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Volume 11 | Number 3

Article 3

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6-1-1978

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#### Recommended Citation

Maxwell M. Blecher & Consuelo S. Woodhead, *The Small Prospects for Shrinking the Big Antitrust Case by Procedural Reform*, 11 Loy. L.A. L. Rev. 513 (1978).

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# THE SMALL PROSPECTS FOR SHRINKING THE BIG ANTITRUST CASE BY PROCEDURAL REFORM

by Maxwell M. Blecher\* & Consuelo S. Woodhead\*\*

## I. INTRODUCTION: THE BIG CASE PROBLEM

The "big case" is the bane of antitrust law. It is a source of constant carping by the lawyers and judges involved and the object of constant criticism by observers. It is not difficult to understand why. The spectacle of a single judge or jury attempting to assimilate months or even years of complicated economic testimony strains credulity that even a modicum of truth or justice can emerge from the litigation system.<sup>1</sup> Similarly, the spectacle of fifty or more lawyers crowding into a courtroom, filling the jury and spectator seats, is one that is not at all unusual in antitrust litigation, and it further strains credulity that the adversary process can deal effectively with the case they have come to present.<sup>2</sup>

The big antitrust case is not a new phenomenon.<sup>3</sup> Nor is concern over the court's ability to deal effectively with such litigation. Fourteen years ago in *United States v. Grinnell Corp.*,<sup>4</sup> Judge Wyzanski observed:

[I]n recent years antitrust litigation, particularly Government civil actions alleging violations of § 2 of the Sherman Act, have involved

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1. One major monopolization case, *United States v. International Business Machs. Corp.*, No. 69-200 (S.D.N.Y., filed Jan. 17, 1969), was in its third year of trial before the Government's case in chief was completed.

2. For example, the complaint in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), named 63 defendants. Former Judge Rifkind has stated that he was one of 84 lawyers in *United States v. Arkansas Fuel Oil Corp.*, 1960 Trade Cas. ¶ 69,619 (N.D. Okla. 1960). Rifkind, *Are We Asking Too Much of Our Courts?*, *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 96, 108 n.13 (1976). The service list in *In re Folding Carton Antitrust Litigation*, 415 F. Supp. 384 (J.P.M.D.L. 1976) (M.D.L. No. 250) (order of transfer), lists 69 counsel for plaintiffs and 49 for defendants; that in *In re Sugar Indus. Antitrust Litigation*, 427 F. Supp. 1018 (J.P.M.D.L. 1977) (M.D.L. Nos. 201, 201A) (order of transfer), lists 89 counsel for plaintiffs and 54 for defendants.

3. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

4. 236 F. Supp. 244 (D.R.I. 1964), *aff'd in part*, 384 U.S. 563 (1966).

an enormous, nearly cancerous, growth of exhibits, depositions, and *ore tenus* testimony. Few judges who have sat in such cases have attempted to digest the plethora of evidence, or indeed could do so and at the same time do justice to other litigation in their courts. Nor is there any sound reason to believe that such extensive presentation accomplishes any important legal or other social end.<sup>5</sup>

At the time he made this statement, Judge Wyzanski seemed to contemplate a coming day when the "cancerous growth" would be halted, even in monopolization cases, partly through judicial exhortation but principally through clarification of governing legal standards and consequent elimination of uncertainty as to the "boundaries of relevance and materiality."<sup>6</sup> However, the big case has instead become an increasingly common phenomenon which has prompted concern over the efficacy of the litigation process. At one time, the big antitrust case was almost exclusively the domain of the government. In recent years, private plaintiffs have entered the battlefield with increasing frequency. Not only is there more private litigation,<sup>7</sup> there is more private litigation of mammoth proportions.<sup>8</sup> Private plaintiffs, often major corporations which once eschewed vindicating intra-industry grievances through antitrust litigation, have brought monopolization cases and attempt to monopolize cases either simultaneously with the government<sup>9</sup> or alone.<sup>10</sup> Private parties have also brought large national or regional price fixing cases in

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5. *Id.* at 247.

6. *Id.*

7. The number of private damage claims filed nearly trebled, increasing from 446 in 1964 to 1230 in 1974. Handler, *Antitrust—Myth and Reality in an Inflationary Era*, 50 N.Y.U.L. REV. 211, 235 (1975).

8. See *The Private Action—The Corporate Manager's Heavy Artillery*, 43 ANTITRUST L.J. 5 (1973).

9. *International Tel. & Tel. Corp. v. American Tel. & Tel. Co.*, 1978-1 Trade Cas. ¶ 61,853 (S.D.N.Y. 1978) (order dismissing part of complaint and denying motion for order dismissing counterclaims); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, No. 76-2512 (S.D.N.Y., filed June 7, 1976); *Greyhound Computer Corp. v. International Business Machs. Corp.*, 559 F.2d 448 (9th Cir. 1977), *cert. denied*, 98 S. Ct. 782 (1978); *Telex Corp. v. International Business Machs. Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *Control Data Corp. v. International Business Machs. Corp.*, 306 F. Supp. 839 (D. Minn. 1969), *aff'd sub nom. Data Processing Fin. & Gen. Corp. v. International Business Machs. Corp.*, 430 F.2d 1277 (8th Cir. 1970).

10. *International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp.*, 527 F.2d 1162 (4th Cir. 1975); *SCM Corp. v. Xerox Corp.*, 507 F.2d 358 (2d Cir. 1974); *Berkey Photo, Inc. v. Eastman Kodak Co.*, [1978] 849 ANTITRUST & TRADE REG. REP. (BNA) A-13 (S.D.N.Y. Jan. 21, 1978) (judgment of liability); *GAF Corp. v. Eastman Kodak Co.*, [1973] 612 ANTITRUST & TRADE REG. REP. (BNA) A-3 (S.D.N.Y., filed Apr. 30, 1973); *Bell & Howell Co. v. Eastman Kodak Co.*, [1973] 595 ANTITRUST & TRADE REG. REP. (BNA) A-4 (N.D. Ill., filed Jan. 4, 1973).

advance of or in the absence of suits by the federal government,<sup>11</sup> as well as concurrently with government suits.<sup>12</sup>

These quantitative and qualitative changes in private antitrust litigation have been met with correlative increases in the pitch of concern over the judicial mode of resolving such disputes. The depth of current judicial concern over the capacity of courts to deal with the big case is well illustrated by the Supreme Court's decision last year in *Illinois Brick Co. v. Illinois*.<sup>13</sup> Under the "direct purchaser" rule of *Illinois Brick*, one who has not dealt directly with the perpetrator of an antitrust violation cannot as a rule recover for injuries or losses actually sustained as a proximate result of the antitrust violation. At the same time, one who has dealt directly with the wrongdoer can, with only narrow exceptions, recover for his own use the full amount of an illegal overcharge, even though he has in fact passed on most or all of it and thus has himself sustained little or no real loss. Indeed, the Supreme Court candidly admitted in *Illinois Brick* that it was "elevating direct purchasers to a preferred position as private attorneys general" and thereby adopting a rule which "denies recovery to those indirect purchasers who may have been actually injured by antitrust violations."<sup>14</sup>

This is very radical surgery on a statute which expressly provides a cause of action for damage to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."<sup>15</sup> Actual injury, not privity, would seem to be the mandated standard.

