ABA SECTION OF ANTITRUST LAW

THE ANTITRUST MODERNIZATION COMMISSION AT MID-COURSE

Is There Common Ground On Whether and How The Antitrust Laws Should be "Modernized"?

A Special Public-Service Symposium Offered By The ABA Section of Antitrust Law

JUNE 8-9, 2006

GEORGETOWN UNIVERSITY LAW CENTER
WASHINGTON, DC

CHAIR:
ROBERT T. JOSEPH

TRANSCRIPT OF SYMPOSIUM PROCEEDINGS

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Donald C. Klawiter, Morgan, Lewis & Bockius LLP, Washington, DC
Robert T. Joseph, Sonnenschein Nath & Rosenthal LLP, Chicago, IL

8:45 – 9:30 a.m.

THE ANTITRUST MODERNIZATION COMMISSION AT MID-COURSE [PAGE 10]

Speaker*:* **Stephen Calkins,** Wayne State University Law School, Detroit, MI

9:30 – 11:00 a.m.

CIVIL REMEDIES [PAGE 21]

• What should be the remedies in private antitrust proceedings?
• Should the private treble damages remedy be modified?
• Should the substantive law and procedures applicable to indirect purchaser litigation arising out of competition-related offenses be modified to reduce the complexity and inefficiency now present?

Moderator*:*
Richard J. Wallis, Microsoft Corporation, Redmond, WA

Panelists:
Kenneth L. Adams, Dickstein Shapiro Morin & Oshinsky LLP, Washington DC
Eleanor M. Fox, New York University School of Law, New York, NY
Abbott B. Lipsky, Latham & Watkins LLP, Washington DC
Richard M. Steuer, Mayer Brown Rowe & Maw LLP, New York, NY

11:00 – 11:15 a.m.

BREAK

11:15 a.m. – 12:45 p.m.

ROBINSON-PATMAN ACT [PAGE 47]

• Should the Robinson-Patman Act be repealed in whole or in part, or otherwise be modified?
• Should Section 3 of the Robinson-Patman Act (providing for criminal penalties) be repealed?

Moderator:
Harvey I. Saferstein, Mintz Levin Cohn Ferris Glovsky and Popeo PC, Santa Barbara, CA

Panelists:
Barbara O. Bruckmann, Howrey LLP, Washington DC
John Kirkwood, Seattle University School of Law, Seattle, WA
Bruce V. Spiva, Tycko Zavareei & Spiva LLP, Washington DC

12:45 – 1:15 p.m.

LUNCHEON

1:15 – 2:00 p.m.

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J. Thomas Rosch, Commissioner, Federal Trade Commission, Washington, DC

2:00 – 3:30 p.m.

MERGER ENFORCEMENT – SUBSTANTIVE ISSUES [PAGE 84]

• Are the federal enforcement agencies and courts appropriately considering efficiencies expected to be realized from transactions?
• Has current U.S. merger enforcement policy – including as expressed in the Horizontal Merger Guidelines – been effective in ensuring competitively operating markets without unduly hampering the ability of companies to operate efficiently and compete in global markets?

Moderator:
Ronan P. Harty, Davis Polk & Wardwell, New York, NY

Panelists:
Albert A. Foer, American Antitrust Institute, Washington DC
Lee Greenfield, WilmerHale, Washington DC
Janet L. McDavid, Hogan & Hartson LLP, Washington DC
Carl Shapiro, Haas School of Business, University of California at Berkeley, Berkeley, CA

3:30 –3:45 p.m.

BREAK

3:45 –5:15 p.m.

MERGER ENFORCEMENT – FEDERAL INSTITUTIONAL AND PROCESS ISSUES [PAGE 110]

• Should merger enforcement at the federal level continue to be administered by two separate agencies?
• If so, should merger review responsibility be divided by industry between DOJ and FTC?
• Differences in treatment (e.g., injunction procedures) arising out of which agency reviews a merger
• Hart-Scott-Rodino Act merger review process

• Should the HSR process be revised to address issues relating to
(a) the number and type of transactions requiring pre-merger notification
(b) the length of investigations
(c) the burden imposed by "Second Requests" and civil investigative demands, and
(d) transparency of the decisional process?

Moderator:
Phillip A. Proger, Jones Day, Washington DC

Panelists*:*

John D. Graubert, Deputy General Counsel, Federal Trade Commission, Washington DC
J. Robert Kramer, Director of Operations, U.S. Department of Justice, Antitrust Division, Washington, DC
Debra J. Pearlstein, Weil Gotshal & Manges LLP, New York, NY
Mark D. Whitener, General Electric Company, Washington DC

Friday, June 9, 2006

8:30 – 8:45 a.m.

INTRODUCTORY REMARKS

Robert T. Joseph, Sonnenschein Nath & Rosenthal LLP, Chicago, IL

8:45 – 10:15 a.m.

ENFORCEMENT ROLE OF THE STATES [PAGE 140]

• What role should state attorneys general play in nonmerger civil enforcement?
• Should state and federal enforcers divide responsibility for nonmerger civil antitrust enforcement based on whether the primary focus of alleged harm is intrastate, interstate, or global?
• What role should state attorneys general play in merger enforcement?

Moderator:

Kevin E. Grady, Alston & Bird LLP, Atlanta, GA

Panelists*:*
Terry Calvani, Freshfields Bruckhaus Deringer, Washington DC
Patricia A. Conners, Office of the Attorney General, State of Florida, Tallahassee, FL
Michael L. Denger, Gibson Dunn & Crutcher LLP, Washington DC
Robert L. Hubbard, Chair, Multistate Antitrust Task Force, Director of Litigation, Antitrust Bureau of the New York Attorney General's Office, New York, NY

10:15 – 10:30 a.m.

BREAK

10:45 a.m. – 12:15 p.m.

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• Should the substantive standards for determining whether conduct is exclusionary or anticompetitive under Section 2 of the Sherman Act be revisited?
• Refusals to deal
• Product bundling and bundled pricing
• Denial of an essential facility

Moderator:
Roxane C. Busey, Baker & McKenzie, Chicago, IL

Panelists:

Kenneth L. Glazer, Deputy Director, Bureau of Competition, Federal Trade Commission, Washington, DC
A. Douglas Melamed, WilmerHale, Washington DC
Steven A. Salop, Georgetown University Law Center, Washington DC
Daniel M. Wall, Latham & Watkins LLP, San Francisco, CA

12:00 –1:00 p.m.

LUNCH BREAK

1:00 – 2:15 p.m.

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• Should antitrust immunities and exemptions be eliminated if not justified by the benefits they provide, or should they otherwise be time-limited?

Moderator:
Theodore Voorhees, Covington & Burling, Washington DC

Panelists:
Peter C. Carstensen, University of Wisconsin Law School, Madison, WI
Margaret E. Guerin-Calvert, Competition Policy Associates, Inc., Washington DC
Stephen F. Ross, University of Illinois College of Law, Champaign, IL

2:15 –2:30 p.m.

BREAK

2:30 – 4:00 p.m.

BRINGING IT ALL TOGETHER: ARE THERE POINTS OF CONSENSUS ON WHICH THE AMC CAN BUILD A MEANINGFUL REPORT? [PAGE 217]

Moderator:
Robert T. Joseph, Sonnenschein Nath & Rosenthal LLP, Chicago, IL

Panelists:
Eleanor M. Fox, New York University School of Law, New York, NY
Timothy J. Muris, O'Melveny & Myers LLP, Washington, DC
Robert Pitofsky, Georgetown University Law Center, Washington, DC
Joe Sims, Jones Day, Washington, DC

The Antitrust Modernization Commission at Mid-Course Symposium - Thursday, June 8, 2006

Welcome

Donald C. Klawiter
Morgan, Lewis & Bockius

Robert T. Joseph
Sonnenschein Nath & Rosenthal

Donald C. Klawiter

Good morning everyone. My name is Don Klawiter. I am Chair of the Section of Antitrust Law, and it is my great pleasure to welcome you to "The Antitrust Modernization Commission at Mid-Course," a symposium on the issues that the Antitrust Modernization Commission is deliberating upon right now.

Having the public phase of the Antitrust Modernization Commission's work going on during my year as Chair of the Section of Antitrust Law can be compared to opening a candy store and allowing the kids to wander unsupervised and with an unlimited budget. From the announcement of the Commission, the Section has been very involved in its work. We immediately formed a Task Force to study issues relating to the Antitrust Modernization Commission, under the able leadership of Roxane Busey, a former Chair of the Section. It is composed of some of the finest minds in the Section of Antitrust Law. Under their careful watch, we have filed seventeen sets of comments with the Commission to date, with more to come.

In an effort to bring the resources of the Section fully to the aid of the Commission, we have also developed the idea of this symposium. This idea came from a variety of sources. It came from discussions with the Antitrust Modernization Commission Commissioners. We spent a great deal of time trying to determine the correct format:

Should the Commissioners speak? The Commissioners didn't think so.

Should we have the antitrust community debate the big issues of the day? Almost certainly.

How should we set it up? What was the format?

We came upon the idea of a symposium, not necessarily in the classic Greek sense of the word, but certainly in the sense of the exploration of ideas - ideas of all types and substance and size, so that we can try to figure out exactly how it is that the Commission should focus on issues, what perspective there should be, how this all can be done, and at the same time, do it in a way that is, in the words of our Symposium Chair, Bob Joseph, "relentlessly practical."

Basically, what we have done is brought together some of the great minds of antitrust to debate, discuss, disagree, talk about these issues. I think during the course of the next few days we will

find that they are up to the task. They have prepared terrifically for this process and will give you a great deal of perspective and information about the antitrust world today.

Several members of the Commission and the Commission staff will be here during the course of these two days. I am delighted and honored that Deb Garza, the Chair of the Commission, will be with us. Commissioners John Shenefield, Debra Valentine, Jon Jacobson, Steve Cannon, John Warden, and many of the Commission staff have RSVPed that they will be here, and we look forward to their participation.

We pledge to them that we will make the sessions relevant to their important work, in a spirited and lively discussion, where they can, hopefully, gain at least some ideas and perspective. That, at least, is the modest goal of this program.

We are also honored that several members of congressional committees who deal with antitrust issues will be here. They, after all, will see the final product of the Antitrust Modernization Commission, and, hopefully, being here and participating in this event will help them to focus as well on many of the important issues.

There are many representatives of the Department of Justice and the Federal Trade Commission and the states as well who are here today. We look forward to their perspective, their analysis, their ideas.

Finally, we welcome the antitrust community. We have a great deal riding on the work of the Commission and the congressional follow-through that will come from it. We pledge to you our best efforts to promote and pursue the great and difficult competition issues of our time in a lively and very civil forum.

Today and tomorrow, we will participate in an antitrust conversation. I urge you to be involved and engaged. All views will not be presented during these two days. This is just the beginning. It is our hope that we will take from these two days of conversation and discussion a situation where people go out and talk more about these issues, comment to the Antitrust Modernization Commission, and generally increase the level of debate in the antitrust world.

The Section is indebted to many people who have made this program happen. Debbie Pearlstein, our program officer, and Howard Feller, our program committee chair, were very, very effective and instrumental in organizing it. Steve Calkins has graciously agreed to open the program and to set the tone. Commissioner Tom Rosch has agreed to be our luncheon speaker today and will talk to you about a variety of issues that are before the Commission.

I am especially indebted to the panel chairs: Rich Wallis, Phil Proger, Roxane Busey, Kevin Grady, Ronan Harty, Harvey Saferstein, and Ted Voorhees, as well as all of our speakers, for their skill in putting together a great program and some great ideas to present to you today.

The staff of the Section of Antitrust Law always does a wonderful job at these programs. I would especially like to thank Angelica Spyres, who has been in charge of putting together this program for all of us.

Finally, when I decided to recommend this conference to the Section Council, I only had one candidate in mind to organize and to chair it. I should confess that he turned me down three

times and, after that, told me how impossible the concept of putting this program together was. He told me that at least twenty times, including yesterday. In the end, however, Bob Joseph, former Chair of the Section, former Program Officer of the Section, person of honest mind and gracious spirit, agreed to do it. (I knew he would all along.) I served as Bob's Program Officer when he was chair, and we turned some wild ideas into first-class programs. I thought, who better than Bob to put this program together? Bob is genuinely devoted to antitrust issues, to the antirust rule of law, and antitrust policy development.

I am grateful to him for agreeing to chair this program, for assembling the amazing group of people he has brought together here for us, and for not being afraid to add new entrants to the market of antitrust ideas.

I would like to thank Bob very much and call him up here to get the program started.

Robert T. Joseph

Thank you, Don, and good morning, everyone.

Yes, it may be impossible to try to cover a number of very rich, textured and difficult subjects in two days, but we're going to do it, and I think you're going to enjoy it and find it immensely profitable, entertaining, and valuable.

This has been a stellar year for the Section of Antitrust Law under Don's leadership, vision, and steady guidance. I appreciate the opportunity to contribute to what the Romans would call an *annus mirabilis*. (If Don's going to mention Greek, I can use some Latin.)

I am very pleased that we are able to start our program with an overview, commentary, and context-placing presentation by Steve Calkins, professor of law and director of graduate studies at Wayne State University Law School in Detroit. Steve teaches courses and seminars in antitrust and trade regulation, consumer law, and torts. Steve is also Of Counsel to Covington & Burling. As I am sure you know, Professor Calkins served as general counsel of the Federal Trade Commission from 1995 to 1997, has written on an array of antitrust subjects, including the AMC, and is always entertaining and insightful. Steve.

The Antitrust Modernization Commission at Mid-Course

Stephen Calkins

Wayne State University Law School

Stephen Calkins

Thank you, Bob. Let me get started, because I have only forty-five minutes and we have an awful lot to cover. [Ed: To cover more material, Professor Calkins used a Power Point presentation which his remarks to not entirely duplicate. If you would like a copy, just let him know.]

I am suffering under two handicaps today. One is that Don Klawiter and I were just in Italy for a marvelous conference; he survived wonderfully; I came back with a head cold. My ears are thoroughly blocked up and I cannot hear myself very well. If you have trouble hearing me, just raise your hand.

The second handicap: this is the first time that I have ever spoken without caffeine at ready access (because of Georgetown's "no food or beverages" policy). No comment. But I thank Rich Wallis for letting me take the bottled water intended for him.

My agenda: First, I am going to take a quick look back at previous modernization efforts and put this one in context. Then I am going to talk about three things: (1) the operation of the AMC; (2) my regrets; and (3) the things that I like. Let's get started.

Previous Modernization Efforts

To provide context, let's look at four previous modernization reports:[1]

1955 Attorney General's Report: this report, prepared under President Eisenhower, is the granddaddy of them all, the gold standard. Antitrust mavens still refer to it with affection. That report made the ABA Antitrust Section what it is today – here lies the origins of the *Antitrust Law Developments* book and the revenue stream that pays for programs like this.[2] Especially in terms of ABA history, the 1955 Report is unsurpassed in importance.

1968 Neal Report: this report, commissioned by President Johnson shortly before he decided not to run for reelection, is well known to all antitrust students for deconcentration proposals that went nowhere.

1969 Stigler Report: The Stigler Report was the anti-Neal report by Chicago luminaries that Nixon commissioned secretly, as he was coming in, only to ignore it.

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[1] For more information, citations, and the like, see Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. Corp. L. 421 (2006).

[2] *See* Stephen Calkins, *The Organized Bar and Antitrust: Change, Continuity and Influence,* 14 Loyola Consumer L. Rev. 393 (2002).

1979 Shenefield Report: The Shenefield Report, prepared under President Carter, featured two people here with us today -- Eleanor Fox and, of course, John Shenefield.

One can draw a number of comparisons among the reports.

Membership: Membership numbers are very different. We started out in 1955 with a massive group — everybody who was anybody. *Neal* was a dozen; *Stigler* even fewer. Then *Shenefield* grew to 22. AMC is down to a manageable twelve.

Members of Congress showed up in meaningful numbers only in the rather unique Shenefield Report, where half the members were senators or representatives.

The role of *academics and economists* has changed over the years. The 1955 Report had a lot of them -- I didn't have time to count how many. *Neal* and *Stigler* were overwhelmingly academic. The fate of those of us in the Academy, and of economists, has been going downhill ever since.

Government officials: here, too approaches have differed. In 1955, the assistant attorney general was a co-chair and intimately involved. With *Neal* and *Stigler*, government officials had no role. *Shenefield* was a heavily government-run kind of program. The staffing was all out of John Shenefield's Antitrust Division, and of course the commission had a lot of government officials. On the current Modernization Commission no government official serves, although when Makan Delrahim was appointed he was a staffer on the Hill. He later became a deputy in the Antitrust Division and now he's in private practice, so it's hard to know how to count him.

I know that Eleanor Fox would want me to count the number of *women*. At two out of 12, the AMC beats *Shenefield*'s 2 out of 22 (the earlier efforts were all male), and this time one of those two women is the chair. In fact, the AMC would have had three women had Debbie Majoras not been elevated to the FTC (which move forced her resignation).

Let's compare *assignments.* The 1955 Report was supposed to evaluate our national antitrust policy. It never actually did that, but that is what it was supposed to do. *Neal* had a broad mandate to address whatever was considered important. *Stigler* was to counter *Neal*. *Shenefield* had a narrow assignment, to do only two things: Worry about the big case problem — nothing can be tried — and think about immunities. The AMC has this bizarre assignment asking whether the antitrust laws need modernizing. (The real conundrum was why people didn't quickly answer with a simple "no" and move on. But they didn't.)

Original research: These study commissions would be great opportunities to do some empirical research, but almost none ever ends up doing it. Often they start out by saying it would be a nice idea. Shortly after that they conclude that they lack the time and resources. The exception was the Shenefield group, which actually commissioned some serious work that involved getting dirty collecting data. With the AMC, the then-outgoing assistant attorney general, Hew Pate, urged an empirical study, and Commissioner Carlton (especially) expressed enthusiastic support, so the idea flickered for an unusually long period of time before, once again, it was concluded that the AMC lacked sufficient time and resources.

Luminaries: open some of these reports and to an antitrust historian famous names just leap off the page. These were some of the true legends of the antitrust world, whether you go to the 1955 Report, the Neal Report, the Stigler Report, or the Shenefield Report. Then, of course, you come

up to the AMC --- and seeing at least one member in the audience, we have to say that all twelve are luminaries! [Laughter]

Was it public? The reports are at very different places on the public – private spectrum. The 1955 Report wasn't really public in the sense of inviting the press in all the time, but its leaders were constantly reporting to the ABA. Go back and look at the old Antitrust Law Journals and you will see regular reports from Chairman Oppenheim saying, "Here's what we're doing, and here's what we are thinking about," and so on. So in that sense, there was a lot of communication about what was going on. *Neal* and *Stigler* were entirely secret. Indeed, *Stigler* was never actually released at all. It was just leaked.

The Shenefield Report was the first one where the glories of FACA were applied. They met in public. Indeed, you can go back and look at your BNA-ATRRs and read reports about decisions made at various meetings. Even some of the votes are reported — five to four, and things like that. But all you had were news reports (assuming you didn't attend the meetings). You don't know who voted what way and you don't have transcripts, whereas the AMC — my golly, this is government not just in the sunshine, but out in the center courtyard disrobing in public! Every scrap of paper is on the Web, accessible anywhere in the world. When they then meet to deliberate -- so far at least -- the ABA, in cooperation with an absolute heroic volunteer, has written up detailed minutes of the meetings, putting down for every issue how every commissioner voted, by name, on the Web, available to the entire world. The AMC claims that eventually transcripts from these meetings will be posted. So these folks are really hanging out in public -- a completely different approach than we have ever seen before.

Hearings: In 1955, there were no hearings, but they did invite comments. *Neal* and *Stigler* were entirely secret. When FACA took effect, we started having hearings. *Shenefield* had a lot of hearings and a lot of submissions. The AMC had a lot of hearings, a lot of witnesses, and a lot of submissions. I did a quick, sort of rough-and-ready count, by self-description, of who the people were who testified at the AMC hearings, with the lineup being probably what you would have guessed with many of the usual suspects showing up. Note the significant number (15) of economists, bolstered by a five-economist roundtable.

There were a lot of *submissions*: 226. That is a misleading number, though, because sixty-eight were on immunities, with every trade association for an export cartel sending in a submission saying, "This is absolutely crucial," and other assorted fellow travelers all speaking up and saying, "We really need to preserve our exemption." Another 44 were on the opening query which asked what should be studied, so they weren't directly on substance. The ABA — and here I include the Antitrust Section and the other sections — had a whole lot. A lot came from the Chamber or the Business Roundtable. The AAI submitted comments on almost everything. At one point when I was writing my article, I asked Commissioner Shenefield what comments I should read, and he said that the AAI comments had been among the most helpful and interesting.

Meetings: In 1955, you had this wonderful image of more than sixty gentlemen assembling in Ann Arbor for three days of candid give-and-take, that sort of thing. *Neal* and *Stigler* we don't know about because they met in secret. For *Shenefield*, the public reports are of about six days, and maybe there were a couple of others. The AMC sets the record, though. They have already

had nine days of meetings. Three more scheduled, and we think there will probably be more after that. So not only is this unbelievably public, but they are being public in person.

There is no way that I can review of all these reports' *recommendations.* What I find interesting about the recommendations from the old reports is how many eventually were adopted — not always right away, but eventually. A lot of what these folks were doing was contributing something to the antitrust conversation.[3] A check on my Power Point slide entry means the recommendation was eventually adopted; the "+/-" means it was partially adopted. Where there is no marking (as with "repeal RP Section 3") the recommendation has not yet won acceptance. But a wide variety of recommendations eventually achieved success. It is also interesting how recommendations keep recurring.

Neal is known for the totally failed concentrated industries act and the merger Act. They also, rather quixotically, tried to repeal part of the RP Act. So in that sense, you might say, "big failure." But they called for premerger notification, which finally became a fixture. They called for limiting antitrust decrees, which eventually happened. They called for reducing the double taxation income tax incentive for merging, which President Bush accomplished — maybe not for antitrust reasons, but it happened nonetheless. *Neal* also sang a hymn to deregulation and successfully called for the (eventual) abolishing of Miller-Tydings. The Stigler Report also called for deregulation, as well as increasing penalties and repealing the Expediting Act. They focused attention on an obscure, unfortunate procedural rule and helped make it a live issue.

As for the Shenefield Report, well, to be candid, it does not have a great reputation. People do not think of it as a particularly successful report. In fact, however, a whole series of the report's procedural recommendations were accepted. Its case management advice was quite widely adopted. (On substance, things did not work out so well.)

We can guess about what the AMC will recommend, but that's all. So let's wait, and instead discuss how it is proceeding.

The Functioning of the AMC

I had read the ABA minutes of the recent AMC meetings, and I had acquired an image in my mind. When I showed up yesterday and sat through a meeting, it was nothing like what I would have expected. I thought about it afterwards. I think the problem was that I worked on an earlier, agency-specific report. I was the reporter on Kirkpatrick II,[4] the product of an ABA task force to address some of the same questions about which the AMC is deliberating. As Tim Muris has explained, much of my role "involved negotiating what might modestly be called a Pitofsky/Muris view of the FTC."[5] Our task force would meet privately in a conference room and work through various issues. We would agree on one or two of them and disagree on one or two – at which point I'd put those aside pending additional work. Then I would talk with Bob and talk with Tim and talk with other interested members of the task force, trying this approach

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[3] *See generally* Stephen Calkins, *The Antitrust Conversation,* 68 Antitrust L.J. 625 (2001).

[4] Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L.J. 43 (1989).

[5] *Robert Pitofsky: Public Servant and Scholar,* Remarks of FTC Chairman Timothy J. Muris at the Second Annual Conference of the American Antitrust Institute (June 12, 2001), *available at* http://www.ftc.gov/speeches/muris/muris010612.htm.

and that one, finally returning to our next official meeting with a more nuanced position. Through this informal, individualized give-and-take we arrived at a consensus document adopted with near unanimity. And subconsciously I was expecting (I think) to observe a process something like that one. That is not what happened yesterday — not at all.

To understand the process, you have to know that before these meetings, Andrew Heimert circulates (and makes available on the web site) staff briefing memos. Thus far they have been models of balanced presentations, summarizing the hearings and the commentary and setting forth the major recommendations with quite responsible reviews of the pros and the cons.

In addition to the briefing memos, Andrew circulates (and makes available on the web site) what are called "discussion outlines" – really lists of issues. These are surprisingly important. On the Power Point screen you may be able just barely to make out the first page of the "International Antitrust Discussion Outline."[6] In the four boxes are the major questions, numbered one to four, the first one being FTAIA, the next one being IAEAA — there were mercifully few jokes about all these acronyms — the third being whether we should have a technical change in the budget authority to fund the giving-advice process of the government, the fourth being whether we should implement multilateral procedures to enhance antitrust comity. Underneath each boxed question, but unfortunately also numbered one, two, three, four, and so on, are various different positions that one might take. And this continues onto a second page. All told, between the two sessions (international and *Parker v. Brown*) there were ten major questions and 29 possible positions for which to vote.

As for the process itself, the commissioners began by going around the room with each person explaining his or her stance on all ten questions and 29 positions. (Except, that is, for Commissioner Kempf, who participated only via a bad telephone connection that faded in and out until the attempted link was abandoned.) I will quote from one Commissioner. I typed this out very carefully. Ready? "For two, I'm against three. I'm strongly for four. I agree with Makan that budgeting makes sense, so I favor seven. On four, I favor eight and [a]; [b] (although I question what it means); yes to [c]; not [d]; not [e]. I support nine — whether it's possible or not is another question — and, of course, ten." [Laughter] The next commissioner then weighed in and said, "Well, I support number two under one, although three has a lot to recommend it."

This was so different from my experience with the Kirkpatrick Commission; it just was unreal. This was all being done in public taking a full hour to go around the group getting preliminary views.

After that hour, they really joined issue. For instance, on that question about how we should budget for foreign assistance to developing countries, I have never heard a more energized, excited debate about a question of budgeting trivial amounts. You had an eloquent presentation saying, "Give me a break. Neither head of either antitrust agency wanted to have the money going directly to the antitrust agency, so let's not even suggest it. Let's keep the money going through USAID, as it is now." At that point Commissioner Delrahim said, "Oh, no, you don't know how the government works. If you're in the Justice Department, you can't say that you favor something, even if you favor it, unless it has gone up the chain of command and everybody has agreed to favor it. Maybe the Justice Department favors this change, but they are not

[6] See http://www.amc.gov/pdf/meetings/International_DiscOutline06060_circ.pdf.

allowed to *say* that they favor it." At which point a former FTC general counsel, who is even now walking into the room, said something about, "If you're an independent agency, you can say what you think, even if the Justice Department can't."

The debate continued then, with John Shenefield saying, "We need to get USAID out of this business. It makes no sense to have the money going there and then have the antitrust agencies petitioning USAID. It ought to go directly to the antitrust agencies." Then followed a very excited debate about line items in budgets and whether, if Congress used a line item, that would make sure the money really would be used for the designated purpose as opposed to just being squandered on something else (perhaps law enforcement).

The debate went on and on, a lot of energetic give-and-take. They eventually voted pretty unanimously (although I couldn't quite tell; the mikes really were terrible) in favor of saying the money ought to go directly to the antitrust agencies, even though neither antitrust agency had requested this.

(A word of caution: When you go to that ABA web site and you read the minutes of these meetings and the votes, take those votes with a massive grain of salt, because there is a blower in that room and the audience can barely hear anything, so for a lot of it, you are guessing at what people are saying. By the time these folks are done, they will have taken positions on so many issues that none of them will be able to run for higher office, because it's all on record, on the Internet. But at least do them the favor, when you are looking at the minutes, to take reported votes with a grain of salt, because some of those reports may be a little off.)

It really was an amazing experience. My main reaction was to be very grateful that I am neither on the staff nor on the commission. The idea that you need to take every lousy issue in antitrust and publicly vote on it — yes/no, yes/yes/no/no --- is incredibly daunting. When an academic writes an article on *Parker v.* Brown, he or she researches the subject for a year, tries out ideas with colleagues, goes through multiple drafts, and finally arrives at a reasoned position. These guys have to do that in a half-hour. It really is a heroic job.

What observations can be drawn? For one thing, the drafting of those questions and issues is very important. The staff performs this role in consultation with a group of commissioners assigned to a particular topic. But picking the questions makes a big difference.

Also important: the testimony and commentary. Remember that this deliberation is grounded on a staff briefing memo that summarizes the testimony and commentary. That matters. Why? If some position is reflected in the testimony and commentary, then it got attention in the briefing memo. But if a position is *not* reflected in the testimony and commentary, then it is probably *not* discussed in the staff briefing memo – even if it is an issue or considerable moment. So the ABA and the AAI can pat themselves on the back for having put so much into the commentary.

Also important: With hindsight, we can say that selection of the original twenty-nine issues to be discussed has proven to be very important, because that list of issues drives all this. Those are the issues on which they held hearings, on which they received submissions, that are discussed in briefing memos, and that are listed on discussion outlines. And it is an amazing number of issues -- they are voting on an unbelievable number of questions.

I think it is fair to say that a liberal critic could go over those 29 questions and carp a little, saying that too many of them are not neutral. Five of the AMC's major questions (looking at all the sessions, not just yesterday's), or maybe six, have two answers, one of which is, "stay the course," the other of which is, "do more enforcement." These are almost all about exemptions and immunities. About 11 major questions have two answers, one of which is, "stay the course," the other of which is, "cut back to some extent." For instance, we are asked about what change, if any, should happen to the states. You don't really think the AMC is going to come out and say the states ought to do a whole lot more, so you? That does not appear to be the implication of the question. Or a question asks about efficiencies. One does not really get the sense that the AMC is asking whether efficiencies get too *much* weight.

So one could criticize some of these questions. Also, they may have left off your favorite issues. (They left off some of mine.) But the observation with which I want to leave this part of my discussion is that the particular questions are important, as is the fact that there are so many.

My Regrets

What do I regret? First, I regret that they are *addressing so many issues*. My head was spinning after sitting in that room for a single morning session, yet they have to come back in no time at all and vote on a slew of additional issues. And before today they'd already met twice to cast series of votes. Unless they are able to take a leave of absence from earning a living, it's hard to see how they are going to be able to do this without some compromises. It is such a massive assignment. I worry that some of the issues will not get the attention they deserve --- or that commissioners will burn out.

That said, I still regret that *some of my favorite issues are not there*. Remember the previous reports? Time and again, it was the procedural, jurisdictional sort of recommendations that ended up being adopted. It was the substantive stuff that ended up going nowhere. I've said before and I will say again: these commissioners could have made a real contribution by drawing attention to the fact that times have changed and it no longer makes sense to say that FTC Act Section 5 cannot be applied to common carriers and financial services. That is the kind of recommendation that could have made an important difference, yet the issue is not on the agenda.

With respect to issues that *are* on the agenda, I fear that *immunities* are going to be left by the wayside. McCarran is ripe for reexamination. There are hearings on the Hill. Were the AMC leading the way, the country really might be able to roll back certain exemptions and immunities. It's a new day. So I regret that it looks like they are not heading in that direction at all.

As an academic, I always regret a lost opportunity for *empirical research*. It can make a real difference. Part of the reason that the Shenefield Report was successful with its procedural recommendations was that they collected a body of data. Yet here we have another commission --- a very talented group of commissioners and staff --- and once again the decision was made that there is neither time nor resources to collect data.

Indeed, a particularly wry moment occurred yesterday when the commissioners were doing a nuanced editing of one of the recommendations. Somebody said, "I'm willing to accept this if you'll change it to recommending only that the issue be studied." That was generally accepted for a while, until a commissioner spoke up: "Wait a minute. I thought that we were the ones in

the business of studying. Since we are studying, how can we recommend that something be studied?" That was a conundrum.

So those are my regrets. Let's talk about what I like.

What I like

First, I like some of the *decisions* that they have tentatively been made, which I think are important and wise. But the decisions are only tentative, and we are embarking on two days of panel discussions of those tentative decisions, so I will leave their analysis to others.

On the other hand, some of the *hearings* have been very impressive. Consider the one on civil remedies. Just take a look at the cast of characters who were there that day. Anyone in Washington who did not come to see that show really missed out on something special. (In truth, yesterday's session also was quite stimulating for those of us in the audience – all 16 of us. People are not flocking to the AMC.)

One AMC hearing was sufficiently exciting that afterwards, John Shenefield described the air during the antitrust debates as "electric" --- prompting Steve Cannon to observe that it is quite unusual to hear "antitrust" and "electric" used in the same sentence. But it really was a substantive, hard-hitting hearing in which issues were joined.

One hearing that I especially liked was the economists' roundtable on merger enforcement. This was not the first merger session. There had been two panels on substantive mergers issues, where you had nine great experts talking about U.S. merger law. They agreed across the board that merger enforcement either was perfect or, possibly, was a little too tough, especially on efficiencies. But that was the range of opinions out of nine people on a substantive merger policy — this when the government hasn't won a merger case in three years. (I continue to be amazed at the uniform expression of satisfaction with the merger guidelines. Indeed, when Bobby Willig was asked, "What would you change about the guidelines?," he said, "Not one word." Of course, we all know that the numbers in the guidelines aren't followed at all. We all know that the efficiencies guidelines have footnotes that contradict what is in the text. So to say that the guidelines achieve perfection is overdoing it a little bit, I think.)

But the economists' roundtable, with Commissioner Dennis Carlton initially leading the questioning, was a very different session – really a stimulating seminar. (And, yes, other commissioners chimed in later on with some good questions.) Here we had Larry White lamenting the fact that, once again, we just don't have enough research: we need to go back and look at more consummated mergers and find out what happened, because we lack good data on critical concentration levels. Then, speaking about market definition in monopoly cases, Larry said that "we are in a horrible, horrible situation." We do a reasonable job of market definition in mergers. We do a terrible job transposing that into Section 2, and there is no very good alternative in common use.

Tim Bresnahan spoke up about consent decrees, saying that these present serious problems: "I think a lot of them just don't do very much for competition. My friends in the bar call me up and ask my advice on what horrible divisions to keep around in case they should someday want to do a merger."

The economists' session featured some high-level discussion about what kind of data makes sense -- what works, what doesn't. And, again, it was only one of several other really terrific hearings (and I carefully don't mention the hearing in which I testified).

What else do I like? There were some *surprises*, although "surprise" isn't quite the right word, but there were a number of times when we were reminded that people known as conservative can be rather vigorously pro-enforcement. Two examples stand out. One concerned Chair Garza and the question of fairness. The hearings and meetings have spent a lot of time on the question of "fairness," almost always asking about fairness for defendants. Those ABA-sponsored minutes report that during one session, after several commissioners discussed an issue in terms of fairness to defendants, Deb said that she just doesn't care very much about being fair to somebody convicted of cartel behavior.

The second example is provided by Commissioner Carlton, who not only is well known as a Chicago economist, but actually *is* a Chicago economist. But on issue after issue, when you go over the straw votes, you will see Dennis, often by himself, voting for enhanced deterrence through refusal to allow claim reduction, or providing for greater-than-treble damages. My point is not that Dennis is necessarily right, but rather that it is refreshing to be reminded that a conservative can be very pro-enforcement.

What else do I like? *Candor* during the hearings. Perhaps because the audiences are so small, discussions have been remarkably candid. Participants forget that though the miracle of the internet their remarks are being shared with the world and preserved forever. Let me give you some examples.

Dan Rubenfeld was trying to make the point that it is all right for the agencies to lose some merger cases. Occasional defeats do not equate to being too aggressive. "If the agencies are not out there aggressively pursuing mergers that they think are anticompetitive because they are afraid of losing a case, we're going to be having under-enforcement. It would be like looking around for a tax attorney when you need some advice, when you're filing your taxes. You really don't want a tax attorney that has never had a discussion with the IRS, because that person is not being aggressive enough."

I understand that the IRS has downloaded a copy of that transcript. [Laughter]

Another famous example of candor made the antitrust news when it was reported live, and I am pleased that it has been preserved for posterity in the corrected transcript. Judge Frank Easterbrook addressed the question whether the jury should decide whether damages should be single, trebled, or something else, and he spoke as only he can: "I think having this very difficult economic issue decided by twelve high-school dropouts is not a good idea." [Laughter]

What else do we like? The *opportunity for the ABA to contribute.* The ABA played an important role in connection with the 1955 Report. After the 1955 Report was issued, an Antitrust Section meeting featured a major symposium, all of which was recorded in *Antitrust Law Developments*. Thereafter, annual Section meetings featured presentations on developments in the law, which eventually led to the *Antitrust Law Developments* book. When the Shenefield Report emerged, again the Section had a major program. In short, part of Section's raison d'etre is to participate in this kind of project. Don has stepped up to this obligation by making Section

participation a major priority. As noted, the Section has filed a host of comments, and it is not done yet. This program is another major project.

Now, the commissioners have shown no reluctance whatsoever to reject this or that ABA recommendation --- but they have paid attention to those recommendations. Looking ahead, I am confident that the Section is hoping that the AMC will issue its report precisely in time to be discussed at next April's Spring Meeting. It is gratifying to see the Section participating in this fashion, because participation such as this benefits the Section as well as the AMC and helps promote the great national (and increasingly international) discussion that we all enjoy.

Finally, I was impressed by the *quality of the deliberation* yesterday. After that first hour of going around collecting everyone's initial positions, I was a little depressed, to be perfectly candid. But thereafter, things picked up, and it was an impressive performance. I can't speak to the other sessions because I wasn't at them. But yesterday was what you would want a group of people like this to do. They listened to each other. Even during that initial voting, the occasional commissioner would say, "You know, I was going to go this way, but I am persuaded by Commissioner So-and-So that I should rethink that, so I think I'm going to go that way." And a couple of commissioners were not shy about saying, "You've given us twenty-nine different things on which to vote, and on this one, I just don't have information, so I'm going to pass," or, "This one is just not my area of expertise. I'm leaning this way, but I really want to hear what other people are saying," or, "I'm happy to go with the consensus on this, because I just don't have confidence in my views." People listened and thought, which is what one would hope to see.

There was serious discussion of important issues. The *Empagran* discussion was particularly good, I thought, in its airing of different positions:

- "It's the worst statute ever written."

- "The D.C. Circuit is getting it roughly right. Better to stick with that than go back to Congress"

- "Wait a minute. We can't simply say we endorse the D.C. Circuit's opinion, because then we're not saying what we think; we're just saying we like a court opinion. People can disagree about what a court opinion means. If there is part of the analysis in the D.C. Circuit's opinion that we endorse, let's endorse that."

- "Yes, but there are problems with the D.C. Circuit opinion, because it's trying to draw distinctions that just are not there, and so it is not an acceptable approach. We cannot endorse the D.C. Circuit's opinion, because it's not a good opinion."

I'm going to commend Jon Jacobson, who is sitting right in front of me, twice. First, he took what I think is the best position: It's a horrible statute and we ought to repeal it and let the common law get back to doing its thing. Second, seeing that he was the only person who shared this (correct) view, he proceeded to recommend what was explicitly a fall-back position. (Indeed, throughout the session, Commissioners would express both an ideal position and a fallback.)

There is no chance that commissioners were scripting this in advance. At times, a new issue would arise and the discussion would veer off in an unforeseeable direction. What we were seeing was live, real, and immediate, all the while being reported for the benefit of anyone with access to the internet.

There was a particularly good joining of the issues on whether to adopt a sovereign compulsion test for state action. Commissioners were not shy about expressing their views. At one point, John Shenefield declared, "We are seriously in danger of becoming unmoored from reality." At that point, the chair, Deb Garza, did something that I thought was profoundly correct. She observed that if the AMC was seriously going to consider recommending a new standard (sovereign compulsion), it should know the impact of doing so. Accordingly, she turned to the (already overworked) staff and instructed them to choose a state, take a look at how regulation functions there, and develop a good understanding of what difference a sovereign compulsion test would make. In short, although it is late in the day the AMC was actually going to do some empirical research!

All in all, it really was an impressive performance. There are all sorts of things that people can criticize, will criticize, and should criticize, but fundamentally the AMC is a group of very smart people, very knowledgeable about antitrust, who are trying to do what they believe in their hearts is right. They are faced with an absolutely unimaginable array of issues that they need to discuss in public, virtually live via the Internet in front of the entire world, and they are working very hard, addressing the issues in exactly the way one would want a group like this to function. What I saw yesterday was very impressive indeed: This is how it is supposed to happen, and we owe them all a debt of gratitude.

Thanks very much.

Mr. Joseph

Thanks, Steve.

The Antitrust Modernization Commission at Mid-Course Symposium - Thursday, June 8, 2006

Civil Remedies

Moderator

Richard J. Wallis
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Panelists

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Kenneth L. Adams
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Robert T. Joseph

Steve mentioned one of the panels at the AMC that debated the remedies question. Remedies is, as you all know, in the forefront of antitrust debate and discussion, not only here, but also around the world, particularly in the E.U. at this time. It is a subject that leads to different and often passionate beliefs and opinions.

This morning's panel addressing remedies issues is chaired by Rich Wallis, associate general counsel for litigation at Microsoft, who was chair of the Section of Antitrust Law from 2004 to 2005. Rich has had extensive experience in antitrust litigation, including complex litigation, both at Microsoft and in private practice.

He is joined by our distinguished panelists, including Eleanor Fox, the Walter J. Derenberg Professor of Trade Regulation at NYU Law School, where Eleanor has taught European Union law, international and comparative competition law, torts, and antitrust. As you all know, she has written extensively and thoughtfully for a number of years on every imaginable antitrust topic.

Dick Steuer is a partner with Mayor Brown Rowe & Maw in New York, where he specializes in the practice of antitrust law, including litigation, mergers and acquisitions, IP licensing, franchising, and e-commerce. Dick broad-ranging expertise in antitrust law has suited him well for Section activities involving remedies questions. He chaired a remedies forum during the year I was chair of the Section and then chaired the remedies task force formed by my successor, Kevin Grady. That task force came up with what is called the "ABA Proposal" that was discussed in some depth at the hearings.

Ken Adams is with the Dickstein Shapiro firm here in Washington. He founded the antitrust practice and has litigated on behalf of major companies who have opted out of class actions and pursued direct plaintiff's cases against antitrust offenders, and comes to us with a wealth of experience on the plaintiff's side and in private litigation.

Tad Lipsky is a partner in the Washington office of Latham & Watkins. Tad served as deputy assistant attorney general under Bill Baxter from 1981 to 1983. He testified before the AMC. He has written extensively on a range of antitrust subjects internationally and domestically, and has served in-house with Coca-Cola as well.

All these folks come to us with thoughtful perspectives grounded in many years of antitrust litigation, counseling, teaching and writing.

Richard W. Wallis

Good morning, everyone. So our job today is to cover civil remedies in ninety minutes. I will quickly move through an overview of the topics that the commission has considered, and then we look at each of them in some depth with our panel. We will leave ten or fifteen minutes for comments or questions from the audience, because we want this to be an interactive session.

The subjects we will cover today:

• The overall state of deterrence, what I call the "Goldilocks approach": Are we over-deterring? Are we under-deterring? Do we have it just right?

• Then, we will move into the specific topics addressed by the commission:

- Treble damages;

• Prejudgment interest;

• Attorneys' fees;

• Contribution and joint and several liability;

• The impact of international remedies on the overall state of deterrence in the U.S.;

• The *Illinois Brick* indirect-purchaser issue.

Bob Joseph asked that we summarize the written submissions to the commission on this topic. As Steve Calkins indicated, the subject of remedies received a great deal of attention at the hearings, and the Commission received a number of written submissions. I am not going to attempt to review the substance of these. As Professor Calkins mentioned, this is all on the Internet, so anyone interested in what has been submitted to the commission can go up to the Web site and find it there.

Mr. Joseph also asked that we talk about the areas of consensus were and the points where there are differing views. In terms of finding the areas of consensus, the first one is that all of these questions that I started with are interrelated. It's sort of like "whack-a-mole": If you propose changes to one aspect of the remedies system over here, it raises important issues in another area. If you are asking someone for their opinion on prejudgment interest or attorneys' fees, they will ask what was decided with respect to treble damages, because modifying one aspect of the remedy system will affect the overall balance of deterrence.

Professor Calkins has cautioned that trying to read minutes of these meetings is perhaps a fool's errand — my words, not his. That said, there appears to be a developing consensus, although not unanimous, on retaining joint and several liability but having some sort of contribution and claim reduction added by statute. Virtually all other aspects of the topics that I have highlighted remain under active discussion and debate. There is considerable evidence of commissioners listening to one another, being informed by each other's opinions, and changing their minds, or at least the slant or direction of their thinking.

So what types of things have been discussed to date?

Treble damages: There have been a number of specific proposals. When we get into the subject of over- or under-deterrence, there is some suggestion that treble damages are most appropriate in per se cases, perhaps even greater than treble damages in some cases, and perhaps not treble damages in rule-of-reason cases.

Another approach to solving the over-deterrence/under-deterrence balance has been a suggestion that treble damages be discretionary with the court. Commissioner John Warden, who is in the audience today, has proposed a new approach for follow-on cases in criminal cases — what to do with the overcharge, bringing in all the direct and the indirect purchasers, and how to allocate all of that out. We will touch on that today.

Prejudgment interest: The debate seems to be centered on "leave it as it is" or "award in all cases."

Attorneys' fees: Everything that has been discussed, probably, by many of you over the last twenty years is on the table, from no change to making the awards discretionary. There has been some suggestion of moving to an English rule where the prevailing party receives attorneys' fees; and there was been a suggestion about lowering fee awards in follow-on cases.

A subject that's near and dear to the Section of Antitrust Law's heart is *Illinois Brick*. Bob Joseph mentioned Dick Steuer's work on our remedies task force. The Commission is looking at whether *Illinois Brick*, the federal rule barring suits by indirect purchaser, should be overruled by

statute. If so, should Congress overrule the corollary in *Hanover Shoe*, which eliminated passing on defense? If you are going to make statutory changes there, is it feasible, is it advisable to preempt state indirect-purchaser laws? Such an effort may be compared to trying to get toothpaste back into a tube — a difficult endeavor at best. But we will talk about that.

Then there is the possibility of a multifaceted statute to improve the existing indirect-purchaser regime.

The commission has talked about joint and several liability,. There seems to be a consensus there for retaining it, but allowing for contribution and claim reduction.

There have been two hearings to date that are relevant to these discussions. After the commission held its opening hearings where people testified, the commission had public proceedings this past month to look at various parts of the remedies regime. There are rough minutes of those hearings available, prepared within the Section of Antitrust Law.

On the subject of indirect purchasers, there seems to be broad support within the commission for legislation overruling both *Illinois Brick* and *Hanover Shoe*. At this point in time — and it's a commission at mid-course, — there is division on whether preemption is appropriate.

Again, strong support to continue joint and several, with a statute allowing contribution and claim reduction. One of the issues there,— Ken Adams will talk about it, and perhaps others — is whether the claim reduction is before or after trebling.

The subject of treble damages was taken up at the May 23 hearing. Again, the majority favor the existing approach, but there has been a serious and interesting discussion about making it mandatory in certain cases, discretionary in others. Whether that is going to break down on a per se/rule-of-reason fulcrum or not remains to be seen.

Prejudgment interest is a much closer question. A number of the commissioners feel that prejudgment interest is simply making the victim whole, so they favor it. Others favor the more limited circumstances specified in the existing statute. They also talked about attorneys' fees at the most recent hearing.

Before we get into the details of specific issues like treble damages and some of the ones we just walked through, we will start the discussion with a fundamental question, the one I have referred to as. the Goldilocks question: Does the current system lead to over-deterrence, under-deterrence, or does it get it just right?

We will start by focusing on cartels. Ken, tell us your views on whether the current system appropriately deters cartels, over deters or under deters. Then, Tad, I would like your views as well.

Kenneth L. Adams

Thanks, Rich. He gives me the easy ones.

If I hadn't heard Mike Denger argue the contrary proposition at a cartel conference in New York, I wouldn't have believed it was possible to make a serious argument that there is over-deterrence

in the area of global cartels. The usual arguments about over-deterrence have to do with innovation, and chilling innovation. I am not sure even this Justice Department wants to encourage innovation and price fixing and market allocation.

So I think the notion of over-deterrence is not really the issue. The question is whether there is under-deterrence to a point where things need to be done about it. When you have only 20 percent detection, according to the Justice Department, certainly you are not getting optimal deterrence. Whether there is anything you can and should do about that is a harder question.

The current set of private remedies is part of a larger system. Obviously, the risk of criminal penalties is an important part of what deterrence we have now in the system for global cartels. But I don't think there is a serious case to be made that there is enough or too much deterrence.

The biggest concern that I have in the area of the present cluster of remedies, private and public, is that the Supreme Court hurt the current system, I think, seriously with a wrongheaded decision in *Empagran*. I think the Supreme Court had it right in *Pfizer v. India*, when they talked in that case about the importance, in an economy that even then was starting to show a trend toward globalization — you cannot expect to have an effective system of penalties and enforcement in the United States if a potential cartel participant who has the opportunity to earn extra-competitive profits worldwide is only at risk in a quarter of the market, in the United States. Therefore, it's essential to U.S. enforcement policy that a cartel participant be held accountable for global illegal profits, not just the portion that was earned in the United States market. Yet that was disregarded in the *Empagran* decision.

I am pleased to report, Steve, that there has been empirical work done on this. We have put it in programs like this on cartels. We have run the numbers on two of the cases that we were involved in, *Graphite Electrodes* and the *Vitamins* case. Both show that, notwithstanding, in the *Vitamins* case, the largest fines ever imposed by the United States government and the highest recoveries ever in civil litigation relative to the overcharge, crime still pays.

Factor in, in addition, the fact that it's 80/20 you won't get caught, and I think the deterrence point makes itself.

I say crime still pays because we showed in those two cases that when you added up the total profits, the total overcharges, worldwide, and you subtracted what they had to pay to the United States government, the E.U., Canada, and the civil plaintiffs, there was still in excess of $1 billion of profit left over, in both of those cases. If you had a rational process of decision making from an economics standpoint only — which no one is suggesting is the way these things happen, of course — it would still not be irrational to go forward with cartel participation.

So I think it's really impossible to argue that there is over-deterrence in the cartel area.

Mr. Wallis

Tad, do you want to take that up?

Abbott B. Lipsky

I am going to prove that it's possible to argue that there is over-deterrence.

Certainly, if you start from the premise that the conduct that you are involved with is actual hardcore cartel conduct, there is no theoretical case that it can be over-deterred, because, almost by hypothesis or, I would say, by common assumption, there is no social utility to the conduct, and therefore there can be no such thing as over-deterrence.

I think Ken raises a very serious point that has been made by a number of serious students and scholars. If it is the case that international cartels can impose a huge amount of damages through markets or in geographic areas where they are not subject to any serious prospect of damage recovery or multiple damage recovery, then I think there is case to be made that there, in fact, is under-deterrence.

I want to put the international issue aside for a second, for two reasons: number one, because it's easy theoretically, and number two, I think people should notice how smartly the level and intensity of anti-cartel enforcement outside the United States is coming up. If you look at the enforcement record in South Korea, where the imposition of criminal remedies is rapidly becoming routine, South Korea imposes very serious damage remedies for cartel conduct. And here is a jurisdiction that really didn't have any serious antitrust enforcement as recently as five or seven years ago.

Similarly, you have the European Union, DG Comp, really beginning to flex its muscles and bring some serious cartels to heel. There is tremendous activity in trying to promote some form of private damage litigation. You have criminalization in places like the U.K. and Ireland, and criminal laws on the books in other jurisdictions, like France, which can, and probably will, start to be applied pretty aggressively in the near future.

So I actually think that, *Empagran* aside, the international issue will solve itself pretty quickly.

To me, the real question about over-deterrence/under-deterrence in the cartel field comes down to two kinds of contending views of the world. One view of the world, I think, is pretty well described by what Ken has said. You continue to observe these rather amazing huge international cartel cases, even though the remedies have been around for a long time. In fact, the remedies are ratcheting up at an incredible rate. In 2004, we just went from three to ten years in prison and from $10 million to $100 million in corporate fines. Now we have surreptitious, unconsented surveillance. Yet these cartel cases continue to come around. So it really raises the question of where the deterrence system is breaking down. Is there a class of characters that is either totally unaware of these penalties or somehow convinces itself that, despite everything, they won't be caught?

What we need there is a better understanding, if that is, in fact, a true phenomenon, of where the system is breaking down.

But there is a contending interpretation of events. There is a contending empirical interpretation of what we are really observing when we see remedies going up and spectacular treble remedies being awarded and people going to jail, and so on and so forth. That is, perhaps some of the behavior that is being condemned as cartel behavior is simply behavior that creates some degree of possibility of being viewed as cartel behavior, but which, in fact, is not cartel behavior, or at least is not close enough to cartel behavior to really justify that kind of ferocious remedy. If you have an exchange of information between competitors or if you have something that looks like it might be an agreement, and the advice to the client is, "Well, you have a 70 percent chance of

getting off the hook and you have a 30 percent chance that all your executives will go to jail and you will have $10 billion in fines," that is a state of affairs that can lead to the phenomenon that we observe, which is essentially a tremendous amount of pleading and settlement of class-action lawsuits.

We have to remember that the vast majority of this activity is resolved through some form of consent remedy. Therefore, it's not possible to say that we see a settlement, we see a plea agreement, we see a payment of treble damages in settlement of a class-action suit and say, "Aha, that was cartel activity," because, in fact, you would observe the same behavior if it was simply something that had happened that could easily be confused by a jury with cartel behavior. That's all you need to get a conservative public corporation, well-advised, to say, "We had better pay some money. We had better pony up."

So I think, even in the cartel area, the question of over-deterrence/under-deterrence is still somewhat unsettled.

Mr. Wallis

Eleanor, how do you see the problem of over-deterrence/under-deterrence in the area of cartels? What would you propose to fix it?

Professor Eleanor M. Fox

First of all, I side with Ken. I think it's very clear that there is under-deterrence, especially of world cartels, and more and more cartels are world cartels.

I want to take up a line of yours, Rich, earlier, when you said everything is interrelated. We are in a world that is interrelated. I think the commission's work ought to be seen in the international context. And here, a little plug for the ICPAC report, which put the antitrust issues in world context, and addressed the world cartel problem. Indeed, the ICPAC report proposed what is the ICN. I think the ICN has been helpful with respect to the world cartel problem, but doesn't go half the way, of course. It has been helpful in bringing the consciousness of so many of the agencies of the world to the problem of under-deterrence of cartels and how to work together to deter them.

Many of the things Ken said I would just take on full force. The fact is, Tad is being overly sanguine in thinking that basically our problem is solved. We are seeing South Korea halve remedies. In Asia and South America and Africa, there is very, very little cartel enforcement and there is no world cartel enforcement. When countries have to devote scarce resources, they will do it for local matters, not international matters.

There is a really good article, and a lot of studies, by John Connor, and some with John Connor and Bob Lande, noting how, in many of the countries outside of the U.S., Canada, and Western Europe, the cartels go unpunished. Part of this is culture. Part of it is not even the remedies, but it is getting the people in the countries to understand that cartels are wrong. In Brazil, for example, it has been reported that the culture induces people to believe that collaboration is good and that ratting on cartels is bad. The leniency program is hardly used, because people think it's wrong to come forward to inform on a cartel.

On the question of what to do about it, we have to do more international thinking to understand how everything fits together and we need behavioral studies to understand why so many people think cartels are fine.

On the question that Tad is raising of this thin line between criminal cartel behavior and perfectly good, say, joint-venture behavior, I don't think there is a thin line at all. If you have engaged in perfectly innocent, productive behavior, you are not going to be charged with a crime.

Brandeis once said that clients always say, "How can I be sure not to fall over the cliff?" He said, "I just tell them, don't walk near the edge." For some non-criminal behavior, that's no longer a good retort. But in terms of the line between criminal cartel activity and an innocent joint venture, I think that's a fine retort, because you know where the edge is, and there is not going to be a criminal violation unless you have done something you know is wrong.

Mr. Wallis

This is all interesting. As we talk about the over-deterrence and under-deterrence issue, Dick, that the dividing line may be whether you are on the per se criminal side of the fence or the rule-of-reason side. To Eleanor's comment, I think that she is probably right that non-U.S. cartel enforcement may not be as robust as their other antitrust enforcement, which is fairly robust.

Now let's move over to rule-of-reason cases. Is the presence of treble damages and attorneys' fees and the other remedies under U.S. antitrust laws a drag on innovation, a drag on competition, in gray areas in rule-of-reason cases, where the line between legal and illegal conduct, is not as clear as walking off a cliff; it's about telling where the fog ends and the sun begins?

So, Dick, what is your feeling on the state of deterrence in the civil rule-of-reason areas?

Richard M. Steuer

I don't think having more dollars at stake would make any difference. In fact in looking at the economics of this, it's not clear whether companies are facing treble damages or even six-times damages in indirect-purchaser states, plus all of the other things that go into the mix, with attorneys' fees and the other costs of litigation. I think that we are just in a new era on the criminal side, where the heightened sentences that are available are really new and what their effect is going to be under the guidelines is really new. It remains to be seen how much of an effect that will have.

But where there is criminal exposure, the exposure to jail time is a much stronger deterrent than adding more dollars into the mix. The exposure is unacceptable. That is why so few cases actually go to trial. Whether you make it treble damages or six-times or twelve-times damages, it's not going to, at some point, change the equation.

Another thing that we need to look at in terms of whether it's chilling innovation is what the effect is on companies altogether. When we have so many different remedies, one of the things we have to start thinking seriously about is, where you have a company that may have transgressed to some degree, through some of the people in the company, if the remedy is going to be so severe that the company ceases to remain in business, then you have one fewer

competitor in the mix. You can think of some examples recently, not necessarily in antitrust, where we have lost major competitors because of some of the things that some people in a company have done that have had tremendous ramifications to that company's customers and to the state of competition in the industry as a whole.

Sometimes it's relatively easy, in making these decisions, to have a great number of penalties assessed against companies that come from other countries. And it works both ways. But if we are going to be taking steps that actually endanger the ability of companies to continue to exist and to compete, that's something that we have to think about as well.

Mr. Wallis

That's a nice segue way into a specific discussion of treble damages.

Tad, there have been a number of specific proposals presented to and by the commission. Let's start at the high level. What are your views about limiting the treble-damage remedy to per se cases?

Mr. Lipsky

I testified before the commission in favor of an approach that actually originated way back in the Baxter days, which is to focus on the area of horizontal restraints as an area which is most promising for reform, and particularly horizontal restraints that can be placed outside the per se illegal category. So we are not at all talking about cartels here.

We have gotten a lot better in a lot of substantive areas of antitrust law. Whereas, before, the Chicago School and the economic rationality movements had sort of worked their way through all of the doctrines in the courts, I think it would have been possible to identify a wide variety of rule-of-reason conduct that is over-deterred by treble damages and where de-trebling could easily have been justified — the vertical restraints, intellectual property licensing, that sort of thing.

My observation is that the most serious problem is with respect to joint venture conduct where there is a strong plausible argument that the joint venture is efficiency-enhancing. If the joint venture is illegal, it's not because it's actual cartel conduct; it's because the structure of the joint venture or its activities foot-faulted beyond the pale. To bring treble damages and all of the other apparatus that we use to subsidize and encourage antitrust litigation — the private attorneys general, the *parens patriae*, what have you — is inappropriate in that area.

Fortunately, we are also getting better at distinguishing and refining the test for what constitutes a proper joint venture. We had the resolution of the Dagher issue recently. But I think even more importantly than that, after a lot of very stormy back-and-forth on the standards applicable to horizontal restraints, dating from BMI/ASCAP and going through the whole controversy about whether *Mass. Board* would be the standard or whether there would be something more strictly resembling per se/rule of reason, which was exemplified by the FTC's approach in *Cal. Dental*, which was rejected by the Supreme Court, but without the proposition of a good alternative.

Now you have what I think is this wonderful decision by the D.C. Circuit in the *Three Tenors* case, which really enshrines *Mass. Board*. Say what you will about the viability of *Mass.*

Board or how much you like it or hate it; it's a huge improvement in terms of objectifying this line between per se and other horizontal restraints. Horizontal restraints with plausible efficiency justifications — that's now the key issue. So, in effect, the legal test for having a joint venture earn the right to defend itself rather than having to concede liability in the per se arena — we really should use that as the line for de-trebling, because that is precisely the line where the policy reasons for the subsidization of antitrust litigation — that's where that should end.

Mr. Wallis

Ken, recognizing that line drawing between per se and rule of reason can be a difficult exercise, how would you feel about a statutory proposal that says cartel behavior, all per se behavior, all criminal behavior is subject to mandatory trebling; for rule-of-reason violations, there will be no trebling? Would that approach be an improvement over today's approach?

Mr. Adams

To quote Commissioner Shenefield, I think when we get into this area, we are all seriously in danger of becoming unmoored from reality. Let's bear in mind that almost nobody ever pays treble damages in the current system, per se or otherwise. I haven't looked at the data in the last few years, but I doubt it has gone anywhere but up. The last time I looked at it, 95-plus percent of all civil cases pending in federal courts in the United States did not go to trial; they were resolved short of trial. I suspect it's higher than that in antitrust cases. So to make policy based on a tiny fraction of cases that get tried to verdict, where statutory penalties or enhancements of damages are imposed — I am not sure that is the way policy should be made.

The reality is that treble damages play a role in the leverage that influences outcomes and settlements. Historically, I think it's fair to say that even in hardcore per se cases, treble damages frame the discussion. But traditionally cases were settled for what were thought to be single damages. The *Vitamins* case is probably a high-water mark in terms of higher-than-single damages being an ultimate settlement point. You will see very few cases, I think, in the future that go as high, because of the unique circumstances of that litigation.

I'm not sure that this is a fight worth fighting about. I'm not sure that the difference in outcomes would be that great in the non-per se area if you didn't have treble damages. I think it would probably be lowered because you would have less leverage. But I'm not sure that it's a fight worth fighting.

