ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, July 28, 2005

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

The hearing convened, pursuant to notice, at 12:32 p.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
DENNIS W. CARLTON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General Counsel

WILLIAM F. ADKINSON, JR., Counsel
TODD ANDERSON, Counsel
ALAN J. MEESE, Senior Advisor
HIRAM ANDREWS, Law Clerk
KRISTEN M. GORZELANY, Paralegal

CONTENTS

Civil Remedies

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his or her testimony.

PROCEEDINGS

CHAIRPERSON GARZA: Let me welcome our

distinguished panelists on behalf of the Commission, and thank you for being here today to participate in our hearing on civil remedies issues. This panel in particular will be addressing the damages multiplier, attorneys' fees, and prejudgment interest.

The Commission, as you know, is in the process of gathering information on the issues selected for study. These hearings are an integral part of the process. They enable the Commission to hear from a broad range of experts and to probe and understand the competing arguments, and because the hearings are open, they inform the public as well.

The topics we have selected for study present complex and important issues upon which reasonable people may disagree and have disagreed and as to which there may be no easy answers. Your presence here today and your thoughtful writings make this clear.

It's important to bear in mind that the fact that the Commission has selected an issue for study does not mean that we have already decided on a particular recommendation or particular findings; we have not. Our deliberations will be conducted in the open, just as our selection of issues for study was made in the open, in public meetings following these next several months of hearings and study.

Again, I would like to thank the panelists for being a part of this process, and let me take just a minute

to explain the format that we will follow. First, we would like to give each of our panelists an opportunity to summarize his testimony or make his statement. We ask you to try to keep your statements to about five minutes apiece so as to maximize the time for discussion. For your convenience, we have devices on the tables with a green, a yellow, and a red light.

After each panelist has made his statement, there will be questions from the Commissioners. In this case, Commissioner Warden will initially lead the questioning for the Commission. He will have about 20 minutes to do that. Following that, each Commissioner will have about five minutes to put forth any questions he or she may have. The order, Commissioners, is on the sheet that should be at your seat. Any Commissioner, of course, may choose to pass on their questioning.

The hearing is being recorded. Transcripts will be made available to the public. Hard copies of the witness statements are available in the hallway outside the room as you came in.

So, with that, I would like to open the hearing, and Tad Lipsky, let me start with you, if you are ready

Panel I: Damages Multiplier, Attorneys' Fees, and Prejudgment Interest

MR. LIPSKY: I would be glad to. I'm very appreciative of the opportunity to testify, and one thing

that the Commission has already firmly established is that I am way behind on my reading and am getting farther behind. It's been very enlightening to go through the submissions and be reassured that antitrust still attracts a lot of interest by responsible and concerned citizens and that, by and large, people follow the label directions on their prescribed medications.

But to turn serious, I want to focus on just three main points, which you can largely derive from my testimony.

First, in many respects the easiest point to make, but the most important one, is that the Commission, like the rest of the antitrust community, is faced with this disturbing and very poorly understood fact that, even as the criminal antitrust remedies and fines have soared skyward, cartel conduct continues at a regular pace. And although the consequences are clear, the causes, I think, are virtually unknown. We need to understand the behavioral pathology that leaves people confronted with the tangible risk of tremendous liability and actual incarceration to, nevertheless, engage in this kind of behavior. And so that is something of serious concern to anybody interested in good antitrust enforcement in a competitive market economy. And so my number one conclusion would be, let's not right now – while we're in the state of uncertainty about this behavioral relationship – let's not limit the remedies applicable to cartel conduct until we have a better understanding of why it

is still occurring.

Second, every advocate in every case has a strongest argument and a weakest argument. And among those who advocate the *status quo* for treble damages, the weakest argument is that automatic trebling and mandatory payment of the winning plaintiff's attorneys' fees are appropriate uniformly in all antitrust cases.

The reason that this is the weakest argument is that conduct once considered reprehensible and damaging, like horizontal mergers or supplier assignment of exclusive distribution territories, is now recognized as ambiguous, in effect, and the possibility of chilling desirable conduct is something that needs to be taken into account in the fashioning of substantive rules and procedures. It's the lesson of *Brunswick* and *Associated General Contractors* and *Sylvania* and *Broadcast Music* and *Matsushita* and *Brooke Group* and all the other cases cited in the testimony, establishing the modern trend of the Supreme Court antitrust doctrine with regard to substance, procedure, and evidence – everything except remedy, which by statute is mandatory treble damages and fee shifting in favor of winning plaintiffs.

I believe that the proof that this is the weakest argument in the *status quo* position is that it actually loses almost every time it's made. You had the Export Trading Company Act. You had the NCRA, which became the NCRPA. You had the Standards Development Organization Advancement Act,

and two other statutes that I think should be referred to, although they are perhaps not strictly related to detrebling, but they are very much in this pattern, and that is the exemption that was recently enacted for the Medical Resident Matching Program, which I believe was an outgrowth of a treble damage suit, and the Need-Based Educational Aid Act, which, as I understand it, basically codifies the relief obtained in another famous joint venture case, which has been referred to as the Ivies case or the MIT case.

For those who support competition subject to a coherent set of antitrust principles, it is always troubling to see a narrow amendment succeeding because the existing enforcement system will not provide the flexibility and wisdom for which judicial application of the Sherman Act is justly renowned. Narrow changes are sometimes essential or plainly justified, my favorite example being the Soft Drink Interbrand Competition Act. But it is almost always the case that it would have been better if the adjustment had occurred within the existing system of rules.

The Federal Trade Commission of that day had a clear opportunity to conform its approach on soft drink territories to the Supreme Court law, but it chose to do a 180˚. Faced with similar treatment before the courts or the enforcement agencies, those who believe their conduct is competitively benign or otherwise justified go to Congress and, rightly or wrongly, use the image of the turbocharged,

multifaceted remedies and procedures of antitrust to make a case that their conduct should be let off the hook or at least be subject to a different standard of remedy. This can have a corrosive and unfortunate influence on the Sherman Act.

The existence of the treble damages remedy for conduct that is not reprehensible is often one of the main drivers of this corrosive evolution, in my opinion.