The essential justification for the direct purchaser rule of *Illinois Brick* is not that it is compelled by any notion of proximate causation or the like, but simply that it is expedient:<sup>16</sup>

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11. *E.g.*, *In re Petroleum Prods. Antitrust Litigation*, 1977-2 Trade Cas. ¶ 61,639 (C.D. Cal. 1977) (denial of motion to dismiss complaint); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re Gypsum Wallboard*, 340 F. Supp. 990 (J.P.M.D.L. 1972) (M.D.L. No. 14) (denial of motion for order of remand).

12. *E.g.*, *In re Sugar Indus. Antitrust Litigation*, 427 F. Supp. 1018 (J.P.M.D.L. 1977) (M.D.L. Nos. 201, 201A) (order of transfer); *In re Folding Carton Antitrust Litigation*, 415 F. Supp. 384 (J.P.M.D.L. 1976) (M.D.L. No. 250) (order of transfer); *In re Master Key Antitrust Litigation*, 1977-1 Trade Cas. ¶ 61,456 (D. Conn. 1977) (pretrial ruling of liability as a matter of law); *In re Arizona Dairy Prods. Litigation*, 1976-2 Trade Cas. ¶ 61,177 (D. Ariz. 1976) (discovery order).

13. 431 U.S. 720 (1977).

14. *Id.* at 746.

15. Clayton Act § 4, 15 U.S.C. § 15 (1976).

16. 431 U.S. at 732, 745. The Court also reasoned that its decision was compelled by *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), which had severely limited the defensive use of a passing-on doctrine, and that adherence to *Hanover Shoe*

Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.<sup>17</sup>

The message is clear: antitrust cases are already so troublesomely complex that the courts cannot be bothered with the task of apportioning damages among the many persons “who shall be injured” in their business or property.

The depth of concern in the executive and legislative branches is equally great. The present attorney general has suggested that monopolization cases under section 2 of the Sherman Act are so massive and so complex that it might be more appropriate to “try” them before Congress rather than individual judges.<sup>18</sup> More recently, President Carter signed an executive order creating a special commission on antitrust reform.<sup>19</sup> The problems posed by the big case are one of the two major subjects the commission is to examine.<sup>20</sup> It will study the possibilities for shrinking the big case by reform of discovery procedures, assignment of cases to judges with antitrust experience, expansion of judicial authority to penalize dilatory tactics, simplification of the standards of proof in structure cases under section 2 of the Sherman Act and nonjudicial alternatives for the resolution of antitrust disputes.

In the private sector, the Litigation Section of the American Bar Association has already undertaken a study of discovery abuse and published a report recommending a number of reforms to the Federal Rules of Civil Procedure to the Civil Rules Advisory Committee.<sup>21</sup> These recommendations range from a proposal to narrow the scope of discovery from “the subject matter involved in the pending action” to “issues

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was, in turn, compelled by considerations of stare decisis. 431 U.S. at 736. However, only two weeks later in its next antitrust decision, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court cast aside all consideration of stare decisis and went out of its way to overrule a prior decision, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

17. 431 U.S. at 737.

18. Address by Attorney General Griffin B. Bell, Spring Meeting of the Antitrust Section of the American Bar Association (Apr. 14, 1977).

19. Exec. Order No. 12022, 42 Fed. Reg. 61,441 (1977).

20. The other is antitrust immunities. *Id.*

21. See A.B.A. LITIGATION NEWS, Jan. 1978, at 1 (summary of study).

raised by the claims or defenses,'<sup>22</sup> to limitations on the number of interrogatories which may be propounded without leave of court<sup>23</sup> to dispensing with the filing of discovery papers until it is needed for a motion or hearing.<sup>24</sup> The ABA proposals are not limited to large or complex antitrust cases, but there can be little doubt that the overwhelming discovery mires in such cases are a major concern underlying the push for reform.

Two dangers inhere in focusing so much attention on the big case problem—overreaction and overexpectation. *Illinois Brick's* dramatic curtailment of retailer and consumer actions may be a case of overreaction to the particularly acute problems posed by massive class action litigation.<sup>25</sup> Certainly it has provoked quite a debate whether the direct purchaser rule will enhance or actually detract from the ultimate prospects for vigorous private enforcement of the antitrust laws.<sup>26</sup> The various other, more modest proposals appear to pin great expectations on shrinking the big antitrust case to manageable size through procedural reforms or moderate substantive changes. There seems to be a widespread feeling that good procedures make good law. Unfortunately, it is not at all clear that formal procedural reforms—short of reforms which emasculate antitrust enforcement—can significantly reduce the size, complexity or length of most antitrust cases. On the theory that if one comprehends the cause of the illness, he can better judge the proposed prescription, it is useful to examine the reasons that antitrust cases are so frequently big and unwieldy.

## II. THE SUBSTANTIVE SOURCE OF SIZE

Some of the reasons why antitrust cases are so often large are self-evident and need not be discussed at any length. Most antitrust cases are, relatively speaking, big money cases, and in addition many are multiparty suits. The high-stakes character of antitrust litigation in itself tends to generate complexity. With hundreds of thousands—or today, even hundreds of millions—of dollars at stake, the plaintiff's lawyer does not want to leave any stone unturned if there is any hope of finding even a

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22. *Id.*

23. *Id.*

24. *Id.* at 7.

25. Class actions present a number of sui generis problems of size, particularly as they affect representation, notice, and manageability. These unique problems require separate examination and are beyond the scope of this article, but observations and suggestions made herein are applicable to class actions as well as to individual litigation.

26. See *A Bill to Restore Effective Enforcement of the Antitrust Laws: Hearings on H.R. 8359 Before the House Subcomm. on Monopolies and Commercial Law, 95th Cong., 1st Sess. (1977).*

scrap of evidence under it. By the same token, the defense lawyer feels he cannot afford to bypass any possible means of extricating his client, or at least delaying the day of reckoning. As a result, overreaching discovery requests, tangential depositions, and dubious motions proliferate. The road to trial naturally and almost inevitably tends to become a marathon obstacle course.