Tell me what I have to trade off for that, and I might be happy to trade it away. But in some abstract sense, I don't feel strongly about it one way or the other.

Mr. Wallis

Ken has just made the point that all of us feel, which is the interrelatedness of all of these subjects.

Eleanor, do you believe a system of discretionary treble damages in rule-of-reason cases is the right approach?

Professor Fox

Let me start by asking: Why do we have treble damages? Are they really penal?

I think it's rather unfortunate that our treble-damage remedy has come to be called penal. It was not meant to be penal. It was meant to incentivize lawsuits. That's why there is no difference between the worst offenses and the "least worst" offenses. It's the idea that the lawsuit simply won't be brought unless there is some incentive beyond compensatory damages.

So one could go back to the old definition and concept and recognize that treble damages are incentivizing and they are not punishing, and then ask whether we need reform. Should we have treble damages? If we don't have treble damages, I think we certainly need compensatory damages, and to have compensatory damages, we definitely need prejudgment interest. If we start from the base that victims should be compensated, then I would think it's fine to have compensatory damages plus prejudgment interest for everybody, and for deterrence aspects, higher government fines. We really don't want the victims to get a windfall; we want the victims to get compensated.

So, in theory, I don't have a problem with saying no treble damages, if something else makes up for the slack. If the norm were compensatory damages, for hardcore conduct, it should be at least treble damages — and maybe, sometimes, more — and for conduct that has good business justification, it should be compensatory only.

Mr. Adams

Rich, if I may add just one point there. I'm glad that Eleanor reminded us all that the point of treble damages is to incentivize private attorneys general. But even on the deterrence side of the equation, an argument can be made that deterrence is especially important when you have an area where the rules are unclear and where you are dependent on self-regulation, if you will, on the part of the decision makers. I think it would be preferable if there was a way that people who were trying to find the line between the fog and the sun could go to somebody — presumably, the Justice Department — and get a clear response: Yes, you can do this; no, you can't do that.

In the absence of that, where they have to make the decision themselves, it may be even more important to have a high deterrent of treble damage risk, so that they don't walk too close to the edge. If you don't have any other mechanism for determining where the edge is, we want to keep them away from the edge.

Mr. Steuer

In a way, I think it begs the question to say that most of these cases settle for single damages. The negotiation of settlements is really driven by what the exposure is and what the strength of the case is. I think that if you are in an instance where there is a real likelihood of having six-times damages in an indirect-purchaser situation, the negotiation takes on a different character. If we made it twelve-times, it would take on still a different character. If it were one-time, then maybe the negotiation would wind up with a third of single damages.

But I think the attorneys' fees and incentivizing largely can be taken care of by simply the fact that plaintiffs' counsel do recover attorneys' fees, and there are situations where they recover them even where there are small or no actual damages.

Mr. Wallis

Another way in which these issues all collide can be seen in the comprehensive proposal by Commissioner Warden on how to deal with criminal cases and the battle between directs and indirects. Commissioner Warden, at the May Commission heargings, put forward a proposal for follow-on cases where the government has instituted a criminal proceeding and has either obtained a guilty plea or verdict. Under his proposal, all the unlawful gains, including prejudgment interest, would be disgorged in this proceeding and divided among the direct and the indirect purchasers. Any fines and penalties that the government imposes would go to the U.S. Treasury. Thus, at the end of that criminal proceeding, there is no follow-on civil litigation because all of the damages are paid into court and divided among the directs and the indirects.

I am curious for panel reactions to that proposal. Tad, do you have a view?

Mr. Lipsky

Yes. I think it's a bold, very imaginative proposal, and it has a lot of features that I think effectively deal with some of the objections to the current system.

I have one area where I still have a little trouble picturing exactly how the proceeding would work. It might end up looking very much like the kind of civil treble-damage litigation that we have now. If you need all the apparatus to gather evidence and get the economists to figure out who bore what part of the harm, and so on and so forth, it could end up being somewhat like the current system, but a lot more efficient, because it's occurring within a single forum and all the reparations or damages, or whatever you call them, are being paid as a part of one integrated proceeding.

Certainly there are a lot of very obvious efficiencies that might be associated with that. It has elements of removal and consolidation, and those are all good things.

But I have a little trouble picturing what the procedural aspects would look like. But I think that's more a question of how it actually works.

I have a bit of a reservation about the institutional capacity of what usually happens in a criminal courtroom. I don't think that a criminal court is usually equipped with all of those skills that you need to do this damage calculation and assessment and assortment. Certainly the criminal skills brought to bear by the Department of Justice really tend not to involve those questions at all. As a matter of fact, I have commented before about how really remarkable it is that, despite the treble-damages provision that was made available to the government some years back — although originally the Clayton Act only provided for single damages for the government — now that they have had the opportunity to pursue treble damages, they have almost never done so. I have a fear that the government has very, very little institutional incentive or capacity to make use of the kind of provision that the Warden proposal describes.

But I think, broadly speaking, that's a detail.

The other main point I would make — and this, I think, is probably where I would put the emphasis — even if you would regard *Illinois Brick* and *Hanover Shoe* as a thing of the past, you are going to look at the entire chain. I would use *Associated General Contractors* to limit standing, on all the traditional *AGC* grounds — on the grounds that to calculate the recovery was going to be too speculative, that there is a class of litigants present that is capable of deterring the conduct. Of course, in the cartel context, that class should be very obvious, if it's not the government itself.

But a lot of the discussion about indirect purchaser and removal and consolidation and the life of this type of proposal comes from this desire or temptation, or whatever you call it, to reach farther down the chain of commerce than *Illinois Brick* and *Hanover Shoe* permit you to do and to try to compensate. I don't think we should try that where the grounds for doing so are excessively speculative. Just because you want to compensate farther down the chain — and maybe repealing *Illinois Brick* would allow you to do that, in the context of this type of reparations proposal — you will reach a point at which it is simply not worth it in terms of the deterrence impact. When you have a good category of claimants, when you have the direct purchasers, or you have a category of reparations or damages that is easily calculable that you think probably accounts for a good fraction or even all of the damages, you have to cut off the search for additional people to compensate. Otherwise, the only people that it's going to help are those who make their livings litigating and providing expert testimony.

Mr. Wallis

Ken, I am going to ask you to focus specifically on Commissioner Warden's proposal and talk about how putting everybody in the room at once, following the determination of the total damages for an allocation of the damages would work. **Mr. Adams**

I like the first half of this proposal. It strikes me as a nice fantasy. But again, if we get moored to reality, I'm afraid it's just not something that anybody in the picture is going to make work. If you could take the first part — disgorgement of unlawful gains (worldwide, I assume, not just in the United States) — and take the defendant out of the picture, I think that would be salutary. Much of what I think are the inefficiencies and burdens and costs that consume the parties and the courts in antitrust litigation are generated by defendants who are hoping that these strategies and tactics will reduce the price they end up paying. If you start out by saying, "Hand it over and go away," and leave it, then, to the adversely affected parties — civil plaintiffs of all stripes — to work out how it's going to be allocated, I think a lot of these problems would get resolved consensually. Presumably, the defendants wouldn't feel the need to fight about how far down the *AGC* chain and so forth. It makes no difference. The defendant has turned over the ill-gotten gains and left the room.

That would be an interesting new dynamic, and I would not be averse to experimenting with it.

But that is not what is going to happen. I very much share Tad's skepticism about the Justice Department's ability — at least from past experience — to participate in a meaningful determination of how much the ill-gotten gain is. I fear that the process of determining that would end up looking exactly like the civil process that we have now, except, instead of real parties and interests arguing about that with the defendants, you would have the Justice Department, who really doesn't care and has no particular expertise in figuring it out. They are used to negotiating those issues out, as part of a plea negotiation. Every case I am in that follows

on a guilty plea, *Vitamins* being the latest example, the damages that end up getting litigated and proven in the civil case are far more extensive in terms of the products affected and the years affected than what was the basis of the negotiated plea. That's part of a plea negotiation. You negotiate that stuff down.

So I would not want to leave it to the Justice Department to make the determination with the defendant, after the plea has been reached and they have achieved their main objective, as to what should be disgorged.

But if you could solve that problem, I like the idea of taking the money from the defendant and sending them out of the room while the plaintiffs of all stripes work out the allocation problems. I think it would get done rather quickly, rather efficiently. There would be a lot of fighting, because of attorney fee issues and so forth, but overall I think it would probably be an improvement.

Mr. Wallis

Eleanor, do you have a comment?

Professor Fox

This is one of the best proposals I have seen. I'm sure the details can be worked out. What really needs to be done is to get everybody in the same room and to have the pot of money. Defendant can go away. The pot gets distributed. Applying *Associated General Contractors*, remote, speculative harms would be recognized.

It is a part of the proposal that claimants may participate through counsel, so that could help solve the problem of the Justice Department not wanting to get involved. Private counsel can get involved.

It will save an enormous amount of waste. It will save a lot of lawyers' fees. It sounds efficient.

That's the first part only. We might come back to other parts.

Mr. Wallis

Let's move to the subject of prejudgment interest. By my count, reading the minutes, it looks like six commissioners favor keeping the current system and a number are interested in extending the recovery of prejudgment interest to all antitrust cases.

Tad, what are your views of the proposal to extend prejudgment interest to all antitrust cases?

Mr. Lipsky

I have some sympathy with the proposal because, conceptually, the economic argument in favor of prejudgment interest is so neat. If you think of a violation which creates a certain amount of harm at a certain point in time, then, of course, to make compensation for that harm whole, you have to provide prejudgment interest, at least if you are going to de-treble.

The problem with that is — and I confess, I haven't really been able to think this through to my own satisfaction — the delays and the costs of litigating to find out whether a violation has actually occurred are an inherent feature of our legal system. I suppose, in some broad sense, you might call it a transaction cost. You always have to be a little bit careful when you are talking about throwing around the allocation of transaction cost, to make sure you are in a kind of institutional setting where you have to decide, first of all, whether it makes any difference, and if it does make some difference, you had better determine how.

What bothers me about the idea of prejudgment interest is the notion that just because the process of litigation imposes delay does not necessarily mean the cost of that delay should automatically be imposed on the defendant. You can only believe that economically if you think that all defendants are guilty.

So I have some doubts about it, and I have some doubts about some other features of the treble-damage system, like the allocation of attorneys' fees, which, I imagine, we might get around to discussing, that have something of the same property. Yes, it's fine in concept, if the liability of every participant were clear and if the system also imposed a degree of delay or a degree of cost, put that on the guilty party, on the theory that he has perfect certainty about exactly how and when to avoid the conduct that creates the violation. But throw in ambiguity about what is legal and illegal, ambiguity about whether evidence is truly showing a violation or something else, and all of a sudden the whole thing looks a little different. In the specific context of prejudgment interest, it is the legal system itself that imposes the delay. There is a certain amount of delay between the injury and the compensation that is due to the operation of the legal system and cannot be attributed to the defendant or the defendant's conduct.

I think that in other fields of law — my understanding is, in the field of tort, there is tremendous disagreement. Some states have prejudgment interest provisions; other states don't. There is a tremendous variety of provisions. So it's a richly mixed picture of an idea that has a sound economic basis, but there are some big empirical questions about whether it would be optimal to actually adopt it.

Mr. Wallis

Ken, I'm going to pose the question to you in a slightly different way and ask you to tie some of the elements together. Let's imagine a non-cartel case. Treble damages still remain. Prejudgment interest is available. The question is, if that's where the system leads, if that's where this effort leads, how would you assess attorneys' fees in a case like that, where you have a non-cartel case, treble damages, prejudgment interest? What would be your proposal for how attorneys' fees should be treated? Treat them the way they currently are? Make them discretionary? Go to the English rule?

Mr. Adams

The English rule I would never go to. Even England isn't going to the English rule. They are moving away from that.

When you disaggregate and talk about each of these things individually, you lose the heart of the matter. It comes back to where Eleanor started. All of these things together are what make the U.S. system as effective as it is, and it's the reason that Europe is moving toward our sort of

system. The reason it's as effective as it is because the government can't do it all, they don't do it all, and the intention is to incentivize private actions.

So how much incentive is needed in a specific non-cartel case? I don't think anybody knows the answer to that. But all of those things provide incentive. If you tip the balance too far in the other direction, then you dis-incentivize and you will not get as effective an enforcement regime as we now have.

I am not sure it's possible to be more precise than that. In the example you posited, if you keep everything else, would it make a difference to let go of one piece of the incentive? Who knows the answer to that? I'm not going to argue that you have to keep all of it in every case. But you can't make a case decision about that.

There are some proposals that I have seen at the AMC to give discretion to judges to make these decisions, as we have now on prejudgment interest. You could make attorney fees discretionary. Discretion is sometimes a good thing. But again, if we look at the way the system really operates, remember that prejudgment interest only gets awarded when there is a judgment. That is a very small proportion of the cases we are talking about. Once again, we are talking about something that is part of the mix in incentivizing or dis-incentivizing a contingent-fee lawyer to bring the case in the first place and then in the relative leverage that both sides have in the settlement negotiation.

The problem that I have with making too many of these things discretionary with the judge is that I think it puts the judges in a position that they shouldn't be in, don't want to be in, and ultimately it doesn't get you where you want to go. There are enough alternative forums in which to file these kinds of cases that I fear all you end up with is another level of forum shopping in which one of the things that lawyers take into account, on both sides, when they try to get the case in the forum they prefer, is, what is this judge's track record for exercising discretion on attorneys' fees and prejudgment interest? I am not sure that discretion is going to get you where you want to go, which is a more flexible system.

Mr. Wallis

Dick, in looking at the balance of incentives, a balance of deterrents, would your answer on attorneys' fees be different in a class case as opposed to, let's say, a battle of corporate titans in a competitor case? Is there a need for an attorney-fee incentive in those types of cases?

Mr. Steuer

On the class issue, the real competition that we are talking about is the competition between antitrust class actions, securities class actions, consumer class actions. Where do class-action attorneys put their resources? They also have to balance that against, as Ken said, which forum you can be in and how hard the case is. Is it a case that is a trail-along case, where there has already been a guilty plea, or at the opposite end of the spectrum, which is the case that is not per se at all, that is not a cartel, that you have to prove from the ground up?

Regarding incentives, there is some floor beneath which counsel are not going to take cases at all. But once we pass that threshold — and we can debate where that threshold might be — then

we are talking about windfalls and where those windfalls should go and into whose pockets, which is why I actually think that Commissioner Warden's idea is really a great idea.

I disagree a little bit with Ken, in that I think that defendants have to play a role in these things, in figuring out who gets into the room. At the end of that process, defendants to have all of the claims discharged against all possible claimants, and if potential claimants are not all in the case, then there is a possibility that there could still be another case after all the shouting is over.

But I think that the type of case, as you say, does make a real difference in terms of which counsel are going to take it and on what basis. I think in most battles between corporate titans, each corporation is perfectly able to find counsel who are able to take the case on a basis that is acceptable to each corporation. Sometimes there are different incentives built into it, but that's really a private negotiation.

Mr. Wallis

Eleanor, I would like to ask for your views on the right balance in a non-cartel civil case. Attorneys' fees, treble damage, prejudgment interest — what is the right balance? Leave as is, or would you do any tinkering?

Professor Fox

First of all, there is no absolutely right balance. I think there should be prejudgment interest. I think, though, as soon as you require prejudgment interest, that certainly affects whether you should have treble damages for ambiguous conduct. The question to me is how much you need to incentivize the actions that ought to be brought. That, of course, is a mouthful in itself. What are the actions that ought to be brought? I also want to be cognizant of not deterring productive conduct that might cross a cloudy line. Yet I want enough incentives.

We don't know the precisely correct balance. We work towards a balance. As Steve Calkins has said, there are calibrating tendencies. The law might get a little more conservative as remedies get more robust and vice versa.

Mr. Wallis

That's an excellent point.

Moving on to the next topic, joint and several liability, there seems to be a developing, albeit not unanimous, consensus among the commissioners that a system of joint and several liability should be retained, but that the antitrust laws should be amended to allow for claims of contribution.

Does anyone believe that contribution should not be allowed? Ken?

Mr. Adams

I think any proposal to add contribution to the mix has to take into account the real-world consequences of that. Now we are talking about the 98 percent of cases that don't get tried.

How do they get resolved? At what stage do they get resolved? This would have a significant effect, in my view, on that process.

In the typical case that I'm involved in, representing direct action plaintiffs in per se cases, the evidence usually lies entirely in the defendant's hands. These are covert activities. The first-out settlement, typically, is at a bargain price in return for cooperation. That, then, accelerates the process, because the other defendants come to realize that the truth will out.

Why would a defendant agree to an early-out deal at a great price if it doesn't buy them peace, if they are just looking over their shoulder at a contribution action down the road from their coconspirators? I think it's a terrible idea. It dis-incentivizes cooperation by any member of the cabal. No plaintiff can deliver peace. And that's what drives settlements.

So I think we should be very careful about doing that and realize that it's going to have a dramatic effect, I think. I think the courts will be very unhappy with the consequence of that. Cases will go on much longer before being resolved.

Mr. Wallis

Dick, let's turn to claim reduction. There seems to be an even stronger consensus developing for allowing claim reduction, such that the liability of non-settling defendants would be reduced before trebling by the amounts of any settlement. Does that sound like a sensible and workable proposal to you?

Mr. Steuer

It does to me. I don't think that my view on this is terribly complicated. It's really a matter of fairness. A lot of these cases are far more ambiguous than they sound like in simple descriptions. When you get into the details, the dynamics of what goes into how the arrangement came to be and what the incentives are for settling aren't nearly as cut-and-dried as they seem. I support the claim reduction proposal.

Mr. Wallis

Eleanor?

Professor Fox

I support claim reduction before trebling. It's fair. When there is no claim reduction before trebling, the defendant that settles first is able to give away something that the defendant really doesn't have.

Mr. Wallis

Illinois Brick has been around now for decades. This is a subject of intense study by the commission. One might ask the question, what has changed? Why should Congress get into the act now to make changes in this area?

Dick, what's your view?

Mr. Steuer

Really, two things have changed, and that's why this seems to be a moment at which this is an issue that is ripe for some type of movement, if there ever is going to be movement.

First, the landscape has changed radically. We now have more than half the states with *Illinois Brick* repealers. So even if one feels that *Illinois Brick* was the right rule, it's not the rule in more than half the states. If you add up the population in those states, it's well more than half the country that has now the possibility that, under this bizarre regime, with *Illinois Brick* existing alongside the repealers, direct purchasers can recover and keep treble damages and indirect purchasers can recover and keep another treble damages, so you really can have six-times damages in much of the country. That's just the reality. Whether, philosophically, one thinks that that is a bad idea, that's the world we live in.

The other thing that has changed is that part of the premise behind *Illinois Brick* and *Hanover Shoe* was that the world of economics simply isn't up to the task of figuring out the apportioning. I think we have changed a great deal in the intervening years, and the level of economic analysis is far more sophisticated.

Whenever I teach in this area, I always make the point that in every antitrust case there is an economist on each side, so at least half of them have to be wrong, and maybe more than that.

But putting that aside, we still know a lot more than we knew then. In terms of a task like apportioning, I think that there is a fair point to be made that the world has changed and that we are far more up to the task of doing that kind of work than the Supreme Court thought we were then.

Mr. Wallis

There has been considerable discussion outside of the Antitrust Modernization Commission about whether the commission should issue a report directing its attentions to what the law should be, or whether the Commissioners should spend their time developing a specific set of proposals that have some realistic chance in Congress.

In a perfect world, Eleanor, unconstrained by precedent, what is the right approach in the indirect-purchaser area? Leave aside the Warden proposal for criminal cases and let's focus on civil cases that are not follow on cases. What is the right approach in *Illinois Brick*?

Professor Fox

First of all, I think the right approach is the ABA Antitrust task force proposal for consolidation. This is akin to the Warden proposal, in many ways. I think *Illinois Brick* is wrong because indirect but still sufficiently-directly-harmed victims ought to be able to recover their losses. It seems contrary to our law that they should not be able to recover their real losses.

The whole solution is getting everybody together; working out ways to do that.

As to whether the commission should be making proposals even if they don't have a good chance, I think that should not be the first question that the commission asks. It's very valuable

for the commission to recommend what they think is right. It may be that, on a second cut, they will restrain themselves because something is so unlikely to succeed. The first line is, do what's right.

Mr. Adams

Rich, there is one element of this that I want to make sure doesn't go unaddressed. Let's get past the code words of "repeal *Hanover Shoe*" to what, really, the proceeding would look like. I think it's hard not to be in favor of some sort of concursus, where all the claims are in one place and can be dealt with in a sensible way. But the notion that in that proceeding, however everybody gets there — whether it's by preemption or consolidation or removal — the defendants should be entitled, as a matter of defense, to litigate pass-through I think is a terrible idea, and the judges will have us all in court for that. If you bring everybody into one proceeding, the defendants should have no participation in the sorting out of how the money gets allocated. The only role that the defendants should have in that proceeding is to defend against — are they liable, and if liable, how much are the damages? It should be then left to the collection of plaintiffs to sort out how the damages get distributed.

The opportunities for — I won't call it "discovery abuse," because if it's a defense, then they are entitled to take discovery on it. The discovery and the economic expert proceedings around pass-through are endlessly complicated, expensive, and time-consuming. It is a defendant's dream. There is no reason in the world why the defendant should have to be a player in that, in my view. Of course, they are entitled to a complete release against all claims, but you don't need to have the defendants litigating pass-through in order to get there.

Mr. Wallis

I may be a naïve, but if you give me a world, Ken, where it is all settled in one proceeding and all the cases are over the allocation is resolved, defendants may not want to muck around with who gets what. Defendants may be satisfied to defend the liability portion and the amount of any alleged overcharge, and leave the courtroom, successful or otherwise, at the end of that round.

Tad or Dick, do you disagree?

Mr. Adams

Problem solved. All we need is for Congress to agree with us.

Mr. Steuer

That's precisely why, given the fact that there is potential exposure to more than treble damages, defendants can get behind a proposal like this, whereas, initially, they thought *Illinois Brick* was just dandy, and there wasn't a lot of support for this.

What we were trying to do with the ABA task force was come up with something that would get broad support. Our hope was to have something that would get support from all constituencies, if possible, and also be politically feasible. We had more constraints, in a way, than the Modernization Commission, because we did take it upon ourselves as our task to come up with

something that — given our narrower mandate, being just the American Bar Association — could get the support of others and be politically practical.

I certainly think the Commission has a broader range that is available to them and can look at this every way that they think is practicable, whether that includes things that they don't think are politically feasible or alternatives, if they want to take that into consideration. All of that is very appropriate.

Mr. Wallis

Eleanor?

Professor Fox

I want to add one more thing. In Europe, they are debating exactly this question, but from a blank slate, as to what would be a good rule for the member states to adopt. I want to read one option in their current options paper, and also to suggest that it would be cosmopolitan for our commission to recognize the debate unfolding in Europe. There are a lot of submissions on exactly this and closely related points.

This is the option: "A two-step procedure in which the passing-on defense is excluded, the infringer can be sued by any victim, and, in a second step, the overcharge distributed among all parties who have suffered a loss."

Mr. Wallis

But what exactly that means —

Professor Fox

I know. I wasn't getting into the details. I know that's hard.

Mr. Wallis

Tad, is preemption politically possible at this point? I let Eleanor live in the world of the unconstrained. Now, since you are an inside-the-beltway kind of guy, I am going to ask you, what is politically possible?

Mr. Lipsky

I don't think it's possible, but that doesn't mean it shouldn't be discussed. One of the comments I was going to make in response to the point about whether the commission should be talking about impossible solutions — that is something that requires a lot of judgment. There are some very fundamental ideas that a commission like this, if it stumbles across them, should put out to be absorbed in the broader culture. If you think of a lot of really good things that have happened in the antitrust field and others, they started as absurd proposals, just ridiculously impractical ideas. Take an idea like airline deregulation, which was a total joke when it was first raised. Ultimately, people were persuaded of its wisdom. I think they are still mostly persuaded.

But it's a real question for good judgment, and it can go either way.

One of the interesting things about the equilibrating tendencies in antitrust is, the Reagan administration took a pretty good cut at state enforcement, and then it kind of battled back and a better accommodation was worked out. So it is what it is.

I think exactly the same thing has happened with regard to *Illinois Brick*. It's amazing how — I suppose the Supreme Court that decided *Illinois Brick* thought, well, that's that. But now, as Dick pointed out, there are more than half the states with *Illinois Brick* repealers. Moreover, a phenomenon that probably has not been quite as much appreciated out in the policy community, although I thought it was pointed out to the commission very effectively in testimony by Peggy Zwisler, who, I should mention, is my partner — it was a great piece of testimony, saying that back in the old days, when we got out of law school, a follow-on suit meant that when there was a conviction or a plea, then somebody would file a complaint. But now, even in the criminal area, an article in the paper saying there was a dawn raid in Europe will all of a sudden spawn fifty class-action complaints the next day in federal court in the United States.

Similarly, the idea of a follow-on suit has spread to all of these types of civil litigation. You have follow-ons to *Intel*; you have follow-ons to *Dentsply*; you have follow-ons to just about any complaint that shows any prospect of success. All of a sudden there are all these litigants who crawl out of the woodwork. I think the effect on the litigation scheme that has resulted is one of the reasons why we have a commission that can be so useful.

It's a mistake to get hung up on the concept and the issue of preemption, to say, "Let's pass a law that says that states are out of this business." I think that reality has shown and experience has shown that that's kind of a meat-axe approach to it. It's going to ruffle a lot of feathers and probably wouldn't be successful in the long run, even if it were in the short run.

But I think if you focus on a lot of the proposals — the Warden proposal, the proposals for additional removal, consolidation, what have you — they have elements. They can accomplish parts of what preemption is all about. But you are never going to squeeze the states out of regulating business conduct. If it's not direct purchaser, it will be indirect purchaser. If it's not antitrust, it will be unfair competition. If it's not unfair competition, it will be unjust enrichment. If it's not unjust enrichment, it will be burning trash on a public highway. They will always find a way to get in the game.

Mr. Adams

Let's remember, that's where *Illinois Brick* came from. It happened when it did because of the Hart-Scott-Rodino change, statutory change, which gave state attorneys general, for the first time, clear standing to bring *parens patriae* cases, not only on behalf of the interests of the state, but on behalf of all consumers within their state. Apparently, that prospect was scary enough, the idea that the states were actually going to be a significant player in this area, that *Illinois Brick* tried to take that way. It came back through another door, as Tad suggested.

I think that's a good reminder that sometimes the solution just becomes the next problem.

Mr. Steuer

I think it's worth mentioning what preemption means here and what it doesn't. It may not be as big an issue as one might think. When the original illustration was drafted by the ABA, CAFA

hadn't even passed yet. CAFA has now passed. So there is a great deal of diversity jurisdiction that is being exercised.

The way this illustration works is, any state law that is comparable to a federal antitrust law would be subject to this and would be consolidated for discovery purposes. What wouldn't happen, if there is no preemption, is that states still could have *Illinois Brick* repealers that call for duplicative damages. But there are no such state laws right now. To the contrary, most of the state laws that exist specifically say the court should avoid duplicative damages.

So the practical difference of preempting the state laws or not may be as little as nothing.

Mr. Wallis

I would like to get us somewhat back to where we started and touch briefly on how competition laws and policies outside the U.S. bear on the issue of what we should do in the United States in terms of civil remedies.

I will ask Eleanor and Tad to talk about the *Empagran* decision. How does *Empagran* affect the efforts to deter worldwide cartels? To what extent should remedies that exist outside the U.S. be factored or not be factored into our calculation on U.S. civil remedies?

Eleanor, why don't you go first?

Professor Fox

In *Empagram*, the Supreme Court held that, where the foreign harm is unlinked to the U.S. harm, there is no jurisdiction. It read the statute to require that the U.S. effect must cause the foreign harm. On remand, the circuit court found the markets linked. On standing, the circuit court held: If you are a purchaser in a foreign market, even if the harm is linked to the U.S. market, you still cannot recover unless you have been *proximately* injured by the *effect* in the United States. That almost never happens. If you are injured in the foreign market, you are injured proximately by the *conduct*, not the U.S. *effect*. The correct rule should be whether the conduct is integrally linked with the United States, not whether the U.S. effect gives rise to the plaintiff's harm.

So, the Supreme Court narrowed the scope of U.S. law. The circuit court opinion, which has been followed, narrows it further. Unfortunately, there are many cases of international cartels where sales in the United States are only a fraction of the affected sales, and U.S. damages are now, almost entirely, based only on harm in the United States. U.S. damages and fines are robust but most other nations' are not. If you put that all together, there will always be a big cartel business – crime pays.

So how do you get optimal deterrence, in view of *Empagran*? Actually, you don't. We have to work with the rest of the world to try to make sure that crime doesn't pay. And also, we have to try to understand what it is that causes people to engage in cartels even though they know it's illegal. Of course, one hypothesis is, they are not punished enough. But there is something much more, which is the competition culture.

Mr. Wallis

Tad, how should we factor non-U.S. remedies into our system?

Mr. Lipsky

I think we have to be careful here, because if we are focusing on the issue of deterrence, we are always asking the question, if you have a bona fide international cartel, given the disposition of damage recovery rules all over the world, what is the consequence of the fact that not all of the damages are going to be charged to the violators? I agree that, conceptually, that's a problem. I know Eleanor is a great internationalist and believes that is a serious problem. I think it leads her into temptation, to say, let's try to use this wonderful mechanism which is the U.S. treble-damage remedy to sweep in as much of the foreign damages as we can.

I am not as pessimistic as — or perhaps the way to put it is, the specific interpretation that Eleanor said of the D.C. Circuit decision in *Empagran*, which is, of course, accurate, I think is going to be challenged in some other cases. In fact, we might end up with a rule that actually does allow a broader class of damages imposed by an international cartel that affected a global market, including United States purchasers, but also including foreign purchasers. Remember the Breyer discussion of what the connection was. He used this word "independent." It was very Delphic, and there was a lot of debate, which is what made the briefing and the decision and the remand so interesting. But there is a lot of possibility, I think, for getting closer to a result that Eleanor would regard, I think, as optimal.

I don't have any serious problem with that. I think there are ways to sweep in a certain fraction of the foreign damages legitimately. But I think that when you are talking about strict foreign-to-foreign purchases and damages attributable to foreign conduct, you really do get into an area where — Eleanor, you mentioned earlier that there is a cultural problem in some countries with the mechanisms that we are led to employ for the deterrence of cartels. I don't think you can simply march around the world and say, "Do this because we know it's good for you, even though you're not quite yet persuaded of it." I think it has to be a much softer diplomatic respect.

We have tried in other areas of policy to impose an American solution without a broad international consensus. There was an old expression back when I was in college: Don't get involved in a land war in Asia. There are maxims that I think are of relevance here.

If we are patient, given the incentives of the private bar, this idea of private enforcement and severe punishment of cartels is a great fundamental idea that is out in the world economy now, in the post-Soviet world. Everybody supports markets, to a degree. This is a concept that will win on its own. It doesn't need to be imposed by U.S. litigators.

Mr. Wallis

I'm glad that we have reached a consensus on this issue. [Laughter]

Bob had asked that we save some time for questions or comments from the audience. We have two microphones here.

Participant

I have a question on treble damages. The panelists today seem to agree that the purpose of treble damages is not punitive; it relates to incentives. My question relates to whether there is a significant difference between whether the incentives are conceptualized as incentives to bring lawsuits or as incentives toward proper behavior on the part of defendants.

Commissioner Carlton, in the most recent round of hearings, indicated the latter. He said that, at least in his view, treble damages are designed to remedy the problem of under-detection. So you essentially have a defendant pay more to compensate for those cases where conduct such as cartel behavior might not be detected and punished.

My question is, is that distinction important? Is Dennis Carlton wrong? If not, what does that suggest for the application of treble damages in a case like *LePage's*, where the conduct was open and not concealed?

Mr. Wallis

Several good questions there. I'm not sure that there is a consensus among the panel that treble damages are not penal or punitive in some sense. A couple of the panel members said that. When I hear your articulation of Professor Carlton's approach to these things, "incentives towards proper behavior" sounds a lot like punitive to me. That's the way it sounds to me.

But I will let others answer this question. Tad?

Mr. Lipsky

I thought your response was very effective, Rich.

Dennis, being an economist, of course, is thinking in terms of optimal deterrence. I can see the graph that he draws in his brain when he says that you need multiple damages to deter covert conduct. I think there is some validity to that model. I think it has to be overlaid with some other realities, which are, for example, these spectacular criminal penalties, which, to anybody who is actually thinking about the consequences of his action and who believes there is any prospect that it will be detected — why would you do that? This is the abiding mystery of the continuing stream of cartel cases. It would all be very understandable if an empirical study showed that everybody who engages in price-fixing behavior or other cartel behavior is absolutely convinced that they will never be caught. Okay, fine. So you can't do anything with the remedies in that case.

But if people do believe there is some possibility of getting caught, why, with the American remedies as high as they are, and particularly the criminal remedies, do we observe this behavior? I don't believe that somebody who is aware of the criminal remedies is really going to care that much about the magnitude of the trebling or sextupling or whatever it is.

Mr. Wallis

Eleanor, I would like your thoughts on this. In particular, we have not focused on the covert versus overt equation that Professor Carlton has raised. If you have conduct that is completely

out in the open — there is no element of a smoke-filled room to it — is that a type of conduct that is worthy of a different remedy?

Professor Fox

OPEC. (That was a joke.)

Mr. Wallis

How about in the U.S.?

Professor Fox

It's hard to answer that. I agree with what Tad said. In a way, Dennis Carlton was saying, "Look, we're using multiple damages as a deterrent. So when it's heinous behavior, use high multiples that will get you to the optimal result."

Everything is bundled together, because people perceive multiple damages as punitive. For ambiguous behavior that has some good business reason, damages should not be punishing.

Mr. Wallis

Other questions?

Participant

I just wanted to get your views on Commissioner Warden's proposal for disgorgement and how you think it might affect the Leniency Program. Right now, under the criminal Leniency Program, an incentive to seek amnesty is that you are subject to only single damages. I am wondering, if all the defendants are subject to just disgorgement equally, do you think it would have an effect?

Mr. Wallis

Has anyone thought about the impact of Commissioner Warden's proposal on the Leniency Program?

Mr. Steuer

I haven't before, but I think that the incentive that is in place now would have to be replaced with some other incentive. But that certainly could be built into it.

Mr. Wallis

We are at our close time. I would like to thank the panel for a very thoughtful discussion.

Mr. Joseph

Thanks, everyone.

The Antitrust Modernization Commission at Mid-Course Symposium - Thursday, June 8, 2006

Robinson-Patman Act

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The Robinson-Patman Act, as you heard from Steve this morning, as far back as the 1955 Attorney-General's Report and up to the current day, continues to engender a significant amount of controversy, debate, criticism, and praise.

This panel is headed by Harvey Saferstein, who is a member of the Los Angeles office of Mintz Levin Cohn Ferris Glovsky and Popeo PC. Harvey has an extensive antitrust practice, which has involved distribution and Robinson-Patman issues. He has lectured widely on the Robinson-Patman Act and was actively involved in the Section of Antitrust Law's working group that prepared the Section's report to the Commission.

Barbara Bruckmann is a partner at the Howrey firm here in Washington. Barbara antitrust practice includes substantial counseling and litigation involving distribution and Robinson-Patman Act questions. Barbara served for a number of years as an officer in the Section of Antitrust Law, was chair of the Robinson-Patman Act Committee, and was also involved in the Section's recent working group.

Bruce Spiva is a partner in the firm of Tycko Zavareei & Spiva here in Washington. Bruce's practice involves antitrust litigation and counseling. His litigation experience has includes

representation of the American Booksellers Association in massive and significant Robinson-Patman Act litigation. Bruce, indeed, as well as Harvey, testified before the Commission.

Jack Kirkwood is a professor at the Seattle University School of Law in Seattle. Jack formerly had a stint at the Federal Trade Commission in Washington, D.C. Jack played a major role in drafting the comments of the American Antitrust Institute to the Commission. Those comments very thoughtfully looked at a number of the Robinson-Patman Act issues.

I am going to turn it over to Harvey, and let's get on with it.

Harvey I. Saferstein

Thank you, Bob. You have done a great job on this whole conference, as well as when we were going through the ABA's comments to the AMC regarding the Robinson-Patman Act.. Roxane Busey and Bob were instrumental in putting together the ABA's comments to the Antitrust Modernization Commission, along with Alicia Downey, who heads up the Robinson-Patman Committee of the ABA. Those are extraordinarily good comments.

I am sure this is the highlight of your two days, the Robinson-Patman Act. This is where the rubber hits the road. This is one of the only places where the AMC is taking a real position, voting 9 to 2 to repeal the Robinson-Patman Act — tentatively. This is all tentative.

It's a fascinating Act. It was passed in the 1930s. It's now seventy years old. As many of you know, when it was passed, it was passed in a very different world that we lived in, economically. Senator Huey Long, who was one of the sponsors of the Robinson-Patman Act, was quoted as saying he would rather have thieves and gangsters in Louisiana than chain stores. That was the atmosphere in which it was passed. I suppose he probably wouldn't say that today.

Professor Bork has said of the Robinson-Patman Act that every literature has its pornography, and in the antitrust literature, it's the Robinson-Patman Act. [Laughter]

Professor Stigler has said that if you put all the economists who favor the Robinson-Patman Act in a Volkswagen Beetle, you would still have room for a portly chauffeur.

So that's where we come from. This is this beloved act that many of us follow through thick and thin. As you can see, the AMC gave it due regard in its vote the other day. But as John Shenefield pointed out, it's only tentative, and you can't tell what's going to happen.

Today we are going to go through the AMC consideration of the Act. Let me briefly try to take you through what the Commission has done. Then we are going to have a lively discussion among three people who have different views on it. We would like to take your views on it as we go along. As we go along, any of you are welcome to speak up with your views. We have roving microphones in the audience. We will take your views and questions as we go through. You don't have to wait until the end. We will have time at the end, but you don't have to wait. We will see where we are mid-course on the Robinson-Patman Act.

On May 4, the Commission issued seventeen study questions for the Robinson-Patman Act, much like the one that Steve Calkins described earlier. It set out major questions, and then minor questions were set out. There are seventeen of them. One of the major questions was,

should the Act be repealed? That was number 1. The rest of them were "if nots" — should this happen, should that happen? Fifteen out of those sixteen remaining questions were all questions on how to rein in the Robinson-Patman Act — that is, whether the Act should have market-power screens, whether to broaden the cost-justification defense, or whether to broaden the meeting-competition defense.

There was only one question that went to whether to expand the Act — that is, whether to expand the Act to cover services. Otherwise, the Commission's questions focused on whether we should repeal the Act; if not, what we should do to make it more "modern", for lack of a better word.

On July 28, the Commission held its hearings on the Robinson-Patman Act across the street in the Federal Trade Commission building. The presenters were Jay Campbell, who represented the National Grocers Association; Professor Herbert Hovenkamp from the University of Iowa; Bruce Spiva, who is here today, representing the American Booksellers Association; and I testified, coming all the way from sunny Los Angeles to give my views.

What did the panelists say? Jay Campbell opposed any attempts to weaken or repeal the Robinson-Patman Act and made a passionate speech in favor of the Robinson-Patman Act as promoting efficiency and lowering prices. He believes that the Act helps create diversity in retailing. That, in turn, creates lower prices, greater efficiency and greater good for consumers.

Professor Hovenkamp has written extensively on the Robinson-Patman Act and was quite negative about it, saying it was costly in terms of its effects on the market and that it was costly to comply with. He recommended that it be repealed and recommended that anything that was really, truly anticompetitive with regard to discriminatory pricing could be attacked under the Sherman Act, and we should leave it to the Sherman Act.

Bruce Spiva said the loss of the Robinson-Patman Act would — I said it would be a disaster. He corrected me. It wouldn't be a disaster; it would be harmful to the independent retailers. It has been helpful, to some extent — but not, maybe, extensively — to the continued survival of small, independent booksellers, and there has been a precipitous decline in independent booksellers, the American Booksellers Association believes, as a result, to some extent, of the rise of chain stores and their pricing practices.

I testified that I worry about state laws and, if we repealed the Robinson-Patman Act, what would happen to state laws. If Congress couldn't or wouldn't come up with a strong repealer, what would happen with state laws and enforcement in the various fifty states, and whether we might have a worse situation, rather than a better situation? Somewhat along the lines of Commissioner Shenefield's dissent from the 9-to-2 vote, I suggested that we still really don't know, after seventy years, how the Robinson-Patman Act really works, both in terms of its burden on business and its effect on stifling prices, which are the main arguments against the Act. Nor do we know how, if at all, it helps small, independent retailers survive — whether it really is helping them or whether the whole mechanics of things are very different now with the Internet. So I made a pitch for greater study and greater resources.

There were also written submissions to the AMC. The American Antitrust Institute submitted a lengthy submission. It was authored primarily by Professor Kirkwood, who is here today. The AAI position was that the Robinson-Patman Act should not be repealed, but reformed. Plaintiffs

in secondary-line cases should be required to prove either that the discriminating seller had market power or that the favored buyer had buyer power.

I think you will explain that more today, won't you Jack? You are not talking about true monopoly power. It's market, not monopoly, power.

Defendants should be allowed to establish cost justification, that prices were reasonably related to cost savings. Sections 2(d) and 2(e) should require showing of competitive injury.

The ABA Antitrust Section, our Section, with the help of Bob, Roxane, and Alicia Downey, and others — Barbara, you were also on that writing committee — stood by its 1987 recommendation that Section 2(c) (that's the brokerage Section) and Section 3 (that's the criminal Section, which no one has ever used or enforced) should be repealed, and that Sections 2(d) and 2(e), which currently do not require competitive injury — they are per se illegal. In other words, if you have discriminatory promotional allowances and services, that is per se illegal. You do not have to show competitive injury. The ABA recommended that those two Sections be changed to require a showing of competitive injury —that they be taken out of a per se classification.

So those were the 1987 recommendations, and we continued to recommend the same thing.

In addition, the ABA comments went on to propound a variety of reforms that could be adopted by the courts and/or the Federal Trade Commission to ameliorate certain portions of the Act, drawing heavily from Irv Scher's work, which is also available — it's not on the AMC website, but it's easy to get it. Just write Irv or write anybody, and you can get it. Irv has been spreading this paper widely, recommending that the Federal Trade Commission take the lead in promulgating cases, rules, whatever, to try to change the Act, especially portions of the Act that really do need modernizing, in Irv's point of view. It's a lengthy paper, and it's quite good.

The Business Roundtable submitted a submission saying the Act should be repealed and it is not consistent with modern antitrust policy.

The United States Chamber of Commerce submitted a submission that does not recommend repeal, except for the criminal provision, Section 3, and favors expansion of the meeting-competition defense and other defenses, and favors requiring proof of competitive injuries for 2(d) and (e), as well as a more market-oriented test for Section 2(a), competitive injury.

What did the AMC Commissioners ask about at the hearing? I have to tell you, as Bruce and I both testified, they certainly hid any intent at the time to repeal the Act. The questions were neutral and fair and quite probing at the actual hearing. It was a long, involved hearing. We all got a chance to testify.

The main focus of the hearings that were held — again, there is the actual testimony — is, should the Act be repealed? Hovenkamp said, yes, it should be repealed. It would reduce cost and increase competition. Campbell and Spiva said no.

I did not favor repeal, but I didn't imagine that repeal would be earth shattering. I don't think life would change that greatly.

Number 2, the AMC hearing spent a fair amount of time on the question: Should full-blown competitive injury be required in secondary-line cases? For the people with the glazed eyes out there, I guess I have to give you a two-second primer.

In Section 2(a) of the Robinson-Patman Act, you have to show discrimination and all the details of price discrimination case. Then you have to show competitive injury. But so far, the courts have come up with something that is not quite what we think of as competitive injury in the Sherman Act rule of reason sense. You don't necessarily bring economists in. You don't necessarily define a relevant market and show that there is injury to competition in that defined market. There are some shortcuts. One of them is called the *Morton Salt* presumption — whether that can be rebutted. There is too much to get into.

But in any event, there is this huge division of thought about whether you should require full-blown market-definition, economists-coming-in competitive injury in Section 2(a) price discrimination cases.

One more background fact. Section 2(a), with regard to primary line — that is sellers suing each other — is sort of dead already. People don't bring these cases after the Supreme Court's Brooke Group decision setting out how to prove predatory pricing.. So primary-line cases have sort of come to a screeching halt. So the most enforcement we have is in buyer cases-- buyers suing sellers for discriminatory pricing. There they have the shortcut to showing competitive injury.

So the argument really was, what happens if you require full-blown competitive injury? I said I thought that would be the end of buyer cases, just like it has been the end of primary-line seller cases. Bruce and Jay Campbell said they don't want it because they don't want to take the chance. Professor Hovenkamp, I thought, agreed with me, but then said, "No. We haven't tried it yet, so we don't know. But maybe it wouldn't mean the end of Section 2(a) buyer cases." So he favored putting in a true competitive-injury requirement to Section 2(a).

How about market-power screens? That is the third thing that we spent some time on at the AMC hearing. That was really Professor Kirkwood's requirement. That is, if you are not going to show a competitive injury, shouldn't you at least show that the buyer who is asking for the discriminatory price had market power or that the seller had market power ? Hovenkamp thought any reform was a good idea. Spiva and Campbell, again, thought this kind of narrowing of the Robinson-Patman Act was not a good idea.

Costs of compliance: Here is where the Commission hit a stumbling block, both informally and at the hearings. The Commission was struggling to get a handle on what the compliance costs are: How much are you spending on lawyers? What do the lawyers do? How is it really impacting people's distribution system? We hear all these horror stories. And both sides use it. In other words, the pro-Robinson-Patman people use the argument that it's helping the small, independent sellers survive, so don't repeal it. The anti-Robinson-Patman people say it is an incredible compliance problem--we have piles and piles of meeting-competitive forms, they're driving us crazy, and we could do better things with our money.

But in point of fact, none of the people at the table could do much other than continue to offer anecdotal evidence. There is really no hard evidence either way. Bruce has figures on the decline in the number of booksellers. They have gone down.

One of the seventeen questions was, should the Act be extended to services? I don't think anybody had any great love for expanding the Robinson-Patman Act to services, although Jay Campbell thought it might be a good idea with regard to things that help small retailers, like credit card services.

Has the RP Act had any effect on the rise of grocery and bookstore chains and the loss of the small, independent bookseller? We saw at the hearings, as well as later during the AMC deliberations, people trying to figure out this more global public policy question: Why do we have all these giant bookstores and Home Improvement stores , and fewer small sellers? Is something else going on in the economy? Does the Robinson-Patman Act have anything to do with it? If so, why? People, I think, are sort of doing a lot of guessing about that.

State laws: We talked about the worry of what would happen with state laws, if you couldn't fully preempt state laws when you repealed the Robinson-Patman Act.

Repeal Section 3: I think everybody agreed that it has outlived its usefulness.

Broaden the cost-justification defense: This is something that a lot of people think is really important. Spiva said no. I thought yes. I think it really is one that has to be expanded.

Was there any consensus? No, except on repealing Section 3. I think there was pretty good consensus on that. There may also have been some consensus about adding competitive injury to Sections 2(d) and (e) and making it similar to Section 2(a).

On January 17, between the hearings and the next AMC meeting, we had the Supreme Court decision , *Reeder-Simco v. Volvo.* I don't want to go into detail. We are going to discuss it later. But it has clearly impacted people's thinking, either positively or negatively, about repeal, modification, and the question of whether the Supreme Court and the courts are capable of reining in the Robinson-Patman Act.

On May 19, the AMC staff issued its report. As Steve Calkins said, those are great pieces, and you really should look at them. They go through all seventeen issues. They give the pros and the cons. They go through the record and give the support from both the people who testified and from the submissions. They are wonderful pieces and wonderful source material for anybody who wants to understand this.

On May 23, the Commission met, and nine members, again, tentatively, voted for repeal and two voted to modify the Act. One was missing. I don't know how that person would vote on this. Again, these are tentative votes.

In terms of the various issues , a lot of them were not answered Nine Commissioners voting for repeal — I have given the names up there on the screen — found that the Robinson-Patman Act does not serve any purpose not already served by Sections 1 and 2 of the Sherman Act, and that the Robinson-Patman Act imposes significant costs on U.S. businesses and consumers that outweigh its benefits to consumers and competition.

The two dissenting Commissioners, Yarowsky and Shenefield, recommended a lot of changes in the law, repeal of Section 3, adding competitive injury to Sections 2(d) and (e), repeal of Section

2(c), and expanding cost justification. Commissioner Shenefield noted that he thinks we need more information to understand the issues.

During debate, there was much discussion of the likelihood that Congress could or would repeal. That has sort of been an overarching problem. Some people think that the AMC doesn't have jurisdiction to decide whether Congress is competent, itself, to modify or repeal the Robinson-Patman Act. Other people are deeply worried, even if they oppose the Robinson-Patman Act, about the ability of Congress to craft even a simple repeal, much less a repeal plus a preemption of state laws that would make it fully effective. There you are talking about states' rights, and you might get into some very, very nasty political situations.

So that's where we are today. Today our wonderful panel is going to discuss the issues. We are going to start off with a straw vote on how we would do it here. If the AMC can take a straw vote, we can take straw votes. So we are going to take a straw vote so you can see where people are coming from, so you will know where they are likely to end up.

Professor, I will let you go first.

Professor John Kirkwood

I would vote for substantial reform, but not repeal.

Mr. Saferstein

Bruce Spiva.

Bruce V. Spiva

I would vote against repeal and reform, but I mean strengthening the Act.

Mr. Saferstein

This is an honest man here.

Barbara O. Bruckmann

I would vote for repeal.

Mr. Saferstein

As I have already testified, I would vote for modification, not repeal, for the reasons I have stated before.

So now you know where the straws are in this panel. As I said, we are going to discuss a bunch of issues that go to the heart of what is happening at the AMC and in the Robinson-Patman Act. We will end up with the repeal issue at the end. As I say, anybody who wants to chime in, we have two roving mikes. If you want to ask questions as we go along, feel free.

Barbara, what do you think *Reeder-Simco* does? Has the Supreme Court killed the Act or given it new life, or somewhere in the middle?

Ms. Bruckmann

Good morning to all the diehard RP folks in the audience. We are delighted that you have come back to this program this morning to listen to us debate these issues.

I would like to answer the questions on Harvey's slides directly and then explain to you my reasons. Given the sophistication of this audience — I know a lot of you — I am going to assume general familiarity with the opinion.

In my view, the Supreme Court has not killed the Act. I think Part IV of the opinion, in which the Court said Robinson-Patman Act did not represent a large departure from antitrust norms, could be construed as a signal that Congress should not scrap the Act. But in my view, the opinion does not provide a clear analytic framework that will necessarily result in the Court's reining in the Act.

A close reading of *Volvo*, in my view, bears this out. You will recall that this involved allegations of discrimination in bid support — the Court started out with the legislative intent and recited, as we all know, that the purpose of the Act is "to target the perceived harm to competition occasioned by powerful buyers" and that Congress was responding to "the advent of large chain stores, enterprises with the clout" to demand lower prices.

Then the Court followed that with a caution that it would be "mindful of the purposes of the Act and of the antitrust laws generally." Then, citing *Brooke Group*, it said the "act proscribes price discrimination only to the extent that it injures competition," so far, consistent with broader antitrust concerns. But then the Court lurches back into an intrabrand world and basically stays there through the disposition of the issue. It says "secondary-line cases," which was the matter before the Court, "involve price discrimination that injures competition among the discriminating seller's customers (here, Volvo's dealerships.)" It recites mainstream RP principle, gives no indication that it was going to undermine or overrule it, and said "a hallmark of the requisite competitive injury … is the diversion of sales or profits from a disfavored purchaser to a favored purchaser," singular.

It recognized the *Morton Salt* inference and then, examining the evidence of discrimination, said "selective comparisons of the kind Reeder presented do not show the injury to competition targeted by the Robinson-Patman Act."

What a lovely opening. What did the Court say? Well, first, most of the comparisons involve situations in which Reeder did not compete against a favored dealer — singular — for the same dollar. As to the instances where there was head-to-head competition, or could be construed to be head-to-head competition, the Court said Reeder did not prove it was disfavored. Even if it were disfavored, the Court said that $30,000 in lost profits was not of such magnitude as to affect substantially competition between Reeder and the favored Volvo dealer. It faulted Reeder, not for not looking at the interbrand world, but faulted Reeder for not providing a systematic study to show that, on average, it was consistently disfavored as against other Volvo dealers.

That is the end of the disposition of the issue. The Court never strayed from an intrabrand world.

Then we come to Part IV, which has all of us excited.

Mr. Spiva

Not me. [Laughter]

Ms. Bruckmann

As you will tell, Bruce and I disagree on most everything about the Robinson-Patman issue.

The Court said four things. Number one, interbrand competition is the primary concern of antitrust law. Then it said, with a straight face, the Robinson-Patman Act signals no large departure from that main concern. It says "we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition," but added no footnote suggesting it would overrule four major circuit court of appeals decisions holding contrary to that, and then purports to limit the reach of the Act by declining to apply RP to cases like Reeder, in which there was no evidence that any favored purchaser possessed market power, the favored purchasers did not resemble large, independent department stores or chain operations, and that "the supplier's selective price discounting fosters competition among suppliers of different brands."

What a lovely footprint. But that is not the standard the Court applied to the facts, which it could have done. Instead, the outcome rested on, one, the failure to prove competition against another dealer, without mention of whether that dealer had market power — it certainly didn't resemble a department store — and the substantiality of harm to intrabrand competition, without mention of whether the effects in an interbrand market would render the substantiality inquiry moot.

So what does this say? The views of the impact of this decision have ranged from, "It's no big deal. It simply raises the threshold for substantiality," to, "It fundamentally guts Robinson-Patman, and from now on you will not have a 2(a) violation where you do not also have a Sherman Act violation."

The response of the courts to *Volvo* is not encouraging if the aim is to bring RP within the ambit of the antitrust laws. An early application of *Volvo* is *Wiegand Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, Eastern District of Pennsylvania, at the end of March. The issue of *Volvo* was before the court. The court began by saying — familiar land here — competitive injury can be shown by proof of lost sales or profits or proof of substantial price discrimination over time, and then it addressed *Volvo* by simply distinguishing the facts and said, here, we have head-to-head competition, and no selective comparisons. It did not examine market power. It did not look at whether these selected discounts could foster interbrand competition.

Even more remarkable, a month ago, out of the Middle District of Pennsylvania, we have *Feesers, Inc. v. Michael Foods, Inc.*, involving allegations of discrimination in the food service business. Competitive injury was the issue, and *Volvo* was not even cited. The court followed the very narrow holding of the Third Circuit.

So what does *Volvo* mean? If you look at the history in the courts since it was decided, it may be a lot of to-do about nothing. But if we are moving to a standard that, under *Volvo*, requires harm to interbrand competition, I think that *Wiegand* and *Michael Foods* suggest that we have a long way to go.

Mr. Saferstein

Bruce, what do you think?

Mr. Spiva

I know this is not what you want, Harvey, but I have to say that, her editorial comments about Section IV apart, I tend to agree with most of what Barbara said. I think that the *Volvo* decision was very fact-bound. It was almost as if Justice Ginsburg, in her usually careful way, was reweighing the facts. I think that was the beef that Justice Stevens and Justice Thomas had in dissent — "hey, it's not our job to reweigh the facts here. The allegations here are within the text of the Act, and it was up to the jury to decide whether or not they were competing," et cetera.

But Justice Ginsburg was very careful not to go as far as saying that you could never apply the Act in a competitive bidding situation like this. She basically just said, "Look, they weren't in competition. They didn't show competition here."

Section IV I read as saying no more than, "If there is a gray area here, and where there are gray areas, we are going to come down in a way that we view as more consistent with the other antitrust laws." Again, I think Justice Stevens was saying, "Look, there's a text here." Actually, this is similar to what Justice Scalia said in his concurrence in *Hasbrouck* sixteen years ago: "You may not like it" — Stevens even said, "I don't like it" — "but there's a text, and that's what we should apply. These economic arguments are to be addressed to Congress."

Mr. Saferstein

How about the professor? What do you think about *Volvo*?

Professor Kirkwood

Barb and Bruce have done a nice job summarizing the opinion for you. They have picked out what I think are the two key parts of it: One, in *Volvo*, the Supreme Court did not jettison any of the basic protectionist features of the Act. They didn't even criticize them. On the other hand, in Part IV, they both expressed a desire to promote overall competition and said, where there is an issue of interpretation, they would resist any interpretation that didn't further overall pro-competitive goals. So they created an opening, and we will see how broad it is.

Mr. Saferstein

Yes, Bob?

Mr. Joseph

I tend to agree with the interpretations, but for the AMC isn't *Volvo* a possible message? The Court is resisting expansive interpretations. In, "close cases" the Court is going to rein in the Act. Perhaps, in interpreting *Morton Salt* going forward, one way of rebutting the *Morton Salt* inference would be to bring in the Part IV factors, even if they weren't part of the holding,

because, at the end of the day, there is a Part IV. The Court didn't have to be put Part IV in the opinion, but it is stuck in there.

Volvo might have this relevance to proposals for repealing the Act. Someone opposing repeal might say, "Why would we want to put the question of repeal before the same Congress that gives us something like the Price Gouging Act of 2006? Presented with a recommendation to repeal the Act, Congress could, (a) not repeal it; (b) but be upset with a recommendation to repeal; (c) with an extensive legislative debate or controversy engendered; and (d) the debate leading to some amendment of the act, which amendment would only be more problematic than what we now have. Rather than a legislative approach, why not just ride it out with *Volvo* and cases like *Volvo*, which incrementally restrict the Act's application, putting up with the inefficiencies of a case-by-case approach?

Mr. Saferstein

Those are good thoughts, Bob. One thing is, it did reverse the verdict for the plaintiff. The plaintiff had received a very large treble-damage award at the trial level and was affirmed by the Eighth Circuit. So the plaintiff went back with zero.

There are a number of practitioners out there who read *Volvo* as much more pro-defense than I think you might have gotten from some of us, who think it is going at least partway toward overruling a *Morton Salt* presumption and taking the D.C. Circuit versus the Ninth Circuit views of how you show competitive injury.

As I said, we have to look at the cases and how they do it. Right now the two returns show that is not occurring.

Ms. Bruckmann

I have three observations.

One, with respect to the message for the AMC, I think that, given the short-term effects of *Volvo* in the courts, you are looking at a long haul here to get Robinson-Patman readjusted, if you will.

Secondly, I do think that this is a defense-oriented decision, because there is no defendant, from the day that *Volvo* was decided, that is not going to raise all of the issues in Part IV. But they will bear the burden on that. They will be coming in as rebuttal evidence instead of having the burden on the plaintiff. I think if you go back and read *Boise Cascade* in 1988, you will be struck by how closely it resonates with where *Volvo* might get us. It's not going to get us all the way there, and it is going to be a long time.

So the question is, how much patience does the AMC have? Are you willing to just sit and let this rock along? It may take a decade before Robinson-Patman is adjusted.

Finally, with respect to whether or not recommending appeal is going to be an unpopular move or whether Congress could or could not handle that effectively, maybe there is room for a backup position — in other words, "If, Congress, this is unpalatable to you because of the political ramifications in your district, we are talking about antitrust policy and we should have a backup position."

But I think the message to the AMC is *Volvo* is not a fix. So the issues are alive and they are there.

Mr. Saferstein

Bruce or Professor?

Mr. Spiva

I don't think there is any indication — as Barbara said, Justice Ginsburg nodded to the *Morton Salt* inference. She didn't give any indication that they were signaling that they were going to draw back from that. So I don't see anything in *Volvo* that suggests that the Court is going to try to repeal the Act, because I think the *Morton Salt* inference is grounded in the text of the Act. I think you would see some surprising bedfellows if you had a case that squarely presented that question. As I said, Scalia's concurrence in the *Hasbrouck* case takes the same view of that, and we have Thomas and Stevens on record.

So there is nothing in the *Volvo* opinion that I see that signals that that is where they were going. All I read IV — which is really dicta — to say is that where there are close factual cases or unique factual situations, we are going to read it on one side of the line rather than the other.

Mr. Saferstein

Professor? The RP Act has produced more Supreme Court decisions than any other antitrust law in recent years, that's for sure.

Professor Kirkwood

If you believe that repeal is desirable, that we can't tolerate further inefficiency from the Robinson-Patman Act, you are not going to get that solution very quickly by following the incremental change that *Volvo* calls for. Whether repeal is wise I will address in a minute, in response to Harvey's next question.

Mr. Saferstein

Okay. Any questions? Professor Ross? We have professor on professor here.

Professor Stephen F. Ross

There is some famous Oliver Wendell Holmes saying about "law is what the courts say it is." Here, I have a bias. I was Justice Ginsburg's first clerk. But I think trying to figure out what she meant is far less relevant than what the lower courts are going to do with it. There is certainly enough language in that opinion, and I think, in general, lower courts are not likely, necessarily, to go for the parsing of her psychobiography to explain what she meant there.

Only a lawyer — you know, the plural of "anecdote" is "data" — would go by two cases. So it may be too early to tell.

I was struck by — and maybe this is a segue into the next question that Harvey wanted to get to — the fact there was anecdotal but not reliable evidence of substantial compliance costs that

firms engage in to do this. They are extremely costly, for very little gain either to society or, quite frankly, to the plaintiff's bar from this.

At the same time, what I was particularly struck by in Harvey's summary was that the Chamber of Commerce took a very moderate position on this. I am wondering what this says about how truly costly the repeal is going to be. Would the defense bar or major corporations significantly affected by Robinson-Patman be willing to trade anything in the horse trading that will go on in Congress in order to get a Robinson-Patman Act repeal, et cetera?