Now, if I were called to defend the Alamo, to defend the treble damages remedy in all cases, I would certainly want to be doing it with these legal titans seated on the right end of the podium here today. They are definitely the Davy Crockett and Jim Bowie of the antitrust bar. But I would still have a problem with the outcome even if I believed in the cause – and I don't really believe in the cause of mandatory trebling in every single case and in all circumstances. The staunchest defenders of mandatory trebling claim it doesn't do justice in each case, usually because plaintiffs are undercompensated and defendants are under-deterred. But in making the claim that in practice there are enormous variations in the degree to which damage awards suit the purposes of a particular case, they equally suggest we should be considering changes that improve the *status quo*.

It's a dialogue that reminds me very much of the old joke about the three economists who go hunting in the

woods. They see an elk, and the first economist takes out his shotgun: Bam!, and he misses to the left. And the second economist takes out his shotgun: Bam!, misses to the right. And the third economist jumps up with his hands in the air and says, "We got him!"

We shouldn't be satisfied with antitrust remedies that go wide of the mark in most cases and that seem effective only if you look at an irrelevant average.

I can finish up very quickly just by saying that, just since I submitted my testimony, there has been a very favorable development in this joint venture area, this overt horizontal conduct area, where I think the case for detrebling is the strongest, and that is the D.C. Circuit's ringing endorsement of the *Massachusetts Board of Optometry* standard in their affirmance of the FTC's decision in the *Three Tenors* decision. And I don't have time to go into it now, obviously, but I think it's a very good evolution of joint venture standards and could provide a very sound basis for drawing a clear distinction between naked cartel conduct, which is properly subject to trebling, and conduct undertaken with plausible efficiency justification, and, you know, detrebling in that area is the main thrust of my testimony.

Thanks very much.

CHAIRPERSON GARZA: Thank you very much.

Professor Cavanagh?

PROF. CAVANAGH: Thank you, Madam Chairman. I

appreciate the opportunity to be here at the invitation of the Commission to share my views on the future of antitrust. It's a little humbling for me to sit here and look at this distinguished assemblage and see my 30 years in antitrust flash before my face.

The antitrust laws are 115 years old. Congress authorized the Department of Justice to enforce the antitrust laws with the full panoply of remedies, including criminal sanctions. But it also authorized a private right of action to complement the Department of Justice enforcement proceedings. That private action was unique then and is largely unique now when you compare it to the way the rest of the world works, particularly in antitrust.

The treble damages remedy is indeed a powerful tool. Mandatory trebling, attorneys' fees for prevailing parties, tremendous incentives to bring lawsuits, and proponents of the current system would suggest that the treble damages system has served us well. Opponents suggest that it is unfair, that it is chilling, and that there are potentially catastrophic effects on a company's bottom line. And, of course, the Commission is going to have to take a look to see whether or not we should be preserving the treble damages remedy or do something else.

Now, given that the antitrust laws have been in place for 115 years, it seems to me that they come before us with a presumption of validity, and the burden for change is

on the opponents of the current system. And I don't believe that the case for change has been made.

Now, at the outset, the antitrust debate can grow complicated very, very quickly. We can start talking about Type 1 error, optimal deterrence, and game theory, among other things, that complicate the discussion. But I think things are really very simple, and I think the enduring and endearing virtue of the treble damages remedy is its simplicity, especially in giving incentives to detect and prosecute cases, to provide rough justice for calculating damages caused by antitrust violations, to deter conduct, to provide for disgorgement of ill-gotten gains, and to punish violators.

Now, I don't think the case for changing things has been made. Unfairness? To the extent we have strike suits, we can deal with them through Rule 11 and other sanctions procedures, insubstantial claims, summary judgment, and motions to dismiss.

Now, over the last eight years – and I worked with the Antitrust Section – one thing that I've done each year at the ABA meeting is provide the year in antitrust through a procedural lens. And what I do is look at all of the antitrust cases for the previous year where there were motions to dismiss and motions for summary judgment. And, not surprisingly, those motions come up in virtually every case, and they're frequently successful. I'm not

particularly sympathetic to the notion that the cards are stacked against defendants.

The second concern, the catastrophic impact on the bottom line caused by trebling, I don't think is a problem in antitrust, and let me draw a distinction. And there was an article on the front page of the *New York Times* last week about asbestos litigation. Over the last 30 years, the *Times* reported that some 20 companies had gone out of business in asbestos, and damages have been – or payments have been made over $70 billion. And there's not even trebling in tort litigation, although there may have been punitive damages there.

But my point is that, if there's a problem with antitrust damages, if there's a problem with antitrust, it's not trebling. There might be something more generic in the system, but I think the fact that we have greater problems in terms of effect on bottom lines in the tort area, where you don't even have trebling, suggests that it's not – the treble damages remedy is really sort of a straw man.

Lastly, and as Tad has noted, Congress has acted to mitigate any harshness with trebling on a case-by-case basis with decisions in the joint venture area, standard setting, amnesty, and, you know, the fact that local governments are not subject to treble damages. In short, I think what we have here over the last 115 years is an antitrust ecosystem that's in delicate balance, and I urge this Commission to

preserve that delicate balance.

Thank you.

CHAIRPERSON GARZA: Thank you.

Professor Lande?

PROF. LANDE: Thank you very much. My testimony today is on the subject of myth. A myth is a tale that has never been proven. It is instead just assumed to be true, often by self-interested parties.

By analogy, unicorns, witches, or dragons might well exist, but unless somebody produces one, this Commission should characterize each as only a myth. This Commission should not make public policy determinations on their assumed truth. The principal myths of antitrust damages are:

First, that antitrust violations give rise to treble damages. This is a myth. Second, there is duplication of antitrust damages because some defendants pay sixfold or more damages. This is a myth.

Third, the size of damages caused by antitrust violations is relatively modest, so payouts are out of proportion to these damages. This causes over-deterrence.

And, finally, even though treble damages should be awarded for hard-core violations, they should be lower for other kinds of violations.

If I am correct that each of these is only a myth, then they should not influence this Commission when it makes its recommendations.

Myth number one: Antitrust violations give rise to treble damages.