But the single most important reason that so many antitrust cases are massive at both the discovery and trial stages of litigation is that they are complex issue cases. The root cause that these cases are big and the reason that neither lawyers nor judges can well confine the scope of inquiry, either during discovery or at trial, lie in the substantive rules which control disposition.

At present, aside from the per se categories of cases under section 1 of the Sherman Act,<sup>27</sup> there are very few simplistic formulas in antitrust. True, some of the formulations of the basic elements of an antitrust claim sound simple, but when the question comes down to the nature and quantum of evidence needed to meet these requirements, it is not at all simple. For example, it is easy enough to state that the offense of monopolization consists of "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power."<sup>28</sup> But there is no precise guideline stating how much power is monopoly power,<sup>29</sup> and the definition of relevant product and geographic markets or submarkets, particularly the former, requires consideration of such a variety of factors<sup>30</sup> that inquiry into every facet of the industry

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27. 15 U.S.C. § 1 (Supp. V 1975).

28. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

29. *United States v. Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948) ("We do not undertake to prescribe any set of percentage figures. . . ."). *Compare, e.g.*, *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969)(something more than 50% is prerequisite) and *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945)(90% of supply is enough to constitute a monopoly; doubtful whether 60-64% is enough; 33% certainly is not enough) with *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1366-68 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977) (less than 20% clearly not enough; but no rigid rule requiring a 50% minimum without regard to other factors) and with *Pacific Coast Agriculture Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976) (market share ranging from 45% to 70% is enough when qualitative aspects of role in marketplace provide other evidence of monopoly power).

30. The basic definition as expressed in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956), is that a relevant product market "is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." However, there may be recognizable "submarkets that are separate economic entities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966). Determination of a relevant submarket involves consideration and balancing of numerous indicia, including "industry or public recognition of the submarket as a separate

involved and assimilation of abstruse economic testimony is absolutely essential. Indeed, the need to prove a relevant market is probably the most salient example of a substantive antitrust rule which not merely invites but requires massive discovery via document requests, interrogatories, third party subpoenas, depositions, and expert evaluation. And the need to prove a relevant market arises in merger or acquisition cases under section 7<sup>31</sup> of the Clayton Act (or section 1 of the Sherman Act),<sup>32</sup> in rule of reason cases under section 1 of the Sherman Act,<sup>33</sup> in monopolization cases under section 2<sup>34</sup> of the Sherman Act<sup>35</sup> and, in most circuits, in attempt and conspiracy to monopolize cases under section 2 of the Sherman Act.<sup>36</sup> Cases involving tying or exclusive dealing arrangements under section 3 of the Clayton Act<sup>37</sup> or section 1 of the Sherman Act also require some analysis of the market and competitive milieu in which the alleged violation occurs.<sup>38</sup> In short, only cases involving the limited categories of per se claims under section 1 of the Sherman Act, various price discrimination cases, or the unlikely cases in which the parties agree on market definition and relevant statistics are very susceptible of narrow discovery and short trials. For the remainder, the substantive law imposes its own discovery and trial burdens.

Moreover, the substantive law of antitrust, viewed over time, is akin to constitutional or Biblical exegesis. From the "comprehensive charter of economic liberty"<sup>39</sup> embodied in the Sherman Act, there has grown a

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economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) (footnote omitted).

31. 15 U.S.C. § 18 (1976).

32. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

33. *See Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

34. 15 U.S.C. § 2 (Supp. V 1975).

35. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

36. *See, e.g., Forbro Design Corp. v. Raytheon Co.*, 532 F.2d 758 (1st Cir. 1976); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959); *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Pacific Eng. & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 98 S. Ct. 234 (1977); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263 (D.D.C. 1976). *But see Oetiker v. Jurid Werke, G. m. b. H.*, 556 F.2d 1 (D.C. Cir. 1977).

37. 15 U.S.C. § 14 (1976).

38. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (Clayton Act § 3); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610-11, 615 (1953) (Sherman Act § 1).

39. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).



significant body of decisional interpretation which is still growing. As *Illinois Brick Co. v. Illinois*, discussed above, illustrates, the growth does not consist merely of refinements; it includes sharp changes in direction. The state of the law at any one moment may be unclear or it may change during the course of litigation. Such uncertainty in itself tends to spawn lengthy discovery and trials because neither the parties nor the courts can easily locate the outer limits of relevance or materiality of evidentiary data.<sup>40</sup>

Even more importantly, the exegesis of antitrust principles seems to be tending toward increasing complexity. As the economic environment in which antitrust law operates likewise tends toward increasing complexity, the two work in tandem to make antitrust cases even more unwieldy than they have been in the past. Recent judicial attempts to delineate simple formulas have regularly been subjected to subsequent complication, qualification, negation or just plain confusion. The history of vertical non-price restraints over the past fifteen years is one notable example. When it first considered the legality of vertically imposed customer and territorial resale restrictions apart from vertical price fixing, the Supreme Court adopted a rule of reason approach, stating that it knew "too little" of the motivations behind and actual impact of such arrangements to classify them as per se violations.<sup>41</sup> This approach, of course, required detailed evidence of the specific effects on competition of the particular arrangement in question.<sup>42</sup> Four years later in *United States v. Arnold, Schwinn & Co.*,<sup>43</sup> the Court, though asserting that it had undertaken a rule of reason analysis, seemed to herald basically a per se approach to vertical non-price restraints, an approach which obviously simplifies the analysis and thus the litigation required for disposition. The

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40. See *United States v. Grinnell Corp.*, 236 F. Supp. 244, 247 (D.R.I. 1964), *aff'd in part*, 384 U.S. 563 (1966).

41. *White Motor Co. v. United States*, 372 U.S. 253, 261-64 (1963).

42. The classic formulation of the rule of reason is reiterated in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of the intent may help the court to interpret facts and to predict consequences.

433 U.S. at 49-50 n.15 (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)).

43. 388 U.S. 365 (1967).