So I am hoping that perhaps in the repeal portion of this, the panel can address what the real costs are to American businesses, and if they aren't that substantial, why we should waste our time repealing it. If they are that substantial, why haven't the Chamber of Commerce and all the clients of the leading members of the defense bar who are represented in the ABA Section councils been rising up to try to get this repealed?

Mr. Saferstein

Any comments?

Ms. Bruckmann

Shall we jump to the cost question?

Mr. Saferstein

We can jump to the cost question, but any rebuttal to that? Bruce?

Mr. Spiva

I actually think there is real evidence that compliance costs are not high. I know that that wasn't the finding of the AMC. But if you look at the citations, they cite back to a 1977 report. If you look a little further up — this is page 7-8 in the pros and cons document — they show that the number of cases brought by the FTC and by the private bar is just way down, from twenty-seven complaints annually in the 1960s to one FTC case since 2000, and that was in 2000, the McCormick case — not one since then. In the private bar, there were twenty decisions last year in the whole country, and that has been true for years.

Presuming that businesses are rational actors, and in these days of supposedly perfect information and rational markets, I can't believe that they are expending such great compliance costs for an Act that nobody ever enforces and that is hard to win under, even if you try.

Mr. Saferstein

We can skip to that one. We're flexible, folks. We will skip to our number 5 question.

Barbara Bruckmann, you were going to take the lead on this one. How bad are compliance costs, both the direct, the legal ones, and the indirect, pricing rigidity?

Ms. Bruckmann

I would like to just address something that Steve said about courts saying what the law is. I am fully respectful of that.

What was startling to me in looking at the cases — there are about a dozen of them since Volvo was decided — was the difference in the reaction of the courts when you contrast that to how they responded to *Brooke Group*. When *Brooke Group* was handed down and there were primary-line cases, it was as though someone called the world to attention, and there was a shift. There hasn't been the same call to attention after *Volvo*. I do think that, over time, we are going to move in the *Volvo* direction over time. But I think the immediate response is notable— but I do agree that we can't say today that this is what the world is going to look like a year from now, two years from now, three years from now.

Mr. Saferstein

And we will stop analyzing Justice Ginsburg.

Ms. Bruckmann

That's right, absolutely.

Mr. Saferstein

Okay, Barbara, compliance costs.

Ms. Bruckmann

We can't quantify costs.

Let me make one observation about the litigation issue. In the 1980s, Robinson-Patman litigation was pretty flat, and, if you recall, before 1990, a number of the circuits did require injury to competition. Because that was very difficult to show if you were talking about a discrepancy within a single distribution system, Robinson-Patman didn't have much teeth in terms of whether sellers were going to devote the resources to it.

In 1990, we had *Hasbrouck*, we had *Feesers*, we had *Alan's of Atlanta*, and we had a beginning shift toward the injury-to-a-competitor standard. Those issues were squarely in front of four circuits during the early 1990s, and they all came out in favor of "you hurt one of my resellers and you're in the world of Robinson-Patman." So there was a rise in lawsuits filed after 1990. The number of cases is probably not as great as what we see under the Sherman Act, but there is increased sensitivity on the part of sellers.

In terms of costs, a good bit of what I do is counseling. A number of the calls that I get on a day-to-day basis involve what the in-house lawyer views as Robinson-Patman. Now, the question may not always be Robinson-Patman; it may touch on Sherman Act or contract issues. But these issues come up regularly. There are certainly calls, although we can't quantify them — there is inside and outside counsel time in providing legal advice and monitoring company processes, the

time and distraction for businesspeople in training and in strategy sessions that are intended to mitigate potential RP consequences of a proposed marketing strategy.

Professor Hovenkamp noted in his testimony that RP makes it costly to reward a seller's more aggressive dealers or to invest resources behind them if, in the process, the seller will discriminate against other resellers. That is consistent with my experience. I see that all the time. Generally, in that situation, if the issue is supporting an aggressive dealer, oftentimes you can get there with a functional discount. But it's not always the case.

The U.S. Chamber noted that it receives reports of entire departments dedicated to tracking and processing meet-comp information. This is true. This is my experience.

In fact, in some situations I do not recommend that a client begin a formal meet-comp form process, simply because of the cost.

Most antitrust compliance manuals continue to flag the Act, and most of them that do flag the Act require the businesspeople to get certain approvals from the law department before selective price cuts can occur. That, in every instance, slows down the responsiveness of the company. I have seen on more than one occasion where a company has simply walked away from a marketing approach, even if it thought it made it more competitive in a particular channel of distribution, because it viewed that it would likely receive complaints from others in its distribution system.

How can you quantify the loss if a company forgoes what the seller believes would likely result in an increase in competition, where the monies aren't there to fund comparable programs throughout its distribution system? I don't think you can put a cost figure on that.

But my point is that this happens.

So I do think there are costs. I don't think they can be quantified. That is where I come out on the cost issue.

Mr. Saferstein

Any thoughts from Jack or Bruce?

Mr. Spiva

I think that the companies that have entire departments devoted to meeting-comp letters aren't smart enough to have hired you, Barbara, because I know you would have told them that with twenty cases per year in the whole country, they would be better off devoting that kind of time to their civil rights compliance or, if they are a communications company, their FCC compliance or any of the myriad of issues that companies have to consult their legal department on. I think the fact that a company has to consult their legal department before taking certain decisions is not in any way support for a finding that there are significant compliance costs.

I think you have to look at: What is the risk of being sued? What is the risk of losing if you are? What is the cost of defense? What is the exposure if you lose?

These damages often are not very significant. You still have to prove causation — it's a very stringent standard — to get damages. If you are talking about a disfavored purchaser that is a small business, they have to show they have lost profits or lost sales. The potential damages are not very high.

So I think it has to be the outlier and the ill-advised company that is devoting these millions of dollars to attempting to comply with an act that is never enforced and that is hard to win under even if it is.

Ms. Bruckmann

Let me just interject here. Enforcement of the act: The act is enforced in lots of different ways, not just in filing a lawsuit. It comes up in telephone calls from a disfavored customer. It comes up informally within a distribution system in which a seller, then, needs to make an adjustment or take a position or deal with a compliant. So the issues with respect to, quote, enforcement of the act are not just simply the fact that you have lawsuits filed. These issues come up in all sorts of circumstances within a distribution system, when a seller is engaged in distribution through multiple channels.

Mr. Saferstein

Let me go back to number 4, which is a parallel to this, or a corollary or follow-on. How do we get better knowledge? How would you answer this question, if you were Commissioner Shenefield and you said, "How do I find this out?"

We at the ABA thought about whether to do a survey to assist the AMC. We kind of came up empty, on the grounds that they are not easy to do, and we are not sure whether people will give us the correct answers or honest answers. It's hard to survey legal departments and say, "How much is your legal department spending on Robinson-Patman compliance?" We were a little bit at a loss to figure out how you would quantify the legal costs of compliance and the non-legal costs — that is, price stratification. I couldn't figure out how to do it. You need economics people to try to figure that out.

Then, conversely, from Bruce Spiva's point of view, how do you show that it is helping small businesses? I don't know how you do that. You have, again, the anecdotal statements from Bruce that it has been some help to the small retailers, and from Jay Campbell about help to the National Grocers Association. I don't know how you show that one either.

So we have a lack of information. It is a little bit puzzling. We don't know what to do about it. Any help from our panel here?

Ms. Bruckmann

I hate to be a contrarian, but I think that is the wrong question to ask: Do we have enough information? With respect to the Antitrust Modernization Commission, I think the question is, let's assume that we know that Robinson-Patman helps small firms buying small volumes in a complex distribution system; is that the appropriate object of our antitrust policy?

Mr. Saferstein

Bruce?

Mr. Spiva

Well, here I go again. I think I might agree with Barbara on the question. We probably would come out differently on what the answer to that is.

When I testified in front of the AMC — and I feel a little bit like this today — I kind of feel like the team they bring in to play the Harlem Globetrotters. [Laughter] The question is, how should we repeal it, or how quickly, and if not repeal it, how do we disfigure it?

If you begin with the premise that the only thing that the antitrust laws care about is price, then it's hard to fight with the notion that there should be some kind of market-power or competitive-injury requirement of the type that is required in a Sherman Act case. I think there are instances where you could make that kind of a showing. But, in some ways, why bother having RP if you are going to require that? You probably have a Sherman Act case if you could.

Two points about that. It's an ahistorical view. We have had over the last twenty-six years the total ascendance of the Chicago School and total dominance of antitrust policy by that school. It started with the Reagan administration walking away from antitrust, and its hostility to antitrust enforcement.

But, historically, the Robinson-Patman Act certainly did not just care about price at the end of the day. It cared about service; it cared about economic diversity; it cared about economic pluralism. I think those are still values that the act promotes, in helping small businesses stay alive.

It's no panacea. The reason I kind of quibbled with Harvey when he said that my position was that it would be a disaster if it were repealed is that I think it's a tough law to win under, it's a tough law to enforce, and it doesn't change fundamental market forces. But I know in the bookselling context, it certainly has given efficient, good small booksellers a chance to compete.

Going beyond that, even looking at the history of the Sherman Act — and Professor Pitofsky wrote about this before the Reagan Revolution, the political content of antitrust — there were other values, other than just price.

So I guess that's where I am coming from. If you start from that premise, repeal and all these other requirements follow from that. But that's not the place that I am coming from, and I think that is an ahistorical view of the antitrust laws. It is, unfortunately, an ascendant view in the antitrust community.

Mr. Saferstein

We have a question. My panelists clearly don't want to answer this question.

Andy, how are you doing?

Professor Andrew Gavil

My question really segues off of Bruce's point. Maybe it really gets us to the heart of the question.

I think part of the problem with analyzing the Robinson-Patman Act is that we feel compelled at this point to view it as an antitrust law. Antitrust has changed a lot in the seventy years since the Robinson-Patman Act was passed. Is it possible to take it out of the mode of our modern antitrust thinking and actually just judge it on its own terms? Do we want a law that is about fairness? Do we want a law that is about helping smaller businesses to continue on, because maybe they give higher-quality services?

Why can't we actually debate it on its terms, instead of trying to force it into the antitrust analysis that we use for everything else?

Maybe it doesn't work. Maybe you conclude that the costs of fairness are too high.

I will tie this back, and then leave the question, to something Barbara said. To the extent that I still do consulting, I find the following scenario very troubling, because it has been pushed under antitrust. It is the manufacturer that wants to promote a distribution system in a certain way, it wants to favor some distributors over others because it is going to make more sales, and it has made some determination about that, and it comes to you for advice. "What am I going to do? I have this smaller dealer" — maybe it's size, maybe it's quality, maybe it's newness of the facility, on with the list — "I want to favor this one over this one because I think I'm going to sell more. I don't have any market power. It's going to make me a better interbrand competitor. What should I do?"

Under the current state of antitrust law, one of the pieces of advice we have to give us, "You would be better off terminating the small distributor than selling to them at a higher price."

Mr. Saferstein

That's right.

Professor Gavil

That is because we are continuing to think about Robinson-Patman in this antitrust mode.

So I guess my question is, either we keep it or we don't keep it; if we keep it, would it be helpful to just sever it and stop talking about it as an antitrust law and just judge it on its own terms?

Mr. Saferstein

What do you think, Bruce? Jack, maybe you can answer this. I think we have gone too far, is the problem.

Professor Kirkwood

Andy, it's hard to think of it totally as an antitrust law, because, as you have pointed out in the way you asked your question, there are costs to pursuing fairness, there are costs to pursuing the

protection of small business, and those are costs to consumers. Of course, antitrust law is now targeted primarily at protecting consumers.

And I think I agree with your analysis of the value of the Act. One reason AAI has supported reform rather than repeal is that there is some value — maybe not a large value, but some value — in promoting fairness to small business and some value in the contributions that these small businesses make. The industries where small businesses most fervently supported RP are groceries and bookselling, based on the testimony before the AMC. In both of them, the small businesses are not mom-and-pop outlets anymore, but, measured on an outlet-by-outlet basis, they are as big as the chains. They simply aren't chains. They contribute sometimes higher services, a distinctive selection, sometimes better quality. Therefore, protecting them provides at least some benefits to consumers.

Mr. Saferstein

We have Sal Romano, who has done a lot of RP work.

Mr. Sal Romano

I have a couple of observations and then a question that leads into the policy issue.

This morning's *Wall Street Journal* had an interesting head note. I didn't read the entire article, but Wal-Mart was threatening Coca-Cola with a make-or-break situation, and if Coke didn't give them the right price on its product, Wal-Mart was going to make it.

This leads into a couple of observations. Some of the reasons for the Robinson-Patman Act — while everybody thinks it was just for small retailers or wholesalers, manufacturers wanted it as well, because it gave them protection against big buyers, so that they could confront a big buyer by saying, "Look, I can't discriminate in price. I have to follow the law." That was one of the elements.

The other element was that it was during the Depression, where everybody wanted to get prices up, not necessarily get prices down. So that was another reason for passing the act.

This leads into the question. The real policy issue is — and I think it's an antitrust law; I agree with his policy statements, but I still think it's an antitrust law — do we want a law that protects the distribution system, small manufacturers, small wholesalers, small retailers? Sure, in the modern era, they may be small chains. But the point is, do we still want a law to protect them, or do we want to just have the Sherman Act that says, "If it doesn't affect consumers or it doesn't affect the price to consumers, we don't care about it"?

I think that is the policy issue. Whether it works or doesn't work — we don't even know if the Sherman Act works. We have more cartels operating today, supposedly, than we ever had. I don't know of any empirical data that says the Sherman Act works or that any of the laws work.

I think it's a policy question. What is the policy of the United States going to be with respect to this particular issue?

Mr. Saferstein

That's why I switched to issue number 6. Bruce, can you respond to that?

Mr. Spiva

Sure. I agree with a lot of what was said. In my testimony to the AMC, I kind of used the bookselling industry as a case study of this. Beyond protection of a small retailer — if that was all that it was about, there would be a real question about whether or not that was a sufficient policy rationale for the act — there are values that it protects that are consumer values, but that may go beyond price.

In the case study of the bookselling industry, the argument that we made is that, first of all, it protects diversity of titles available. People look at me askance when I say that. Barnes & Noble has 100,000-and-some titles, and your mom-and-pop small bookseller, many fewer titles. How can you say that this somehow protects diversity?

There are two types of diversity. Having multiple buyers — I would argue it's better to have 1,000 or 2,000 independent buyers across the country making decisions about the inventory in their stores. So even though any given store may have fewer titles than any given Barnes & Noble, they all have different inventories, not totally overlapping inventories with each other. So you get more diversity because you have more decision makers. The chains make their buying decisions, by and large, centrally. So if we only have Barnes & Noble and Borders, we only have two decision makers — and Amazon now.

Also there is diversity of promotion. You walk into a typical chain and you may see twenty copies of Oprah's latest book piled up high. I'm not being disparaging, but that is space that is paid for by the publishers. The independents are known — it's anecdotal, but there have been, actually, what I would call rigorous examinations of this by the Authors Guild — for hand-selling. So books like *Cold Mountain* or *The Kite Runner* originated from this type of hand-selling.

I think the problem is, you can't quantify this, because if the independents disappear, it is going to have an effect on what books get noticed. Barnes & Noble carries *Cold Mountain* and it carries *The Kite Runner*, and for some of these books, they may have done it from the day they were published; some, maybe not. But if they weren't promoting it, nobody is going to know about it. That is a key function, I think, of independent stores, getting the word out there. If they disappear, I think you will have lots of that, and eventually you will have fewer titles published. You really can't quantify that, because if it's never published, we won't know what we are missing.

Ms. Bruckmann

A word on diversity. I think in Bruce's example, in his litigation, there were multiple publishers involved, and so his commentary on diversity may resonate more squarely with antitrust norms, because I do think diversity and consumer choices are values that we do hold when we are talking about antitrust. But in the normal situation, if you are just talking about diversity with respect to a single product, I am not sure that you can make that same argument with respect to the distribution of a product in a distribution channel. That is diversity within an intrabrand

world. I think the issue is diversity within an interbrand world. I think that Bruce's comments are moving in that direction because of the nature of his litigation.

But as a value for Robinson-Patman purposes, I think if we hail diversity, it's going to fall out most regularly in a situation where we are talking about different formats for a brand. I am not sure that is where we want antitrust policy to go.

To Andy's point on whether we should just stop talking about RP as an antitrust law, I think that is a valid point. I think it is a policy decision, but I am not sure that we want a fairness-in-distribution act with treble damages attached to it. That's a policy choice, whether or not we want to have a fairness law for distribution.

Mr. Saferstein

Jack, you were on the FTC's booksellers case, as FTC counsel, right?

Professor Kirkwood

Right.

Mr. Saferstein

Was there any development in that case of whether the Robinson-Patman Act was a good thing for preservation of small businesses and the growth of chain stores?

Believe it or not, the AMC seems quite interested in this topic. It came up both times, this macro question of whether Robinson-Patman really is quite helpful to the small booksellers and to the small grocers, and conversely, whether, in fact, the chain stores are something nobody can stop, and it really has to do with China and macroeconomic issues and not the Robinson-Patman Act.

Professor Kirkwood

Barbara once told me that she thought the FTC's case against the booksellers was the best secondary-line RP enforcement case she had ever seen. Both Bruce and I have participated in litigation in this industry, and it does strike me as useful to think about the case as, perhaps, the ideal of the kind of case one would want to preserve. So our reforms are designed to cut RP back and to preserve the ability to go after a case like *Booksellers*, where you had two powerful buyers, neither of them a single-firm monopsonist (so you couldn't reach them under Sherman Act Section 2), and you had systematic discrimination — not *Volvo*-like idiosyncratic or sporadic discrimination, but systematic discrimination — against an entire class of independent booksellers, where, as Bruce has pointed out, literally thousands went out of business, and where you had an argument, not proof — if we had proof that it would harm consumers, as well as small business, we might have been able to proceed under the Sherman Act or Section 5 — you had a significant argument that there would be consumer harm from the destruction of this sector, for the reasons that Bruce has given.

Mr. Saferstein

Don Baker?

Mr. Donald Baker

The question I have is, why do we stop and focus just on price discrimination? In 1975, we tossed out resale price maintenance, which had the same kind of goals. Congress tossed it out almost over its shoulder. You look around the world, and in the name of fairness, the Article 82 abuse-of-dominance cases are both requiring people to deal and going after people for higher charges.

We reject all that stuff, and yet we sit here and make these arguments about price discrimination.

Mr. Saferstein

Anybody want to take that on?

I think it is the thing that came up at the — the people from the AMC may know better than this. It was a little bit hard to read the ABA summary. But, apparently, at the end of the discussion of the repeal vote, there was a discussion of — people often feel very strongly about discrimination, especially in price, and it came up with regard to the cable industry, I believe. Somebody asked, why don't we extend the Robinson-Patman Act to the cable industry? How do you do things like price discrimination? People often worry about things like price discrimination, as opposed to resale price maintenance, which is keeping prices up. This is charging one person differently than another. People care about it in their personal lives, and I think it resonates to some people in terms of fairness.

Mr. Baker

Yes, but we only do it in goods. In an economy in which goods are becoming less and less important —

Mr. Saferstein

That's right. That's why the AMC did ask whether it should be extended to services, like lawyer services. We want to be part of the Robinson-Patman compliance program, right? We have Barbara to design ours.

Yes? We have a Commissioner.

Commissioner Jonathan M. Jacobson

Honestly, the thing that would be most helpful for me is to get a sense of how credible we really think organized opposition to a repeal of the Robinson-Patman Act would be. I would like to hear the panelists address that.

In setting up our panels, we found support for the act very hard to find. For the reasons that Bruce has articulated, I suspect there is not the level of support that, I believe, a myth out there says is lodged behind the act. So the question for our panelists is, is that residual support still there, the way it was in the late 1970s, or is the time different now for looking at the Act anew?

I am on record on my position on this, but just let me make one comment. I think a Commission tasked with modernization of the antitrust laws cannot responsibly fail to look at repeal of this statute.

Mr. Saferstein

That was Commissioner Jacobson. Any thoughts on that?

My sense is that, as Professor Ross has pointed out, what is odd about the Robinson-Patman Act is that the pro and the con don't come from the normal sources that we see in the Sherman Act. There is not a huge plaintiff's bar that is pursuing Robinson-Patman cases, as there is in the Sherman Act. Basically, there are very few people doing it. Carl Person — I don't know that he has been called to testify. I think people have invited him to a couple of events. He writes quite a bit and he talks quite a bit, but I don't know what type of following he has. He obviously brings a lot of cases. My guess is that he could be bringing as many as 25 to 50 percent of the cases being brought.

I don't think you will see the organized plaintiff's bar, the Trial Lawyers Association, there.

On the defense side, conversely, I don't think you will see a lot of major corporations running in and saying, "We don't like it," because they don't like to talk about it a lot. That was one of the problems we ran into in thinking about our survey. Big corporations don't really want to talk about their Robinson-Patman compliance.

I see a big corporation GC right there, Rich Wallis.

Richard J. Wallis

I don't talk on Robinson-Patman very much at all, or think about it very much at all. But coming from the perspective that I have, what I wonder about, and what I want to get the panel to wonder aloud about, is if you repeal it and the states replace it, what sort of mess are you going to have? The prior panel dealt with *Illinois Brick*. *Illinois Brick* came out and you had twenty-some-odd states do repealers. Then you get a bunch of supreme courts that interpret their state laws to repeal. Then you have this everywhere.

Given my choice between having one set of rules that apply across fifty states and having twenty-six other ones, I'm not so sure that I don't keep the one set of rules and deal with that sort of litigation.

I hope that the panel is going to talk about that.

Mr. Saferstein

We will go right there right now. What number was it?

Ms. Bruckmann

Number 15, at the end.

Mr. Saferstein

That's the next panel.

I will get back to your question on the lobbying. Let me finish that up, by the way.

My understanding is, on the lobbying of Congress, what you will get, especially on the House of Representatives side, is a small — like the plaintiff in *Reeder-Simco*. That's my sense. They speak to the local representative. That's the sense of the person who would come in and the small business entrepreneurs — I think we were all surprised that the Eighth Circuit Court of Appeals affirmed that. It was a fairly large treble-damage verdict, on a pretty far-out theory in a lot of ways. Yet the Eighth Circuit Court of Appeals affirmed it.

So there is this body of people out there who believe it. I can't tell you who they are. I am not sure I could speculate. I'm not sure we would want to test it, but I guess we could.

On your point, the state law, there are a couple of things. One is, I think Barbara believes that the state laws maybe don't pose a big problem, because for years we have been talking about the threat of state laws, and not much happens.

I tend to think they are a bigger problem. We saw it in *Eddins v. Redstone*. *Eddins v. Redstone* is a recent California case involving a secret rebate. The secret-rebate provision is somewhat similar to but not identical to the Robinson-Patman Act.

It was similar to a case that some people may know about called the *Blockbuster* case, which was brought in Texas against the entire movie industry and Blockbuster for discriminatory pricing on the sales of VCRs and DVDs to mom-and-pops versus Blockbuster. They lost in the district court in Texas before they went to a jury, and the Fifth Circuit affirmed that. So they went to California and sued under California state law and the secret-rebate law, and the court of appeals has just given them a green light to go ahead on at least the secret-rebate portion of that case.

I think that's pretty frightening. The reason we worry about it is that at least those state laws are under cover right now because Robinson-Patman exists, and you have Robinson-Patman decisions which tend to give guidance to state court judges who are looking for something to look at. If you get rid of the Robinson-Patman Act, our notion is that you wouldn't have that body of decisions that would inform state court judges who are trying to decide cases under similar laws. They wouldn't have to follow it, but they might well.

So I think there is a genuine concern that if Congress can't stomach a strong preemption, you would have a real problem of dealing with fifty states.

I have talked too long. Let me hear some of my panelists on this. Jack?

Professor Kirkwood

Jonathan's and Richard's questions actually seem linked analytically. I will get to that in a moment.

To address yours first, my impression is that there is still significant small business support for the Act. You had both the independent grocery sector and the independent bookseller sector in. In addition, if you look at comments by the business groups, you had the Business Roundtable proposing repeal, but the U.S. Chamber of Commerce coming out for limited reforms, suggesting that their small business members pushed them against repeal.

In addition, I was told just this morning that there would be quite a fight if the Commission recommends repeal.

I suppose, though, to show the link between the two, if small business could not prevent a federal repeal, maybe there would not be much support at the state level. But I don't know.

Mr. Saferstein

Bruce?

Mr. Spiva

In terms of the state law question, I think the reason you don't see many of these cases under the federal law — the reason you don't now and the reason you wouldn't, even without the federal law, under state laws — is that they are expensive to bring, they are difficult to win, and the damages are not that great. I spent seven, eight years in the vineyard litigating the bookseller cases against both publishers and the chains. I was fortunate enough to work for an association that had the resources to pay for the litigation. I now have my own firm, where I do contingency-fee antitrust work. I would never take an RP case on a contingency-fee basis.

You are talking about small businesses. They have to prove their lost profits. They have a very rigorous — we hired Frank Fisher to do the analysis, and it still wasn't good enough for the judge in California. At the end of the day, even if it had been, we are talking about $8 million in damages. No contingency-fee lawyer is ever going to take that. And that's a big case. That's a big RP case. It would be a teeny Sherman Act case.

Mr. Saferstein

A question here. Give everybody your name for the record.

Albert A. Foer

Bert Foer, AAI. When Jon talks about modernization requiring repeal, modernization of an act passed on the basis of the power of chain stores — what has happened in the interim? It's the elephant in the room. We now have Wal-Mart. We now have big-box retailers that are different from the chain stores in many, many ways. This is where your political opposition is going to come from. You have small business, you have labor, you have environmentalists, you have consumers up in arms (although consumers have voted for Wal-Mart with their feet). There is a welling-up of concern about what you do in the future about Wal-Mart. Do we really want this?

I keep getting questions from the press and from all these other groups about what antitrust has to say about Wal-Mart. You can't answer that question without referring to Robinson-Patman or, perhaps, some new approach to interpreting the Sherman Act.

So I think there is kind of a requirement, if you are talking about modernization. How do you deal with this? Is there a question there? What does it mean? What are all the implications? Politically, what are the ramifications if you ignore it?

Mr. Saferstein

Anybody want to tackle that?

The only thing I can say is that I'm the only person who had the audacity to suggest in our ABA comments that if you were going to keep the Robinson-Patman Act, you might well want to strengthen the law with regard to buyer liability. Right now buyer liability for inducing price discrimination under Section 2(f) is effectively a dead letter. So the Wal-Marts might be complying with it for some other reason, but as a matter of liability, the likelihood that Wal-Mart can be hit with 2(f) is pretty low.

With the booksellers, you sued the buyers, right?

Mr. Spiva

We did both. We originally had suits against the publishers, the sellers, and the last suits were against Barnes & Noble and Borders.

Mr. Saferstein

Those are really tough suits, because you have to get through a double layer of proof. Those are really tough.

Mr. Spiva

I tend to agree. Also there is no 2(d) or 2(e) liability for buyers.

Mr. Saferstein

I forgot to mention, to Rich's question, the same secret-rebate law in California is one of the two counts in one of the biggest antitrust cases going right now, which is interesting, in the fight between AMD and Intel. AMD has sued Intel in the District of Delaware — O'Melveny on one side and Gibson Dunn on the other side, these giant law firms — for monopolization and attempted monopolization.

But the other count is for violation of the California secret-rebate law. They decided not to use the Robinson-Patman Act, for I don't know what reason, but it's a violation of the secret-rebate law of California.

Who has something that we haven't hit yet? How about 11? Any thoughts on this? Jack, do you want to add competitive injury to 2(d) and (e)?

Professor Kirkwood

Sure. This is a relatively easy one, because this would allow Congress to cut back the Act, while still preserving some protection for small business, some fairness and diversity values. It would simply impose on 2(d) and (e) the same competitive-injury test that is now under Section 2(a).

The appeal of this seemed obvious for all of us who recommended reforms. Both the Antitrust Section of the ABA and the Chamber of Commerce supported AAI in recommending this change. It also has the value of avoiding the distortion or disincentive effect created by the existing Robinson-Patman Act, which makes it more difficult for a plaintiff to sue for price discrimination than promotional discrimination. To put it the other way, it makes a seller more likely to be liable if it wants to reward dealers using promotional benefits rather than price. To equalize the competitive-injury test for both would avoid that distortion.

Mr. Saferstein

You also ought to go to number 10, since the AAI has its own proposal for a way to craft an injury-to-competition test that is not a full-blown rule-of-reason Sherman Act case, but is something more than the current *Morton Salt* presumption, right?

Professor Kirkwood

Actually, not quite. What we suggest is a power requirement, which fundamentally would require proof of buyer power, but also we would leave open the possibility that a plaintiff might prove market power on the part of the seller.

The point of these requirements is, one, to focus Robinson-Patman Act litigation on its original purpose – to combat the inducement of discriminatory advantages by power buyers and concessions to them by sellers; two, to reinvigorate the cost-justification defense. The test wouldn't be, as Harvey said, either monopoly power on the seller's part or single-firm monopsony power on the buyer's part, but the power of a seller to grant and the power of a buyer to induce a non-cost-justified discount. This is a statutory term, but it has not gotten serious attention by the courts since the FTC largely eviscerated the cost-justification defense. This would be a way of giving some spine to it.

Finally, it is connected to competitive injury. If there were a buyer-power test, you would get rid of the troubling consulting case that Professor Gavil had, and you are more likely, as he has pointed out in his own article, to have cases of systematic rather than sporadic discrimination. If you do have a powerful buyer present, you are more likely to have discrimination against a class of disfavored buyers.

Mr. Saferstein

Let me throw this question number 3 that we had up there. I know we have little time left. Do you think the FTC could do this, Professor? Irv Scher wants the FTC to take all these reforms and lead the charge, so to speak.

Professor Kirkwood

It would be possible for the FTC to do this through enforcement, but they have been massively disinclined to do that for a number of years. Hence, what is most realistic is simply for them to hold hearings and issue a report. But the Commission can do that as well.

Mr. Saferstein

We are almost at the end of our time. Any closing remarks? We have gotten through all our numbers. I appreciate all the help from the audience. Any parting shots from any of our panelists?

Mr. Spiva

I will just take one. I would not be in favor of — I appreciate where you are coming from. Already, under existing law, you have to show, even to get the *Morton Salt* inference, a substantial price difference over time, not some one-off thing. You have to show that it is not cost-justified. You have to show that it is not meeting competition. If you are doing a buyer suit, you have to further show that the buyer knew that it was not cost-justified, knew that it was not meeting competition, which almost requires direct evidence of malice, essentially, and —

Mr. Saferstein

You are here to say there are enough obstacles already.

Mr. Spiva

Yes, I think that's right. Also I do think these new tests — I don't know if you talked about this, the notion that the cost-justification defense would be kind of watered down. It would be almost impossible to administer, because it's very amorphous. What is a reasonable relationship? There is already the judicially created functional-discount defense, which, as Scalia said in *Hasbrouck*, is not in the Act. For those reasons, I wouldn't be in favor of any of these changes.

Mr. Saferstein

Thank you all, panelists. This was wonderful. I'm glad you all came here to hear how much fun the Robinson-Patman Act is. We have a Meg Ryan movie with it and the whole thing.

Thank you.

The Antitrust Modernization Commission at Mid-Course Symposium - June 8, 2006

Luncheon Presentation

J. Thomas Rosch
Federal Trade Commission

Robert T. Joseph

It gives me great pleasure to introduce our luncheon speaker, Commissioner Tom Rosch. Tom was sworn in as a Commissioner in January of this year. His appointment reflects extraordinary expertise and experience as a policy maker, litigator, counselor, and leader of the antitrust bar. As you may know, Tom was the Director of the FTC's Bureau of Consumer Protection from 1973 to 1975. He subsequently re-entered private practice, participating in every imaginable type of antitrust litigation and proceeding, including complex treble damage actions and merger matters, while doing extensive antitrust counseling.

I have had the pleasure of knowing Tom through my activities in the Section of Antitrust Law. When I was a much younger lawyer, I saw Tom work so effectively as a committee chair and then as a member of the Section's Council, as an officer, and then as the Section's chair in 1990-91. Throughout that time, he showed great vision, imagination, and an ability to lead, always appreciating the work performed by Section members on a volunteer basis.

He was recognized by the California Antitrust Section as the California Antitrust Lawyer of the Year a few years ago. I was pleased to offer my congratulations, which were read the evening Tom received the award.

This isn't the first time he has talked about this topic. At the 2003 annual meeting, I chaired a program on the Antitrust Modernization Commission. Nothing had been done yet. I think the act had been passed, and there was probably some talk about the nominations, but no funds had yet been appropriated. At that point, Tom shared his thoughts. I will be very interested, as all of us will be, to hear his further comments today.

Commissioner J. Thomas Rosch

Thanks so much, Bob. It's such a pleasure to be here. I see so many old friends. By "old" friends, I mean longtime friends.

I will say that what I am about to say is going to be very different from what I said in 2003, principally because my term is for seven years and I have six-and-a-half years before I can get fired. So I have somewhat more freedom to speak my mind than I had at that time.

What I would like to do is share some views with you, first of all, and then afterwards, to invite your comments and criticism. I think your comments will be very well-received by the members of the AMC who are here today. I don't want my remarks to just go by the wayside without comment, without criticism. So please feel free to weigh in or ask questions when I am finished.

First, though, I do need to expand the standard disclaimer that we all make- -to say that my remarks are my own and to emphasize that they not only do not reflect the views of any other Commissioner, but they don't reflect the views of any Commissioner, including me. That's because what I am going to say here is not only at odds with what I am absolutely certain are the views of several of my colleagues on the Commission, but also because I am not speaking as a Commissioner. I am speaking instead as an antitrust litigator for forty-plus years. Many of the things that I am going to say today are things that I said a decade-and-a-half ago at various Antitrust Section meetings, as well as NAAG, and I have been saying them ever since.

The things that I have to say about the federal and state law enforcement agencies also reflect my experience in dealing with those agencies as an outsider over the years, rather than as a Commissioner today.

This is not to say that I speak for any of the other graybeard antitrust litigators either — far from it. Many of them have at least as much antitrust expertise and experience as I do. Indeed, John Shenefield and Don Kempf, who are AMC Commissioners, were law school classmates of mine, and John Warden and I were summer law clerks together in L.A. back in 1964. Almost all of the other AMC Commissioners are folks with whom I have been co-counsel — Sandy Litvack on several occasions — or antitrust colleagues for many years. So even as a graybeard, I am speaking for myself.

The AMC. First, you have to count me as among the skeptics when the AMC was first formed. At that time, the powers that be in the Antitrust Section asked Jan McDavid, Bob Taylor and me to discuss at the ABA's Annual Meeting in San Francisco what the AMC should and would do. The list of "shoulds" was a lot longer than the list of "woulds." However, that was before the roster of Commissioners was announced. That roster is very distinguished and I think the Congress should and will take seriously its recommendations.

What Has Happened. More fundamentally, however, I think the three of us neglected the potential impact that the mere existence of the AMC could and would have. Let me be more specific. As some one who represented merger candidates before the DOJ or the FTC, I was one of the legion of critics about the process. Although it was clear that HHI numbers were not dispositive, the criteria that the agencies actually used in issuing second requests and initiating challenges were opaque. Second requests were sometimes enormously (and seemingly

inordinately) burdensome and expensive. The lack of settled merger clearance rules meant that it was hard to predict which agency would even review the matter. And there was a difference in the statutory standards for issuance of preliminary injunctions.

The agencies have tried to make the decision-making process more transparent through issuance of the Commentaries this Spring.[7] Chairman Majoras also announced limitations on some of the most burdensome aspects of Second Requests,[8] and I hope and trust that the DOJ will follow suit shortly. I think it would be wrong to say that these things wouldn't have occurred if the AMC were not in the wings, but there is little doubt in my mind that the AMC's presence hastened them.

Unfinished Business. There is of course unfinished business. The Chairman candidly told the AMC that because of a commitment that she made during her confirmation, she was not in a position to advocate a comprehensive merger clearance agreement between the agencies. But I'm not similarly handicapped. I think the AMC should certainly recommend to Congress that the agencies be mandated (or at least free) to enter into such an agreement. I say "the agencies" instead of Congress both because I would hate to see the division of responsibility become a political football and because I thought the agencies got things pretty right the last time and I think they'll do as well or better this time. (Personally, I think certain core industries should remain with each agency, but for the vast majority of cases, there should be a system for doling them out that can't be gamed; for example, odd numbers to DOJ; even numbers to the FTC.)

Also, although I think the difference in the statutory standards for preliminary injunctions is way overblown - I defy anyone who read the *Arch Coal* decision[9] to identify any daylight between the way the Pipeline Act[10] standard is currently being applied and the way the federal courts are applying the standard in cases brought by DOJ - the AMC appears disposed to recommend that the standards be made uniform. I don't disagree with that. However, in choosing the uniform standard, I think there is at least as good an argument for adopting the Pipeline standard as there is for adopting the DOJ standard. The Pipeline standard is the more recent standard; it is merger-specific; and as far as I can tell, it hasn't resulted in the antitrust screen being too fine.

Similarly, I think the perceived difference between DOJ and FTC enforcement posed by the possibility that the FTC will initiate administrative proceedings after a federal court denies a preliminary injunction is mostly theoretical. The FTC hasn't done that for more than 15 years

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[7] Fed. Trade Comm'n and U.S. Dept. Of Justice Commentary on the Horizontal Merger Guidelines (Mar. 2006), <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>

[8] Reforms to the Merger Review Process, Announcement by Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Feb. 16, 2006, <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>.

[9] *FTC v. Arch Coal, Inc.*, 329 F.Supp. 2d 109 (D.D.C. 2004).

[10] Trans-Alaska Pipeline Act, Pub. L. No. 93-153, 87 Stat. 576 (1973), codified as Federal Trade Commission Act, §13(b), 15 U.S.C. § 53(b) (1988).

(the *Donnelley* case in 1990 was the last time),[11] and I see no real threat that it will do it in the future, absent extraordinary circumstances B for example, where a court decision is obviously a home town decision (think certain courts in South Texas or Madison County, Illinois). I think it would be a mistake to strip the Commission of the power to send matters to Part 3 if those extraordinary circumstances exist.

You will note that I left off my list of merger process reforms the elimination of the FTC as a merger law enforcement agency. I was frankly surprised that there were *any* votes to do that in the AMC's straw poll - again, not because I'm a Commissioner but because the two-federal agency model was thoroughly debated in the late 80s by the ABA Antitrust Section Task Forces studying the FTC and DOJ. The difference was that at that time the issue was whether *DOJ*, not the FTC, ought to be eliminated as the agency with responsibility for merger enforcement (with DOJ retaining exclusive jurisdiction over criminal cartel enforcement). The arguments for making that change were pretty compelling. The FTC is the closest thing to a specialized antitrust agency that we have (for example, the current five FTC Commissioners collectively have nearly a century of antitrust experience among them). The various antitrust studies that the FTC conducts for the Congress uniquely inform its antitrust enforcement activities. And the Commission's antitrust and consumer protection missions have a symbiotic relationship that unites them. Indeed, I shudder to think of any consumer protection law enforcement agency that is not tethered to free market considerations.

I can't think of any similarly compelling reasons for making DOJ the exclusive merger law enforcement agency. To be sure, some AMC members may feel their clients have been burned by the FTC. But I can guarantee you that the client in the last big merger case that Dan Wall, Greg Lindstrom and I tried felt the same way about DOJ. At all events, as the Chairman said in her AMC testimony, the dual enforcement system at the federal level has stood the test of time. The ABA Task Forces concluded, as I think the AMC should, that that system should be preserved (though improved in the ways I've previously described).

Tripartite Law Enforcement. I don't feel the same way about the current tripartite system of merger law enforcement - or about the current tripartite system of *antitrust* law enforcement more generally - in which the states and private parties, as well as the federal agencies, are the enforcers. There is no doubt there is currently warrant for this system. Since *California v. American Stores Co.*[12] was decided by the Supreme Court in 1990, the states and private parties have had the undisputed right to obtain divestiture remedies in merger cases, notwithstanding decisions by the federal agencies that that relief was unwise or at least unnecessary. And the Clayton Act specifically provides states and private parties with the right to recover treble damages (plus attorney's fees) when they win Sherman and Clayton Act cases.

At best, this tripartite system of antitrust enforcement has the potential to produce conflicting case law. At worst, it can produce bad case law and/or bad case outcomes because the incentives of private enforcers - and sometimes State AGs - are not aligned with the incentives of federal

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[11] *In the Matter of R.R. Donnelley & Sons Co.*, 120 F.T.C 36 (Docket No. 9243; Complaint, Oct. 11, 1990; Final Order, July 21, 1995).

[12] 495 U.S. 271 (1990).

enforcers. Private plaintiffs (or their attorneys) are sometimes more investors than anything else. Indeed, the recent indictments in the *Milberg, Weiss* cases raise doubts about whether attorney and client are not *de facto* one and the same in class actions. And, as my friend and predecessor, Tom Leary, has pointed out, because notice and an opportunity to opt out are not given until late in the class action process, class action attorneys are the real decision makers in class action litigation in any event.[13]

Whether or not one agrees with Judge Posner about the shortcomings of state antitrust expertise, human beings (and their ambitions) being what they are, political considerations cannot help but play a bigger role in state merger (and other antitrust cases) than they do in federal agency cases because State AGs are generally more involved in antitrust prosecutorial decision-making than is the Attorney General of the United States. (Indeed, since at least the days of Rita Beard and Earl Butz, the AAG-Antitrust at DOJ and FTC Commissioners have taken special care to make their decisions independently.)

The unfortunate results of the current tripartite system of antitrust law enforcement are more evident in private cases than they are in state cases (mainly because the states have lost most of the merger cases they've brought independent of the federal agencies).[14] Time and again private treble damage cases have gone off the rails, and the Supreme Court has had to put things right in *Monsanto*,[15] *Sharp*,[16] *ARCO*[17] and *Kahn*[18] with respect to vertical restraints; in *Spectrum Sports*,[19] *Brooke Group*,[20] and *Trinko*[21] with respect to single-firm conduct; in *Brunswick*[22] and

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[13] *See* Thomas B. Leary, The FTC and Class Actions, Remarks Before The Class Action Litigation Summit, Washington, D.C., June 26, 2003, <http://www.ftc.gov/speeches/leary/classactionsummit.htm>.

[14] Merger cases lost by the states include: *California v. Sutter Health*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001); *The Bon Ton Stores Inc. v. The May Department Stores Co.*, 881 F.Supp. 860 (W.D.N.Y. 1994); *New York v. Kraft General Foods*, 862 F. Supp. 1030 (S.D.N.Y. 1993); *Pennsylvania v. Russell Stover Candies, Inc.*, 1993-1 Trade Cas. (CCH) & 70,224 (1993 E.D. Pa); *State of Cal. ex. rel. Van de Kamp v. Texaco*, 46 Cal. 3d 1147 (1988); and *Texas v. Coca Cola Bottling Co.*, 697 S.W. 2d 677 (Tex. Ct. App. 1985).

[15] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

[16] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

[17] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

[18] *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

[19] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993).

[20] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[21] *Verizon Communications Inc. v. Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

[22] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

Monfort[23] with respect to mergers; and more recently in *Dagher*,[24] *Volvo*[25] and *Independent Ink*[26] with respect to joint ventures, price discrimination and tying.

The most recent example, in my mind, is *Twombly v. Bell Atlantic Corp*.[27] The core conduct alleged in that case is parallel conduct by competitors, which the case law says is benign standing alone. There must be "plus factors" to support a conspiracy claim. Under the Federal Rules - and under Supreme Court cases like *Rex Hospital*[28] and *Leatherman*[29] - those plus factors should be pleaded with sufficient specificity to put the defendant on notice of the issues to be litigated. This is not just legalese. In *Associated General Contractors*,[30] the Supreme Court noted that in an antitrust case "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed."[31] The burden and expense involved in litigating such a "massive factual controversy" can be a tax on defendants that may be passed on to consumers. So it is very important that the pleading standards be high enough to prevent that tax from being levied when it's not warranted. The pleading standard imposed in *Twombly* seems to me to require no real specificity in the factual allegations in a parallel conduct case.

What to do about this? For one thing, I think the DOJ and FTC must speak out more loudly and clearly in private antitrust litigation cases that the agencies consider have gone awry. The agencies filed amicus briefs in *Dagher, Volvo* and *Independent Ink*. I hope they are invited by the Court to make a recommendation in *Twombly*. Beyond that, I think the agencies should consider filing such briefs in private litigation in the federal circuit courts, where most antitrust jurisprudence is developed. Sure, it takes resources. But it is critically important that antitrust law not be a patchwork quilt. More fundamentally, I urge the AMC to take a close look at HR 5253, which is the House's price-gouging bill.[32] There is much to be debated in that bill but one

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[23] *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

[24] *Texaco v. Dagher*, 126 S.Ct. 1276 (2006).

[25] *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006).

[26] *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281 (2006).

[27] 425 F.3d 99 (2d Cir. 2005).

[28] *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976).

[29] *Charlene Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

[30] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

[31] *Id.* at 528, n.17; *see also id. at* 544.

[32] Federal Energy Price Protection Act of 2006, H.R. 5253, 109th Cong. (2006).

of its provisions would give the FTC the right to intervene - not just to speak as amicus - but to *intervene* in federal price-gouging litigation brought by State AGs. If state and private party authority to challenge mergers is not curtailed, I think federal intervention authority in cases brought by the states or private parties is essential in the long run if our tri-partite system is to operate uniformly, as I think it should and indeed must.

Treble Damage Class Actions. Finally, let me say a few words about treble damage class actions. In the real world, they are almost as scandalous as the price-fixing cartels that are generally at issue in the cases. The plaintiffs' lawyers who play in this game are big time investors, and they stand to win almost regardless of the merits of the case. Class certification has become routine - in all but a few cases, the views of economists challenging assurances that there is commonality of impact are dismissed as going to the merits instead of the viability of class certification; commonality of impact is found even when prices are arrived at through negotiations and without regard to list prices; and the federal appellate courts have largely ignored the revisions of Rule 23 that were designed to provide for appellate review of errant district court certifications. Confronted by class certification, it takes a very brave - or foolish - defendant to take a case to trial. For example, in 1999, I had an indemnified client go to trial with four defendants that weren't indemnified. Those four were literally betting billions of dollars that a Chicago jury would do the right thing. There was little doubt about the lack of merit in that case. After 8 weeks of trial, the judge granted judgment as a matter of law. But I know first-hand how good an extortionate settlement looked during trial to those who were not indemnified, and I just thanked my lucky stars I wasn't representing one of them.

Today the multitude of Illinois Brick Repealers magnifies the burdens, expense, and in terrorem effect of this kind of litigation. Fifteen years ago, I said that both *Hanover Shoe*[33] and *Illinois Brick*[34] ought to be repealed so that at least *federal* treble damage actions by direct and indirect purchasers could be consolidated in one federal court, the total damages determined, and then that sum could be apportioned among direct and indirect purchasers. A couple of years later I said I thought that legislative change should pre-empt state Illinois Brick Repealers so that federal reforms would not be gutted by state litigation. I was a voice in the wilderness then, but let me say it again. If the AMC does nothing else, it should recommend this fundamental reform. That will not cure all that ails the treble damage class action. However, it would be a good start. And if the AMC were to recommend further revision of Rule 23 to ensure that federal appellate courts act as meaningful gatekeepers to class certification, I think that might just do the trick.

Conclusion. I want to thank the Antitrust Section for inviting me today and the AMC for listening. I know I'm here because it was thought that I would wear my Commissioner's hat and I regret that misimpression. But I greatly welcome the chance to speak to the AMC no matter what the circumstances. I've had the pleasure of practicing antitrust law my entire working life. I have loved every minute of it, and I want to do everything in my power to see that it is well served.

Questions or comments?

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[33] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

[34] *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Participant

I have a question for you. You were talking about the state role. You did not mention anything about confining the states to particular types of cases, like those that have intrastate effects, or preventing the states from getting into mergers that have national implications. Would you like to comment on those? Have you thought about those as ideas?

Commissioner Rosch

One of the earliest state AG merger challenges was against a merger by Texaco. It was initially brought out in California, in California state court, under a California statute. The California Supreme Court held at the time that the California statute did not allow for merger challenges by private parties — or by the state attorney general, for that matter. I believe that is the case in many states today. I don't think that is necessarily the case in New York, but I know in a lot of states that's the case.

I think, as a practical matter, if the state AGs were not in the game on the federal level, they wouldn't be in the game much at all. I think that's the realistic end result.

Participant

Tom, since you are being so shy and opaque about your views on this thing, what do you think of the Robinson-Patman Act?

Commissioner Rosch

Frankly, I thought the Robinson-Patman Act had been taken care of, in very large measure, by the *Volvo* decision. But I think there is arguably more to be done in that area.

My own view has always been that just simply interpreting the Act — and, more specifically, the injury-to-competition provision in the Act — in a fashion that focuses on whether there is going to be real injury to competition or whether the allegedly injured buyer could go elsewhere to buy the products — so that there was real vigorous interbrand competition on the sell side, upstream — that would pretty much take care of any problems.

In the District of Columbia Circuit, that is the law. It is not the law in the Ninth Circuit or in some other circuits.

I think, at the very least, the Supreme Court is going to have to grapple with and resolve that issue. If it resolves it in the right way, quite frankly, I don't know that I would have that much quarrel with the RP Act. But unless and until it does, I can't quarrel with the recommendation in the straw vote the other day, which was pretty overwhelming, that the AMC, at least, recommend repeal.

I will say this. I think as a political matter, it's very doubtful that that is going to happen, just as I think of a lot of the things that I said today are going to happen.

Participant

Tom, that was really one of the finest antitrust cover-the-waterfront statements that I have heard.

We agree that a screening device for private actions is a good idea. But why would you do it on the pleadings? We know that federal judges have caught on, and they are throwing these cases out more quickly on motions (for summary judgment?)—Bob?. If you try to do it on the pleadings, all that will happen is that lawyers for the plaintiff will simply plead plus factors, and it won't get you anywhere. Why should the emphasis ever be on the validity of the case based on the pleadings?

Commissioner Rosch

Two reasons come to my mind. The major one is just the massive amount of discovery that occurs post-pleading and before summary judgment. If you don't have a screen at the pleadings point, and a meaningful screen at that point, you can take it to the bank that both parties, particularly a defendant in a class action, are going to be spending an enormous amount of money in discovery before the issue is really teed up.

Secondly, I think you have to draw a distinction — or at least I do, in my own mind — between a case like *Twombly* and a lot of other antitrust cases. In that context — that is to say, where parallel conduct is teed up — it is really the plus factors that matter. That is the ground for litigation. If the plus factor, for example, is allegedly a series of meetings that were held by the defendants on or about the time that they started engaging in parallel conduct, the defendants should be put on notice that that is what is going to be litigated in the case. If it is that the defendants are acting contrary to their own self-interest in acting in parallel fashion, that is something that ought to be pleaded up front, so that the defendants are put on notice that that is what is going to be litigated in the case.

To my way of thinking, simply pleading parallel conduct, which is what the Second Circuit essentially said was enough, is a little bit like saying it's enough to allege that car A entered an intersection at the same time that car B did, and there was a wreck — plaintiff being car A, defendant being car B. In and of itself, the conduct of the defendant that is pleaded is perfectly benign. Something else has to be pleaded in order to put the defendant on notice as to what the fair ground for litigation is.

That's the best I can do.

Participant

I have a question about political reality. What would you like to see come out of the Commission? How much should the Commission take into account the concerns that some of us have about Congress' capability to deal with some of these issues?

Commissioner Rosch

Frankly, that's why I am not speaking as a Commissioner. [Laughter]

That's all I'm going to say about it, too.

Mr. Joseph

Thank you, Tom, very much for your thoughtful comments.

The Antitrust Modernization Commission at Mid-Course Symposium - Thursday, June 8, 2006

Merger Enforcement – Substantive Issues

Moderator:

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Davis Polk & Wardwell
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Panelists:

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Robert T. Joseph

We turn this afternoon to mergers. Our first panel is "Merger Enforcement — Substantive Issues." It is moderated by Ronan Harty.

Ronan is a member of Davis Polk & Wardwell's litigation department. He has provided general antitrust counseling to U.S. and non-U.S. companies in connection with mergers, acquisitions, and other antitrust matters. Ronan has extensive merger experience and has been part of Section of Antitrust Law working groups and task forces preparing comments for the AMC and for other governmental bodies in connection with merger law and policy.

Jan McDavid is a partner at Hogan & Hartson LLP here in Washington. Jan has had extensive experience as an antitrust litigator and in counseling, and has handled some of the largest merger

transactions in the last few years. Jan served as Chair of the Section of Antitrust Law and, in her capacity as Chair, was responsible for leading Section comments in a number of important areas, including those involving mergers.

Carl Shapiro is a professor of economics at the Haas School of Business, the University of California at Berkeley. Carl served as economic deputy assistant attorney general at the Antitrust Division. He has written extensively on merger matters and other major industrial organization issues.

Bert Foer is the president of the American Antitrust Institute here in Washington, D.C. Bert previously served with the Federal Trade Commission as an assistant director, has had extensive merger experience, and has commented frequently on major antitrust issues. As you have seen from our previous programs, the AAI has submitted comments on a number of issues before the Antitrust Modernization Commission, and Bert has taken the lead in putting its working groups together.

We have a substitute this afternoon, Lee Greenfield from WilmerHale. Lee is pinch-hitting for Bill Kolasky, who, because of an unavoidable conflict, could not make our program. Lee has also had extensive experience in mergers reviews, litigation and counseling. He has taught comparative U.S. and E.U. competition law at Georgetown.

Ronan P. Harty

Bob, thanks very much.

Mergers seem to be one of those topics that always are part of any antitrust seminar or discussion. As we will see, it was included as a recommended AMC study topic by almost all of the public commentators.

That may be a little bit at odds with what happened at the Commission, as we will see. The AMC chose to divide its treatment of mergers into three broad buckets:

• One was the overall effectiveness of merger policy in the United States, including an examination of the Merger Guidelines.

• Two, efficiencies. Are those treated correctly in the courts, in the agencies? Is there anything that needs to be addressed there?

• Third, the bucket of procedural nuts-and-bolts issues — second requests, Hart-Scott issues, which is the subject of the panel following this.

Our panel will address the first two areas.

In inviting public comment, the Commission, as it did with the other topics, put out a paper to indicate to the public what topics they would like comments on. The overall effectiveness of merger policy was phrased in terms of, "Has merger policy been effective in ensuring competitive markets, without hampering firms' ability to operate efficiently and compete globally?" Suggested issues that people were asked to address were, for example:

• Has the government erred in allowing certain mergers?

• Has there been over- or under-enforcement?

• Were decisions for relief sound?

Focusing more particularly on the Merger Guidelines, the AMC was interested in views on:

• Whether, in fact, they accurately reflect practices at the agencies.

• Are any changes warranted?

• Is the transparency of the process sufficient?

On efficiencies, again, the focus was on whether they are given adequate treatment, given proper treatment in the courts and the agencies. There, the focus was on, for example:

• Ought there to be a different treatment of fixed cost efficiencies, or efficiencies associated with innovation?

• The burden of proof in proving efficiencies, where ought that to lie appropriately? Is it correctly applied today?

A topic which occupied a significant amount of time in the discussion at the Commission was the appropriate welfare standard: Should it be consumer welfare, total welfare, or some other standard?

The first of the AMC merger hearings was held in November on the effectiveness of merger policy. We have, obviously, a very impressive lineup, as in the efficiencies discussion. That was followed with an excellent presentation in January, the economists roundtable, which was described in detail this morning. Then, although not specifically on the topic of mergers, the heads of FTC and DOJ addressed the Commission in March and, among other topics, had some thoughts on mergers.

The merger topic drew the second-largest number of comments with approximately seventeen bodies commentating.

In the debate at the Commission, when I was going through the record, the one thing that comes across very, very clearly is that there appeared to be very little criticism of the framework of the current system — not only very little criticism, but very positive comments overall. One of the Commissioners commented that we seem to be in, quote, “a certain stable, golden age of intellectual clarity about antitrust.”

There was agreement that transparency was vital to the process. There was significant discussion, which we will get to later, that, although we as antitrust practitioners may feel that everything is just about right, that is not necessarily the case if you read the editorials or watch the news shows, where people may be commenting that merger policy is either too lax or too stringent. Is there anything that the Commission could do to address this gap in public perception — although it was acknowledged that without a study, an extensive and reliable study, that may be something that is very difficult to do.

The possible recommendations that were debated included the recommendation for such a study. There it was noted that there could be confidentiality issues in terms of getting access to information which might need for such a study, and ought that to be addressed in any recommendation that the Commission would make?

An analysis of the effectiveness of consent decrees was also given some consideration.

The focus on transparency — there was particular comment that this is clearly a vital issue and, for example, in the economic studies that the agencies engage in, perhaps there is less transparency in that arena than there is in others. The additional point that was noted was the consideration of a court-appointed expert in complex merger cases, which would probably be most merger cases.

On the Merger Guidelines, there appeared to be general agreement that the framework was a good framework and was not in need of any fundamental overhaul. The panelists and Commissioners noted that there was increasing judicial acceptance of the Guidelines, that the analytical methodology has been imported and used in the international sphere on an increasingly frequent basis. While market definition was discussed, particularly in the economists panel, it was felt, by the majority at least, that it was important to retain that as an analytical tool, even where direct evidence of competitive harm might be shown.

In this area, possible actions were:

• Clarification.

• One suggestion was the elimination of the unilateral effects Section in the guidelines, which we will address.

• Again, a possible study on the issue of concentration, to more precisely fix the levels of concentration where antitrust should intervene in mergers;

• Clarification of the entry analysis, because not all entrants are created equal, it was noted, and depending upon who the entrant was, what their prior experience was, the weight that you might give to entry could differ.

• A harder look at countervailing buyer power was also put out there as a possible topic, as was — I think we mentioned this this morning — whether it was appropriate or not appropriate to use the Guidelines' methodology for market definition in other antitrust cases, in particular Section 2 cases.

On efficiencies, the representatives of the agencies who testified were clear that they do give serious consideration to efficiencies, that they are reviewed in detail, and that they must, obviously, be cognizable and merger-specific, as set forth in the Guidelines. There was debate on the pass-on requirement, which we will touch on, the burden of proof, and the extent to which non-marginal cost-reducing efficiencies should be given credit.

In the discussion of R&D efficiencies, while there was consensus that those could be important efficiencies, there was no consensus as to whether they should, or even could, be measured appropriately.

Possible actions:

• Specific affirmation of the consumer-welfare standard.

• A clarification of the treatment in the Guidelines of R&D efficiencies or fixed cost savings.

Subsequent to the hearings, there was the issuance, at the end of March, by the DOJ and the FTC of the Merger Guidelines commentary. That we will try to address, and whether that takes account of some of the criticisms or the issues that were discussed at the AMC.

Unlike a number of the other topics that we have had so far, the Commission has not yet had its deliberations on mergers. That is scheduled for Friday of next week.

That brings us to our panel. By the way, similar to the Robinson-Patman panel, I would invite questions at any point as we are going through this, as we discuss the topics.

Let me ask the panel this. We noted the comment on this, the golden age of antitrust and intellectual clarity. It did appear that virtually all participants expressed a large degree of satisfaction with the current structure and effectiveness of merger policy. I would just ask each of you whether you agree with that position. Is that too complacent a position? What implications does that have for the recommendations that the AMC should or should not make?

Jan?

Janet L. McDavid

Thank you, Ronan. It's nice to see so many friends in the audience.

I think one of the things on which there is a remarkable level of consensus within the antitrust community is that the framework established for the analysis of mergers under the Guidelines is extraordinarily useful and provides a principled way for us all to review the competitive issues that are involved in a transaction. The recent Commentary clarified a number of the things that have been dirty little secrets inside the beltway for a long time, such as that the 1,800 number really didn't mean very much. But the reality is that, but for that kind of debate, which is pretty much niggling around the edges, I think there is a very broad consensus — and it has been adopted through things like the framework that is used in the European Commission for the evaluation of horizontal mergers, the Canadian guidelines, the best practices and standards coming out of the ICN — that the framework that was established with the guidelines under Bill Baxter is an extraordinarily useful and flexible tool for the analysis of mergers.

We can all disagree about whether they have been appropriately applied in any particular transaction. Sometimes the counsel and the parties know things that the public doesn't know. Sometimes the staff knows things that the parties don't know. So none of us are playing with an entirely full deck — perhaps, except the staff. But the reality is, I think there is broad and appropriate consensus on the framework for analysis.

Carl Shapiro

I agree. And "framework" is the key word there. The Guidelines have held up well and were lauded, as Steve Calkins mentioned earlier. However, from my perspective, it would actually be a good idea if they were enforced.

The framework is great. When I went, on the GE-Honeywell case, over to Brussels, and ultimately to Luxembourg, you really could tell there was a difference there. That framework was not the one they were using. There was a whole different view on efficiencies and price reductions and a lot of stuff.

So we get a lot from having that framework. We have had it for a while, I guess, going back to 1982, and more so after 1992.

But it's not niggling around the edges when you have a merger — look at the mergers that are going through these days. If you have a merger that is 50 percent and 20 percent shares, that is raising the Herfindahl from 3,000 to 5,000, and that is sailing through, well, maybe they should change the guidelines to reflect the enforcement practice.

So I just want to distinguish framework from merger enforcement at this time.

Mr. Harty

Bert?

Albert A. Foer

I agree that the framework, in a very general sense, is very workable. There has not been a debate yet at the AMC, so we don't know what they are going to say. But I think we can predict, based on the selection of the witnesses, primarily, and the general trend of things, that they will determine that everything is pretty much hunky-dory.

It is not as if everybody is in agreement with that outcome. The AAI's submission questioned a number of the aspects of merger policy that don't seem to be getting discussed by the AMC. To name several:

• The deviation from the incipiency intent of the statue, which I guess you can see in the movement from policy favoring, essentially, five strong competitors to where we now challenge almost only three-to-two and two-to-one mergers. This is a huge change. We should talk about whether it's justified.

