly, as has been discussed and referenced by most of the panel here, the DOJ has increased its resources that it has devoted to prosecuting these international cartels dramatically, to the extent that the percentage of their cases that involve foreign defendants has increased dramatically over the last dozen or so years. From almost nothing in the early '90s to a substantial share in the last couple of years. Now, recognizing that cartels, like everything else today, are a global phenomena, it's not surprising that many other countries—a lot of countries in Europe, in particular—have either tightened up, introduced or increased the severity of the enforcement of antitrust laws in their own countries, including Denmark, the U.K., the Netherlands, Canada, Korea, France and Spain. And I could have made this list longer if I had wanted to, but those are the major countries that I wanted to draw your attention to.

Now as a consequence of increased attention by antitrust authorities on international cartels, there's obviously been more convictions and larger fines, and here is a table that I've put together of the largest fines involved in these international cartels. There are a lot of the cartels I've previously mentioned as well as a few others. As you can see, the fines involved are in the many tens of millions of dollars and sometimes involving hundreds of millions of dollars, peaking with the vitamin cartel, where the total fines involved were over $800 million.

**MR. SPRATLING:** These are just U.S. fines?

**DR. PROWSE:** Yes, these are just U.S. fines.

Now, I've talked quite a bit about my brief discussion about the effect on consumers or the estimated affect on consumers in terms of the overcharges in prices and the dollars that might mean in terms of affected commerce. And of course, the rationale for all the attention on international cartels, especially ones of international flavor, which are broad and affect large amounts of commerce, is that they impose severe burdens on consumers in the form of, most obviously, raised prices. Now, estimating such costs on consumers in terms of raised prices is one of the things that we do in our work at KPMG for clients. And the question I want to address now is how does one in very general terms come up with some of the estimates that you saw earlier regarding damage estimates for consumers?

Conceptually of course, the matter appears to be very simple. What you need to do is you need to estimate by how much prices were raised during the cartel above the market equilibrium price that would have occurred in a competitive environment, what we call the "but-for" price. And that obviously requires an estimate of this "but-for" competitive price. You usually have the actual market prices at which the transactions were made both before, during and after the cartel. And what you need to do is estimate what would have been the competitive price during the cartel period. Then you have a benchmark from which you can estimate damages based on the increase in price during the cartel period.

For example, here is the price profile of a product in an international cartel case that we've worked on recently at KPMG, and I've deleted all the references to the names and the actual product. But conceptually what one wants to do obviously is to estimate the "but-for" market price absent the collusive behavior. And although the concept of that is easy, implementing that and actually estimating a "but-for" price is often very, very complex. This is because there are a lot of other market factors out there, supply and demand factors that are affecting the price over time, both before, during and after the cartel that you need to take account of when you are estimating the "but-for" competitive price.

For example, looking at this price series, it seems relatively easy to identify when the cartel starts and when the cartel finishes. But you have to rely on other evi-

dence for that too. You just can't assume that the bump up in price at the beginning of 1988, as I think it is on this timeline, was solely the result of the cartel agreements starting up. There may have been other market factors going on at that time, such as supply restrictions or substitutes not being available in the market at that time that may have led to at least some portion of that price increase being due to what we would call natural market factors and not the result of the cartel. Similarly, changes in price during the period of price elevation, whether up or down, may have been the result either of cartel effects, the cartel weakening or the cartel getting stronger or deciding to elevate the price among themselves. Or they may have been the result of market effects, supply and demand factors that would have increased the price anyway, regardless of whether there was a cartel in effect or not.

Our job is to try and figure out what price movements are due to the cartel and what price movements are due to the natural market factors, supply and demand factors that are going on in the market during the period. And so what that requires on our behalf is a number of things. First, it requires a definition of what the relevant product and geographic market is that we are looking at. Because that is very important in establishing a benchmark in figuring out how supply and demand factors can affect the market as you define it. It involves looking at pricing behavior both before and after the cartel, and how market factors affected price in the uncontaminated pre- or post-cartel period. And in more detail it requires looking at what exactly the supply and demand factors are that are important in affecting price for this product: the number of suppliers, the amount of capacity in the industry, the cost of production and how that is affected on the supply side. And then on the demand side who the consumers are, what their demand is, how they use the product, what are alternative substitutes and how are they becoming available during the cartel period, and both before, during and after.

Now, the problem or the challenge is that not only are there a multiple of factors, but they are changing over time in terms of their importance as to how they would affect the competitive price of the product. And when you have multiple factors affecting the price of the product and their influence is changing over time, you're almost always forced to go to very complex economic modeling that usually requires some sort of fairly sophisticated regression analysis in terms of modeling what the "but-for" price would have been. So we are very often involved in cases where we are asked to estimate damages or overcharges or what the increase in price would have been because of the cartel. What we are very often forced into is a very sophisticated economic model that uses very sophisticated statistical, econometric and regression techniques. And if I had another hour, I would gladly go into all those sophisticated econometric techniques, but I don't. And I think you're probably very happy that I don't.

Thank you very much for your time. And I'll turn it back to Steve and questions.

**MR. TUGANDER:** Okay, at this time we have some time for a few questions. So, any questions for any of our panelists? Yes.

**AUDIENCE MEMBER:** Yes, Gary Spratling and others have emphasized moving very quickly when you have certain information or certain things happen, to put your marker on the table to get into the amnesty favorable position. But Gary, exactly what is it that happens that prompts, and what information is it that prompts you to urge clients to move very quickly?

**MR. SPRATLING:** Information indicating a felony violation. I mean how much more to say about it than that? Obviously, you also do some assessment of likelihood of detection. What your civil exposure is going to be, because you're going to have it. You're admitting. Assuming that the full investigation, after you put your marker down, verifies the violation you suspect has been detected, whatever the dimensions of that are, you're going to have that extent of liability. There's some discussion as to whether or not you've got a leg up on the other parties in the civil arena. Sometimes you do, sometimes you don't. And any discussion of what the collateral effects are going to be in the other jurisdictions, whether or not you go in.

So there's a discussion of all of that. But you know, I used to say when I was with the Division, and I can verify now that I'm in private practice, it is the case that if something has brought it to your client's attention, that same thing, there are circumstances at work that have probably brought it to the attention of others. Or at the very least, if you found it and you think nobody else has, your cessation of the activity is going to prompt others to think that something is up and maybe they'd better go in and do something.

So in today's world it is such a risky proposition that those that are colluding on things are going to pull back and that somebody is not going to break and go in. And so oftentimes the analysis turns into a rest-of-the-equation-minus-criminal-fines-type of analysis.

I mean is it worth it to you to get in there, to have zero dollars in criminal fines? You know, whatever you're giving up in terms of exposing the company to a civil exposure that they might not have otherwise faced, exposing the individuals to whatever they are exposed to as a result of going in. You evaluate that risk against the likelihood that others are going to go in and you're going to face that exposure in any event.

But a really real important consideration in this, and I've grown to appreciate more in private practice. I mean I don't think I missed it when I was in government, but when you're sitting across the table from the people who either were involved or other people in the organization that they know real well are involved and you say that every single person gets a chance for a pass, this is not just a reduction in zero fines in the company, but every individual gets a pass, that gets everybody's attention. But as we have known for years, it is going to jail that really can turn an antitrust case.

**MR. TUGANDER:** Yes. Steve.

**MR. HOUCK:** I have a question for Gary or Joe about your decision making as outside counsel for a corporation vis-à-vis the interests of the individual. What I have in mind is what I think is a typical scenario. You get a call from a client who has a subpoena from Ralph's office. You go meet with executives. You don't know much about the case, and you tell them you represent the corporation, not them; tell them they are entitled outside counsel if they want. If it works, they don't confess; you get their documents, and read them. It looks like the vice president of marketing may have been involved in something illegal. You wanted to go back and talk to that individual. You feel at that point you have an obligation to be stronger in your warning to the individual about getting outside counsel. And if so, do you have some concern that the person might not talk to you or you might light a fire under that individual so that he will beat you to Ralph's door and deny your client the opportunity of being first in? How do you balance all those factors?

**MR. LINKLATER:** Yes, as you obviously appreciate, you're dealing with a lot of factors, and one of them is where does the person sit in the organization. If it is the CEO of the organization, it is time to become more aggressive in any event with the person I think, but particularly with the CEO because you're not going to fire the CEO. If you fire the vice president in charge of sales, you're creating the famous disgruntled former employee. And of all the sources Ralph mentioned, I suggest that's probably the most productive source for any office. And you don't want that person out there burning you.

I think you have to, as I suggested earlier, get that employee in the hands of a very competent lawyer who can persuade him; I'm assuming you've failed at every effort to persuade him. That person needs a lawyer who can persuade him that it's in his or her interests to cooperate with you, so that not only the company but she personally can be benefited. It's tough calls.

Of course, the other thing, soon as you fire that person, besides creating the DFE you've shut off cooperation within the company. Some people might say Mary got fired, I'd better come clean. But a lot more people will close their doors and hunker down. They will get calls from Mary and say you'd better not talk, look what happened to me. You may persuade a lawyer to talk to them, that they are truly her lawyer and not the company's.

**MR. SPRATLING:** And I think the other part of the question is whether or not you can keep representing them or encourage them to get a lawyer. Was that the other part of the question?

**MR. HOUCK:** Yes, do you have an obligation to give them a warning? And if so, do you have a concern that it will deny your client or corporation to get the amnesty as first in?

**MR. SPRATLING:** Yes and yes. Everybody in this area thinks this is the toughest area of the law, this is the toughest area of the practice. What your warnings are and what your admonitions are when you interview corporate employees the first time.

A lot has to do, as Joe said, in his introductory remarks, with if you think you're in the amnesty game. If you can explain that alignment of interest. You typically don't get into the conflicts situation at least in codes of ethics in most states. But once you realize that someone has independent exposure and whose interest may be at variance and who has an opportunity to go in and cut a deal with the government, yeah, I think you have to advise that, and I think you have to get them separate counsel. And it is a tough thing for companies to do, and oftentimes legal departments don't want to do it, and management don't want to do it. They know what the consequences are. But absolutely, I think you have to do it.

**MR. LINKLATER:** I guess the only thing I'd add to that—and I'm not trying to imply any compromise of your duties, but the way you deliver that warning has a lot of meaning. And if employees hear you terrifying them or hear you saying you're on your own, we are going to cut you loose, we are going to drop you out the window, we are going to turn you over to the government, you're in trouble here—as I have sometimes seen written warnings that were used by lawyers—they are gone. They are not going to cooperate with you. They are going to go talk to their brother-in-law who had a real good lawyer handle a real estate closing for him last week, and look out. Game over. But you can deliver the warning in a sensible fashion and keep their confidence.

**MR. SPRATLING:** And one of the ways you can do that—this brings us back to Joe's earlier point—is by giving assurance as to how the company is going to treat them once the disclosure is made and whether or not you are going to keep them on board. And the challenge for me about a year ago with a company that had an absolute policy and was very public about the policy, anybody gets involved in this, they are gone, they are history, goodbye. And the co-counsel and I tried to per-

suade them and eventually did persuade the company that was not in the company's interests this time. It was a much better deal not to fire the people, as Joe said, to keep them on board one way or another. To give them a package, to put them in another position. Obviously you take them out of the current responsibility, pricing responsibility and get them way away from that. But it is so important that you keep the employees aligned with the company interest.

**MR. TUGANDER:** Unfortunately, I think we are out of time. Pam, what do you think?

**MS. JONES HARBOUR:** Well, if there are a few more questions, we should take them.

**MR. TUGANDER:** Yes.

**AUDIENCE MEMBER:** This is from the prosecution team. Did you have to prepare and anticipate that perhaps you might find that the *Taubman* jury and one or more Joe-six-packs, who really didn't relate to it and couldn't really give a damn about [how millionaires] through the years were buying and selling the most luxurious, unnecessary articles, $50 million dollars of Monets and Picassos; so how would you deal with that with the juries?

**MR. GREENE:** Well, I think it is fair to say that was a concern of ours, though not a great concern. We had some data that we could put in front of the jury to show that the average consignment or most consignments are really relatively of low value. We could put up data to show that it was not just the millionaires that were affected by it.

Also many times people consign stuff to auction from a bad personal experience—somebody has died in the family, they are in divorces, there were deaths in the family. So many times the person might look wealthy, but he has to sell stuff and he has to get a good price for it. So we had counter arguments for it. But I can't say it was a matter of great concern to us.

**MR. LINKLATER:** John, I'll tell you, Joe-six-pack himself was the foreman of that jury, and the government did a masterful job of dealing with that by demonstrating the sort of fellow that they were trying to characterize the defendant to be and contrasting him and his alleged abuse of the law or not proven abuse of the law with the lives of those jurors in making him a fairly unsympathetic person to those jurors. So it wasn't just the conduct. It was more the defendant and his conduct.

**MR. GIORDANO:** Let me just add in terms of the trial staff on the Sotheby's *Taubman* case. I think the brilliance of their performance was that they talked to the jury. They didn't talk down to the jury. They talked with the jury about their plan, and I think that came across and helped us immeasurably.

**MR. TUGANDER:** We are out of time.

**MR. GREENE:** I would just like to add that I've served on criminal juries, and I think that's an extraordinarily valuable experience when you're dealing with them.

**MR. TUGANDER:** The panelists will be available for questions afterwards, thank you.

**MS. JONES HARBOUR:** I would like to thank our moderator, Steve Tugander, and our panelists. This was an excellent, excellent program. We are going to break for lunch now. We will resume promptly at 1:30 with our Antitrust Federalism Revisited program. We will be featuring New York State Attorney General Eliot Spitzer and Deputy Assistant Attorney General Deborah Majoras.

# Antitrust Federalism Revisited

**MS. JONES HARBOUR**: If I may ask you all to take your seats, we'd like to begin. Welcome back to the second half of our Antitrust Law Section's Annual Meeting. This next program presents a unique opportunity to glimpse what antitrust federalism will mean in the next decade.

In 1989 the National Association of Attorneys General, also known as the NAAG, sponsored a conference in Lawrence, Kansas on antitrust federalism. That date marked the centennial of the codified antitrust laws. The conference examined the history of the federal-state relationship and the status of that relationship.

Since 1989 there have been numerous cases involving joint or coordinated state-federal efforts. As you'll hear, the enforcement pattern has grown more complicated, as exemplified in *Microsoft*. The distinguished panel of Antitrust Federalism Revisited will examine the complex and evolving relationship between state and federal enforcers.

Our moderator, Lloyd Constantine, is the managing partner of the law firm of Constantine & Partners. He is currently lead plaintiffs' counsel in the *In re: Visa/MasterCard Antitrust Litigation*, a certified class action for five million merchants in the United States which will go to trial in April in the Eastern District of New York. Lloyd is the former Chief of the New York Attorney General's Antitrust Bureau, past Chair of the NAAG Antitrust Task Force, and principal author of the 1987 NAAG Merger Guidelines, the 1985 and revised 1989 Vertical Restraints Guidelines, and the NAAG Merger Disclosure Compact. Lloyd headed the Antitrust Bureau and the NAAG Antitrust Task Force during the period of its greatest activism.

I now turn the podium over to Lloyd who will introduce the other illustrious panelists.

**MR. CONSTANTINE:** Thanks, Pamela.

I'll tell you what we are going to do. I know there's press here, and I know that Eliot has to get out in less than four hours, so we are going to do our best here. Eliot is probably speaking around 14 times at the State Bar, meaning actually he's in fact speaking someplace else right now. So we will do our best.

I'll give an overview of the federalism issue and its history. I'll introduce all three speakers in reverse order. They will each speak, and then we will have questions among the panelists and also from the audience.

Mike and I, the working stiffs, will stay as long as you want. We have four hours scheduled. I don't think we will go four hours, but you'll all get your four CLE credits. It is an honor system.

**ATTORNEY GENERAL SPITZER:** We'll investigate that.

**MR. CONSTANTINE:** Antitrust federalism, the relationship between state enforcement and federal enforcement, has had four distinct periods: pre-1890, 1890 to 1980, 1980 through 1990, and 1990 to today.

First, pre-1890. Prior to 1890 all of government enforcement was state enforcement at the state AG level. Prior to 1889 that was under British common law principles. In 1889 thirteen states, beginning with Kansas in March of 1889, codified full antitrust laws, which is why we had that centennial conference in Lawrence, Kansas in 1989. It was typical of what we were doing then. We were always trying to top the feds, show them up, make the point that we were first, we were better, etcetera, etcetera. And that's why this panel is called Antitrust Federalism Revisited.

In 1890 the Sherman Act was passed. I should point out that Senator Sherman said at the time that the purpose of the Sherman Act was not to supplant state antitrust law but to supplement it. When the Ohio AG was pursuing Standard Oil, Standard Oil went over to New Jersey. There was obviously a need to have a national law; thus the Sherman Act.

With a few notable exceptions, the next 90 years were a period of complete federal dominance, and federalism really meant that the feds took care of virtually everything and the states did very little, certainly of national scope. There were some exceptions. The oligopolistic structure of competition in both the oil and natural gas industries owes as much to the efforts of the Texas AG in the early part of the twentieth century as it does to the federal government. But that was a very, very rare exception.

Antitrust was a big policy. It was a policy of the first magnitude. It was called by the Supreme Court, on numerous occasions, the Magna Carta of free enterprise. It was a major issue in national elections. Teddy Roosevelt, as we know, was a trustbuster. Taft was one of the greatest antitrust jurists.

The Clayton Act and the FTC Act of 1914 were products of the thoughts of both Taft and Brandeis. And the states did local cases, mostly per se cases, certainly nothing involving anything other than local mergers and certainly nothing national. They did some national cases but those were copycat cases, MDL cases involving broiler chickens, folding cartons, tetracycline, cephalosporin, etcetera. It was basically a subservient role.

In 1976 the *parens patriae* reforms were passed by Congress and with it, some seed money for the states to

do more antitrust enforcement. But almost immediately the *Illinois Brick* decision took away precisely what the states thought they would do with that money.

Then we get to 1980. In 1980-81 the Reagan administration came to power. Everything changed. Bill Baxter and Jim Miller came into the DOJ and the FTC. They came in to shut down the agencies, and they almost did. Let's revisit that.

They dismissed the *IBM* and the *Mercedes Benz* cases. The staff at the DOJ went from 467 attorneys to 209. During those eight years they brought zero vertical cases. They brought a total of one Section 2 case between the two agencies, and that was the attempt to monopolize case, the *American Airlines* case. The FTC went down to 40 percent of its pre-1981 size. The New York regional office went from 93 people to 12. Merger enforcement occurred roughly at a rate of one-quarter of what had happened before. And that did not take into consideration the greater size of the mergers or the greater concentration levels of the mergers.

The legislative program of the Reagan administration included a bill to eliminate treble damages, to do away with joint and several liability, to repeal Section 7 of the Clayton Act under the so-called Merger Modernization Act, and to exempt various industries that were "distressed" by foreign competition. That was a bill that was principally written by Malcolm Baldridge. Bill Baxter refused to back that bill. So did Paul McGrath. But Doug Ginsburg was willing to back that, and he was rewarded almost immediately for that by being put on the DC Circuit, and virtually the next day being nominated to the Supreme Court.