Court stated that "[u]nder the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it."<sup>44</sup> But *Schwinn* left room for loopholing and, faced with an almost infinite variety of vertical commercial arrangements and asserted reasons for undertaking them, that is just what many courts did. There developed exceptions from the per se approach for territorial restrictions framed as location clauses<sup>45</sup> or primary responsibility clauses,<sup>46</sup> restrictions which are not firmly and resolutely enforced,<sup>47</sup> restrictions justified by consumer protection and product liability considerations,<sup>48</sup> and restrictions which purchasers can circumvent by buying the product at a higher price.<sup>49</sup>

Finally, last year in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,<sup>50</sup> the Supreme Court simply overruled *Schwinn*, concluding from "scholarly and judicial authority" that many vertical restrictions have "economic utility" and that "the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*."<sup>51</sup> This decision certainly clarified the state of the applicable law, but it equally certainly complicated the task of litigating a vertical restriction case. Under *Continental T.V., Inc.*, vertical non-price restrictions can no longer be found illegal without the "elaborate inquiry as to the precise harm they have caused or the business excuse for their use"<sup>52</sup> that is required by a rule of reason analysis.<sup>53</sup>

The short of the matter is that while per se treatment is said to be the judicial means of avoiding economic analyses that are beyond the capabilities of the judicial mode of resolving disputes,<sup>54</sup> and while the current furor over the big case seems to be pregnant with an admission that courts are not capable of handling detailed economic analysis in

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44. *Id.* at 379.

45. *Salco Corp. v. General Motors Corp.*, 517 F.2d 567 (10th Cir. 1975); *Kaiser v. General Motors Corp.*, 396 F. Supp. 33 (E.D. Pa. 1975), *aff'd*, 530 F.2d 964 (3d Cir. 1976).

46. *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973).

47. *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398, 406 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968).

48. *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 936-38 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970).

49. *Carter-Wallace, Inc. v. United States*, 449 F.2d 1374, 1379-80 (Ct. Cl. 1971).

50. 433 U.S. 36 (1977).

51. *Id.* at 57-59.

52. *Id.* at 57 (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

53. See note 42 *supra*.

54. *United States v. Topco Assocs.*, 405 U.S. 596, 609 (1972).

numerous antitrust cases, not one significant category of cases has been added to the per se list since *Schwinn*, and the *Schwinn* category has now been deleted. There has even been some suggestion that the logical extension of the *Continental T.V., Inc.* case is application of the rule of reason to the traditionally per se offense of resale price maintenance,<sup>55</sup> thus extending the categories of cases which inherently require detailed—and hence prolonged and extensive—analysis.

Litigation under section 2 of the Sherman Act has met a similar fate. Judicial efforts to simplify such litigation have been extremely rare and have not reached the Supreme Court level at all. The Supreme Court has not reviewed a major monopolization case since *Grinnell Corp.*, and even in *Grinnell Corp.* it dodged the proposal of the lower court that a showing of monopoly power be deemed to create a rebuttable presumption of illegal monopolization.<sup>56</sup> In the years since, the Court has repeatedly declined certiorari petitions for review of section 2 cases.<sup>57</sup> Consequently, section 2 cases are still governed by broad generalizations that require in-depth analysis and concomitantly broad discovery, and the authoritative “lines of interpretation” of section 2 have still not hardened sufficiently to avoid the kind of uncertainty that virtually forces litigants to overprepare their cases.

The most notable attempts to draw sharp boundaries of legality in section 2 litigation have come from the Ninth Circuit, which has dealt with a number of cases under the attempt clause of section 2 in which an initial simplifying formula has been followed by subsequent qualifications and reformulations, often without a redeeming quality of clarification.

In *Lessig v. Tidewater Oil Co.*,<sup>58</sup> decided in 1964, the Ninth Circuit rejected “the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize”<sup>59</sup> and stated bluntly

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55. Address by R. Posner, Federal Bar Association Conference, *The Supreme Court and Antitrust Revisionism* (Nov. 2-3, 1977).

56. *United States v. Grinnell Corp.*, 384 U.S. 563, 576 n.7 (1966).

57. See, e.g., *Greyhound Computer Corp. v. International Business Machs. Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 98 S. Ct. 782 (1978); *Pacific Eng. & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 98 S. Ct. 234 (1977); *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *Yoder Bros. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *Hallmark Indus. v. Reynolds Metals Co.*, 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

58. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

59. *Id.* at 474.

that "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.'"<sup>60</sup> This holding was reaffirmed six years later in *Industrial Building Materials, Inc. v. Interchemical Corp.*<sup>61</sup> Thus, it would seem that inquiry into the difficult issues of relevant market and dangerous probability were excluded from the scope of discovery and trial.

But only one year later, in *Cornwell Quality Tools Co. v. C.T.S. Co.*,<sup>62</sup> the circuit held that to establish an attempt to monopolize case, the plaintiff must prove two elements: (1) that the defendant had a specific intent to monopolize and (2) that it had sufficient market power to come dangerously close to success.<sup>63</sup> The court also stated that Cornwell's "threshold problem in proving a prima facie case for any of its antitrust claims was proof of a well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact."<sup>64</sup> Thus, the Ninth Circuit seemed to be refuting *Lessig* and reinjecting into section 2 attempt cases the need to prove both relevant market and dangerous probability, and hence the need for broad economic inquiry.

One year later, in *Moore v. James H. Matthews & Co.*,<sup>65</sup> the court reformulated its position, again asserting, "[T]his Court has ruled that an attempt to monopolize under section 2 does not require proof of monopoly power. Proof that there is a 'dangerous probability of success' is certainly enough. Evidence of market power is relevant but not indispensable to a *Lessig* claim."<sup>66</sup> Of course, *Lessig* had fairly well implied that proof of market power is not even relevant (*i.e.*, "not in issue"), and that proof of a dangerous probability of success is not necessary either. Thus, *Moore* simultaneously remolded *Lessig* as a case which contemplated alternative means of proving dangerous probability and reinjected some vitality into *Lessig*. Exactly how much is still not clear.

Some months later, in *Hallmark Industry v. Reynolds Metals Co.*,<sup>67</sup> the Ninth Circuit asserted, citing *Lessig*, that specific intent is the only evidence of dangerous probability of monopolization that is necessary to a section 2 attempt claim, and that such intent may be inferred from conduct undertaken without legitimate business purpose and directed at

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60. *Id.* (citation omitted).

61. 437 F.2d 1336, 1344 (9th Cir. 1970).

62. 446 F.2d 825 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

63. *Id.* at 832.

64. *Id.* at 829.

65. 473 F.2d 328 (9th Cir. 1972).

66. *Id.* at 332 (citation omitted).

67. 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

setting prices or excluding competition.<sup>68</sup> Soon after, in *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*,<sup>69</sup> the court indicated that a section 2 attempt claim may be established either by a showing of sufficient market power in a traditionally defined relevant market or by establishing a section 1 trade restraint that demonstrates specific intent to monopolize. Of course, the second alternative does not eliminate the need to show actual adverse effects on competition in a meaningful economic market unless a *per se* violation is evident, in which case the plaintiff might get relief under section 1 unaided by section 2.