• Another issue is the general policy of assuming that significant efficiencies are there, even in the largest mergers, and basing our entire policy on that presumption of efficiency.

• Policy recognizes that potential entry to reduce concentration is okay, but seems not to be concerned about eliminating potential entrants by way of merger.

• Finally — and maybe it's most important — I think there is an overemphasis on short-term price increases as the test, at the expense of choice and innovation in the longer run.

Let me just say one last word on that. The European Article 82 discussions (not about mergers) made a very interesting statement that I think is critical to some of the distinctions between U.S. and European policy right now. They said, "We are going to focus on the short term. We are also going to focus on the middle term and long term, and consider them very important." I think that in the United States we are pretty much at the point where we are only looking at the short term.

Lee Greenfield

If we are talking about fundamental reform, the answer is there isn't a need for fundamental reform. I particularly think, when one juxtaposes in the merger area the substantive issues against the process issues, when focusing on reform in the merger area, I think much more fundamental reform is needed in the process area. But that will be the subject for later today.

That having been said, this is not an area where there is no work that needs to be done. To reel off a few areas, I think we need a lot more thinking on efficiencies and the role they play in the analysis. Going to what Bert said, I think it's a very good question, whether we have moved too much away from a focus of concentration in merger analysis and whether that has hurt transparency and led to too much micro focus on the facts and not enough predictability.

Another area that I think has not gotten as much attention in any kind of formal guideline sense is the vertical area. We haven't looked at vertical rules since the 1984 Merger Guidelines, and those are pretty far out of date. We talk a lot about horizontal mergers, but I think there is a lot less predictability and consensus around vertical principles.

One point I would like to make, though, is that I think, compared to some of the other areas of antitrust law, there has been a fairly steady ship, in my view, over the last few decades, between administrations. There have been differences in enforcement policies, but I think, compared to a number of the areas, there has been more consensus in this area between administrations. Maybe that says something about the fact that, in a general sense, things are working.

Mr. Harty

Bert, in other contexts, I have seen you referring to the AMC as having lost certain opportunities. I wonder if you might expand on that, particularly in relation to the merger area. From your perspective, was there anything that the AMC contributed in the way of empirical information which suggests that particular changes should be recommended in the area of mergers?

Mr. Foer

I think it will prove to be a lost opportunity when it's all finished and done with. What I mean by that is that I really think they should have started with the big questions and with empirical evidence to determine what needs to be modernized. First of all, what has changed? We got into this a couple of hours ago with the question about Wal-Mart. What has changed in our economy and in our polity that requires antitrust to be modernized?

Here I think we could have done something like the National Temporary Economic Council of the 1930s, which really produced a baseline of evidence and information that gave everyone the

idea of where we are and established the idea that concentration is a really important issue and needs to be dealt with. The AMC is not taking that approach.

It seems to me that we are going through a period now — and we have been going through it — in which there has been a revolution of presumptions. In particular, the presumptions that have changed involve efficiency and concentration. So here's an area, critically important, where you would want empirical evidence on the nature and impact of these changes — not over two years, but over a generation. The AMC is not doing that type of analysis.

Which leads to the question: What are the appropriate presumptions? If you are not going to have clear empirical evidence, then what's the appropriate default? Shouldn't the default just be the statute as it exists, a statute that emphasizes incipiency in the case of mergers?

What I think the problem is here is too narrow a grouping of inputs. For instance, the Commission itself, by act of Congress and the White House, is a highly talented body of experts, no question about it. But they are not highly diverse in their backgrounds. That means that when the debates take place, you don't have a tremendous clash on basic issues. We had a wonderful argument yesterday, as Steve Calkins outlined, on some very technical issues, but I don't think we are going to have that on the really big questions.

Where, for example, talking about mergers, was Michael Porter, a man that is enormously respected, consulted by everybody, and has said a number of things about mergers that — everybody is smiling; maybe Michael Porter is in the house.

Participant

We invited him. He didn't come.

Mr. Foer

I can't get him to answer my telephone calls either.

But Michael Porter does stand for something very important and is just an example of a well-informed viewpoint that has not been heard.

Ronan, you also asked me about empirical information. My answer to that would be that the AMC has really not produced empirical information. I could go through a series of questions that I think ought to have been answered, but I have been talking for a long time, and I think I will stop right now.

Mr. Harty

Let me just stick to the issue of empirical information. We heard this morning that the Commission had received a number of recommendations, including from Hew Pate, that a starting point would be that a larger study be conducted on the effectiveness of merger policy. That was, for a variety of reasons, rejected by the Commission, although they did seem, in the hearings, to be favorably disposed toward recommending that such a study be conducted.

Carl, let me ask you, would you agree with that recommendation? And please, give us a sense, if you can, of how such a study would be constructed and executed.

Professor Shapiro

It's very difficult for an academic not to be interested in doing a study. But I think, as Steve Calkins mentioned this morning, there's a little conundrum there. The Commission was asked to study things, not necessarily asked to call for more studies of things.

What I think we most want to know is probably two things. One is, what about this concentration? Does going from 1,500 to 2,000 matter? We can't really see that? Does going from 2,000 to 4,000 matter? It seems a lot more likely. In which industries? We don't have a clear answer on that. That's one thing.

But I think the more practical thing to do is what they did in the U.K., actually. The OFT did a study looking at mergers that were seriously looked at — in fact, they were equivalent to our second request — but went through, and did an *ex post* review to see if something bad happened, in the ones that were on the margin but went through. They did a survey/customer-interview methodology, and they didn't find any dramatic problems that had arisen. They looked at about twenty-eight mergers, if I remember. I'm not sure of that number — in the dozens, though.

I would like to see that done, either by academics or by the agencies. The FTC has a great tradition of doing studies and holding hearings. I think that is a focused thing that could be done, particularly now. From the academic point of view, we are getting data we never used to get. We are getting all sorts of mergers, highly concentrating, that used to be prevented that are now going through. So this is a wonderful opportunity to study what the effect is going to be. I'm not too happy about the experiment, but we do have that.

There are a lot of studies out there. I don't think the AMC should call for one, really. I don't mind if they do. The FTC had a roundtable on merger enforcement back in 2002. There is quite a bit of stuff referred to there. There is a substantial economic literature here, too. I can give people cites.

So this is something where I think academia is doing what we can. I don't think you are going to use subpoena power to do these studies. I don't know that you would want to. So I think we don't need to call for that, but we should encourage it.

Ms. McDavid

The FTC has done that, as Carl said. They have actually gone back and even published retrospective analyses of consummated transactions and asked "Did we get it right?" Were the effects as we expected? I think it's some of the most interesting work that the Bureau of Economics has done.

But then we also have industry-wide studies, such as the — over and over — oil industry studies. The FTC gets forced to look at the oil industry every time gasoline prices go up, and they find the same sorts of things.

But again, the exercise is extremely useful in terms of informing decision makers, policymakers, and the public about what is the reality of antitrust enforcement. Now, when we fill up our cars, we may not believe the FTC's view that oil company mergers didn't result in this price increase. I think the FTC studies have actually been principled and extremely careful and thoughtfully done, and are right. But I do bring a certain bias, having merged Mobil and Exxon.

Professor Shapiro

Single-handedly.

Ms. McDavid

Not single-handedly. Deb Garza helped me.

I think that is an extraordinarily useful thing to do. It really has to be done by the agencies, because the data that are necessary for this are confidential, and they are within the agencies. They know what they were told. They know what the expectations were. They are uniquely qualified to do these kinds of retrospectives. They don't have a lot of extra resources to do that. The FTC seems to be able to do it, perhaps, more, but that's because it was always part of their mission, to step back and think about whether things are going in the right direction and what policy should be.

But I would encourage them to do more of that. I think, perhaps, they are better equipped to do it than the Commission is, which is extremely thinly funded and on a very short string in terms of the time that is available to them to produce a remarkable piece of work.

Professor Shapiro

Part of the literature that I think is worth mentioning is a large finance literature on the effects of stock prices of mergers and so on and so forth, relating to performance and efficiencies. There is a lot of evidence that acquiring companies really hope for, and apparently honestly expect, to achieve lots of synergies — far more than they actually do. So I think there is a solid literature on that. That is worth bearing in mind when we talk about efficiencies later.

Mr. Harty

Let me just stay with the oil industry for just a moment. We have all heard from time to time, as various crises occur, for special merger rules in particular industries to address particular situations. The oil industry is obviously one that most recently comes to mind. There is a bill in Congress on that issue. There seemed to be a consensus at the Commission that no such special rules are needed, or indeed should be in place.

Jan, I just wonder, would you agree with that? If so, should one of the things that the Commission does be to affirmatively come out and say so?

Ms. McDavid

I do agree with that. Bob Pitofsky is in the audience. Bob and I served on a Defense Industry Task Force in 1993 to study whether the antitrust laws and the Merger Guidelines were

sufficiently flexible to handle the fact that we had won the Cold War, that we now had extraordinary excess capacity in our defense industry and we needed to rationalize it in some ways. I believe that the Defense Department expected us to come forward with a recommendation that would say, "As long as the Defense Department says a merger is okay, it should be fine. Don't worry about this antitrust stuff." I represent a large defense contractor, and at the beginning of that relationship, the vice chairman of the company said, "Antitrust laws? Are you kidding? This is the defense industry."

We ended up recommending, as part of our Task Force report — a work product that I think Bob and I are both proud of — that the antitrust laws and the Merger Guidelines were sufficiently flexible to take into account the unique characteristics of the defense industry, that there are lots of opportunity to consider a range of different things in the industry, and that mere presumptions in Herfindahls aren't outcome-determinative because you need to consider other elements of the competitive effects analysis. That's where we came out.

The process that we established as part of that Task Force, I think, has, until very recently, worked well. Now it has broken down, largely as a result of personnel changes inside the Pentagon, not at the agencies. The antitrust agencies are doing what they were supposed to do under the report as we wrote it.

That was my first experience with the notion of special rules for special industries. We said then it wasn't necessary, and I think it's not necessary for the oil industry. The reality is, as the FTC's reports show, concentration levels in the oil industry are far lower than the average person on the street would think when they fill up their gas tank at, as I do, $3.50 a gallon. Whatever is happening is being driven by the input costs which is controlled by a genuine cartel. When we did the Exxon-Mobil merger, the reality was that Exxon/Mobil, the largest integrated oil company in the world, was going to control crude oil supplies in single digits — 7 percent, 5 percent, 4 percent. That was the reality. It was a tiny number. It is the Saudis, the Venezuelans, those folks, who control the input costs for gasoline.

Mr. Harty

You touch on something that, somewhat to my surprise at least, occupied quite a bit of time and discussion at the Commission, which was this perceived gap between public perception of antitrust enforcement — maybe with decisions like Whirlpool-Maytag, you have some people saying it's too easy, and the oil industry — and the professionals' assessment at the hearings that we are in the golden age.

There seemed to be (a) a recognition of this gap, and (b) a desire on some of the Commissioners' part that the AMC do something about this.

Lee and Bert, if I may ask you, do you think that this is a valid concern for the Commission to be addressing? Is it really realistic to think that they can do anything about it?

Mr. Greenfield

At a time when *The Wall Street Journal* is slamming merger policy for being too interventionist and *The New York Times* is slamming merger policy for not being interventionist enough, one is tempted to say that things are probably just about right.

Mr. Greenfield

Well, I was going to get there.

Picking up where maybe Carl and Bert are, I think it's probably true that over the last decade or so we probably have moved to a realm where the economists have started to take over; maybe inquiries have gotten more fact-specific. Frankly, I think the thought is probably right that we are seeing a lot of mergers go through that wouldn't have gone through ten or fifteen years ago.

Given that, one can fairly ask, has the process opened itself up too much to Type II errors? Is there too much room in the process for under-enforcement? Are the agencies so shy about over-enforcement that they have swung too much the other way?

I think my answer to that is, who can really know? The only way we are going to know is through a good amount of *post hoc* looking at the kind of thing Carl was talking about, how the marginal transactions that have gone through have impacted the markets. We have seen a lot of industries lately that have consolidated to only two, three, or four players. Is that a good thing, particularly over the long run? Somebody said something about short-term effects and the focus on short-term effects. I think that is a clear distinction we have here between the U.S. policy and the E.U. policy, where we tend to be very focused on short-term effects, and maybe there hasn't been enough attention paid to whether the kind of dynamic effects over the longer term may be more negative where we have allowed industries to consolidate down to only a few players.

I really don't know the answer to that, but I think, given the way the policy has gone, those are fair questions to ask, and very important questions for research.

Mr. Foer

Lee, does Kolasky know you're sitting in his seat? [Laughter]

Ms. McDavid

I know our focus today is on the analytical tools for merger enforcement. We have to remember one really important distinction between the U.S. system and the European system. In the United States, if the agency wants to bar a merger, it has to be prepared to defend that decision in federal court, in which it bears the burden of proof. That is a critical element in the decision-making process inside the agencies. In the European Commission, they can just say no. If they say no, the chances are that the matter will get appealed to the Court of First Instance. But even under an expedited procedure, it will be at least a year before the court issues its judgment, during which period the transaction cannot stay alive.

That is a really important distinction that drives a lot of the decisions that are made inside the agencies on whether or not a transaction should be challenged: Can we stand up and convince a federal judge to enter an injunction precluding the consummation of this transaction? It's a rational standard for decision makers to apply, because if they bring these cases and do not win them, then they become paper tigers, and people like me are going to go and push them around in investigations.

Mr. Harty

Bert?

Mr. Foer

Let me go back to oil for a second. I do think that the FTC has been unfairly castigated by aspersions that it has treated oil in some lighter way than other industries. There are good reasons for the high prices of gasoline not related to antitrust. I think that the criticism ought to be that all industries are being treated too easily with regard to concentration. It does not surprise me that Congress is beginning to look at several industries that are perhaps uniquely critical. The oil industry is very unusual. It is based, at root, on an enduring international cartel, which antitrust is really not able to get to. It is having an impact throughout the economy. It's an unusually complicated industry, with a great deal of verticality. We don't look too much at verticality anymore.

I think that the fact that Congress is at least thinking about some changes for this one industry, while it may not be desirable to go industry by industry, is very natural and normal and to be expected in a democracy. In fact, the less that antitrust does, the more demand there is going to be for governmental intervention, political intervention, in order to try to achieve desired results.

We are looking right now at what the common eye — forget about sophisticated antitrust lawyers and economists — the common eye is going to look at the reversal of the Standard Oil decision, people are going to look at the reversal of the AT&T breakup, and they are going to say, "What's going on here? Is this what we want?" It won't be strictly a focus on short-term prices. It's a political sense of what we think about power, what we think about private power, public power, intervention by the government — all these questions that tell me that when we look at antitrust, we should be talking about political economy, and not merely about economics.

Robert Joseph

I have a question. Isn't the larger question something other than an antitrust question? Isn't the larger question a question of demand for oil in the United States, involving very difficult public policy issues about how and whether demand ought to be controlled, for example, whether there ought to be a tax or not? And doesn't antitrust tend to stay away from issues of that type? I am wondering whether in the end the reluctance of antitrust policymakers to stay out of those questions hurts antitrust. In the face of a proposal to impose higher taxes on gasoline, the antitrust policymakers seem to me to say, "Well, that is not an antitrust question." Another answer might be that such a tax has various economic effects that are or are not good, that do or do not distort markets, etc.

On related point, is Congress avoiding the larger public policy debate by laying the energy crisis problem on to antitrust, when there are larger issues and potential solutions involved that Congress is unwilling to tackle. I sense that sometimes the agencies are afraid of saying something like this: "You know what the real problem is? We are narcoticized with gasoline. We believe we have a constitutional right to gasoline at a low price. So what are you, Congress, going to do about that?"

This might be part of a larger political issue of how antitrust fits in to national economic policy.

Mr. Foer

I agree with you, I think. There's a problem. If antitrust is not going to deliver — and it may be that antitrust is incapable or should not try to deliver in certain areas — if it is perceived that antitrust is not going to deliver, then you have two problems. One problem is, we get blamed — we, the antitrust community — for things that we really can't control. Sometimes we get oversold. In electricity deregulation, antitrust was going to be there as we deregulated and it was going to take care of everything, which, when you think about it, is ridiculous. It couldn't have happened.

So we have this back-and-forth, and that leads to the fundamental question of how we educate the American people as to what it is we do and why it's valuable. That is something that we have totally failed at.

Participant

I wonder if the panel could talk about, specifically in the merger context, which is obviously the topic, but it has effects of economic analysis and antitrust under the rule of reason as well — picking up on Bert's comment about the revolution of presumptions, what merger analysis has characterized now as the search for monopoly profit. If we are not confident that a merger will result in monopoly profit, then it's okay. That is the way we approach what used to be the question of whether this is good or bad for consumers.

I will just give a couple of examples of market questions that maybe the panel could address in that context.

One example is, with telephone mergers, which have been approved — I am moving, and so I am looking for new telephone service. There are actually, from what I can tell, competitive rates. On the other hand, there are only three or four real options, and I had to spend a half-hour on the phone with these incomprehensible phone menus from every one of these places.

Contrast that to the credit card industry today, Citi-card and Discover, who are fiercely competitive, are now starting to advertise that if you use their credit card and have a problem, you can actually speak to a real person.

If you look at what the FTC says in its guidelines when they say "price," and then there is a footnote — "we mean, of course, all forms of competition." But I wonder to what extent — when you start thinking about reducing the number of firms to three and two, the conditions may be such that the detectives can't find monopoly profit, in the sense that price will be above a competitive level and they will earn what economists call monopoly profits, but there has been a substantial reduction in the host and diversity of ways that firms compete that consumers would prefer, so that consumers would actually have been better off if the mergers had been stopped.

I wonder if the panel could comment on whether the increasing turning-over of merger analysis to this strictly economic inquiry into monopoly profits is one of the problems and is something that either the AMC or the Commission and the Justice Department should do something about.

Mr. Harty

Maybe I will ask Carl to address it. It is, I think, a version of one of the questions we were going to get to later.

Professor Shapiro

I think the key term here — I think you may have brought it into the conversation — is this "revolution of presumptions." It makes a huge difference. You can read the guidelines, and one approach would be to say, "Hey, I read the guidelines. I looked at the Herfindahls. It's 2,500 from 2,000. You have to have really strong arguments to get this deal through." That's one sort of policy. There is obviously a strong structural presumption there.

Another way to read it is, "Well, the Herfindahl went up from 3,000 to 5,000, but there could be entry and there are some efficiencies, and those could be good. I'm going to give those a lot of weight, so the deal is going to go through." It's very different, depending on, ultimately, the structural presumption. Is it much of a presumption?

I think one of the things that has shifted — we can all say the guidelines are great, and we are not going to change the guidelines, but in the shifting of presumptions.

That is what I think is actually going on.

Are we necessarily looking for monopoly profits? This relates to questions about unilateral effects, for example, and you have to be the closest competitors and you have to have a monopoly power in order to have a merger blocked. If you are going to raise price after the merger, there is some market power, but that could be far short of monopoly power.

I am concerned, actually, about those who mix up those terms and say, "Oh, well, there's one strong competitor. It's a three-to-two. There's one strong competitor. You don't have a monopoly, so it's fine." That is sort of what happened in *Oracle*, in a way. The court said, "You have SAP out there still, so what's the problem? It's not a monopoly. This unilateral-effects thing seems like it must be a monopoly story," which is false. There's this thing called oligopoly, as it turns out.

So, sure, we should worry about market power and ability to raise prices far short of monopoly power. That is where structural presumptions should be helpful, but are not getting much weight these days, I think.

Mr. Greenfield

I think there's a tension, in some sense. People want to get away from structural presumptions and focus more on the particular facts, but then the kinds of issues you are talking about, like service, are much harder to measure than price, which sort of drives one to a focus on price. I'm not sure that is completely a bad thing. There may be limits to what is prudent to go after from an enforcement perspective. Once you delve beyond the realm of price, it gets harder to predict, and maybe drives you back towards some of the shyness about over-enforcement.

Mr. Foer

I think price is just a proxy for what we want from competition. It's not as though we only care about price. It's just useful as something we can measure. We can frame questions in terms of that. But non-price benefits such as choice and innovation could be much more important to consumers. I don't think anybody serious completely ignores the non-price stuff. That is not quite the language of how to investigate things.

Ms. McDavid

The reality is that from the beginning of the Merger Guidelines process, the 1,800 Herfindahls presumptions were merely a screen to identify the transactions that were going to get more scrutiny. No one was going to block a deal because it was a transaction that produced an HHI of 1900. We were going to look at it really hard. Then we get into the really hard stuff, which is the facts: What are the unique facts about these companies, this industry, and what do those facts tell you about whether post-transaction prices will or will not go up or about other anticompetitive effects? I have been involved in lots of deals in which we focus on things like innovation and whether it will or will not happen after the transaction goes forward. Then we start really looking at how this industry works and how these companies work. That is where it has always happened.

Yes, there is a lot of economic work that happens now, sophisticated economic analysis. In the cruise lines transaction, there is no doubt in my mind that the economic work we did was absolutely critical to getting the deal approved, because we established that it was simply not possible for firms to coordinate, and the agency understood that.

But all of the other facts about the industry were also relevant. It's an all-facts-and-circumstances analysis. It always has been, and it is today.

Mr. Foer

Jan, we clashed on the Cruise Mergers, I would say —

Ms. McDavid

A little bit.

Mr. Foer

A little bit. But we are at peace now.

Mr. Foer

Going back to the education question, Cruise is a good example of the increased transparency that the agencies have brought. I compliment them on that. But still and all, how do you explain a case like that, where I still am not convinced that the economics was right? The agency can't disclose all of the information. But there you are with a conclusion that is almost unsalable —

that's a bad choice of words regarding cruise ships — unusable. The consumers can't understand a decision like that.

That is where we have this conflict. That is a good example of the conflict. The agency did the best it could, the best it has ever done, in explaining the closing of a merger investigation. Yet I don't think that that kind of explanation can be persuasive to the man on the street.

Ms. McDavid

The man on the street focuses on the fact that, as *The Wall Street Journal* reported about two weeks ago, prices for cruises are still in the tank, post-transaction. A cruise is still a real bargain vacation.

But the other thing that they explained in the closing memo —

Mr. Foer

You want some reasons for that, by the way? [Laughter]

Ms. McDavid

Despite high fuel prices.

The other thing they explained was that, although they defined the market in the most technical terms to be cruises, other vacation options were a very significant competitive constraint on the ability to raise prices. That was something that people can understand. As they book their vacation, do they say, "The only thing that is available to me this year is a Caribbean cruise," or do they say, "I could go to Sandals"?

Mr. Harty

Carl, you had a comment.

Professor Shapiro

I don't really go for cruises that much, actually.

Andrew Gavil

Hi. Andy Gavil.

I want to come back to something that Carl was talking about. There has been a lot of emphasis on the panel about the structural presumption. My perception of part of the meaning of cases like *Oracle* and *Arch Coal* is that we have moved beyond the structural presumption when the government goes to court. It is now being held not only to the structural presumption, but its own standards in terms of proving theories of anticompetitive effect, unilateral and coordinated effects theory.

My question for the panel is, have we really moved beyond the structural presumption? Is the real debate today about effects? It's sort of structural-plus. In the old days, under *Philadelphia*

National Bank, there was very little mention of effects. The effects were inferred from the structural. The guidelines evolved to emphasize effects theories as well, in some ways parallel to what was happening in other cases in Section 1 and Section 2.

I suppose the question here is, has that inhibited the government? When you sit there and think about challenge, yes, you can put your bet on *Heinz* and say, "When it's three-to-two or two-to-one, I'm going to get a really strong structural presumption. That's all I need." It seems to me the message of *Oracle* and *Arch Coal* is, "Not really. You also need to have a fairly high level of evidence of anticompetitive effect."

Is that where we ought to be focusing more attention in the discussion here and at the AMC? Is that where the problem is? Are we expecting too much in the way of our ability to predict effects prospectively in mergers?

Mr. Harty

I think that relates somewhat to the discussion at the Commission hearings on the necessity of market definition, retaining or not retaining the market definition structure in the Guidelines.

Who would like to comment on that? Jan or Carl?

Ms. McDavid

I think it's the point that I made earlier, Andy. What we are really talking about is how the industry works. The agency, when it is going to challenge a transaction, has to go into court and tell a story. If they can't do that, the presumption isn't going to get them very far. I think that is one of the lessons of *Oracle* and *Arch Coal*, absolutely. But it has been true for a very long time.

Mr. Harty

A practical question, Lee. One of the suggestions at the hearings was the appointment of a special master-type person in merger cases to assist the federal judge. I wondered whether you thought that was a good idea in all cases, in some cases. Is that something the AMC should get into?

Mr. Greenfield

I guess I come out as sort of a skeptic on this. I think special masters have their place in extraordinarily complicated technical cases. But one thing I worry about is that a special master may take over in a way that reduces the ability of the court to sort of interject common-sense judgments into the analysis and not be overly tied to sort of a battle of experts.

If we wanted to have a system of competition courts where everything was a battle of experts, we could do it that way, but I think there is a tradition of litigation in this country where we have generalists deciding matters. There are lots of technical cases that go before courts in all types of areas of the law. I am not sure it makes sense to have antitrust be a special exception to that.

Professor Shapiro

I'm keen on court-appointed experts, myself. Whether I am going to be testifying as such a person, I just think it's useful. I didn't want to particularly go there, except to alert everybody that the Antitrust Section has an Economic Evidence Task Force. We have been operating for almost a year now. Howard Morse and Jon Baker are chairing that. We are addressing this issue more generally, about the role of economic evidence. That brings up court-appointed experts or other mechanisms, as well as the use of parties' experts generally.

So look for that. It's not just about mergers, but it would be relevant to this question.

Mr. Foer

I think there is a big difference between the use of experts, court-appointed experts, which may be quite useful, and expert tribunals. I look to the federal circuit and I see the problems that I think they are causing for competition policy. Experts — well, which experts? The more expertise, the further we get away from people who, sooner or later, have to accept and approve and support antitrust-- or support will disappear.

Mr. Harty

Turning to the Guidelines, if I may, there appeared to be general acceptance that the general framework was good, but as they delved into it, certain topics were perhaps deemed to be worthy of some further consideration and maybe some recommendations.

I thought one of the more interesting — I am not sure if he meant this entirely seriously — but Commissioner Carlton at one point seemed to suggest that maybe we didn't need the unilateral-effects Section of the Guidelines, because it was really just a clever way of addressing what are really very narrow markets.

I wonder, Jan, if you agree with that. Do you think that the agencies' practice in unilateral effects accurately reflects what is said in the Guidelines? Is there anything the AMC needs to do there?

Ms. McDavid

One of the interesting things that came out of the commentary recently was that the agencies have explicitly disavowed a unilateral effects safe harbor with a combined market share below 35 percent. Many of us thought there was, kind of *de facto* safe harbor under the Guidelines They have said no.

Carl's basic work back in the early 1990s on unilateral effects I thought provided a very interesting and useful analytical framework to think about how a transaction might impair competition or not, as an alternative to a coordinated-effects theory. I find it a useful way of working through the issues as I am considering a transaction that one of my clients is about to do and we are trying to give them advice on whether there is or isn't a problem.

So I don't think it really is the same kind of analysis. I suppose it could be argued to be, just as, for example, in the Antitrust Division's challenge of the hospitals on Long Island, they basically defined the geographic market as the parking lot surrounding the merging hospitals.

But I think of it as being analytically quite different. I would really be interested in Carl's take on it.

Professor Shapiro

I think it is analytically different, yes. But let me give an example, the DirectTV-EchoStar merger that was attempted and failed. There you could say, "Oh, well, it's a market for direct-broadcast satellite services, and it's a merger to monopoly, or near that," or you could say, "It's a merger in the market for multi-channel video programming distribution." Then the shares are very different, because cable is 70 or 75 percent of that, and these guys are each 5 or 10 percent, give or take.

I think the danger would be if you defined the broader market, which would be, reasonably — clearly, they compete against cable. It's their closest competitor, in a sense. It's big. But they also directly compete with each other. I think the danger is if you define the market in the way the courts tend to like to. "Reasonable substitute" is relatively broad. Then you may miss things in terms of price effects.

If you follow the guidelines strictly, they lead to quite narrow markets, very often. There are papers about this, including stuff Mike Katz and I have written. That is analytically helpful in figuring out effects, but it's hard to make that case in court. They say, "You mean you're not going to include cable? How can you keep cable out of the market? It doesn't make any sense. That's not reality."

So there are some tricky currents to navigate here. But, ultimately, we want to look at how much direct competition there is between the two merging companies, sort of a cross elasticity or diversion ratio thing. If we do that, in the end, we are going to get the right answer.

Mr. Foer

Larry White testified that when the guidelines were written, unilateral effects was not an issue, and he recommended, I think, that the AMC should suggest that the FTC and the Justice Department pay special attention to unilateral issues, and perhaps make revisions, so that the Guidelines would be more immediately workable. Without knowing what changes that special attention would entail, I think it's a good idea.

Professor Shapiro

I think the AMC, if anything, here should just — the guidelines are a good framework. There is consensus on that. They should affirm that, including unilateral. I will tell you, in the economics profession, it is, what do you think competition usually means? When two firms actually compete against each other and then they merge, they are not competing anymore. It's not only about collusion. So the notion that this is sort of odd or novel strikes me as extremely bizarre, actually, going back at least seventy-five years, in how economists have thought about oligopoly and competition. I have to believe, when Congress passed the merger laws in 1950,

they meant, "Yes, if you are merging with an important, direct competitor that could well be illegal."

Mr. Harty

On the HHI thresholds, there seemed to be, an acceptance that they really don't reflect what the agencies actually do. I don't think I included anybody as saying, "You actually ought to recommend that they should be changed to reflect that." I think the view was expressed by some that "antitrust practitioners are smart enough to know what's actually going on, so you really shouldn't do that."

Here we have a set of guidelines, a very important part of which — the concentration ratios — doesn't reflect what they actually do. Should the AMC recommend something here?

Professor Shapiro

I think there has been some additional transparency with the publication of the data on these Herfindahls and what has been challenged and not.

Jan, your comment notwithstanding, I don't think it's a secret inside the beltway. Even the lawyers out where I live in California have figured it out

Mr. Greenfield

I tend to agree with that. I think, as a practical matter, it's not a big problem, although I think if there comes a time when the Guidelines are revised anyway, there ought to be some attention paid to this, because one of the purposes of the guidelines is to give people who aren't inside the beltway — or even in California — an opportunity to know how this really works, whether it be businesspeople or non-antitrust lawyers who have to advise from time to time on antitrust issues.

I think it also sort of begs the issue. We have gotten away from the guidelines, back to something we were talking about earlier in the concentration area. Whether that is a good thing or a bad thing is probably a more important question.

Just one other point about studying the effect of concentration on market performance. I think it's a very good thing to undertake, because it's such an efficient thing to undertake. It not only goes to mergers, but it goes to Section 2 cases and some kinds of Section 1 cases. So you could kill a lot of birds with one stone and add a lot of value to a lot of types of enforcement actions and private litigation questions by looking harder at that.

Mr. Foer

I don't see any value served by a dissonance between the Guidelines and reality, but I would move in the opposite direction. I would urge the agencies to conform to the guidelines.

Mr. Harty

Carl, one of the things Bobby Willig was critical of was, quote, "a lack of transparency at the agencies with respect to the more searching type of economic analysis that very much characterizes late-stage merger analysis."

I wonder whether you share that concern. Is that something the Commission should spend its time on?

Professor Shapiro

I think there are always going to be tussles, parties feeling that the agency staff is hiding the ball and doing the thing the way they want to. I have worked as an expert both for merging parties and for the agencies. I don't think that is going to go away. I appreciate the discussion at the agencies these days about trying to increase transparency.

I think it is sort of odd for Bobby to be saying that, given that he was the expert for EchoStar, and the Commentary on the Merger Guidelines that was just published explicitly mentioned the extensive back-and-forth — that both sides were doing this detailed economic analysis of the effects of the DirectTV-EchoStar merger and were engaged on that. It seems there was — maybe they don't think that was transparent. I don't know. But that is the sort of way it is supposed to go.

I don't know if the AMC needs to address transparency. I think the agencies are aware of it. It's kind of perennial.

Mr. Foer

May I add something on that?

Mr. Harty

Sure.

Mr. Foer

Because I don't completely agree.

Professor Shapiro

What?!

Mr. Foer

Excuse me, Carl.

It seems to me that the focus of discussion about transparency, particularly in the hearings, was on the needs of the parties. Even now we have been talking about that. I want to focus also on the public, third parties, outsiders who are trying to grasp what is going on, in order to explain it and in order to evaluate it, and ultimately in order to convince the public that wise decisions are being made.

I think that agencies ought to be told to provide more information, more detailed information, more often. I think the Tunney Act could be strengthened. It could be applied to both agencies equally. It could be expanded to cover closed investigations in certain circumstances —

certainly not every time, but at least where there is substantial public interest expressed. The agencies should have to address major issues that are raised during the investigation.

We are a long way from that, but I think that is an essential path to follow if people are going to buy into antitrust.

Mr. Harty

In the couple of minutes remaining, maybe we could just turn to the last topic that the Commission considered, which is efficiencies and the consideration of efficiencies by the courts and the agencies.

If I may ask Bert and Carl, in the debate on the total-welfare versus consumer-welfare standard, there seemed to be some disagreement, both among the Commissioners and the experts testifying, as to what the agencies actually do, what the appropriate standards should be. Could you comment on that? Again, is this something — this large debate — something that the AMC should enter into?

Mr. Foer

I will go first, so that the economists can correct me.

I did a paper recently that I did submit to the AMC, in which I argued that there are actually three principal economic goals being argued about: static allocative efficiency, static productive efficiency, and growth. I argued that each of these is flawed when you think of it as a single goal for antitrust, but that we ought to try to arrive at some sort of a hierarchy of which is more important, which is less important. For instance, I would say that economic growth is probably the most important overall. The second most important would probably be productive efficiency, and third would be allocative efficiency.

I would say that hierarchy is exactly the opposite of what we currently use.

But I don't think there is science to get to this. I think it is, again, a matter of political economy. And so is the argument between consumer welfare and total welfare. I would hope that the AMC will come out strongly in favor of a consumer-welfare recommendation that says that, ultimately, if a tradeoff has to be made — and I think it's pretty rare that you really run into a conflict between consumer welfare and total welfare, but if there is a conflict — the consumer-welfare standard should apply.

My reasoning behind that, at the end of the day, is a political judgment that it doesn't work if consumers see that there is a merger in which stockholders are getting all the benefit and prices are going up. Who gives a damn about trickle-down economics? People don't care about that. They are not persuaded by that. If you want people to support the antitrust laws, they have to get something out of it.

Professor Shapiro

This is an area where we are looking at modernization. I have to say, I believe in traditional values here, which would be consumer welfare from competition.

The Commentary on the Guidelines that the agencies put out — the part on efficiencies I will read to you. It says — and I agree with this; that's why I am reading it — "Competition spurs firms to implement cost-reduction initiatives."

I think an important issue here is, if we think longer term, if you merge and have more market power and prices go up — that is the situation we are talking about, merger with efficiencies. Prices go up, so consumers are hurt, but there are efficiencies, so there are a lot of profits. Adding up the profits and the consumer benefits, it turns out, is positive. That is the situation we are talking about.

If people are going to let through that merger, I want to say, "Well, wait a moment. In the longer run, I'm not convinced this, generally, is going to lead to lower costs. Because of the reduction in competition, there may be less innovation, fewer product improvements. I am deeply concerned that" — let me back up.

If you take a very short-run perspective, they are not going to lower their costs. It's going to be a mess for a year or two. *Business Week* came out with a study based on the Consumer Satisfaction Index that looked at twenty-five or thirty mergers, telephone companies, oil companies. Consumers hated what happened in the couple of years after those mergers. So if you look really short term, it's not good for consumers; it's not efficient because there is a huge integration problem.

They claim, in the medium run, that it is going to be good. In the long run, we should worry about it as well, because the loss of competition is going to, very probably, lead to less incentive to make improved products and lower costs as well.

So I think it's actually quite hazardous to move off of what I think is the well-established consumer-welfare standard here. I think we should stick with traditional values.

I don't agree that it matters little. I think it's a very big deal. I have done some calculations that I can share with anybody. I think the efficiencies often may be only 25 percent, or even 10 percent, as big to justify a merger under the total-welfare standard as they would be under the consumer-welfare standard. So it's a huge change, and I think it's very important that the Commission say it doesn't want to go there.

Mr. Harty

Just as a wrap-up, two more questions.

As a panel, let me just ask each of you, is there any fundamental change to the treatment of efficiencies in the Guidelines that you would recommend that the AMC recommend? Jan?

Ms. McDavid

In my case, no, because the reality is that when I am defending a merger before one of the agencies, I don't run an efficiencies analysis. I try to explain to the agencies the business rationale for the transaction, and what kind of cost savings the businesspeople think they are going to achieve. That is a somewhat different kind of analysis. I simply want them to view it

through that lens, as opposed to bearing the burden of proof on an issue that they don't get to until they have already concluded that the merger is likely to be anticompetitive.

Professor Shapiro

I think the Guidelines, as revised in 1997 — I like the language on efficiencies. I would hope the AMC would endorse that or let it sit, and recognize that, between the parties' desire to get their deal through and well-documented over-optimism about efficiencies, these claims have to be taken with considerable skepticism — and so put a very high standard for proving them to be cognizable.

Mr. Foer

The principal — maybe the only — evidence that the AMC heard was from Professor Kaplan of the University of Chicago. I think it should be ignored, more or less, totally. We don't have time to get into why.

But one reason why is that the evidence he was citing was for all mergers. What we are interested in — nobody is talking about restoring Von's Groceries. We are interested in a very small percentage of mergers at the most concentrated levels. His evidence bore no resemblance to that part of the world.

Beyond that, what I would like to see, and what I think we need, is a fundamental study of the frequency and the magnitude of efficiencies that are predicted and, as Jan is talking about, that either do or do not occur in these large mergers. We don't know very much about that.

Mr. Greenfield

Again, I think nothing fundamental. If I were going to pick one issue that I think ought to get more attention in future iterations of the Guidelines, it would be what I think is sometimes a bit of a false dichotomy between variable costs and fixed costs, and trying to think about how fixed costs in the real world enter into pricing decisions, and the fact that fixed costs are only fixed for a certain amount of time. Maybe the flip side of taking a longer-range view of anticompetitive effects might be taking a longer-range view of positive effects from a merger as well.

Mr. Harty

Any final questions from the audience? Yes?

Participant

Focusing on presumptions, there seems to be a presumption about the non-merging companies in an industry in which there is concentration and a significant merger under investigation. The presumption seems to be that all of those other remaining competitors will be in business, actively competing, over the next five years. Looking at it from 35,000 feet, it seems to me that this group and the AMC are not focusing on those companies that don't go through a merger review process, whether it be an Arthur Andersen or an Enron or any company that happened to have been located in below-sea-level parts of New Orleans or any other kinds of natural disasters. It just never seems to get into the merger analysis at all. That may account for some of

the anticompetitive effects we see over time in particular industries, but it doesn't seem to be stoppable by anything that anybody in this room does.

Professor Shapiro

I would just say, one tries to figure out what likely entry will occur and if there is exit that is very predictable — somebody has run out of natural reserves or something — then you would want to account for that. But random exit, unpredictable? I don't see how you could account for it anyhow.

Participant

The *General Dynamics* case was based on just that kind of consideration.

Ms. McDavid

There is a portion of the Guidelines that talks about whether current market shares accurately reflect future competitive significance. We really do try to evaluate that, based on the evidence that is available to us. It's one of the things I argue very often in front of the agencies.

The Antitrust Modernization Commission at Mid-Course Symposium - Thursday, June 8, 2006

Merger Enforcement – Federal Institutional and Process Issues

Moderator

Phillip A. Proger
Jones Day
Washington DC

Panelists

John D. Graubert
Federal Trade Commission
Washington, DC

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J. Robert Kramer, II
U.S. Department of Justice, Antitrust Department
Washington, D.C.

Mark D. Whitener
General Electric Company
Washington, DC

Robert T. Joseph

We are ready to now turn to Mergers II -- "Federal Institutional and Process Issues Relating to Merger Enforcement."

We have another distinguished panel. Our moderator is Phil Proger, a partner with Jones Day in Washington. Phil oversees the Jones Day antitrust and competition law practice. He is a former chair of the Section of Antitrust Law. He has extensive experience, as do all of our panelists, in the complete spectrum of antitrust subjects, including a wealth of experience in merger practice.

John Graubert is the principal deputy general counsel of the Federal Trade Commission. He is also an adjunct professor at Georgetown University Law Center. Before coming to the FTC,

John was with Steptoe & Johnson. John has been intimately involved in a number of process issues that we will be talking about today.

Debra Pearlstein whom Don introduced this morning, is the program officer of the Section and a partner in the New York office of Weil Gotshal and Manges, where she specializes in antitrust litigation and counseling, including an extensive amount of merger work.

Bob Kramer is a director of operations and director of civil enforcement for the Antitrust Division. He has held that position since September 2003. In that position, Bob directs and reviews all civil antitrust investigations and litigation in the Division, which clearly puts him in a position to know a lot about our subject.

Mark Whitener is senior counsel, competition law and policy, for General Electric Company. Mark is based in Washington. Prior to joining GE, he was deputy director of the FTC's Bureau of Competition.

So we have a very experienced and talented panel, which I know is going to entertain and enlighten all of us.

Phillip A. Proger

Thank you very much, Bob. Thank you, those hardy of you, who are still here. We appreciate it, as a panel, very much.

We have such an excellent panel that I think it's best to hear less from me and more from them. So I am going to do my appointed job of going through the background here fairly quickly, so we can get to the questioning.

If any of you have any questions or participation that you would like to do, please feel free to jump in, although I will tell you that, as a panel, we have agreed to reserve the last ten or fifteen minutes for your participation, comments, and questions.

Our panel is looking at the dual federal enforcement issue, merger clearance reform, and the merger review process. So we truly are "mergers, too." We are focusing, after the excellent substantive panel chaired by Ronan Harty, on procedural issues. Interestingly enough, in the international world, many people predicted that it would take a long time before we would ever get substantive convergence. I think we are closer to converging substantively than we are procedurally. So I think this is a very important area for the AMC to consider.

There has been a lot of testimony, a lot of comments in this area. Of course, the basic question that was started with was, should merger enforcement authority be reallocated between the FTC and DOJ? Tentatively, the AMC's straw vote is against making that change.

If you go around the world, one of the more difficult questions you have to answer is to explain why in the United States we have two separate but somewhat overlapping agencies. In particular, it's hard to explain, given also our enforcement by state AGs and private attorneys general, why we have this duality in federal enforcement.

Many argue — and argued in AMC testimony — that dual enforcement is a strength of our system, that it creates a marketplace of ideas and differences that enrich the overall fabric. Many others argue that it creates inefficiencies and slows the process down. So there are a number of open questions that have to be addressed. The Commission has a real challenge before it in addressing those questions.

One of the fundamental questions that the Commission has been looking at, and one that even crept up in the discussion of the previous panel, is, should we change the clearance process? There have been a number of suggestions on how to do that. Like anything in life, the exception is the lightning rod for the criticism. By and large, the clearance process goes fairly smoothly. It's the exceptional case where there is a battle. As some of you are aware, there have been clearance processes that rage on for extraordinarily long periods of time.

You can understand the criticism, given that parties, in the first thirty days, want to get in and explain their story, and time is ticking away. Although the outliers may be few and far between, they tend to occur in major deals, or in ones where the substantive issues are a little bit harder, where the first thirty days, from the parties' perspective — and, I would think, the staff lawyers' perspective — are very important.

So, while this is a procedural issue, it is a very important issue. There have been a number of recommendations — after a certain brief period has expired, Commission Jacobson has proposed allocation among the agencies by odd/even case number. Others have proposed a coin toss. There was the old system of "let's see which way the basketball arrow is pointing."

Clearly, I think, the Commission's straw polls suggest that, one, we need to do something about this, and two, the agencies' 2002 aborted attempt at clearance reform, although thwarted by congressional pressure, might be one way to proceed. That might take care of a lot of the issues here.

There have also been some suggestions for penalties if they fail to resolve clearance in a set period of time.

This raises an interesting question: Should the AMC recommend legislative intervention, or leave this issue to the agencies? If so, what would be the intervention and what would be the standards? If clearance is not resolved within a certain number of days, should it be decided via arbitration? Should a third party decide — heaven forbid, the Secretary of Commerce (a personal editorial there) — or should it be decided more or less randomly by case number or a coin toss? Should we let the parties choose the reviewing agency?

Another issue that has come up is the differences in DOJ and FTC standards to obtain a preliminary injunction. Remember, the ultimate process here is fundamentally different. I think when you talk about this, you have to remember that. The Commission, under 13(b), either obtains the preliminary injunction or does not, but simultaneously or thereafter, it can still invoke a Part III administrative hearing, because can act as its own judicial body.

The DOJ must proceed under traditional equitable standards before a federal district judge. As a practical matter, the same judge that is handling the PI will usually handle the case after the PI. It generally makes sense to consolidate those proceedings into a single action.

So it seems that, as a practical matter, there may be a significant difference. Nevertheless, the preliminary straw poll of the AMC is to suggest that no change be made here.

A number of questions are raised by this. One of the more fundamental points that has been raised is whether the different standards actually yield different results? I think the view at the Commission was that there really was no evidence to suggest that it would. I personally would challenge that. I think it's a totally different situation when you are litigating a PI with the FTC than with the DOJ, because that judge has no equitable power to force the parties to a settlement. So the FTC and the parties know that they can go ahead and risk a yea or nay.

The next question is whether Part III proceedings should remain available for the FTC to litigate merger challenges. Obviously, those procedures are not available to the Department of Justice. The AMC straw poll indicates some consensus to recommend some changes. But as you see from the slide, there is no consensus on exactly what the recommendations will be.

So there are a number of open questions and ideas on Part III proceedings. Obviously, this is an area where the report by the AMC to Congress could have an enormous influence, particularly on the nature of the Federal Trade Commission. If Part III were eliminated, I think that would change the nature of that agency. On the other hand, the Department of Justice has lived without an administrative process for many years and seems to have done well without it.

There have been some suggestions to restrict Part III to certain situations. For example, in situations where the FTC seeks a PI, it might be barred from initiating Part III proceedings if it fails to obtain the PI. It seems to me that such an approach ignores the fundamental reasons for having Part III in the first place.

We turn now to the next aspect of the Commission's deliberations the HSR merger-review process. There is probably no part of merger analysis and procedure gets more attention than the HSR process. As you can see, there were quite a few testifiers, including quite a few from the agencies, including some people on this panel. There were comments from all the major bar associations and the Chamber of Commerce.

One of the issues that the Commission is looking at is whether the number and type of deals that require notification? This asks, in essence, are the reporting thresholds too low? Are we capturing deals that shouldn't be captured? Both sides of the aisle in this debate use statistics. But let me suggest that the question isn't the number; the right question is, do the filing requirements capture the deals that we should be reviewing?

Another question that has been raised is whether there is any need to address the length of merger investigations? The American Bar Association has noted that investigations last up to eighteen months. But, of course, that is not the norm. There have been suggestions of imposing an outside limit of five or six months to manage the outliers. But such limitations will require a fundamental reevaluation of the second-request process, because the timing of the investigation is directly linked to how quickly both parties achieve substantial compliance.

The AMC clearly plans to address the burdens of the HSR process. There has been a fair amount of discussion of whether the process, particularly the second request process, is broken. But for every problem considered, there are a myriad of solutions. It is difficult to identify a consensus as to the nature and degree of burdens imposed. For example, compare the views expressed by

representatives of the Department of Justice and by the American Bar Association. If you believe that there is value in diversity of ideas, that is a rich marketplace.

One of the suggestions has been to limit the number of individuals to be searched. In fact, the FTC, under the leadership of Chairman Majoras, has recently implemented such reforms. But the DOJ has pointed out that, as a practical matter, the number of people to be searched depends a lot on the complexity and nature of the organizations and the products and issues in the investigation, and has said that adopting an arbitrary standard may limit its ability to adequately investigate.

There have been, as I said, a lot of proposals. I am not going to go through all of them. But one of the ones that I thought was more interesting is the third bullet from the bottom, which suggests permitting some redress to a magistrate, or maybe an Article III judge, on the second-request process. It is an anomaly in our system that the second request, which is close to compulsory process, is not reviewable by any independent entity, like an Article III judge, to determine whether or not it's reasonable under the circumstances and whether or not it places undue burdens on the parties. No other compulsory process in our system gives such unbridled discretion to enforcement officials.

One might respond that a second request is not compulsory process, because the parties, by choosing to merge and going through the HSR process, have submitted themselves to the requirements of the Act. But I think that is a little bit unfair. It's clearly compulsory in our system, and the agency's demands are not reviewable, except by the agency itself (e.g., the general counsel of the Federal Trade Commission).

There has also been some discussion of the need for transparency. In this area, the agencies have gotten some compliments in the hearings. There is no doubt that the agencies are attempting to increase transparency. At the same time, you also will hear from them that there are practical limitations on what they can do, particularly when their decision making is based on confidential data, as Jan McDavid suggested in the last panel, that they are not at liberty to disclose.

What are the remaining issues?

First, there is the inevitable discussion about de-linking agency funding from HSR filing fees. I think antitrust lawyers and other commentators on the antitrust laws will be able to debate that forever, with very little influence on Congress. Congress has found a pot of gold that helps to finance the agencies, and they are not going to give it up, particularly with our fiscal situation.

Second, some have suggested that we formalize extensions of the initial waiting period versus pull-and-refile. I don't think that is one of the more significant issues.

With that, let's turn to this excellent panel and get through the first of these daunting issues.

The issue of allocation of merger enforcement responsibility between the agencies arises in a number of different ways. You can talk about whether both agencies should have full authority to investigate mergers. You can talk about the clearance process. But in the end, the question is who is going to investigate a particular merger and what that process should be, and how you clear that merger to a particular agency.

Debbie, could you lead us off with your thoughts on that?

Debra J. Pearlstein

It was interesting to me that at lunch Commissioner Tom Rosch expressed surprise that the Modernization Commission was even discussing dual FTC and DOJ merger enforcement, because he thought it was sort of understood that we have a good status quo. It is one of those third-rail issues in antitrust. You don't make friends at either of the agencies, or maybe you make friends at one agency, if you take up the issue.

But, to me, there is an issue to be discussed. I think any good-government sort would tell you that we have a system that is dysfunctional and is a waste of our resources. Most of us in this room are taxpayers and can be offended by it. It doesn't take much to demonstrate that fact. We have two pre-merger offices and we have two different groups — this is non-merger — in charge of international relations and liaison with foreign antitrust enforcers. We have a lot of people in each agency trying to coordinate with the other agency. We just had a Supreme Court petition filed by one agency and opposed by the other.

We are in a situation where it's clear that we do not have the front wheels and the back wheels — or whatever the right auto analogy is — always moving in the same direction. The fact is, if we only need two wheels, why do we have four?

I don't think it makes sense. The only thing I can remember about that 1989-1990 task force that the ABA did, which Tom referred to, was that, like the ABA comments this round, everyone said, "Well, it doesn't seem to be so dysfunctional that it's worth the dysfunction of trying to change it," but not that anybody can endorse it. I think even current enforcement officials at each agency will say they wouldn't recommend this if we were writing on a clean slate and they don't recommend this to their counterparts in foreign governments.

So I personally do not accept the arguments that I have been given that say this is good for us; that it is better to have two agencies working, because they stimulate creativity, they compete with each other, and that is better for us. It's sort of interesting that Tom, in his remarks, was saying that he didn't think four people doing this — four different sources, the states, the FTC, the DOJ, and private parties — was a good thing, but he thought two were a good thing. If two is a good thing, why not four, why not six, or why not ten? As competition lawyers, we think more people competing is good.

I just don't happen to accept that in government we should have agencies competing to be better enforcement vehicles. The logic doesn't stand. And if it stands for the FTC and the DOJ, why doesn't it stand for also having the DOJ enforce the election laws so that we have competition between the DOJ and the FEC, and we have competition between the DOJ and SEC? If you can't see it there, then the question is, why do you see it here?

Of course, that's the principled answer on my part. But the practical answer is, everybody says it's a dead letter. So why should the AMC use any political capital on taking this to Congress? I don't have the same assessment powers that they do to evaluate what the political environment is for their ultimate report, and so I can't really argue with them if they choose not to pick this fight. There are other fights they want to pick.

But I think it's a good discussion to have. I was sort of encouraged by the straw votes, where people were frankly saying this doesn't make any sense. Maybe it's a cosmic vote that is more important than the political vote here.

Where I do come out on it is that it should move the argument, because the fact that we have a dysfunction between these two agencies suggests to me that they ought to be working really hard to make that dysfunction go away. They ought to be working really hard to coordinate in the merger area, and they ought to be working really hard to coordinate in other areas.

When it comes to the merger area, the most obvious is, as Phil suggested, the clearance issues. I think they have a burden to make us, as taxpayers and as lawyers representing parties before the agencies, indifferent as to which agency our matters go to, and not bog down in bureaucratic infighting. I think that, whatever proposals are suggested by the AMC, it should be that the outcomes are agency-neutral and there is no delay.

I am not sure I would go so far as to punish the agencies if they don't solve the clearance problem and say, "You can't issue a second request if you don't solve clearance within a certain number of days," because I just think the agencies will find a way to make the parties miserable anyway. But I do think that the AMC should issue a strong statement — that seems to be their sentiment, and I endorse it — that says, "Fix the clearance problem."

Clearly, the agencies have had limited success fixing the clearance problem on their own. Except for the 2002 clearance proposal that was quashed by — everyone says congressional opposition, although I have also heard it described as one senator being able to do it, so it's not fair to blame Congress for this particular thing.

I think that the agencies have been unable to do it themselves. Once they didn't have the 2002 agreement — and even before the 2002 agreement — people of goodwill apparently can't solve this issue. I have colleagues on the panel on both sides who can speak from firsthand knowledge. I can tell my share of horror stories. The agency word tends to be that there are only a few cases where it is a problem, but on the private bar side, we all tell these horror stories. There is no transparency that tells you how often clearance is a problem, so we are left with our horror stories.

I don't think it's acceptable. I just think there has to be a fix to this, and if it's mandated by Congress, it's mandated by Congress. But I don't think there is any reason that folks should stand up at either agency and defend this situation. It is their responsibility to fix it if they want to continue to have two agencies managing mergers.

Mr. Proger

Would you, Debbie, be satisfied by an arrangement along the lines suggested in 2002, based on each agency's industry expertise that was known to the public — would that solve a lot of your concerns?

Ms. Pearlstein

I had no problem with that. When the ABA considered it, we completely endorsed it. I thought it was a great idea. But I am sort of indifferent. I don't care which agency has my matter. Most

people in the merger bar have their favorites, but there are terrific people at both agencies and there are people you would rather not be in front of at both agencies. That is somewhat the luck of the draw.

I don't think Congress should have an opinion on that either. I just think that even if you have an allocation arrangement, you are going to have transactions that fall between the allocated buckets. So in addition to an allocation arrangement, you clearly need some mechanism for resolving disputes, and resolving them within a very short number of days. The pre-2002 agreement, I think, said nine business days on the outside. That is my recollection. I think that's pretty long in a thirty-calendar-day process.

It is very hard to describe to one's clients what is going to happen — not so much the mystery of which agency (because I don't know that clients focus on it that much), but trying to explain to the clients, "This one could be one where the agencies both want it because it's kind of sexy, and there could be a fight. You could have to withdraw and refile. Whichever agency wins might be more inclined to issue a second request, because they have to justify to the losing agency that they took it seriously." The clients think you're nuts. It just confirms people's cynicism about our government.

As I said, I think it's a problem. I hand it off to my colleagues here, on that provocative note, to fix.

Mr. Proger

John?

John D. Graubert

There were a few provocative comments there, and you raise a lot of good points, too, Debbie. I must say that anything that might mean that someone else has to worry about oil and gas prices, in my view, should be given very serious consideration.

But on the structural issue, I must agree with Commissioner Rosch. I was a little surprised that the issue of forcibly moving merger enforcement from one agency to the other got any discussion at all, given the amount of work that has already gone into this issue over the last twenty years. As Bill Blumenthal pointed out to the AMC during his testimony, even Judge Posner, who had earlier suggested the slow death of the agency by strangulation, has changed his mind in recent years and decided that maybe the FTC has done some good things anyway.

On the structural thing, we should talk about clearance, because I think that is probably where the real productive discussion could take place. I would like to stress that, on this question of waste and duplication, that, perhaps, is overstated. There is really not a lot of actual duplication. There is a lot of specialized expertise in both agencies. Once we do get a matter cleared, that means that only one of the agencies is working on it. So if we somehow combine these groups, you would still have specialized expertise in various regulated industries, in retail sectors, other sectors, and all that would have to be maintained. So I am not sure you would really gain a lot of efficiency by —

Mark D. Whitener

But, John, you could take out a lot of overhead.

Mr. Graubert

I was wondering if somebody was going to mention that. The people who are most at risk in that sense are Bob and I, unfortunately. Perhaps we are not objective.

Mr. Whitener

But those are just fixed cost savings.

Mr. Graubert

Exactly.

I also just wanted, in passing, to talk about this idea of marketplace of ideas and competition between the agencies. Sometimes people don't seem to be terribly convinced by that idea or belittle it in some way. I am not defending it on its terms, but it is undeniably clear that the leadership of the division and the agency, in recent years in particular, has been able to pursue a number of initiatives that are of interest to them. Take a look at the half-dozen things that Tim Muris said he was going to do when he came in. I do believe, personally, that the ability to do that is enhanced by having more than one decision maker in a position to implement his ideas.

Mr. Proger

John, if you are going to make that argument, why not have three, why not have four? The more the merrier.

Mr. Graubert

At the federal level? Tom was talking at lunch about some interesting relationships at the federal level and other levels of government, which, perhaps, present different issues.

We do have, for historical reasons, two. That has seemed to have worked fairly well. The FTC was given other responsibilities, such as the industry studies and the ability in Part III, which we will also talk about in a moment, to take a little more time to apply expertise to complicated antitrust issues, including merger issues. Many people have been very gracious to comment that at the moment we have a particularly strong Commission. Finally, we are up to five. I am glad we have all the vacancies finally filled.

I think it is a good thing that five experienced practitioners, with the benefit of a very experienced staff and a very well-developed record, can occasionally opine on difficult issues. I think that's a valuable function.

Mr. Proger

Bob Kramer, what do you think?

J. Robert Kramer

The one thing I won't jump on is the suggestion that oil and gas be cleared to the Department. In fact, we have talked about putting in a reverse caveat, so to speak, that we would look at gas matters only if it could never be cited that we actually took them.

I agree completely that the idea of whether we are going to get rid of one of the agencies is a dead letter. I don't see much reason to talk about it. There is not a lot of benefit to having two agencies. I don't think there is a lot of cost to having two agencies either. There are not a lot of scale economies. Most of the people aren't doing duplicative things. To the extent that you have overhead, when you have twice as many people, you certainly need more personnel people than one agency would have. There are a few minor overhead savings. If there were no Commissioners, you would have five people you could get rid of, versus one at the Department. But that seems like a pretty slim reed to make a decision on.

I think you would lose some things if you eliminated an agency. The FTC has a long history of making studies. We don't have much in the way of real statutory authority to do that. We can't use our civil process to look at that, like the FTC does. So that would be lost, if the FTC wasn't around.

If we weren't around, I think you would lose the connection with criminal antitrust. I think we have learned quite a bit from our cartel people, learning about how entry may or may not undercut a cartel, for example.

I think we have benefited from two sets of eyes on Hart-Scotts when they come in, because people miss things. I guess you could institutionally take care of that under one roof. But I think dual review has worked pretty well. I have seen DOJ ET a matter, and the FTC investigate it, think there is a problem, and end up bringing a case.

So there are some benefits to two agencies. I am not claiming that they are large, but I also think that the discussion of the problem is overstated. I think there are some clearance costs, clearly, both institutionally and for private parties. I think they are relatively rare. In 2005, the average contested clearance was a little over four days, from when clearance was requested to when it was granted. The average Hart-Scott clearance was three days. The average non-contested clearance was two days. The vast majority of these things get through very quickly.

Then there are a few each year that are bad examples. It's something that we would like to do something about. But it is something that is relatively small in the great scope of things that the agencies are doing.

Mr. Proger

But the issue is about the relatively few. I am going to let Mark speak next, but, Bob, I want to put you on the spot. What is your solution to the clearance process?

Mr. Kramer

We are open to a lot of different things. We tried something in 2002, you might remember. Despite the fact that, in some of its minor pieces — I thought it wasn't to the benefit of the

republic because it gave too many things to the FTC — I supported it back then. I thought it was a great thing. During the period that it was in effect, it worked very well. I think that it had the benefit of not only taking care of a lot of specific industries, which it did, which became automatic, but it affected the climate. With so many things off the table, there was less gaming, I think, and less grandstanding on certain other things.

The trouble is, we can't go back to that, as agencies alone. We were told by Congress back then not to do it. I think it's naïve to think that the issue was just one senator. The promise not to implement the clearance agreement was made more broadly. Chairman Majoras has certainly made promises about it.

Ms. Pearlstein

But you could go back to it if permitted to go back to it.

Mr. Proger

We are talking today about whether the AMC should recommend it.

Mr. Kramer

I personally would be very open to that. I can't speak for the agency on that, but I would personally be open to it. I thought the 2002 agreement was a very positive step.

Mr. Proger

If, nevertheless, there still was a clearance problem, would you accept, for example, the coin flip?