If you look at antitrust's so-called treble damages remedy carefully, you will find that it is really only approximately single damages. This is in part because of a lack of prejudgment interest, which is virtually never awarded in antitrust cases. Due to this factor alone, the so-called treble damages are really only around double damages.

Moreover, antitrust violations also give rise to allocative inefficiency, which also is never awarded in antitrust cases. Judge Easterbrook calculated that, on the average, allocative inefficiency effects of market power are probably almost half as large as the transfer effects. He concluded that, due to the omission of this factor alone, and I quote, "'Treble damages' are really double the starting point of overcharge plus allocative loss."

Now, you probably see where I'm going. What would happen if we were to make both of these three-down-to-two adjustments at one time? What would happen to the so-called treble damages multiplier? However, there are six more adjustments that we should make, such as for umbrella effects and statute of limitations. If you make all of these adjustments together, you'll find that what we think are "treble damages" are really only about single damages.

However, the damage multiplier really should be

greater than one, because not all antitrust violations are detected and proven. If it's not greater than one, then defendants would have an incentive to violate the antitrust laws. For example, if we catch a third of all violations, if we detect and prove a third of all violations, then treble damages are appropriate. Yet damages today currently are only single-fold.

The second myth has to do with duplication of antitrust damages, because allegedly, some defendants currently pay sixfold or even more damages. Some argue that the combination of three-times damages to direct purchasers, plus another three to indirect purchasers and so on, leads to sixfold or even larger damages. However, this duplication possibility is only theoretical. It has never occurred even one time in the real world.

If you read the statements of witnesses before the AMC carefully, as well as writings of critics who have discoursed on this subject, they always say that duplication could occur, but they never provide even one real-world example where it has occurred. We have been living with *Illinois Brick* for more than 25 years, and the defendant's nightmare scenario has never happened even one time.

Respectfully, this Commission should not just take the defendants' word for the duplication argument. This Commission should demand evidence that neutral parties – judges or juries – have concluded that defendants had to pay

sixfold damages.

Moreover, from a public policy perspective, anyone wanting to change the existing system should have to present more than just a single anecdote. They should have to present a pattern of evidence. Yet, such a pattern has never been shown. The duplication argument should be ignored.

I see I'm getting low on time. I will have to ask you to see the written version of my testimony for myths three and four. Myth three is that the damages caused by antitrust violations are relatively modest, and payouts are out of proportion to them. However, if anything, the opposite is true. A survey that my coauthor, John Connor, and I did, which we summarize in our written testimony, shows that the damages from cartels are probably two or three times as large as was conventionally believed. We also show that the current level of cartel fines is insufficient to stop most cartel violations. This might be the answer to Tad Lipsky's question, why do people keep fixing prices when it's illegal, they can go to jail, *et cetera, et cetera*? I think the reason is that penalties, even though they've gotten much larger in recent years, should still be doubled or tripled.

My written testimony will also discuss the fourth myth, how, even though treble damages should be awarded for hard-core violations, they allegedly should be lower for other violations. I will have to refer you to my written comments because I'm out of time.

In conclusion, the only changes that this Commission should recommend is that prejudgment interest should be awarded in antitrust cases and cartel penalties should be significantly raised.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Susman?

MR. SUSMAN: I don't have a very heavy burden today because I see it is going to be four and one-half out of five in favor of keeping the law the way it is. In nearly 40 years representing both plaintiffs and defendants in antitrust litigation, I have only once recovered more than actual damages for a plaintiff, and that was after the case was affirmed on appeal by the Fifth Circuit. That was the *Affiliated Capital* case. And I have never represented a defendant who paid more than actual damages to settle an antitrust claim. That's because, particularly for the last 20 years, there have been so many substantive legal obstacles put in the way of the private plaintiff. Add to that a business-friendly judiciary ever ready to grant summary judgments or to reverse jury verdicts in antitrust cases, and a pool of jurors whose hearts have been hardened by tort reform, and no plaintiff's lawyer ever expects to recover more than actual damages when deciding to file or settle a private antitrust case.

When a number of us appeared on an ABA panel 20

years ago to address the subject of reassessing antitrust remedies, no one could make much of a case even then for eliminating mandatory treble damages. Today, that task would even be harder given the demise of the *per se* rule, the erection of standing and direct purchaser doctrines, the adoption of *Matsushita* standards and the use of *Daubert* filters on expert testimony.

The only effects that the theoretical availability of treble damages has on antitrust enforcement today are to give the plaintiff with a meritorious claim some ammunition for achieving a settlement closer to his actual damages and to give the antitrust corporate counselor some ammunition for warning his client to avoid clearly illegal conduct.

If corporations know that all they have to do is disgorge their unlawful gains if they get caught, they will have little incentive to keep their executives away from the line. Isn't the lesson from Enron and its progeny that we need more rather than less deterrence of corporate executive excesses and arrogance?

If mandatory treble damages were no longer available in federal antitrust cases, plaintiff's lawyers like me would file their antitrust cases in state courts under state statutes that provide for enhancement or simply as a tort seeking punitive damages. They would forum-shop for friendly jurisdictions where *voir dire* is allowed to weed out the tort reform-minded jurors and where verdicts need not

be unanimous.

In none of the testimony or submissions to this Commission have I seen any reference to even a single case, even a single anecdote or horror story, where a company was coerced by the threat of treble damages to forego beneficial conduct or to pay to settle a frivolous claim. A remedy that has been part of our laws for over 100 years should not be tinkered with in the absence of a lot of empirical evidence that it's causing harm, and there is none here.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Boies?

MR. BOIES: Thank you very much. It's a pleasure to be here.

I think one of the things that is remarkable is that the panelists, who come from very different backgrounds and very different experiences, all share two common views: one is that the antitrust laws as a whole, including mandatory treble damages, do not adequately deter illegal antitrust conduct; and, second, that it would be premature, based on the evidence available, to make any change in the deterrence that exists under current law.

If you look at what has happened over 115 years, I don't believe that you can find any significant instances – and this, of course, is a point that other panelists have already made – where there has been over-deterrence, where

there have been windfalls for plaintiffs, where desirable economic conduct has been deterred. Whether you call those myths or speculation, the fact of the matter is that there simply isn't a basis for making a change in law based on those kinds of considerations.