In subsequent decisions, the concept of "a *Lessig* claim" has been reshaped further, and it is still being formulated.<sup>70</sup> As a result of this constant state of flux and the overall poor recovery record of *Lessig* claims, even in the Ninth Circuit no prudent lawyer or district judge can expect *Lessig* to have any semblance of vitality in the practical context of limiting discovery or trial evidence in an attempt to monopolize case.<sup>71</sup>

In a second series of cases, the Ninth Circuit has toyed with simplification of the concept of predatory pricing in section 2 attempt cases. In *Hanson v. Shell Oil Co.*,<sup>72</sup> the court stated that "proof of pricing below marginal or average variable cost is prerequisite to a *prima facie* showing of an attempt to monopolize."<sup>73</sup> Although the court added that "such a showing, if made, would not show a *per se* violation. . . . [but instead] . . . merely clears the first hurdle and raises the question of justification,"<sup>74</sup> the below cost criterion was a simplistic, clear formula which could have cleared many section 2 attempt cases of a good deal of discovery and trial time. But the next two attempt cases in the Ninth Circuit<sup>75</sup> which dealt with pricing did not even mention *Hanson* in connection with the substantive offense, and in one the court invoked the concept that where a large company establishes a price (not shown to be below cost) designed to limit the competitive opportunities of others, that

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68. *Id.* at 12.

69. 512 F.2d 1264, 1276 (9th Cir. 1975).

70. *See, e.g.*, *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977); *Greyhound Computer Corp. v. International Business Machs. Corp.*, 559 F.2d 488, 504-05 (9th Cir. 1977), *cert. denied*, 98 S. Ct. 782 (1978); *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 813-15 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

71. Other circuits which have addressed the problem have generally rejected the *Lessig* approach. *See* cases cited note 36 *supra*.

72. 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

73. *Id.* at 1359 n.6.

74. *Id.*

75. *Greyhound Computer Corp. v. International Business Machs. Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 98 S. Ct. 782 (1978); *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

action may raise the possibility of an attempt to monopolize violative of section 2.<sup>76</sup>

In its most recent decision on predatory pricing under section 2, the Ninth Circuit stated that it "has been less than clear in formulating a succinct, definitive test to determine predatory pricing" and cited *Hanson* as a case in which it gave "some general guidelines,"<sup>77</sup> thereby completing the circle and returning the law on pricing claims to its normal status of uncertainty and vagueness.

In short, major developments in substantive antitrust law over the past decade or so seem to indicate that other than the most time-honored per se rules, simplistic, rigid formulas for separating the innocents from the wrongdoers are not tenable in antitrust litigation where the particular aggregation of facts in each new case seems to present unique nuances of economic right or wrong. The apparent unwillingness of the Supreme Court and other lower courts to "codify" substantive rules and the apparent inability of the Ninth Circuit to adhere to any codification which dispenses with the need for wide-ranging, individualized inquiry underscore the point that, when all is said and done, the complexity of so many antitrust cases is attributable to the substantive law on which they are premised.

### III. SOME MODEST PROPOSALS

The foregoing discussion is not intended as a criticism of the developing case law in antitrust, nor as an argument for any particular substantive rule of law, nor even as an argument for simplistic rules in general. It is rather intended to suggest that the line between energetic, legitimate competition on the one hand and anticompetitive behavior on the other is not always clear and cannot always be defined in advance or by simplistic criteria of universal applicability. Consequently, there is a strong proclivity in our system to evaluate antitrust claims on a case-by-case basis which takes into account the unique economic facts of each case and which necessarily results in expansive inquiry during discovery and trial.

The size and complexity that this ad hoc approach engenders in antitrust litigation is more or less impervious to change by procedural reform. As long as a plaintiff is required to demonstrate, or a defendant to disprove, the anticompetitive impetus of a defendant's acts and the specific anticompetitive consequences of those acts in the complex economic environment of a relevant market, that party must be allowed

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76. *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 814 n.2 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

77. *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 856 (9th Cir. 1977).

latitude in discovery and trial to do so. It is therefore unrealistic to expect that many big cases can be effectively shrunk by procedural devices and remain effective enforcement tools within the limits of the substantive law as it exists today.<sup>78</sup> Moreover, given the infinite variety of predatory schemes which can be devised and of circumstances which may coincide to make a particular set of acts anticompetitive *under those circumstances*, albeit not under others, it appears that such an alternative is not even desirable.

However, within the limits of the substantive law, there is room for eliminating some of the time-consuming but wasteful litigation activity that is currently a norm in big case litigation.

#### A. *Proposals for Improved Management of Individual Cases*

In light of the substantive source of size, the greatest prospect for controlling the big antitrust case may not be formal rule revision at all, but rather greater judicial involvement. The judge is in a position to restrain the lawyer's natural proclivities toward ever broadening the pleadings, issues, discovery and trial. Taking the needs of the individual case into account, he can structure discovery to curb the use of time-consuming, but largely useless, interrogatories, and of harassing marginal depositions and early in the game can force to a head those preliminary issues and defenses which may limit or dispose of the case.

All these things can be done under the present rules. But they cannot be done by perfunctory status conferences or by awaiting motions to compel discovery. They require special efforts on the part of the judge. In this regard, there are a number of possibilities for reform which are worthy of consideration:

##### 1. Roster of Judges

Development of a roster of judges in a position to oversee closely the development of a complex antitrust case by virtue of experience and time to become familiar with the facts of the case and to control the discovery may help improve the management of such cases. The factor of time is particularly important. Unless he has time to familiarize himself with the pleadings filed and to question the attorneys as to the essence of their contentions, no judge or human alive can be in a position to identify

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78. Nor is it realistic to expect that antitrust cases can be reduced to smooth simplicity by tinkering with the substantive law. It would take a drastic act of Congress, like the bill proposed two years ago by Senator Bayh, S. 1284, 94th Cong., 1st Sess. (1975), to so rework the law. Given the quick, strong adverse reaction to that proposal, it appears that a totally new rigid or simplistic set of antitrust laws is not in the offing.

factual issues, to force the lawyers to narrow issues, or to prevent the studied ambiguities by which lawyers adroitly avoid doing so.