Mr. Kramer

You know the answer to that is yes, because it is the best of the available solutions out there – when it's the end of the day, you have thought about a clearance dispute long enough, and it's time to make a decision — I prefer the coin flip, in part because I think the other solutions are more subject to gaming than the coin flip, and the others lead to worse incentive issues than does the coin flip.

I also thought the arbitration idea was a good one, but that is extremely unpopular with the Commission. It does take time. The coin flip has the benefit that you walk down to the FTC, it takes fifteen minutes, fifteen minutes to get through security, you go upstairs, you flip the coin, and then you go back and it's done.

Mr. Graubert

I agree that the coin flip is quick. I also agree that the 2002 agreement approach did include a dispute-resolution mechanism which was supposed to be very quick. I think the benefit of having something like that is that it keeps the issue of expertise on the table as much as possible and takes out purely arbitrary factors. I can understand, if there was a really hard case that was

going down to the wire, you might have to take a somewhat arbitrary approach. But to the extent that we can keep the idea of expertise in the picture, and we are addressing the problem that Debbie mentioned, which is that there are some issues that are hard to characterize — is this an entertainment case, is this a software case, is it a floor wax, or is it a dessert topping, or is it both? If there is a way to apply some kind of rational analysis to that — I understand that time is an issue, so it has to be done in an expedited way.

Mr. Proger

Mark Whitener, you have the advantage over, I think, a lot of us here, in that you have been in private practice, you were at the Federal Trade Commission, and now you are in corporate America. We have solved it here, right? We have answered the clearance problem.

Mr. Whitener

Last things first: From the time the AMC was created, I have viewed resolving the interagency clearance problem as the low-hanging fruit for the group. You don't have to propose legislation, I would think. You do need to provide political cover for the agencies to do what they tried to do earlier. There are lots of variations about how to do this, but I think there is widespread support for the industry allocation approach. There was political opposition before — it may be fair to say it was more than just one senator. But my sense is that the AMC is a congressionally created organization that is supposed to make recommendations — and this is an issue where the AMC can provide the support, the cover for the agencies to go back and do it themselves.

I think that is the best way to do it. It's not the only way, but I think it's probably the best way.

The statistics on clearance delays do I think generally tell the story that Bob tells, although my sense has always been that this is an issue that is kind of underreported. The agency leadership doesn't see the disputes that go right up to the point, but not beyond the point, where they come to the leadership to resolve. It's usually the more difficult deals, the ones that really raise issues and that are complex, that result in the clearance dispute. Those are sometimes the deals where the full thirty days is needed to make a good judgment on whether you really need a second request.

So I think it's maybe a bigger issue than some of the agency folks will say.

But if I were going to say one thing that the Modernization Commission should do, it's this: In some manner, provide cover for the agencies to fix this issue.

Going to the bigger issue that I think everybody on this dais agrees about, taking on dual enforcement, it seems to me that is very high-hanging fruit, and it seems to me there needs to be a judgment about what issues really need to be the focus of policymakers in the United States. It seems to me this is not an issue that is on to my top ten or twenty list in terms of what really needs to be addressed in antitrust policy.

Mr. Proger

Is it fair to say, panel, that we have a consensus that trying to do something with the overlapping jurisdictions is politically hard and not worth the effort, and that the AMC's efforts are better spent in trying to clear up some of these differences?

["Yeses"]

Mr. Graubert

I agree with the last part.

Mr. Proger

That is a good segue, John. One of the other things the Commission is examining is the fact that not only do we have two agencies, but also, because of history, they are structurally different. Unlike DOJ, the FTC has 13(b). It has Part III administrative proceedings. It has both prosecutorial and judicial functions. There has been some review and questioning of that.

Are these differences at the FTC really a problem, and do they really need to be addressed? Or in the end, is this an area where the AMC should leave things as they are?

Mr. Graubert

I think no and yes. The questions that have been raised about differences between the agencies, as Phil mentioned, are in the area of PI standards and post-PI procedures. As we have said several times, although there may be theoretical semantic differences, we don't see them in the courts. The judges have made no distinction that I can see between whether or not the DOJ or the FTC is the plaintiff in a PI case. Unfortunately, neither the DOJ nor the FTC, in my view, has actually been getting the benefit of a preliminary injunction. We have been subjected to extensive, extensive proceedings. There may be various reasons and people to blame for that. But I point to, if nothing else, the drug wholesalers litigation in front of Judge Sporkin. I defy anyone to describe that as what a preliminary injunction hearing is supposed to look like. I think the trial was seven weeks.

So I don't think that any court has stopped to consider the semantic differences between — however you want to describe the difference between the 13(b) standard and the DOJ standard. I think, as a practical matter, they are the same.

One thing that I think is a source of confusion is, the standards of the federal agencies for preliminary injunctions are different than the standard applied in cases involving private parties. I think that is appropriate. There is a more elaborate standard applied in private parties' cases, which also includes requirements of showing irreparable injury and some other factors. I think that a shortened public-interest standard is appropriate in government actions. So far as I can tell, as I say, there is no outcome-determinative difference in the standards imposed in DOJ and FTC cases.

The fact that FTC has administrative options available, the Part III process — again, I fail to see any real-world problem. In the context of this seminar, I also see nothing that the AMC or

Congress could latch onto here, either in terms of an actual problem or an actual solution. After the denial of the PI, both agencies have to make a decision. In fact, DOJ has proceeded in at least one case that I can think of offhand. I think it was the *Waste Management* case. After the PI was denied, they proceeded to a full adjudication. That, I think, is appropriate. That's the way litigation is handled in this country generally. The FTC has the option of proceeding to a full trial when they lose a PI.

In the FTC's case, as you all know, this option is severely limited by a self-imposed policy. The FTC has made a very serious consideration of whether, once it loses a PI, it is in the public interest to continue litigating. This would apply, I think, in any context, but also in the administrative context. As I think someone mentioned this morning, in fact, in the last fifteen years, the FTC has never proceeded to a full Part III adjudication after losing a PI — most recently, in the *Arch Coal* case.

So I don't see any glaring disparity or prejudice that is resulting from the fact that there is a different administrative machinery available.

Of course, we could talk, if we had to, if we had more time, about why it's a good idea to have administrative adjudication every now and then. I mentioned a moment ago that, with such an outstanding group of five Commissioners, we might — in fact, we do have pending a couple of Part III cases, in which we will say some things about merger law. That was, of course, one of the reasons for the FTC being created.

The last thing that I would just hope that we would all keep in mind is that all this discussion about what happens after a PI overlooks the fact that we all acknowledge that almost every matter is decided at the PI stage. If the agencies lose a PI, as I said, in most cases, pursuant to our policy, the FTC has ended the case. If we grant the PI — I guess this is an unintended byproduct of having such extended proceedings. If you get a 120-page opinion by a judge, after hearing forty witnesses, and he says, "This is a violation of Section 7," I think it's probably prudent for parties to say, "I think we're going to lose this case."

Since the overwhelming number of cases is, in fact, decided at the PI stage, I don't see a pressing problem, and I don't see any actual disparities between the two agencies in the post-PI phase that warrant any AMC intervention.

Mr. Proger

Let me just ask you a question. If I understand what you are saying correctly, you are saying that, as a matter of discretion, in the last fifteen years, the FTC has never proceeded to Part III after losing the PI. I would guess that a majority of the parties, after losing a PI, abandon the transaction, correct?

Mr. Graubert

Yes.

Mr. Proger

So it would seem to me that, as a practical matter, a Part III merger proceeding is something that the FTC is not really relying on. If that is the case, why not just follow the same procedure that the Department of Justice does and put the decision to an Article III judge, so both agencies have to go before the same forum?

Just to add, I will grant you that Article III judges are not the same, and there are a lot of vagaries there. But at least the two agencies would have the same process.

Mr. Graubert

I was with you until the very end. I was going to say, about the Part III process, even if we don't use it very often in mergers that have not yet been consummated, there is a value to having the ability, occasionally, to have a fully litigated Commission decision, rather than having merger law be enunciated through a series of PI rulings of disparate courts. Posner has made that comment as well.

Again, I don't think we are in a significantly different position than the Department in this case. The outcome of the PI proceeding is going to determine a large number of cases. In fact, as I think about it, most of the merger law that exists today — modern merger law — is the appellate review of PI orders. I think we are, in a sense, in substantially the same position.

But I see no reason to eliminate the possibility that, if the facts permit and the parties are willing to litigate beyond the PI, we have a fully reasoned Commission opinion on some Section 7 issues.

Mr. Proger

Any other comments?

Mr. Kramer

I largely agree. But one small correction. *Waste Management* was lost on a TRO, and then the Department decided to go to a trial on the merits, which I remember quite well, having tried that case in New York in front of Judge Griesa.

We will review whether to proceed whenever we lose at PI. If you lose a PI, it matters what sort of PI it is, when you get down to it. If we have an old-fashioned, one-day PI hearing, or we have a PI decided on the papers, we are much more likely to go to a full trial afterward. Where we get a PI hearing that is a couple of weeks long, then we are less likely to go to trial if we lose. We have only tried one PI that was purely a PI, not consolidated, in the last five or six years, the *UPM* case, which we won, so we didn't face that issue.

I also agree that the statutory standards faced by the two agencies when seeking a PI are essentially the same. We may be wrong about this, but this view has been in our Division Manual for a long time. We think that the statutory standard at the FTC was crafted to basically make it like the standard that courts were applying to the Department of Justice in cases like *Siemens* in the Second Circuit and *Ingersoll-Rand* in the Third. These cases basically assumed

irreparable injury. There are some statements in the *Congressional Record* that indicate that the FTC statute was written to import the concept of presumed irreparable injury into the FTC Act.

Mr. Proger

Mark?

Mr. Whitener

I think, as a practical matter, federal judges have taken this issue into their own hands over the years. The standards have essentially coalesced — although the injunctive standards on paper are different, they are essentially the same now for the two agencies, and they have become much closer to a permanent injunction standard. These seven-week trials are perhaps still unusual, but the average, I suspect, now for a merger PI is a couple of weeks. Those are more like trials on the merits. I think this is because judges, acting independently, in various judicial circuits around the country, understand and accept the argument that their judgment in a merger case is essentially a decisive up or down judgment on the deal, as I think everybody who has spoken so far has agreed.

By the way, I think that's a good thing. Carl Shapiro referred to E.U. merger review in the earlier panel. One of the criticisms of that process is that there really isn't an effective judicial check on the agency's decision.

There is here. It's a real one and it needs to be a real one. That is not to say that the standards ought to be so high that meritorious cases can't be proven, but I think what judges have done is, they have taken Section 13(b) and they have taken the DOJ standard and they have essentially applied both to say, "I'm rendering an up or down vote on this merger. I am going to decide, basically, who wins or loses." They have essentially, I think, read out the presumptions in favor of the agencies that really were there in the case law fifteen, twenty, or twenty-five years ago.

That evolution is undeniable. I don't think it's anything that needs to be addressed by the AMC. I don't think it calls for statutory changes, because I think it has been a natural process that has ended up in about the right place in terms of the balance between private parties' interests and government enforcement.

Mr. Proger

Debbie?

Ms. Pearlstein

I am not as convinced as my fellow panelists are that it doesn't make any difference which agency is before the judge. That is based partly on my own experience. It's impossible to conduct a controlled test, so neither side on this issue can prove that they are right. We can't control all the variables. We have different judges, different facts, and different mergers, so no one can show that the same merger would come out differently if litigated by one agency versus the other.

I am just not as convinced, because I think psychologically a judge who says, "If all I need to know is there is enough to send it back to the FTC versus me being the final decision maker with the DOJ," I think that's a different psychology for the judge. That is where I get my instinct from.

Again, my philosophy is that the AMC should be saying, outcome-neutral. So if there is something in the statutory language that is different that a judge could seize upon, then it doesn't make sense — if we are going to have two agencies looking at this stuff, the outcomes ought to be the same, regardless of which one.

That influences my view as to the Part III adjudication as well. I completely agree that we have five highly qualified Commissioners at the current time. I am not sure we have always had five highly qualified Commissioners, and we don't always have highly qualified ALJs. The whole process, of course, of administrative adjudication is one where you have the same agency being prosecutor and jury and judge. There are issues there. I am not casting in doubt the whole FTC, but there are differences in process.

Again, if the FTC is never going to use Part III after they lose, and that is their policy — which is clearly the right policy — then I don't think they should be fighting to keep it, when they are not going to use it anyway.

Mr. Proger

You raise an interesting point, because inherent in your point is the same reason why we want structural relief in mergers. While we may have an excellent Commission now — I will be stronger than you — in the past we haven't had excellent Commissions. We do now. But that doesn't mean, if we leave the structure in place in the future, we won't again suffer.

By the way, you touched on something else that I think is a practical problem, outside of those of us who have spent most of our lives with antitrust, which is the appearance issue. It's not only an appearance issue insofar as standards and procedures differ in an FTC investigation from those in a DOJ investigation. In addition, it is difficult to explain to people that the same agency that issued the complaint is also going to adjudicate whether you did something wrong. Like it or not — maybe this is a silly point — but in this country, people take umbrage at that.

Mr. Graubert

The Supreme Court has already addressed that several times, and I'm surprised that anybody would still have any issue with that whatsoever.

Mr. Proger

The Supreme Court has addressed its legality, not whether it's good policy.

Mr. Graubert

I might also say — we were talking about international developments — the FTC model is now being widely accepted elsewhere in the world and being explored in various other contexts.

I also won't get into characterizing the quality of the Commissioners. One of my former bosses got into trouble about that.

That is not the intent or the reason, but that is one thing that the adoption of policy statements addresses and is useful for. The Commission has adopted policy statements in recent years in several areas in which it is perceived that there is some controversy — the use of 13(b) to get equitable monetary remedies in competition cases and resorting to Part III after the denial of a PI. The Commission realized that it would be helpful for the public and for future Commissions to see that there is a policy statement and some kind of guideline. Then, if there is some reason to change it later, they can consider changing it. But at least there is something on paper for future generations to have to take into consideration.

Mr. Proger

Let's conclude. Does anyone on the panel want the Commission to seriously consider changing 13(b) or eliminating Part III?

Ms. Pearlstein

I think I am saying that the Commission should look for a single preliminary injunction standard, yes.

Mr. Proger

Mark?

Mr. Whitener

In reality, we have, in essence, similar PI standards. To get to a point I made earlier, what is the AMC's best approach? This program is not just about what the best antitrust policy is in the abstract, but what the AMC should do. I think they should pick their battles. I think, if we are not going to have one antitrust enforcement agency — which we are not — the AMC should focus on the differences that really matter and the problems that really matter. Interagency clearance is a problem that matters. It should be fixed. We will talk later about the second-request process. I think that's a problem that is being fixed. I would focus on the things that really bite, and it is not clear to me that the different PI standards really do.

Mr. Proger

All right. Switching gears, then, Mark, do you think we are capturing too many mergers? Should the thresholds be raised? Should we have a different approach? Or is it about right?

Mr. Whitener

In your presentation, you went through the issues that came up in the testimony, Phil. I look back at what people said about this. I think it's fair to say that the testimony to the Commission mirrored my sense there isn't a big groundswell right now for significant changes to the HSR filing thresholds or the filing system as a whole. I think those are two different issues — numeric thresholds, and how the HSR system is structured.

In terms of thresholds, there were business groups that said, "It's great that the thresholds were raised and that they were indexed." Some of the business groups said, "the thresholds are still not high enough." That is a question for which I don't think there is a principled basis to answer. It's a regulatory tradeoff between catching more deals and enabling potentially more enforcement, versus letting more deals go through without a regulatory screen.

I do think it's worthwhile to note, on an international comparative basis, that what has been happening over the last few years is that we are now operating in a global merger-review environment, and the U.S. has now been, in essence, outflanked by some major jurisdictions. If you look at filing thresholds as a percentage of GDP, the U.S. thresholds are now lower relative to GDP and more inclusive than the thresholds in a number of other major countries. Canada is an example, and there are numerous other countries as well. France has changed its filing thresholds to be significantly higher relative to the size of its economy.

I think there is an argument to be made for raising the thresholds again. Here's the problem: As long as the agencies' funding is tied to filing-fee revenue, and as long as threshold changes have to be revenue-neutral, then you are going to see significantly higher filing fees as you see thresholds go up. The business community didn't used to pay attention to filing fees. Now the highest fee is over $250,000. That gets people's attention. I see deals where that is one of the last issues to get negotiated: Who is going to pay the fee? You can be talking about a material amount of money.

So one thing that the AMC should think about is trying to decouple agency funding from filing-fee revenue. That link is not particularly good policy. I don't think the agencies have acted in crass self-interest in how they have approached HSR filing requirements and filing fees, but there is always the perception that that could happen. I think it also impedes a sensible regulatory balance of what the thresholds should be, because in the current environment raising the thresholds and capturing fewer deals requires increasing the fee even more. Then you have a very sharp divide between deals that pay nothing and deals that pay a substantial amount of money.

Other possible changes were addressed in some of the testimony in terms of trying to go to more of a short-form/long-form system or some kind of triage of deals to determine if they involve substantive problems. All of that, to me, runs counter to the best practices that are developing internationally, in the ICN and elsewhere, that filing thresholds need to be objective and clear and numeric, and you need to be able to understand them and comply with them. So I would not think the AMC ought to look at tests for whether deals involve overlaps or market shares or other similar subjective questions in determining which deals get filed.

I think the thresholds are an issue to think about, but mainly I would urge decoupling of the fees from the agencies' funding.

Mr. Proger

Let me ask you, as a follow-up, you have talked about the AMC appropriately using its political capital. How risky is it to suggest decoupling? Is that suggestion likely to be followed?

Mr. Whitener

No, I think it's not likely to be followed. I think this was a mistake that was made some years ago, and some who were involved in it have acknowledged his. It seemed like a good idea at the time, and it produced, in the short run, some boost in funding for the agencies. But I think it's a bad idea.

I want to just add, I think there has to be a reality check in determining what the AMC should recommend, but — maybe to Debbie's point — I don't think the right thing to do should invariably be left off the list just because it might be politically infeasible. If it is important, maybe the Commission should take a few controversial stands and try to stimulate some debate.

This particular issue is pretty technical, but would have a lot of positive public policy benefits.

Mr. Proger

What about other members of the panel? Do you agree with Mark? Or should the AMC leave the fee question alone?

Ms. Pearlstein

It clearly violates all the rules of good government. On the other hand, I have been extremely impressed, in all the years since this became a factor — I remember when these filings had no filing fee — I have been extremely impressed with how principled the Premerger Notification Office at the FTC is in terms of giving advice as to whether you have to file or not file — completely indifferent, as far as I can tell, to this issue, which I really have been impressed by, because it is human nature, of course, not to be so principled.

I don't think it's a problem. It would not have made my top twenty list.

Mr. Graubert

I want to thank Debbie again for nice words about the agency.

Just in terms of good government, I note in passing that user fees — which is essentially what this is — are, as Judge Dubina would say in the Eleventh Circuit, fundamental to the American system. It is a little different than the problem that arises in other countries, where the penalties are tied to your budget. That raises good-government problems.

I have no view on the political ramifications of this. As long as I get funded, that's fine.

I wanted to throw out something on the related issue of the threshold, which is just a note in passing. Since the threshold has been raised — and we are still sort of digesting that change — we have had significant cases in which the cases were unreported and consummated and caused problems, and we have investigated and brought cases. So just raising the threshold doesn't get us all out of the woods. It obviously raises the same problems we had before 1976 in terms of investigating and applying remedies to those cases.

Mr. Kramer

I was going to say something similar. I think we have seen an increase recently in the number of consummated mergers that we are looking at. So it is not absolutely costless. I think it was still a good idea to do, because it's still relatively small compared to the 2,500 deals that went away. It turned out to be a good balance. Really, now, if you look at that $50 million-to-$100 million range in transaction size, there are a significant number of second requests and clearance requests within that range.

What you would really like to do is to go through the numbers and say, "You get down to this size, and the number of investigations falls off a cliff. We shouldn't subject them to Hart-Scott." We are not seeing that when we look at the numbers in that $50 million-to-$100 million range.

Ms. Pearlstein

This is not, in my view, John, a user fee. A user fee says, if I want to log on government-owned land, I have to pay for the privilege. This is, "I want to do a transaction. You tell me I have to file, and then you make me pay you to review my filing."

Mr. Whitener

Let me throw in one other thing, Phil. I think, in a couple of years, another issue we will be talking about is the impact that U.S. filing fees have had on other jurisdictions. What the U.S. does, for better or worse, sets the standard.

I have been wondering why other jurisdictions weren't racing to impose substantial fees. Now they are starting to do it. Italy just implemented, I think, a €50,000 filing fee. And they have very inclusive thresholds.

So I think in a couple of years we may be looking at run-of-the-mill barely HSR-"filable" deals, generating very substantial global filing fees. At that point, I think we are talking about something beyond any fair idea of a user fee — even if you define it as a user fee, it is going to be disproportionately high.

That is why I focus less on the thresholds as an absolute matter, because I think you can make a good case that they are set at a fair level now, and more on the filing fee issue.

Mr. Proger

On the thresholds, at least they are indexed now, which I think is good government. Again, I think that you can always challenge where the line is drawn.

I would like to conclude the panel by considering, in comparing our system to other systems that employ market screens, market-share tests, or percent of GDP, should the Commission consider our filing thresholds, or is the current test good enough? You might quarrel about whether it should be 56.7 or 75.4. But rather than a market-screen test or some of the short forms or other things we have been talking about, is this one area where this panel thinks the AMC should not recommend a change?

Mr. Kramer

I don't see any reason for a change in this particular area.

Mr. Proger

Mark?

Mr. Whitener

I certainly would not go to a more subjective test.

Mr. Proger

Debbie?

Ms. Pearlstein

Yes.

Mr. Proger

John?

Mr. Graubert

Yes.

Mr. Proger

Okay. Let's turn to what has always been the most controversial area, and that is the length and burden of the second-request process and the overall HSR process — what you have to search, how you have to search, and what is in that second request.

I would take it, Bob, that from your view, the Commission doesn't have to make any changes here.

Mr. Kramer

It's a little more nuanced than that. Let me just start off the way I was going to start off.

I think any discussion of the Hart-Scott-Rodino process has to begin with the world before the Act was passed, when the agencies had little or no notice of mergers and post-closing litigation took years, and the proverbial eggs were not just broken, but usually beaten as well.

Our experience in post-closing deals since then has reinforced the view that without a premerger notification regime, we would be back in the same soup.

HSR was enacted for the dual purpose — I know some would disagree with this — of giving agencies sufficient information premerger to make an enforcement decision and to give sufficient discovery to allow the agencies a fair shot at a PI hearing. The expectation was that second

requests would be short and easy to respond to. There was also an expectation — remember, this was 1976 — that PI hearings would be short and driven by structural presumptions.

None of these expectations held true. Initially, second requests got broader as more issues became relevant, entry became relevant, and you saw entry specs added into the second request. When efficiencies became more relevant, they were added to the second request. As competitive-effects theory overtook structural presumptions, more questions came into the second request.

More recently, two things have happened that have raised Hart-Scott compliance to be more of a burden. One is empirical antitrust, and second — and maybe more importantly — the cost of storing electronic information dropped so severely that firms reacted by saving huge volumes of emails and documents and spreadsheets and everything else electronic they could think of. Knowledgeable commentators have said that the volume of electronic production per custodian has increased sevenfold. That is a burden on parties. I would note that it is also a burden on the agencies, something which I have been saying publicly for about a year-and-a-half now, I guess.

The question is, how do you balance desires of firms to reduce merger process burdens with the need of agencies to obtain enough information to enforce the law? I think the agency answer, right now at least, is focusing on the critical fact that the vast majority of merger matters, even second-request matters, are either not brought or are settled and don't go to trial. Of the Division's last approximately 250 second-request investigations, only four have been litigated.

The FTC has issued a package of merger reforms that includes limits on the number of custodians — I think thirty-five. The ABA study, for example, found that, on average 100 or 110 custodians have been searched under a second request.

The Department will issue its own similar package of reforms. It is not going to be identical to the FTC package. It is explicitly going to attempt to move some of the burdens from the vast majority of deals that are not litigated and replace that with discovery later on, after a case is brought.

I think there is an expectation, given the relevant numbers that we are talking about, that the actual production of documents could be reduced easily to a third of current volumes, when you look at the reduction in the number of custodians and a reduction of the default time period in the second request.

The question is — I think it's a fair question — if that is done and if that tradeoff is the right tradeoff to make between firms that are in the process, but aren't ultimately going to be litigating — moving some of that burden to those that are litigating after the complaint is filed — does that do it?

Mr. Proger

Former Commissioner Leary suggested that parties be allowed to choose an option going in. Option 1 would be, "We agree that, should you decide to challenge the transaction, you have ninety days for discovery. In return, we get a much more limited second request." Option 2 is, "We are not going to give you that," in which case the investigation proceeds in the usual course.

Mr. Graubert

There is something like that in the set of merger reforms that Chairman Majoras issued back in February. I guess I can only say that we should wait a little longer and see how it works. We haven't had a lot of experience under the new procedures. All of our second requests that have gone out have had the more streamlined definitions and the other options. But I don't think we have had a lot of experience in these kinds of choices, where people say, "All right, I'll go for the more limited number of custodians and then I'll give you various assurances about what would happen if we ended up in litigation." But those options are on the table today.

Mr. Kramer

I think that's the way it is going to be laid out. That's how we are thinking about it in the Department as well. You are not forced to go down this road. It is an option.

Mr. Proger

Do you think, Mark and Debbie, that second requests would look different if you had a right to review by an Article III judge?

Ms. Pearlstein

Each of the agencies has its appeal procedures, I gather. They have them now or they have had them in the past. I have always been extremely reluctant to recommend them to clients, with the view that going over the staffer's head, even though the agencies technically are inviting you to do so if you have a problem, is likely to make your life more miserable down the road than not.

Going to an Article III judge is going to take time. Is it really going to be worth going to them to fight over whether you have to go to Europe and translate some additional documents or something like that? You have now gone to, essentially, psychological war with the agency staff by doing that. I am not convinced that people would — you guys probably know how often people use the appeal process that exists. You have to go that much further to want to take it to a judge.

I am not convinced that this is something that the Commission needs to address, recommending some sort of legislative change of that sort. I am not even sure that this is something the Commission needs to spend a lot of time on, because I think the agencies are doing a better job.

I will divert myself with a small trip onto the high horse about why the DOJ's second request rules should be different than the FTC's rules. "Similar but not identical" is how Bob described them. That, to me, is an issue.

We have had a variety of experiences with the agencies trying to address second request burdens in the last few years. Charles James did this with some initiatives, and, clearly, Debbie Majoras is — they are trying, I think, hard to make them more reasonable. I don't think anybody will ever think second requests are reasonable if they are on the receiving end. I am just not sure we will ever get to anything that really makes everybody happy.

Mr. Proger

Mark?

Mr. Whitener

I am a little skeptical of a new judicial review process, partly because, for the reason Debbie notes, the cost of invoking any such process usually can be high for the parties as a practical matter. It's hard to quantify, but it's there when you are dealing with regulators as a repeat player. The evidence I point to is the fact that there essentially is judicial review now. As some practitioners have pointed out — and one practitioner has tried to do in the last year, though not too successfully — you can go to court. You can declare substantial compliance and say, "I'm done. I've done what the statute called for and I've read the HSR legislative history, and the parties are in substantial compliance," and you end up in court, because the agency brings a (g)(2) action. At that point, you find yourself explaining to your client why you are in court with the Justice Department over the deal that you want to close in three months.

So it is not often practical to do. The right to litigate second request compliance is there now, and I am not sure a new procedural right to litigate is really indicated.

I do think, though, that the AMC needs to pay attention to this issue, because I think the scrutiny brought to bear by the AMC and the goodwill of the agencies and the insistence of the bar that this is something that is important has brought about a really good, substantial discussion of these issues, tangible action by the FTC, and, I am sure, shortly tangible action by DOJ. I would let that process play out. But I hope it plays out successfully before the AMC is finished with its work, because I think the existence of the AMC is an important incentive for everybody to take this issue seriously.

Mr. Proger

Panel, the problem for the AMC is that, under Chairman Majoras's leadership and before, we have the FTC — at least its leaders — attempting to deal with a perceived problem with the second request burden. Otherwise, they wouldn't be suggesting reforms. The DOJ is now considering doing something similar. So the AMC now has to decide, "Do we leave it to them, or is there something we should contribute?" They are confronted by the practical problem of, "Do we do anything here?"

Mr. Kramer

But then again, I don't think there is any realistic way for it to be treated legislatively, putting aside the whole issue of opening up the entire Hart-Scott process to whatever amendments anyone might want to put in there.

I wanted to make a couple of points. One is that I am not sure the second request would look all that different with a direct appeal to an Article III judge or to a magistrate or whomever. There is a substantial body of law out there on administrative subpoenas. It grows out of our CIDs and out of CIDs from the SEC and other agencies. Courts are very deferential. They obviously care about burden, but they also give agencies a very wide range of discretion as to what is in them. So I am not sure that second requests would look any different.

I also wanted to comment on one thing. I think there is some value in having slightly different proposals coming out here. This isn't something where everybody knows what is right going into it and what is going to work. The FTC and DOJ may both believe they have crafted reform perfectly, but their counterpart's ideas may work a little bit better. I think we can each learn from what the other agency does.

I think our experience with the Merger Review Process Initiative of Charles James was very positive. Obviously, Chairman Majoras had a lot to do with that when she was at the Department. Not surprisingly, the positive results of that can be seen through the new reforms at the FTC. If you look at the second-request investigations where we did not bring a case in at the end of the day, the average length of those investigations was six to eight months in the years prior to the initiative, and now they are running about four-and-a-half months, four to five months, over the last several years. The result of the Initiative and the cooperative approach that we have taken, the higher-transparency approach that we have taken, focusing on particular issues as part of a timing agreement — the ultimate effect is that the investigations of those matters which turn out not to be competitive problems are being finished sooner than they were before.

So, we have made some progress. This is an example of how, when we did this, we didn't know if it would work. It is working. The FTC has added it to their program.

Mr. Proger

John, Debbie, Mark? Audience, any questions? Yes?

Participant

I'm very wary of judicial review by Article IIIs. They don't like it [inaudible] district court judges. They didn't like in the Telecommunications Act. They didn't like it way back when [inaudible]. They don't like [inaudible]. So I wouldn't think they would decide them as quickly, if speed is an issue, as you would like. [Inaudible] lobby [inaudible] against this kind of [inaudible].

Mr. Whitener

And let me just chime in. If a particular judge reads Judge Walker's detailed decision in *Oracle* and says, "That's what I will have to adjudicate at the end of this process," I'm not sure the judge is necessarily going to tell the parties what they want to hear when the parties complain that the government is asking for too much information. They may tell the government what they want to hear.

You could obviously recommend legislative changes that would tilt the process toward, in some manner, a more streamlined process. I am not saying that won't ever be necessary, but I do think we are in the midst of a process now where the agencies are addressing this, and I would give it some time to play out.

I see your point, Phil, about what the AMC does in the meantime. They can't keep their engines idling forever. Hopefully, Bob and his colleagues at DOJ will do their thing soon, and then we will have a few months to see how it works out.

Mr. Proger

I don't know. I think, implicitly, with the statement by the gentleman from the audience — who I thought was exactly correct — there is fertile ground for the AMC. We could look at why judges who are paid to decide things don't like to decide things. But that's a different problem.

I think one point here is very well-taken, which is that there is a body of law on administrative CID investigatory subpoenas, and there is no doubt that there is a lot of deference given to an agency or a prosecutor in an investigation.

One of the things that has been suggested by some of the commentators, which this panel seems to disagree with, is that the availability of review by an Article III judge could create an inherent deterrent effect. It has also been pointed out that, from a good-government perspective, it is questionable in appearance that the people issuing the second request get to adjudicate whether it was reasonably and properly issued.

Bob, did you have a question?

Mr. Joseph

It's something that Bob touched on, and that maybe relates the two panels we've had on mergers — the relationship between the assessment of how many mergers we think are bad and what the burden of proof is that we are going to require of the plaintiff in a merger case. Isn't that what is driving this at the end of the day, the policy question: What mergers do we care about, and what is the burden of proof? If you start off with strong presumptions, the plaintiff may not need a lot and may be prepared to seek a preliminary injunction with relatively few facts. The court may have the perception that a preliminary injunction will mean the death of a transaction that could have substantial benefits and efficiencies and may, in the end, demand more hard proof that what would be typically associated with plaintiff's burden in a preliminary injunction case. This could lead to the agency seeking extensive discovery at the second request stage.

So the two really do relate. I think that's what makes it difficult. Where there seems to be some consensus is that for both sides -- agency and merging parties -- dealing with a lot of paper at the second request stage can be highly problematic in terms of expense. And may be that is where there is some room for compromise. Of course, as Debbie notes, when you are on the receiving end of a second request, it never looks good.

Mr. Kramer

I agree, in large part, although I think that it is ultimately to the benefit of antitrust and good decision making that there are more factors in play now than there used to be. I think today's approach leads to better decision making than a pure reliance on presumptions.

The downside is, when you go down that road and everything becomes relevant, you need a lot of information on everything.

So what the agencies are trying to do now is figure out what information we really need to make a decision and how much can be deferred to litigation. But if you are going to make that

tradeoff, you actually have to have the ability to get sufficient discovery before you go to trial, in order for this whole process to be litigation-neutral.

Ms. Pearlstein

I guess I would end with a compliment to both of the agencies. One thing I love about being an antitrust lawyer is that the antitrust bar and the antitrust enforcement agencies are willing to talk to each other in a constructive manner. The agencies have been very open to hearing from the bar, whether through the ABA or in other manners. I think that has enormously improved the process.

That's not something that I hear from my brethren who work with other enforcement or regulatory regimes. Sometimes there is too much hostility and everyone assumes the private bar is just out to pull one over on the enforcement agency, and the enforcement agency is just a bunch of bureaucrats.

You don't see that in this area, and it is really to the credit of the agencies, I think. I guess, as a private member of the bar, you can take some credit for having an honest exchange of views. I think that has helped, and I think that's just one of the reasons we probably don't need AMC action here.

Mr. Proger

I can't resist that. I think that probably *the* outstanding benefit that the Section of Antitrust Law over the years has provided, perhaps more than any other bar organization, is the willingness to work together and to have the enforcement agencies on the council. So I think that's right.

On your point, Bob, just to conclude, this is not a new issue. If you listened to the panel before us, Derek Bok, in 1960, wrote a *Harvard Law Review* article about a dizzying array of factors. We tried to get to guidelines. Then people said the guidelines were too inflexible. There has always been this tension in antitrust between flexibility and predictability. And that is not going to change.

I think, in the area of procedure, what is daunting for the AMC is that we are a little xenophobic here. The mergers that are the outliers, the ones that increasingly give rise to problems, are mergers that are international, that face, to now play off of Derek Bok, a dizzying array of procedures worldwide. It's not just the United States where this is an issue.

One of the problems for us, frankly, is that, we go around the world preaching that you shouldn't have a market-share standard and you shouldn't do this and your agency shouldn't have these; but at the same time, we have some of these differences here. Going into another area, state AGs – I think the AMC, in this respect, on procedure, really has a difficult problem.

In conclusion, we have talked about whether certain things may be politically doable. Should that even be a factor, in your mind, for the AMC? Or should the AMC go ahead as a group of experts, and make their recommendations regardless of whether or not the recommendation action is politically doable – like the delinking of filing fees and funding? Mark?

Mr. Whitener

I think it depends on what one hopes the AMC accomplishes. If you would like to see an agenda of a few proposals that might actually get enacted, then I would say, be selective and have a limited number of proposals, and make sure they are, at least arguably, politically doable. Otherwise, you put out a very elegant report that everybody ignores.

But my concluding comment is, I think there is also, just lurking over this whole process, the question of unintended consequences. If I had the decisive vote on whether there would be any major substantive recommendations for legislative change to the Sherman Act or the Clayton Act, would I say yes or no — even assuming I could pick what each of those proposals would be? I'm not sure I would say yes, because you are opening up a process in which everybody gets to come in and make their own special pleading. At the end of the day, if I had to say whether I would like to see the antitrust laws substantially changed in a way that I can't predict or kept the way they are, I might go for the status quo.

So there are a few things I would like to see done, but I'm not sure I would like to see them put into a comprehensive package of legislative proposals that might launch a broad congressional reevaluation of a set of laws that have worked reasonably well.

Mr. Proger

Bob, final comment?

Mr. Kramer

Just that I am a pragmatist rather than an idealist. I would hope the Commission would focus on things that are doable, even if it lays out some markers on a few important things that aren't doable, but which just have to be said.

Beyond that, no particular advice.

Mr. Proger

Debbie?

Ms. Pearlstein

It would seem crazy to me if the AMC were ultimately to decide that it should say, "Do nothing," because it's afraid of what would happen and the unintended consequences. I can't imagine that the Commissioners would want to waste their time over these years doing this.

I think there is probably a compromise position, where you pick a few things that are specific proposals, but you move the dialogue forward on other things. I don't think these things just get lost forever — even if it's only Steve Calkins who remembers them and lists them from 1955. In this bar, we do follow these things, and whether it's political cover for the agencies, even if it isn't something that goes to Congress, I think there is an effect of writing about these issues.

So I certainly hope that the AMC will choose which specific issues wisely, but I think there is a benefit to actually having them talk about even the other issues.

Mr. Proger

John?

Mr. Graubert

I will just repeat what I said to the Commission during my testimony. Based on my very limited experience with legislation — I do not have a lot of training in the political aspects of the legislative process — in the few instances where I have had success, we have had three things: (1) a clearly identifiable problem; (2) a clearly identifiable solution, and a concrete one; and (3) some confidence that the solution wouldn't have unintended consequences, as Mark mentioned.

Certainly in the areas that we have been discussing today, I don't see that those three criteria are presented in any of these issues.

Mr. Proger

Thank you, panel, and thank you, audience. Bob?

Mr. Joseph

Thank you very much.

We will be starting at 8:30 tomorrow. Thanks for your attention. Good evening.

The Antitrust Modernization Commission at Mid-Course Symposium, Friday, June 9, 2006

Enforcement Role of the States

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Kevin E. Grady

Good morning to everyone. I commend you for being here early on a Friday morning to listen to the panel discuss the enforcement role of the states.

Here is a little secret. Those of you who were at the lunch yesterday know that Tom Rosch decided to throw off the shackles of shyness and to speak from his heart about state enforcement. I paid Tom about a hundred bucks in order to create some controversy, so that at least some people would show up this morning, and you could listen to a reaction from some of the state enforcers.

What we are going to do today is go over exactly what the commission has heard thus far about the role of the states. Then we have, as Bob has already introduced the panel, the perspective of different people: Mike Denger, who will provide the views of a veteran of the private bar; Trish Conners and Bob Hubbard will be giving the states' perspective; then Terry Calvani, who will be

the last person with opening remarks, will focus a little bit more on the international perspective on this issue, particularly how our system is viewed elsewhere in the world.

So let's begin.

The issue of the role of the states raises two main issues: merger enforcement and non-merger enforcement. That is what the commission examined. There are various arguments about why the states should not be involved in antitrust enforcement. The claims are:

• State involvement results in inconsistent enforcement approaches; there needs to be unified enforcement in the U.S.

• There are additional costs imposed by having states look at matters.

• Businesses don't have any kind of certainty when they are dealing both with the federal agencies and with fifty state attorneys general.

• There can be delays in merger reviews as a result of the role of the states.

• The states, basically, in terms of their involvement in antitrust enforcement, are nothing more than an anachronistic vestige of the pre-modern Commerce Clause interpretation by the Supreme Court. The states' antitrust laws were there beginning in the late 1800s. They preceded the Sherman Act, but they are really more of an historical anomaly in terms of antitrust enforcement.

• It's inconsistent to have the states advocating antitrust enforcement when here we are, with the federal agencies (I refer to Bill Kovacic as the "Johnny Appleseed" of antitrust enforcement on the international stage) encouraging other countries to adopt antitrust laws. One of the things we are telling our friends in other countries is that there needs to be a single voice for antitrust enforcement in their countries, but here we are in the U.S. with multiple enforcers -- the FTC, DOJ, the states, and private parties.

The other criticism of the states is that the state AGs are more subject to political influences. The joke is that the acronym for the National Association of Attorneys General (NAAG) really stands for the National Association of Aspiring Governors. In short, some criticize the state enforcers for bringing cases that are more focused on political points rather than based on good economic theory.

Those are the major criticisms for state enforcement of the antitrust laws. The flip side is:

• You have the basic constitutional principle of federalism. The states have a right to enforce their antitrust laws. Those laws have been there in many states since before the Sherman Act. Who are we now to tell the states they should no longer be involved? Yes, maybe their laws are a vestige of the pre-modern commerce clause interpretations, but so is the electoral college a vestige of our constitutional history. Are we going to eliminate that as well?

• The states are a safety valve during periods of lax federal enforcement. Those of you who are old enough in the audience may remember (I see several folks around here who I know were around during the early Baxter years.) that at the spring meeting of the Antitrust Section the Enforcers Roundtable only had the FTC and Antitrust Division leaders. It was not until the mid-

1980s when the NAAG representative was invited to participate because the states had taken a more active enforcement role. Trish Conners has participated in the Enforcers Roundtable — Bob Hubbard has been up there as well. Why? Because the states were enforcing the antitrust laws in the 1980s, when many people believed the federal agencies were not.

• The *parens patriae* powers of the states have resulted in direct benefits to state agencies and consumers. I know that Trish and Bob will cover that issue shortly.

• The states, generally, have primarily focused on local matters that really have been of little interest to or have been overlooked by the federal agencies. Consequently, the states still have a role, or should have a role, to play in enforcing the antitrust laws.

• The states generally complement federal enforcement. They are usually not adverse to the federal agencies, despite the controversy during the Microsoft settlements.

The commission had a meeting on October 25, 2005. They heard from four speakers. The Maine Attorney General, Steven Rowe, gave his comments. Phil Proger gave his views as a private practitioner. Professor Harry First from NYU gave his views, and Professor Mike DeBow from Samford University, Cumberland Law School, gave his views.

There were also written submissions. There is not a sparrow that falls in the antitrust world upon which the Antitrust Section does not comment. The ABA Section of Antitrust Law, under Roxane Busey's leadership, submitted comments. Steve Hauck, former New York assistant AG, and Kevin O'Connor, former Wisconsin assistant AG and the former head of the NAAG task force, gave their written comments.

The American Antitrust Institute (AAI) provided comments. (If the Antitrust Section is making comments, you know that Bert Foer and AAI can't be far behind.)

The Business Roundtable, the Chamber of Commerce, and the International Chamber of Commerce also submitted written comments.

If you read the transcript of the October 25 decision you will find, surprisingly, that a general consensus seemed to evolve from the discussion that the states and the federal agencies seem to be cooperating fairly effectively. States don't appear to have, "gone wild" in terms of their enforcement actions. Yes, there may be some additional costs imposed by state involvement, but it's primarily in merger notifications and investigations, and those are really a very small percentage of the overall costs in those kinds of matters. Everybody realizes that states do have limited antitrust enforcement budgets.

There were a handful of states that were the most involved — Florida, New York, Illinois, California, Texas, Maryland. It is not as if you have fifty state AGs chomping at the bit to get involved in every antitrust investigation.

There was a general consensus that state AGs can play a very positive role, from the federal agencies' standpoint, in terms of helping the federal agencies avoid "home-cooking" when they go into states to enforce the antitrust laws. Particularly on the merger side, those of you who have followed it know very well that the states can be very helpful, and that the feds have indeed

gotten "home-cooked," particularly in challenging hospital mergers, when they have gone in without the state AGs on their side.

Yes, there is political influence at the state level, but — let's not be naïve about this — there is also political influence at the federal level. It may not be as transparently overt, but it's still there. Generally, however, those of us in the antitrust area have been fortunate in that, to the extent there have been political influences, they have been fairly limited, both on the federal and state sides.

So what were the proposals that were discussed? What should the Modernization Commission consider?

• A total preemption of state enforcement — get the states the heck out of the game.

• Limit state enforcement just to hard-core Section 1 violations.

• Provide the federal agencies the right of first refusal in enforcement actions.

• Limit the states just to intrastate violations, however that would be defined.

• Enhance more cooperation and transparency between the federal agencies and the states by adopting formal protocols.

• Revise the NAAG merger guidelines to be consistent with the federal agencies' guidelines.

• Fund state enforcement through *parens patriae* recoveries in order to give the states more money to be more effective in their antitrust enforcement.

• Use NAAG to develop permanent staff with specialized antitrust experience to assist the different state AGs in their enforcement efforts.

• Amend the Hart-Scott-Rodino Act to permit federal agencies to share information with the states under confidentiality provisions.

• Finally, NAAG should develop model statutes concerning confidentiality in order to permit one state to act for all of the states and eliminate the need for separate negotiations with the states, primarily in merger enforcement.

Those are the various proposals that were on the table and that were discussed.

Then the commission met on May 23, 2006. Again, if you read Emily Myers' summary (By the way, I would like to meet Emily because she has done a terrific job summarizing the AMC sessions.) — I haven't seen the transcript yet; I'm not sure it is out — you would see there was a real split of opinion. Instead of the previous consensus of maintaining the status quo, on May 23, all of a sudden, there seemed to be a real split on the AMC between maintaining the status quo and some variation of the federal agencies having either primary or exclusive jurisdiction on antitrust enforcement. To the extent there was a consensus, it was basically on improving the amount of coordination among the state and federal officials.

On non-merger civil enforcement, the majority of the AMC seemed to want to maintain the status quo. There was a significant minority, however, who wanted to restrict the states just to challenging localized conduct, focusing particularly on horizontal price fixing.

Then there was a general recognition — you would have to be crazy if you didn't recognize it — that to come out and recommend taking away the states' antitrust authority will stir up a huge political hornet's nest. The idea of restricting the power of the states is going to be something that is not going to be accomplished easily. Certainly, the states are not going to be silent if this effort is made.

Then there was Commission Warden's proposal about limiting private actions. Even though it didn't appear to be directed at the states, nonetheless it would have potential impact on the states.

So that's the general framework of where we are — at least my interpretation of where we are.

What I would like to do now is turn to Mike Denger. Mike, as a private practitioner and somebody who has been around the block a few times and has dealt with the states, how about giving your perspective in terms of your view of the proper role of the states, particularly with respect to where the commission seemed to be going? Then we will ask Trish Conners, Bob Hubbard and Terry Calvani for their views.

Michael L. Denger

Thanks, Kevin.

I have been known over my years in practicing law for throwing a few grenades from time to time. Not coincidentally, I guess what I would say is that in the area of a multi-centered enforcement system and state enforcement, I think, at least at the present time, you may need some tinkering around the margins, but the status quo has performed reasonably well.

Let me give you a little bit of background, to the extent that you haven't had it. Trish and Bob may cover this in greater depth, particularly in talking about NAAG's database.

Most state cases appear to be ones that are brought by single states. Many are filed in state courts. Approximately a quarter of the cases, give or take, are those that are brought in conjunction with the FTC or the Department of Justice. (I may have my numbers wrong, because there are all sorts of datasets and none of the numbers are complete.) The bulk of state cases are aimed at traditional horizontal per se conduct — price fixing, bid rigging, market allocation. There are a substantial number of merger cases. Then, when you get to areas like vertical restraints, there are very few cases. There are a number of follow on cases, where the states seek recovery on behalf of consumers injured by vertical price fixing, that have been brought over the last ten or fifteen years, but by and large, not much else in the vertical area.

The states, as best I can tell from reading the record and looking at my experience, have largely been cooperating effectively with the federal enforcement agencies and among the states themselves.

I also come away with the impression that, like the federal government, most of the state cases are driven by the staff, not by political considerations.

So that is just a general background, which Trish and Bob, I think, are going to talk a lot more about. But I want to point out a few other things that, at least to me, are important.

First of all, we are not writing on a blank slate, as Kevin has indicated. We have over 100 years of coexistence of a multi-centered federal and state antitrust enforcement regime. We have a situation where any efforts to significantly curtail the states' antitrust enforcement authority are going to require congressional legislation. I think any proposals that are sent up to Congress are going to have to have a solid empirical basis for them. I have seen no substantial evidence of any systemic problems in state antitrust enforcement. While everybody has his favorite war story from time to time, I haven't seen a lot of instances of episodic improper application of the antitrust laws by the state enforcement agencies. In fact, in some of the cases I have been involved in, such as the *Vitamins* case, I thought the states played a very constructive role in working out multistate settlement approaches.

So absent an empirical basis, and even if an empirical basis were to be established, I think any proposed legislation to limit over 150 years of state enforcement activity may not be dead on arrival in Congress, but is going to likely be looked at very skeptically, unless there is a concrete evidentiary basis for such proposals.

I would be somewhat concerned, to the extent that the AMC supports proposals, that it might detract from other areas where I personally think legislation is much more warranted — namely, the indirect purchaser/direct purchaser problem and so forth.

As a Republican, it also seems somewhat incongruous to me, or ironic, that many who would otherwise support federalism argue uniformity and efficiency considerations support a single national federal antitrust policy which would displace state authority. There is a little bit of tension there.

Two other general observations. First of all, as Kevin indicated, we have a multi-centered antitrust policy. We have private plaintiffs out there. It seems to me that it would be somewhat incongruous, as I think Chairman Garza noted and, I believe, Commissioner Litvack observed as well -- to give private parties greater rights to bring an action under federal antitrust laws than you would give the states.

The second consideration I would call to your attention is that even in the merger area, the states don't have a Hart-Scott-Rodino waiting period. They have to go to court in both merger and civil non-merger cases to establish that challenged conduct in fact violates the antitrust laws. That means that you are going to have, at least in federal courts, a federal judge involved, and to the extent there are significant misapplications of antitrust policy or the antitrust laws — and I don't think there have been many where there have been substantial disagreements with the federal agencies — if there are some, the courts certainly can ask the federal agencies for their views or the Department of Justice and the FTC can intervene to make their views known or file amicus briefs. So you have that federal judiciary here, and it can be informed by the federal enforcement agencies, to the extent that they believe that in a particular case state enforcement is misapplying fundamental antitrust principles.

So in balance, I guess where I come out is — we can discuss all the reasons later — that I don't favor limiting state enforcement to local matters, because I think that is going to be hard to define. I don't favor providing the federal government a right of first refusal. I don't know what

I drank in the water this morning, but I'm ending up agreeing with Trish and Bob more often than I normally would.

Trish has threatened to kick me under the table. I just want that noted for the record. In case I hobble off the stage, you will know I hobbled off with the preprogrammed message I was supposed to deliver.

But in short, in the area of state enforcement, I would urge the Commission to look at the margins, look at voluntary ways we can get the states and federal enforcement agencies to work better together, but I don't think any legislative approach is either going to make any headway in Congress or has the requisite evidentiary support to show any systemic problems. As I say, we all have our war stories, but I don't think that the evidence as a whole warrants displacing the states in any significant way.

I think the states also bring together additional resources. I think they sometimes bring a focus on local markets and local conditions that may be lost in a merger that has national, regional, or local effects. They bring local knowledge. I certainly know the federal government would like to have them in local cases where — I don't know about "home-cooking"; we always used "hometowned" — where you can get "hometowned" by the defendants. It's nice to have the attorney general in there with you singing the same song.

So on balance, while I think there are a number of steps that can be made at the margins, I think there is no real empirical basis for a change at this time.

Mr. Grady

At this point, we are going to have Trish, Bob and Mike start singing *Kumbaya*.

Trish?

We are holding Terry in reserve here. We want to make sure the fireworks come at the end. Trish, go ahead.

Patricia A. Conners

I am going to apologize in advance, because I'm nursing a sinus infection. I hope I don't cough too much in your ears.

I am going to deviate from my prepared remarks, because I would otherwise repeat a lot of what has already been said.

I want to commend Michael, though, because I have been watching the give-and-take on this issue for many, many years, and Michael was one of the hardliners early on against state antitrust enforcement. What he has done that a lot of people in the bar have not done, frankly, is educated himself, both through his work and through just trying to understand how we approach antitrust enforcement in the states, in a way that he now appreciates what we bring to the table. I really appreciate him taking the time to do that. A lot of what you hear — what you heard yesterday in the luncheon speech and what you hear peppered through some of the comments that are made both at ABA programs and somewhat yesterday — is these anecdotal remarks, things that people

rely on from an isolated incident that perhaps wasn't the best circumstance or the most shining moment for a state attorney general or state antitrust enforcement.

I would challenge you to think about the many times you can say the same things about the federal enforcement agencies, when they have come through and done the right thing and when something isolated occurs that can be pointed to anecdotally as not having been an appropriate moment for an antitrust enforcer in the federal context.

I think it is all relative, and I think it is born of a bias against state antitrust enforcement, which is, actually, very interesting, in light of the Republican viewpoint that predominates now. I think Mike makes a very good point.

There are two bases — and I have talked about this before — for a lot of the issues surrounding the controversy regarding state antitrust enforcement. As both Kevin and Mike have alluded to, state antitrust enforcement has been around for 150 years. The state antitrust laws were on the books well before the Sherman Act. For over a century, no one said there was anything wrong with the symbiotic relationship between the federal enforcers and the states. What I think really spawned the recent criticism of state antitrust enforcement were two things: the Microsoft case and the divergence of the result there — I will tell you more about that in a minute -- there was much good about that in terms of federal-state cooperation — and mergers, and how we handle some of the major merger reviews.

With respect to Microsoft, that is a case where, if you knew the facts from the inside out, you would know that the federal agency, the Department of Justice, was not moving on that case very quickly. We had contacted them. We had talked about our concerns.

We have done it before, by the way, with respect to large cases, to test the waters, to see where the federal agencies are going before we act. We don't just act without discussing it with the federal agencies, most of the time.

In that particular circumstance, there had been a recent result in a prior Microsoft case that the Department of Justice was concerned about, and they were concerned about losing going forward if they took on Microsoft again, quite frankly. I believe Anne Bingaman was the Antitrust Division director at the time. There was a lot of discussion about whether the Department of Justice should move forward or not.

The states waited and waited and waited, and nothing really was happening. So Texas took the lead and started a multistate investigation that eventually included twenty different states.

Many believe the Department of Justice eventually acted only because the states were already looking at it. We then started working together on the investigation. We worked together on the drafting of a complaint. We argued vociferously over what counts should be included in the complaint, but ultimately came up with a joint complaint that was filed in a single court in the District of Columbia. We pursued the case in litigation together, sharing experts and witnesses, with very little duplication of effort, through to the conclusion in the district court, the judge's ruling against Microsoft, finding it to be an unlawful monopolist.

The case was appealed, and the states and the DOJ won on most counts. It went back on remedies. (I am simplifying; you are welcome to read the opinion to see for yourself.) It went

back on the remedies issue. That was when there was a change in the administration and a change of view as to whether or not the Department of Justice would continue to litigate the matter on remedies. They came up with a solution, which was to negotiate conduct relief, with which I believe we are all familiar, regarding licensing restrictions and other things. Some of the states decided to join in the DOJ settlement and some chose not to. Those states that continued — there were about seven of them — continued on and tried to get better relief.

One can say whether that was wise or not. The reality is that when you have multiple plaintiffs in litigation, it happens every day. Some plaintiffs decide not to participate in the first settlement that comes down the pike. They decide that perhaps they should pursue it further.

This was an important issue to competition in the software industry. I don't think those states that went forward, and ultimately lost, essentially — or were able to tweak somewhat the conduct remedies beyond the DOJ relief — regret their decision. They now know that they did the best that they could do to get the best relief possible before that particular court.

So that's the Microsoft case. That is a case that has a lot of pluses to look to — the joint cooperation with the federal agencies throughout the litigation and the best result that we could get, given the circumstances, and the use of the federal courts, a single court, to prosecute multiple claims from the federal agencies and the state AGs. I think these are good things and that the system actually worked. To be critiqued because they chose at the end to move forward with a different remedial approach is hardly an appropriate critique, given the good things that came out of that case.

If you know anything about state antitrust enforcement, Microsoft is not the norm – that is, it is not typical for state attorneys general to pursue just equitable relief that identically duplicates what the federal agencies are doing. It's simply not the norm.

We have a multistate database. I would like to introduce Emily Myers, sitting in the audience, from NAAG.

Kevin, Emily. Emily, Kevin.

Emily has been instrumental in doing something that I started when I was chair of the multistate task force, putting together this multistate database. We had to rely on the various states' initiative in submitting their information, but, after some delay, we now have it up and running. There are a lot of tweaks. But, really, if you are interested in this topic at all, go to www.naag.org and click on "Multistate Database," and you will see the beginnings of a very enterprising effort to try to get all the state information in there that we can get on both mergers and non-mergers, criminal and civil matters. The bulk of it now goes back to 1995. It certainly is not complete. There are a lot of glitches. There are even typographical errors. But you have to understand the resource limitations that we have, and we are doing the best that we can.

I am very proud of it, and I would like to thank Emily publicly for implementing this beyond the concept that I started with. I very much appreciate it, and I appreciate Bob's support as my successor in putting it forward.

If you look at that database, you will see the types of cases state attorneys general more typically do. The Microsoft approach is the exception. Predominantly we do cases where our primary

focus is to recover damages for consumers, both indirectly and directly. We are always seeking monetary relief. It could be civil penalties. It could be any kinds of damages, disgorgement — whatever you want to call it. Those are the kinds of cases we typically bring. They are usually hardcore price-fixing kinds of cases, bid rigging, involving local markets.

Peruse the database and you will see that overwhelmingly those are the type of cases we bring. I wouldn't recommend searching on particular things, because it may give you a skewed view, until we get the proper key terms in. But if you just go through and pick some cases and look at them, you will see that they predominantly deal with local-market issues and hardcore price-fixing kinds of things, protecting the consumer, getting restitution for the consumer, getting monies back to our public entities — using 4(c) of the Clayton Act, yes, but also using state antitrust enforcement laws. The key there is that we can use 4(c) to collect treble damages on behalf of natural persons. That is something that the Congress gave us the authority to do. The federal agencies don't have that authority. If we are removed from that process or somehow bifurcated, then that leaves the private class-action bar to bring these kinds of cases, and I don't think that is an appropriate result.

I think Michael is right. Our case selection is very careful. When we get involved, many times we can reduce, for the defendant, the pains that you have to go through with respect to a class action. We don't have to be concerned with class certification. We can move through the process quickly. You can negotiate with folks that have actually conducted an investigation under their state laws and have been able to reach some conclusions about the strengths and weaknesses of the case, where perhaps the class-action bar hasn't even started one bit of discovery yet to be able to do the same thing. So we can see and do what we need to see and do to get the cases resolved sooner.

I know that Phil Proger can attest in *Nine West* to working well with the states to resolve a case early. Michael can attest to it working well with us in *Vitamins*. We did the *Remeron* case like that, and there are a number of other cases that we have done like that, where the class-action has been sort of put to the back, so that we could get it resolved appropriately for everyone concerned, but most importantly, the consumers and the public entities affected by the practice in question.

So that's Microsoft.

On mergers, I would say, again, go to the database. I knew what I am about to say was true, but I had never been able to confirm it, so I went to look at the database. The critiques the states get about their merger reviews are that we duplicate everything the federal agencies do; there is this perception that there is massive state involvement in all these big mergers and we conduct our own reviews without any coordination with the feds – that we duplicate everything for the defense bar; they have to deal with multiple subpoenas and all of this. That is really not true. If you search on the word "mergers" — I did that. There are different ways to do it. I searched on the word "mergers," and it yielded 121 cases. I know many of them myself, so I was able to cut through any inputting errors. Fourteen of them were erroneous entries. They either used the word "merger" and it was inappropriate for the case or there was a duplication of case information between states.

That yielded 107 merger cases. Of course, this isn't the universe; these are just the ones that are in there now. I should say there are about 400 cases in the database now, representing about thirty-four states. It is certainly not everything that they have done, but it's a start.

Of that group of 107, as far as I could tell, twenty were merger reviews of purely intrastate matters that appear to have been handled by a single state, one was two states doing a case on their own — that was the rock salt case — but the bulk of the mergers, sixty-one of them, were just a single state working with a federal agency. Fifty-one of those were with the Department of Justice; ten were with the Federal Trade Commission. In the cases where the DOJ was the federal agency, of course, it wasn't unusual for us to be in a joint consent with them, filed in a district court in the state in question, resolving whatever the issues were.

That leaves only twenty-six that involved multiple states working with a federal enforcement agency. Of those, fifteen were just two states working with a federal enforcement agency — more than half. Eleven involved two to six states, and sometimes a little bit more than six. Those eleven are the ones, I think, that are causing this big issue. Ten percent of the cases in the database are cases that had more than one state, more than six, fewer than twelve, probably. Those are cases like EchoStar-Hughes, PeopleSoft-Oracle, Chevron-Texaco, Exxon-Mobil. What they all have in common is that they all are local-market cases. Yes, they are mega-mergers, but they all involve local-market issues important to state enforcers.

Believe it or not, you and I should be concerned about what happens to the retail gasoline station down the street in our states. If the federal government in Washington can sit back and determine whether that retail gas station should be closed and have perfect information, that's terrific. But I know that's not the case. What they do is, they reach out to us to substantiate what makes sense in those local markets. We work with them closely in that regard. When we do that, we are not duplicating effort. We are adding to their knowledge, and we are adding to their expertise. They actually reach out to us in those cases.

I will say, as well, that when they reach out, it is, in a lot of instances, to be honest, for political cover, because they don't like coming into a state not knowing whether the state attorney general is on their side, which would be true, I suppose, whether or not we had merger enforcement capabilities. But it's important that we are there and we are in the courtroom with them in those cases.

So just those eleven cases are defining this issue in a way that is a wholly inaccurate representation of what really goes on with respect to merger reviews and state enforcement.