In 1982 Bill Baxter went to Harvard. Two things happened in 1982. Eliot became an intern in the Antitrust Bureau at the New York AG's office and Bill Baxter went to Harvard, spoke to us and said he was going to prevent us, the people at state AG level, from enforcing the law. Also at the same time he sort of derisively predicted that by 1996 virtually all enforcement would occur at the state level. But he assumed that that would occur on a much, much smaller scaled-down menu.

He began the so-called Amicus Intervention Program, where the DOJ went into court to try to prevent state AGs and private parties from enforcing the law, which resulted in a gag order which was placed on both the DOJ and the FTC. To get around the gag order, the DOJ did a set of vertical restraints guidelines, and that was sort of the final straw. We formed the National Association of Attorneys General Task Force on Antitrust. We did a set of vertical guidelines. We did our own set of merger guidelines. We established the merger compact. We did a series of cases. You may remember some of them. The *Minolta* case, the *Visa/Master Card* case, a Section 2 and Section 7 case, the *Panasonic* litigation, the *Sandoz* tying litigation, the *Mitsubishi* litigation. *Hartford Fire Insurance*, which involved 19 states, ultimately went to the United States Supreme Court.

Merger cases involving Macy's, Federated and Campeau. Airline merger cases. The *American Stores* case, which is a supermarket merger case that went to the Supreme Court. In that case the FTC had taken the position that once it had cleared a transaction, it preempted the states from doing anything, and also that private parties, including state AGs, had no standing to get divestiture in a merger situation. The Supreme Court disagreed unanimously.

Also, the *ARC America* case was an important case in which the Supreme Court again unanimously said that states could enact separate, different, divergent, additional remedies which did not necessarily jibe with federal remedies; in that particular case, an *Illinois Brick* repealer.

And then came 1989. The first Bush administration came in. The federal agencies cried, "Uncle!" Janet Steiger mentioned to me that she told her top staff she did not want to wake up in the morning and read in the *Wall Street Journal* that the state AGs were doing the job of the FTC.

Jim Rill took a trip to Asheville, North Carolina, met with me, and asked for us to slow up our investigation of the Prime Star-DBS joint venture to give them time to start their own investigation and to do a coordinated investigation with the states. And we did. We formed the Executive Working Group for Antitrust, which was staffed by people from the AG's office, the FTC, and the DOJ, and that began the next era, which is 1990 to the present.

The federal agencies started to come back very significantly into the antitrust area under Jim Rill and Janet Steiger. That intensified under the Clinton administration under Klein and Pitofsky. And there's been a dizzying series of joint and coordinated state and federal cases, investigations, task forces etcetera. They take on, as Pam mentioned, just a crazy quilt of different patterns. Sometimes it's all the states, or virtually all of the states with the federal agencies such as in the *Prime Star* coordinated investigation prosecution. Sometimes a group of states, such as thirteen states and the DOJ in the *Waste Management* case. Sometimes just one or two states with an agency, such as the *Tenet Healthcare* case involving the FTC and Missouri. Also, numerous state-only actions, such as—some people forget this, but the tobacco action was in part an antitrust action resulting in a settlement of something north of $200 billion.

Let me touch briefly on two of the 1990s' so-called coordinated efforts. One, the Bell Atlantic-NYNEX merger; and two, the *Microsoft* case. Let me just put my spin on those.

The Bell Atlantic-NYNEX merger, which occurred in this area, was a situation where the federal government was involved, the DOJ, the New York Attorney General, at the time Dennis Vacco, was involved, and also the FCC was involved. At the time the FCC was headed by an antitrust lawyer, Reed Hundt. All three of them at some point in time looked each other in the eye and said, I'm going to stop this merger if you don't. I'll do it with you or without you. And they all said that to each other, and obviously none of them did, and then there were lots of recriminations after the fact. Which is a cautionary tale about coordinated work and sometimes dual or triple enforcement. But anyway you'll take your own conclusions from that.

Now *Microsoft*—clearly on some level, at least on a publicity level—the case of the century. As everybody knows, the DOJ was involved, 18 or so states were involved. Ultimately nine states settled. Once they dropped out, nine states settled, and nine states went on. I would like to be on that case sort of the way Guido Calabresi was when he said that both Clarence Thomas and Anita Hill were both absolutely telling the truth. I think that all sides were right in that case. I think the feds were right to do what they did. I think the settling states were right to do what they did, and I think that the nonsettling states were absolutely right to do what they did. And in fact, I remember Eliot more or less saying that. And that was another very interesting 1990s or early 2000 kind of pattern of coordinated and joint enforcement.

The criticism of all of this has been that it is a sort of crazy-quilt, chaotic pattern of enforcement, and that it prevents so-called "business certainty." In my own view that is actually a good thing. I gave you the numbers of the scaled-back Division and the scaled-back FTC. And certainly on some level the AGs' offices have been scaled back at various points in time. The fact of the matter is, with our economy being so much bigger, with the number of mergers occurring so much greater, with the scale of those mergers being so big and the concentration levels being so high, and that's just merger enforcement alone, there is a huge, huge, huge task to be done. And there is an inadequate number of people to do it at the state AG level, at the DOJ level, at the FTC level all combined.

I think one of the things that this somewhat crazy chaotic pattern does is it introduces a healthy degree of "business uncertainty." It is very hard to counsel now. One of the things that we do at our firm is we counsel, and it is hard to counsel and really give a business considering a risky strategy some sense that there really is some risk involved in that. I think this crazy quilt, this chaotic pattern is actually one of the things that counsel has going for them, and it is one of the things that the country has going for it in terms of the enormous problems that we have concerning concentrated economic power.

Okay, that's my quick review of the four areas. I'm now going to introduce our three speakers. I'm going to do it in inverse order. Actually, I'm just going to introduce Debbie and Eliot, then I will separately introduce Mike later on. Because I do know there are time constraints, and I will do it in the inverse order in which they will speak.

From the DOJ we have Deborah Majoras. I'm really happy today, because everybody on this panel is both a friend of mine and somebody that I've worked with in some way, shape or form, and it is a real pleasure to have this stellar panel today. And certainly that's the case with Debbie.

Debbie is a graduate of Westminster College. She went to UVA law school where she was a Law Review editor, clerked for Stanley Harris in the DC District, a partner at Jones, Day. While she was there we were co-counsel in a very significant case together, and it was absolutely a pleasure and an honor to work with her.

She is now, as you know, the deputy AAG in charge of the Antitrust Division where she is the second ranking antitrust official in the United States. She is recently also the founder of the Women of Antitrust, a very powerful group in Washington. And although she is the number two at Antitrust Division, she is certainly number one in the hearts of the men of antitrust.

Now Eliot. As Eliot's biography has appeared virtually everywhere, it is unnecessary to give the traditional introduction. So I'll give a somewhat personal and idiosyncratic bio of Eliot.

He was educated in the Bronx, at Princeton and Harvard, where he was an editor of the Law Review. He interned for me in the AG's office in the Antitrust Bureau. He clerked for Bob Sweet in the Southern District. He spent some time at Paul Weiss. He spent a good deal of time at the New York DA's office under Bob Morgenthau where he headed the Labor Racketeering Bureau. He spent some time at Skadden, and was a founding partner of Constantine & Partners. And, as you can see, he was a named founding partner. In 1998 he was elected Attorney General of New York in a "landslide."

Now just some personal things that you may not know about Eliot. When Eliot skis, he skis double black diamonds, and he skis fast, and he doesn't stop. And when he falls, he gets up and he skis faster. He gets up at 5:00 a.m. to play tennis with me. And when we finish at 7:30 a.m., so that he can be at his desk at 8:00 a.m., he calls his wife and three kids to make sure they are up and on the way to school, which is wonderful to see and hear.

All my adult life I have been in rooms with intelligent people who constantly wring their hands and they say why doesn't somebody do something about this or why doesn't somebody do something about that. Well, Eliot is the person who does something about this or that. He has got a job. He's got the smarts. He's got the intellect, and he's got the jurisdiction to do it. And he is doing it. For the first time in my life I've had the experience of casting a vote, going into a ballot box and casting a vote without one trace of equivocation, ambivalence or self doubt. Eliot.

**HONORABLE ELIOT SPITZER**: Who did you vote for?

Lloyd and I are friends. What's this "named partner" stuff? We never finished that discussion. Thank you, Lloyd.

It was interesting to hear a hundred plus years of history in 15 minutes. It actually is true. It did get me thinking. I finished skimming my high school treatise on American history because it occurred to me that I had forgotten so much of what I used to think I knew. Whether or not I ever did is debatable. I am amazed how antitrust law has played a much more vibrant role in the politics of this nation than anybody today would imagine. Back in the early part of the last century—and even before that—debates about trust busting were integral to the debate that has driven the nation.

Just a couple of notes. I was at a CLE panel this morning, in a room full of accountants. (Contrary to Lloyd's rather flip comments, you'll get your four hours of credit no matter how long you were here.) The accountants were actually having people fill out forms. If you left for 15 minutes, they were going to dock you, and it was quite something to behold. I attribute that to the Sarbanes legislation applying to them and not us.

The other scam (somebody should look at this, Lloyd, and I don't know who has jurisdiction—I hope I don't) is that on the panel up here we get triple the points you get, on the false premise that we prepare for these comments.

A couple of other personal notes. It is great that Pamela Jones Harbour is here, and it's great to see folks from the AG's office. Pam was there for quite a lengthy period of time, became a deputy AG, had enormous jurisdiction, and then went over to Kaye Scholer. But Pam is off to the FTC at some point in the near future, when confirmations are done. So congratulations! It is wonderful to see the FTC getting someone of such caliber and from New York. We always like that.

I just have to put in one brief word for Debbie, who is sitting here to my right. She leaned over to me when Lloyd was going through this litany of all the things states have done. She said, you know, we did make a case once. It is true: the feds, every now and again, their heads pop up out of the fox hole, and they are given permission to file a case. We haven't seen the caption yet; but you're right, they make an occasional case here or there.

For anybody who has wondered where I got my training and my views on federalism, I think you now have seen it. So predicting my actions in the future may be a little bit easier.

Two other personal observations. First, I think Lloyd's entire firm is here. I think my entire Antitrust Bureau is here, so I despair for the state of conspiracy out there in the world. But let me introduce Jay Himes, who is the Chief of the Antitrust Bureau. If you don't know him, you should.

I was reading the *Times* over the weekend. I always read Bill Safire's columns although I don't always agree with him. He is, frankly, in the traditional political spectrum, more conservative than I think I am. But he's always thoughtful, incisive, fun, and interesting. Over the weekend his column was an argument for increased antitrust enforcement in the telecom sector. It was a remarkable column. I read it and checked the byline and made sure they hadn't reversed Paul Krugman's and Safire's columns. But indeed this was Bill Safire, and he was decrying the increase of consolidation in the telecom sector and what he believed would be the consequence of diminution in information flow to those of us out in the general public as a result of a very limited number of telecom companies controlling various media.

Now, without agreeing or disagreeing with him—because I think the prevailing wisdom, which may be right, is that with the exponential growth in access to cable and other technologies there is more information flow than ever before—the fascinating thing was: here was a traditional conservative voice waking up to the fact that government had an obligation to get into the marketplace to ensure that the rules of fair competition were being enforced. And it was so contrary to the traditional rhetoric that we heard from the Nixon, Reagan, Bush administrations. I mentioned Nixon because Safire, of course, goes back that far on that side of the aisle.

What it made me realize was that even more thoughtful, conservative voices were now understanding that there's a fundamental fallacy in the Chicago School rationale and logic that has driven so much of what we have seen out of the federal government over the last twenty years. The paradigm of Chicago School economics that they have relied upon (and I'll set up a little bit of a straw man because it is easier to knock those down, obviously) is wrong. What they have said, and what they have tried to argue to the public, is that the marketplace will resolve all issues and will resolve them more efficiently and with greater speed if the government does not intervene.

I think those of us in this room appreciate that as a fundamentally flawed argument about how markets function. Markets function only if government can be there to ensure that certain principles of fair competition are protected. I want to go through several sectors and give you what has been the Chicago School argument with respect to the absence of intervention, and then give you what I think is the appropriate response on the part of those with a more thoughtful, clear-headed vision of what is needed on the part of government. At the end I think you'll see why we believe intervention at certain times is appropriate and indeed necessary.

The first sector that I'll mention is civil rights. I begin there because it may be the most potent argument. Many argued against our adoption of the 1964 Civil Rights Act and other subsequent acts, on the theory that the market, in and of itself, would eliminate discrimination. Why? Because it is inefficient to discriminate. Those who discriminate end up producing products that are less valuable. Their companies are run less effectively. And consequently, the best thing to do is not legislate that one cannot discriminate, but to permit the market to work and have the market end the discrimination.

Anybody who has studied the history of discrimination knows that simply doesn't work. Prior to the 1964 Act, discrimination was rampant, even though there was good constitutional law that said discrimination was not permissible. Only when enforcement actions were brought thereafter, whatever context you want to look at it in, did the market begin to change. There was no market downside to participating in a discriminatory structure and therefore the market simply couldn't address that values debate. We needed to intervene, but the Chicago School would say, don't do it.

Second sector, the environment. As to the environment, the Chicago School says let the market value the costs of pollution and let the market factor through those costs. But you do not want or need government to impose either limitations on the capacity of companies to pollute, or to have government-created trading systems that value pollution differently. Yet the external costs of pollution are not captured in the price paid by individuals in the marketplace. If we want a genuine equilibrium that values not only the positive but the negative externalities, then only government is in a position to create a system that captures those externalities in the marketplace. That's what we have tried to do with our statutory structures with respect to the environment, and that is why we are here to enforce those statutes.

Third sector, financial services. When I began to examine the interplay between analysts and the investment banking side of these houses, people—those who were sort of Chicago School types—said to me, You don't need to get involved in establishing a false construct here that separates the two, or imposes rules or regulations, because bad advice will be driven out of the marketplace. That argument has a certain appeal. If advice is bad, people wouldn't follow it; therefore, the good advice, the good information, will drive out the bad. But it didn't work. Why didn't it work? Because the structure of the marketplace was so overwhelmingly powerful, and the capacity of the investment houses to disseminate this information and drive market share and drive the stock purchases and sales of the retail purchaser left no capacity for good information to get into the marketplace.

Now the reason I picked these three initially is that there was a failure of the federal government to intervene over the past years, and consequently a void that had to be filled. I come back to the discussion of federalism that we are having today. In the civil rights context, there has been a failure, in my view, on the part of many federal agencies over the years because of the adoption of a Chicago-based theory about when intervention is appropriate.

What Lloyd talked about in the antitrust context, the numerical decline, both in terms of cases brought and in terms of staffing levels, applies also in the civil rights context where there has been the same dissipation at the federal level yet an increase in enforcement at the state level.

I will give you two examples of cases we got involved in. One is predatory lending, which is in my view among the most important civil rights areas of litigation, first in regard to finance and then more recently Household Finance. States stepped into the void and opened up an entire area of litigation and settlement to protect core civil rights that had, to a certain extent, been ignored by federal law enforcement entities. Why? There was a void. It is not really that nature abhors a vacuum and politicians abhor a vacuum. It was because states felt the need to step in and enforce certain core principles that needed to be established.

Likewise in the context of environmental litigation. We stepped in regarding acid rain. It began like the *Microsoft* case. We jumped in and then we were joined by the federal government when president Clinton was there. With the change of administration there has been a 180-degree shift in the ideological underpinnings of environmental enforcement. Work has been ongoing to undermine the litigation, but we are continuing. Why? Because these principles of market enforcement need to be perpetuated.

The financial services area is where the federalism argument is perhaps most poignant. There I ran head-on into arguments from those who are concerned about the stability of the financial marketplace, the uniformity of rules, and the paramount position, what is and will continue to be the paramount position, of the SEC: to articulate what the rules of the marketplace should be. They

said to me, How can you do this? And I said, Well, this is not the first time we have intervened; as in every other context—civil rights, the environment and so on—we will step into that void where we see a fundamental obligation to enforce what is not being understood. Moreover, I said to those who were primarily Chicago School theorists (their argument was: good information will drive out the bad; don't worry about this, just give it time), Do you understand the misallocation of resources that is resulting from the bad information that is being disseminated into the marketplace? This is something that I think few people have focused upon, but it is critically important. The harm we have all seen as a result of this, the bad advice rendered by the analysts, is that millions and millions of Americans who were for the first time getting into the market, in this so-called democratization of the marketplace, suffered enormous losses.

I'm not saying suffering loss is an ill that has to be rectified. We all know the market goes up and down. Risk is inherent in the nature of any investment. But this is risk that should not have been adopted because the advice was bad. That is one harm. Consequently, a result of that harm has been a loss of confidence in the marketplace, which we are trying to recoup.

A second harm that has not been sufficiently appreciated has been the misallocation of capital to those sectors that were favored by the investment banking companies because there was underwriting to be done. If you were in a sector other than telecom, other than an Internet-hooked sector, and could not bring an underwriting or an issuance of debt or equity to the investment banks, and you could not therefore induce the investment banks to put a strong buy on your sector, you were competing against a false report. So if you happened to be in the media business—or maybe media is wrong—happened to be a steel producer, an auto producer, if you were in a traditional industry where you needed to issue debt or equity, you did not get the benefit of your stock trading up because of these false reports. And the consequence was that the billion dollars raised based upon these false reports were improperly allocated to the wrong sectors of our economy. That will have a long-term detrimental effect upon our productivity. I don't think people appreciate this. If government had been there to ensure that analysts were not playing this game, we could have avoided that.

Let me talk for a moment or two about the pure antitrust world, which I've saved for last. I think Lloyd's presentation of the history of the dynamic between states and the federal government—or among the states and then with the federal government—indicates in a way that our relationship with the federal government with respect to antitrust issues is better now than it is with respect to the federal government in any other substantive area. We get along with DOJ better when it comes to antitrust issues than we do in the context of civil rights, labor, the environment, or virtually any other substantive area where we theoretically have parallel interests. I think the reason for that is that there has been such a foundation laid over the course of the history that Lloyd articulated, during these different periods of tension, combativeness, and rivalry. A somewhat symbiotic relationship has emerged where there is a rational allocation of cases. We don't always agree; of course we don't. But there is a rational effort to cooperate and understand when we inquire. It makes sense to work with the DOJ. It makes sense to work with the FTC. It makes sense to share theories.

There is a rational allocation in terms of burden sharing and who does the leg work, and also of sharing in terms of intellectual theories. Often we look at a merger, and we wonder whether the DOJ will adopt our theory. They may talk us out of a particular theory because they think we are wrong, or they think our arguments are not persuasive. So the multistate efforts need to go hand in glove with what the DOJ is doing.

I think the *Microsoft* case demonstrates that. It began before I was here, so my next sentence is not meant in any way to suggest anything that my office necessarily deserves credit for. But I think again the initial impetus may have come from the states and was quickly adopted by the feds. I think it is fair to say once DOJ got involved, Joel Klein and the rest of the Antitrust Division really did the lion's share of the work and did a spectacular job. People have challenged New York being one of the settling states. From a game-theory perspective, I said this is the best we will get now in terms of settlement, given what I believe the judge will do when she is presented with the opportunity to go with thumbs up or thumbs down, and I think the record in the district court affirms that.