## 2. Use of Magistrate in Other Cases

Not all cases filed in federal courts call for the judicial expertise or attention which complex antitrust litigation requires. Even if it is not feasible to develop a special roster of judges for antitrust cases, those judges which are handling antitrust matters might free themselves to devote more time to complex antitrust cases by more liberal use of magistrates, as provided in the Federal Magistrates Act,<sup>79</sup> to handle discovery and, with the consent of the parties, trial itself, in some of the more routine types of cases.<sup>80</sup>

## 3. Judicial Control of Discovery

Imposition of controls on discovery might be instituted either at the outset of the case or promptly upon the first appearance of abuse, delay or aimless meandering by the attorneys. For example, the "twenty-interrogatory" rule used increasingly by individual judges<sup>81</sup> to limit the number of interrogatories which may be propounded without leave of court may not be suitable for incorporation into the Federal Rules of Civil Procedure, but selective application in appropriate cases may go far to reduce the use of this discovery tool, which has become notoriously burdensome and largely unproductive.

Greater use of such sanctions as the imposition of costs for harassing discovery or delay, already provided for by the Federal Rules of Civil Procedure,<sup>82</sup> can also assist in encouraging lawyers to take care in framing and responding to discovery requests.

Similarly, greater use of requests for admissions and judicial scrutiny to prevent weaseling answers can help to narrow issues and focus the area of dispute.

## 4. Early Identification and Disposition of Controlling Legal Issues

In general, as the Supreme Court has noted, summary procedures should be "used sparingly" in antitrust litigation, particularly where

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79. 28 U.S.C. §§ 631-639 (1970 & Supp. V 1975).

80. *Id.* § 636 sets forth the jurisdiction and powers of the United States magistrates.

81. For example, Judge Turrentine in the Southern District of California; Judge Singleton in the Southern District of Texas in *In re Corrugated Carton* Antitrust Litigation, Judge Burns in the District of Oregon; Judge Renfrew in the Northern District of California; and Judge Will in the Northern District of Illinois in *In re Folding Carton* Antitrust Litigation.

82. *See* FED. R. CIV. P. 37.



motive and intent, evidence of which lies primarily if not exclusively in the hands of the defendants, are all-important.<sup>83</sup> However, there are some claims and defenses—*e.g.*, statute of limitations, fraudulent concealment, standing to sue, immunity, primary or exclusive agency jurisdiction, collateral estoppel—which can be determined early in a suit either on the basis of motion papers for partial summary judgment or with a limited factual hearing with testimony in open court. Early resolution of such issues helps to define the perimeter of the case and forces the parties to limit all further inquiry to the central disputes outstanding between them.

#### 5. Use of a Non-Trial Judge, Magistrate or Master Solely for Purposes of Settlement Discussion

Discussion with a disinterested third party can be a very useful mechanism for settling disputes. But lawyers may generally and understandably feel inhibited about discussing in total candor a case, particularly its weak points, with a judge assigned to that case for trial as well as pretrial. Use of a magistrate or even another judge to guide settlement discussions can obviate fears that admissions or characterizations made during the discussion will return to haunt the parties at trial. This procedure was used with success in *In re Boise Cascade Securities Litigation*,<sup>84</sup> a securities case estimated to take several months in trial, which was settled after a "settlement judge" from another district spent a week in discussions with the parties.

#### 6. Setting a Firm and Realistic Trial Date

Many cases amble along for years before the court or the parties even begin to mention trial. Once a definite, realistic trial date is set, both parties are under a real pressure to expedite discovery. But the date must be firm and realistic in order to serve the purpose of encouraging both sides to proceed with dispatch.

#### 7. Adoption of Mechanical Procedures to Expedite Trial

There seems to be some feeling among antitrust lawyers and judges that lay juries cannot understand the intricacies of an antitrust suit sufficiently well to render reasoned verdicts. But the simple fact is that almost nothing is done to help them understand the nature of their task. In most cases, they are told in preliminary statements what facts each lawyer expects to prove. Then a plethora of factual testimony and

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83. *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962).

84. 420 F. Supp. 99 (W.D. Wash. 1976) (order striking demand for jury trial).

contradictions is literally thrown at them, often through the boring medium of depositions recited at length by lawyers. Only then, after all the testimony is in, are they really told what this fuss is all about, what the elements of the legal violation of, say, "monopolization" are, and what it takes to establish those elements. The jury's task would be far more reasonable if this time-honored but inefficient order of things were changed to include:

- (a) Agreed-upon statements of fact;
- (b) Preliminary instructions informing the jury of the elements of the legal violation charged at the outset of the case;
- (c) Opening statements of broadened scope, allowing the lawyers some leeway in informing the jury not only of the facts they expect to prove but of their view of the legal significance of those facts;
- (d) Increased use of visual presentations, including charts, diagrams, and blowups of major documents;
- (e) Curbs on cumulative testimony;
- (f) Limitations on the number of experts testifying;
- (g) Statements during trial by the court, counsel, or both, describing for the jury the areas that have been covered and the next upcoming phase of proof.

None of these suggestions is particularly novel or particularly dramatic. None will serve to convert the big antitrust case into simple, speedy or small litigation. With such reforms, antitrust cases will still very often be big, as the substantive law requires, but they may be less wasteful.

#### *B. Some Proposals for Reducing Duplication Between Cases*

The adoption of the *Manual for Complex Litigation*,<sup>85</sup> with its procedures for coordinating or consolidating similar private cases through reference to the Judicial Panel on Multidistrict Litigation, has gone a long way to reduce wasteful duplication between such cases. But there remains one discrete group of cases which is susceptible to some significant shrinkage by procedural reform, namely, the private suits which follow in the wake of government actions. At the present time, there is an enormous amount of duplication in discovery and trial of government and private suits challenging the same conduct by the same defendants, and often this duplication serves little purpose other than allowing the defendant to impede or delay enforcement of the antitrust laws.

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85. 1 Pt. 2 MOORE'S FEDERAL PRACTICE (2d ed. 1948).

### 1. Collateral Estoppel

Nowhere is the wasteful and unnecessary duplication of effort more apparent than in those private cases which follow successfully completed government suits. Under section 5(a) of the Clayton Act,<sup>86</sup> private plaintiffs may use a final judgment or decree in government antitrust proceedings as prima facie evidence as to all matters on which it would operate as an estoppel between the government and the defendant. The section has limited practical value in terms of reducing discovery and trial time because, in practice, the private litigant must relitigate the government's case in order to establish his own convincingly and to respond to the defenses raised by his opponent. As one commentator has said,

[s]ection 5, in and of itself, means little to a plaintiff unless he fortifies its impact upon the minds of the jury with a dramatic reproduction, *de novo*, of the same kind of evidence which resulted in the Government's earlier victory. . . . Section 5 substantially decreases neither the length of treble damage suits, the extent of preparation nor the cost.<sup>87</sup>

In enacting section 5(a), Congress clearly intended to confer a special benefit on private antitrust plaintiffs and thereby stimulate private antitrust enforcement.<sup>88</sup> But at the time it did so, the doctrine of mutuality, which held that only one who was party or privy to a prior proceeding and therefore bound by the final judgment in it could invoke that judgment as collateral estoppel against another, was in full force throughout the country and was even thought to have a constitutional due process dimension. Thus, in 1914, when section 5(a) was passed, the limited benefit of a prima facie rule was believed to be the outer limit of congressional power to facilitate private antitrust litigation.<sup>89</sup>

Time has proved this belief wrong. Over the years, the doctrine of

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86. 15 U.S.C. § 16(a) (Supp. V 1975).