I would say, basically, when you are dealing with a concept so fundamental to how we exist in the United States, federalism, and make conclusory statements based upon nothing but sheer anecdotal and inaccurate information, it is really unfortunate. I hope very much that the commission sees its way clear to working through all of the morass of stories that are based on these inaccuracies and getting to the bottom line and appreciating what state enforcement has brought to jurisprudence in this country.

I have no idea how much time I have used, but I do want to respond briefly —

Mr. Grady

You have gone over, but —

Ms. Conners

I would like to respond briefly to Commissioner Rosch's luncheon statement yesterday, just on four or five points. Then I will yield the floor, because I probably won't be able to speak again after this.

Mr. Grady

For those of you who have never been in front of Trish's train rolling down the track, it's not easy, I can promise you that.

Trish, we do need to keep close to the time.

Ms. Conners

Okay. I want to just talk about the three or four things that I think he raised that are very insincere, in my point of view, or just not fair.

One was the comment that, when we have brought merger challenges on our own, we have only won one in five. I don't know which ones he is talking about. Bob and I were trying to figure that out. But, regardless, if that is the test for whether or not you are a quality enforcer or you have a quality case before you, then the Federal Trade Commission is in trouble. They have lost all of the hospital merger challenges that they have brought recently. They lost *Arch Coal*. The Department of Justice lost Oracle-PeopleSoft, albeit with ten states with them. So if that is the test, that is an unfortunate test, and Commissioner Rosch has his work cut out for him.

On the politics issue, I would go further than what Kevin just said about politics and attorneys general and say that, with respect to the Antitrust Division and the Commission, the politics is more pervasive. Although you don't see it as much, the fact is that the management changes with every administration — at some point with the Commission, and almost immediately with respect to the Division. That can change the whole philosophical underpinnings of how the administration pursues antitrust enforcement. That is not true with respect to attorneys general. For example, we have had an influx of Republican attorneys general take over, basically, seats that were primarily Democratic, and the staff, in most cases, has remained the same. So you have antitrust enforcers who have been in place at the staff level for twenty-something years. What they do is set the antitrust policy for those attorneys general. So there is no political influence, in the same philosophical way as there is undercutting and underlying what goes on in federal enforcement.

Lastly, there was a statement that he made about not liking the tripartite system because of conflicting laws that are created by state enforcement perhaps pursuing different cases and getting different results where the Federal Trade Commission and the Department of Justice wouldn't act. I will point you to *Schering Plough* as an example of FTC and DOJ not seeing eye to eye right now, on an issue that is very important to state attorneys general. If the potential for conflict among enforcers is an issue, then we have a problem in our judicial system. The way

our antitrust jurisprudence, and any jurisprudence, is supposed to evolve and establish itself is through conflicting ideas. Ultimately, they are resolved in front of a single court. That is the beauty of our system. The sophistication with which our jurisprudence evolves has everything to do with the ability to have those conflicting issues resolved.

If states are left out of the process to raise those kinds of issues and be the "conflictor," if that is how people see us, then I suggest to you that antitrust jurisprudence and other kinds of jurisprudence where states are removed from the process are only that much more diminished.

I am finished.

Mr. Grady

Great.

Bob, I don't want to say that Trish has taken all your time, but —

Robert L. Hubbard

I will keep it short. I think a lot of it was covered by you and Michael and Trish. I just want to add some stuff at the margin.

I was involved in Roxane Busey's ABA Antitrust Section task force for the AMC. A lot of the straw vote that happened in the AMC deliberations on state enforcement felt like déjà vu all over again to me. I have seen now, in three separate levels, a process by which there is very significant distaste for state merger enforcement. I try to transcend the limits of my experience, so I have been trying to understand what that distaste is about, why that criticism arises, and to respond to whatever valid criticisms come from it. I know that the rhetoric of the critics is significantly divorced from my experience as a state enforcer. That was part of the challenge in trying to understand the criticism.

The ABA work groups looked at various topics. The groups did very well on considering the topics. Billy Vigdor was the individual who chaired the state merger group, which had very divergent views on state merger enforcement.

The process worked down to trying to specify the cases in which people thought the states did was wrong — that is claims that aren't antitrust-related that shouldn't have been brought. The group whittled down the list until it got to a handful of cases and then talked about that handful. From my perspective, all of those cases come down to instances in which reasonable minds can differ on whether the claim was appropriately asserted. I even heard some of the critics of state enforcement, after hearing the state that had brought the action, switch. Look at Michael DeBow during the testimony. He welcomed the comments about Maine's antitrust theory in a merger matter that he had not fully understood, and agreed Maine could appropriately have asserted that antitrust claim.

So I can't understand where the problem is, at least from the perspective of reported cases.

But more significantly than the reported cases and their resolutions is that, from my perspective, undisclosed events fuel the criticism and you can't probe those undisclosed events. You go in,

you ask what's going on. You ask why the critic asserts that AGs are acting politically instead of responsibly, and you don't get an answer to that. There are confidentiality concerns, which I recognize and accept.

One of the things that the ABA Antitrust Section did to try to probe the criticism in a Listserv distribution. They didn't get very many responses to that. They promised confidentiality, but still did not get many responses to it.

I know that states are criticized for not being adequately transparent. But, frankly, I don't see how states can be expected to respond to this kind of criticism, which completely lacks transparency. I would think that, as lawyers, we should try to rely on evidence.

Mr. Joseph

What if Section 4 of the Clayton Act were amended to say that states have a cause of action under Section 4, but they are not to recover attorneys' fees? The United States doesn't recover attorneys' fees. One criticism may be, why should a private party be paying the government the attorneys' fees? The government is either supported by the state or it isn't. That may be an unstated thing that is or is not there.

One other issue. Apart from the states, it is troublesome to me that there are fifty different state laws, regardless of the issue of interpreting consistent with — and there are private parties who have causes of action under those laws, and we don't have a national economic policy. The Republican Party originally is in favor of a national economic policy.

But I'm getting ahead.

Mr. Hubbard

I am more than happy to talk here or wherever you would like on these kinds of issues.

Mr. Grady

Bob is the chair of this whole program. You have to respond. When the big man talks and asks a question, you have to respond to it — even though he does disturb the flow of this whole program.

That's fine, Bob. You have messed us up in the past.

Mr. Hubbard

I think the economic policy is free enterprise. Where there is diversity of opinion, entrepreneurs are able to proceed. I think that kind of diversity extends to how antitrust enforcement is set up.

Our national system is set up so that judges decide the disputes where the parties cannot reach agreement. That establishes the national antitrust policy. It's a case-driven system. That's the way it is.

I think that is one of the fundamental pillars of the strength of our economy. The centralized systems, like the Soviet Union, are falling apart. Everybody understands why that should be.

The diversity of opinion and views and entrepreneurship is one of the benefits, not a detriment, of our system.

As to attorneys' fees, first of all, states generally seek fewer fees than class counsel, but number two —

Mr. Joseph

That doesn't make me comfortable. But go ahead.

Mr. Hubbard

Let's talk anecdotes. The Poughkeepsie Hospital case — I talked to people and they said, "Why is the state of New York requesting fees?" I say, "I believe that we lost a lot of opportunity to use our resources in other ways, because you continued to pursue what we viewed to be price fixing. We expended a lot of resources and a lot of time." I probably could get billed out at a few hundred dollars an hour. I am talking with them. I say, "We have done what we believe to be a conservative calculation of what our fees are, and this is what we are requesting of you." They say, "Well, we're not-for-profits." I said to them, "You document for me how much in fees you have taken from these hospitals and I will consider whether I am being reasonable or not." In response to that kind of request, I got no response. So they accepted my fee calculation.

That's number one. I think that everybody sees fees on only one side of the issue, generally.

Number two, there is an incentive that is provided as part of the system to make sure that the free enterprise systems works well. Part of that is to provide the attorneys' fees. That extends to states. There are some states that, to fund their antitrust programs, need fees.

Mr. Grady

Anything else, Mr. Joseph, that we can help you with?

Bob, are you finished?

Mr. Hubbard

I also wanted to mention the state antitrust enforcement database available on the website of the National Association of Attorneys General. I had sent around the database tutorial that I prepared with a legal assistant in the New York office. If people didn't get it, feel free to give me a card or send me an email and I will get it to you.

The attempt there was to focus the discussion on the substance of what states actually do. I think that kind of focus leads to the conclusion that state merger enforcement is something that is worth support.

Mr. Grady

How many people received the email from Angelica that had the list of the databases? If you didn't get it, let Angelica know, and we will make sure you do get it.

One of the things that is really, really helpful is that this database, which Trish talked about that Emily has now completed — it is a little bit of a work in progress, but the thing that struck me when I read the transcript of the commission meeting was that people are coming up with different numbers about what the states have been doing. If there is one theme, I think, that should come from this session, it is that rather than speak in generalities or anecdotes, we need to look at the real factual record about what the states have done. I think, to the extent that the database has been created, that's something that would be to all of our benefit in terms of looking at what the states have actually done as opposed to what they have been accused of doing anecdotally.

We have heard Mike Denger talk about his view. Mike has had this incredible conversion because he has looked at the facts. We have Trish and Bob talk about their perspectives from the state's side.

I will tell you. When the Antitrust Section set up its task force, which Roxane Busey so capably has chaired, to look at this, there was palpable concern by Trish and Bob in terms of where the commission was going to go in terms of trying to undercut the states. At least that is the way I perceived their concerns. There is some real concern, I think, by the states to see what the commission is going to come up with.

The general view, however — and we will get into some of the questions a little bit later — the general view, I think, from the testimony was that it was not a system that was out of whack.

Now we will take a look at it from an international perspective, from Terry Calvani. I will go to my deathbed remembering Terry Calvani. In fact, the last thought I probably will have on my deathbed is Terry Calvani. When the Antitrust Section, at the spring meeting, did its first fundamentals program years ago, Terry was given the job of coming in and explaining to these bright-eyed and bushy-tailed young people the Robinson-Patman Act. Terry did that by proceeding to dress up in a clown's outfit and going in and talking to the people.

Terry, if a picture is worth a thousand words, you summarized the Robinson-Patman Act. So thank you very much.

Terry, why don't you give us your perspective, having been at the FTC, in private practice, over in Ireland as a competition enforcer, and now back in the U.S. as a private practitioner.

Terry Calvani

After hearing my colleagues on the dais this morning, I don't know whether to scream or get sick. But I will attempt in more measured tones to do neither and, instead, look to what other countries have done when they have confronted similar kinds of issues.

All of us appreciate, the United States is not the only federal system. Indeed, a good number have well-developed competition policies. So we might ask ourselves, how have these other countries addressed these issues?

We only have to look to our neighbor to the north, Canada. It is a federal state, but competition there is vested exclusively in the national government. On this side of the border, we might say loosely that Canadian antitrust law has been subject to federal preemption.

Australia is another federal system. There the states and the national government share the power to enforce competition law. In that country, however, the states have ceded the exercise of their competition enforcement to the national government, in return for certain rights to help shape the national competition agenda.

Germany is more instructive because it has both national and state competition enforcement. But in Germany, unlike the United States, the *Länder* focus on intrastate antitrust issues, whereas the national authority, the Bundeskartellamt, takes responsibility for interstate competition policy.

These three examples don't offer much in the way of a practical solution to our situation here. Frankly, it will be a cold day in hell before Congress federalizes competition law, as in Canada. The states are not about to cede responsibility to the national government in Washington, as in Australia, and the states are not going to retreat from the interstate playground, as in Germany. So with all due respect to the Modernization Commission, discussing these alternatives seems to me to be a colossal waste of time.

The E.U. might be a slightly better model. There the member states not only administer their own competition laws within their own jurisdiction, but they also share in the enforcement of interstate competition policies under the Treaty. This is a model much more like our own, and we might ask ourselves the question, what can we learn from them?

Focusing on mergers, very large mergers are basically federalized, while others are not. By "federalized" I mean that Member States are generally not only precluded from applying the merger regulation, but forbidden to apply their own national laws as well to those transactions. Where very large mergers are at issue, Europe presents a "one-stop-shopping" experience. Obviously, there are still U.S.-like opportunities for chaos where the merger regulation thresholds are not met. But recognizing this, the Union makes provision for both the parties and the Member States to send a transaction, which would otherwise not qualify under the Merger Regulation, to Brussels.

With reference to non-merger cases, Regulation 1 of 2003 dramatically expands the competence of the Member State authorities to enforce the competition provisions of the Treaty — that is to say, to involve themselves in interstate antitrust enforcement. But here, too, the sharing of power is bounded by rationality. It is this story that I find most interesting for purposes of today.

In negotiating the contours of Regulation 1, the Commission and the Member States struck compromises to ensure an efficient allocation of cases. To oversimplify, cases touching four or more Member States go to Brussels; cases touching three or less are handled by the Member States, with either one state taking the lead or with the states sharing responsibility. When considering Regulation 1, there was much opposition in Europe to the general idea of devolution, because many feared what they perceived to be the importation of the crazy quilt of American competition policy. As a result, the Regulation provides that in all instances Brussels retains the trump card and can seize a case otherwise belonging to a Member State if it disagrees with the manner in which the case is being handled.

Of even greater interest to me this morning, is the European Competition Network, the ECN, that was created by Regulation 1. It brings together all of the Member States and the Commission in an organization that coordinates European competition enforcement. The

workings of the ECN are the subject of another program. But suffice it to ask whether the U.S. needs an "American Competition Network":

• Would it make sense to actually have a network here composed of the states and the federal agencies where division of labor on matters could be discussed at very high levels?

• Would the principals — that is to say, the attorneys general themselves — be willing to participate?

• Could you reach an agreement on an allocation of cases?

• Would the federal agencies be willing to cede interstate deals which really present single-state or regional-competition issues to the states?

• Would the states be willing to cede deals posing national issues to the federal agencies?

• Could all of this be done on the basis of cooperative, non-statutory, non-binding agreement?

It seems to me that that question is at least worth discussing.

We want to have time for discussion, so my time is nearing the end. I did not join issue with my friends here on the panel where they had this little "love fest" , but let me be clear. I think that there is a problem. The problem is largely in the merger area, but also goes beyond mergers.. Frankly, I fear that the problem is intractable.

Mr. Grady

On that happy note —

Mr. Joseph

Kevin, before we start, Commissioner Warden, who is here today, has a question he would like to ask.

Commissioner John L. Warden

Actually, I don't have a question. I have a clarification, a few comments by way of clarification.

First, I have no problem with 90 percent or more of what state antitrust enforcement agencies do. I think that if you took a very careful look at what you are calling my proposal, you would see that it does not interfere with most of what state antitrust agencies do.

As a result of my experience in the *Microsoft* case, I began to think about this in a more general way. I do have several problems, some of which Mr. Calvani has alluded to. First, let me say, in that case, while I don't take issue with most of what Ms. Conners said, I think her emphasis on the politicization at the federal level and lack thereof at the state level is entirely wrong.

First, the settlement negotiations that ensued after remand were ordered by the judge. They weren't started by the administration as a result of the election. Second, the earlier settlement negotiations, before Judge Posner, that were ordered by the prior judge came to naught, in that

judge's view and in the view, I think, of everyone who participated in them, by reason of the states' inability to engage in real negotiations.

The other problem I had, and that I continue to have — and then I will get to questions of principle — in that situation — and this does not apply to New York or Florida, I hasten to say — is the grandstanding attraction of a Microsoft-type case for people who otherwise are dealing with relatively dull legal matters. If you had been there and seen some of these AGs come and grandstand for the cameras, you would probably share that view.

Finally, on that side, the decision of certain states to depart from the settlement that was negotiated and continue litigation was clearly, in my mind, not informed by views as to competition policy, but as, again, some kind of populist grandstanding. The public statements of some of the officials responsible, when read by anyone knowledgeable about competition law, could only lead to that conclusion.

As to the principles involved, as opposed to the personalities and perspectives, it seems to me to be absolutely absurd to have fifty non-federal law enforcement agencies with respect to issues of competition that are not local, not even national, but global. That's what was involved in that case.

I don't think that the system is compatible with the spirit of Article II of the Constitution. I think it's the setting up of a kind of parallel executive, and I don't think it's a very good idea.

In terms of local enforcement, whether it be under local law or federal law, I have no problem. That is, if it is a primarily local problem, I don't see why the local authorities shouldn't deal with it.

I also have no problem with state *parens* standing for damages. I think some of the things that have been said about their superiority over class actions are entirely accurate.

My problem is limited to what I have said, and that is the attempt — to talk about judicial decisions being the end-all and be-all here is to ignore the fact that in this area of the law, as in most others, where you are dealing with public law issues, policy formulations by the enforcement agencies are the most important input into the ultimate structure of the law. That has happened over a century with the Justice Department's enforcement policies, and it has served us very well.

But I see no reason why any company or group of companies ought to have to litigate policy issues against fifty different enforcers, in addition to the one constituted by the Constitution.

Mr. Grady

I am going to take that as not a question, but a statement.

Mr. Hubbard

If I might, Kevin, I will try to keep this short. I think one of the benefits of the AMC process is that it provided an opportunity for people to comment. One of the items that Kevin listed among the comments that came in to the AMC was from Steve Hauck and Kevin O'Connor, who

worked on the Microsoft litigation for the states. They set forth what I would view as a more accurate reflection of what that litigation was about. I guess reasonable minds can differ, and I welcome the opportunity to respond to your comments.

On the proposal that you have made, I certainly have tried to focus on the substance. In terms of making a single pot of recovery available and then having plaintiffs make an allocation decision after that is available, that is something that has been discussed internally among the states. There are certainly some benefits to setting up a structure that way. There are pretty significant problems with your proposal, I think, in terms of DOJ's willingness to do that. DOJ frequently will bargain away the scope of the conspiracy as part of the plea deal. There are very significant issues.

But I do think that the dispute should be more an allocation question of the damages than it is now.

I note also that we would be insane to not realize that the litigation that occurs in an effort to overcome the fundamental injustice of *Illinois Brick* is not the most efficient way to proceed. I would welcome an overruling of *Illinois Brick* and setting forth a system that overcame that fundamental injustice.

I think your proposal moves in the correct direction. It certainly merits consideration.

I spent a fair amount of time trying to engage the states in the AMC process. I thought I did extremely well in getting state attorneys general to come in and present their views. We hope that it was fruitful for that process. In addition to comments on state merger enforcement and antitrust federalism, we put in *Illinois Brick* comments. We put in comments on regulated industries. New York put in comments suggesting that McCarran get repealed. We have tried to look at this generally and we have tried to recognize the substance, from whatever the source.

Mr. Grady

One point that Terry Calvani made at the end was the idea of an American version of the ECN, as perhaps one approach to that. Is there currently any effort like that going on between the states and the federal agencies? If so, how about explaining what it is? If there is, a lot of people in the audience may not be aware of it.

Mr. Hubbard

We know who federal enforcers are. If issues come up, we generally have had experience with people who deal with these industries, and we know how to contact people and see whether things are going on. I do that in health care matters all the time in New York. I know who at FTC and who at DOJ works on those matters. I call them and see what's going on. They call me.

Separate and apart from that, we have a regularized process where once a month there is a conference call of the State/Federal Cooperation Committee to raise issues about whether things are working out, whether those sort of day-to-day operations are operating in the way they should.

Mr. Grady

Who is on the conference calls?

Mr. Hubbard

For the states, it's Steve Rutstein in Connecticut, Rebecca Fisher in Texas, Meredyth Smith Andrus from Maryland, and I have showed up a few times. For the FTC, it includes Karen Berg and John Graubert. For DOJ, it's Gail Kursh, and…

Rebecca Fisher

Maribeth Petrizzi.

Mr. Hubbard

This is Rebecca Fisher, who chairs the state group on that committee.

So we do try to deal with those issues. In connection with the *Oracle* and *Arch Coal* matters, we tried to have a debriefing and a thinking-through of what went right, what went wrong, not only for improving cooperation among enforcers, but also for improving our litigation strategies and otherwise.

Mr. Grady

Terry, how would you react to that? You may have already been aware of that.

Mr. Calvani

That's not what I am talking about. I am talking about a meeting of principals that can make decisions as to who does what.

I just toss that out because it seems to me that the many of the other proposals are unrealistic. I like Dick Posner's idea, but frankly I am surprised he made it. I think it's the right answer, but it's not going to go anywhere. So why waste time thinking about it?

I tossed this little idea out because it doesn't require legislation. Maybe people with goodwill could sit down and make some progress here. But even there, I am, frankly, pessimistic for two reasons, one of which Bob touched on. The first one is money. We have created a situation in some states where antitrust is a profit center. It's not a whole lot different from what used to exist where I grew up: where JPs could impose court fees whenever there was a finding of guilt or where county sheriffs were paid on a per diem basis for prisoners that were housed in the county jail. Financial incentives made it very difficult to get reform in those areas, and it will be very difficult to get reform here for the same reason. I remember one case that I had where the state took no remedy at all except the payment of money. My client had a very difficult time understanding how the payment of money to the state AG would have cured any particular problem. So money, I think, is one big issue.

Secondly — and Mr. Warden touched on this — unlike in Europe, where you had people who were concerned about good government, certainly a driving force in state antitrust enforcement is

the fact that a large number of state AGs don't want to be state AG; they want to be something else. There is not a lot of publicity that is garnered on the win/loss record in the state court of criminal appeals. So antitrust provides a way of getting your picture on the front page of the newspapers, and it is a way of rewarding friends and garnering headlines. I think that that characterizes a good bit of what we see in the state capitals.

But few of us, in fairness, would endorse a policy that would reduce our own power. Few of us would decrease our own wealth. Few of us would impair our own career developments. It is, frankly, unreasonable to expect the state AGs to do what we ourselves wouldn't do. So I am not optimistic about reform in this area.

So silly it is and silly it will remain.

Mr. Grady

That's a silly idea, Terry.

Mr. Hubbard

Kevin, I do want to mention one other thing. There is a group among the principals, the Executive Working Group for Antitrust ("EWG-A"), in which there are meetings of the attorneys general who are on NAAG's Antitrust Committee, which is currently Mark Bennett of Hawaii and Hardy Myers of Oregon. They meet with the FTC's Debbie Majoras and DOJ's Tom Barnett. It is not the only time that there are communications among the principals, and it is not a clearance meeting by any stretch, but there is a process by which those more general issues can be discussed and are discussed in a regular format.

Mr. Grady

Picking up on that for just a second, one of the ideas that has been tossed out for the commission to consider would be the idea of enhancing more cooperation and transparency between the federal agencies and the states, similar to what is going on, but maybe at a higher level, a more formal protocol, if you will. Is that something that would be possible? Clearly, it wouldn't require congressional action. Clearly, it would not run the risk — Commissioner Warden, I don't know when you arrived this morning, but one of the issues is, if the commission comes down with a recommendation that appears dead on arrival in Congress, that well could affect Congressional views of the other recommendations that the commission may have. So why waste a ton of time and blood on something that is dead on arrival?

On the other hand, is this something that would be workable? If you had Debbie and Tom and you and the others committed to some type of a formal protocol, along the lines, perhaps, of what the Europeans are doing, is that something that is workable? Or are we just talking pie-in-the-sky or some other silly idea, like Terry was saying?

Mr. Hubbard

There are guidelines. There are protocols. And there are systems by which those communications occur. In connection with this AMC process, Mark Bennett put together a bipartisan NAAG resolution, which every AG endorsed. The resolution endorsed cooperation as

something very worthwhile to pursue and we will continue to do that. I think in the database and otherwise, we have tried to enhance transparency. We have long tried to recognize that it's better to coordinate. I think we have done that better and better among the states. I think that in most matters we are doing it better and better with the feds.

Mr. Grady

But in order to do this, would you have Debbie and Tom and you guys sit down together? How would something like this be done, if it could be done? What would be the logistics? Would you have to have more of a buy-in by the FTC and DOJ on this at the highest levels?

Mr. Hubbard

I think that, for the issues that are raised on Rebecca's calls and during the EWGA meetings, there is general agreement on this process being worthwhile. It's worthwhile to try to figure out what we did right, what we did wrong, and to give an opportunity to complain about the substance of what has occurred.

I don't know how to respond to that. We are trying to do that. We may not be doing it as well as we can. We certainly try to scrutinize what we do and make it better. There are issues on which reasonable minds differ. But I do think that we have had very cooperative relationships with the federal enforcers on a whole slew of matters, and I don't anticipate that changing.

Ms. Conners

The cooperation has been good, but the answer to your question is yes. I think you need a buy-in from the upper levels of the agencies to formalize the process and start coordinating more formally with the states. I think the answer is yes, because until it trickles down to the staff lawyers, those staff lawyers aren't going to — it's going to be hit or miss, depending on the personalities involved and the counsel involved.

Mr. Grady

Okay. Steve Ross?

Stephen R. Ross

It seems to me that we in this antitrust world are sometimes looking at it — we are exceptional, and we don't function in sort of the rest of the world. There are a couple of things that are antitrust-specific and a couple of things that go beyond antitrust that haven't really been discussed.

The thing that is antitrust-specific about the United States compared to most of the world is that antitrust is law and not business regulation. Antitrust is a federalized business tort. Nobody can ever prove money damages from mergers. If you could, you could actually get money damages. It's law. You have to prove it in court before a generalist judge, with no deference to the person bringing the case.

If we adopted the European system, it would be an interesting question — if we gave the Antitrust Division and the Federal Trade Commission the power to block mergers and then somebody could seek deferential review in court, and that was the way to do it, as a form of regulation, and then we take the states out of it.

But the bottom line is, it's going to court.

Commissioner Warden's complaints — it is the reality of the business tort situation that only state AGs and the federal government, and maybe Sun, have the resources to challenge Microsoft's alleged tort of monopolization and to seek relief. You can say that that is a bad way to run antitrust law, but the fundamental question is, it ultimately has to be proved to a judge. This whole debate about enforcement of federal law strikes me as somewhat unreal in the context of who gets to bring the suit. If what you are really saying is, "We really ought to regulate," then we ought to take it out of regulation.

The second comment about this operating in sort of the broader question is that what the comments seem to reflect is that states shouldn't be able to interfere in interstate commerce. As Terry can talk about better than I, in Europe, coextensive with competition laws are extensive laws on state aids. They have a much broader definition of things that states do to interfere with state law. As an individual, I might personally be willing to trade and adopt everything Terry would want in antitrust, if we could also have a federal system that prevented states from subsidizing localities and doing all sorts of things that states can do in the United States.

But we operate under a system in the United States where the definition of federal interstate commerce is very broad, covering all sorts of things that are considered local in most other federal places, and at the same time, we allow states to regulate business torts of all sorts. Unless you are prepared to make a wholesale and radical, revolutionary change in that system, it seems to me that the discussion really ought to be focused on how antitrust fits into the regular system.

Mr. Calvani

May I respond? I agree with what you had to say on the state aid side. I think that is a subject that we don't spend much time thinking about. We think it's a European issue. It is really an American issue, too. In fact, it may be a bigger American issue than it is a European issue.

But I do take issue with your characterization of the differences between the powers of the administrative agencies in Europe and the United States. It is technically true that you do get your day in court in the merger case in the United States. Clearly, Oracle has done so, and other companies have done so. I think that, however, is the exceptional case. There are few mergers that will hang together, particularly financed mergers, during a period of litigation, including appeals. While we can sit back and say, "Well, at the end of the day, you get your day in court," in most merger cases our situation is not meaningfully distinguishable from that that prevails in Europe today.

So I don't think that the difference between Europe and the United States, Oracle notwithstanding, is that significant.

Mr. Grady

Mike, you have been awfully quiet during this time. I want to give you a chance to respond to Steve's comments, or any other comments you want to respond to.

Mr. Denger

At this point, I have been sort of subsumed by events. But let me just make a couple of points.

One is to Terry's comments about politics and fee-raising on the part of the state attorneys general. The real issue here, I think, is historical. The states got into this business prior to 1890. They were in antitrust enforcement for a long time. If we were writing on a clean slate, I don't think any of us would be necessarily advocating what we have. But we do have a system that has a historical basis to it. I think we are trying to look at that system in that context. Frankly, we can argue about all of these things until we're blue in the face, but I don't see anything changing.

The second problem that I see is — and this goes a little bit to what Commissioner Warden was saying — we obviously have mergers that have international aspects and they have national aspects. But there may also be a legitimate local-market aspect in there that is of concern to the states. It's hard to say, at least for me, that if you had a state — take Illinois, for example. In Chicago, if Jewel and the other big supermarket chain, Dominick's —

Participant

They're owned by Safeway.

Mr. Denger

Okay. I didn't say I was current.

Anyway, if Jewel and Dominick's (Safeway) were to merge — while obviously they have multi-state operations — it would be something of great concern to the state of Illinois, one would think, because they have a very dominant share of the grocery store business in the Chicago Metropolitan Area.

It's hard for me to think that the state doesn't have a legitimate interest there, even though the federal government may have an interest in the national effects of the merger. You can make the same point in lots of other industries.

So I have, personally, trouble saying that the states, protecting their consumers and protecting competition concerns in the markets with which they are concerned, don't have an interest, even if the merger is national or international.

Maybe I am at odds with everybody else, but I think there are different market aspects to different mergers which should, theoretically, have the federal government and the states coordinating together. That's one of the things that I think underlies a lot of the problems. There are mergers that have both local and state aspects, as well as national aspects, as well as international aspects, and it's hard to draw the line.

Mr. Grady

Any other questions? Yes, sir?

Participant

I also think that the system that we have now is basically one that has grown up over time, one that probably isn't amenable to a legislative change, and maybe isn't advisable.

Another example of a merger that would have had disproportionate impact on some states is the Hughes-EchoStar merger, which the federal agencies did stop. But it would have been in certain rural states a merger to monopoly. If somebody wanted to overlook that because of what it would have meant in other states, if they had a different view, I certainly can't blame those rural states for wanting to enforce the law.

On the civil non-merger side, though, I think there is a problem, and I don't know, really — other than discipline, themselves, by the states — what could be done about it. The states often will combine, I think, their state antitrust laws with other laws in the states and claim their right to collect damages that are not only applicable to their states. That creates a situation where you are using the antitrust law in combination with other laws. You are sitting in front of groups of states who are claiming damages on behalf of other states, who are claiming something different. It's just an amazingly difficult situation.

I agreed with almost everything the states said. The one area where I would respectfully disagree — maybe because I define politics differently — it is very political. The states compete against one another. The attorneys general do. Sometimes they work together very well and they manage to come together, and sometimes they don't. I think we can admit that without saying that that means that legislation has to change that problem. But that is plainly the case, and we shouldn't deny that.

Mr. Hubbard

I don't have time to give a full response to all of this. I do note that I was intrigued by Bert Foer's comments yesterday. He was talking about how we have developed into a discipline that focuses on the economics and have lost those other values that were important to antitrust. Personally, I think that there are many reasons to think about those other values in our democracy. Isn't an elected official a repository of the thoughts of the voters? Shouldn't an AG come with a certain amount of respect for having prevailed in a contested election?

I am at least willing to consider that state AGs bring a perspective to some of these antitrust issues that add those other values that Bert Foer was talking about. I have looked at the executive law in New York State and other places, and the obligation — the obligation — of the attorney general is to protect the state and New Yorkers. If that is protectionist, it is an obligation imposed by the legislature on the attorney general.

Mr. Grady

Let's not get Eliot Spitzer involved in this discussion right now, but —

Ms. Conners

To be fair, I have to comment on the political grandstanding comments that both Commissioner Warden and David have made. You are missing my point. I am not denying that attorneys general may seek out cameras. That happens —

Participant

It's not partisan, I agree.

Ms. Conners

It's not partisan. The point I was trying to make is that the politics does not — and I think other people know this — the decisions in case selection that go on with respect to antitrust enforcement start from the staff and work their way up. The philosophy of how a state pursues antitrust enforcement rarely changes with a change in administration.

That is not true at the federal level. It is simply not true. We always talk about what happened in the Baxter years, what happens whenever somebody different takes the helm in the Antitrust Division; the enforcement philosophy of the unit changes. Those people are selected by the president of the United States. How is that not an endemic problem within federal enforcement?

Mr. Grady

I think we all realize that we will never do away with politics, and that it's going to be with us.

For time purposes, we need to wrap things up.

Mr. Joseph

We really do have to wrap up, but let me give Don Baker — Don, you have thirty seconds.

Don Baker

I wanted to give one particularly striking example. We have two newspapers in Honolulu, because the state attorney general stepped up to that when the feds declined, feeling that they were bound by the Newspaper Preservation Act. I represented a citizens group that worked with the state. But we got an injunction. It was a real triumph for democracy that wouldn't have happened without state enforcement.

Mr. Joseph

I thank all of you.

This is the kind of discussion that we could use another hour for. These are discussions about great political issues and competition issues. During the coffee break, I urge you to discuss these issues. Don is correct. This dialogue doesn't end here. It doesn't end at this program. A lot of people feel very passionately about very important subjects. It has been very helpful.

The Antitrust Modernization Commission at Mid-Course Symposium, Friday, June 9, 2006

Exclusionary Conduct

Moderator

Roxane C. Busey
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Panelists:

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Federal Trade Commission
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Wilmer Cutler Pickering Hale & Dorr LLP
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Daniel M. Wall
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Steven C. Salop
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Robert T. Joseph

I am pleased to introduce our next panel, which will address the area of exclusionary conduct. The moderator is Roxane Busey, a partner in the Chicago office of Baker & McKenzie. Joining her are Ken Glazer, who recently joined the Federal Trade Commission as Deputy Director of the Bureau of Competition; Dan Wall, a partner at the San Francisco office of Latham & Watkins; Doug Melamed, a partner in the Washington office of WilmerHale; and Steve Salop who is professor of economics and law here at the Georgetown University Law Center in Washington, where he teaches antitrust law and economics and economic reasoning.

This is a distinguished and top-notch group which I know will tackle this timely area with in-depth and creative analysis. With respect to this subject, I commend to all of you the latest issue of the *Antitrust Law Journal*, which contains a marvelous set of pieces on what the Section 2

standards ought to be. One of those pieces is written by Doug Melamed; another by Steve Salop. Roxane, take it away.

Roxane C. Busey

Our specific topic is "Should the substantive standards for determining whether conduct is exclusionary or anticompetitive under Section 2 of the Sherman Act be revisited?" I am just going to spend a couple of minutes summarizing the activity at the Commission so far.

Unlike some of the topics, there have been no deliberative hearings yet by the Commissioners, so it is going to be hard to report areas of consensus. There are only a couple that I think come out of the panel presentations.

There were two panels that presented to the Commission on September 29. The first panel included two of our speakers today: Ken Glazer, Larry Popofsky, Rick Rule, Steve Salop, and Willard Tom. The second panel included Tim Muris, Hew Pate, Bob Pitofsky, and Carl Shapiro. They each submitted comments to the Commission, and they are available on the Commission's Web site.

In addition, there were twelve additional statements submitted, including one by the Antitrust Section.

The basic discussion of the Commission was focusing around different tests for determining exclusionary conduct. I'd like to discuss each of those tests, But for each of these tests, keep in mind that we are always talking about a situation where the defendant has monopoly power.

The first test is the profit-sacrifice test that was advocated by Judge Bork and was referred to in *Aspen* and *Trinko*. This is a test that defines exclusionary conduct as where the defendant sacrifices short-run benefits and goodwill in exchange for a perceived long-run impact on its smaller rival. Some of the criticisms of this test include:

• It can over-deter, because research and development or capital purchases entail profit sacrifice, but are not exclusionary.

• It can under-deter, because some exclusionary conduct is "costless".

• It does not focus on consumers; it focuses more on the defendant.

• It is possibly inconsistent with *Brooke Group*.

A related test, the no-economic-sense test (sometimes referred to as "NES test") , is, to me, a refinement or a further development of the profit-sacrifice test. Doug Melamed has written an article on this. In his article he talks about the no-economic-sense test, but he calls it the profit-sacrifice test. To me, it's a little broader test than profit-sacrifice.

Under this test exclusionary conduct is defined as the conduct that would not make economic sense for the defendant but for the tendency to eliminate or lessen competition. This was advocated by the Department of Justice in *Microsoft*, *American Airlines*, and *Dentsply*, which, by the way, are very different kinds of cases. Yet the same test was proposed.

Some of the criticisms of this:

• The test focuses on the defendant rather than on consumers.

• It may not apply in all situations.

• It can under-deter.

I think that, to some extent, this test has been misunderstood. In the paper that was submitted by Doug Melamed to the Commission, he pointed out a four-part test to further explain the no-economic-sense test: (1) There is material harm to competition, not just competitors. (2) There is no business reason or economic reason apart from the exclusion of rivals. (3) If there is a duty to deal, there must be an easy way to determine the price at which to deal and, of course, (4) There would have to be a showing of monopoly power.

A third test that was discussed at the hearings is the less-efficient-rival test. Here you would define as exclusionary, conduct that would be likely to exclude an equally or more efficient competitor. This test has been advocated by Judge Posner.

The criticisms are:

• It's difficult to administer, because, obviously, if you are trying to figure out whether to pursue certain conduct, you have to figure out what effect it would have on your competitor and then whether that competitor was equally or more efficient.

• It possibly under-deters.

• Again, it does not focus on consumers.

Another test, which has been proposed by Professors Hovenkamp and Salop, is what is sometimes referred to as the consumer-harm test or the consumer-welfare-effects test. In the transcript for the hearings, it was referred to as the balancing test. It has also been called the disproportionality test. This is a test that would take into account and evaluate both the negative effects and efficiency benefits of the conduct to determine when the harm to consumer welfare is greater than the benefit.

The criticisms of this are:

• It's too complex.

• It has the same uncertainties as rule-of-reason analysis or even perhaps merger analysis.

• It provides insufficient guidance to the business community.

• It could too easily create a duty to deal.

According to Hovenkamp, exclusionary conduct consists of acts that are unreasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals and that either do not benefit consumers at all or are unnecessary for the particular consumer

benefits, or produce harms disproportionate to the resulting benefits. That is the reason it is sometimes called the disproportionality test.

Our last test — and there may be more — is one that was proposed by Ken Glazer—the coercive/incentivized test. This is where the defendant refuses to deal with a rival. The conduct is considered coercive and presumptively exclusionary when there is an absolute refusal to deal —with a customer. Incentivizing conduct is where the defendant encourages loyalty through incentives, but does not refuse to deal, and therefore it's not considered, under this test, exclusionary.

The criticisms of this test are:

• It's ambiguous.

• It probably only applies to vertical conduct.

Before I get into the questions for consideration today, here is a brief rundown of all of the many issues that at some point were considered during the presentations by the panelists to the Commission.

They included such things as:

• Have the courts' rulings under Section 2 been so wrong or so inconsistent that Section 2 should be legislatively amended?

• Should there be a single standard applied to all exclusionary conduct?

• In considering any standard, is it better to over-deter pro-competitive conduct, thereby creating false positives, or to under-deter anticompetitive conduct, thereby creating false negatives?

• What criteria should be used to determine the best standard? Are we most concerned about not having any error in terms of these false positives, false negatives, or should we be looking for a standard that has more certainty and is a bright line? Should we be looking for standards that have simplicity or ease of understanding or ease of administration? Should we make sure that the rule has an economic basis?

• What are the pros and cons of each proposed test?

• Should there be safe harbors or market-power screens to assist in this analysis?

• Should there be different evidentiary presumptions for different types of exclusionary conduct?

• What is the appropriate balance between innovation and other efficiencies by a monopolist, on the one hand, and consumer harm caused by a monopolist, on the other hand?

• What efficiencies should be recognized?

• Should there be only single damages?

• Should there be only government enforcement?

• To some extent, the flip side of all of this is what can a monopolist do to reap the rewards of its success?

A number of cases were briefly referred to by the panelists before the Commission. They included *LePage's*, *Trinko*, *Aspen*, *Kodak*, *Dentsply*, *Lorain Journal*, *American Airlines*, *Microsoft*, *Ortho*, *Concord Boat*, *Conway*. So, obviously, they were covering most of the waterfront, although the discussion about each of these varied significantly.

As far as a consensus was concerned, I don't really think there was too much consensus coming out of the presentations to the Commission, except that almost everyone said that there should not be any substantive legislative change. To the extent the Commission were to do anything, it could be in terms of a statement of the law or providing some guidelines or recommending that the agencies provide some guidelines.

The actual hearing by the Commissioners on this particular topic is currently scheduled for June 23. It's a public meetings, so if anyone wants to pursue this topic, they can certainly attend that particular session.

For today, we are going to talk about whether there is any problem, whether it is really worth it to be talking about this, either here or before the Commission. We are going to talk about whether we think there is a single standard that could be utilized for all conduct. Then we are going to talk about specific conduct and how the various tests apply and whether one test is preferable to another. Finally, if we have time, I would like to have the panelists comment on what they would like to see the Antitrust Modernization Commission do on this topic.

To start off today, the first question is: What is the current status of the law? Is there really a problem under Section 2?

Daniel M. Wall

Let me say, of course there is a problem with Section 2 law, just as there is with Section 1 law and Section 7 law. I daresay, pick another field of law and another conference of practitioners would find comparable problems.

In my view, it is fundamentally what you might think of as an ordinary problem. It's a problem in the development of common law. We do not have, by any means, a highly specific statute here. It is an enormously important statute, I will say. But it is very general, and it has been left to the common-law tradition to develop.

At a systemic level, what has concerned me for a long time, and actually concerns me more now that so many people are off on a search for a "Grand Unified Theory" of exclusionary conduct law, is that we place too much reliance in exclusionary conduct law on the broadest, highest-level principles that are at the very top of the pyramid. I have seen cases in which plaintiffs have said, "What I intend to prove is the *Grinnell Corp.* standard," and that's it — that there was simply the willful acquisition or maintenance of monopoly power. What more detail do we need?

The next cut on that, which is actually the prevalent one that is used to prosecute so many of these cases, is the *Aspen Skiing* jury instructions. Frankly, if you could just take the body of the

case and reformulate it like a ransom note and throw out the holding — because that is incomprehensible — if you could just take some of the words in the opinion about the nature of exclusionary conduct and about the role of intent, you could come up with something pretty good. But, unfortunately, *Aspen* blessed some very broad, very vacuous jury instructions, which are now the typical jury instructions that are used in Section 2 trials. They contain essentially no limiting principles. Under any standard of law that lacks meaningful limiting principles, you can imagine how many errors you can get.

The find a solution to this problem I think back to the famous statement that the remedy to offensive speech is more speech. The remedy to offensive common law is more and better common law. It is certainly not legislation. I don't think there is any plausible legislative solution to any of this.

But it is also a greater reliance on conduct-specific rules. If there is one thing that you are going to hear me say over and over again today — because we are going to talk a lot about these broader tests — it is that I respectfully dissent from the view that we need a "Grand Unified Theory" of exclusionary conduct law. I think it is an affirmatively bad idea. I think that we simply do better, because of the importance of administrability, when we have structured rule-of-reason inquiries that are tailored to practices that we can think about in a more focused way.

Mark Popofsky has an article in the *Antitrust Law Journal* that deals with some of this. Typical of Mark, he puts a fabulous academic underpinning to it. To me, it's a matter of the principle that small bites are easier to digest than big bites.

We can come up with good rules for things like tying and exclusive dealing and even the hard questions like product introductions and so forth, much, much more readily than we can come up with any "Grand Unified Theory."

Ms. Busey

Doug, I know you have a different point of view.

A. Douglas Melamed

I do, on the last point. Let me preface that with a general comment.

I think I agree with a lot of where Dan starts from. I don't think we have a crisis in Section 2. We have problems. We have cases that are wrongly decided. Our favorite whipping boy, I guess, is *LePage's*, and probably for good reason, because the opinion is incoherent.

But I actually think that there is a widespread agreement on the fundamental normative principle underlying Section 2. This is something I came to as a young lawyer reading the cases, not trying to come up with a grand theory. I tried to figure out how to explain all the cases. I think what they come down to is the following normative proposition: If the conduct complained of serves a legitimate efficiency-enhancing purpose, the defendant wins.

So you take *LePage's* — an incoherent opinion, maybe a wrong result. I'm not sure about that. But here is what I think drove that opinion. The court believed, I think, that 3M was a monopolist, and that its bundling conduct imperiled its only rival, and the court couldn't think of

anything good to say about the bundling conduct. If the court were right on all three of those facts, it seems to me, it reached the right result.

So the question is not one of finding broad normative principles. It is one, I think, of legal craft, of figuring out a way to articulate those principles, to embody them in meaningful operational legal rules that can be applied by courts, that can give guidance to decision making, and therefore can reduce the number of wrong decisions and help companies comply with the law.

The problem — I agree with Dan — is most acute in jury instructions. Most instructions I have seen in exclusionary conduct cases are either patently ambiguous or at too high a level of abstraction to be helpful. The *Weyerhaeuser* case is the best example, but it is not alone. The reason is that they use words that connote the normative principle (i.e., "unfair," "competition on the merits," "unreasonably exclude," "paid too much") — but they don't give any content to what they mean.

To go to Dan's last point: Does that take us to a lot of specific rules applicable to pricing, tying, exclusive dealing, and so on, or does it suggest that perhaps what we should look for is an overarching principle that can be articulated with greater precision and operational meaning than conclusory terms like "competition on the merits"?

Here are my concerns with a lot of specific rules: First, if you have different rules for different categories of conduct, you create disputes about what category your conduct falls into. It's easy for us to posit a predatory pricing case and say, "Here's the rule that ought to apply in predatory pricing." But look at all the recent cases that have involved the threshold question: Is this case one for which predatory pricing rules should be applied? You have *Weyerhaeuser, Concord Boat, LePage's, American Airlines* and others. So you have disputes about what category you belong in.

Second, with lots of specific rules, there is a lack of guidance from the courts about what you do if you don't know what category the conduct falls into. There is no principle to guide the courts. That's why the cases like *LePage's* that are thought not to fall into a perceived category often get treated so incoherently by courts.

Third, you have an invitation for courts to solve that problem by making up new rules and new categories. That is an invitation to courts to make mistakes, because they don't have an overarching principle to tell them how to decide what the new rules should be for the new category.

Finally, you have economic distortions. Lawyers — I have done this; we have probably all done it — say to our clients when we are advising them, "If you change the conduct this way or that, you're going to fall into a category where the rule is more defendant-friendly." And when the law encourages that, it interferes with the efficiency of transactions by inducing a focus on formalisms to determine how conduct is going to be categorized.

So, while I think it's a hard inquiry to find an operationally meaningful overarching principle, I think it's an effort we should undertake.

Steven A. Salop

I think I will respond to Doug's last point when we get to it on the agenda, where Roxane put it. But I agree with Doug on the characterization issue.

With respect to *Aspen*, what *Aspen* said in the jury instruction was — it asked whether the defendant's conduct was designed primarily to further any domination of the relevant market or whether it was efficiency-enhancing. It asked whether the conduct was unnecessarily restrictive. That is rule-of-reason type of language. You may want a structured rule of reason — I think we all do — but the issue is, are we going to use the rule of reason or are we going to use something closer to per se legality?

I think we have gotten into this issue very deeply, more quickly than I think Roxane's question intended. The issue before the Commission, and what the Commissioners' questions were all about, was whether we need to fix Section 2. I was there. It seemed to me that the advocates of change wanted to fix Section 2. They wanted to fix it in the same way the vet fixed my cat, by neutering it.

The real issue, it seems, is something about the incentives of the monopolist. What I think is that the advocates of change — however they dress it up, it's really that they have drunk the monopoly Kool-Aid, and they think antitrust is about the protection of the monopolist's incentives, not about the protection of consumers and competition.

I think we do need an overarching standard, and we need one that is oriented towards consumer protection. You take Doug's language — okay, Doug said that you can explain the cases as the defendant wins if there is a substantial legitimate purpose. Well, (a) that is an incomplete standard; (b) you have to define "substantial" and you have to define "legitimate." I am in agreement that substantial legitimate purpose should be the test as well. It's just that I think what "substantial" means is that the benefits to consumers exceed the harms, and "legitimate" means that the benefits to consumers exceed the harms. So I believe we are in perfect agreement.

Ms. Busey

Ken, the basic question right now is, do you think there is a problem with Section 2 that needs to be corrected?

Kenneth L. Glazer

Before I say anything, I need to give my standard disclosure, which is that my comments are my own and don't reflect those of the Commission.

I think I pretty much disagree with everything I have just heard, except that I agree with part of what Dan just said. I'm not sure if I agree. Let me state it and you tell me whether I agree or disagree. [Laughter]

I think we can stop the search for a unifying principle, because I think we already have a unifying principle. We have had it all along. The question is, was the conduct pro-competitive or was it anticompetitive? Did it result in higher prices, lower output, worse quality, and all that stuff, or the opposite? That's the unifying principle.

The problem with that — there is nothing wrong with it as a unifying principle; it's just not terribly operational. This is where I think Dan and I agree, which is that it's not something you would give to a jury in a jury instruction. I think it's less than worthless as a jury instruction. I don't think it is terribly helpful even if that is all that a judge has when a judge is deciding a summary judgment motion or the like.

I like Professor Elhauge's analogy to traffic law. You could say, in a sense, the ultimate unifying principle in traffic law is safety. But we still have speed limits. You can drive faster than the speed limit and still be driving safely. You can drive slower than the speed limit and be driving unsafely. But the point is, I think we all agree that we ought to have speed limits.

The ultimate question is, was the conduct pro-competitive or anticompetitive? That might be a good question, say, in a merger case. I think there is an argument that that is essentially the analysis that goes on in a merger case. You do have a structure of analysis in a merger case — market definition, market power, barriers to entry, and so on. But, essentially, the question in a merger case is, is the merger pro-competitive or anticompetitive?

But mergers are extraordinary events. When we are talking about unilateral conduct, we are talking about the stuff that companies do every moment of the day.

I guess where I disagree with Dan is that I wouldn't go right from "we shouldn't have any unifying principles" to little categories. I think what we need is a framework of analysis. I happen to have such a framework.

First, I think you have to start with the fundamental question: Are you talking about horizontal conduct or vertical conduct? It's the same distinction that we have in the Sherman 1 area, but, for some strange reason, people have forgotten that distinction when they turn to Sherman 2. What I mean specifically is, are you talking about a refusal to deal with a rival, as in *Aspen Skiing* and *Trinko*, on the one hand — or all the so-called essential-facilities cases? Are you refusing to deal with a rival? A vertical case would be, are you refusing to deal with — it's not necessarily refusal to deal — does the conduct have to do with customers or suppliers, vertical partners?

I think that is the first question you have to ask. If you are in a horizontal case, then you have a good framework of analysis. It's not one that is developed yet, but it's right there in Scalia's opinion — Scalia's great opinion, I think — in the *Trinko* case, where he talks about the three factors you have to look at: Does it undermine the incentives of both the monopolist and the rival? Would it put the court in the position of having to be a central planner? Does it raise the risk of collusion?

You develop a very nice framework for analyzing the horizontal cases from those three factors in the *Trinko* decision.

If it's a vertical case — that is, anything having to do with relations with customers or suppliers — I think the proper question to ask is — this is the coercion-versus-incentivizing distinction, which has to do with customers, not with rivals. You have to ask the fundamental question — basically, all of these vertical cases — and this is really the bread and butter, I think, of Sherman 2 — all of these vertical cases are about the alleged monopolist doing something to get customers to favor it over its rivals, to give it 100 percent loyalty, or some degree of loyalty.

But I think the courts have failed to ask the question: How did he achieve that loyalty? My proposition is that there are only two ways. Apart from trickery or fraud, as in a *Conwood* type of case, there are only two ways that that loyalty could have been achieved. One is by what I call coercion, which is a refusal to deal with disloyal customers, as in *Lorain Journal* and the recent *Dentsply* case — we will come back and talk about those more — which basically is shoving it down the throat, not giving the customer or, in the reverse case, the supplier any choice. You are with me or against me. You can't deal with both of us. The only other way that that loyalty could have come about would be what I call incentivizing, which is where there are incentives. He is not saying to the customer, "I'm not going to deal with you." "I will continue selling to you, but if you give me loyalty, then I will give you a better deal."

There are some difficulties about exactly when — there may be some difficult line-drawing problems. I talked about that in my article. I think those are resolvable. But, basically, in the incentivizing case, you are talking about — and the reason I think it should be treated more leniently — it is basically, as Robert Nozick put it, "capitalism between consenting adults." Therefore, I think it's a very different form of conduct from coercive conduct.

Ms. Busey

I think you can see how the panel was selected. We have three people who basically feel that there is somewhat of a unifying test, although Ken's is limited to vertical conduct.

Mr. Glazer

I call it a framework.

Ms. Busey

A framework. Then there's Dan, who doesn't think there should be a unifying test at all — presumably, other than what we have, which is Section 2.

You have spoken a little bit, Ken, about the proposal you would make. I would like Doug and Steve to comment a little bit more about whether they think their test will work for all exclusionary conduct, and then for Dan to comment.

Doug, is the profit-sacrifice/no-economic-sense test that you have advocated applicable to all exclusionary conduct? Is there conduct that you don't think it would apply to?

Mr. Melamed

The issue in exclusionary conduct cases is whether the benefits to consumers from the efficiencies of the conduct complained of exceed the harm to consumers from the exclusion of the rival. Those are the two things you have to trade off, one way or another.

I think the no-economic-sense test could be articulated in a way that would apply to all cases raising this issue — this trade off between benefits and harms for conduct that excludes rivals. I don't think you have to get into the arcane analysis, for example, of whether *Walker Process* is really susceptible of being analyzed under the sacrifice test, however. The sacrifice or no-economic-sense test is a test for dealing with conduct that has both properties — some benefit,

some harm. If you have conduct that is naked exclusion and there is absolutely nothing good to be said about it, like fraud on the Patent Office, blowing up your rival's plant, or whatever, you don't need a fancy test for that. It seems to me there you simply say that there is nothing good to be said about the conduct, and if it excludes rivals and creates market power, it ought to be illegal.

So I don't really worry too much about whether the no-economic-sense test could be applied in that situation, although I think it can be.

Where the test, I think, is particularly valuable is in answering the question: How do you balance the pluses and the minuses of conduct, like exclusive dealing or price cutting or tying or whatever, that has both properties? I think literally balancing all the pluses and minuses is simply impossible. The no-economic-sense test is a superior test. It has the following properties.

First, it is easy to apply compared to any other overarching principle because it is relatively easy for the firm to apply in real time — and that's the key to these tests: What incentives do they create for optimal conduct? It is not how they are applied after the fact by courts. It is whether they appropriately deter anticompetitive conduct without deterring pro-competitive conduct. To comply with the no-economic-sense test, a firm simply has to ask, "Would my conduct be profitable even if it didn't give me market power? Is my investment in the new product and the expected price I could sell it for without gaining market power enough to justify the investment? Is what I have to pay to induce my distributors not to do business with rivals an efficient investment, even if the rivals are not driven from the market as a result of that," and so on. This is not always trivial, but it is a rather tractable question for the firm in real time.

Second, the test condemns only conduct that is inefficient, regardless of its effect on rivals — that is to say, conduct about which the defendant can't conclude, "This would be profitable for me even if it didn't exclude a rival." It is, therefore, a very conservative test, which, if properly applied, will have no false positives.

Finally — I think this is important, because we are lawyers and not just economists in the classroom — this is a test that I believe is very consistent with and can be a rigorous expression of the widely shared normative principle that has been expressed in the cases for decades: Namely, that a defendant will not lose an exclusionary conduct case if he is engaged in competition on the merits. I believe that means you look to the defendant's conduct and ask whether this is efficient conduct. You do not ask whether somebody with some social reckoning, looking throughout the marketplace, can determine that even though the defendant built a better mousetrap and did it with skill, foresight, and industry, ultimately the world was made worse off for it.

Professor Salop

Let me just quickly respond to Doug.

I agree that we should be balancing the pluses and minuses. I think we should be doing that in the context of the consumer welfare standard. Consumer welfare should be the unifying overarching standard for monopolizing conduct and everything else. The goal of antitrust is to

protect consumer welfare. Using that test would lead to the most accurate outcome. It would minimize the errors.

I agree that it can be phrased in various ways. I thought the way Hovenkamp expressed it on that one slide was very useful. I think we can talk about the rule-of-reason type of test that the D.C. Circuit used in Microsoft. I think we can call it a consumer-harm test.

However, whatever we call it, it's the only standard that provides the kind of flexibility needed to address the various situations, the very varied situations, we hit under Section 2.

Doug says the no-economic-sense test balances the pluses or minuses. But that's not right. It doesn't balance. It actually looks to the profitability of the defendant's conduct in a hypothetical market — and not the real world, but in a hypothetical market. That is not a balancing test.

It is also not easy to apply, for the same reasons. It involves asking businessmen to do a hypothetical of the sort that we do in economics classes and business school classes, but are not what businessmen do in the real world.

Yes, it's a conservative test. It under-deters. But I don't think that is a good thing, unless you believe that the central concern of antitrust law is maintaining the incentives of monopolists.

In my paper, I have given some examples in which the NES test actually over-deters, where the consumer-welfare test would be a less restrictive test. I have a section in my paper — I highly recommend it — where I show that if a monopolist engages in a cost-reducing innovation, that monopolist would face greater concerns under the NES test than he would under the consumer-welfare test; it would be very difficult, if not impossible, for the plaintiff to win on the consumer-welfare test. But under the profit-sacrifice test the innovation may sacrifice profits in the short run, if it takes a while for the cost reduction to lead to lower prices. Secondly, under the NES test, the cost reduction may not be profitable but for the ability of the firm ultimately to raise prices. So under the NES test, it could fail, and under the NES test, you wouldn't balance the benefit to consumers from the low prices until the rival went out of business versus the high prices after the rival went out of business. You would just ask, would they have engaged in this innovation if they couldn't ultimately have raised prices? If the answer to that is no, then Doug puts him in jail.

So I don't think it's easier. I don't think it even commits only false negatives, although it certainly does have a lot of false negatives. There also can be false positives.

It seems to me that the main criticism of the consumer-welfare test is the concern that it is going to over-deter innovation. This is now the all-purpose excuse for loosening antitrust rules, that we want to incentivize innovation. But I think that it's just purely speculative. I don't see any evidence supporting a claim that Section 2 deters innovation. We have patent and copyright, as well as profit incentives, that create really high-powered innovative incentives. I think it's really implausible to think that the fear of violating Section 2 prevents firms from innovating.

Is that the rationale for engaging in a non-compete agreement with a producer of a generic drug, that the patent life is too short and if you are not allowed to have a covenant not to compete, there will be too little drug innovation in the next generation? I think not.

Finally, the point that really gets lost, including by the Supreme Court in *Trinko*, is that Section 2 is also about protecting the incentives of innovators who are under attack by entrenched monopolists or dominant firms. It is the new entrants, the small firms, that do most of the innovation, not the monopolists. If you are concerned with innovation, you should worry about their incentives, too.

Mr. Melamed

I don't think Steve accurately described, at least from my point of view, the criticisms of the balancing test. Pure balancing, where you really balance all the long- and short-run pluses and minuses of conduct, is plainly beyond the competence of courts or firms. To my knowledge, no one on this side of the Atlantic supports that.

Steve's pared-down static balancing test is somewhat better in that respect. But the two basic criticisms of it are these: One, it is, I think, virtually impossible to apply in most circumstances — particularly by firms in real time. Steve didn't address that. Two, it applies only to raising-rival's-cost cases. It does not apply to refusal-to-deal cases — because it does not take account of investment incentive issues, which are critical to analyzing those cases — or to demand-shifting cases, like predatory pricing.

Professor Salop

That's not true —

Mr. Melamed

Your article addresses refusals to deal, but it uses a no-economic-sense test when it talks about them.

Professor Salop

What I said was that the no-economic-sense test and the consumer-welfare converge in the case of refusals to deal. I said you use the consumer-welfare test, not the other way around. With respect to administrability, I think that predatory pricing — there is fundamentally a balancing between short-run and long-run there. You could do that balancing.

Ms. Busey

I have looked at the two tests. You are both talking about them as being very different, but I do see some overlap. I do see that in some cases perhaps one would work — the simpler one proposed by Doug — but in other cases we might need to go to the other more complicated test.

I think that you both are giving the impression that they are mutually exclusive. I do think there is more similarity here than initially meets the eye.

Dan, are you convinced that either one or both of these two tests could be applied to all or most exclusionary conduct?

Mr. Wall

No, of course not. That's why you asked me here.

With all due respect to Doug and Steve and everyone else that has been pursuing this particular Holy Grail, we have been at this for a long time. The seminal article that starts us on this path is maybe the 1981 Ordover-Willig article, which is, itself, inspired by the debate over the Areeda-Turner standard on predatory pricing. This has been going on for certainly twenty-five or thirty years, and I am sure that it's been going on long before that.

One of the reasons I was very happy to just wait and not say anything is because I think they amply demonstrated that there is no consensus here. If you look at this *Antitrust Law Journal* symposium, which is really very helpful, you will come away absolutely convinced that there is no consensus about this.

There is a very interesting feature about this. Steve and Doug and Greg Werden and Mark Popofsky have all written more or less the same article dealing with the applicability of these tests to various kinds of conduct. It's like the four brightest law students you have ever seen taking the longest blue-book exam on exclusionary conduct that has ever been written, and they came up with four different answers.

I really come to this from the perspective that the single most important principle of any rule about exclusionary conduct is administrability. It's not conceptual purity; it is administrability. Most of the work that is done to deter monopolistic, abusive conduct is done through counseling. It is not done by the Antitrust Division, Lord knows, and it's not done by the FTC. What happens in private litigation — a lot of that is just rent-seeking behavior, directly. But the real good work is done in counseling. Any principle that is not administrable fails in its essential purpose for counseling.

I just want to give one tangible example of this that comes from my scarred past, which has to do with the *Kodak* case. I am sure a lot of you know that I represented Eastman Kodak in the Image Technical Services case. The refusal-to-deal monopolization claim was Kodak not selling parts to its independent service company rivals. In my counseling capacity talking to Eastman Kodak, I took a lot of comfort about what they were doing from the essential facilities doctrine. I know a lot of people, Ken included, don't like it, but it is actually the part of our refusal-to-deal case law that has some measure of objective standards in it, around the nature of the asset that might be subject to mandatory dealing, focusing on whether it is available elsewhere and essential to competition.