Nonetheless, even though I made that judgment, nine states chose to continue litigation. As Lloyd says and I say, that's wonderful because we are in a position where we can try to get the best of both worlds: some settle, some litigate. So, there was governmental action with a logic to what was being played out. That will continue to be the case.

Now, having set up this notion that there is indeed a symbiosis these days, let me add a wild card. I think we are being a little parochial when we stand here and discuss this as only a matter of state and federal enforcement. There's now a third player on the field: the EU. Frankly, if I were a private sector entity, I would almost be more worried about what the EU is going to do with these major multinational mergers than what is going on here with the states.

New York and the other states have gone beyond one of the phases Lloyd talked about that was our perceived domain: mergers that affected a local product market. Because we have gone beyond that, we now feel

some obligation to understand the national impact of the mergers that we investigate and challenge. We have greater hesitancy to jump into some cases where it is harder when you look at the larger marketplace, when you look at the national market as opposed to just a local market. Sometimes it is harder to challenge a particular merger. The wild card these days is the EU. The EU in the past year or two has succeeded in stopping some mergers that most people thought would pass muster. I won't give you names, but I had a meeting with the CEO of a rather significant company on the morning he was about to fly over to Europe. He told me, Oh, I won't have any trouble with the EU; I'm going to persuade them this merger makes perfect sense. Well, lo and behold, a couple of months later the whole thing fell apart, not because of a domestic issue, but because the EU put its foot down and said, No, we are not going to permit that. I think the EU is the wild card that will throw a bomb and say we are not willing to permit that to happen.

As a U.S. citizen, I sense there's a certain parochialism they bring to the table that we never do, a certain parochialism they bring to their antitrust analysis that I think to a certain extent we are immune to.

Now, let me pick up on something that Lloyd said. People who argue against the multiple layers of antitrust jurisdiction, as in every other sector, argue that we need uniformity. We need certainty. We need to be able to go to one decision-maker and learn from that one decision-maker whether what we are doing passes muster. A sector where this is perhaps most appealing intellectually, because it is a reasonably new sector and because we are dealing with a technology that literally does not have any respect for geographic boundaries, is the Internet. In the context of the Internet people are asking, how can the states start to regulate Internet-based commerce? As I said, there's an intellectual appeal to it, but here's the downside: when you buy into that logic and you say yes, we want one decision-maker, you take the risk that that decision-maker simply will not step into the breach, will not rise to the occasion, and won't challenge a practice that deserves to be challenged. So accepting that there is an upside: the greater efficiency of having one decision-maker, what you risk on the downside is there will be moments when practices that should be challenged won't be challenged.

I would ask that you just look back over the past year in the securities context and say, Was it worth having the states, or giving the states, the capacity to jump into the securities market to say there's a problem here that deserves to be remedied or dealt with? I'm not sure how my friends at Citibank would feel, but I think certainly most investors would say, Yes, we are glad that an alternative enforcement entity can step into the breach when things really are egregiously out of synch. We have to balance the capacity to step in against the benefits of uniformity.

I won't bore you with my discussion of theoretical federalism. But it was a remarkable thing: soon after we began the Wall Street investigations, former federalists—they don't admit they are former federalists—floated an amendment in Washington to preempt the states from looking at the securities business. I said to them: if you try that again, it will be worse for you. It will be a bloody, bloody fight. Because I think most investors, who lost vast sums of money, will stand up and say No, we do not want the SEC to be the sole enforcer of what goes on in the financial markets. We need alternative reservoirs of enforcement.

Why do I raise the SEC right now? Because if anybody looked at today's *Law Journal*, you would see a fascinating article about the SEC and DOJ disagreeing about the role of antitrust enforcement when it comes to the investment banks. The SEC has filed an amicus in the *Initial Public Offering Antitrust Litigation*, arguing that because the SEC in essence has primary jurisdiction, the SEC has a mandate to construct a uniform and universal set of regulations for the securities markets. The SEC argued that behavior by the investment banks that might violate the antitrust laws should not give rise to antitrust sanction. Only the SEC, they are arguing, should be in a position to determine the appropriateness of their behavior. That seems a little wrong to me.

Unfortunately, there are two Second Circuit opinions from which one can discern that the SEC's argument is not frivolous. But you have a fascinating position here with arguments and amicus briefs that say, No, DOJ's Antitrust Division would have jurisdiction here. The SEC is disagreeing. Now, because these jurisdictional issues are of major importance to us, we are going to get involved in this case. Obviously we have to get permission to file an amicus, but—given that the judge last week in argument sought further briefing from the parties—we will send in a request to participate. Even if that is not granted, when the case goes up to the circuit, as I imagine it will at some point for clarification of what this area of law really means, we will try to participate as well.[1]

The notion that the SEC would be in a position to preclude meaningful antitrust enforcement in this area is simply wrong. I think we need to preserve the meaning of the antitrust laws and not fall prey to this argument of primary jurisdiction that the SEC would have us accept. I know we are working together, we are friends, partners the past couple of months; but I think it is fair to say that in past years there was an inadequate vigor in many of their enforcement and rule-making areas. Whether that continues to this very moment, we simply don't know. We will have to wait and see. But we are going to continue to protect not only our jurisdiction but also the juris-

diction of other important voices in the marketplace, such as DOJ's antitrust capacity in areas where other enforcers will try to squeeze them out.

Let me stop there. I've gone on longer than I should have. But Lloyd, thank you for what you taught me back then. It is true, my first job as a lawyer was as an intern, and God only knows what would have happened if a more timid litigant had been the chief of the bureau in that day.

**MR. CONSTANTINE:** Deborah.

**HONORABLE DEBORAH P. MAJORAS:** Well, thanks very much to Lloyd and to Pam and to all of you for having me here today. It is only fitting that I should be surrounded by Harry and Jay and some of my friends who formerly and currently work with me and for the states, because those folks are always forced to come down to Washington to speak and be surrounded by a bunch of federal types like myself. So it is a pleasure to be here. And I would echo Lloyd in saying that it is particularly a pleasure for me to be on this panel because I, too, have worked on matters with all of the distinguished speakers, and it is really an honor for me to be able to talk with them.

I'll start by echoing something that Eliot said about the terrific state of cooperation in antitrust enforcement between both the Antitrust Division, which I am a part of, and the Federal Trade Commission, and the states. There is no question that *Microsoft* was a case—and like the others, I will be forced to talk about it a little bit—that everybody loved to jump on. And it does raise some interesting issues for all of us to think about. But the fact is, most of the time our relationship is just pretty boring. As a normal matter of course we cooperate in investigations.

So these are my friends up here, and I am going to try to keep it that way as I talk to you today. On the other hand, I do not think I was put on this panel just to nod to Lloyd and Eliot, and so I will express some different perspectives so that we can have a more fulsome debate on some of these issues. I think it is fitting that we gather in New York to discuss federalism issues, given that it was in New York newspapers that the Federalist Papers were first published, in large part in an effort to get the state of New York, which was Alexander Hamilton's home state, to sign onto a constitution that would establish a national government. So, obviously, New York and other states, like Virginia, the state in which I live, overcame their concerns. Nonetheless, 215 years later we are still talking about some of the same issues.

I always go back to the basics when I am thinking through issues. If you look at a dictionary definition of "federalism," it is "a system of government in which power is divided between a central authority and constituent political units." In the debate that rages in the antitrust community, the word "federalism" actually has taken on a much broader context. For example, Mike Denger, who is on the panel and from whom you will hear soon, has written a lot about the various ways in which one might be subject to antitrust enforcement, not only by public officials and enforcers but also by private parties. It is a huge web of enforcement. Often when we talk about antitrust federalism, that issue gets swept into the definition. But regardless of how the word is used, the crux of the issue comes down to *how* the power is "divided between the central authority and constituent political units."

In a publication of the Federalist Papers, an editor talked about the fact that the federalist system was established as a bundle of compromises, exhibiting the very tension that was in the Constitution and still remains. In many contexts, compromise can result in a watered-down product. But in the Constitution, as much as we sometimes may not like to admit it, the genius is in the compromise. That said, living with the system is not without difficulties, and these are difficulties we need to acknowledge and work with within constitutional confines.

Some have suggested that, given the federalist approach that many political conservatives take, any Republican official who would advocate anything less than full support for states independently exercising enforcement authority without regard to the federal government must be hypocritical. But that criticism ignores half the equation. As Justice Scalia once said twenty years ago, federalism is a principle that runs in more than one direction; it runs in both directions. He said it is a compromise between, on the one hand, the "autonomy, disunity, the conflict of independent states; at the other, the uniformity, the inflexibility, the monotony, of one centralized government." That makes it sound like a lot of fun, doesn't it?

Congress has explicitly provided the states with a role in federal antitrust enforcement, and the courts have molded that role somewhat. There simply is no question about that. Although the states traditionally have played a very important role in antitrust enforcement, their role has continued to be subject to not only praise but criticism, and debate in between.

I am going to talk a little bit about some of the critics' viewpoints that have been expressed. Since I knew when I prepared my remarks that I would be speaking third, I assumed you probably would have already heard them all. So I will offer some other perspectives as well.

Some people say—and you actually have heard this, so I will not belabor it—that the states' role adds a significant layer of uncertainty for businesses in their consideration of possible mergers and in their business conduct. That uncertainty could chill procompetitive

conduct that actually would inure to the benefit of consumers. Certainly, like all tough arguments, that one can go other ways. Some uncertainty may be a positive thing, but I do not think we can overlook the fact that there can be a very fine line between very aggressive competitive behavior, which we all want, and behavior that goes into the area of antitrust violation. With respect to the latter—and I support Eliot on this—that is where the government absolutely has a role and must step in to remedy the situation. But even the Supreme Court has said in the *Gypsum* case that "over-deterrence does not redound to the public's benefit." So it is very tough for all of us to figure out where to draw the line.

Second, some have written that the states, in considering whether to investigate or act, may be more likely to take into account factors that are no longer taken into account in federal antitrust jurisprudence, such as protecting local jobs or small businesses in a particular state. The NAAG guidelines actually articulate some policy goals that would permit states to take into account how a merger would affect small local and regional businesses and their ability to survive. As established by the Supreme Court and lower federal courts, the goal of the antitrust laws is to increase competition in the form of lower prices, better products and increased value. In fact, mergers that generate efficiencies can force smaller competitors to be more competitive, not less. That obviously is something we want.

There is no question that a state legislature can decide whether protecting local jobs or assisting small businesses is an important goal for the state, and pass legislation along those lines. But I think it is harder to make the case that an individual state, in enforcing federal antitrust law, should focus on protecting such local interests, especially when the effects of that action would go beyond the state's borders.

It also is sometimes argued that state antitrust officials are more likely to be influenced by local businesses within the state. Some would say that should not be a criticism of our democratic society. We would not want to say that lobbying from constituent viewpoints is somehow a bad thing. But we have to be careful because we hear again and again in antitrust law—and it is always good to go back to basics—that what we should be attempting is to protect competition and not individual competitors. Indeed, in the District Court's recent *Microsoft* decision in the non-settling states' remedies case, the court "took careful note of those remedial proposals which advanced the interests of particular competitors and expressed concerns that certain remedies have been put forward just for the benefit of particular competitors as opposed to the marketplace as a whole."

Some say that as antitrust matters have become not only increasingly national but increasingly global, states need to confine their role to a more local or regional context, otherwise we could have one state or a handful of states making policy for the entire nation or making decisions that affect the entire world economy. Former Assistant Attorney General Jim Rill has made many comments to that effect, as he has been very involved in global antitrust matters. There is no question that the importance of coordination of enforcers in global matters is increasing. I spend a great deal of my time coordinating with agencies. As Eliot said, over 100 nations in the world now have competition laws. The role of coordination is very important and is one that is reserved for the federal government, because states cannot engage in international relations. It is a role that the federal government needs to take on, and, when necessary, coordinate with the states and with other enforcers around the world.

Of course, on the other side of the debate, you have heard arguments that if there is a void to be filled, the states could step in. Some states have been very aggressive. And I have heard it said, possibly by Lloyd and others, that in fact the state attorneys general as elected officials are closer to the citizenry we all serve, and therefore in some ways may be better equipped than the federal government to decide what is in the public's interest.

Finally, it has been argued that it is a positive thing to have innovation in antitrust jurisprudence, and that as we have more enforcers involved, we are more likely to have innovation. I think those arguments are good ones.

So where does that leave us? As I said in the beginning, we cannot talk about this topic today without talking a little bit about *Microsoft*. So I will do that for a few minutes. You may know that *Microsoft* was a case that I worked on quite extensively from the time that I was first appointed. Several states have pointed to it as an example of a case in which a small group of states can act independently of the federal government. And it is certainly true that nine states and the District of Columbia did just that in *Microsoft*. We largely had coordinated investigations with some twenty or twenty-one states from the very beginning of the matter. I say "we," even though I wasn't there at the time, but I mean the Department of Justice.

The United States and several states commenced separate suits against Microsoft challenging substantially the same conduct, but the federal and state cases had been consolidated for all purposes. They were tried together. They were decided together. They were remanded together. They were appealed together. The courts and the parties all treated these cases as indistinguishable. When the "slimmed down" case came out of the Court of Appeals in 2001, the District Court Judge ordered the parties to engage in intense settlement negotiations "seven days a week and around the clock." It was a marathon, and representatives from the state of

New York as well as a few other states negotiated together with us in that endeavor. And when we emerged after five weeks of negotiations, we had agreed to a settlement. Nine states and the Department agreed to that settlement. Nine other states and the District of Columbia, after taking a few days to consider it, decided that they were going to go their own way. Notwithstanding the great cooperation—which many of the states involved said was unprecedented—we had a divergence.

The issue of the legality of those states proceeding alone was challenged by Microsoft. Microsoft argued that the demand for injunctive relief that those states were pushing exceeded the states' jurisdiction. Microsoft was basically arguing that the states do not have a role to play in a case that involved nationwide conduct about which the federal government had already spoken, litigated, and settled.

The states, with some variations among them, filed briefs in this endeavor. Indeed, not only did the states that were still involved in the litigation file briefs, but so did the state of New York and a number of other states who were never involved in Microsoft. They essentially presented the view that states are independent sovereigns and can enforce the federal antitrust laws just as the federal government can, and it makes no difference that *Microsoft* is a case of national importance.

At the Court's request we filed an amicus brief. We noted that this was the first time that a small group of states with no particularized interests to vindicate were seeking to obtain divergent injunctive relief that would have absolutely nationwide consequences, if not global consequences, and they were doing it after the federal government had already secured a remedy.

Nonetheless, we looked at the law and saw that the law was not in Microsoft's favor, and made several important points in the brief that I want to make here quickly. The first point was that the United States is the sole enforcer of the federal antitrust laws on behalf of the American public. While the states do have authority to seek injunctive relief under federal law (which was all the case was about at this point—they also can seek damages, but the case was not about that), they do so as private parties under Section 16 of the Clayton Act, which means that, like private parties, the states have a greater burden to show some injury. The states are not acting as sovereigns in this respect, whereas the United States does not have to show any antitrust injury to secure a remedy. This distinction was not accidental, and Congress expressly considered it. Given these limitations, given that the United States had already acted and given the case law that said that the Court could consider what the federal government had already done in its exercise of equitable discretion, we recommended that the Court do so in this case.

The Court denied Microsoft's motion largely on the basis that the Court of Appeals had implicitly or explicitly already affirmed the states' *parens patriae* standing. The Court noted our policy arguments and said they might in fact inform its views when deciding upon the states' remedy proposals.

Judge Kollar-Kotelly ruled on those proposals last November. She issued her opinions in what had become two *Microsoft* cases: the approval of our settlement under the Tunney Act, and the states' remedy proposals that had been litigated the previous spring. The assessments of the two remedy proposals are a study in contrast. The Court found that the Department's and nine states' settlement was in the public interest and approved it, and Judge Kollar-Kotelly addressed virtually every criticism of the settlement. I am sure I do not have to tell you that there were plenty of them. We received more than 30,000 public comments, and some of them were positive and some of them were negative. But she addressed every one of the criticisms in hundreds of pages, and she commended all of us for the quality of that final judgment. She disapproved the non-settling states' attempt to seek relief. She said they were seeking to get relief for conduct that has not been proven "or for which liability has not been ascribed," and that they "showed little respect for the parameters of liability that were so precisely delineated by the appellate court," and presented "little, if any" legitimate legal or economic justification for their proposed remedies.

The case is not over. Two of the states, West Virginia and Massachusetts, have pursued an appeal. We will see where that goes. The remaining seven non-settling states and the District of Columbia have chosen not to appeal, and they are working together with us as we enforce two related and very similar judgments.

*Microsoft* was an example of a matter in which a small group of states decided that the federal government was not properly enforcing the antitrust laws, and that they must step in to fill a void. Their supporters' rhetoric was absolutely deafening. Nonetheless, we believed that we had reached a settlement that appropriately remedied Microsoft's violation in accordance with the antitrust laws, including the appellate decision. And almost one year to the day after we settled, the district court opined that our settlement was the right one.

What happened in this rare case in which the federal government and the states disagreed? Well, let's examine the possible reasons for the non-settling states doing what they did—and you have heard from Eliot and Lloyd that there may be some good reasons for state enforcement that may inure to the public good.

Did the non-settling states fill a void? No, because quite simply there was not a void to fill. Were they more aggressive? They unquestionably were more aggressive

in their remedy proposals. Were they closer to the public whose interests we serve and therefore more accountable? They certainly had a lot of strong support from Microsoft's competitors, many others in the computer industry, and a number of academics.

I have to say that the hardest part of the job, and maybe others would agree with me, is figuring out what is "the public interest." We do not take public opinion polls before we make decisions, and so it is not an easy thing to assess. But suffice it to say, by law we are charged to represent the interests of the consumers in the United States, and that is what we were doing. Besides, even if you would agree that the staff of state attorneys general are closer to the public than the staff of the United States Attorney General, I do not think there's a colorable argument to say that the nine states who settled were somehow less close to the public than the nine who did not.

Finally, did the non-settling states further the development of the antitrust jurisprudence? Yes, I think they did. I think litigation of their proposals allowed the Court to consider their proposals on a full evidentiary record and the opinion it produced should provide guidance in future antitrust cases.

I am not in any way suggesting that this one case ends the debate. But given all the arguments made pro and con for multiple enforcers, it does present a number of interesting questions. Who decides whether there is a void in federal antitrust enforcement? Are there 56 potential decision-makers who decide whether to fill that void? What if they apply different standards in making that decision? Do the federal antitrust agencies have a role to play if there is a belief the states have left a "local void"? Do the federal antitrust agencies have a role to play if they believe that the states are not appropriately applying federal antitrust law? When a federal antitrust agency is investigating or bringing a case of national significance, should states conduct parallel investigations and bring parallel actions? If we all think that more antitrust enforcement is a good thing, should we duplicate our resources or try to spread them out? If we do conduct parallel investigations, who defers to whom? Does it make a difference if only one state wants to bring a case of national significance? What if it is two, five, ten or fifty? And does it make a difference if the European Commission or another foreign competition authority is conducting a parallel investigation?

Now, you did not think I was actually going to try to answer any of those questions, did you? I hope not. Critics of the current system periodically offer proposals for change. Some years ago, Bob Lande proposed that the federal government and the states adopt federalism guidelines that would make it clear that local matters clearly belonged to the states and very large national matters clearly belonged to the federal government, and that would establish principles for working out matters that fell somewhere in between. And then Judge Posner, after trying to settle the *Microsoft* case the first time around, wrote an article in which he recommended that states be stripped of their antitrust enforcement authority.