87. Note, *Clayton Act, Section 5: Aid to Treble Damage Suits?*, 61 YALE L.J. 417, 425 n.33 (1952) (quoting communication, dated May 17, 1951, from Harold Stickler, attorney for the plaintiff in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951)). Similar statements by the attorney for the defendant in that case are also set out in the same footnote. Even the Supreme Court has recognized that the practical value of the prima facie rule of section 5(a) is often limited. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965).

88. S. REP. NO. 698, 63d Cong., 2d Sess. 45, 51 CONG. REC. 16,276 (1914).

89. As first proposed by the House, the bill would have given government decrees conclusive effect in subsequent private actions. It was then honed into a prima facie rule in the Senate. The Senate committee felt that although there were "considerations of public policy which favor the House provision of conclusiveness," the House version might not withstand judicial review; the House ultimately agreed. *Id.*

mutuality has been discredited and application of the doctrine of collateral estoppel has expanded enormously. The principal considerations impelling this change in the common law have been judicial economy and a growing recognition that there is no basic unfairness in precluding a party who has had one "full and fair opportunity to litigate" an issue from relitigating it when the identity of his adversary changes.<sup>90</sup>

Today, there is little doubt that under common law principles of collateral estoppel, a private antitrust plaintiff generally could use a prior judgment or decree in a government suit to preclude relitigation of the issues actually and necessarily decided against the defendant. Indeed, in at least one instance where one private antitrust suit followed another, it was held that collateral estoppel was available in the second case.<sup>91</sup> But in cases where the private suit follows a government suit, some courts have held that section 5(a) defines the limit of the private plaintiff's right to use the prior judgment, that it is *prima facie* evidence only.<sup>92</sup>

As one commentator has stated,

[t]he irony is apparent—a statute which was designed to aid private antitrust litigants now deprives this supposedly preferred class of litigants of a right to which they would otherwise be entitled. This result is not required by the text or legislative history of the Clayton Act, the law of collateral estoppel or the right to jury trial.<sup>93</sup>

In light of the extreme burdens imposed on both courts and parties by litigation of the typically "big" antitrust case, the economy motive for extension of collateral estoppel is particularly acute in the antitrust arena. Nor is there any compelling consideration of fairness which requires that antitrust defendants be permitted to duplicate litigation when others are

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90. As the Supreme Court stated in its leading decision on collateral estoppel, [t]he courts have often discarded the [mutuality] rule while commenting on crowded dockets and long delays preceding trial. Authorities differ on whether the public interest in efficient judicial administration is a sufficient ground in and of itself for abandoning mutuality, but it is clear that more than crowded dockets is involved. The broader question is whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue.

*Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 328 (1971) (footnote omitted). The Supreme Court has now effectively answered this broader question in the negative. *Shore v. Parklane Hosiery Co.*, 565 F.2d 815 (2d Cir. 1977).

91. *In re Gypsum Cases*, No. 46414-A (N.D. Cal. Dec. 22, 1971); *see also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 758-62 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

92. *Compare Purex Corp. v. Procter & Gamble Co.*, 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1971) with *Illinois v. Huckaba & Sons Constr. Co.*, [1978] 845 ANTITRUST & TRADE REG. REP. (BNA) F-1 (S.D. Ill. Dec. 14, 1977).

93. Comment, *The Use of Government Judgments in Private Antitrust Litigation: Clayton Act Section 5(a), Collateral Estoppel, and Jury Trial*, 43 U. CHI. L. REV. 338, 374 (1976).

not. Government cases which go to trial are serious business, and defendants may reasonably be expected to argue and present all favorable facts and contentions as vigorously as possible on that first round. A growing body of authority suggests that the anachronistic limitation of section 5(a) can be eliminated by judicial interpretation and that legislative intervention is not required.<sup>94</sup> But one way or the other, given the contemporary range of common law collateral estoppel, the wasteful duplication engendered by a prima facie limitation should be eliminated.

## 2. Disclosure of Discovery Collected by the Government

Much duplication in discovery efforts could be avoided by adoption of a policy, along with appropriate procedures to implement it, that information accumulated by the government in its antitrust litigation be freely available to private litigants, notwithstanding entry of a consent decree or nolo contendere plea.

The great majority of criminal antitrust suits are terminated by a plea of nolo contendere which deprives private litigants of even the limited benefits of section 5(a) of the Clayton Act.<sup>95</sup> If the government has brought a companion civil suit, it is then usually terminated by a consent decree which is also unusable as prima facie evidence of violation in private suits.<sup>96</sup> As a result, the private litigants generally derive no benefit from the outcome of government suits, even though a nolo plea is deemed an implied admission of guilt at least for sentencing purposes, even though the terms of sentencing or of a consent decree are highly favorable to the government, and even though there is a statutory scheme which is theoretically designed to aid and encourage private litigation.

The rationale for this seemingly anomalous result is that defendants are to be encouraged to avoid lengthy and involved trials and are therefore induced to plead nolo contendere or enter consent decrees.<sup>97</sup> Yet it is doubtful whether avoiding the donnybrook in an initial government action does anything more than transfer to other judges, who are presiding over treble damage suits, the greater burden of even more lengthy and

94. See *Illinois v. Huckaba & Sons Constr. Co.*, [1978] 845 ANTITRUST & TRADE REG. REP. (BNA) F-1 (S.D. Ill. Dec. 14, 1977). The comment cited note 93 *supra* takes the position that § 5(a) does not preclude application of collateral estoppel, as does *McWilliams, Federal Antitrust Decrees: Should They Be Given Conclusive Effect in a Subsequent Private Action?*, 48 Miss. L.J. 1 (1977). But see *Purex Corp. v. Procter & Gamble Co.*, 308 F. Supp. 584 (C.D. Cal. 1970), *aff'd*, 453 F.2d 288 (9th Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972); Comment, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 YALE L.J. 541 (1976).