I also took some comfort in the case law which says that you didn't have a mandatory duty to deal with respect to patented goods.

So from that, I came to the conclusion that Kodak probably didn't need to sell to its competitors parts that were either patented, available elsewhere, or not essential to competition. I was wrong. We lost that case. We lost that case because the plaintiff actually eschewed the essential facilities doctrine, said they were not bringing an essential facilities case, because, very clearly, they didn't want to be subject to the limiting principles of the essential facilities case law. Instead, they went to the broader level of analysis, the *Aspen Skiing* kind of analysis, and that's what allowed them to get the judgment.

I think we see this time and time again. *LePage's*, which is sort of the poster child for this today, is a case that I personally believe was both wrongly decided and analyzed — the root problem is the generality and wishy-washiness of the analysis. Respectfully, I don't think that any of these proposals that are being made to try to unify doctrine under Section 2 are capable of doing as good a job in meeting the administrability standard as conduct-specific tests.

So from the very pedestrian standpoint of somebody that is trying to serve clients, that is where I come out.

Professor Salop

But, Dan, I find this really surprising. Your statement of the Kodak case — had you bought on to the basic structured rule-of-reason or the consumer-welfare standard, you would have won that case.

Mr. Wall

The deep irony is that of all of these tests, the one that is closest to the case law is your consumer-welfare test, because it's closest to *Aspen*. So it's not a conceptual failure. It's an operational failure, but an operational failure is enough to make it a failure.

Professor Salop

You may have been out-lawyered, I don't know. I am not going to comment on that. But the point is, the consumer-welfare standard worked fine.

As for *LePage's*, 3M lost because of lazy lawyering. They did not do the work to try to win this case. They didn't show that there were no prices below cost. They could have pursued that path. Instead, they took the lazy-lawyer approach of saying the burden is on the other side to show that there is below-cost pricing. They could have shown — I don't know whether they could have; I don't know whether they had the facts. But they didn't try. They could have put together the facts, if they had them, to show that consumers benefited from 3M's discounts. They could have shown that the prices were passed on by Staples and the other firms to consumers. They chose not to do that. They just took an extreme position that said they had the right, the unbridled right, to refuse to deal.

For that matter, that is the situation in *Aspen* as well. If that case had been properly litigated from the get-go, the defendant probably would have won on market definition, or maybe they would have won on the grounds that the agreement was price fixing, that the attorney general of Colorado had it right that these firms shouldn't be setting the price of this blanket license together. Instead, they didn't do that. They just said, "We have a right." By the time the case got to the Supreme Court, there was nothing left.

Ms. Busey

Ken, I am going to turn to you with an example of specific conduct to see how your test would apply or not apply, with the hope that either there will be a unifying principle or at least some general principles that could be applied to different typical scenarios of exclusionary conduct.

The first one that I thought we would talk about, and that Steve has started to talk about, is *LePage's*, because that did seem to be the trigger point for, perhaps, the Commission choosing this topic. Basically, what is the appropriate test to apply here? Should we have just used a below-cost standard from *Brooke Group*?

Then, of course, the next round of questions will be: Do we need to make any change in *Brooke Group*? Is the below-cost pricing standard for predatory conduct consistent?

Mr. Glazer

I will get to *LePage's* in one second. I just want to say, I thought both Doug's and Steve's articles were great. I think Steve did a great job of showing why Doug's test stinks, and I think Doug did a great job of showing why Steve's test stinks. I think they basically cancelled each other out. I think that is what you were saying, Dan.

That leaves my test as the sole standard. [Laughter]

LePage's — speaking of my test — I think *LePage's* actually is a relatively easy case, when you apply the right framework. First of all, it is obviously a vertical case, because you are talking about an attempt to get loyalty from customers on the part of 3M. So, obviously, it is that kind of a case. You have to orient yourself first. Are you talking about customers or rivals?

It is just amazing to me that we can even be talking about these tests — NES or profit-sacrifice — without first asking ourselves that fundamental question. We keep talking about a refusal to deal. Refusal to deal with whom? As if it doesn't make a difference who you are refusing to deal with.

But on *LePage's*, we are clearly talking about a vertical case. The question to ask is, first, was it coercing or was it incentivizing conduct? To answer the question of whether it was coercing, you ask, was 3M saying, "I refuse to sell Scotch tape to a customer unless he also purchases my private-label tape." There was no claim in the case that 3M was doing that, that they were expressly refusing to sell — in other words, tying, basically — expressly refusing to sell the Scotch tape unless the customers took the private-label tape. There was also no evidence that I could see in the case that the standalone price for the Scotch tape was sort of a dummy price — in other words, so high that, effectively, it was a refusal to sell unless the customers took the private-label tape.

So it is not coercion. Then the only other thing it would be would be incentivizing conduct. 3M was paying a lot of rebates to customers to take that range that included both Scotch tape and private-label, and also some other things — Post-it notes and so on.

I think that, once you say you are in the world of incentivizing — that doesn't mean, by the way, under my test, that the defendant is home free — you then apply the predatory pricing framework of *Brooke Group*. You ask yourself, are the incentives so great that they put the defendant into a below-cost position? There I think it is relatively straightforward. The theory is that the defendant was using the Scotch tape to leverage, to get them to buy the other kind of tape. You just take the rebates that they were paying on the Scotch tape, attribute them over to private-label tape, and see, when you actually put them all over on the private-label side, whether that put the private-label tape below cost.

You also have to ask, as you would in any predatory pricing case, can you limit the relevant product to that one product? You also have the recoupment question as well under *Brooke Group*.

I think that is basically the way the case should have been analyzed. Neither side analyzed it in that way. I think there was no dispute, actually, that if you looked on an across-the-board basis, it wasn't below cost. But neither the defendant nor the plaintiff analyzed the question of whether, if you attributed the rebates over to private label, it would put 3M below cost.

I think it's possible that it would have, actually, at least with respect to certain customers, because some of those rebates — for example, Wal-Mart — were very large, in the millions of dollars. If you took $3 million, say, to Wal-Mart and you just applied it to the private-label tape — obviously, that is much smaller than for the Scotch tape — they may well have been in a below-cost position with respect to that one customer.

Then you have to ask — and the Areeda treatise talks about this at length — can you apply the average variable cost test to one customer? There may be circumstances in which it's okay to do that.

But that is the way the case should have been analyzed.

Ms. Busey

Doug, when I read the recent *Antitrust Law Journal* articles, I actually thought that Greg Werden and you were pretty much espousing the same test. Yet he did criticize the no-economic-sense test in this particular context of bundling cases. He said the reason that he didn't think that it would work well was because it was difficult to distinguish between legitimate profits and profits from eliminating competition.

Mr. Melamed

I am not sure exactly what Greg means. I will let him speak for himself.

But here is what I think the problem is with applying either the balancing or consumer-welfare test or the no-economic-sense or sacrifice, test to bundling. Both of those tests require comparing the real world to some "but for" world. What would have happened if the conduct hadn't been engaged in? In a bundling situation, it's very hard to know, often, what the "but for" world is. You cannot simply say that in the "but for" world you would have the same standalone prices for the components of the bundle without the discount for the bundle. If you live in a world in which bundling is permitted, the bundling is probably what is used to target the marginal customer, and the standalone prices then tend to go higher because they are a way of exploiting the inframarginal customer. If you prohibit bundling or imagine a hypothetical world without bundling, the standalone prices might be lower than in the real world with bundling.

Professor Salop

To just sort of join issue on this one point —That would mean that it would violate the consumer-welfare standard.

Mr. Melamed

Not necessarily.

Professor Salop

You just said price would have been lower but for the bundling.

Mr. Melamed

No, no, no. In bundling, you have a combination of higher standalone prices and a lower bundled price. Without bundling, you have lower standalone prices, and you don't have the bundle option. What the net effect is on welfare is hard to know.

So I think Greg is right that applying any of these tests to bundling is very difficult.

I actually think that one way to think of bundling is as follows. It is almost ubiquitous in our economy and commonly used by firms that don't have market power. So one should presume that it's efficient.

Second — this is preliminary — there has been some empirical work done by experimental economics over at George Mason that has found so far that it's very hard to come up with a bundling scenario that actually reduces welfare, long run or short run.

If you combine those two facts, one might want to have a very cautious rule, in the spirit of *Brooke Group*, that would say that bundling is in a safe harbor if (a) the standalone prices are not so high as to constitute a *de facto* tie; (b) the price of the package as a whole satisfies the *Brooke Group* test; and (c) if you allocated the entire discount to the competitive product, you would satisfy the *Ortho* test.

Mr. Wall

I think you just described my framework.

Mr. Melamed

I want to just finish one thing on Ken's. I don't think Ken's distinction between incentivizing and coercion helps the analysis.

I have three problems with it. First of all, it applies only to exclusionary vertical agreements. It doesn't cover the waterfront.

Second, I think it is inherently ambiguous. The prototypical coercion is, "If you deal with my competitor, I'll cut you off." Let me change the hypothetical just a little bit.

I have a very attractive product. I will let you distribute my product if you give me your complete loyalty and promise to do your best to push that product in the marketplace. Is that incentivizing because I gave you the opportunity to share in the money to be made from distributing this product, or is that coercive?

I think it's an inherently ambiguous and not meaningful distinction.

But the most important problem I have with incentivizing-versus-coercion is this: The issue in an exclusionary conduct case is how to compare the efficiencies from the conduct with cost of excluding rivals. Incentivizing-versus-coercion doesn't address either of those components of the analysis. It focuses on the middle man, the distributor or the input supplier. But in cases involving exclusionary vertical agreements, antitrust doesn't really care about the middle man. We know that a monopolist can, for example, cut off his distributors and switch to self-distribution, even though that harms the middle man. So why should we have a test that is fundamentally focused on the middle man and not on either of the two factors — benefit and harm — that should drive the analysis?

Mr. Glazer

First of all, that's correct; it only does apply to vertical. I think that is one of the virtues of it. It's not trying to cover the waterfront. It is basically saying that the refusal to deal with a rival is a totally different animal, and it doesn't make sense to apply the same framework to that. There is a very good framework for those rival cases set out in the *Trinko* case.

On being ambiguous, and your example with Don, if you are talking about saying, "You have to be loyal to me," then it is coercive. It is presumptively illegal, not per se illegal. Then you can overcome that presumption by showing that there were free-rider benefits or the like.

On the third point, that it doesn't address the consumer, first of all, the *Lorain Journal* case did involve the ultimate consumer, the merchants who were buying the advertising space. But I am not sure I understand why we don't care about the middle man. The D.C. Circuit, I think correctly, in the baby foods merger made clear that we do care about the middle man, the retailers.

Mr. Melamed

Baby Foods was a horizontal collusion case. It has nothing to do with exclusionary vertical agreements.

Ms. Busey

Dan, I am sure you want to comment.

Mr. Wall

Oh, yes. First of all, let me say that any feelings of inadequacy I may have had for not having a "Grand Unified Theory" are now well behind me. [Laughter]

Let me first address Ken's test. I have to tell you, I have a big problem with a test that creates a binary distinction between incentivizing and coercive conduct, when that isn't a binary. It's not. It's just not a binary. There is a range of inducements that, at some point, come to the place where a reasonable person or some other hypothetical construct would no longer ever say no. The idea that we don't care about anything until we get to that range just seems to me to have such vast potential for under-deterrence that I would want no part of that.

I also completely disagree with the notion that there is a meaningful distinction between horizontal and vertical refusals to deal. I can think of one refusal to deal that is arguably horizontal, truly horizontal. It is the one that Carl Shapiro writes about, where a small network wants a large network to let it share its network effects. Every other case that I know of that involves a refusal to deal, even if it involves a competitor, including at least a dozen that I have defended, has involved a vertically integrated defendant that was a competitor in a horizontal sense with the plaintiff in one market, but was a supplier or a potential supplier in some other market.

So that distinction is, to me, quite meaningless.

Mr. Glazer

No. If there is a competitive relationship, then it is horizontal. When I say vertical, I am talking about a pure vertical relationship. As I say, think about *Lorain Journal* and think about *Dentsply*. There is no horizontal relationship in either of those cases.

We distinguish between horizontal and vertical in Section 1 all the time. Someone who comes in and says, "Well, I don't think we should use that distinction because there is going to be some ambiguity" would be laughed out of court. It's the fundamental divide in the Sherman 1 world. I don't see why we ignore it in Sherman 2.

Mr. Wall

With respect to the bundling, in my opinion, I don't think there is a more difficult issue, from a sort of raw intellectual challenge level, in the whole field of exclusionary conduct than how to analyze multi-product bundles. It is hard, because, first of all, it is an extremely important issue. It's important not only because it's common, but because there has been a lot of recent work, particularly the work that Barry Nalebuff has done on the potential exclusionary effects of these bundles, that identifies this as a very serious competitive concern.

I really disagree with the notion that, because we are having difficulty settling on an analysis that we are comfortable with, it is appropriate to presume the efficiency of this in some way or adopt a very liberal rule.

But I also have to say, Doug, that when you said that, you were impeaching the notion that there is a unified principle that can be applied to everything. You are actually doing exactly what Mark Popofsky was writing about in his article. You are saying that for this particular conduct, we need to make a specific determination about the potential for over- and under-deterrence. That is the fundamental benefit, beyond administrability, of having conduct-specific rules: they can be calibrated to the particular issues that that conduct raises with false positives and false negatives.

I think that, with respect to these multi-product bundling issues, the best that has been proposed is the *Ortho* kind of standard. It is extremely difficult to do. In fact, I was involved in one case where I was in the position of the plaintiff, and we basically were not able to get the data that we needed to make really sensible, defensible predictions of what "but for" prices would have been in the absence of bundling. It's hard.

But the fact that it's hard just means that we have to work at it more. I don't think we can take the approach that this is something that deserves to have liberal treatment, because it has some profoundly exclusionary effects in certain circumstances.

Professor Salop

Yes. I think these bundling cases are really hard as well. Let me attempt to get some consensus here.

First, I think we all agree that the terms "coercive" and "incentivizing" are confusing — the other three of us. But at the same time, I think everyone is being really unfair to Ken's rule. Fundamentally, Ken is using incentivizing-versus-coercing as the *Ortho* test. That's what it comes down to. You conclude that it is coercive instead of incentivizing if it fails the *Ortho* test. As he said, if the alternative is just a sham, if *Lorain Journal* had said, "We'll let you advertise, but you have to pay $10,000 a square inch," then we will consider it coercive. But, hey, that's the *Ortho* test, because the only natural limit to use for what makes it a sham is whether it meant below-cost. That is exactly the way the court looked at the rule in *Ortho*.

I agree that the *Ortho* test is a good starting point, subject to the point that both Dan and Doug made, and one that I made earlier, which is that there is the issue of the "but for" benchmark. The *Ortho* test implicitly uses the "but for" benchmark, what the current non-bundling prices are. There is a paper by David Reitman, who is at CRA now and was at DOJ. Sometimes that is not true. Sometimes you raise the price in anticipation of the bundling.

Second, there is the point I made earlier, which is that the *Ortho* test should be trumped if the plaintiff can show that the lower price from the bundling isn't passed on, like in *LePage's*. There was some evidence that the rebate wasn't given until way after the end of the fiscal year, and 3M encouraged people not to pass it on. That would have been useful evidence if the plaintiff had wanted to do some serious lawyering in the case.

So it seems that the only significant place we disagree has to do with the experimenters at George Mason. I suggest that they read the literature instead of asking undergraduates whether there is harm from bundling.

Mr. Melamed

Are you speaking of the Nobel Prize-winning experimental economics?

Professor Salop

Yes, I am.

Ms. Busey

We are going to talk about exclusive dealing a little bit now to see how the tests might apply there. I hope we will have time to cover one more scenario after that.

Exclusive dealing is defined as where the distributor can only sell the manufacturer's product. A recent case in which there was illegal exclusive dealing was *Dentsply*, at least according to the court. Steve, how would the consumer-harm test apply to exclusive dealing?

Professor Salop

This is a category, for me, where I thought the raising-rival's-costs analysis under the consumer-harm approach was well-established — probably the only place where it is really well-established. You look to see whether a competitor's costs were raised materially or quality was materially degraded. You look to see whether the cost increases have allowed the defendant to achieve, maintain, or enhance market power. Then you look to see whether the claimed benefits from the exclusive dealing — generally, free-riding — imply that consumers are benefited rather than harmed.

Under that approach, it is insufficient for the plaintiff merely to show harm to competitors. They also have to show harm to consumers — i.e., harm to competition.

So it's basically the D.C. Circuit's approach in *Microsoft*, but without the burdens being formally allocated.

Ms. Busey

Doug, how would the no-economic-sense test apply? I know it has been criticized in this context.

Mr. Melamed

It has been criticized, I think, on the mistaken view that exclusive dealing is costless to the beneficiary of it. That is usually — maybe always — not the case. If you go to a distributor and you say, "I'll let you distribute my product only if you forgo what would otherwise be profitable opportunities to deal with other parties' products," you are imposing on the distributor a cost that presumably results in an inward shift of the demand curve for your product, and therefore you internalize the cost to the distributor.

That would not be true where the distributor had no intention of dealing with the third party anyhow. But in that case, the exclusive dealing is harmless, so you wouldn't be worried about it.

I think, in the area of exclusive dealing, that the no-economic-sense test and Steve's, what I call, static balancing test are very close. They are not identical; they are very close. I think the rhetoric is a little different. In the no-economic-sense test, I think what you ask is the following. The monopolist who benefits from excluding rivals by this scenario of exclusive dealing incurs this cost that I just described, because he has to pay something, directly or indirectly, to induce people to forgo opportunities to deal with his rivals. The question is, where does he get the proceeds to defray those costs? Does it come from the efficiencies created by exclusive dealing — enhanced dealer loyalty, better promotion of product, whatever it may be? Or does it come from, in a predatory pricing recoupment sense, the market power that might be gained by excluding rivals? If it's the latter, the plaintiff wins; if it's the former, the defendant wins.

Professor Salop

But, Doug, that is where we differ. Take a case in which the benefit to the defendant is that it lowers his distribution cost by ten cents. But by doing the exclusive, he drives the rival out of business and is able to raise the price of the product by ten dollars. Under those circumstances, your test would say it's legal; my test would say it's illegal.

Mr. Melamed

I'm glad Steve said that. This is the crux of the disagreement between Steve and me. In theory, Steve is right; we ought to weigh all these benefits and all these costs and ask: is this a good thing to happen in the world?

But let me change Steve's hypothetical just a little bit. Suppose I build a better mousetrap, and I drive my rivals out of business. I get a lawful monopoly by what the cases would call "skill, foresight, and industry." As a result, I can raise prices. Nobody is going to enter because they know my costs are so low from my efficient mousetrap that I will be able to drive them out of business.

You can think of lots of hypotheticals where a toting-up of pluses and minuses would cause you to conclude that the world would have been better off if I hadn't built my mousetrap. But antitrust law does not condemn the better mousetrap in that situation.

So what's the policy choice between these two rules? On the one hand, you could have a rule that says, weigh it all, whether it's your hypothetical or mine. I think that is intractable. It's intractable for courts. It's impossible for firms in real time. Or you could say, in the shortness of life and reflecting the normative belief about competition on the merits, we are going to have a different test that is more manageable, but that at least requires us to prove that the defendant's conduct was efficient in the sense of being profitable without regard to its effect on rivals. It is a policy choice we are talking about here between, I believe, an intractable theory and a workable policy.

This hypothetical of efficient conduct that in the long run could come back to reduce welfare in some individual case illuminates the policy choice.

Professor Salop

I think the difference between the mousetrap and the vertical case, in terms of the way people think about it, is what animates people —

Participant

What if he just used the term "vertical," by the way, even though it's a meaningless distinction?

Mr. Melamed

Not meaningless, but when I am supplying you an input, it is a vertical relationship, whether you are my competitor or not. That's what Dan was saying.

Mr. Glazer

It doesn't matter whether the other person is a competitor or not?

Professor Salop

The problem is, you can view *Aspen* as a vertical case. You can view *Aspen* as a horizontal case.

But, in fact, they were supplying an input — what they were taken to task for was refusing to supply an input to Aspen Highlands, which is their daily tickets. That is the problem with it.

Mr. Glazer

I think Scalia, in the *Sharp Electronics* case, in that footnote about what horizontal versus vertical is, handled all this. He said you can call it anything you want — you can call a vertical case a horizontal case if you want — but the important thing is, what is the competitive relationship between A and B?

Mr. Wall

But the point is, it's both.

Professor Salop

The thing about the mousetrap is that, when we think about the mousetrap situation — the guy invents a better mousetrap. He doesn't know when he invents the better mousetrap whether that mousetrap is going to be imitated in the next ten minutes or the next year or the next three years by somebody else with a better mousetrap. He has —

Mr. Melamed

So it's just skill and industry, no foresight.

Professor Salop

No. Foresight does matter. Thank you. So you would do an *ex ante* analysis on the mousetrap case, and you would conclude, if there actually were a case brought by a plaintiff, that the plaintiff could not prove that it was reasonably foreseeable that the defendant would have gotten a monopoly and that monopoly would have led to consumer harm. The plaintiff could never carry the burden on that.

In the vertical case, in *Lorain Journal*, it was eminently predictable that the impact would be to give *Lorain Journal* — to maintain their monopoly, that they would drive WEOL out of business, and the customers who lived in Lorain and Oberlin would be deprived of that advertising alternative.

Mr. Melamed

Steve, I would not be more willing to condemn an innovation —that everybody thought from the outset, because it was so fabulous, would probably give the innovator monopoly power — than

an innovation that was thought to be trivial and only by happenstance gained monopoly power. I don't think that is a sensible distinction.

Ms. Busey

Dan, I would like you to comment on this. We have talked a little bit about innovation. I would also like to take it to product integration, where you have a monopolist who is obviously very creative in developing new products, and you have to tell them to go ahead and innovate. But there could be some serious exclusionary effects. Where do you come out? You have heard all three talk about this. Where do you come out in terms of counseling?

Then we are going to turn quickly to: what in the world should the Commission do with this topic?

Mr. Wall

With respect to counseling, I just want to make one fifteen-second comment on exclusive dealing. I am not going to do what any of these guys did. I am going to do what Bill Baxter taught me a long time ago. I am going to ask whether there is still room to dance, whether the amount of exclusive dealing is going to really foreclose access to inputs or distribution. I am going to ask what the rivals' counterstrategies are. I am going to do that because if I answer those questions satisfactorily, I am going to have a very high probability of having the correct answer, without having to deal with hypotheticals about profit sacrifice and measuring consumer welfare.

With respect to the question of product introduction and innovation, I am inclined to agree with Steve that the promote-innovation thing has lately become the dominant firm's get-out-of-jail card for a lot of things. There is also, I think, somewhat of a disturbing tendency to transfer the problems that we have with Section 2 law into a "life should be made easier for monopolists" sort of theme. I hope we never go there.

Product introduction comes closest to building the better mousetrap. I think that is why it is so difficult. If we were to have a general normative rule that building a better mousetrap is going to be per se illegal, you could make a pretty good case for that because of the concern that there would be such a potential for over-deterrence and consumer harm from over-deterrence that you wouldn't want to go there.

The problem is, the cases all have their specifics. You were involved in the government's *Microsoft* case, the notion of the metaphorical bolting, the combinations of functionalities that may not be anything that really stands up to a genuine test for product improvement, or which could have been done by consumers themselves or something like that. You can't just wave a magic wand and say, "I have improved my product, and therefore I have immunity."

When I counsel in this area, I am definitely counseling in the direction of saying that if there is a substantial engineering improvement, efficient improvement in a product, the odds of antitrust provision are very, very low. But it is different today than it was five years ago, because we do finally have a couple of cases on the books — the *Bard* case and the *Microsoft* case — in which the defendant has lost these. So there is now some risk attendant to the practice.

Ms. Busey

Obviously, we could talk about this for a long time. We have not covered all of our scenarios. But I do want to do what the moderators were asked to do, which is to see what the panelists think might be the appropriate thing for the Antitrust Modernization Commission to consider, given the problem that is here.

In that context, preliminary indications are that they are not going to give any substantive legislative recommendations. There is still the possibility that they could give some non-substantive legislative suggestions. We haven't talked about any of those, but those might include allowing only government plaintiffs; maybe limiting the remedies to injunctions or just single damages. There was an earlier mention of the difficulty with jury instructions — perhaps, somehow, taking this out of the jury, if that is constitutionally permissible.

There is also the possibility that they could take the approach of trying to provide some authoritative statement of the law, perhaps discussing all of these tests or evaluating them.

They could also encourage the agencies to come forward with some guidelines, with examples. I think the examples are very helpful. I think it does help everyone to focus on what exactly we are talking about here.

There has been some suggestion of safe harbors. We have kind of a safe harbor for predatory pricing. Perhaps market screens — we haven't talked about market power.

There could be some recommendations with respect to presumptions or a change in presumption, or, of course, the famous "we need further study."

With that kind of an introduction, I would like each of the panelists to give their final word, by focusing on what they think would be best for the Commission to do at this point. Ken, why don't you start?

Mr. Glazer

I think there is consensus that there is no statutory change. I think they do need to give a lot of consideration to the whole question of whether treble damages should apply.

Ms. Busey

What would the thinking be? If they did that, it would be because there is confusion about the law?

Mr. Glazer

If my framework were applied, I think the law would be much clearer, and then you can have treble damages. But if you don't know if you are going to end up in the Third Circuit, in a *LePage's* standard, then it does seem unfair to impose treble damages.

Mr. Wall

I think that, as a practical matter, the only thing they really can do in this area is to try to get on the bully pulpit a little bit and advocate for some sort of doctrinal direction. Obviously, I don't believe that any of these grand unified theories are a good idea. But I do think that there is this recurring issue about the clash between standards with limiting principles and the very high-level *Aspen-Skiing*-jury-instruction kind of standard. Any help, even from the bully pulpit, that they can give in trying to get the courts to deal with the importance of having standards with meaningful limiting principles is what I would want for Christmas.

Mr. Melamed

I would say modesty is in order. There is obviously no consensus among the four of us about almost anything. I don't think there is going to be consensus on the Commission or a consensus among the people who made submissions to the Commission or testified before it and they represent only a tiny slice of the potential participants here. There are enormously creative and interesting thinkers in the academic world and judges and practitioners who haven't been heard from.

So I don't think there is any way that the Commission could say a whole lot that reflects a consensus. They can't say a whole lot that reflects science, because there hasn't been much science done here. We talked about which test is more administrable. Who knows? Steve has his views; I have mine. Are we afraid of false positives or false negatives? Steve is more concerned about false negatives. Others are more concerned about false positives. Who knows what the greater risk is?

So I would urge the Commission, instead of telling us what they think the substantive rules ought to be, to say what we know and what we don't know, and to identify the issues that are really important that we don't know much about, like false positives versus false negatives, administrability of the tests, whether predatory pricing — that is, pricing in an effort to exclude a rival in order to gain market power — is really rarely tried and rarely successful, when bundling is harmful and, so on. Identify the questions that drive the policy debates that we need to study further, and maybe suggest some protocols for studying those questions.

Basically, I think that is all they ought to do — with one possible exception. They might write something that will help push federal courts — the Supreme Court ought to help us here, too — to do something about the state of jury instructions in antitrust cases. It is ridiculous to put, as courts often do, to juries the policy questions we are talking about. When they say things like, "If there was a legitimate purpose, it is pro-competitive," "if it's competition on the merits" — those terms have no meaning to a jury. That is just saying to the jury and some hired experts, "Go have the debate that we just had today."

Professor Salop

The questions that came up at the Commission — they asked about eliminating jury trials, de-trebling, and eliminating standing for private plaintiffs. I think juries have a problem in understanding economics.

But, I must say, as a professor of economics and law, that I find that the courts also have a lot of problems, including the Supreme Court, with economics.

But I would not favor getting rid of jury trials. I don't know how they could do it constitutionally.

In terms of de-trebling, I have been thinking about that since the hearings. I think it's not a good idea. I don't think it is proven. I don't think you can demonstrate over-deterrence empirically. I think, as a matter of first principles, treble damages are needed in order to maintain the incentives to bring private cases, given the high costs and low probability of winning a Section 2 case. I think it is clear that private cases contribute to deterrence. Private cases can spur the government to get over its inertia and act, and private plaintiffs also sometimes do a good job. I don't think we can trust the federal enforcement agencies to be the only antitrust enforcers.

So I would not favor either de-trebling, which would tend to give standing only to the government, or having legislation that would only give standing to the government.

Ms. Busey

Thank you all very much.

The Antitrust Modernization Commission at Mid-Course Symposium, Friday, June 9, 2006

Exemptions and Immunities

Moderator

Theodore Voorhees
Covington & Burling
Washington DC

Panelists

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Peter C. Carstensen
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Margaret E. Guerin-Calvert
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Robert T. Joseph

Exemptions and immunities have been a subject on the antitrust policy plate for a number of years. They were a major focus of the 1978 Shenefield Commission, as we know. In fact, the recommendations in that report bore fruit in Congress.

Our moderator is Ted Voorhees, a partner at Covington & Burling, in its Washington office. Ted is co-chair of the firm's Antitrust and Consumer Law Practice Group and has had extensive experience in antitrust counseling and litigation.

He is joined by Peter Carstensen, who is the Young-Bascom Professor of Law at the University of Wisconsin Law School, whose scholarship and teaching have focused on antitrust law. Peter is currently co-chair of a drafting committee for the Section's monograph on statutory exemptions and is a coauthor of a forthcoming book on merger policy in the formerly regulated industries.

Steve is a professor of law at the University of Illinois Law School. In August, he will move to Penn State from the University of Illinois. He will be taking up an exciting position there as he opens a new law school, which is great news. Steve is an accomplished author, lecturer, professor. He had a career on the Hill. He was a staff attorney at the Federal Trade Commission. He has been actively involved in the AMC process. He was one of the persons that the AMC itself enlisted to look at what I guess you would call an exemptions protocol, an approach to considering and evaluating exemptions.

Meg Guerin-Calvert is a founding director of Competition Policy Associates, where her expertise includes health care, financial, and network industries in the U.S. and internationally, with an active practice before federal antitrust agencies and in litigation. She was formerly Assistant Chief of the Economic Regulatory Section at the Antitrust Division, where her expertise spanned regulated, manufacturing, and services industries.

So we have quite a panel here. I am going to turn it over to Ted.

Theodore Voorhees

Thank you, Bob.

I will start by trying to set this discussion in context, for four or five minutes. Then we will have ten-minute presentations by each of our excellent speakers. I will then start the discussion off with some questions. As I ask this first series of questions, of course, everybody in the audience should feel free to interject, raise your hands, follow up. Hopefully this can be as interactive as possible. So don't feel at all shy about jumping into the discussion.

But let me set it off with a couple of minutes of context.

Antitrust exemptions are pervasive in the federal code. They cover everything from A to almost Z, the Anti-Hog-Cholera Serum Act to the Webb-Pomerene Act and a lot in between. The AMC has listed at least thirty-one statutory exemptions that they could find. Peter, who is our resident archivist and detective, may have found thirty-six. There may still be a few more lurking out there that are so obscure that people aren't aware of them, but they may, nonetheless, be having an effect on the economy.

There are exemptions in place that affect most of the major segments of our economy — agriculture, defense, health care, insurance, labor, transportation, you name it. They are everywhere. They range from very, very broad statutory exemptions which cover a wide array of conduct by every conceivable industry to extremely narrow, targeted exemptions, which, if they affect any economic behavior, it's sometimes hard to measure exactly what it is — the Need-Based Financial Aid Act. I believe that was passed after someone was suing some of the major colleges for the way they handled their programs for financial aid to students.

Exemptions are both a very old idea and a very new idea with Congress. The first exemption was probably the Shipping Act in 1916. One of the latest exemptions was for the Medical Resident Matching Program for sending medical school graduates off to different medical teaching hospitals for their resident training program, and arguably setting the terms of compensation in a joint program. That was challenged. As many of you may know, it has been in litigation. Congress passed an exemption to erase the litigation. That was appealed by the

losing plaintiffs to the D.C. Circuit, and the D.C. Circuit just issued an opinion approving dismissal of that lawsuit under the exemption, just a few days ago. We may discuss that this afternoon.

The ABA Antitrust Section has long had a position of skepticism about exemptions. They are not the only ones. This first segment from the report of the president's national Commission in 1979 said that exemptions should be granted only where there is compelling evidence of the unworkability of competition. The ABA Section position has been stated: "We do not believe that such compelling evidence has been or could be shown with respect to the malt beverage industry." That was a couple of decades ago, when we unsuccessfully challenged a congressional effort to enact an exemption for beer.

Then we stated, "The Section is inherently skeptical of exemptions and immunities, whether created judicially or by statute. The reason is obvious: Whether justified or not, broad exemptions are harmful to consumer welfare almost by their very definition."

This is the ABA's repeatedly stated position. It is very skeptical; it is very consumer-welfare/economics-based. It is skeptical of most social justifications for exemptions — although, on the other hand, perhaps there are cases that can be made that some of these exemptions are justified. We will discuss some of those in our comments this afternoon.

We tried to list some of the factors that the ABA and others cite as disfavoring exemptions:

• Harm to consumers;

• Drag on a competitive economy;

• Contradicts the national commitment to the Sherman Act as a comprehensive charter of economic liberty;

• Disrupts uniformity and enforcement across all industries, especially when there are special industry exemptions that are picked out;

• Leads to an endless parade of supplicants for special treatment;

• Complicates the Department of Justice's efforts to spread the good news of competition throughout the world, if we can be charged with being hypocritical.

Arguments that are frequently advanced in support of exemptions (some of which raise eyebrows and skepticism, but, nonetheless, they are repeatedly made):

• The antitrust laws won't work well in a particular industry setting.

• The industry needs protection from the overwhelming costs of litigation, regardless of whether the activity they want to engage in will ultimately be found to violate the antitrust laws or not. They want an exception because they want to avoid costly litigation and risk.

• There are often arguments made that an exemption is needed to eliminate legal risk in advance of an industry response to an urgent national need. The Defense Production Act might be a good example of that.

• Situations where there are anticipated social benefits that arguably outweigh any economic costs of the exemption.

The AMC has been actively considering exemptions. It had a hearing on December 1, which attracted some very outstanding speakers, including both Peter and Stephen, who are here today. They were both speakers at that hearing.

I will summarize where we think the AMC was, at least as of the date of the hearing. It seemed to be moving toward identifying a series of process and burden concepts that might be proposed to Congress that should be applied as Congress analyzes each effort to create a new exemption or, possibly, to sunset an old exemption:

• That the proponent of exemption should bear a burden of persuasion, maybe a very high burden;

• That it should be a completely transparent process;

• That there should be sunset provisions;

• That there should be rigorous cost-benefit analysis.

• That less restrictive alternatives should be considered;

• That any exemption that ultimately comes out of the pipeline should be construed strictly by courts, and applied narrowly.

So that is the context in which we believe the discussion is taking place now before the AMC. We would like to contribute from each of our speakers.

We will start with Steve Ross, who, along with coauthors, provided an excellent framework for examining exemptions that is part of the AMC record.

Stephen F. Ross

Thank you.

First, I should say that working on this project was a delight. As an academic, this is the closest I'll come to being like a partner at a really good firm, because Darren Bush and Greg Leonard, who are these two fantastic scholars — Darren, a law and economics professor, and Greg, a business school guy — did most of the work, and I got to sit around and just make my little suggestions at the margin and stuff like that. I am pretty pleased with the process that we came out with.

The basic principles of the framework are sort of those that Ted outlined, and I won't repeat them, in the interest of time. The one thing that we tried to emphasize is, to go back to what, to me, is the greatest antitrust opinion ever, *Addyston Pipe* — there, Judge Taft makes it clear that the courts should not be in the business of deciding when competition is or is not in the public interest, a view that I think most antitrust lawyers strongly endorse, as do I.

But there is a flip to that. If, in fact, courts are to keep in the harbor and not set sail on a sea of doubt, then those who believe that competition is not in the public interest have to have somewhere else to go. That has to be Congress, which is politically better suited to make those decisions. So as hostile as many of us might be to any specific set of exemptions, or even to the concept of exemptions, I think as a political matter, we have to have a workable way for those who may disagree with us to go to elected representatives and present that case. Otherwise, the pressure is just going to be too great to fit it into the court system, and then we have an even less satisfactory process.

Our framework is a five-stage framework. It is in the public materials. I will just quickly go over some of the points of interest.

It starts with the notion that there should be hearings and public documents where the exemption and immunity advocates set forth how they meet their burden of demonstrating (1) why the protected conduct would be prohibited or significantly inhibited by application of antitrust law (otherwise you don't need it); and (2) why the prohibited conduct is, in some definition, in the public interest. That is sort of the burden and we set that forth initially.

Second is to carefully analyze the justifications. We suggest that there are basically three categories of justifications. One is pro-consumer justifications: For some reason, the antitrust laws are, effectively, not consumer-welfare prescriptions in some particular cases, and the conduct would actually enhance consumer welfare, but it would still be either illegal or inhibited by antitrust liability. Another is that conduct is socially desirable, notwithstanding negative effects on consumer welfare. The third is that an immunity is necessary for a regulatory regime to function optimally.

We suggest that almost any claim for an exemption fits within one of those three categories and it helps to think about them in this manner.

The third step, which I am going to let Meg talk more about — mostly because I don't know much about it — is the cost-benefit balancing and how you analyze these sorts of things.

The fourth step is tailoring the cost-justified exemptions and immunities to avoid overbreadth. There are a couple of things that we noted that are worth thinking about here:

• One is explicit consideration and rejection of less restrictive alternatives.

• Second is a careful definition of the scope and limits.

• The third, which has not gotten a lot of play in the literature, is when collaborative activity, like joint venture activity, is immunized — a concern for how the joint venture is structured. How joint ventures are structured can be very important in terms of minimizing the effect. Giving each member of the joint venture a veto, for example, raises far more competitive problems than a joint venture where the management of the venture is interested only in the efficient operation of the venture as a whole. We think that ought to be an important factor.

• A fourth — and, I suspect, controversial — recommendation we make is not only regulatory transparency in terms of how a regulator makes any cost-benefit judgments, but we suggest that any regulatory analysis that would exempt conduct involves (a) a weighing of competitive

effects and (b) a determination that anticompetitive effects are outweighed by some regulatory goal. We suggest that the analysis of the competitive effects be made by the Justice Department or the Federal Trade Commission and that their findings on competitive effect be binding on the administrative agency.

• We propose sunset provisions.

So that's our framework.

I would like to make four comments on sort of the politics at the moment and why I am optimistic that something can actually happen with this.

One is that this transcends ideology. I am saving some for the future. I may frame it. At the hearing I sat next to Jim Miller. As some of you may know, I used to work for Howard Metzenbaum. Jim Miller, as he noted on a signed business card, wrote, "I just praised you six times. You owe me big-time." It's not often that Jim Miller and I will have a substantive discussion about antitrust law where either one of us would be praising the other on substance six times. So I think there is a transcendence of ideology on this issue.

Nonetheless, I think there is a need to overcome a status-quo bias. People are afraid to do anything because they don't know that the future might be better. So I think it takes some work to overcome this bias.

Politically, the reason I think there is some promise here is that politicians may not have considered the political benefits to them of our sunset framework. If there is a sunset provision requiring careful consideration, it just means they get more attention and lobbying. For those who advocate the Export Trading Company Act or the Dairy Marketing Act as a permanent feature, what exemption advocates are saying (as opposed to what I am saying) is, "We don't ever want to have to lobby you again. We want to come here, make our case, and never be seen again." What I am saying is, "These guys from the export trading company field and the dairy marketing field need to come back to you about every five to seven years and" — we would say they need to make their case again, but another version is, "They need to lobby you again." Congressmen like to be lobbied. So I think for a congressman to turn down a sunset proposal is sort of like one of you practicing lawyers saying, "Oh, I'm going to take a nice big fee, a flat fee, to represent you for the next fifty years, and you're never going to have to pay me again." Virtually none of you in private practice would ever take that retainer agreement. That is basically what these opponents of our sunset proposal are asking.

The best way to demonstrate to Congress that a framework for analysis works is for the AMC to do it themselves in a selected area. What I would hope would come out of this process is that the AMC — and, obviously, I prefer that they adopt our proposal verbatim! — would use a process, pick a handful of exemptions, and actually do the sort of work that we suggest in carrying this out. Perhaps they will come to specific conclusions. Or, perhaps they will determine that more study is needed and they can't actually make a recommendation. But in this way, they could demonstrate to Congress that this stuff actually works, that the fact that you can't quantify every single thing doesn't mean that you can't do an effective cost-benefit analysis. I think that would give greater confidence to Congress that they could move ahead on some sort of sunset and framework provision.

Mr. Voorhees

Thank you, Steve.

We will now move from the *realpolitik* that was just described regarding how Congress really works to the world of economics and to someone who hasn't yet formally been introduced, Margaret "Meg" Guerin-Calvert, an economist at Competition Policy Associates here in their Washington office, and a very well-known and highly regarded economist-witness in many antitrust cases.

Margaret Guerin-Calvert

Thank you, Ted.

I think that basically conveyed that perhaps economists are not too practical. But my perspective on this, to give you some background: I spent about twelve years, all told, in the government, in the Department of Justice and the Federal Reserve Board. Between 1990 and 1994, there was a long period where the Department was very actively interested in reviewing all of the exemptions and immunities, and most particularly, the agricultural marketing orders. I spent a considerable amount of my life reviewing, at that point, about fifty marketing orders with a team of economists, understanding the nuances of raisins, cranberries, cherries, Valencia versus navel oranges, and so on. While it sounds as if it might have been very tedious, I think, for relevance today, it was exactly on point. This was an area where there had already been, by a variety of parties, a great deal of academic research that had been done that was really available to inform the policy discussion and, as a result, actually, some of the interventions that the Department took during that period.

I see Phil Eisenstat in the audience. He was one of the premier authors, with Masson, in terms of looking at various marketing orders.

So let me go quickly to my presentation.

Just by way of overview, I think what the Antitrust Modernization Commission has indicated is an interest in identifying the exemptions and immunities that are potential candidates for repeal or modification — that is a basic element, not necessarily the full approach — ascertaining and articulating whether there are common principles from existing exemptions and immunities and their effects that could be applied to the evaluation of new requests. This is not a static process. There are a large number of existing exemptions and immunities, in a wide variety of industries. But with great frequency, at various levels — be it at the state level, be it at the federal level, or internationally — there are new requests for additional restrictions on competition, in the guise or in the positive benefit of expanding output or overcoming market failures.

So the third thing that I particularly want to address is their interest in identifying whether or not there are methodologies for assessing the costs and the benefits of exemptions and immunities, and what, exactly, is the breadth and the nature of the empirical evidence on these topics.

As we all know, and as we have heard already, exemptions and immunities, by their nature, limit or eliminate competition or the terms of competition between and among industry participants or potential industry participants. There are a variety of dimensions on which this could occur, but

as such, they have the potential, on balance, to result in consumer harm rather than consumer benefit. By the same token, to the extent they overcome realistic market failures and really improve the interactions of market participants, they would have the potential to provide for consumer benefit.

From an economist's perspective, because of the fact that these are, in principle, legislative or regulatory artificial restrictions on competitive behavior, they should be subject to very, very close scrutiny, either in their new enactment or in the review of existing ones, to determine whether they should indeed be added, whether they should be eliminated, or — something that Peter has talked about in many circumstances — whether or not some sort of surgical modification or tailoring back would achieve the goal and limit the anticompetitive effect.

What is the role for cost-benefit analysis? Essentially, it's an analytical framework for looking at the costs that are imposed by the particular form of regulation of economic activity:

• Is there the potential for enhanced price discrimination and an increased price?

• Is there the potential for longer-run effects in terms of limited entry or reduced innovation?

• Or, on the other hand, as has happened in a number of the marketing orders, where you have certain kinds of regulations and no limitations on entry, as a result, one of the inefficiencies is excessive entry and waste that occurs, which again, on balance, results in higher cost to society and negatives, versus the potential gains.

What I would like to talk about is, what, in essence, is available to all of us here with regard to cost-benefit analysis? Let me first talk very quickly about the principles of cost-benefit analysis. None of these are particularly novel or new.

The first — and I think this is the most important one — is identification, very specifically, of the proposed constraint on economic activity. Is it a limitation on price or a direct regulation of price? Is it something that sets up a mechanism by which market participants can successfully price-discriminate and maintain and limit arbitrage between various market participants, so as to sustain spreads between various market participants? Is it a restriction on entry? A common form, obviously, is licensure or qualifications that only let certain participants into economic activity and not others. Or are there non-price attributes?

I would say, as an overarching principle, listening to Steve, one of the things that I think is the ultimate testable hypothesis is that the dynamic that has been set up is a sense that it is a battle between consumer welfare — reduction or increases in consumer welfare — versus protection of small business activity. When I walk you through some of the studies, what I have found intriguing is that the vast majority of studies that look at eliminating various kinds of marketing orders, in particular, have been ones where the supporters have been smaller businesses, because the restrictions have tended artificially to protect larger incumbents relative to the activities of smaller and more innovative businesses.

So as we identify — the second point — the nature of the expected benefits and the specific source of the gains, I think it's very important to examine and challenge the assumption as to whether or not this really will be beneficial to small businesses and to consumers as well.

I think an important point is, is this regulation actually going to be binding? Arguably, why is it being imposed if it's not going to be effective? But if it's something that is going to be promoting certain kinds of activity but not really constraining, in a significant way, price, entry, or competition, it may be that the economic harms are not as much as we would expect. What Steve has already mentioned is the importance of the determination of less anticompetitive alternatives.

So where do we turn in order to evaluate and quantify the expected costs and benefits of certain exemptions and immunities? Let me reference a few and then turn to the literature, quickly.

One is referencing other industries that may be similar that have been subject to regulation or deregulation, and then looking at what has happened as industries have changed their regulatory format — looking at the consumer-welfare effects and then turning particularly to the economic literature.

One of the things that you all are probably very familiar with, but to alert you to, is that there are well over 500 articles that detail to great extent empirical analyses of a variety of industries, which allow us to understand the benefits and the costs associated with price, entry, terms of condition, and non-price competition limitations. Some of the ones that you are likely very familiar with largely were done in the 1970s and 1980s, but are ones that supported efforts to deregulate, to remove antitrust immunities, to remove overt price and entry regulation, in industries such as airlines, trucking, and rail. These are massive empirical studies that supported the relative nature of looking at marketplaces that were not regulated relative to the ones that were regulated, building models to evaluate and examine the empirical effects of eliminating particular kinds of regulation, and provide a strong basis for examining what the gains are from removing certain kinds of regulation.

A second part is looking at agricultural marketing orders, which I will turn to. Then, as Peter can speak to with a great deal of expertise, there is a wide variety of industries — for example, insurance — where there have been a lot of academic studies, a great deal of research, looking at the nature of competitive activity.

Let me close by talking briefly about a case study of the agricultural marketing orders. These are largely administered by the U.S. Department of Agriculture. As I mentioned, there is a total of about thirty-five to forty-five commodities, a wide array of different industries that are covered. Many of them are loosely binding quality restrictions that do not restrict major forms of economic activity. As a result, while they may not generate much in the way of benefits, neither do people view that they impose a substantial cost.

A notable exception that is widely studied in the literature is the milk marketing orders, which set up a fairly pervasive form of price regulation and price discrimination, which, numerous studies have documented, results in substantially higher prices of milk than if it were possible for milk to move more freely.

Other ones that have been studied in great detail are ones involving Valencia and navel oranges, lemons, hops, eggs, and a variety of other ones. Again, these seem somewhat mundane, but the value of them is that there has been academic research, there have been regulatory filings by economists at the Department of Justice, including Robin Allen [phonetic] and Sheldon Kimmel, and active participation particularly by small growers in a number of these industries, to try to

repeal various ones. We also have the benefit of having a lot of research after the repeal of given marketing orders to show that market failures did not occur, that there was a substantial reduction in price and realignment and a more efficient allocation of resources.

So these show that, in principle, you can find clear and good cost-benefit analyses that apply rigorous principles. I think these, while they are useful for the particular industries, are also more broadly applicable.

I think the thing that I, as an economist, would say is that the inherent thing that cost-benefit analysis can do is to really look at the economic activity that is actually currently regulated or proposed to be regulated and pose the following three questions:

• What is the market failure that is attempted to be addressed?

• Are there less restrictive means to accomplish the same end?

• What are the potential costs associated with the restriction, by reference either to the same industry or to related industries, in terms of, very specifically, the type of economic activity that is regulated?

Mr. Voorhees

Thank you, Meg. Now we will turn to Professor Peter Carstensen.

Peter C. Carstensen

Thank you.

We have been digging around and digging around trying to find these specific statutes. My task is to talk a little bit about how I would look at what the AMC might do by way of repeal.

I should say that AMC former staff member, Todd Anderson, and I spent an awful lot of time and talked to an awful lot of folks to try to dredge these out, because they are not systematically organized or presented anywhere in the U.S. Code. One of the really minor but, I think, important reforms that the AMC can certainly advocate is that Congress should at least get these things collected together, partly so they can see all the different ways they have gone about granting exemptions and immunities and modifications of antitrust law. There are some rather interesting and engaging strategies out there.

We keep adding to the list. I have two more from just a couple of weeks ago. I have made a brief outline and an amended appendix that is comparable to the one that the AMC put out. There are some copies by the registration center that you can pick up at break time.

I thought about the repeal issue, if I was going to guide the AMC. I divided it into four categories: what I think of as the irrelevant, then the unnecessary, then the actually harmful, and I actually have some that are possibly helpful, but they sure are in need of modernization.

For the irrelevant — it has already been mentioned — my poster child is this Anti-Hog-Cholera Serum Act. Hog cholera was eliminated in the United States three decades ago, but the statute still lives. This is, as I say, the poster child. Then there is a Y2K statute. We are well past that.

There is this Defense Production Act that was adopted in 1950 that has never been used. I think, after fifty years of inactivity, it deserves a decent burial. There is something called the Fisherman's Cooperative Marketing Act, which turned out, after it was construed a few times by courts, to have no meaning at all. There are others that I could put on that list.

Then there are what I think of as the unnecessary. They have some bearing, but they really aren't very significant in the way the world has evolved. The Shipping Act deals with general cargo and made sense when you used block and tackle to load cargo. With containers, with the whole transformation of the shipping industry, 90 percent of the cargo in and out of the United States travels outside of the cartel price fix. Whatever you might want to do with that, it doesn't seem to me that you need the kind of antitrust exemption that is there.

I would kick the Soft Drink Interbrand Competition Act out, for the reason that it was there for a particular purpose — which Congress, of course, totally lied about — which was that small bottlers were going down the drainpipe of history. But they had no property right in their franchises. What Congress did was to give them a property right, which the big bottlers — the Cokes and the Pepsis — had to buy. In the monograph we actually have a footnote that lists the transactions that our research assistants could come up with, and it covers practically a whole page. Okay, you have transferred the wealth to these small and worthy businesspeople. But the statute no longer has any relevance, because the small bottlers — allegedly more efficient — no longer exist.

I would really look at the Newspaper Preservation Act. Newspaper joint ventures didn't work. It is not of much relevance, and it probably increases advertising costs.

The Surface Transportation Board gets to review intercity bus line mergers, but they don't review trucking mergers. Why do we do that? I don't know. I don't think it's necessary. They don't have any expertise in intercity buses. I don't know that there are any intercity buses anymore.

Then we can turn to my three picks for the actually harmful. I start with the wholesale electric power area. Congress has construed the wholesale power act to exempt price fixing and other anticompetitive conduct in competitive electric power markets as being exempt from antitrust law, without providing us with an alternative and effective remedy against that conduct. It seems to me, take away the exemption and we find a solution to the problem of how to regulate, more effectively, electric power.

I would take another look at the railroad situation. The STB still gets exclusive review of mergers. There is an interesting playback against some of our state versus federal stuff. The STB's exclusive right is expressly exclusive against state review, as well as antitrust review. You take a look at that, and the question is, on that point, is it necessary? But the other thing the STB does is it approves the sale of shortlines, sidings, et cetera, which carry with them perpetual exclusionary agreements that prohibit the buyer from delivering traffic to any other alternative railroad. Those ought to be subject to antitrust law. They are not, because the STB can grant them immunity.

The last one, the one that Meg focused on, is the Agricultural Marketing Agreement Act. Lots of people attack Capper-Volstead. That is misdirected. The evil in agriculture is the Agricultural Marketing Agreement Act, and it is particularly evil in the area of milk. It facilitates a kind of

cartelization, an exploitation of consumers. Maybe in Michigan the farmers are getting ten cents a hundredweight more. I do have some data that suggest that maybe a farmer actually got an advantage, but it's only in the state of Michigan, ironically, where there are competing cooperatives, and so they have to create a cartel that actually delivers something to their farmer members. In the rest of the country, the farmers are being screwed on one side and the consumers on the other. I am not sure where the money is winding up, but there is sure some transfer there that ought to be taken care of.

My last category here of things that one might want to consider:

McCarran-Ferguson. Ten years ago, twelve years ago — more than that, I guess — the ABA suggested that it was time to modernize McCarran-Ferguson, because there are some real needs for information-exchange safe harbors, some need for some things that will provide some protection for certain kinds of conduct in that area.

Another one, which, I have been educated by Steve Ross, may not be entirely bad but certainly needs reconsideration, is the Sports Broadcasting Act, which facilitates market exploitation by professional sports organizations, but has had the balancing advantage, for at least a Green Bay Packer fan, of keeping the Green Bay Packers on my local television set, so I don't have to buy some expensive cable channel, as I would if I cared anything about boxing.

The Local Government Act probably needs to be reconsidered because it has become an exception by attribution. That is, instead of simply limiting the remedy, it has tended to create immunity for conduct.

In the transportation industries, I look at a number of other exemptions that are there and listen to the people in the industry. What I have learned, I think, is that what they are really getting is usually term-limited — three-to-five-year — what I guess I would call super-powered business review clearance. That is, their conduct is not anticompetitive; it's not a violation of antitrust law. These are legitimate joint ventures, collective enterprise, vulnerable to a lot of antitrust challenges, at least as I hear it from industry folks. The Justice Department folks are in there, everybody is policing them, and at the end of the day, what we get is a set of agreements that are then immunized for their duration. Then they come up for review again and can be challenged again.

If that is really what is going on, however, you need to take that whole set of things and at least rethink it and reorganize it in terms of the statutory goals there, and maybe consider whether that isn't a subset of a more general kind of category for some kind of stronger but more public and transparent business review clearance procedure that then carries with it a little more of an immunity, for at least a period of time.

I will say that the Capper-Volstead Act also needs to be rethought, because it really serves two different functions. One is, it has insulated some farmer cooperatives that produce things — the Land O' Lakes, the cranberry groups, things like that. But it has had enormously bad effect on them because it has limited their access to capital markets and other consequences that really need to be rethought.

On the other side, it also insulates some bargaining co-ops that look a lot like trade unions in terms of being organizations that essentially bargain — a kind of countervailing power model. So it, again, needs to be rethought.

So one goes through them that way.

I have an alternative that I would like to suggest. It picks up on the sunset idea. That is, what about the Commission, rather than doing a detailed review of specific exemptions, for which I don't think they have, really, a fully adequate record in their proceedings — not that it can't be done, the way Meg has pointed out, by pulling up a lot of the literature — instead, taking this list that we now have, which I think is pretty close to definitive, and suggesting that what Congress ought to do is to prospectively repeal every single one of these puppies seven or eight years, maybe ten years, down the road? Then, essentially, everything will go. We will get rid of the Anti-Hog-Cholera Serum Act. For those that have constituencies, you can begin a review process and reauthorize, and reauthorize not with the Shipping Act of 1916 or the Capper-Volstead Act of 1920, but with something that is adapted and focused on the modern context.

In that context, you could then implement a bunch of the suggestions that Steve's gang has come up with, through having the Government Accountability Office, the FTC, DOJ, or some combination thereof, provide preliminary analysis to the relevant congressional committee, let the proponents provide their arguments, so you really begin to frame these issues. Rather than telling Congress, "This is what you ought to be doing," have them, in terms of adopting a prospective repeal, also adopt a kind of methodology.

When I sketched this for Don Baker yesterday, he said, "Maybe what you ought to do is create some kind of a review Commission that would review all these things and file reports with Congress." That strikes me as another possible alternative.

My preference in terms of advising the AMC would actually be for the second alternative, because I perceive — having for the first time in my life been lobbied about what I was going to say at a hearing about an ag. aspect here, not surprisingly, I guess — that to choose a particular one is to invite a focused political fight and to engage particular special interests, who will, of course, always pretend to be speaking in the public interest. I think we can all hold hands and agree that exemptions really need strict scrutiny, and so to create a pathway to assure strict scrutiny of not just some, but all of the exemptions, might be a politically more strategic way to bring about this process of repeal and, in some cases, I think, modification.

Mr. Voorhees

Thank you, Peter.

Lest the audience think that this panel is uniformly and unalterably opposed-to-exemptions, let me ask a few questions which, perhaps, present the countervailing values that at least are argued in favor of exemptions. Let me start with a comment that Peter made: That the Defense Production Act of 1950 or 1951 doesn't seem to have been meaningful since then.

I can say from personal experience that within the last year, the Defense Department assembled a meeting of the producers of a certain kind of military hardware that they felt needed innovation because of events in the Iraq War. That meeting might not have taken place had it not been for

the producers' belief that their meeting and their activities on a joint basis would have a basis for claiming protection under the Defense Production Act.

Let me just pick up from that with a question to all three members of the panel.

Cost-benefit analysis: Attempting to weigh the economic costs versus the alleged benefits, you might look at the costs in the defense situation and say, "Maybe the costs of that military hardware will increase, and that's bad." But how do you weigh the countervailing benefit of having the innovation in the military hardware that was needed during a war effort?

Similarly, in the newspaper situation, there is the argument that those joint operating agreements are necessary to have a diversity of opinion of two newspapers in a given market. How do you evaluate, let alone measure the societal benefit of diverse viewpoints that is alleged to be derived therefrom against the economic cost, which is rather easier to measure, of higher advertising rates, et cetera?

For each one of you, how do you address evaluating the alleged social benefit of a lot of these exemptions that you hear from the lobbyists?

Professor Ross

What I would say — and this was one of the key thrusts of our framework paper — the task of evaluating this is not to produce something that would be accepted for publication by the *American Economic Review*. It may be that one of the criticisms of the economics discipline is that — there are lawyer jokes and there are economist jokes — they only value what they can quantify. But in a policy process, that doesn't have to be. The fact that you can't quantify a benefit doesn't mean that the analysis won't benefit from inclusion of those factors you can quantify.

What we called for is a weighing of cost-benefit and an attempted estimate as to whether it is a big benefit, a modest benefit, or a little benefit. If you can actually quantify the higher prices, which I suspect you might be able to do with some modeling and some drawing on the economic literature, you do that. If the benefit is a potential that innovations will save lives in Iraq, which will preserve American support for the Iraq situation, which will transform the Middle East into a system of democracies, where world peace gains forever, that is a big benefit.

Ultimately, members of Congress are going to vote yes or no. They can reach their own conclusions. What members of Congress do every single day, on every single issue, is make implicit cost-benefit analyses based on empirically unverifiable assumptions of what is really happening here. You go through almost every vote that Congress makes on everything. You take Barney Frank and Tom DeLay, and what it often will come down to is an empirical prediction about what is going to happen, whether it is on some precisely economic point — say, cable legislation — or, for that matter, it's about the same-sex marriage act, which is based on an empirical disagreement between folks about, if government action isn't happening, what actually will happen to family structure in the next twenty years. That is just something we can't measure.

So this is stuff Congress does all the time. I think that people like Meg can contribute to the analysis, and it's worth doing.

Mr. Voorhee

Meg?

Ms. Guerin-Calvert

I don't necessarily disagree with you, but I think that to back it all the way up before one even starts to try to quantify what the costs are or what the benefits are — I think in the example of the defense thing, the most important question is just to identify whether there is really a market failure. Is the thing that is stopping the innovation from occurring, in whatever the product is — be it a vital defense one or not — the inability for multiple firms to get together in one place to discuss various stages of innovation, to do production joint ventures, to talk about what they are doing? Is that what impedes the flow of innovation? If so, then you have come over one hurdle, because you have at least identified a benefit that, in principle, but for the antitrust immunity, might not exist.

But I think the second stage is, having identified that in one context, is it necessary for it to apply in all contexts in that particular industry? Or is it one where you can cabin off particular things or do one-time reviews that allow the particular action to go forward?

My concern is that, in part, people do jump too quickly to the assumption that there really is a market failure, that this wonderful benefit would not otherwise occur. I think it's at least worth challenging that and assessing it, because that then provides a stronger basis for going forward, even if you can't quantify all the dimensions of it.

Mr. Voorhees

Peter, did you want to add something?

Professor Carstensen

Just very briefly, I think the way I was taught cost-benefit analysis many years ago was, first, you looked for the things that you could quantify and then you looked for the things that you couldn't quantify on both sides, and you then had to strike that balance, as Steve said. With the Defense Production Act, if, in fact, there is a market failure and a need for this kind of collaboration that a national research and development cooperation act, et cetera, doesn't already provide a handle on, you have an issue that needs to be addressed. If the benefit is innovation — the Defense Production Act has a number of handles in it that actually make it more restrictive, in many ways, than, I think, the state of antitrust law might otherwise be with respect to that kind of collaboration.

The same thing with the newspapers. If these joint operating things — and we now have a substantial period of experience — if joint operations actually provided demonstrable diversity of opinion in communities, you would have that cognizable benefit. If the elimination of competition in advertising is, as Meg suggests, the essential element to bring about that benefit, then you need to go forward and look critically at the statute. If most of the joint ventures have failed, if the newspapers that have survived that are in these joint ventures wind up with almost identical content, then the question is whether there is a benefit, whether the joint venture system really works effectively at all.