So people make proposals; that is healthy and good. But because I believe our current system is unlikely to change significantly in the near term, which I will selfishly define today as "as long as I'm around in the Justice Department," I think we need to keep in mind the questions that our enforcement system raises. We should keep in mind our ultimate goals, because they, I think, are quite largely the same—serving the taxpayer. We should exercise our prosecutorial discretion in these matters and utilize our clients'—the taxpayers'—precious resources in the best manner that we can.

I will offer just a few additional thoughts on that issue. I do not think there is any question that the state attorneys general should enforce the antitrust laws locally within the state. I am often presented with potential matters by my staff and say "Wow, this matter looks like it is confined to State X, so have you called state X yet and referred that matter to them?" We do that as a matter of course, and it works very well. In fact, I know of one case that was recently brought by the state of New York that was started in that way. So it is a good system, and sometimes, as Lloyd and Eliot pointed out, states germinate cases and approach us, and we work together on them.

But recently we have encountered a few cases in which a state has declined to take on a matter, citing lack of resources and asking that we nonetheless investigate. And we have handled such matters. This state was not New York. New York actually has many lawyers compared to some of the other states, which sometimes get very stretched. The difficulty that I had with taking on these matters, however, was that the referring states also were involved in some very large national matters that we are involved in as well. And I submit that it does not make a lot of sense to have the federal government handling intrastate antitrust issues to free up states to work on more national matters. That seems a bit backwards.

Second, I think it is critical to the integrity of what we do and, most importantly, to the public we serve, that we work very hard to make sure that our enforcement efforts are complimentary and not conflicting. We all have to continue working to that goal, not just procedurally but substantively as well.

Since 1998 we have had a protocol in place for cooperation between the FTC and the Justice Department and the states. It basically codified, if you will, practices that had been in place for a long time, and we are continuing to work under that protocol. In addition, in 2002 we

established a federal and state relations working group, in order to keep up with what is happening in enforcement and in the economy, and so that we can work together better. The Division, FTC and states all are part of that working group.

And finally, we need to remember that—and this really goes to the last point that Eliot made—we enforce the antitrust laws together with an even larger web of antitrust enforcers. The Justice Department works closely with the FTC because we have overlapping jurisdiction with the FTC, and we have to make sure we do not duplicate our efforts and put undue burdens on parties. We also have to work with federal agencies like the FCC, the SEC, independent agencies and others to avoid duplication of effort and divergence in enforcement positions. Likewise, states, in addition to working with all of us, have also worked with private class action lawyers in cases—again, to try to achieve some of those same goals. I think that is positive, and quite frankly one could argue critical, lest the enforcement system—which Mike will talk about in a minute—comes crashing down on all of us, which would not inure to anyone's benefit. And of course, the importance of our cooperation with non-U.S. agencies cannot be understated. As Eliot said, it is very important. It is a very positive development that we now have 100 or so competition agencies throughout the world. But it is very important that they not be used for purposes other than the promotion of competition and the benefit of consumers. That is critical, because enforcement is a tool we have in our hands that can be very powerful.

In closing, I want to describe a federalism effort beyond our borders of which you may not be aware. The European Union's recent modernization regulation contributes to the debate about multi-jurisdictional enforcement and appropriate allocation of responsibility. The regulation is scheduled to take effect in May of 2004, when ten new countries are joining the European Union. It is going to decentralize nonmerger antitrust enforcement by allowing EU member states and courts to enforce Article 81 in its entirety, which is the counterpart to Section 1 of the Sherman Act. It will create joint jurisdiction between the Commission and the member states for cases involving intra-EU trade. The Commission will retain the power to assert jurisdiction or intervene in cases of particular community interest. And the member state authorities will be obligated to inform the Commission of all national cases involving Article 81. The Commission also will have the power to open its own investigation, which would remove it from the jurisdiction of the member state.

While the regulation at present does not offer much guidance on how matters will be divided between the Commission and member states, the European Council and Commission issued a joint statement in which they indicated that the Commission will be best equipped to deal with cases that: affect more than three member states; are closely linked to other Commission policies and other parts of the competition law—so that the law may be exclusively or more effectively applied by the Commission; or require the adoption of a Commission decision to develop competition policy further for the entire European community. It is an interesting effort.

The Commission also will try to work out jurisdiction between the Community and the member states. If a member state antitrust agency applies national antitrust rules to trade between the member states, it also is obligated to apply Article 81.

We have also followed with interest the European Commission's recent proposal to refine its "one-stop shop" system of merger review. Under this system as refined, either the Commission or a member state—but not both—will rule on mergers.

Although we in the U.S. have more experience with antitrust enforcement than EU does, we probably could learn a valuable lesson or two as we watch and see what happens with their new form of federalism. And I think they should be applauded for working to create a complementary and not conflicting system of enforcement, which is certainly what we strive for.

Thank you for your attention.

**MR. CONSTANTINE:** Thank you, Deborah. That was great. To accommodate Eliot's need to leave at some point in time, this is the way we are going to proceed. If it is okay with everybody, we are going to take questions now from the floor for both Deborah and for Eliot. We are also going to take questions that Mike may want to pose to either of them.

Mike actually is the person who really knows this stuff the best. He was the Editor-in-Chief of the three-volume ABA State Antitrust Practice Work. He was also, on the other side, a member of the 2001 ABA task force on the federal agencies, so on a scholarly level—he's also a consummate litigator, but on a scholarly level—he has written more extensively than anybody in the field.

So while we have the entire panel here, I would like to take questions both from the floor, and I would like to have Mike either comment or ask questions. Then we will take a break, and then we are going to come back and Mike is going to give his presentation. And I promise you that Mike's presentation—I mean these two people have been wonderful, but Mike's presentation will be incredibly rich and substantive. And I want everybody to stay, or else you don't get your CLE credits.

So, questions from the floor. Yes, sir.

**AUDIENCE MEMBER:** Yes, I was wondering—this is a question directed to the Attorney General. He spoke

about cooperation between state enforcement and federal enforcement. Do you have any views about cooperation between state enforcers and private counsel, specifically private class counsel? Do you have any views about how, if at all, they should work together?

**ATTORNEY GENERAL SPITZER:** The question—if you couldn't hear it—pertained to how state and federal law enforcement organizations can work dynamically together. I think at various times everybody has heard the states speak of how they try to work among themselves as a collective. The question is, How do states work with the plaintiff bar?

We try to work in a way that is symbiotic, but also make sure that we are careful not to merge interests, in the sense that there is a very discrete interest that attaches to class action counsel. That is not always the interest that we are there to protect and/or defend, so in each case we have to examine whether or not the claim is meritorious. If the claim is meritorious, we can work with class counsel to establish liability.

But then there are also tension points in terms of distribution of recoveries, how that is to be negotiated, how it is to be handled. You have to guard carefully what is in your interest to protect. But when the claim is meritorious, we have a joint interest in developing the facts.

**MR. CONSTANTINE:** Other questions? Yes, sir.

**AUDIENCE MEMBER:** Mr. Spitzer, I'm wondering if you can identify some of the enforcement priorities of your office within terms of industries or types of cases in the antitrust area?

**ATTORNEY GENERAL SPITZER:** Well, I'm not going to start listing. I'm not going to say anything that you'll print. I'm going to keep it so boring it won't mean something. I don't want suddenly to see articles saying that we are targeting this, that or the other thing.

But within the context of what you've heard, that Debbie described and we described, we look for local cases that we think are beneath the radar screen of DOJ or FTC because they may not have the national significance. There are some such cases, regional cases, mergers that don't rise to the level of DOJ efforts. And as Debbie said, we are fortunate enough in terms of our resource capability both to do the national and focus on the local.

We have done more vertical cases over the years. I think that is an historical reality both for ideological reasons and just because of the way that those cases have fallen into particular sectors that we have looked at.

**MR. CONSTANTINE:** There was a question from a gentleman back there.

**AUDIENCE MEMBER:** I was wondering when you considered your stance on a particular issue, there has been a decision recently concerning Microsoft selling where Sun Microsystems sued Microsoft and was granted a preliminary injunction which requires Microsoft to carry Sun's Java product wherever Microsoft's competitive product was distributed. Microsoft in that case took the position that the relief that was being sought was actually beyond the state of New York's and the United States' claims, and actually Microsoft said the private party there should not benefit from the government's litigation in that action because of that. I was wondering what your thoughts are on Sun's standing in that case?

**MS. MAJORAS:** Well, it is interesting because it is not the first time that we had ever heard the possibility of that remedy mentioned or some wanting that remedy. On a personal note, what's interesting about it is that as I struggled with whether that remedy and many other remedies would be in the public interest and in the interest of the marketplace versus in the interest of one particular company, I said to myself, "You guys know the way to the courthouse." In the U.S. we have a mechanism by which privately aggrieved parties can go to court and prove their injury and get their own separate remedy. In terms of the standing issue, I haven't looked at the technicalities in that case and I don't even remember what Microsoft said about the standing issue, but it didn't even occur to me that Sun wouldn't have standing.

Judge Motz said that he looked at our settlement. He said what he had before him was a private party looking for a private remedy, and that's what he gave. So I don't take an issue with Sun's standing in that context.

**MR. CONSTANTINE:** Eliot, do you want to say anything?

**ATTORNEY GENERAL SPITZER:** No, I would merely mention that throughout the *Microsoft* litigation substantial competitors of Microsoft came to us with private grievances about particular aspects of Microsoft's behavior. In a way this harkens back to the first question that was asked in the context of the private class action bar. But really there is no distinction in our mind when we analyze these cases, between the private class action bar and the large corporate entity that is a competitor that also would benefit from our initiating an antitrust action.

There were many companies both in New York and out of New York who approached me and said, continue to fight until you get X, Y, or Z as a remedy. We would factor that in but do no more, because we felt we had to serve the public interest, that amorphous thing we are asked to protect.

**MR. CONSTANTINE:** It certainly was the case, the Java portion of the DOJ/states' case and the portion which involved Netscape were core issues in the case, so this was not simply a little company with some parochial

concern. It could be said that what Java wanted might well be consistent with competition, not simply the interests of a competitor.

**ATTORNEY GENERAL SPITZER:** It could also be a big company with a local concern.

**MS. MAJORAS:** And plus it isn't that Java didn't get anything in our settlement.

**MR. CONSTANTINE:** No, Java got something great. It got collateral estoppel.

Other questions? Okay, I would like Mike before we break to both comment on what he's heard and ask any questions that he might have for Eliot and for Debbie.

**MR. DENGER:** I would make a few observations. First of all, rather than a discussion of federalism, I thought I was hearing from Attorney General Spitzer more about the merits of Chicago School enforcement versus a more interventionist view of antitrust enforcement. I'm not so sure that's a federalism issue as much as it is a philosophical issue over the proper degree of antitrust enforcement. If the Warren Court enforcement standards and the enforcement philosophy under the Truman, Kennedy, Johnson and Clinton administrations were compared to state enforcement, you might not have the same contrast. So I think some of it is a philosophical difference as opposed to a federalism issue.

The second comment I would have is, more enforcement is not necessarily better enforcement. More aggressive enforcement takes more lawyers, and I suppose for most of us in this room that is not a bad thing. It also gets more headlines, and I suppose that's good, too, for the enforcement agencies. However, consumer welfare and the economy is not necessarily better off from more interventionist enforcement. For example, we used to vigorously enforce Robinson-Patman Act prohibitions against price discrimination. You don't see those cases brought by federal and state agencies today. Is the consumer better off without that enforcement? I suspect he is. During the Warren Court period, you were challenging mergers with companies with market shares of 3 to 6 percent. If you look at the economic underpinnings of the concentration hypothesis, most economists today would say that there is very little empirical foundation, particularly at those share levels, for challenging mergers and that all you need in many industries to get workable competition is three or four effective competitors.

Similarly, if you look at changes in exclusive dealing law, the economic view of the foreclosure theory has changed. And if you look at vertical non-price restrictions which were challenged in dozens of cases, the economic learning reflected in the writings of Judges Bork and Posner, among many others, has led to a widespread acceptance of such reasonable and procompetitive practices that more vigorous—and interventionist—enforcement had challenged.

Consider also maximum resale price maintenance, once *per se* unlawful, and now subject to the Rule of Reason. Finally, if you look at predatory pricing, we have had dozens and dozens of predatory pricing cases, and with the exception of *Utah Pie*, at most one or two where the plaintiff prevailed.

So I suggest to you more enforcement is not always better enforcement, and does not perforce equate with enhancing consumer welfare and protecting competition. We have to have a solid economic underpinning for enforcement. In this connection, I would commend to all of you, if you have not read it, a report by an ABA Antitrust Section Task Force on "Perspectives on Fundamental Antitrust Theory," published in July 2001, with contributions from Michael Porter and many distinguished economists and lawyers. It examines whether concentration theory, which, in significant part, underlies the antitrust enforcement policy applied to mergers, has continuing validity in light of the empirical economic knowledge of the last 40 years. And it undertakes what we have done far too little of in connection with formulating antitrust enforcement. We haven't looked back retrospectively to see whether our enforcement assumptions and premises continue to be valid. The enforcement agencies need to do more of that. The same point applies to the efficacy of remedies. Now sometimes there are data limitations, but I think we need to do a lot more in this area.

The third point relates to the EU and its member states. While the EU may have a somewhat different economic approach, and its cases may at times reflect a bias toward protecting EU-based competitors, the EU has largely centralized antitrust enforcement involving major mergers and cartels and, in my view, it should continue to do so vis-à-vis its member states. Anyone who has had to process one of these international mergers through the merger review regimes of 60 or so countries, with not all of them solely focused on protecting their consumers and competition, realizes the benefits of centralized review. Decentralization adds time, complexity, cost and uncertainty, and it makes it harder to move even competitively neutral or procompetitive transactions forward on a timely basis. While giving due regard to national sovereignty, we need to try to reach consensus on common substantive standards and to work toward simplifying and centralizing the global merger review process.

Fourth, if we are going to have greater international convergence on merger enforcement, the United States government must be able to speak for the United States. To the extent a group of state enforcers have a contrary policy with respect to the enforcement standards for challenging international mergers, that makes it more difficult. We need to work together to have a unified position.

Fifth and finally, we heard from Lloyd about all of the cases the states brought and so forth. At times, however, the states have not minded the store with respect to antitrust enforcement involving local and statewide matters where they should be primarily responsible, such as *Indiana Dentists*, *Detroit Auto Dealers*, hospital mergers, various physician group cases, the milk cases, the paving cases, and so forth. There are dozens and dozens of matters involving state and local matters where it was the federal government stepping in to fill the void. So it is a two-way street. We all ought to remember that.

The essential question is not how much enforcement we have, but whether it is soundly grounded in economics. If it is, then the state and federal governments can coalesce together and do an effective job, as they have on numerous occasions.

**ATTORNEY GENERAL SPITZER:** Can I jump in for a moment? You're certainly right about a few of your points. I think you made five. You're two for five, so that's not bad.

In terms of the federalism versus the Chicago School you're absolutely right. When the federal government has adopted the Chicago School argument, the argument for an alternative enforcement entity is stronger. It is not because there's a Chicago School; therefore, there must be state enforcement. More doesn't equal better. I have long proposed to the folks in D.C. pushing preemption statutes that they can preempt all the other states as long as they carve out New York; we will be just fine. You're right there is a limit, diminishing returns at some point and there's no question about that.

Next you went into a litany of areas where you think the economics no longer support aggressive enforcement: resale price maintenance, exclusivity, predatory pricing, monopoly. Let's wait and see what happens longer term. I think that many of these areas are absolutely critical. I think that to say there hasn't been a lot of success, certainly is empirically true in terms of the predatory cases; they are just hard to make. It doesn't mean the theory is wrong.

It reminds me of the economist who says, Well, it works in practice, let's see how it is in theory. You know, the economists—I'm not so sure that I trust their data so much. Sorry, Hampton. (Hampton Finer, our economist who does wonderful stuff, is here.) But their data has a lot of suppositions built into it. So I'm not sure I'm ready to toss these theoretical bases of antitrust enforcement into the scrap heap of history yet. Let's give them a shot.

Two last points. We need to speak with one voice internationally. Nobody questions that, and we don't aspire to extend our jurisdiction beyond the borders. But that doesn't mean domestically we can't be aggressive.

Finally, locally we have done pretty well: highway paving cases, the milk cases. We should probably begin again. I think Lloyd was there in 1982 when that set of cases was being litigated. It is time to renew that. It seems every twenty years we do so.

**MR. DENGER:** I was just trying to do my job to create controversy here, and I would certainly agree with Attorney General Spitzer that in a lot of these areas we need to do more economic work and make sure we have the right economic foundation for our policy.

**MS. MAJORAS:** I'm going to make two short points. First I'm going to put in a plug for the last point on healthcare. The FTC and Department of Justice are jointly sponsoring hearings on healthcare and antitrust starting at the end of February. It is true that there are a lot of thorny issues here, and it is true that the federal government and the states kept bringing hospital merger cases that seemed under the merger guidelines to be cases that really ought to be brought, and losing them one after another. So along with that issue, we are going to do some retrospectives on some of the hospitals that did merge in communities and what is happening there. So there's my advertising.

And the other thing is, so I don't repeat what's already been said here, I'm just going to offer a short defense of my friends in the EU. I actually don't believe that the biggest issue is whether they will try to be protectionist of their own companies vis-à-vis U.S. companies. I think the reason we need to work so closely together with them is really the same reason we all need to work together so closely at home. There are different views on what it means to enforce competition laws and when they should be enforced. And at the margins we always say there's a lot of dispute, and when we are looking at Europe we are talking about a number of countries, particularly when the ten new countries join which are primarily from eastern Europe and do not have a history of a capitalist system. It is a system with more state aids, aspects of socialism and so forth. So I'm fond of saying we can't just take capitalism and antitrust principles, stick them in an envelope and send them around the world. It doesn't really work. It requires a lot of working together and study, and we need to continue to do that. And that is what I think is of greatest concern at the moment.

**MR. CONSTANTINE:** Any other questions from the floor? I'll take those two. The lady, please.

**AUDIENCE MEMBER:** In regard to seeing the states stepping in where they might perceive a void, do any of you perceive yourself as filling a void internationally on the FTAIA when there is not international enforcement that you might think that you had the breach to exercise jurisdiction extraterritorially?

**MS. MAJORAS:** I assume that's probably directed to me. No, I don't—I mean no, not really. I think that we have been leaders in international cartel enforcement

now for a number of years. And that has included cartels like the vitamins cartel made up of European and Asian companies that have effects in the United States. So obviously we have taken a leadership role there.

But I can think of cases that have been brought to the Department of Justice in my tenure in which we have looked at them and decided that there really was not an issue facing our nation. And now that we have so many countries with competition laws—for example, the European Union has adopted an amnesty program for cartel cases that is almost identical to ours—companies will have an even greater incentive to come clean here, since they can also go and seek amnesty in the EU and not have to make a difficult choice there. As we achieve greater convergence and reach more cooperation agreements with countries, we can rely on our counterparts elsewhere to take care of their own commerce.