What we know, and we know as a fact, is that damages in antitrust cases are rarely, if ever, of an amount that exceeds single damages under the current system. What we know as a fact is, if any attempt to change the treble damages remedy were made, there are many other things that would have to be changed at the same time. You would have to have mandatory prejudgment interest. You would have to extend the statute of limitations. You would have to change the rules that have grown up that restrict damages. You would have to allow damages that are now considered speculative in order to fully compensate injured parties and to deter the parties from violating the antitrust laws, because if you know, as we all know, that some of the damages that exist and flow from an antitrust violation, and some of the benefits that flow from an antitrust violation to the violator are speculative under current law, you've got to find some way to compensate the victim and some way to deter the violator, or you will simply have unfairness to the victim and continued incentives at the corporate level to violate the antitrust laws.

So there are many changes that would have to be

made to the antitrust laws if you were going to consider changing mandatory treble damages, or else you're going to throw the ecosystem of antitrust off in a significant way. I think that the Commission would be much better off staying with the system that has worked for 115 years. If it's not broken, don't try to fix it. Antitrust law is not, in the damages area, broken. What has happened over the last 20 years is the courts have addressed instances of perceived unfairness, instances of perceived uncertainty, instances of perceived deterrence of desirable economic activity by changing the antitrust laws, by eliminating *per se*, by providing safe harbors.

If you were to go back and attempt to change the treble damages remedy, I think you would have to look at the substantive law changes that have been made over the last 20 years that have made defendants' lives easier, made it easier to defend antitrust cases. I think the trend of the law has been exactly right, to try to make the substantive law reflect economic reality, to make the substantive law reflect what is desirable deterrence and what is undesirable deterrence, not to change the remedy phase or the mandatory treble damages. That aspect of the law is something that has worked well, and I think you hear all of the panelists essentially telling you that it does not result in over-deterrence, and I don't think anybody can point to you any significant examples where it has resulted in

overcompensation or central unfairness.

Thank you.

CHAIRPERSON GARZA: Thank you.

We'll begin the Commission's questioning with Commissioner Warden.

COMMISSIONER WARDEN: Thank you.

Mr. Boies, you seem to have recognized in your written testimony that treble damages may not be needed as an incentive in follow-on class actions. Are there other categories of cases, such as cases brought by well-financed competitors of the defendant, where that might be so as well?

MR. BOIES: I think that if you are looking simply at the question of whether a lawsuit will be brought, there will be cases in which a well-financed competitor with a very serious injury will probably bring that lawsuit, whether or not there are treble damages. The problem is it is very hard to construct a law that says we will have mandatory treble damages only for companies that are not well-financed and don't have a serious claim.

I think that the right way to approach it is to look at what fair compensation is, even for the well-financed company, and what deterrence is for the antitrust violator. You want to provide adequate compensation even for the well-financed company that may sue, and you want to deter the defendant from violating the antitrust laws. And I think you need treble damages to do both of those, although I agree

with you that there would be antitrust cases filed by some parties, even in the absence of treble damages.

COMMISSIONER WARDEN: Sticking with these well-financed competitor cases, given the huge cost of antitrust litigation today, wouldn't it be fairer to award counsel fees to the prevailing party, plaintiff or defendant, or to neither prevailing party?

MR. BOIES: I think that the issue of the English rule in terms of fee shifting is an important issue. I think that it is something that is not peculiar to the antitrust laws, and I think it would be undesirable to try to change the antitrust laws in that area independent of other kinds of litigation. The reason that you have fee shifting in favor of a successful plaintiff is to encourage the private attorneys general, to encourage people to bring lawsuits, even where the total amount that may be recovered may not be enormous, because the damage to society – there's a societal interest in having antitrust enforcement.

I think that if you were to look at the issue of whether the prevailing plaintiff should get antitrust fees, I think you would find that that rarely, if ever, results in any of the disadvantages that the Commission is concerned with. The issue of fees for plaintiffs, I think no one could seriously argue results in over-deterrence, the discouragement of desirable economic activity, windfalls for plaintiffs, and the like. And that is a very small part of

what you're talking about, and since most antitrust cases are settled, there's no fee award anyway.

COMMISSIONER WARDEN: Do you recognize that competitor cases may have the potential for having themselves an anticompetitive effect by deterring the defendant from aggressive competition and imposing expense?

MR. BOIES: Sure, I think that you can have tactical lawsuits under the antitrust laws or under many provisions. I think those are undesirable. I don't think the treble damage remedy is an issue there because, by definition, you're talking about something where the plaintiff doesn't intend to recover damages. It's bringing the lawsuit for tactical purposes. So I don't think changing the treble damages remedy affects those lawsuits, but I think that is a problem not only in the antitrust area but more broadly.

COMMISSIONER WARDEN: Thank you.

Mr. Susman, what is your reaction to Mr. Boies' suggestion in his written testimony that detrebling might be worth considering in these follow-on class actions?

MR. SUSMAN: That might be worth considering. I haven't focused on that, but certainly you are talking about large damages to make it worthwhile for a class action to be filed in a price fixing case, for example. So I think the main effect of treble damages there is not so much giving an incentive to the plaintiff as it is deterring the conduct in

the first place. That is, hard-core conduct that no one can argue there's any danger of – there's no danger in deterring that conduct. And so you say, isn't going to jail enough of a danger for people who engage in it? And probably, for the individuals it is, but the corporation – you can't put a corporation in jail. The fines are small given the gains to be gained.

It just seems to me that it is so helpful in counseling corporate clients to have compliance programs that eliminate any possibility of collusion or talking to competitors. It's so helpful for a lawyer to be able to tell them about treble damages and class actions. Those are just words that scare them – and, of course, going to jail. But treble damages, I mean, it's a deterrent.

COMMISSIONER WARDEN: In your testimony, and otherwise, there has been a lot of suggestion that we need the award of counsel fees and trebling as an incentive for private attorneys general to file antitrust actions. Wouldn't the award of counsel fees to a prevailing defendant in the cases I was discussing with Mr. Boies brought by the well-financed competitor create a desirable incentive against filing unmeritorious cases for competitive advantage?