So again, one would want to do the critical analysis and really think through, based on data and information, how much of a benefit there is, where the benefit is, and what the cost is of getting an occasional benefit. If it is an enormous increase in advertising expenditures and costs that has ripple effects out through the business community, is that worth it to preserve a few competing newspapers in some markets? As Steve says, that is a judgment. That is a legislative judgment; it is not a judicial kind of judgment. If Congress judges yes, then you are going to keep the Newspaper Preservation Act.

Mr. Voorhees

Again, I had been inviting questions from the audience, and unless I see — oh, good. Why don't we start over here?

John Magnus

John Magnus, with Tradewinds.

A very quick comment and a question connected to it. The comment, which may make me unpopular in this room, is that during the introduction, the positions that you were referring to, I believe, in every case, were Section positions and not ABA positions. The reason that matters to me is that I am the policy and government affairs officer of the ABA Section of International Law, which has a very active antitrust committee, and which has a different view in this area than the Section of Antitrust Law, particularly on the exemption for joint export trade.

It is on that one that I wanted to ask my question to the group. Could anybody on the panel who has an opinion give us a quick thumbnail of what you perceive to be the costs and the benefits of the joint export trade provisions in the Export Trading Company Act? If you can't come up with any costs, then what would be the basis for sweeping these into a general recommendation for a sunset provision or repeal? Thank you.

Professor Ross

I'm not going to completely satisfy the questioner, because my entire knowledge of the Export Trading Company act comes from sitting through testimony that comprised a third of the three hours the AMC devoted to exemptions, at the request of the Department of Commerce. The testimony primarily concerned joint activity. There was, at least in my mind, a complete failure to explain what it was that people were engaging in that was legitimate that would be illegal under the antitrust laws.

I start with a difference of opinion about the question. My question, the fundamental question, relates to our predominant presumption is in favor of antitrust law, and it's the burden on those who want an exemption to advocate what's wrong with the antitrust law. If nobody can figure out either the costs or the benefits, it strikes me that the presumption is that, as a matter of antitrust policy, you get rid of the exemption.

Again, what I would say to members of Congress, who are going to be hearing from the International Law Section of the ABA, is — what I would turn around and ask the International Law Section lawyers who are lobbying to preserve the Export Trading Company Act in perpetuity is, why shouldn't you have to come back to them very five or six years to make your

case? Why should they give you a permanent immunity for this thing that you claim is a good thing?

Ultimately, I'm hoping that Congress will find that to be a hard sell.

Professor Carstensen

I would chime in that a really interesting feature of the testimony of the general counsel of the Department of Commerce was, "We approve these things only if we are assured that there is no antitrust violation involved," in which case you don't need an exemption.

Again, the transaction-cost argument, the burdens argument, which I referenced in the context of the transportation industries — if you were going to rethink what we are doing with joint ventures in trade, you might say, "Gee, we need something that looks a little bit more like the Small Business Administration research and development authorization," which calls for the Small Business Administration to authorize joint ventures that get an antitrust immunity if the attorney general — that is to say, the Antitrust Division — approves, for a period of up to, I think, five years, voidable if the attorney general says it should be voided, but only prospectively. So if you were engaged in misconduct during the period when you had your exemption, that still could not be the basis for a prosecution. But if you had actually abused the exemption — that is, you were using it for ways that were not those that were proper — going forward, you would be in trouble.

I saw that whole discussion as showing the total misdirection. Antitrust exemption was not what that should have been about. It was something that had to do with a concern, legitimate or not, among small businesses engaged in joint ventures to trade overseas, that they wanted some greater insulation from the risk of antitrust litigation, having gone through a clearance process, including review by the Justice Department, that had concluded that there was no violation.

That is very different from the kind of naked restraints getting exemption that are the theory of an antitrust exemption.

Professor Ross

If I may make just one more comment on this —

Mr. Voorhees

Make it quick, because there are other questions.

Professor Ross

A lot of people advocate exemptions because they basically don't like the risk of treble-damage liability for their industry. What a lot of people don't want to talk about is that the case they are making is really a case against treble damages. People on both sides of the treble-damage issue don't want to deal with that.

Mr. Voorhees

It's a case both against treble damages and against the uncertainties of the way the antitrust laws are applied. You find it in a lot of comments that have been submitted to the AMC. It's a very realistic problem.

John Shenefield

John Shenefield, in private practice.

Peter had a list of those exemptions and immunities that he thought were affirmatively harmful. So the first question is, do other members of the panel have nominees to add to that list?

The second question is directed to Peter. If you have some that you think are affirmatively harmful, why on earth wouldn't you expect the Commission to say something specifically about them?

Professor Carstensen

I would be happy to have the Commission take them on. I guess my sense of the politics — one of those three, the Agricultural Marketing Agreement Act, is the one that I got lobbied on: "Don't go attacking anything related to agriculture. You're from Wisconsin. You'll destroy the economy of the state," and so on.

My sense of the politics of the situation was that — certainly, one would want to raise questions. One would want to show that there were exemptions that raised very serious questions about the merits of the cost-benefit of the exemption. I didn't feel that the three hours that we spent, with so much of it on foreign trade, were sufficient to build the kind of record from which the Commission could say there had been a full ventilation of the milk marketing order situation.

Commissioner Shenefield

Well, we need to have more hearings.

Professor Carstensen

If you're up for it, I'm up for it.

Professor Ross

Taking off my hat as a consultant to the Commission in the real world and putting on my hat as a professor in the ivory tower, in terms of what is really harmful to millions of consumers, I would overturn the baseball exemption and repeal the provision of the Sports Broadcasting Act, added in 1966 by Hale Boggs to get the New Orleans Saints to New Orleans, which permits football clubs to merge, basically exempt from antitrust laws, in perpetuity, as long as they are adding one team.

Ms. Guerin-Calvert

The one on Peter's list that I would say deserves particular attention is the agricultural marketing orders, for a couple of reasons. One is that this is the area where each time the USDA has called before it various industry participants, including the Department of Justice, the Federal Trade Commission, or other interveners, and empirical evidence has been presented, there has been a way to look at it and take into account all of the issues, and in many cases, they have been eliminated.

I think it's also an area that, as I look back over the milk marketing literature, on the academic side and between the agencies, goes back all the way to the 1970s and as recently as 1995, when the ERS at the USDA looked at it and also looked at alternatives, ways in which to think of modifying particular regulations. So I think there is a scope there.

It is also one of the areas where I think there is more to be examined as to whether or not there is a dynamic or an issue where certain incumbents — larger ones — are protected, relative to smaller participants.

So I think that is one where, to take off the naïve economist's hat, there is more of a political constituency and louder voices who can represent the consumer interests, in the form of some of the smaller businesses, that can provide some helpful additional insight.

Participant

Jay Schaeffer [phonetic].

Somehow, we have managed to discuss this topic for over an hour without mentioning *Parker v. Brown*. I just wondered, how is all this supposed to play out in the context of a state action?

Mr. Voorhees

Parker v. Brown was at one point another topic for this panel. It was taken off because there is just so much ground to cover.

Professor Ross

And the whole analysis, which gets into federalism and stuff, is a fascinating issue, but it really, I think, raises fundamentally different questions.

Mary Lynne Calkins

Is the AMC likely to recommend narrowing the language of the McCarran-Ferguson Act, in light of the fact that it has been construed and used to exempt the insurance industry from conduct that is absolutely clear antitrust violation in any other industry?

Mr. Voorhees

You are asking for a prediction from this panel on what the AMC is likely to do in that area?

Ms. Calkins

How is it leaning?

Mr. Voorhees

If anyone knows and wants to speculate, go ahead.

Professor Carstensen

It was interesting. At that hearing, we did not have any discussion of McCarran-Ferguson.

Ms. Calkins

You received statements?

Professor Carstensen

There was a truckload of statements, and I am sure there were some on McCarran-Ferguson. I can't recall the specifics in the statements.

It is one, again, where there is a pretty broad analysis that has been endorsed by at least the Antitrust Section — I don't know where the International Law Section stands on McCarran-Ferguson — that there is a need for some safe harbors, but the way the statute is written is overbroad, unnecessary, and therefore creates some problems, as recently illustrated in some of the cases that were filed in New York.

That is one that, I think, is maybe an easier one to go forward on, if the Commission is so inclined. But I think the problem is, nobody really quite — the Commission has not yet their discussion.

Does anybody know when they are going to have at least a preliminary discussion of their views on exemptions?

Participant

June 23.

Professor Carstensen

That is when we are going to get more of an idea of where they are likely to be going.

Mr. Voorhees

Are there other questions?

[No response]

Since McCarran was mentioned, let me throw out another of my pet questions for the panel. Some exemptions have specific, you might call them savings clauses, where they say, "Nothing

in this exemption is intended to exempt any price fixing or boycotts from the antitrust laws." I believe McCarran has language like that. Does that type of language make you feel better about the exemption?

I know it's a very general question, but it is a subject we don't have on the list of seven pillars of wisdom here. Are savings clauses a half-measure that should make anyone feel more comfortable about exemptions?

Professor Ross

I think a well-crafted savings clause is the sort of stuff we talk about when we call for a careful definition of the scope and limits. A lot of times, you do have this sort of common-law process, where people come in and say, "We need an exemption because we want to do X." As you think about the legislative process that we sort of contemplate, then other people come in and say, "Yes, but if you get the exemption, then you can do Y." Then they respond, "We agree. We shouldn't be able to do Y. We just want to do X." Then the crafting problem is, how do you craft language to do that?

McCarran-Ferguson is an example of how not to do it, unless we are promoting the ABA Section of Antitrust Law's interest in increasing billable hours. It has just been a mess defining what a boycott is, defining what price fixing is, and these sorts of things — in particular, using terms like that, which have broader antitrust implications, so that when courts try to interpret what price fixing is for the purpose of the McCarran-Ferguson Act, then people are worried about, "Does whatever we say there translate into a definition of the per se rule of price fixing in non-insurance?" In the boycott area, that has really come into play as well.

So I would caution against using general terms of art in antitrust, in these areas. It is an area of careful drafting.

To the extent that something is carefully drafted, I think it does make me feel better that an exemption has been carefully drafted and limited, instead of poorly drafted and overbroad. But that is a real task. The transparency of the process, I think, enhances that. Having a drawn-out process, with hearings, with expertise by the Division and the FTC heavily involved in the drafting and writing process, getting the American Bar Association involved in that process, I think makes it much more likely that you are going to get a well-crafted thing, as opposed to something that was put on as a floor amendment in the Senate before something goes into conference.

Mr. Voorhees

Any other thoughts? Any other questions?

Participant

Just a note on McCarran-Ferguson. Steve Calkins talked yesterday about the unintended consequences of having the Commission operating, and that is that other people are doing things. I just wanted to note that there is a hearing scheduled before the Senate Judiciary Committee on June 20, on the McCarran-Ferguson Act.

Mr. Voorhees

Timely.

Thank you very much for coming. To our panelists, thank you very, very much for contributing.

The Antitrust Modernization Commission at Mid-Course Symposium

Bringing It All Together: Are There Points of Consensus on Which the AMC Can Build a Meaningful Report?

Moderator

Robert T. Joseph
Sonnenschein Nath & Rosenthal
Chicago IL

Panelists

Timothy J. Muris
O'Melveny & Myers
Washington, DC

Robert Pitofsky
Arnold & Porter
Washington, DC

Eleanor M. Fox
New York University School of Law
New York, NY

Joe Sims
Jones Day
Washington, DC

Donald C. Klawiter

Before I introduce our last panel, I would like, first, to thank everyone for coming, for spending time, for being a lively audience and watching some lively panels. It has gone extremely well.

I would once again like to thank Bob Joseph for really pulling this together and thinking hard about it, and really having a conversation of the kind that we had all talked about and we had talked to the Commission about, and that I hope we delivered for the audience as well. The great

work here was Bob's work and the work of the Section staff. Please thank them as you leave today.

Secondly, this is the AMC issue at mid-course. There is much more to be done. There is much more to be discussed. As we heard today, there are going to be more deliberations and hearings and discussions. There are going to be more comments coming forward. The Section is going to be very involved in the comment process going forward. So please continue to have the discussion and the conversation that we all started here and contribute in whatever way you can to the Commission by your comments, by your thoughts, by your ideas. The Section has a Listserv called "AT Conversation," which is there exactly for the purpose of taking ideas and discussing them and challenging them and putting them forward. Please use that as a means of continuing this conversation, which I think would be really an excellent outcome to this program as well.

With that, I will introduce the last panel. Bob Joseph said that we shouldn't promise too much in terms of bringing it all together. I think we are at a point in time when there is still much more to be done. But if anyone can bring it together, it is this panel.

Bob Joseph, of the Sonnenschein firm, will be the moderator. The four panelists need no introduction whatsoever. You know them all. You have seen them all. You have heard them all. I think they are the right folks to talk about this at a much more macro level.

We have on the panel, to the far right, Joe Sims from Jones Day. Next to Joe is Eleanor Fox of the New York University School of Law. Next is Bob Pitofsky from Georgetown, our host here.

Again, thank you, Bob, for your hospitality and your facilities over the last two days. It has been terrific.

Bob, as you know, was chairman of the Federal Trade Commission.

Finally, Tim Muris of O'Melveny & Myers. Tim also was chairman of the Federal Trade Commission.

I think this will be a great panel. With that, Bob, I will turn it over to you.

Robert T. Joseph

Thank you, Don.

Let's begin with some questions of a more general nature, at the 40,000-foot level, and then move to more specific subject areas.

Our program has centered around a creature of Congress, the Antitrust Modernization Commission. What did you think of the idea of the AMC when you first heard about it? What is your current view, including that of the AMC's process? And what do you expect of it?

Joe Sims

If you want my first reaction to it, I thought that it was probably an unnecessary effort. Most of us on the panel, with the possible exception of Tim, have been around long enough to remember

what the real "golden" age of antitrust was, which was back in the 1960s and 1970s. Compared to that time, we have no serious antitrust problems today. We had real issues to talk about in those days. We don't have anything remotely approaching that today.

So was the commission really necessary or important? I doubt it.

But it has, in fact, done a heck of a lot of work. As people have said earlier, the work that it has done has been quite impressive in terms of its volume and its quality. So I am sure that the output of the commission, even though it may not have been necessary in a literal sense, will turn out to be useful.

Eleanor M. Fox

At the very first moment when I read the announcements, including statements by Congressman Sensenbrenner, I thought the Commission was likely to be on a track of simply shrinking antitrust law. I thought the Commission might have a mandate to get other countries to keep their hands off U.S. firms.

I think of the project now as very productive. There is a wonderful group of Commissioners, very creative and thoughtful in terms of the issues they have posed and the depth of the work they have been doing. There may be a need to eliminate some detail and be broad and conceptual in the report.

I think the process has been wonderful, and very open. The documentation, the testimony, has been rather exciting. Whether or not you think there is room for modernization — and there is always some room — it is always good, from time to time, to ask what the real issues of antitrust are, what is broken, what is not working, what we should do in going forward to adjust ourselves to what is a new world situation. And that's what they are doing.

Robert Pitofsky

Let me pick up on Eleanor's last remark. I, too, think that regular review of antitrust law and enforcement is a good idea. We did that through a set of hearings when I was at the FTC. Tim did the same thing. I think that's excellent.

I think some of the people on this Modernization Commission are outstanding, and the work that I have seen so far is very thoughtful.

I also think the Bar Association taking a look over the shoulders of the Commissioners at mid-course, in the series of panels that I have observed yesterday and today, is a very, very good idea.

Now let me express my concerns.

First of all, calling it the Modernization Commission bothers me, because it implies that current antitrust law is not up to speed, that there is a problem, perhaps that the private sector suffers from old-fashioned, overly aggressive antitrust enforcement. There are some mistakes, some things that could be rectified. We will discuss them. But fundamentally, it seems to me that antitrust has served this country very well.

I am also concerned that, except for the last panel on exemptions, virtually every proposal that has been put forward with serious support by this Commission looked to me to be ways to curtail the enforcement of the antitrust laws and to make enforcement more difficult by the antitrust agencies, federal and state — for example, de-trebling, eliminating state enforcement, and so forth.

So it worries me about where we are going here, although I have confidence that the people on this Commission will come out with a sensible, moderate conclusion.

Timothy J. Muris

Joe, I actually am old enough to remember the 1970s. You won't remember this, but the first time we met was at what I call the MacIntyre hearings, when you were defending abolishing the Robinson-Patman Act thirty years ago. I am, just for the record, substantially younger than everyone else here. [Laughter]

Despite six jobs in the government, I have spent more time in the academy than anyplace else, so the idea of self-assessment is obviously laudatory. If you divide antitrust along the lines of substance and procedure, very loosely, with the institutions as part of the procedure, then there are some serious procedural issues. Outside of Section 2, there are not serious substantive issues, although I do think there are certain areas. such as *Noerr* and state action, for example, where the Commission is considering some recommendations that would make it easier to bring cases, which I think is appropriate in those areas.

You have very talented people on the AMC. I have always believed that if you get talented people together to think about a problem, something useful can come out of it.

Mr. Sims

Let me just make one point to respond to Bob Pitofsky. While I understand his concerns, I wonder whether at least some of the proponents of the commission might not be disappointed from the other perspective. I think at least some of the people who were pushing the idea of this commission were hopeful that the commission would look at big-picture issues, macro issues, the appropriateness and applicability of the antitrust laws to the new economy, et cetera. The commission has chosen — I think probably appropriately, but maybe to the disappointment of some — to focus more on details than on the overall structure of the antitrust laws.

While Bob may be concerned on the one side, I suspect there are some, even outside the editorial board of *The Wall Street Journal*, that are maybe a little disappointed on the other.

Professor Pitofsky

I hope you're right.

Mr. Joseph

Let's approach this area from a slightly different perspective. If you were writing the AMC's introductory overview in its report to Congress, what would you say? On what themes would you focus?

Mr. Sims

I will take a shot at it. I would say a couple of things. Number one, I would say that, in general, on balance, in the aggregate, the antitrust laws are just fine, thank you. They have been highly beneficial to the economic growth and prosperity of the United States, and we shouldn't be thinking about enormous changes.

I think I would worry a little bit about what I think is the growing gap, as Bert Foer and some others have pointed out, between the public perception of antitrust and the reality of antitrust. As we have gotten more sophisticated in our analysis, we have moved further and further away from the "anti-hyphen-trust" reality of antitrust and more into competition policy, which is more nuanced and more difficult to explain and justify. As a result, I think there is a pretty dramatic perception gap between what the general public thinks antitrust is and should be, and what antitrust in reality is. That could have — is having — political connotations. See Specter's legislation in the oil business and the like.

So I would worry about that.

Then — since it's me and not Rick Rule — I would offer some specific suggestions for change, some of which, I would be quite confident, would not be accepted, but are worthwhile mentioning in the first place, and some of which, I hope, would actually be accomplished.

Professor Fox

If it were I — because I am not the center of gravity of the Commission — I would not say that the antitrust laws are just fine. I believe that the antitrust laws have leaned and are leaning too far on the side of freedom of action of monopolists. But I want to put that to one side.

If I were writing the report, I would put it in the context of three issues or problems:

• One is, what is old and broken and has to be revised because it's not working efficiently? Here I have in mind efficiency in enforcement and in damage recovery. (We are going to come back to the details.)

• Second is, what is out of sync with the modern shared liberal views of competition? Here I would put categories such as eliminating immunities and containing anticompetitive state action.

• Third — and this is probably the most important; perhaps one starts here — what is different about the world? What has changed? I would talk about globalization and international markets and where we find ourselves in the world.

This would not lead to proposed legislation, but to modes of better collaboration with the rest of the world — collaboration, coordination, merger review, relief in monopolization cases, containing state (of U.S.) action that has external negative effects on the rest of the world — all elements that would smooth our adjustment to the new world order.

That would be the big picture. Then I would take stock of all of the issues, decide which are really important, and focus on them.

Professor Pitofsky

Two points. One, I will masterfully agree with both previous speakers who said they were going to disagree with each other.

I think the antitrust laws, the guidelines, the rules, and so forth are in good shape, although there will be some examples — they will come up later today — where I will join the group that thinks reform is necessary. But those are relatively rare.

I do worry about enforcement. If things have tilted too much in favor of monopolists and the private sector, I don't think it's the law's fault; I think it's the fault of enforcement.

Second, I think people have forgotten to give enough credit to the flexibility of antitrust, the way the laws are written. Therefore, with rare exceptions, I would hope that this Commission will very assertively and aggressively state its views, but not urge that Congress get hold of these issues and reform them, but rather that the courts take this Commission's views into account.

Mr. Muris

I want to respond directly to the part of the question about how the Commission should reflect consensus and dissent. Bob and I both, as chairmen, had an extraordinary amount of consensus and rarely were on the losing side of votes, and there were rarely dissents in any votes. With twelve people, it's a different story.

I would hope, however, that the Commission will emphasize the points on which people agree. There is so much work and territory that they have covered that I don't know that it's worthwhile spending a lot of time on issues on which there is not substantial consensus. I think they should try to emphasize the consensus at whatever level they can. For example, in monopolization, it will be harder than other areas. Still if you take the 3M case, for example, I can't imagine that anyone thinks that turning the question over to the jury, the way the Third Circuit did, is the sensible way to handle the bundling problem. A statement like that would be useful.

A statement of the modern consensus would be helpful. Joe is right that we are going into a rough period, for a variety of reasons, including high gas prices and the telecom mergers — in which anyone in the modern antitrust consensus would only accept modest remedies. It will be the political season soon for the 2008 election, with natural tendencies for the outs to criticize the ins.

The antitrust consensus may be fraying a bit. There was a *New York Times* article that I thought was wildly misleading. It incorrectly asserted that there hadn't been major cases in the Bush administration. Yet, following on the work that Bob did in the drug area alone, for example, the Commission, working with states, got billions of dollars back for consumers. The Unocal case was an enormously successful case, and there are many other cases that were pursued.

Nevertheless, for the first time in a while, there is a potential for fractioning of the consensus, and the AMC can help there.

Mr. Joseph

Realizing that some folks have a some reluctance about having Congress wading into some areas of antitrust law, do you believe there are any antitrust laws, substantively or procedurally, that need to be modernized through Congressional legislation? What are they?

Professor Pitofsky

I testified before the AMC group at a very early point. I think the Robinson-Patman Act shouldn't be just left out there to wither. I think there are some portions of the act that are not defensible. The very fact that the government has brought two Robinson-Patman cases in about twenty or twenty-five years is some indication of skepticism that the statute reflects a good idea.

The real key problem for the Commissioners — and it's a tough one — if you go for total repeal of the Robinson-Patman Act, which can be justified with plausible arguments, I think politically it won't fly. On the other hand, if you go for reform and say, "Well, we'll change this one. We'll get rid of that. We might repeal 2(c). We'll require injury with respect of 2(d) and 2(e)," there is a possibility of serious reform. That would be my guess.

But I don't think the Robinson-Patman Act should be left out there as it now stands for private lawsuits and class actions to take advantage of a kind of approach to antitrust that virtually all the scholarship indicates is a bad idea and that the government has pretty much abandoned.

Professor Fox

Robinson-Patman is a tough political issue. I do think that Robinson-Patman causes a lot of unnecessary costs. It could be reformed along the lines that the American Antitrust Institute recommended — for example, requiring proof of market power, either on the buyer side or on the seller side, and also getting rid of criminalization. That would be useful. But I can't predict the process. This might be a hornet's nest.

On *Illinois Brick*, which we are going to come back to, and related issues on consolidation of victims' cases, there will probably need to be legislation.

Legislation on immunities, such as very helpfully suggested by the last panel — by Peter Carstensen and by Steve Ross — would be very useful.

Mr. Sims

I am massively ambivalent about the possibility of legislation in this area. You can imagine some very good outcomes and you can imagine some really horrible outcomes. I can think of some marginal changes that might be able to be accomplished in a way that would severely diminish, if not eliminate, the potential for really bad outcomes, by attaching them to other bills and the like. Those would include access to a magistrate for a second-request dispute, which is an idea that I first proposed some years ago, and I still think it's a good idea, notwithstanding the earlier panel. I would repeal *Illinois Brick* and *Hanover Shoe*. I think that conceivably be done separately.

I liked Steve Cannon's suggestion when I appeared before the panel. Some form of direction, probably in a rider to an appropriations bill, to the agencies that would require them to implement the 2002 clearance program or something close to it would be another little thing that could be done.

None of those things are worth doing if they opened up the potential for a serious review of all antitrust, but I think they could probably be done without doing that now.

If, on the other hand, you wanted to open up the potential for a serious review of some antitrust reforms that would make a difference, that would actually change the world in some important way — some people will think good, some people will think bad — I have five or six suggestions that you could do.

Number one — and this would be number one on my list — you could eliminate the dual enforcement of the antitrust laws, which I think is not justifiable. There is no possibility of doing that by taking jurisdiction away from the FTC, so if I was running the world, I would take it away from the Antitrust Division and make the FTC the sole federal antitrust enforcement agency.

I would do that because I think the benefits of a single federal voice outweigh the obvious detriments of loosening, to some extent, the administration's control over an important part of economic policy.

Professor Pitofsky

Joe, would you give criminal enforcement to the Federal Trade Commission?

Mr. Sims

No. I would leave criminal enforcement in the Department of Justice. But criminal antitrust enforcement could be managed by the U.S. attorneys. There is not any particular need to have it done by a specialized part of the Department.

But if you were going to do this, you would have to reform the Federal Trade Commission. My reforms would be to replace the five-member Commission with a single agency head, or at least with only a three-person Commission. You would repeal 13(b) and require the FTC to seek preliminary relief under general PI standards. You would repeal Section 5 with respect to competition matters, retain it for consumer-protection matters. You would eliminate Part III proceedings in any matter in which the agency sought preliminary relief.

If you did all those things, having antitrust authority centralized in a single federal agency, I think, would be a good thing.

Mr. Joseph

A modest proposal.

Mr. Sims

A modest proposal.

I would augment that with five other modest proposals:

• Adopt the Warden proposal or something similar for follow-on damage actions.

• Eliminate treble damages in rule-of-reason cases; in those cases, allow the judge to award prejudgment interest at his discretion.

• Repeal the Robinson-Patman Act, obviously. (There is no reason not to do that if you are going to do a big package.)

• Replace the FTAIA with legislation that would make it absolutely clear that the U.S. is not going to be the global antitrust policeman.

• This kind of goes in the other direction, but I would either prohibit the use of efficiencies as a defense to an antitrust challenge or make it absolutely clear that the burden of proof by clear and convincing evidence is on the parties asserting that their efficiencies should justify what would otherwise be an antitrust violation.

If you took that list of six things and presented them, that would be a list, if adopted, that would change antitrust — in my view, for the better, but perhaps in some other view, for the worse. But it would be something meaningful that the commission could accomplish.

Mr. Joseph

We will come back to some of those. Tim, what are your views on legislative changes?

Mr. Muris

Let me first respond to Joe's view of the super-FTC first and then talk about a few legislative issues that involve, or should involve, antitrust..

There are a couple problems that people don't normally focus on, but that, having been in these jobs, I think about. One is the span of control involved. Putting the FTC and Justice antitrust together is about 1,500 or 1,600 people, which is difficult for one person to manage closely. Having worked in the White House, one of the interesting things you notice when you meet the head of the FTC and the Antitrust Division, you are dealing with a hands-on person who is quite knowledgeable. That's not true in most other regulatory agencies. It is true in some, but it is certainly not uniform like it has been in antitrust.

So that is an issue: You get too big, and you lose the hands-on leadership.

On the consumer-protection side, you have a real danger with a separate agency. I think there are extremely beneficial synergies between antitrust and consumer protection, which run in both directions. (The antitrust people think they only run one way.) There is a constant tendency for people to push the consumer-protection envelope.

Chairman Majoras was asked, "You did Do-Not-Call last year. What are you going to do next?" This is not a good attitude for the world to take. If you have to top whatever good thing you did, you are going to end up eventually doing something dumb.

There are issues with two antitrust agencies, but given the various institutional formats we have, it has worked surprisingly well. Nevertheless, we should fix points like clearance.

There are legislative issues involving telecom, airlines, insurance, and energy, which usually involve antitrust in direct ways and certainly in indirect ways, that are very important for antitrust to be at the table. We have complex issues in airlines, for example, because we prohibit foreign ownership. That means the airlines have taken various actions to try to mimic mergers. They have an antitrust immunity procedure with the Department of Transportation, which makes the Antitrust Division very uncomfortable, and it causes a whole set of problems that wouldn't exist if we had normal investment rules for airlines.

For insurance, which has been discussed here in the last couple of days, we have a strange set of rules. Many in the insurance industry want to return to a more federal-oriented system. The way the rate bureaus work, for the most part, in the states is pro-competitive. We brought the Ticor case when I was at the FTC, but the relationship between title insurance and most insurance is tangential, at best. Insurance is an area where antitrust could usefully have a lot to say.

In telecom, as a former chairman of an independent agency looking at the 1996 Act, there has never been a vision of how to do your job repudiated as thoroughly by reality and in the courts as the FCC's vision of the 1996 act in the late 1990s. Something needs to be done to modernize that statute. Competition principles should drive the modernization of the telecom act.

Energy is the same. Energy deregulation got a bad name because of what happened in California, but there are tremendous potential consumer benefits if sensible pro-competitive steps can be taken in energy.

These things should all be in the domain of the competition agencies.

Mr. Joseph

Put to one side whether it is politically feasible, "yes" or "no": should the Robinson-Patman Act should be repealed? Joe, you say "yes".

Mr. Sims

I should add, though, Bob, that I'm not sure it really matters that much. The actual burdens that the Robinson-Patman Act imposes on United States business — I am not at all clear they are significant. On the other hand, it presents absolutely no benefits. So whatever burdens it has outweigh any benefits it might have.

Mr. Joseph

Eleanor, do you have a view?

Professor Fox

Yes, I have a view, but it's not yes or no.

Mr. Joseph

Bob, what do you think?

Professor Pitofsky

I would vote to repeal all except 2(a) and 2(b). I don't think I am utterly convinced that everything you can do under 2(a) can be done under the Sherman Act. I think that there are going to be some discriminations by firms with modest market power that you could challenge under 2(a) that you couldn't reach under the Sherman Act. I think that the law under business justification that has developed under the Robinson-Patman Act and has been rejected in some places under the Sherman Act — for example, with respect to predatory pricing — is good law.

So I would go that far. It takes out most of the provisions that provide no benefit to the competitive system and can be costly in terms of facilitating cartels. But I would leave 2(a) and 2(b).

Mr. Muris

The economics of the Robinson-Patman Act were resolved empirically and analytically by Morrie Adelman's study fifty years ago and the law, by Fred Rowe's work forty years ago. We have known for a long time that this area is a problem.

I agree with Joe on both counts. I agree that he is asking the right question about what impact the RP Act has now. Young antitrust lawyers don't learn about Robinson-Patman anymore, but there is a lot of Robinson-Patman counseling that goes on in major companies. Whether it's much of a burden, I don't know.

Mr. Joseph

Eleanor?

Professor Fox

The point that I wanted to make is this. The Robinson-Patman Act does not even bill itself as an antitrust law. Yet antitrust lawyers are asked what to do with it. They say: "We believe that antitrust law should be used only to maximize consumer welfare." Do we want to get rid of the Robinson-Patman Act? Who are we to say, "Yes, we do"? It wasn't meant to maximize consumer welfare.

We ought to recognize that it was meant to combat unfairness to small firms who were deprived of the lower price that their competitors got by power, not merit.

It's a legislative question. It is a big policy question. It cannot be answered from the framework of aggregate wealth or aggregate consumer welfare.

Mr. Joseph

For that reason, you do think the American Antitrust Institute proposal has something to be said for it?

Professor Fox

I think it does. I like to look at everything to see if it has a negative impact on consumers. The Robinson-Patman Act may have a negative impact, the way it is written now. Fairness to small firms could be preserved, but one ought to modify the act along the lines proposed by Jack Kirkwood and the AAI.

Mr. Joseph

One of the subjects that a number of folks proposed be put on the AMC's agenda is the remedies system. There are AMC agenda items involving criminal law, but also involving private treble damages, including the treble-damage remedy itself, prejudgment interest, attorneys' fees, indirect purchaser liability, *Illinois Brick* and *Hanover Shoe*, consolidating actions in one form, and the like.

There has been already been some reference by our panelists to damages. On treble damages, there has been discussion before the AMC and at our program yesterday about whether or not treble damages should be limited to certain types of cases, such as per se cases, whether they should be discretionary, whether there should be (related to that) a new procedure for awarding damages arising out of criminal cases, proposed by Commissioner John Warden. I will call it the Warden proposal.

Let's start with treble damages. What is your view on whether or not the treble-damage remedy should be modified?

Mr. Muris

At a minimum, Judges ought to have discretion. It wouldn't bother me if they had discretion in both directions — at least in the per se cases, to not only lower but also raise it. I also wouldn't be troubled at all by a system that said treble damages or more only worked in the per se or so-called hard-core cases.

But a lot of the problems go to the structure — which I will hold off talking about because I think you are going to ask about this — of our legal system, in which class actions are easy to bring, discovery costs are wildly asymmetric, and incentives tilt toward settlement.

Professor Pitofsky

Tim and I really are on the same wavelength here. I would be happy with a sliding scale for damages. I would give discretion to the judge. I wouldn't do it in terms of per se versus non-per se, because there are some non-per se antitrust violations that are quite vicious and quite harmful to consumers and to the victims. I would give discretion to the judge, who is right there and who hears all the evidence, to assess less than treble damages.

But I would also give discretion to the judge to charge a higher multiple than three. I am increasingly concerned about the possibility that international cartels, which are hard to detect — the detection rate is, some people say, one in three; some people say, one in five — where you know that the damages that occur abroad are going to be single damages at most, and it is only in

the U.S. that there are treble damages. Also, in the U.S., you don't get prejudgment interest. Some scholars have said that means the U.S. approach is practically single damages.

I am worried about the possibility that some people are going to think that cartels, even if they get caught, are going to be profitable for them.

I also do not believe that cartels are all that fragile and that they come apart and they don't last long. We now have motion pictures of cartels that lasted twelve years. They handled currency exchanges. They handled the difficulty of protecting against cheating. They handled supply-and-demand difficulties in different countries.

I think some cartels can be stable. I think, given the reality of what you can collect — the fines in the United States can be extremely high, but the profits from some of these cartels can be enormous. I don't want to see a situation where a cartel, even if detected, can be seen as a profitable opportunity.

Mr. Joseph

Eleanor?

Professor Fox

First, a little history. The treble-damage remedy was not meant to give windfall profits to victims. It was meant as an incentive to sue.

I suspect that our system is as vibrant as it is today because of the treble-damage remedy, with other accompaniments, like contingent fees. We would never be where we are today in terms of the vibrancy of antitrust but for the fact that we have treble damages.

In Europe, DG Comp, which is not thinking of treble damages, is thinking of double damages, realizing that there might have to be an extra incentive to sue. The United States has a strong, robust system; Europe doesn't. The difference is that Europe doesn't have incentives for victims to sue.

Putting that to one side, and agreeing on hard-core cartels with Tim and Bob, I would like to say this. If there are sufficient incentives to sue, I would be fine with saying that victims ought to just get compensation. Compensation means they must get prejudgment interest. If they don't get prejudgment interest, I am against repealing treble damages. If I had to assume no automatic general treble damages, I would say: prejudgment interest for everybody, and multiple damages in hard-core cases. There could be a hard-core monopolization case. But I would want to make a line fairly clear, because I would worry about judges being influenced by an innocent document that says, "I intend to kill the competitor."

Mr. Sims

I'm still puzzling over the notion of a "hard-core monopolization" case. It is a concept that I have some trouble with.

I would like to have a little less vibrancy, if you don't mind, thank you, in our system. I think the Europe that you are talking about that wants something more like us is the European antitrust enforcers, which may not actually reflect the entirety of European public opinion.

The only legitimate justification for the treble-damage system is as an incentive to bring action. We don't really need the treble-damage system to bring most price-fixing treble-damage actions, because most of those follow on government prosecutions, and there is plenty of incentive there for those actions to be brought, in the form of attorneys' fees. They don't need treble damages.

It seems to me not to be a very good idea to try to incentivize people to bring lawsuits challenging ambiguous conduct. Certainly, almost everything in Section 2 would fall into that category, if not everything, and most of Section 1, outside of traditional per se hard-core offenses.

So the rational course, it seems to me, for the damage question is to apply treble damages only in those cases where you actually require an incentive in order to accomplish some public goal. To me, that would be in cases involving hard-core per se criminal-type behavior which are not follow-on antitrust actions. Everyplace else, treble damages ought to be eliminated.

I don't have any real problem with giving the judge discretion to provide more than treble damages in that class of cases, but I would limit it to that class of cases.

As far as prejudgment interest, I think there is a point there. In a lot of cases, prejudgment interest is appropriate and should be awarded. I would leave that to the discretion of the court.

Professor Pitofsky

There won't be many hard-core monopolization cases. But predatory pricing by a monopolist, with the intent to drive your competitors out of business — it seems to me that there, especially if the defendant is successful, more than three-times damages might be a good idea.

Mr. Sims

You made the same point on the RP side. The question is, do we want to have a potential risk out there that affects the business behavior of the entire economy in order to catch that once-every-twenty-five-year, once-every-fifty-year problem — give me some examples of actual cases in the last twenty-five or fifty years that would meet that test. There aren't very many. You can count them on at least a hand, and maybe you don't need all the fingers.

Professor Pitofsky

You make a very good point. But I think the problem can arise more than once every twenty-five years.

Mr. Joseph

Do you view the purpose of the private action to be compensation of victims of antitrust violations? Or to incentivize enforcement? Or is it to optimally deter violations? Or is it some combination of these objectives?

Mr. Muris

If you look at the economic literature on the subject, the most important thing is to produce the right and optimal amount of conduct, and to give money to victims. In consumer protection, the FTC has done a very good job at this. If you can get the money back, that's great. If you can get it to victims at a sensible price there's no point in putting it in the Treasury.

The problem with the current system is that the incentives are distorted and what I call the class-action bar, the plaintiff's bar — whatever you want to call it — has run amok. We have some serious issues. After the defeat in *Trinko*, Milberg Weiss turned around and said, "Well, we'll just add a conspiracy count." The district court judge said, "You've got to be kidding," and the Second Circuit said, "No, we're not kidding." The case is on appeal.

Mr. Joseph

Is that a class action question or, rather, a question involving the elements of pleading requirements for the underlying price-fixing conspiracy claim?

Mr. Muris

It's both.. It's a problem of class-action law because of the distorted incentives. If X corporation sued Y corporation, the discovery burdens would be symmetrical. In a class action, the discovery burdens are entirely one-way. The incentives create real problems. What look like cheap consents for the business, are great consents for the lawyers because of the lawyers' fees involved.

At the FTC, ,we objected to some class-action settlements because the settlements are so often between the business and the plaintiff's lawyers, and the consumers are treated as irrelevant. The consumers often get coupons, which some judges — although they are getting better at this — value at the face value of the coupon, not at the highly discounted value at which they are likely to be redeemed.

These settlements got so bad that in one case several state AGs agreed with us, and we jointly asked the court to drop the case rather than accept the settlement, because the settlement was a negative option and the consumers were going to end up being billed if they didn't opt out.

That is an extreme case, but it illustrates the problem.

Professor Fox

I agree with Tim. I think it is a big problem. I just wonder whether it could be solved through class-action law and other law that affects incentives of attorneys, rather than through revising treble damages.

Mr. Joseph

One question I have — I'm going to play devil's advocate a bit — is, does everyone agree that it is more difficult to prove a monopolization case than it was twenty years ago?

Mr. Sims

Of course, and appropriately so.

Mr. Muris

Do you think that's true post-Conwood and 3M?

Mr. Joseph

Does everybody agree that it is much more expensive to prosecute a rule-of-reason case?

Mr. Sims

Than a per se case?

Mr. Joseph

Yes.

Mr. Sims

Of course.

Mr. Joseph

Does everyone agree that there are not a lot of people winning rule-of-reason cases?

Mr. Sims

I guess that's true.

Mr. Muris

I'm not sure that's the right question.

Mr. Joseph

I haven't come to the question yet.

Mr. Sims

Wait a minute. The fact that a lot of people are not winning rule-of-reason cases gives you no support at all for the proposition that you ought to encourage people to bring some more bad cases so they can lose more bad cases.

Mr. Joseph

They already may know they have a difficult case. We presume they are intelligent in deciding whether to bring one, correct?

Professor Pitofsky

Well, *you* can presume that.

Mr. Joseph

This is what I believe is an argument that has been made by Steve Salop -- that is, that you need the greatest incentives to bring rule-of-reason cases.

One follow-up on that. Is the panel saying that the private litigant should be able to obtain treble damages only in cases that do "follow-on" government cases? Or should treble damages be available to a prevailing plaintiff in both "follow-on" cases and "non-follow-on" cases?

Mr. Sims

I wouldn't give it to them in follow-on cases. It's not necessary to incent them to bring the case.

Mr. Joseph

Is there a general consensus that serious consideration should be given to de-trebling in non-hard-core cases or non-horizontal cases or something like that?

Professor Pitofsky

Discretion to the judge.

Professor Fox

If prejudgment interest is included. I definitely wouldn't, otherwise.

Mr. Sims

I wouldn't leave it at the judge's discretion. I would not allow treble damages — you have to make a judgment about how you are going to describe the category -- but in non-hard-core cases.

Mr. Joseph

In hard-core cases, could the award to the private plaintiff be greater than treble damages?

Mr. Sims

As far as I'm concerned, it could.

Mr. Muris

I'm where Joe is. I think Bob is not quite as far as that.

Mr. Sims

One point we ought to make is that we shouldn't let this debate get confused over questions of deterrence. Unless I represent an unusual subset of American industry, which I don't believe,

treble damages is not a significant deterrent in the vast majority of business decisions. Prison sentences are real deterrents. The potential of prison sentences is a real deterrent. Treble damages are not.

Mr. Joseph

Steve Ross, a question?

Stephen F. Ross

I don't know if this is on your agenda for later. If it is, I will quickly shut up. I wonder if consideration might be given — and I was thinking about this with Tim's comment about discovery — to whether the applications of the federal rules of civil procedure are really appropriate in antitrust and, instead of just reflexively saying, "Well, of course, they are trans-substantive," whether bad substantive antitrust doctrine is being driven by a concern for discovery.

I won't go through, in the interest of time, the whole thing, but imagine a complaint, and a lawyer starts the complaint by filing a claim, and how facts are developed in that way and when a non-meritorious claim can be dismissed. Think, instead, if that lawyer comes to the Federal Trade Commission and tries to get the Federal Trade Commission to look into it. First, some staff person is allowed fifteen hours of work, and then fifty hours. There is this gradual process — whether we aren't too intimidated and allow substantive antitrust doctrine to be too affected by the fact that if you state a viable claim and there are any disputed facts which anybody might find to be a potential violation, you have to allow unbelievably costly, virtually unlimited discovery. That is clearly not the way the Federal Trade Commission makes its decisions about how costly, both for its own resources and to impose on staff.

Again, if this is something you are going to talk about later, that's fine. But I wonder if the panel shares my view that concern about discovery costs may be driving substantive antitrust rules, and if that is true, whether we ought to think about special rules of antitrust civil procedure.

Mr. Joseph

Any reactions?

Mr. Sims

I think it's a tough question. Discovery frequently costs a fortune and some cases are only brought to get the discovery. On the other hand, if you don't allow the discovery, how are you going to enforce the antitrust laws? It's a very tough call. I think strong judges have to take control of the early stages of the process.

Mr. Muris

To add to what Joe said, a pure notice-pleading standard doesn't work in antitrust. The complaint ought to state more than, "There is a conspiracy."

I disagree, incidentally, with Joe on the treble damages. I testified before Congress about one example, payment cards. There are industries where the treble damages are enormous, because the companies involved are so large. That isn't necessarily typical. But in some of these monopolization cases, the trebling is quite a substantial amount—in the tens of billions of dollars of potential liability.

Mr. Sims

You can always come up with examples. I'm talking about day-to-day business decisions. I don't believe those are driven, in the vast majority of cases, by worries about treble damages. People will pay attention to you when you say, "Hey, you might go to jail." They will pay attention to that. To say that the company — not you; the company — might be exposed to damages at some point down a long litigation trail doesn't influence many business decisions.

Mr. Muris

We are talking about different points. In terms of what the deterrent is for price fixing, I agree, it's jail. In terms of a significant number of Section 2 cases settled, the companies think that there is an 80 percent chance that they will win. They settle anyway, not because it's cheap and easy, but because of fear of large treble damages.

Mr. Sims

No question. But that's a different point than deterring behavior. You are talking about what happens after you are in litigation and you now have to make a decision about where your risk — I am talking about when they are actually making business decisions.

Mr. Muris

Yes, we are talking about different things. After 3M, however, if you are a multi-product firm that bundles products, even if it is not a tying arrangement under anybody's view, and you have a large market share in one of the products in the bundle, you are in substantial danger. There are suits being filed in the Third Circuit based on this point.

Mr. Joseph

Bob?

Professor Pitofsky

We have mentioned *Illinois Brick* and *Hanover Shoe* a couple of times. Let's do that one, because that is one where I think this Commission can really make a difference.

Mr. Joseph

Before I do that, I just want to summarize parts (but not all) of what I call the Warden proposal. parts. One of its basic features is that in matters where the government institutes criminal proceedings and obtains a guilty verdict by plea or trial, all unlawful gains made by the defendants and pre-complaint and prejudgment interest shall be disgorged in that proceeding, together with such fines and penalties as may be provided by law. The disgorged unlawful gains

shall be apportioned among those from whom they were taken, directly or indirectly, by the criminal court in a summary proceeding to be concluded within ninety days of the entry of a final criminal judgment. Classes of direct and indirect claimants may participate, through counsel, in that proceeding. Fines and penalties shall accrue solely to the Treasury, but the court may award compensation from those amounts to any party found to have been a material factor in the instigation — that is, somebody who helped bring the case.

This is basically bringing it all together at one time. There are also "softer" versions of this.

Reactions to that concept? Eleanor?

Professor Fox

I think it's a wonderful concept. There are details that have to be worked out — whether the criminal court can really do it. The Justice Department, apparently, is not very happy to take on the tasks that would fall to it. But I think the details can be worked out. I think it's exactly the right way to go. It would consolidate. It would get rid of *Illinois Brick* to the extent necessary. It would get rid of *Hanover Shoe* to the extent necessary. I think it's really good.

Mr. Joseph

Any other reactions? Joe?

Mr. Sims

It would be one hell of a lot harder to do than it sounds. But, conceptually, it's a great idea. I think Eleanor understated by about nine orders of magnitude the reaction of the Antitrust Division to having this responsibility. They wouldn't be all that enthusiastic at all.

Mr. Joseph

Tim, do you have a reaction to it?

Mr. Muris

I agree that the current situation is a mess. This is a good concept. While I understand the view of the Antitrust Division, Given the magnitude of the problem, I am not as sympathetic.

Mr. Sims

If we adopt my system, it could be the FTC, and they are much more capable of doing this kind of work.

Mr. Muris

An interesting fact, of course, about criminal enforcement is that answering the phone is the mainstay of current criminal enforcement. There could be other aspects of it.

Mr. Joseph

Bob, do you have any reaction to this?

Professor Pitofsky

I think it's a good idea. I agree that the devil is in the details.

Mr. Joseph

Assume this aspect of the Warden proposal is not adopted. Where do you folks stand on whether, to what extent, and under what circumstances *Illinois Brick* and *Hanover Shoe* should be modified or overruled? In what circumstances and in what way should state and federal actions growing out of the same common set of facts or government case be brought together in one forum? More generally, what other things should be done?

Professor Pitofsky

Fundamentally, on *Illinois Brick*, I think if this Commission will take the lead and make a proposal to repeal both *Hanover Shoe* and *Illinois Brick*, that could trigger some real action. My reason for thinking that is that I think both the private bar and the private sector might think that would be a better world.

I went back about a year ago and read *Hanover Shoe* and *Illinois Brick*, and there is no question that, if not the decisive consideration, one of the decisive considerations is that the Supreme Court wanted a bright line. We now have the opposite of a bright line. We have more than half the states with different kinds of *Illinois Brick* repealers, and it is very tough to live with that kind of situation.

So I would say, get rid of both decisions. Let the indirect purchasers sue. There may be other reforms, like bringing all the cases into one court. But, fundamentally, with the best of will, those two cases — I understand what the Supreme Court was trying to do, but it has not worked. I think most people who are interested in this area recognize that it hasn't worked, and we ought to go off in a different direction.

Mr. Joseph

I assume that part of your proposal would be to have, if not the Warden proposal, some mechanism for coordinating cases, wherever they may be filed.

Professor Pitofsky

Absolutely. You would have to think about the problems of coordinating. But that can be done.

Mr. Joseph

Any other reactions?

Professor Fox

I agree with Bob. I wanted to mention the ABA Antitrust Section task force proposal for consolidation of suits by all direct and indirect purchasers who would have standing. That has a lot of merit also.

Mr. Joseph

Anybody else? Anything else on remedies?

I take it also, just to circle back, that there was general sentiment in favor of prejudgment interest, if there was going to be de-trebling in certain areas. Is that correct?

[The panelists said "yes".]]

We had discussion about merger enforcement, both substantively and some procedural issues. Let me jump to one of the procedural issues. There was discussion about clearance. Nobody seems to be against some procedure to remedy the problem on a going-forward basis. What procedure makes sense?

Mr. Muris

Let me state my usual mantra and criticize once again the agency alumni — many if not most of those present have already heard this. The performance of the alumni of both agencies was shameful in 2002. It will have to change if there is going to be a clearance proposal.

I had an exchange with Hew Pate that is in the public record in which he made my point. The attitude of the alumni of both agencies to what Charles and I did was outrage, because their agency lost — and I mean 90 percent of the alumni. I said this and meant it to be chastising at the 2004 Antitrust spring meeting. Hew said, "Yes, I agree it was a lousy deal for Justice," to which I said, "I rest my case."

When I testified before the AMC, someone, it might have been Steve Cannon suggested having the appropriators tell the government to fix it, and if not, a case gets cleared automatically. I think that is a great idea. Nothing, however, is going to happen until the agency alumni who represent the business community, support an agreement. There are three groups of cases: cases that are clearly the FTC's, cases that are clearly DOJ's, and cases clearly in the middle. Until the alumni realize that the cases in the middle aren't theirs to claim, almost no matter what Congress does, we aren't going to have reform.

Mr. Sims

Having spent a large number of hours working with Bill Baer and Steve Sunshine and Kevin Arquit on this subject — and we went through the whole kind of discussion you would expect when you have two people from the FTC and two people from the DOJ -- and, relatively quickly concluding that it was a hell of a lot more important that it get done than who did it, it seems to me it is very hard to argue with that proposition, as a general proposition. Exactly how it's divided doesn't really make a damn bit of difference. Even the experience point doesn't make a terrible amount of difference, because if you give something to one agency and the other agency

has people with experience, have them detail them over or have them change to that agency. It's not a complicated problem.

So this is something where it might be able to get done easily and quickly without having the major battles that we would have over some of these other issues. I would hope the commission would suggest that.

Professor Fox

I want to ask Tim and Bob: For that third that is not clearly within the domain of the expertise of one or the other, would you support a flip of the coin or an odd number/even number suggestion, which has been made at the Commission?

Professor Pitofsky

I think I would. First of all, I don't think there are that many cases in the middle.

Mr. Muris

I'm not saying the three categories are equally divided. But it's a nontrivial number.

Professor Pitofsky

Oh, yes. And it often involves some of the biggest cases you are going to see. Just to make one up out of thin air, suppose a cable company buys a programmer and the FTC has one and the DOJ in the past regulated programmers, and they both say, "It's my case. It has been my case for the last thirty or forty years." I could argue it either way. You go to the twenty-ninth day, and then finally somebody gives in. I think it's a terrible experience.

I was in favor of the proposed clearance agreement. I wrote a letter saying I was in favor of it. But I never did know how you handled a cable company-programmer and a cable company-Internet provider merger case.

In desperation, I would say, if that one comes up once or twice a year, flip a coin and go on with the rest of your work, which is consistent with Joe's point. It's more important to get it done than to get it done in some so-called right way.

Mr. Joseph

So, with respect to clearance, what should the AMC do? Recommend to Congress that Congress instruct the agencies to enter into an agreement?

Mr. Sims

The agencies are not going to do this on their own. Life is too short, and they have other things on their plate. Unless they get some direction from somebody, they are not going to do it.

Mr. Muris

Charles and I happened to have worked together and been close friends. We had this miserable experience at the beginning over music that had gone on for over a year. Our agreement was a fluke. Particularly after the 2002 clearance experience, a new clearance proposal and process will not happen without external direction.

Professor Fox

And Deborah Majoras, apparently, gave her word to Congress that she would not instigate it again.

Mr. Joseph

There was some discussion yesterday on the panel involving merger process about the question of different standards for preliminary injunctions and also the question of possible restrictions on the FTC's ability to have an administrative proceeding, in addition to a PI action. Are these topics you would put in the AMC report to Congress? Are these issues ones on which to expend political capital (I think that was the way it was phrased by panelist Mark Whitener). Or do you say, "Let's not spend time on them; we have other matter that really should be the subject of focus"?

Professor Pitofsky

What I would want the Commission to do, if they make any recommendation on what the agency should do after it loses a preliminary junction — should it be able to bring the matter into Part III? All I want to see is how many times that has happened over the last thirty years. I know of one.

So should the Commission spend a lot of political capital on an issue like that? I think the answer is no.

There may be other examples of that. I never looked into it. I can only remember one.

Mr. Sims

These are not real problems. These are conceptual issues that are interesting to talk about, but they are not real problems.

Mr. Muris

It looks on paper to a lot of people that the FTC standard is easier. If this was really true—that it was easier for the FTC to win PIs—then if I was on the AMC, I would recommend fixing it. In reality, however, its not true. The same lawyers who go to the FTC and go to the Justice Department behave the same and treat the standard the same. They don't behave differently.

Mr. Joseph

Joe, you talked about dual enforcement. With respect to merger enforcement only, there was a tentative preliminary 7-to-4 vote against recommending a change. Any particular views on that issue? Would you even go to Congress on that issue of dual enforcement of mergers?

Mr. Sims

I have given my view. I would be interested in the rest of the panel.

Mr. Joseph

You view is that mergers should be handled by the FTC, correct, although that was part of a larger package.

Mr. Sims

I wouldn't limit it to mergers. I would do it for all non-criminal enforcement.

Professor Pitofsky

I kind of like that, the more I think about it.

Professor Fox

For a reality check, and given history, I wouldn't touch it.

Mr. Muris

I thought that being chairman was a big enough job without taking on the Justice Department's mergers. That assumes, however, that you fix some of the other problems. Clearance is an issue. If one agency is systematically imposing more burdens in the Hart-Scott process then there is a problem. The problem I had was not differences with Justice, it was differences between the merger shops. I think Debbie Majoras's reforms are excellent. Obviously, it remains to be seen how they work out in practice.

But there are problems in the procedure dimension that I started with. Clearance is a big procedure issue. The merger burdens are large and overwhelming, and electronic filing is going to make any set of reforms archaic quickly.

Mr. Sims

I think it is important to note that, notwithstanding the fact that there are still occasional problems — it's a process involving humans, so there will be problems — the second-request process today compared to the second-request process ten years ago is one hell of a lot better. While I think that is, in very large part, a result of the driving of the leadership of the agencies, and in particular Charles and now Debbie — and so I worry a little bit about what happens when you get different leadership in there — it's hard to say that today that is a real problem that needs the attention of the Congress.

Mr. Joseph

Another panel yesterday discussed substantive merger principles, including the use and possible revision of the Merger Guidelines. What are your views on the Guidelines and what, if anything should be included in any AMC report on the subject of merger analysis?

Professor Pitofsky

I thought the Baxter guidelines were outstanding. They were such an enormous advance over where the law was before he stepped into it. I think the improvements — three later reforms of the guidelines, adding an efficiency defense, changing the definition of entry, which Jim Rill did — helped. As the panel said, I think the framework is excellent. I don't think I would play around with it.

I had this idea about easing off on failing firms. I'm not so unhappy with "industrial policy". But nobody else feels that way. I am not suggesting that anybody propose it.

That panel's discussion earlier today was entirely about Whirlpool-Maytag. If that is the standard of enforcement of the guidelines on a going-forward basis, you have the sort of problem you had at the very end of the Reagan administration, when lots of people said, "Antitrust has gone to sleep." Whirlpool is one case, and I am not prepared to jump that far. Besides, I don't even know the details about the case, because I don't have access to the full facts. But that is what Carl Shapiro was talking about and that is what that debate was about.

Mr. Muris

I think the joint FTC-DOJ merger data release was extraordinarily useful. The AMC should recommend that the agencies produce more merger data, which is not that hard to produce, especially if the agencies keep it on an ongoing basis.

What the merger data— mostly comprised of Bob's cases (about 80 percent) because he had the merger wave and was there longer — showed was that the number of significant competitors often counted more than the Herfindahls numbers in the guidelines — that 2,400 was a much more important number than 1,800, and the number of significant competitors was more important still. It also showed the importance of customer complaints. It showed the importance of entry. It showed the sophisticated way that merger enforcement was being performed.

The only way to test something like Bob's point about Whirlpool-Maytag is to have that kind of transparency on agency merger decisions..

Mr. Sims

This is, to some extent, an inevitable consequence of the direction of merger analysis over the last twenty years. If every case is going to be about its facts, which is where we have basically come, away from presumptions, and if you are going to be concerned, as an enforcer, about whether you are likely to be able to prove that this particular case violates the antitrust laws, then the chances of having Whirlpool-Maytag results — where, I am assuming without knowing the facts, Tom Barnett concluded that he would have a hard time proving his case in court because of the facts that were put before him — the chances of that are going to be very real.

I may be less principled — probably am — than Tom Barnett, so I might have brought that case in any event. But if you are going to actually decide cases on the facts, then it's going to be very easy to decide not to bring cases and a lot harder to decide to bring them.

Professor Pitofsky

My view is that the structural presumption is not dispositive. You have to go further and ask whether the merged parties can really raise price. But you shouldn't forget the difference between structure that combines two firms with 24 percent, and structure that combines two firms with 80 percent. When you are up in the 80 percent range, it's not whether you can prove a violation, although the burden is on the challenger; it is, what the other side can say to prove, in the presence of an 80 percent combination, that there is no likely anticompetitive effect.

Judge Sporkin said when you get the numbers up that high, it has to be one hell of a defense.

Mr. Sims

Judge Sporkin is probably not the model here.

The fact of the matter is that the government has the burden of proof. You can't walk in — they have tried and lost — and say 80 percent, we win.

Professor Pitofsky

I agree with that.

Professor Fox

Also, as the merger panel discussed, there has been a revolution of presumptions. There was testimony before the AMC going in different directions. Larry White testified to the circumstances under which high concentration, increased concentration and high barriers produce a logical influence of lessening competition. There is evidence of harm from the structure itself. But this is exactly a point on which there is disagreement today, and it seems to be covered up because people don't like to talk about it.

Mr. Joseph

Given our time constraints, in planning this program, we necessarily had to limit the subjects that could be analyzed and discussed. We are unable to cover all the subjects on the AMC agenda. For example, we did not devote panel discussion to any international subjects.

Bob and Eleanor, do you have any observations on the international subjects that the AMC is covering? Beyond international areas, are there any other subjects on which any of you would like to offer views?

Professor Pitofsky

I will defer to Eleanor on this subject.

Professor Fox

There are at least two big issues on the international side. One is whether to revise the terribly written statute called the FTAIA, and the other is how to deal with thinking about more enhanced comity, as Bob has been very involved in.

I think there is a very good chance that the Commission will reach some consensus on more comity. For example, one country has taken an action regarding the conduct of a "home" company, and given relief. Other countries that may be concerned about that or similar conduct should think sympathetically about whether country 1 has done what is necessary to protect country 2. I think the Commission will probably say something about that, and probably should, because in a globalized world, there are so many actions that affect many countries, and because companies can get overregulated; but at the same time, nations are sovereign and have to have the right to protect their markets.

On the FTAIA issue, that is a terribly written statute. It could usefully be repealed. The question is political; what would Congress do for a substitute? In my own view, the FTAIA language, in the best of possible worlds, would be replaced by much simpler language on the limits of subject matter jurisdiction, and standing issues would be dealt with quite separately. People should have standing even if they bought their price-fixed products abroad if their harm is from the same conduct that harms the U.S. market and is integrally related to the United States' harm.

Mr. Sims

On this point, I think I would pretty strongly advise the Commission not to go in that direction. It's not an accident that in the *Empagran* litigation, the non-U.S. governments that took positions on that took positions directly opposite of what Eleanor has suggested. Their basic rationale was, "We get to decide what happens to people that are injured in our jurisdiction, and the United States should not be deciding for us. It's a very paternalistic view of the world."

So I would strongly urge the Commission not to walk themselves into that problem.

Professor Pitofsky

I read the Commission's preliminary statement. It came out yesterday, I think. I think it was terrific, and I would go with it. I think the Commission is right where it ought to be on this. Comity is more and more important as the commercial world grows smaller. There are ways to reform it, and these are some of the ways. I think it's a good idea.

Mr. Muris

I want to thank everybody for staying. We all lost on the over and under for the number of people that would be here.

The big issue to me, in many ways, is divergence, particularly in mergers, because mergers are multi-jurisdictional, and also in dominance, for the same reason. There's a lot of work to be done. There have been some promising starts and a lot of good people working at it, but there remains a lot of important work..

Mr. Joseph

Thank you very much. Thank you, everybody, for your attendance and attention throughout the program.

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