You know, interestingly there is this FTAIA issue up at the Supreme Court now which was taken last week, and the court asked the Justice Department to weigh in on that particular issue. I think the issue may be a relatively narrow one, but I'll be interested to see where we come out.

**AUDIENCE MEMBER:** I was wondering also whether the states might have an independent view where you might have a divergence philosophically about whether or not enforcement was appropriate. I don't know that the enforcement was limited to the federal government. Private standings, if the FTAIA permits the suit, I would think the states might have a different view.

**ATTORNEY GENERAL SPITZER:** We are going one continent at a time.

**MR. CONSTANTINE:** Of course there is a historical situation in the *Hartford Fire Insurance* case which involved 19 states. That was a conspiracy that occurred at the Lloyd's syndicate in London. A bunch of members and brokers at Lloyd's sat down and decided that there would no longer be pollution coverage in American CGL policies, and they would raise the price of CGL insurance in the United States to the point where it went up a thousand percent in a very short period of time.

At that point in time the federal agencies did not choose to act on that and the states did. There was a comity issue in that case, and at the time states, and ultimately the Supreme Court, found there was a direct and foreseeable effect on commerce in the United States and between the United States and foreign nations. So, you know, you never say never.

I want to thank Eliot for coming. I want to thank Debbie. I think Debbie is actually going to stay with us. Mike, as I expected, really laid the basis for the second part of our program by asking just the right questions. So let's take a ten-minute break, and then let's come back and Mike will speak.

**MR. CONSTANTINE:** Okay, for the second half of our program, before the third half, this is what we are going to do. We are now going to let Mike deliver his prepared comments, which are really excellent. Mike is going to speak about the issues that we have already discussed, but more broadly also about the relationship between federal law and state antitrust law to some extent.

Mike is, as I said before, a consummate antitrust litigator. He has done virtually everything to be done that an antitrust litigator can do and should do. He has litigated extensively for both plaintiffs and defendants from virtually every industry. He is a graduate of Northwestern, the Harvard Law School. He is a partner and co-chair of the antitrust group at Gibson, Dunn; he works out of the D.C. office. Mike is the former chair of the American Bar Association Section of Antitrust Law, and I was very proud to serve as a committee chair under him.

As I said before, very pertinent to today's program, he's the editor-in-chief of a wonderful three-volume work by the ABA on state antitrust practice. He was a member of the ABA Task Force on the Federal Agencies in 2001. His list of publications is incredibly extensive and too extensive to go through here.

But anyway, without further ado, we are going to cycle back and discuss many of the issues that were discussed in the first part and try to get our arms around some of the questions that Mike posed towards the end of the first part as well. So, Mike.

**MICHAEL L. DENGER, ESQ.**: Thank you, Lloyd, for that kind introduction, and it's good to see again Pam, Harry, Deb and many others that I have had the opportunity to get to know on various matters over the years.

Lloyd, when he asked me to come to this program, said he invited me for two reasons. First, he wanted to have someone to argue with, no matter where the discussion meandered and no matter what positions he took. As a former intercollegiate debater used to arguing both sides of an issue, Lloyd said he thought I could fill that role. And secondly, he said the program was scheduled for four hours, and he needed someone to make sure he could fill up the time. Now, I hope I can be successful as to his first objective. And you can rest assured that I'm not going to come even close to the second in filling up all four hours.

What I would like to do is talk to you this afternoon about some broader federalism issues, extending beyond the federal government's antitrust enforcement versus state governments' antitrust enforcement. However, I want to look at the entire panoply of federal and state

enforcement, different statutes, different courts, private as well as public actions, as they relate to one aspect of our system, namely antitrust enforcement and remedies relating to cartels.

Effective cartel enforcement is among the most important pillars of our antitrust policy. No one seriously questions that cartels should be prosecuted vigorously and punished appropriately, both to deter their reoccurrence and to compensate those who have been actually injured.

To evaluate the effectiveness of antitrust enforcement as it relates to cartels, we must examine our system in its entirety, criminal and civil, government and private, federal and state. In connection with any such evaluation, I would suggest that the overall efficacy of our combined system of federal and state remedies for cartel behavior should be assessed in light of the following criteria.

First, does our combined system of remedies adequately deter cartel behavior? This is a difficult question, since we have almost no reliable empirical evidence on what provides real deterrence.

Second, does our system provide compensation to those actually—and I stress the word *actually*—injured by cartel behavior?

Third, does our system of remedies avoid windfalls to those not injured or overcompensate those minimally injured?

Fourth, does our system of enforcement give rise to excessive costs by generating unnecessary legal fees and related expenses and imposing unjustified burdens on the judiciary and the parties through protracted, uncoordinated and duplicative litigation?

Fifth, does the remedial system have a rational foundation that can command respect both at home and abroad, given the increasingly international nature of competition?

And sixth, finally and perhaps most importantly, does the system of remedies further the fundamental antitrust policy of promoting a more competitive industry structure that furthers competition and consumer welfare?

In the area of cartel enforcement, in which I have practiced for over 30 years, I have concluded that the answer to each and every one of the foregoing questions is "no." And the situation is getting worse over time, not better. Those representing each component of our multi-layered enforcement system—federal criminal prosecutors, counsel for direct purchasers, state attorneys general, and indirect purchasers' attorneys—are, quite naturally, preoccupied with enhancing their particular enforcement role and the remedies available to them with, I suspect, frequently little thought or concern about how the remedies they are vigorously pursuing collectively fit together to further the goals of antitrust policy.

The consistent theme of our multi-centered approach seems to be the more—and the more stringent—remedies the better. I submit this may not be the best approach, except perhaps for those of us in this room, who benefit from the wealth maximization of plaintiffs' and defendants' antitrust bar.

The 2001 ABA Antitrust Section Task Force on the Federal Antitrust Agencies, which submitted a report to the Bush Administration a couple of years ago and on which I served, recommended that the federal and state antitrust enforcement agencies and the bar convene a broad-based blue ribbon task force to study and evaluate whether a major statutory overhaul of our system of antitrust remedies is needed, and whether it would better serve the goals of the sound international antitrust policy. I think the organized bar should actively support an examination, in its entirety, of our combined federal and state system of antitrust enforcement against cartels, which has grown out of a plethora of judicial and legislative decisions made over decades, each of which may have been sensible in context but which, over time and taken as a whole, do not in my judgment provide a coherent, rational or efficient system of remedies that furthers the six enumerated goals of antitrust enforcement that I have outlined. Maybe a statutory overhaul is not politically do-able, but if we care about effective antitrust enforcement, I think we need to step up and address the issue in a timely fashion.

Now, why do I think our system needs reexamination? Let me briefly outline the reasons which are more fully set forth in an article that Jarrett Arp and I wrote, which is included in your materials.[2] First, let me focus on criminal enforcement. To begin with, I think we should consider the need for significantly longer jail sentences and higher personal fines for individuals, as well as continued efforts to extradite foreign nationals. I say this despite the fact that the Justice Department recently has obtained some very lengthy criminal sentences for individuals. It is individuals, after all, that run cartels. And significant personal accountability may in fact be the best deterrent to their participation.

Now, as to the fines imposed on corporations, in practice they are not based today on the Sherman Act maximum fine of $10 million, but on the alternative maximum fine provision of Section 3571(d), which is the greater of twice the gross gain or twice the gross loss. The Sentencing Guidelines assume an average gain from price-fixing of 10 percent of the volume of affected commerce, and an average loss of 20 percent. The presumed 20 percent loss is thus the starting benchmark. And the 20 percent baseline can be increased based on various culpability factors.

The analytical problems with this approach are as follows.

First, the assumption that an average gain to cartel participants is 10 percent of the selling price wholly lacks an empirical foundation. There is simply no evidence that has been put forward by the Antitrust Division or anyone else to support that presumption. The further assumption that the average loss to victims is 20 percent of the selling price or twice the amount of the gain, presumably because some purchasers were forced by the higher prices to switch to inferior substitute products, has even less empirical basis.

Third, the assumption that the 20 percent loss multiplier is properly applied to all of defendant's sales of the product at issue during the alleged conspiracy period, which a number of courts have accepted, is also problematic. This is because many conspiracies do not affect all sales of the product in question, many of them are not continuous—but on again off again—and many are subject to substantial cheating. Moreover, the volume of affected commerce approach is disconnected from the government's required proof in a criminal case. All the government need prove to establish a criminal violation is an overt act in furtherance of the conspiracy sometime during the period of the alleged conspiracy. The offense is the agreement. The government need not show that the conspiracy was put into effect for any part or all of the conspiracy period or that it was successful in raising prices.

Note also there is a potential disconnect between using the volume of the affected commerce to measure the harm flowing from a defendant's participation in a conspiracy, and hence the fine. If a defendant cheats on the cartel and gains sales volume by increasing its output or reducing prices, its volume of affected commerce likely will be proportionately greater than a non-cheating conspirator. Its actions, however, mitigate the injury caused by the cartel to consumers of the cartel's products. Under the Guideline's mechanical computation, such a defendant will be subject to a higher fine, not because it furthered the cartel agreement, but because it breached it.

In addition, the sentencing court is allowed to impose restitution either as part of the sentence or as a condition of probation. And restitution differs from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss. Finally, leniency has often become a contest where the more cartels the company is involved in, the more benefit it potentially can get from cooperation with the government. If a defendant has been involved in no other illegal conduct, that is if it is more law abiding, it can be severely disadvantaged in obtaining more lenient treatment in an Antitrust Division cartel investigation. Thus single-product companies and smaller cartel participants frequently are exposed to and have paid higher fines as a percentage of their sales than the larger leaders of the conspiracy. This, I think, has in many respects put enforcement all backwards. In summary, the criminal fine exposure is no longer a $50,000 fine as it was before 1974 or a million dollar fine as it was before 1990 or a $10 million maximum fine as provided by the Sherman Act today. It can run under the alternative fines mechanism into the hundreds of millions and potentially billions of dollars.

On top of this criminal fine exposure, cartel defendants face direct purchaser and indirect purchaser damage actions which can take years to resolve and give rise to significant exposure.

First, defendants are jointly and severally liable to direct purchasers for treble damages, no matter how limited their participation in a conspiracy, and a defendant has no right of contribution from co-defendants.

Second, guilty pleas are prima facie evidence of liability, and a defendant receiving amnesty may receive only a minimal benefit in a civil proceeding from the absence of a plea because it will be tried jointly with those defendants that pled and be required to produce any incriminating documents that it supplied to the Antitrust Division and, in all likelihood, that it furnished to foreign enforcers as well. Third, the class action vehicle gives plaintiffs' counsel substantial leverage. The idea that plaintiffs' attorneys typically have a difficult task warranting premium fees for extracting ordinary settlements in class actions following government criminal cases is certainly debatable, given that they have class actions, guilty pleas, *per se* violations, defendant employees taking the Fifth Amendment, joint and several liability, automatic trebling of damages, and the benefit of time-honored negotiating principle that the first to settle gets the best deal, and on and on. The fact that few direct purchaser class actions are ever tried shows that representing direct purchaser classes in many cases is not a "10" on the degree-of-difficulty scale.

Fourth, plaintiffs need only establish a reasonable estimate of the overcharge to direct purchasers to recover damages, and except in very limited circumstances there is no passing on defense. In *Illinois Brick*, the Supreme Court held that indirect purchasers could not sue so as to (1) maximize deterrence by avoiding dilution of direct purchasers' incentives to sue, (2) prevent defendants from being exposed to multiple liability to direct and indirect purchasers, and (3) avoid a detailed and complex factual inquiry as to whether some or all of the overcharges were passed on by direct purchasers. The uncontroverted fact, however, is that in many industries, some or all of the overcharge is in fact passed on, sometimes with an additional markup. And direct purchasers in many instances may be only minimally injured. Yet, they can recover triple the overcharge. And nothing the

defendants pay a direct purchaser either in settlement or in a judgment is credited against defendant's liability to indirect purchasers in state court, giving rise at least to the policy issue of risk of multiple liability that *Illinois Brick* sought to avoid.

Fifth, class opt-outs are increasingly a significant issue. In the *Vitamins Litigation*, about 75 percent of the potential direct purchaser class by purchase volume opted out. Substantial opt-outs make settlement and litigation more expensive.

Sixth, MDL proceedings at the federal level are useful to coordinate discovery and pretrial proceedings, but there is no statutory MDL coordinated trial in a single federal venue.

Finally, direct purchaser plaintiffs, U.S. and foreign, are increasingly attempting to recover damages for foreign purchases in the world's most litigation-hospitable venue, further broadening the scope of litigation and its attendant costs. While the circuits are split on this issue, and the Supreme Court in due course, I believe, will resolve it, foreign-based direct purchasers anywhere in the world have been permitted in some circuits—in the cause of further "deterrence"—to sue for purchases abroad without having to establish any connection between their injuries and the conspiracy's adverse effect on U.S. commerce.

Superimposed on top of the direct purchaser actions are indirect purchaser exposure in approximately half the states. In some states, both the state attorney general and private counsel can represent the same indirect purchaser plaintiffs. And, with the availability of class actions, there has been no lack of incentive for indirect purchasers to sue. As noted earlier, there is some precedent for state attorneys general being able to sue for restitution on behalf of indirect purchasers, even where a state has no *Illinois Brick* repealer. State attorneys general, and in some jurisdictions state agencies, and county and local prosecutors can also sue to recover damages for state and local purchases and to obtain other monetary relief. And some states have unusual remedies, such as in six states that arguably allow recovery by direct (and potentially indirect) purchasers of the "full consideration" that was paid for the product in question.

I'm not taking issue in any way with the propriety of state attorneys general or indirect purchasers seeking relief for their injuries. The layer of disparate state remedies and proceedings superimposed on the federal framework, however, poses additional costs and even more in the way of coordination and burden concerns. For example, if you represent a defendant, counsel qualified to practice must be obtained in each state. There is no MDL counterpart proceeding at the state level to coordinate discovery among state courts. The potential exists for duplicative discovery both among states, and between state and the federal actions. There is also a potential for overlapping liability and damage trials. And plaintiffs' lawyers have figured out the best way to get leverage and extract settlements is not to facilitate coordinated and efficient proceedings, but to impose as many burdens and costs on the defendants as they can.

Furthermore, state law is undeveloped on a host of critical issues. For example, the availability of the pass on defense from one level of indirect purchasers to another. In addition, indirect purchasers may be able to assert claims for the *same* indirect purchases under the laws of multiple states, complicating the coverage of settlements in some cases, recovery by direct (and potentially indirect) purchasers of the "full consideration" that was paid for the product in question. Individual state cases also are often filed many years after the first federal cases. In the *Vitamin Litigation*, for example, the first private case was filed in 1997. Today, new cases are still being filed, which makes it harder to achieve finality and to coordinate and handle litigation efficiently.

Finally, coordinated settlement and discovery on a multistate basis rests solely on the *voluntary* cooperation of counsel and the courts involved. And here I would like to commend Harry First and the state attorneys general in the *Vitamin Litigation* where the parties were able to reach a novel "global" settlement to resolve indirect purchaser claims in 23 jurisdictions. This settlement was the first of its kind, and it was made possible only by the voluntary coordination and cooperation of the state attorneys general and the lead private plaintiffs' counsel, whose firm represented plaintiffs in a number of states.

Remember, however, voluntary cooperation is not always the principle incentive that underlies the economic motivation of plaintiff's counsel. And opt-outs are an issue in state court as well, and I could go on and on.

As you would expect, it takes many years for a defendant to fully extricate itself from our multilayered remedial system. To paraphrase David Ignatius of the *Washington Post*: A cartel participant can look forward to that particular American version of hell in which it will be tormented for eternity by lawyers. Now, what exactly does "hell" look like?

First, the potential exposure of defendants in criminal and civil actions may be six, eight or tenfold damages, and the total cost to defendants, including defense costs and criminal fines, can easily approximate somewhere between 75 to 150 percent or more of a defendant's dollar sales in the conspiracy period. And for smaller defendants who have less sales volume over which to spread their defense costs, the costs can be even higher. Second, multiple judges—state and federal—and numerous magistrates and special masters will be gainfully employed for years. Third, substantial windfalls will go to plaintiffs that are not injured or only minimal-

ly injured. Fourth, a defendant's total costs unrelated to fines, settlements and judgments, that is its outlays to pay defendant's legal fees, plaintiff's legal fees, expert expenses and other litigation costs are substantial and clearly excessive. Fifth, the cost to smaller and weaker defendants may be disproportionate, leading them to exit the business leaving a more concentrated and less competitive industry structure. And, finally, over time nothing in life is free. The costs of our inefficient, multi-layered system will likely be passed on by the surviving defendants—lawfully—to the very victims of the original cartel. For these reasons I say it is time to re-examine the system.

The 2001 ABA Antitrust Section Task Force on the Federal Antitrust Agencies on which I served made the following proposal, which parallels ideas proposed periodically in ABA Antitrust Section task forces ever since *Illinois Brick* was decided. It would require legislation. It might offend certain views of federalism. But it, or something like it, seems appropriate as an alternative to our patchwork and ill-coordinated remedial system today.

First, all criminal and civil actions would be consolidated in the court where the federal criminal informations or indictments were filed (or in an MDL-type designated court). This court would have exclusive jurisdiction over all direct and indirect purchaser or other monetary claim relating to the charged conspiracy, whether federal or state. This is the "one forum" principle. It also embodies the "one judge" principle. While the burden on the judge would undoubtedly be substantial, most trial judges that I have talked to or that I have heard address the issue say they benefit from seeing the entirety of the matter—criminal and civil. This gives them a complete perspective from which to deal with the problems that cartel litigation poses

Second, all defendants, both foreign and domestic, would be subject to the jurisdiction of the court and be required to provide relevant discovery for any civil damages actions following the criminal enforcement action. This is the "let's-have-all-the-evidence" principle.

Third, courts would no longer have the option in federal criminal proceedings not to hold a Section 3571(d) sentencing hearing to determine the amount of the gain or loss if defendant asked for such a determination on the ground that such a hearing would unduly complicate and prolong the sentencing process. In fact, such a hearing potentially could be conducted simultaneously with the second phase of the civil proceeding, which I will discuss in a moment, in which the aggregate overcharge at the direct purchaser level is determined.

Fourth, after criminal liability is determined, a single civil proceeding would (1) determine liability for damages, (2) determine the aggregate amount of any unlawful overcharge or other damages, and (3) determine the appropriate allocation of damages among all claimants, direct and indirect purchasers, private and government purchasers and consumers alike.

This civil proceeding, as envisioned, would have several distinct phases. The first phase, which would follow any criminal trials, would determine whether the defendants violated the antitrust laws, applying all rules of evidence including the prima facie effect of guilty verdicts or pleas that exist today. The court would appoint a limited number of counsel from among the ranks of state attorneys general and private counsel to conduct discovery and litigate liability on behalf of all claimants. There is simply no reason why we need dozens of (or hundreds) of government attorneys and plaintiffs lawyers involved in determining the issue of liability.

Defendants, particularly if they pled guilty, could elect to bypass this phase by stipulating to liability or limiting the issues to be tried. As you know, there will often be issues as to the scope of the conspiracy in terms of the products involved, its duration, the identity of the participants, and so forth.