MR. SUSMAN: Of course it would. But, if the plaintiff had to pay the defendant's attorneys' fees – now, what's unmeritorious? A motion to dismiss is granted? You've got to define what an unmeritorious case is. But if a

plaintiff had to pay the defendant's attorneys' fees, what plaintiff would file any kind of case? It would be true of any kind of case. I don't think this is unique to antitrust.

COMMISSIONER WARDEN: Okay. Thank you.

Professor Lande, have you read Harry Reasoner's written testimony?

PROF. LANDE: No, sir, I have not.

COMMISSIONER WARDEN: Among other things, it recognizes that antitrust cases are often close calls on both the law and the facts. Do you agree with that?

PROF. LANDE: Absolutely.

COMMISSIONER WARDEN: If that's so, doesn't that counsel strongly against any kind of punitive sanction such as treble damages in all but quite clear cases?

PROF. LANDE: No, sir, I don't believe it does. First of all, I think that damage in rule-of-reason cases today are single; they're not treble. That was the first –

COMMISSIONER WARDEN: Okay. Can we leave aside, for the purpose of this conversation, your analysis about what damages are and how they're never sixfold and so on?

PROF. LANDE: Fine. I think –

COMMISSIONER WARDEN: Some of your co-panelists, as well as others, have recognized that treble damages are punitive in nature. Can we assume that for the purpose of this?

PROF. LANDE: Sure. I think another factor is that

society won't produce enough antitrust cases. It's desirable to have a lot more antitrust than would be produced merely by the action of plaintiffs, for a number of reasons. The damages from antitrust violations – Mr. Boies started to talk about this – are much greater than could ever be recovered by any plaintiff. We already talked about the allocative inefficiency effects of market power. I'm not going to –

COMMISSIONER WARDEN: I was asking you to assume that treble damages are punitive.

PROF. LANDE: Absolutely. I'm saying we need to incentivize plaintiffs to bring these cases. We have to give them something like treble damages for a lot of reasons: because antitrust violations lower consumer choice, because antitrust violations cause less innovation, because antitrust violations are often remedied only by an injunction that won't give the plaintiff any money at all.

The system will not produce enough antitrust cases unless you – even in rule of reason, hard cases in which reasonable people could disagree – unless we really incentivize the plaintiff to bring these cases. That's why you really do need treble damages even in the close-call rule-of-reason cases. Even those cases are really tough to prove. Judge Easterbrook says even in a notorious case, there may be evidence that's just very hard to find. Single damages just aren't going to be enough.

COMMISSIONER WARDEN: Okay. So I take it you would

not subscribe to changing the law so as to require proof by clear and convincing evidence before treble damages were awarded?

PROF. LANDE: No, sir, I would not agree that that would be a desirable change.

COMMISSIONER WARDEN: Have you looked at any of the questions that the Commission is considering this afternoon from the standpoint of a defendant who is sued and believes that it has been wrongly accused? Have you taken that perspective?

PROF. LANDE: I have tried to, yes, sir.

COMMISSIONER WARDEN: So you know that antitrust litigation is quite expensive.

PROF. LANDE: Yes, sir. I used to work for Jones Day, a firm that does mostly defense work.

COMMISSIONER WARDEN: And you accept Harry Reasoner's point that wide-ranging conspiracies are easy to allege and sometimes hard to get dismissed on motion?

PROF. LANDE: I've never been personally involved with one of those cases.

COMMISSIONER WARDEN: You disagree with his testimony?

PROF. LANDE: I have no knowledge on that point.

COMMISSIONER WARDEN: Okay. Have you read the testimony of Mr. Reasoner or anyone else with respect to the "whipsaw" settlement tactics used in large conspiracy cases?

PROF. LANDE: I have read that on occasion. I haven't read Mr. Reasoner on the subject.

COMMISSIONER WARDEN: Let me ask you this: Doesn't the combination of liberal pleading rules, treble damages, joint and several liability, lack of contribution or claim reduction, and the uncertainty inherent in litigation, both as to law and fact, confront some defendants with a Kafka-esque nightmare?

PROF. LANDE: I don't doubt you could find individual cases of injustice. But, on the average, I think there are not enough cases against hard-core collusion, which is what you're mostly talking about, I assume.

COMMISSIONER WARDEN: If one were to accept that cases can be close on both the law and the facts, and one were to accept that the judicial process isn't perfect, as we well know from the number of overturned death sentences, for example, by reason of DNA evidence, and that there may be two sides to every story, isn't it a fundamental value of our legal system to avoid exercises of state power that are draconian in relation to what a reasonable person may perceive his own conduct to have been?

PROF. LANDE: I don't think we're anywhere near the draconian stage, with due respect, sir. I don't think we're close to it. If a firm helped cause price fixing in an industry that helped cause prices to go up throughout that industry, that firm helped cause prices not only for its own

customers to increase but for other firms' customers to increase, I see nothing wrong with making them liable for all of the price increases in that industry.

COMMISSIONER WARDEN: But you're assuming that the determination of law and fact against the defendant in every such instance is perfectly correct.

PROF. LANDE: There will be mistakes on all sides. I concede that, of course.

COMMISSIONER WARDEN: You state in your written testimony that detrebling for rule-of-reason cases would mean that the number of uncontested rule-of-reason violations would be likely to increase tremendously. Do you have any evidence that the National Cooperative Research and Production Act of 1993 has led to a tremendous increase in uncontested rule-of-reason violations?

PROF. LANDE: I've never studied the effect of that act. If this Commission wanted to commission a study of that act, I think it would be a very worthy exercise. I have not studied it myself.

COMMISSIONER WARDEN: What is the basis for your suggestion that only one-third or fewer of antitrust offenses are detected or proven?

PROF. LANDE: First of all, I didn't say that. I said let us assume that one-third are detected. The only evidence I know on the subject is a testimony by then-head of the Antitrust Division, Douglas Ginsburg, that, at most, 10

percent of all cartel cases were detected, when he said that in 1986. I happen to have the highest regard for Judge Ginsburg. I regard that as evidence, not proof, but at least a piece of evidence. Now, that figure has surely increased due to the amnesty program and other programs. But I have seen no solid evidence on that figure.