95. *United States v. Brighton Bldg. & Maintenance Co.*, 1977-1 Trade Cas. ¶ 61,436 (N.D. Ill. 1977); *United States v. Saks & Co.*, 1975-1 Trade Cas. ¶ 60,219 (S.D.N.Y. 1975).

96. *United States v. Saks & Co.*, 1975-1 Trade Cas. ¶ 60,219 (S.D.N.Y. 1975).

97. *Id.*; *City of Burbank v. General Elec. Co.*, 329 F.2d 825 (9th Cir. 1964).

involved trials preceded by lengthy and involved discovery which, on the basic question of defendant's liability, largely duplicates the work already done by the government. Therefore, a strong argument can be made that the public interest would be better served were section 5(a) amended to give nolo pleas, at least, the same effect as guilty verdicts or, in the absence of statutory revision, were judges to use their discretion in allowing nolo pleas or approving consent decrees far more sparingly in antitrust litigation than has been the case in the past.<sup>98</sup>

At a minimum, however, the public interest would be well served by a policy of disgorgement of evidentiary data—notes or transcripts of witness interviews and testimony as well as documents and factual analyses—collected by the government in all cases, including those terminated by a consent decree or nolo plea. Since both forms of disposition are subject to prosecutorial advice and judicial approval,<sup>99</sup> there is no clear reason why judges could not make such disclosure a condition of acceptance of the disposition. While a good part of such material can be obtained through separate civil discovery or under the Freedom of Information Act,<sup>100</sup> an express condition of disclosure would be helpful in eliminating any need for wrangling over the private parties' right to all of it. Such a policy of disgorgement would have a most significant impact on those private suits which follow criminal indictments. At present, rule 16(e) of the Federal Rules of Criminal Procedure and the principle that a plaintiff must show "particularized need"<sup>101</sup> in order to be entitled to

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98. Several courts have indicated that the effect of a plea of nolo contendere on private litigants should be taken into account in determining whether or not the court should accept the plea, but in very few reported decisions has a nolo plea been rejected even in part based on such considerations. *Compare, e.g.,* United States v. Brighton Bldg. & Maintenance Co., 1977-1 Trade Cas. ¶ 61,436 (N.D. Ill. 1977) (plea denied), United States v. American Radiator & Standard Sanitary Corp., 288 F. Supp. 696 (W.D. Pa. 1968) (plea denied without prejudice to renewal motion), and United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955) (plea denied) with United States v. Saks & Co., 1975-1 Trade Cas. ¶ 60,219 (S.D.N.Y. 1975) (plea allowed), United States v. Burlington Indus., Inc., 1965 Trade Cas. ¶ 71,376 (S.D.N.Y. 1965), United States v. R. & G. Sloane Mfg. Co., 1973-1 Trade Cas. ¶ 74,289 (C.D. Cal. 1972) (plea allowed), and United States v. B.F. Goodrich Co., 1957 Trade Cas. ¶ 68,713 (D. Colo. 1957) (plea allowed). Other courts have expressly stated that a nolo contendere plea should not be refused in order to aid private litigants. *E.g.,* United States v. Rubber Mfrs. Ass'n, 1959 Trade Cas. ¶ 69,435 (S.D.N.Y. 1959); United States v. Safeway Stores, Inc., 20 F.R.D. 451 (N.D. Tex. 1957).

99. FED. R. CRIM. P. 11. *Cf.* United States v. Lake Asphalt & Petroleum Co., 1960 Trade Cas. ¶ 69,835 (D. Mass. 1960) (consent decree specifically provided that it would constitute prima facie evidence in certain suits by state and local governments).

100. 5 U.S.C. § 552 (1970 & Supp. V 1975), as amended by Act of Sept. 13, 1976, 90 Stat. 1241.

101. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958).

peruse grand jury materials impede disgorgement of facts underlying an indictment and sometimes effectively render years' worth of work by government attorneys wholly useless.

Several courts have implicitly recognized that the justification for maintaining the secrecy of grand jury testimony drops off precipitously after indictment and even more so after final disposition of the criminal suit.<sup>102</sup> One recent decision has noted that of the numerous justifications for grand jury secrecy, only one operates to any meaningful degree after the defendant has been sentenced: "The reason that survives the grand jury's term and the criminal proceeding is the need to protect the grand jury witnesses from retaliation, lest witnesses before future grand juries be inhibited by the knowledge 'that the secrecy of their testimony [may] be lifted tomorrow.'"<sup>103</sup>

The court went on to note that this reason is "considerably diminished" when the witness's corporate employer has had access to his testimony and is reduced to a virtual nullity when the employer has disclosed the testimony to co-defendant industry members.<sup>104</sup> As a practical matter, in many, if not all, cases, corporate defendants and other industry members probably know who "talked" whether or not they actually obtain and read grand jury transcripts.<sup>105</sup>

The question which then arises is whether this reason is sufficiently strong to justify imposing on the system the burden of reaccumulating the testimony already gathered. The ever-increasing concern over the strain which massive discovery places on the system and the apparent trend toward weakening the "particularized need" requirement suggest that the judiciary is coming to recognize that it is not.

#### IV. CONCLUSION

The "big case" has become a permanent fixture in antitrust litigation. It arises in large measure from the complex subject matter with which antitrust law deals and from a legal system of evaluating antitrust claims which values flexibility more than simplicity in dealing with the almost infinite variety of devices which may be perceived as stifling free and

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102. See *Petrol Stops Northwest v. Douglas Oil Co.*, 571 F.2d 1127 (9th Cir. 1978); *Illinois v. Sarbaugh*, 1977-1 Trade Cas. ¶ 61,370 (7th Cir. 1977); *United States Indus., Inc. v. United States Dist. Court*, 345 F.2d 18, 21-22 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965).

103. *Illinois v. Sarbaugh*, 1977-1 Trade Cas. ¶ 61,370 (7th Cir. 1977) at 71,312 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)).

104. *Illinois v. Sarbaugh*, 1977-1 Trade Cas. ¶ 61,370 (7th Cir. 1977) at 71,312. *But see Texas v. United States Steel Corp.*, 1977-1 Trade Cas. ¶ 61,267 (5th Cir. 1977).

105. It is regular and prudent practice to "debrief" each employee witness after he or she has testified.

open competition. Such a system inherently tends toward expansive and expensive litigation, for the detailed exploration of facts is crucial and precedents are of limited value. The big case can be streamlined and duplicative discovery work can be reduced significantly. But as long as a commitment to vigorous antitrust enforcement persists side by side with a desire to avoid the straightjacketing effects of rigid, substantive formulas (and this latter seems to be increasing), there can be no procedural panacea to shrink big antitrust cases to proportions comparable to garden variety negligence suits.