The second phase of the civil proceeding would be devoted to determining the aggregate amount of any overcharges or other damages which would be calculated on an overall basis at the direct purchaser level for the period of the conspiracy. Once again, the court could appoint a similar limited group of state attorneys general or private counsel to conduct discovery and litigate this phase. These two phases embody the "let's-limit-the-lawyers" principle.

Finally, after the overall determination of an overcharge or a judicially approved settlement, the defendants would deposit the overcharge, appropriately doubled, trebled or quadrupled pursuant to whatever Congress determined was appropriate, into the registry of the court. In this connection consideration could be given to crediting in part any loss-based criminal fine to the overcharge fund to compensate the plaintiffs.

In the final phase, with the assistance of whatever special masters, magistrates or other resources the court elects to engage, an allocation of the overcharge between and among the direct and indirect purchasers and any other claimants would be made for their respective claims. There would be wide notice and any potential claimant who elected not to claim its share would be precluded from bringing a separate action.

Now, in making its allocation, the court could adopt presumptions as to whether an overcharge was passed on, depending on elasticities and so forth. And indeed, as in interpleader actions, it probably would not be necessary for defendants to participate in this final phase or to participate only in a limited fashion. This reflects the "once-you've-paid-you're-out" principle.

Now, obviously a solution along these lines would require some complex form of state and governmental interaction, legislation to overrule *Illinois Brick*, to provide for consolidation in a single court, and to preempt certain types of lawsuits in state court, and/or possibly a federal-state compact. I'm not a legal or constitutional scholar in this regard, and such a proposal may, after study, prove to be politically impractical or suffer from other faults. Nevertheless, the concept of consolidating all cartel-related litigation in one court and thereby reducing the burden on judicial resources, eliminating unnecessary attorneys' fees and related litigation costs, expediting resolution of damage actions, avoiding windfalls and duplicative and inconsistent recoveries and providing compensation to the actual victims of cartel behavior is, I suggest, worth considering.

We can still keep an appropriate role for the states in antitrust enforcement and provide for injured direct and indirect purchasers to recover their damages, but we can certainly do so in a way that is more efficient, avoids windfalls, is much more timely, relieves the burden on the courts, reduces legal and other costs, and provides effective deterrence.

As a bar, I suggest that it is time to address these issues. Thank you.

**MR. CONSTANTINE:** As I promised, Mike really does know this stuff very well. This is the way I would like to proceed from here on. We will get you out early, but what I want to do is this. I want to give myself as a moderator and Deborah the chance to cycle back on anything and everything that has been said and make some comments. I will take some additional comments from the floor and then some additional comments from Mike. So let me just tick off a few things.

Mike appropriately thanked someone who collaborated on his excellent outline that's in your materials. I want to do the same thing. There are a great set of notes in your materials that are prepared by people at my firm, my partners, Yang Chen and Stacey Mahoney and a young attorney in our firm, Margaret Ross, and I want to thank them.

Also on the table out there is the freshly minted BNA state antitrust publication which is just off the presses, and it was also authored by the same three individuals in our firm. So it's out there and available from BNA.

Just a couple of points that were made by the various panelists I would like to touch upon. I would like to second what Eliot said about this dichotomy between a philosophical difference and federalism. And the issue again is if it is the case that at one level of government there is a philosophy, like the Chicago School philosophy, which is a heads-I-win-tails-you-lose type of philosophy, then having enforcers at another level gives the economy, gives competition, gives consumers the opportunity to avail themselves of that other group of enforcers. So I think that's sort of a false dichotomy.

Now, when Eliot talked about people actually believing that the civil rights of people who were discriminated against would have been better served if a market-based approach had been taken, there hadn't been all this civil rights litigation.

That sounds almost like a fable. It sounds like that didn't actually happen.

I just want you to know that indeed Judge Posner, whose name has been invoked several times today, has actually written that precise thing. He has said that the cause of civil rights would have been better advanced if a market-based approach had been taken to civil rights without all the litigation. He has written that it would be better to allocate organs for people who need organ transplants by having them sold on the open market rather than have some kind of a system of allocation, which is what we have in the United States. He has written that better than our system of adoption in the United States for children, it would be better for children to be sold on the open market. Now, whether you agree with that or disagree with that, the issue is—what I really want you to understand is—that people in a position of power actually have those beliefs. And when they have those beliefs it is a good thing that there are other governmental people at another level of the government who can have other types of beliefs, and so that type of competition can occur.

I shouldn't go into it, but there was a gentleman who was the Director of the Bureau of Competition at the FTC during the period that I discussed before who had those very beliefs as well, spoke about it very frequently at the Federalist Society, but I won't go into that.

For the people here who came for a reason other than to hear Debbie and Eliot or for an additional reason, there are some things that you might want to take a look at, and I commend them to you. Certainly, I commend to you the three-volume treatise which Mike was co-editor of. There is an article that I wrote which I commend to you called "Antitrust Federalism." It was from 1989. It is in the *Washburn Law Review*, and it does a fairly exhaustive analysis of this whole period of 1980 through 1989 that I discussed. I also commend to you a wonderful article that was written by the editor-in-chief of the *Harvard Law Review*, Peter Yu, called "To Form a More Perfect Union." And he examines precisely what the states did during that period of time in terms of their merger guidelines, their vertical restraints guidelines, their merger compact and some analogous things that the state AGs did in the consumer protection area. And he assesses those both in terms of their merits and also in terms of their constitutionality, measuring them against the commerce clause, the compact clause and the supremacy clause. It is an excellent article, and I com-

mend that to you. So, there are some other things for those who are interested in this on a scholarly level to take a look at.

One of the points made in that article is that federalism, the kind of federalism that we have been talking about today, is often referred to as the vertical system of checks and balances. Not just the checks and balances that exist at the federal level among the three branches of government, but it was quite clearly set up by the framers of the Constitution as a kind of vertical check and balance at both levels. I made the point I already want to make about the very, very rare circumstances in which the states will get into a situation which goes beyond the borders of the United States. *Hartford Fire Insurance* is a good example of that, and I thought it was appropriate and ultimately it was sustained by the Court.

Now, one thing I think is very important to point out is that I just said that the Supreme Court and the Ninth Circuit in that case ultimately sustained what the states did in that case, and therefore one could infer that that's good. I don't infer that. I think it was good anyway. But we should not confuse judicial decisions with what's good, okay. Often it is said, well, you know, Judge Kollar-Kotelly said what we did was okay, so therefore it was okay. What the Supreme Court, what the Ninth Circuit said we did in *Hartford Fire Insurance* was okay, so it was okay. What the Supreme Court said happened in *Matsushita* was okay, so that was okay. I mean I don't think anybody seriously really believes that. I mean there are cases on one end of the spectrum and the other end of the spectrum that demonstrate that. And there's an exhaustive analysis that goes on one end of the spectrum in Judge Bork's "Antitrust Paradox."

So an example: the government won in *Vons Grocery*, but I don't think too many people would think that was a good result. And by the way, I think, as a matter of fact, Judge Posner argued the *Vons* case on behalf of the United States.

**MR. DENGER:** He was doing his duty.

**MR. CONSTANTINE:** He was doing his duty, but his reaction to that when he actually looked at what he had done was a kind of revulsion, a kind of revulsion that a substance abuser has and then spends the rest of his or her life going off the deep end on the other end. So let's not confuse judicial decisions with what's good. Let's look at those decisions. So *Vons* is one on one side. Think about *Matsushita* on the other side.

**MR. DENGER:** Let's think about *Matsushita*. The allegation was they priced TV sets below cost for 20 years with the hope that they would somehow, someday be able to recoup the loss. Twenty years of lower prices to American consumers. We have had about 30 other litigated predatory pricing cases and (Harry, you're our resident scholar here so correct me if I'm wrong), with the exception of *Utah Pie* and maybe one or two others, very few of them have ever found any recoupment and injury to consumers.

**MR. CONSTANTINE:** That doesn't mean it was good. Now, let's just talk about—

**MR. DENGER:** That is true, but you've got to have either underlying economics or litigated decisions finding harm to competition. You can't say we should go after a defendant because it sounds bad.

**MR. CONSTANTINE:** Well, we could really do four hours on *Matsushita*. But suffice it to say at the point in time until in '86 the Supreme Court said this was implausible, that they could get the result that they want. There were no American television manufacturers left. So while the Supreme Court, seemingly the blind Supreme Court was saying this can't possibly work, it had already worked, and it had already worked with extreme prejudice.

**MR. DENGER:** What happened over time, however, is that the American consumer got lots of new products and prices went down.

**MR. CONSTANTINE:** But no American manufacturers.

**MR. DENGER:** So, if there were a conspiracy, wouldn't you expect to see TV prices get jacked up by now?

**MR. CONSTANTINE:** What happened was the Korean industry ate their lunch, which probably—

**MR. DENGER:** Yes, all those Korean TV sets; there are a couple of Korean brands and Phillips, but most of the principal competitors are the "conspiring" Japanese.

**MR. CONSTANTINE:** Now when you think about predatory pricing cases that are successful, think about the *American Airlines* case from a couple of years ago. And take that decision into any room that you want and just quietly read the panoply of conduct engaged in by American Airlines. But at the end of the day, because of essentially a rigged standard, a standard that says unless you can show that both the price that was charged is below marginal cost—and we note marginal cost of an airline ticket will be simply the incremental fuel necessary for an additional passenger to get on plus the cost of the meal—and no longer the cost of the meal because the meal is not there anymore, so it is just the incremental cost of the fuel for the additional passenger. And you can also set forth a plausible recoupment theory so because of that, because the deck is so stacked with Chicago School learning and Chicago School principles, the kind of conduct that American Airlines engaged in

that case was okay. And of course, that helped American Airlines a lot, because the entire airline industry, you know, having been the beneficiary of these lax and loose standards is going to hell anyway in a hand-basket.

**MR. DENGER:** Ladies and gentlemen, I always thought the goal of a free market was the best empirical evidence prevailed, and we certainly can't say that conservatives dominate American academia.

**MR. CONSTANTINE:** This is why I invited Mike.

**MR. DENGER:** I mean I can't let him get away with this and go on with a three-minute speech. You go back and look at it, and almost all of these are areas where economics learning has evolved, where we don't hear a lot of debate from the liberal economists anymore contesting whether some of these practices are potentially procompetitive and shouldn't be stricken down as *per se* unlawful. And that's because there's a widespread consensus among economists reflecting what we have come to learn over time.

**MR. CONSTANTINE:** Now, you will find in the outline in the materials around 20 vertical price fixing cases successfully prosecuted by the states attorneys in the decade after I left the states.

**MR. DENGER:** I thought I was talking about vertical nonprice restrictions. See how he subtly switches. And when I discussed vertical maximum price fixing, then he comes back with vertical resale price maintenance.

**MR. CONSTANTINE:** I want to comment on the point that Deborah made about the federal government being—

**MR. DENGER:** I think this format works pretty well, don't you?

**MR. CONSTANTINE:** —about the federal government being the exclusive enforcer of the federal antitrust laws on behalf of the United States or the people of the United States. You'll correct me if I misstated that. And that is absolutely true. But of course, under law, under Supreme Court precedent and also under statutory law, the state attorneys general are the *parens patriae* for the general welfare and economy of their states. So for their states, for their economies, for all of the entities within their states and under the statute they are *parens patriae* for each and every one of the natural person citizens within their states.

Now, those are different things, but it does give the attorneys general a very significant source of power and legitimacy, and that's something that they take in consideration.

**MS. MAJORAS:** It is something, Lloyd, that I think needs to be borne in mind in prosecutorial discretion. It is not always a question of "Can you?" It is a question of "Should you?" And that is really what I'm trying to get at. Because as we all work through these tensions, we have to be aware of this whole web that we have woven here.

**MR. CONSTANTINE:** It is absolutely the case, and I think that you would probably get unanimity up here and you'd probably get unanimity out there. That good people, smart people, well-motivated people, people who know their stuff do a good job whether they sit in Washington, D.C., or whether they sit in Albany, Georgia. And that badly motivated people and people who don't know what their job is—and there have been a significant number of those people in state capitals and a significant number of people in the national capital who don't know what they are doing and do a bad job. So I would endorse that.

All right, now, on the point that Deborah made I believe—I believe it was Deborah that made this point about competition policy and merger policy being forged in 56 different jurisdictions. And obviously that's a kind of spectre which is out there, but the fact of the matter is that the problem is not in that. It's in the statute. Section 7 gives not just the state AG, but it gives any single consumer who is aggrieved by a merger in an economically coherent market in any line of commerce, in any section of the country the ability to go into court and stop a merger of national dimensions or international dimensions. It is not frequently done, but there is that power. And that is something that the framers of Section 7 quite consciously put into that. So it is a statutory issue.

On the point about why is it that some state AGs get involved in national cases when they are not taking care of local business? And I think it is important and it's important to recognize that actually does happen at times, and sometimes it is badly motivated or it is not wisely motivated. But often it is because something else is going on and everybody should understand it.

There are these 50 states or 56 states, if you take into consideration the territories and the district and all of that. But effective real enforcement comes out of a smaller number of states, okay. It is not by accident that New York is always involved and that California is almost always involved, that Maryland because of a certain tradition is almost always involved, that Massachusetts is frequently involved, and that Texas is frequently involved. And I don't mean by not mentioning some other states that they are not involved. These are the larger states with an Antitrust Division that have the resources, that sometimes have an economist on staff and that have the ability to do this.

The other states lend in some sense token assistance to those cases. But they lend something else. They lend their state to it. So it is the case that in many of these

instances that state that is not taking care of local matters really doesn't heavily participate in these national actions, except by understanding what's going on and lending their sort of moral persuasion and their state to these actions.

It also is the case that sometimes there will be a national issue which will be of much more significance to a small state than a local matter. Let's take the example of a state like Wyoming, okay. There might be some localized price fixing or bid rigging situation which is important and should be pursued. But at the very same time—take a transaction that was I was recently involved in—the proposed merger of Direct TV and Echo Star. Now, if that merger had gone through, a state like Wyoming or Montana would have seen the elimination of the only competition, the only competition for multichannel video programming distribution in its state. It would be a perfectly rational thing for whatever tiny resources the state of Montana or the state of Wyoming has to lend that to an effort to stop that kind of merger.

And there happens to be another example of a Department of Justice and the states working very well together. People were involved in that on either side. You sat down with a group of unified lawyers and economists, and it worked quite nicely. But it would be quite rational for a rural state or a mountainous state like that to say my resources are better deployed in that type of situation. Sometimes the state AG is simply making the wrong decision, and that happens, you know, that happens at all levels of government.

**MS. MAJORAS:** If I could just jump in there, Lloyd. Yes, I understand what you're saying in theory. But the fact is in that case 23 states, D.C. and Puerto Rico plus the federal government were working on that particular merger. So you could say that it's rational, but on the other hand, it goes to one of my points that you really do have to factor in—how much overlap do we need in enforcement? There were many enforcers already involved.

**MR. DENGER:** Can I ask you a question, Lloyd?

**MR. CONSTANTINE:** Yes, sir.

**MR. DENGER:** We have talked a little bit about courage and so forth and motives and whatever at the federal level.

**MR. CONSTANTINE:** I don't remember the courage part coming in, but in terms of—

**MR. DENGER:** My question is this. There was a recent matter about a year and a half ago, if my memory is accurate, in which the FTC basically brought suit and obtained what was in effect going to be a substantial recovery for consumers, and then there was a private action on top of this. And the private plaintiff lawyers sought to justify their attorneys' fees based upon the whole fund, a significant part of which the FTC had a substantial role in creating. The FTC came in and opposed the private plaintiffs attorneys' fees based on creating the entire fund, saying that wasn't what they did. The FTC argued: We did the bulk of the work; they shouldn't get attorneys' fees for the whole fund. Could you ever envision the state attorneys general going into private class actions and arguing that class plaintiffs' counsel are not entitled to all the attorneys' fees, either because they are excessive or because of the initial work that the federal government or the state government has done?

**MR. CONSTANTINE:** Absolutely I could conceive of that.

**MR. DENGER:** From the national association of aspiring governors.

**MR. CONSTANTINE:** Absolutely I could conceive of that. Because I have just had, you know, a somewhat analogous conversation. Without going too deeply into it, when I was introduced by Pam, she introduced me as being lead counsel in this case involving Visa and MasterCard, which is about to go to trial. Suffice it to say that in the certified class of 5 million merchants, every state in the United States is one of those merchants, because in some way, shape or form, every state has some entity, whether it be the motor vehicle bureau, the taxing authority that now accepts a plastic form of payment. So they are purchasers in that action. And none of the states opted out. During the course of the opt-out period there were conversations, and without going into detail, it was very clear to me that the states really had their eye on the ball about the issue of attorneys' fees and all of that. And they were absolutely properly motivated to make sure to the best of their ability that the interests of consumers were protected and the interests of the consumers within the states, which in this case were the merchant—the entities that accepted plastic were taken care of.

Now, you know one of the comments from somebody was that—and I'm not here today in this capacity to defend the plaintiffs bar. I've never considered myself to be a member of the plaintiffs bar or the defendants bar. Just like you, I'm an antitrust litigator. I have a mixed practice, and I know you've been on both sides of the aisle. Today if I'm a representative of anything, I'm a representative for the state AGs or a past representative for the state AGs. But in that very same case, in the *Visa/MasterCard* case. There's also been—and I think it is public knowledge—extensive discussions with the Department of Justice about that case. Because the

Department of Justice has prosecuted their own case against Visa and MasterCard over the last several years, and there is a connection between the two cases. It is very clear to me that whether you're a private plaintiff or whether you're Department of Justice or whether you're a state AG, you primarily focus on what you have to do and what is best for you. And that's appropriate for the DOJ, and it is appropriate for the state AGs. Because as we know, the Department of Justice does represent the entire United States. And as we do know, the state AGs, at least collectively, represent the general welfare and economy of all of their states and all of the natural person citizens in the United States. So if they focus exclusively, or virtually exclusively, on what's good for them, they wind up focusing pretty much on what's good for society, what's good for competition. So part of that is human nature, but I think especially when that comes out of the AG's office or when it comes out of the DOJ or FTC, that's something that is allowed to have a sort of presumption of correctness until proven otherwise.

That was sort of my laundry list of things.

Debbie, do you have comments on other things?

**MS. MAJORAS:** Let me just think for a minute. There is one thing I want to comment on just very quickly, in response to something Mike said. And by the way, before I went into the government, when I was in my other life, Mike and I wrote together on some of this stuff, which I think is not only intellectually fascinating but something for everyone to think about.

Having said that, I should be careful because the Bush Administration takes no position on such proposed changes, at least none that I know of so far. But on one point, Mike, you did have some criticism of the Justice Department mixed in there, so I feel forced to defend us. And one of the things that you criticized was the amnesty program, which I'm not going to tell you is perfect. But it is single-handedly one of the most successful programs ever in terms of bringing antitrust violators to justice. And there are just no two ways about it. There are major cartels or conspiracies that may never have come to light or as quickly were it not for that program. One of the things Mike was criticizing was that a company that comes in and has more than one cartel to tell us about may be advantaged over a small company that's so small because they may only make one product, and so could only conspire in one particular market. My response to that is I have absolutely no sympathy. Because if that small company had done the right thing and come through the door first, that company would have been the one to receive the amnesty. When you're looking at this from a deterrence standpoint, it is not as though the program encourages companies to go out and participate in multiple cartels so they will then have more to say when they come to the door.