COMMISSIONER WARDEN: What was the foundation basis for Judge Ginsburg's testimony when he said that? Do you know?

PROF. LANDE: I've got it here if you want me to read you –

COMMISSIONER WARDEN: No, no. I'd just like to know what evidence he had in mind when he made that conclusory statement.

PROF. LANDE: To be perfectly honest, I e-mailed him on that subject about a year ago, and he said he couldn't remember. It's almost – [Laughter.]

PROF. LANDE: It's more than 15 years –

COMMISSIONER WARDEN: Fine. We'll proceed to another topic then.

Professor Cavanagh, you suggest on page eight of your written testimony that intent should not be a prerequisite to trebling because intent is not an element of horizontal price fixing. Do you know of any cases in which a defendant stumbled unknowingly or unintentionally into a price-fixing conspiracy?

PROF. CAVANAGH: I don't.

COMMISSIONER WARDEN: If trebling were committed to the sound discretion of the court, which I think is your second-best outcome, wouldn't intent and knowledge of illegality be important factors in the courts exercising that discretion?

PROF. CAVANAGH: I think so.

COMMISSIONER WARDEN: Do you think it would make sense to require proof by clear and convincing evidence before awarding treble damages?

PROF. CAVANAGH: No, I think part of the theme I'm trying to develop here with the current system is its simplicity. And if we start going into clear and convincing evidence, we start making the process more complicated. We change the standards that have been around for 115 years. We're going to introduce some uncertainty in a case that is going to have to percolate up through the system, what is clear and convincing, and I just think that would be a mistake.

COMMISSIONER WARDEN: Are you aware that parties may expend many millions of dollars in antitrust litigation, even in cases that are thrown out on summary judgment?

PROF. CAVANAGH: That's true.

COMMISSIONER WARDEN: Does that fact bear at all on the question of whether fees should be awarded to prevailing defendants?

PROF. CAVANAGH: I think the current one-way street situation works well because it's just very, very difficult for plaintiffs to win cases. And I'm looking at this now from a 2005 perspective. The fact of the matter is that since the late '70s, the substantive law has really gone in favor of the defendants. And if we now make that switch, we're throwing – we're going to throw the ecosystem out of balance, and we're going to stack the deck in favor of defendants.

COMMISSIONER WARDEN: Presumably, the courts have articulated rules of substantive law that they believe correctly carry into effect the policy of the antitrust laws, not rules of law that they think are favorable to the defendants.

PROF. CAVANAGH: That's true. They're trying to do the right thing. The fact of the matter is it's just hard to win cases these days for plaintiffs, and if that's the case, you're not going to have a whole lot of incentive to bring a case if we have a loser pays situation.

COMMISSIONER WARDEN: And you would apply that reasoning even in the case of one huge corporation suing another?

PROF. CAVANAGH: Yes.

COMMISSIONER WARDEN: Doesn't the fact that the courts have, in your words, in your writing, and again today, narrowed the *per se* spectrum over time actually bear in favor of awarding treble damage only when the challenged conduct is

per se unlawful? Because that's a much clearer category than it used to be.

PROF. CAVANAGH: Well, I'm not so sure how clear it is. Certainly we know price fixing among competitors is *per se* unlawful, but is tying? Tying is nominally *per se* unlawful. I think it's still a very, very unsettled area.

COMMISSIONER WARDEN: Thank you.

Mr. Lipsky, what evidence do you have to support your suggestion that present law has deterred the formation of procompetitive joint ventures?

MR. LIPSKY: This is a judgment based on personal observation of and counseling of, in many situations, joint ventures, and I think this is reflected in other testimony. Although the music for joint ventures is very welcoming at the enforcement agencies and, to an extent, in the courts, joint ventures receive an extremely rough ride. They get looked at very, very carefully. Just recently, a three-year investigation, which did not result in complaint, came to a conclusion. It was a Department of Justice investigation into a very overt, publicly announced joint venture. It went forward. There was nothing to hide. And that is one element of, I think, an accumulated experience. If you read business review letters granted by the Department of Justice, my very first experience coming out of the position of Deputy Assistant Attorney General was getting a favorable business review letter for a trade association, the president of whom

died a couple of days before the end of the six-month period that the Department of Justice had taken to look at that joint venture. It is slow; it is painful; and it deters experimentation in a lot of procompetitive joint ventures in my judgment.

COMMISSIONER WARDEN: So that our record is clear, what are you including within the term "joint ventures"?

MR. LIPSKY: It's an excellent question, and I would say that – I would try to conform the definition to the precise point where the courts are trying to focus in distinguishing between cartel conduct, conduct deserving of immediate condemnation without consideration of any further competitive analysis or efficiency defense, versus the kind of joint venture that at least has the kind of integrative efficiency or potential efficiency justification that would require examination of the efficiency defenses. And I really commend to you – as I mentioned at the very end of my oral testimony, because this decision was just Friday the 22nd, after I had submitted my written testimony – Judge Ginsburg's decision in the *Three Tenors* case I think is about as close as I have seen to any judicial decision that defines that line. And that is the line that I would try to choose.

COMMISSIONER WARDEN: What I'm trying to find out is, what do you call a joint venture? You're not just talking about a plant that two people build.

MR. LIPSKY: I'm talking about any – well –

COMMISSIONER WARDEN: You're talking about any overt horizontal arrangement; is that correct?

MR. LIPSKY: But with the element of potential efficiencies or productivity-enhancing integration.

COMMISSIONER WARDEN: That's a good joint venture.

MR. LIPSKY: Absolutely.

COMMISSIONER WARDEN: Okay. It would be a joint venture even if it didn't have those qualities, wouldn't it?

MR. LIPSKY: That's right. But what justifies the treatment under something other than an immediate *per se* cartel rule is some element of efficiency, and that's the difficult-to-define concept. *BMI ASCAP*, in which I think Mr. Boies was the victorious lawyer, if I recall correctly, waited – what was it? – about 20, 25 years to find out that it was in the rule-of-reason category. We've gotten a little better at defining that line, I hope.

COMMISSIONER WARDEN: All right. One final question: Does your overt/covert distinction apply to conduct other than joint venture formation?

MR. LIPSKY: It was not intended to, for a variety of reasons that I could go into if you wanted. I've excluded those other areas, but it is primarily relevant to this area of horizontal efficiency creating –

COMMISSIONER WARDEN: You've excluded them for analytical reasons.

MR. LIPSKY: That's correct.

COMMISSIONER WARDEN: Not because you just didn't consider them.

MR. LIPSKY: That's correct.

CHAIRPERSON GARZA: Thank you, Commissioner Warden.

Commissioner Yarowsky?

VICE CHAIR YAROWSKY: Thanks for being here. I just wanted to note that we've now shifted over from the lead questioner, who gets 20 minutes, to everyone else, who gets five minutes.

CHAIRPERSON GARZA: Is that a complaint?

VICE CHAIR YAROWSKY: No, not a complaint at all. So what I'm going to do is probably set up two or three questions, and then if any of you would like to jump in and answer any of them, that would be great. Maybe that's the best way to use the time.

The lovely, almost baroque semantics of antitrust lead people to think this is a very exotic field, but I really do agree with Tad Lipsky that this is really about human behavior. That's really what antitrust is about. And for that reason, I think the role of conventional wisdom is very important, as it is in most human endeavors.

What I mean by that is that over 115 years a certain system has been laid down and inculcated in many different audiences, including the business audience, and the consumer audience. If one changes that conventional wisdom – I am just asking – would that signal less vigilant commitment

to the antitrust laws? And maybe even more significant – and I think Mr. Boies brought this up – would that lead itself, just that change in remedial structure, lead itself to substantive changes, kind of drive them, first?

Second, drawing on a number of your different statements, some of the proposals for change in this area – and they're very creative and very important to consider – seem to be going in the direction of transforming the antitrust remedial system into the tort system. And they're very different systems. Is that a good idea, meaning should we be changing evidentiary burdens? I think Mr. Warden made that point. He was asking. Obviously, with punitive damages, the highest evidentiary standard attains for the most part in most states. Obviously, they're looking at subjective states of mind, *mens rea* – not a lot of that going on in antitrust – and long proceedings. So we have involved proceedings at the damage phase in antitrust, but a different kind of proceeding that goes on. Would it be useful to see this kind of shift over?

Lastly, if there's any time, what about these pre-notification statutes that have started with the NCRA? And this goes to the joint venture area primarily, obviously. The NCRA was about R&D joint ventures. In '93, there was an amendment to have production joint ventures. They drew the line at marketing. They didn't want to have joint venture protection for that, and then we just had the standards

development. Is that a possible model, that, in certain areas, it might be useful to clarify this without having major remedial change? Anyone?

MR. BOIES: As I previously said, I think if you were to change the remedy phase, it would have other effects, that you would have to make other changes. That is, you couldn't just detreble without looking at some remedial issues, like prejudgment interest, like the statue of limitations, and expanding recoverability of damages that in our view are speculative. But you'd also have to look at the substantive law changes that make it difficult for plaintiffs to recover, in part because if you change one without looking at changing the other, you're going to affect deterrence.

MR. SUSMAN: I very much agree with your comment. I think changing the treble damages remedy is definitely going to encourage lawlessness. I think that it sends the wrong signal to business and businessmen at a time when they need to be sent a different signal. And I just think that we need to say these are important laws and there are seriously consequences to your violating them; therefore, you had better listen to your antitrust lawyers.

PROF. LANDE: I agree with what both of them said, and I'd like to add that antitrust is not torts. Torts are usually private matters between two people. Antitrust affects an entire market. It causes lots of damages, more than just to a few individuals. We've already talked about

those. The economists call some of them externalities, harm to choice, harm to innovation, all these other harms that make antitrust close to unique.

VICE CHAIR YAROWSKY: So your point is simply that tort law, if it does involve people, personal injury or things like that –

PROF. LANDE: Right.

VICE CHAIR YAROWSKY: That's why there is this delving into subjective states of minds and things like that, as opposed to antitrust, which is more external.

PROF. LANDE: Right. Antitrust is usually concerned with harm to a market. Otherwise, we don't usually get involved.

PROF. CAVANAGH: I just want to pick up on your pre-notification statutes as sort of a model. I agree that trebling in every case can be harsh. There are some cases where we probably shouldn't be trebling, close cases. The problem with that is that it's just really hard, until you've seen the evidence, to know whether or that's the case. In terms of what we like with a rule, we like clarity, simplicity, and predictability, and you lose all of that when you start saying, only in clear cases, because we don't know what that's going to be like.

With this piecemeal detrebling that we've seen, you know, Congress is watching what is going on, and if there is harshness, it's going to come to Congress' attention, and

Congress is going to act on it; and it has shown that it's going to act on it.

You know, I'm not sure that I always agree with what Congress does, and the political process may mean that my choice doesn't get taken and somebody else's does. But I think that's the best way to deal with that.

MR. LIPSKY: I think it is terribly corrosive to approach this in a piecemeal way. I think that the NCRA and the detrebling in return for disclosure would be particularly appropriate in this horizontal joint venture context that I've been addressing.

I also want to say that it doesn't bother me that you have to, when you reform treble damages – or it's usually advisable to – sort of reform a little suite of functions. And that's been the pattern in the NCRA where – you know, in the Export Trading Company Act, which you can argue with or not. But the point is there you do have a change. Not only do you have detrebling, but you also have a change in fee shifting, and I believe you also have changes in the prejudgment interest area.

Just one final comment quickly, if I may. I wanted to respond to something David said about changes to the speculative damages rule, because antitrust goes at least as far as any other system of law that I'm aware of or at least, you know, civil litigation in the U.S. And the rule in antitrust law is that once you get through the gate of

proving a violation and proving that that violation was a material cause of the plaintiff's injury, anything other than speculation is acceptable. Basically, anything you can give a reason for is an acceptable damage proof, anything you can persuade the jury of.