The point of the program and the way it is designed is to foster instability among cartels and to get them to wonder whether the other guy is going to run in first. And because, as Mike knows, I took my client in on what is still the biggest cartel case. I know all about that thought process, so I don't have sympathy for the small guy who you say gets hurt if the bigger guy gets in first.

**MR. DENGER:** Can I respond? If you look at the biggest cartel case in history, which we have both been involved in, the third largest company got off with amnesty. The first and second went in together and got substantial reductions for turning in a few of the smaller participants. That doesn't seem right to me.

Secondly, Deb's point is a good one, that the small company that doesn't go in shouldn't be penalized. But oftentimes the small companies are foreign companies. They may not have consulted U.S. antitrust counsel; they may not realize their options.

So I would suggest this as a possible modification to the Department's approach. Once you get some information from a company in an industry, the amnesty applicant comes in and gives it to you, then DOJ makes it known to everybody in that industry, to the extent feasible, that somebody has come in and advises all companies potentially involved that if you have any information, and want to come in, you can and you may benefit from doing so promptly. Some larger companies that are in there all the time, because they are better counseled or may be named in related civil litigation, shouldn't have an advantage over the smaller companies and be able to get a substantial reduction because the smaller companies out there somewhere in Asia or whatever may not be aware of their options. So I think if you're going to give the second and third deal, once you've got the amnesty applicant—without necessarily disclosing its identity—you ought to put everybody on notice there's a problem in this industry, and if you've got anything you want to tell us, come see us.

**MR. CONSTANTINE:** I think we have heard another clang of reform proposal, that any foreign company doing business in the United States should be assigned an antitrust lawyer from a panel which maybe the ABA can put together, and they have to pay the prevailing rates.

By the way, on the reform package, which you've come up with, Mike, it sounds to me in most respects very, very sensible. But here's the caution. You know, this parade of horribles of the possible quadruple and quintuple and sextuple damages and all that, there's an excellent article which I would refer to everybody, done by Bob Lande who is a professor at University of Baltimore and also involved in the American Antitrust Institute. It dissects all of that and basically comes up with the con-

clusion that with treble damages and the potential of multiple treble damages and direct purchasers and indirect purchasers and all that, the fact of the matter is that damages are frequently at single damages or less—

**MR. DENGER:** May I say something?

**MR. CONSTANTINE:** —at the end of the day.

In a second.

And that dizzying array of potential penalties has to be juxtaposed with the incredible difficulty of sustaining a case these days, given the nature of the judiciary, the nature of these heads-I-win-tails-you-lose rules. As we have discussed, for example, in the predatory pricing area, which has absolutely nothing to do with the merit of the cases. It just happens to do with what the rule is.

And Mike, please.

**MR. DENGER:** With all due respect to Bob Lande, who I view as a friend, I would raise two caveats as to his data. One, most non-class settlements are confidential. And secondly, he's relying on data that is largely 10, 15 or 20 years old. The world has changed.

**MS. MAJORAS:** And third, Lloyd, in the context of the cases in which Mike presented his proposal for change, those are the cartel cases that began when guilty pleas—well, I guess they all began with guilty pleas; nobody has gone to trial—well, I guess except for *Taubman*. And so it is harder to make the argument that the plaintiffs are going to have such a tough time establishing these cases. It is absolutely not the case.

**MR. CONSTANTINE:** Which is why I think and I said a lot, indeed, most of what Mike says and most of what the task force came up with sounds to me to be extremely sensible.

Yes, sir.

**AUDIENCE MEMBER:** I was just going to ask: Is Mr. Denger's proposal, a proposal that would require the preemption of all state antitrust laws in the sense if there's an antitrust violation or a price fixing allegation against a defendant, that all such action would have to be brought in federal court under federal law? And isn't that in essence rewarding a price fixer and a cartel participant with the commission of a felony that doesn't justify the preemption of all state antitrust laws, and it would also accommodate the costs of a price fixer? Does that make any sense?

**MR. DENGER:** I'm not entirely sure. I haven't thought through all the details of this, only in very broad terms. I certainly wouldn't envision all state antitrust law being preempted. It would only be in cases where you had a criminal prosecution by the government, and possibly some types of cases brought by the Federal Trade Commission, such as *Mylan,* where there is follow-on litigation similar to the direct and indirect purchaser litigation that follows criminal cartel cases.

In those cases I can assure you that the price fixer isn't being rewarded. It is being hit with criminal fines, and a panoply of federal and state court follow-on litigation. And there's got to come a time that you look at what effect this piling on and protracted litigation is going to have on the future competitive structure of the industry. I'll be very interested to look, for example, at vitamins ten years from now. We know that a number of companies have left the industry. Roche, the leading company, has sold its vitamins business. I hope you like to get your vitamins from China, because that's probably going to be your principal source in the future.

**AUDIENCE MEMBER:** Just one brief comment on that. We have been litigating indirect purchaser cases now for eight to ten years. I think you've vastly overstated the lack of cooperation among private counsel nationwide and private and public counsel. Very many cases, *Mylan* and many other litigations where private counsel works hand-in-glove with government counsel, there's no duplicative depositions, and there may be duplicative liability. That's currently the law. But in terms of excessive costs to the defendants, private counsel have worked hand-in-glove with government counsel in very many big cases.

**MR. DENGER:** I'm not saying that there isn't cooperation and that it doesn't occur in some cases. What I'm saying is we shouldn't have a system where we have to depend upon the goodwill and voluntary cooperation of plaintiffs' lawyers. We need a system that addresses this in a rational before-the-fact manner. And I would be the first to say there's been lots of cooperation and a lot of lawyers on all sides—defendants, plaintiffs and the government—who have worked together effectively with the courts to try to address on an ad hoc basis some of these structural problems. I'm just saying a structural problem needs a structural solution.

**MS. MAJORAS:** And you just said something that you just quickly brushed past. There might be multiple liability, and that is the law. But part of what Mike is saying is to look at changing that as well. If you look at the purposes of the antitrust laws, certainly criminal antitrust laws are meant to punish defendants. But enforcement of the civil antitrust laws is supposed to be a way to compensate victims and to achieve deterrence in the future.

So I often get the feeling when we have this discussion that a lot of people have the view there's not enough you can do to these cartel participants. Well, you know, I like to eat them for breakfast too, but the fact of the matter is, for anyone in our society who gets pun-

ished, there are limits. And the fact that it is becoming virtually unlimited in some cases is something that I agree is certainly worthy of a look.

**MR. CONSTANTINE:** Deborah has been incredibly generous with her time. We are going to take two more questions. The gentleman in the back.

**AUDIENCE MEMBER:** It is a question for Mike. Many in this room are having trouble having sympathy for felons violating the antitrust laws, and we are not going into the specifics of your proposal. As I understand your argument, it is there is somehow over-deterrence?

**MR. DENGER:** I have no sympathy for individuals and companies that engage in hard-core behavior. That doesn't mean that I have to support an ad hoc system that doesn't further the broad set of goals underlying antitrust enforcement.

**AUDIENCE MEMBER:** I'm not talking about recidivist corporations that continue to violate the antitrust laws. My question to you is if there's somehow too much deterrence. How come you continue to see government prosecutions, grand juries continuing to uncover new cartels year after year?

**MR. DENGER:** We could go out and cut their thumbs off, stick a poker in their eye. We can get the consummate deterrences, capital punishment, and you're still going to have some of this behavior. Why do they do it? Because they don't think they are going to get caught. In addition, American (and other countries') corporate culture is focused on meeting current numbers and this preoccupation may lead executives to violate the law. I don't think there's any evidence that any particular level of fines or punishment is necessarily going to deter cartel behavior.

When you're talking about having to pay in combined criminal civil and defense costs a sum that approximates potentially 75 percent to over 100 percent of your sales, that's one heck of a deterrent, particularly when you couple it with the fact that some of these high-level executives are going to jail for extended periods. But remember, deterrence and punishment are only part of this. We deter because we want to have competitive behavior. And if you get the punishment so high, and large windfalls are going to people that aren't injured, and you drive a lot of the smaller companies out of business, you're not going to have a more competitive structure long term. So I think you have to look at it carefully. There is a real issue out there.

**MR. CONSTANTINE:** One last question. Maybe Larry Fox, who just joined us with ten minutes to go. Do you have a question, Larry? Anybody else? Any other questions?

**MR. DENGER:** Could I make one comment?

**MR. CONSTANTINE:** Yes, sir.

**MR. DENGER:** I'm speaking for Deborah, but all of our comments were in the interest of stimulating debate with Lloyd. They should not be considered as reflecting our position, the government's position or anything else.

**MS. MAJORAS:** Thank you.

**MR. CONSTANTINE:** I have the prerogative of the moderator to have the last word. I want to thank Mike. He was spectacular, as I expected. Deborah was spectacular, as expected. And I want to thank Eliot in absentia and his wonderful staff that are here, and thank you all.

**MR. EDWARDS:** As the outgoing Chair I want to thank all of our panelists for these wonderful panels. And I in particular want to thank Pamela Jones Harbour, our Program Chair, for putting this together. Can we have a round of applause for Pamela?

The next event on the agenda is the cocktail reception at 5:45 on the seventh floor. Just as we are very flexible on CLE credit, even if you haven't paid for the dinner, I suspect you can stop by and have a cocktail if you'd like to. Hope to see you then.

## Endnotes

1. New York's position was ultimately conveyed in a letter dated Feb. 5, 2003 to Hon. William H. Pauley III from Jay Himes, *In re Initial Public Offering Antitrust Litigation*, 01 Civ. 2014 (S.D.N.Y.) (WHP) (*available at* www.abanet.org/antitrust/committees/state-antitrust/ipolitigation.pdf).
2. M. Denger and J. Arp, "Does Our Multifaceted Enforcement System Promote Sound Competition Policy?", 15 *Antitrust* 41 (Summer 2001).

# Antitrust Dinner

**DINNER SPEAKER:**
**Commissioner Orson Swindle**
**Federal Trade Commission**
**Washington, D.C.**

**MR. EDWARDS:** Can I have your attention, please?

I would like to welcome you to the annual dinner of the Antitrust Section of the New York State Bar Association and introduce the people at the dais.

To my far left is Steve Prowse of KPMG, who was on one of our panels today. Next to him, Steve Tugander, who is now the Secretary of the Section. He is with the Antitrust Division. Next to him is his boss, Ralph Giordano, head of the New York Regional Office of the Antitrust Division. Then, Barbara Anthony, who is head of the FTC Regional Office. We have FTC Commissioner Orson Swindle with us and are very pleased to have him tonight as our featured speaker. To my left is Pamela Jones Harbour, my successor as Chair, and I'll say a little bit more about Pamela in a second.

To my right is David Boies, who will be receiving our service award tonight. Next to him is Mary Boies, who is a fine lawyer in her own right, and next to her is Jay Himes, who is head of the Antitrust Bureau at the New York State Attorney General's Office. Then we have Lloyd Constantine of Constantine & Partners, who is also a former head of the Antitrust Bureau.

We would like to thank KPMG for sponsoring the cocktail party and providing the wine for dinner tonight.

At this point what I'd like to do is introduce to you Pamela Jones Harbour, who is my successor as Chair. She's a partner at Kaye Scholer. She started out in life as an opera singer but then went on to practice law. I don't know why. She has been nominated for a Commissioner post on the FTC, and we are all very proud of her. Pamela.

**MS. JONES HARBOUR:** Thank you very much, Steve.

Good evening and welcome to our annual dinner. On behalf of the executive committee, I extend my appreciation and gratitude to the moderators and the panelists of this year's annual meeting. The programs today, for those of you who could not attend for the full day, were truly excellent. They began with the annual Antitrust Year in Review, moderated by Bill Lifland. We then had an excellent criminal antitrust enforcement panel moderated by Steve Tugander, discussing the antitrust conspiracy between the famous auction houses, Sotheby's and Christie's. We then went into our Antitrust Federalism Revisited panel, moderated by Lloyd Constantine. And New York State Attorney General Eliot Spitzer was there to speak, as well as Deputy Assistant Attorney General Deborah Majoras. Then we ended with an illuminating debate on antitrust federalism between the state and federal enforcers.

We are also very pleased this year to have KPMG sponsor our reception. And the table wine that you are enjoying is also from KPMG. We thank them very much for that. They also agreed to extend the cocktail hour an extra hour, so it will be open until about 8:45 so that we can all imbibe just a little bit longer.

As incoming Chair, it is my pleasure to present the traditional gift to outgoing Chair, Steve Edwards.

Now, Steve, on behalf of the New York State Bar Association, the Antitrust Section and the Executive Committee, I present you with this gift in appreciation for your service and dedication to the Section in the past year. Thank you. Enjoy your dinner.

**MR. EDWARDS:** May I have your attention, please? The last thing I get to do as Chairman of this organization is give the service award to David Boies.

I've known David for many, many years—almost 30 years, I think. I first encountered him at Cravath on a case called *U.S. v. IBM*. My assignment on that case was to be the beach master. The beach master was a young associate who was responsible for everything that happens in the courtroom; everything that you needed in the courtroom had to be there and that was the beach master's job.

One day we got ready, the witness took the stand, David went up to the podium, and he turned to me and said, "Where are my cross books?" On the *IBM* case we had very elaborate cross-examination books. I looked up at him and said, "How should I know where your cross books are?" And he said, "Well, I had them at breakfast." And I said, "I don't recall having breakfast with you, David." I thought I had gotten the better of that exchange, until that afternoon when we got back to the office after court and I found out that my assignment for the next couple of months was to keep a duplicate set of the cross-examination books. I would have to go through the cross books every afternoon and make sure that all of the highlighting and underlining was replicated in the duplicate books in case they were left on the breakfast table.

The stories of David are legendary. There are many stories about his sartorial habits. I see he's still wearing the same suit that he wore 30 years ago.

**MR. BOIES:** Still fits.

**MR. EDWARDS:** I think one of the early cases that David tried was *CalCom v. IBM*. David represented IBM and won a directed verdict in that case. It was one of the first cases in which jury consultants were used. At the end of the case we interviewed the jury. One of the comments was: David Boies is a very good lawyer, he's obviously successful, but why can't he afford a change of clothes? Now, I'm told that David has about fifteen of these blue suits and blue ties, but nobody will ever know.

In any event, David has been a very successful litigator over the years. He has litigated many significant cases. In the *Westmoreland* case, he became a defamation expert for a period of time. He litigated the *Pennzoil-Texaco* case. And of course, there is the *Microsoft* case.

You know, I would say if you could get a transcript of everything that was said during the program today and you counted up the number of times a particular word was repeated, the word Microsoft I think would win the contest. That word came up many, many times in the discussion today. And then of course there is the—I can't remember, was it *Bush v. Gore* or *Gore v. Bush*? But whatever, and of course David is well known for that case.

In the course of that case, my father actually said something about David, which he should take as a great compliment. My father said to me, you know, I've been hanging around lawyers for a long time, listening to you and your friends talk, and David Boies is the first lawyer I've ever listened to where I could actually understand what he was saying. I think this is a quality David has; he has the ability to take something that is very complex and to translate it into something that is very simple and understandable and makes a lot of sense.

Now, the service award that this group gives is for outstanding contributions to the field of antitrust, and David certainly qualifies for that. He has written extensively on antitrust issues. He has written a book on antitrust and deregulation. He has been involved in the field of antitrust from a legislative standpoint with the Senate Judiciary Committee, of which he was ultimately chief counsel. And he has excelled in the field of antitrust as a litigator. I think it's fair to say that he is perhaps the most significant litigator of our generation. So we are very grateful that he has agreed to accept this award, and very proud that he's here tonight. I am very proud to be able to give him the antitrust service award of our organization. David.

**MR. BOIES:** Thank you very much. As Steve said, I started out an antitrust lawyer, and I'm going to end an antitrust lawyer. There have been a lot of interesting cases in between. But I think that none of the cases that I have tried have been more interesting—nor, I think, more important to our country—than my antitrust cases.

The Supreme Court said a number of years ago that the antitrust laws were the charter of the economic liberty of our people. And I think that's true. Those of us who have worked in the antitrust vineyards over the last 35 years have seen a lot of changes. We have seen a lot of movement in the right direction, including the increased use of economic analysis. However we have also seen some ebbs as well as flows, including periods when the antitrust laws have not been enforced as vigorously as they should be. We have made progress, but we have a lot more to do in continuing to develop the antitrust laws.

All of us have been blessed by having the opportunity to work in this area. It is certainly interesting and challenging. Indeed, there's no area of the law that I know of that is more challenging: first, to understand a case yourself, and then to make it understandable to a judge and to a jury. There are also very few areas in the practice of law that are more important to the development of our economy.

So it is a great privilege and honor to accept this award. I can't think of an award I would rather have or of a group I'd rather have this award from. Thank you very much.

**MS. JONES HARBOUR:** Thank you, David. Well, I have the pleasure of introducing Commissioner Orson Swindle, who had, I might add, an unusually speedy appointment to the FTC. He was recommended by Senator McCain in late August 1997, and he was appointed by former President Clinton on December 16th of that year. And he was sworn in by Clinton two days later on December 18th, when the former president invoked his constitutional power to make recess appointments. I should be so lucky.

As you may know, Commissioner Swindle had a very distinguished military career. He retired from the United States Marine Corps in 1979 with the rank of Lieutenant Colonel. He has twenty military decorations for valor in combat, two Silver Stars, two Bronze Stars and two Purple Hearts.

After he left the military, he continued to serve the public and his country in various ways, including positions as Assistant Secretary of Commerce for Development and State Director of the Farmers Home Administration for the United States Department of Agriculture.

Since his appointment as Commissioner, he has continued to fight for America's security. This time his new battlefield is the Internet. And the weapon he uses to fight on this new front is his companion and good friend, Dewie.

Now, for those of you who don't know him, Dewie is a turtle. In fact, he is the FTC mascot to promote good online security. Dewie accompanies Commissioner Swindle on his talks on the importance of Internet security for all consumers. And as a matter of fact, I have Dewie here with me this evening. (A large picture of Dewie the turtle is shown.) The Commissioner has used Dewie to remind us that knowledge, experience and persistent effort win the race. And that we need a shield to protect our underbelly when we first turn on the Internet by using and updating antivirus and firewall technology.

Now, Commissioner Swindle has also brought his concern for creating a culture of security to the global marketplace. He currently heads the U.S. delegation of the OECD, Organization for Economic Cooperation and Development, which has recently issued global guidelines for the security of information systems and networks. With his experience in areas of national economic and rural development, cultural and national housing programs and innovative thinking, Commissioner Swindle is finding new and creative ways to inform and educate consumers. These talents all lend to the unique attributes that he brings to the Commission.

Without further ado, it is my great pleasure to introduce Commissioner Orson Swindle.

**COMMISSIONER ORSON SWINDLE**: Having been in politics for some time, I've always heard that politics is a science of contrast. And me being on the same dais with David Boies is about as big a contrast as you're going to get. I'm the first to admit it.

David, I congratulate you for your award.

I'm delighted to have this opportunity to address the New York State Bar Association on a number of antitrust issues, which will be boring as hell, and you sound like a real lively group. I've spoken to a lot of Rotary clubs, and you can tell the ones that are dead when you go and nobody talks. And you guys have been in a constant uproar here. I think it is wonderful, and it obviously means you're having a good time.

I would remind you of one of the great eloquent speakers of the Democratic Party (and they don't have very many of them), Adlai Stevenson, back when he was running against—I think it was the first race running against Dwight Eisenhower. He was giving a speech one night, and he got up and said, "You know, my job tonight is to speak to you in eloquent terms, enlighten you, and when you leave here you will have had a great experience and go and tell everybody." He said, "Your job tonight is to pay attention to what I say, and I hope and pray to God I finish my job before you finish yours."

Speaking after dinner is a little bit difficult, but I'll try to rush through this. I'm delighted to meet Pam. We talked on the phone a few months ago, and I'm afraid she's in trouble as far as her nomination goes, because she asked me for advice. I told her I would tell one story about when I was going through this short confirmation thing. I was out in Okinawa speaking to a bunch of Marines about combat experiences and leadership. I was called at 3:00 o'clock in the morning in late October. As Pam mentioned, I was sworn in sometime mid-December of '97. It was the White House General Counsel, a very nice lady.

She said she had a couple of questions. "We are going through the last phases of vetting you for this position. I would like to ask you a few questions about some of the things you have said." I said, "Oh, God, I'm in trouble." She said, "Well, okay, we have done a Lexis/Nexis search (at the time, I had no idea what this was), and you're often quoted." I replied, "Well, you know I'm in politics, ran for Congress a couple of times, and you get quoted." I could just hear it coming. She said, "First question (I think it was on Larry King or Crossfire in the summer of '95, and this was in '97), did you say in '95 on the Larry King show that President Clinton is a pathological liar and his re-election would be a national tragedy?" Valor being the better part of discretion, I said "I think you've got it just about right." She remarked, "Well, that's the only question we want to ask you. You're an honest man."

So Pam, never lie. Everything you have said is out there somewhere. Don't lie!

I'll give you the boring part of the presentation, I hope it is the most boring part. It says here (in my notes): "Before I proceed I should point out that my remarks tonight reflect solely my views and don't necessarily reflect the views of any other Commissioner or the Commission." Isn't that the most insane statement you've ever heard?

Now, this is the same agency, as I was telling Pam, that will not allow three Commissioners to sit down and have coffee together. I mean there are a lot of stupid things in government. In fact, Barbara Anthony told me I can only have three and a half glasses of wine because wine costs seven dollars a glass here and we're limited to $25.

So KPMG, I appreciate it.

I'll try to rush through these remarks and hope it is something worthwhile talking about. I know there are alot of people here who hung around and were so jovial because of the promise of an extended happy hour. Being a Marine I know about that.

David, congratulations again. You're recognized as one of the unparalleled litigators of our times. You certainly are to be congratulated. And, no doubt we will see David out on the leading edge of all sorts of controversial and ice-breaking things in the future of antitrust. I'm

also delighted that David was able to scrimp and save and make it to tonight's event.

The FTC has had some well-known differences of opinion with him over some counsel fees in a recent antitrust case. I sympathize with your father. I've been at the FTC for five years, and I haven't understood anything either.

I want to touch on a couple of issues here, FTC cases and some other activities that we engage in. There's a copy of my remarks outside if anyone wants to sue me.

Anyway, at first blush you might think this is just a smorgasbord of antitrust and policy issues that I'm just using to bore you and keep you occupied for a couple of hours. But, I hope my remarks reveal there is an overarching theme to all of this, that the ever-shifting kaleidoscope of industries and the issues with which the FTC must deal requires us to respond with agility and creativity, even while remaining true to the economic principles that are the bedrock of our work. And it isn't just the mix of the industries that shifts over time, it is also changes within those industries. Because they are so dynamic, they change, and we have to keep adhering to these principles and yet using them in the environment today and not 30 years ago. Realizing that things do change, we have to react appropriately too, because otherwise we never make any progress.

I'll begin with a matter with which we were dealing recently that garnered a lot of public attention. In fact, Burt Foer (of American Antitrust Institute)—he's sort of our nemesis—was very quick to criticize us. That's the cruise line litigation. I understand that you had a discussion about it today.

I'll also discuss a merger case that continues to generate controversy with us, another one of the grocery store mergers. We had the case down in Puerto Rico involving Supermercados Amigos. And later, I'll discuss some of our work with the healthcare industry, including some of the competition and consumer advocacy work.

First the cruise line. Early last October, following one of the most fact-intensive investigations and analytical efforts that the FTC has engaged in in recent history, the Commission closed an investigation of two proposed transactions in the cruise industry, the proposed dual-listed company deal involving Royal Caribbean and P&O Princess, and the competing—and originally somewhat hostile—offer by Carnival Cruises to acquire Princess.

Having just come back from a cruise, I was particularly interested in this because I was looking for a good deal. But again, back to the three and a half glasses of wine, you can't do that at the Federal Trade Commission.

As most of you probably know, the three Commissioners in favor of closing the investigation, as well as the two who dissented, issued public statements that laid out in considerable detail our reasons for and against closing this investigation.

For their candor and thoroughness these statements have been praised by a number of people in and out of the public and media sector and even from those who raised concerns about the proposed merger during our investigation. In our public statements, we didn't leave any stones unturned as far as I was concerned. And, I would suggest, you probably need a magnifying glass to find anything we didn't address. We examined a number of important issues in connection with Royal Caribbean/Princess and the Carnival/Princess deals, including what is the relevant product market in this case? Is it limited to cruising? Is it all vacations? Is it something else? And, what is the relevant geographic market implicated by these deals?

If either proposed transaction goes forward, is the merged firm likely to be able to exercise market power unilaterally? If either deal goes forward, will the firms remaining in the market likely be in a position to engage in anti-competitive coordinated interaction? For example, will either acquisition eliminate a maverick firm whose competitive behavior presently stands in the way of such action? In the wake of either transaction, will the firms remaining in the market be in a better position to collude in terms of pricing capacity or the amenities offered on the cruise?

As our statements made clear, the majority was satisfied that neither a unilateral nor a coordination story had merit in this case. This is not going to be a rehash of the details of our analysis. But, I think it is important to emphasize, as other FTC officials have in recent speeches, one of the key things this case stands for: That we don't make decisions whether to sue, settle or close investigations unless we have undertaken painstaking review of the evidence, legal and economic analysis that go into the investigation.

Chairman Muris has often referred to the stubborn facts, and how they play a role in everything that we do in our work. This case provides an excellent illustration that no matter what one might have thought about this particular case before it got started, there's no substitute for rigorous and intensive analysis and investigation to find out what the real facts are. On the basis of such an evaluation, the majority decided to close this investigation.

As I see it, the substance of our analysis and the analysis of the dissenting Commissioners was the heart of the matter. We also tried to do something important, something somewhat unusual in terms of a process: I think all of us wanted the Commission, to use an overused term, to be transparent, to be as transparent as possible about the reasons for the action we took. The majority and the dissenting opinions contained a degree

of factual and analytical detail that I don't believe has been seen often, if at all—certainly not since I've been at the FTC—in such documents. I hope that you and the public at large found them valuable to your future work.

Last November the Commission announced the acceptance of a consent agreement in the settlement of a challenge we made to Wal-Mart in its acquisition of Supermercados Maximo, the largest supermarket chain in Puerto Rico. Under the settlement Wal-Mart is required to divest four stores in three locales in Puerto Rico to Super Maximo.

The consent agreement was placed on public record, and we received comments. And now it is our decision as to whether or not we will go through with this agreement. One aspect of this case that attracted a fair amount of attention was the Commission's definition of the relevant product market. As you know, market definition is often one of the trickiest aspects of merger case review. And supermarket mergers in recent years have presented the Commission with some interesting challenges.

One of the key questions that we face is whether non-traditional food retailing outlets, such as club stores and Wal-Mart super centers, should be considered a part of the market. In my experience, a prudent path to follow is the one that counsels against categorically including or excluding any class of retailer and that instead evaluates each transaction and thus each market definition exercise on its own terms.

Following the intensive investigation of Wal-Mart's proposed acquisition of Amigo, we included club stores in the relevant markets for the first time in a supermarket investigation. In my view, we did so because close scrutiny of the competitive dynamics of food retailing in Puerto Rico clearly demonstrated that the role played by the club stores was significant. To anyone who says that this finding is evidence of some sort of sea change at the Federal Trade Commission, I would strongly disagree. Rather, as I said at the outset, all it shows is the Commission's application of a consistent legal and economic framework in the sometimes rapidly changing markets. Joe Simons, the Director of our Bureau of Competition, pretty much said the same thing. He said that while this is the first supermarket investigation of which the Commission has included club stores in the market definition, it does not indicate a change in policy. Instead, it underscores the fact that the Commission conducts merger investigations on a case-by-case basis, considers all of the relevant facts, and makes an informed decision based on those facts. To do it any other way would be a crime.

The Commission had been quite busy in the pharmaceutical industry since March of 2000. I expect more cases to arise in this area. Although a principal objective of the 1984 Hatch-Waxman Act was to intensify competition between pioneer and generic drug companies, firms in the industry recently started to realize that they can profit from reaching agreements that blunt competition between a branded manufacturer and a generic manufacturer and their rivals. Sometimes even between one generic company and another. And, as I will explain later, we have also undertaken enforcement actions against single-firm behavior, largely involving the FDA's Orange Book listings, that appeared likely to harm competition.

Our earliest cases in this area were *Abbott/Geneva* in which a consent agreement was announced in March of 2000, and *Hoechst/Andrx* in which we announced issuance of an administrative complaint in March of 2000 and announced a consent agreement in April of 2001.

In the *Abbott/Geneva* case this involved an alleged agreement between a branded and a generic manufacturer of terazosin. (They've got some great names, and I'm too old to start learning them.) Terazosin hydrochloride or Hytrin is the brand name. It is a hypertension and prostate drug, pursuant to which a branded manufacturer, Abbott, paid a generic firm, Geneva, to stay off the market.

*Hoechst/Andrx* involved an alleged agreement between a branded and generic manufacturer of once-a-day diltiazem, brand name Cardizem CD, a drug for hypertension and angina, pursuant to which a branded manufacturer, Hoechst Marion Roussel, now known as Aventis, paid a branded firm, Andrx, to stay off the market.

Both of those cases were settled with orders that, among other things, said the obvious: Don't do that anymore. You people who are counsel to these people, tell them don't do that anymore.

On the same day that the Commission announced the Hoechst/Andrx settlement, April 2nd of 2001, we announced the issuance of administrative complaints against Schering-Plough, Upsher-Smith and American Home Products, which is now known as Wyeth.

I cannot talk much about these particular cases, since the litigation involving Schering-Plough and Upsher-Smith is still pending at the Commission. In fact, we heard oral arguments on this just a couple of weeks ago.

I can say, however, that the Commission's complaint alleged that Schering, a brand-name manufacturer of a potassium chloride supplement, known as K-Dur 20, entered into separate agreements with Upsher-Smith and with ESI-Lederle, a subsidiary of American Home Products. Upsher-Smith and ESI-Lederle both developed generic versions of K-Dur 20. According to the complaint, the agreements were designed to keep those generic products off the market, somewhat similar to those other cases.

The case was withdrawn from adjudication with respect to American Home Products in the fall of 2001,

and last February the Commission announced it had reached a settlement in the case with AHP.

Meanwhile the administrative law judge hearing the case against the remaining respondents, Schering and Upsher, ordered that the complaint be dismissed last June. The staff prosecuting the complaint has appealed from the ALG's order, and the oral arguments that were heard on January 7th stemmed from this appeal.

The cases I've described involved alleged agreements between a branded and a generic firm. The Commission subsequently unearthed a questionable arrangement between two generic manufacturers of Adalat CC, a drug for the treatment of hypertension and angina.

According to the Commission's complaint in the case of Biovail and Elan, the two firms reached an agreement pursuant to which they would refrain from competing with each other in the markets for 30 milligram and 60 milligram dosages of Adalat CC. Under this agreement Biovail would have diminished incentives to introduce its own 30 milligram product in competition with Elan's established 30 milligram dosage. The agreement also gave Elan a substantial incentive not to launch a 60 milligram product in competition with Biovail's 60 milligram product.

Folks, this is so obviously wrong that I wonder why they did it. But nevertheless—you see, I'm a pragmatist, and I'm not a lawyer—I just look at this stuff and say, who are you guys kidding? There's something I've always used in trying to deal with decision making and leadership. After I hear all the experts speak, I asked myself one question: Does this make sense? Some of this stuff doesn't make much sense. So, I would hope you would crank that into your advice to your clients.

Our consent order, which was issued just last August, requires termination of the Biovail/Elan agreement and also prohibits each respondent from entering into similar agreements in the future.

You no doubt noted that all the pharmaceutical matters I've described to this point involve alleged agreements not to compete. We all know that is wrong. As I said earlier, however, we have also found antitrust problems in this industry can arise through the conduct of a single actor.

The Commission brought another case against Biovail, but this case involved a hypertension medication Tiazac, also a once-a-day diltiazem. Our compliant alleged a number of actions that Biovail took to cement its alleged monopoly in the U.S. markets for Tiazac, including the acquisition of an exclusive patent license from DOV Pharmaceuticals and the initiation of patent litigation against Andrx, pursuant to that patent.

The core of this case, however, involved allegations that Biovail had wrongfully listed the patent in the FDA's Orange Book, and it made misleading statements to the FDA for the purpose of blocking generic competition in the market.

The consent order we issued last October places several obligations on Biovail. The most important features of the order are prohibition of the wrongful listings in the Orange Book and a requirement that Biovail divest certain patent rights back to DOV.

The listing of patents in the Orange Book raises the issue of whether some of those listings are protected under the Noerr-Pennington doctrine. The Commission filed an amicus brief in the *Buspirone* litigation, which is pending in the Southern District of New York, and some of you may be involved. We took the position that such listings are not immune because, among other things, the government does not perform an independent review of the propriety of the listing. The district court agreed with the FTC's position and denied defendant's motion to dismiss, notwithstanding defendant's claim that its Orange Book listings enjoyed Noerr immunity. No doubt you've seen recent reports in the news about Bristol-Myers Squibb's desire to settle private and state litigation involving Buspirone and Paxil.

Partly as an outgrowth of our enforcement actions in these cases, we also conducted a Generic Drug Study to examine whether the conduct we have challenged amounts to only isolated incidents of unlawful behavior or instead indicates more pervasive practices in the drug industry. I don't have time to get into the details of the study's conclusions and recommendations, but I thought I would mention it as another example of other tools that we sometimes employ in carrying out our mission at the Federal Trade Commission.

The last thing I'll mention in connection with the pharmaceutical area is a part of the vigorous program of competition and consumer advocacy that the Commission has maintained over many years. This is another arrow in the quiver that also contains litigation, investigations, amicus briefs and the like. Under this program, the full Commission or its staff files comments on the competitive and consumer implications of legislative and regulatory proposals before a variety of state legislative bodies, as well as numerous federal and state regulatory authorities. We believe we can get a great deal of bang for the buck if we file incisive comments expressing the pro-competition, pro-consumer viewpoint when legislation and regulation are being considered and developed. We have been particularly active in this regard in the last couple of years.

For instance, we commented recently on issues of importance to members of the public who take prescription drugs—in other words, virtually all of us. We submitted a comment concerning the FDA's proposed rule governing patent listing requirements and the application of 30-month stays on the Abbreviated New Drug

Applications or ANDAs. The FDA proposed to amend its existing rule by allowing only one 30-month stay of FDA approval for any Abbreviated New Drug Application. This differs from the FDA's previous position, which was that the Hatch-Waxman Amendments allow multiple 30-month stays of an ANDA approval date.

In our comment we said that this proposed change would go a good way toward dealing with an issue identified in the Generic Drug Study that I mentioned earlier—the problem of pharmaceutical companies' manipulation of the 30-month stay provision as a mechanism to delay generic competition. I refer to that as "gaming the system." Again, it seemed quite obvious as I was considering and looking at the various cases we were dealing with. We noted, however that the proposal unveiled in our study is more stringent than the FDA's in that, unlike the FDA's proposal, ours does not necessarily guarantee any 30-month stay of ANDA approval. Rather, as recommended by our Study, a 30-month stay would be granted only on those patents that the pioneer firm filed with the FDA before the generic firm filed its ANDA.

The FDA's proposed rule also clarified the types of patents that must and must not be listed in the Orange Book. Our comments to the FDA supported that agency's proposal to prohibit companies from listing patents claiming packaging, metabolites and intermediates.

In addition, we urged the FDA to refine its product-by-process listing requirements to clarify that patents claiming a novel process for producing a known product may not be listed in the Orange Book, even if the claims of the patent are in the product-by-process form.

We also suggested that patents claiming a form of the drug substance different from that approved through the NDA—so-called "polymorph patents"—should not be listed in the Orange Book.

Finally, we encouraged the FDA to address the issue of double-patenting identified in our Generic Drug Study. We suggested the FDA prohibit the listing of patents with a terminal disclaimer in the Orange Book and require an additional question concerning these patents in its proposed enhanced certification procedure.

I hope that this discussion on some of the FTC's recent antitrust work has conveyed to you a sense of the breadth and scope of some of the things we have to consider. We have to be rather mobile on our feet. And I must say that working with my fellow Commissioners and an incredibly talented staff at the FTC has been a pleasure, as all of you know. I have been stunned by the revolving door that goes on around there. Because everybody there used to work with you and everybody here used to work there.

We have a great group of people. It has been a great learning experience for me and an incredible pleasure to work at the Commission and to try to understand these problems. As David was talking about the antitrust laws, I was thinking about how antitrust is such an important aspect of our democracy, society and free enterprise system. It has been an honor to work with you.

I know some of you are probably disappointed that I didn't talk about the suit that you filed here in New York against the Federal Trade Commission. I've been reading some history lately and a couple of good books: DiLorenzo's book, The Real Lincoln; and another, April 1865 by Jay Winik, is a fascinating book. It talks about the complications of putting this nation together and all of the controversies that existed. As I read both books, you learn as a Southerner—I'm from Georgia you know—I find it absolutely ironic I'm from Georgia, went to school at Georgia Tech in Atlanta, and I'm enforcing the Sherman Antitrust. Nevertheless, I found in reading these two books that I remembered a lot of history I had studied. But I also learned of the enormous conflict in our country that had to do with secession. You read that Lincoln was having so much trouble, and it had been going on for decades, with New York wanting to secede, with New England en masse wanting to secede and New York City wanting to secede.

He had to cope with that in those waning days of his life, and the conclusion of the war with anti-war riots in New York, and I got the impression that New York really disdains federal rule-making and federal laws and federal agencies. And, I said, you know, my God, history really cycles through. Here we are again, you guys are challenging the federal government in the form of the Federal Trade Commission. Rather than talk about it here, I'm just waiting for the day when some of you come into my office representing a client, and then we will talk about it. Thank you very much.

**MS. JONES HARBOUR:** Thank you very much, Commissioner Swindle for your witty and informative speech.

This concludes our 2003 Annual Meeting. Thank you for coming and good night.


# 2004

# New York State Bar Association

# *Annual Meeting*

## January 27-31, 2004

New York Marriott Marquis
New York City

**Antitrust Law Section Meeting**
**Thursday, January 29, 2004**