I actually sat through the damages presentation in *MCI v. AT&T*, which I think at the time was actually the largest civil antitrust remedy in history, and, you know, MCI had a piece of paper written when the company was a fledgling saying, boy, if we could get into this market, we could earn a couple of billion dollars. And that was accepted as the damage proof in that trial. It was later retried, but MCI got a very substantial award from that case.

So I would have an issue with going beyond and permitting damages that were merely speculative, because we're just one notch short of that right now.

CHAIRPERSON GARZA: Thank you.

Commissioner Valentine?

COMMISSIONER VALENTINE: Thank you. Good afternoon, and obviously, thank you all very much for your testimony. Since this is actually quite a love fest and I think we have heard very clearly and strongly where the panel is coming out, can we just try getting at it one other way? I want to ask each of you if you had to pick one area where treble damages might be adjusted to achieve better deterrence, compensation, punishment – and we're going to

just detreble in one area – I'm going to give you four choices: no trebling in class actions brought post-DOJ conviction or guilty plea in a criminal case; no trebling for indirect purchasers where direct purchasers have gotten damages with respect to the same violations; no trebling for competitor suits; and no trebling for joint ventures where the joint action is transparent and open. And I want you to pick the one that you think would do the least damage to the system and tell me why. And if you're really gagging in going for one of those, you can also add that there should be prejudgment interest, and if so and so, or you can say judicial discretion, at least one and one-half, per Judge Easterbrook, or whatever. Or you can make up another one.

MR. SUSMAN: How about this one: punitive damages awarded by a jury after a finding of liability, but no cap at three times. Okay?

COMMISSIONER VALENTINE: Okay.

MR. SUSMAN: I've get six if I can convince the jury to give me six times, or five times, or something else. I'm not sure I would accept that. I'm not sure that that wouldn't have a pretty good deterrent effect also on unlawful conduct, because during that punitive damages phase I can talk about the defendant's wealth; I can talk about the defendant's lack of a compliance program or the hypocrisy involved in it. And so I'm not sure that – I mean, why don't we leave it to the jury to decide?

If you're going to get rid of mandatory trebling, then leave it to the jury and let it be handled like punitive damages in a normal tort case. But I guess if you had to pick one, I would pick the indirect purchaser one.

COMMISSIONER VALENTINE: Okay. Let's go with David Boies.

MR. BOIES: If I had to pick one, I'd pick the post-verdict, post-guilty plea class actions. I do think you would have to make adjustments there for prejudgment interest and the like and the other things I've mentioned. But if we were going to pick one of those, I would pick that one.

One that I – sort of the second one, depending on how you defined it, would be joint ventures where everything's transparent. I think it's important that everything that affects the legality of it be transparent. That is, you can't just have notification of what is being done. You have to have notification of why it is being done and what the effects are going to be. That is, you've got to have notification of everything that makes it legal or illegal if you're going to do that.

COMMISSIONER VALENTINE: Bob?

PROF. LANDE: If I absolutely had to pick one, I guess it would be the joint venture one, for the reasons that Tad talked about. I wouldn't do class action follow-ups or indirect purchaser, because those usually involve hard-core conduct, hard-core price fixing. I think in that area we

ought to be increasing damages, not decreasing.

In the joint venture area, while I don't agree with Tad, there's certainly some merit to his argument. So if I had to pick one, I would go with that one.

PROF. CAVANAGH: I would pick indirect purchasers, and the reason for that is this: My objection *to Illinois Brick* – the reason I agree with the *Illinois Brick* decision is due to what Justice White said there: the complexity, the fact that you're transforming a courtroom into an Economics 101 classroom, and all of a sudden the testimony is a battle of the economists.

What troubles me about indirect purchaser suits is that there's probably some pass-on there, and there's probably – the rule of *Illinois Brick* probably denies people who have actually been hurt compensation. And I would just like to be able to compensate them without incurring all of the other problems that Justice White points to. And I think if we – I think permitting actual damages might be a reasonable compromise.

MR. LIPSKY: My testimony should make clear that I would go for the joint venture situation. My issue with all three of the other cases that you mentioned is that they are potentially applicable in the cartel area. And I really think that we need to understand better why these cartels are continuing, and what the pathology of the behavior is, before I would consider anything that might substantially decrease

the remedies in the cartel area. So joint ventures, I wouldn't give them anywhere near as rough a ride as it sounds like David would want in order to qualify. And I think that the previous detrebling acts, particularly the NCRA and the NCRPA, provide the model for that.

COMMISSIONER VALENTINE: I might go with David's model, but one quick question because my time's up. Do any of the other panelists agree with Mr. Lande that one should, in fact, have prejudgment interest in addition to treble damages?

[No response.]

COMMISSIONER VALENTINE: Okay. Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Shenefield?

COMMISSIONER SHENEFIELD: Let me start with Mr. Lipsky. I got through the first 13 pages of your statement. I was fascinated, indeed riveted.

[Laughter.]

COMMISSIONER SHENEFIELD: I got to the first sentence of the 14th page, and it's all downhill from there. What is the answer to the question?

MR. LIPSKY: Judge Ginsburg really has filled it in for us.

COMMISSIONER SHENEFIELD: Why don't you word it for us today?

MR. LIPSKY: Well, here I brought – give me back my

copy of the –

[Laughter.]

COMMISSIONER SHENEFIELD: Don't sing. Just word it.

MR. LIPSKY: Well John, one way to do this, go on to one of the other panelists, and I'll find the wording and raise my hand when I do.

COMMISSIONER SHENEFIELD: Okay. Take your time. It's important. For the rest of the panel, let's just assume that the Commission is going to recommend rescission or repeal of *Illinois Brick*. This is a little unfair because this isn't on your list of things to think about, but you all are as smart a group and as good a group to comment on this as any I know. Do you think it would be necessary to accompany that with a preemption of state law? Is there anybody who has a view on that?

MR. BOIES: Did you say, assume that you're going to recommend repeal of *Illinois Brick*?

COMMISSIONER SHENEFIELD: Well, reversal.

MR. BOIES: Reversal. So that under federal law you would be able to bring indirect purchasers –

COMMISSIONER SHENEFIELD: Correct.

MR. BOIES: And the question is, should –

COMMISSIONER SHENEFIELD: Do you need to preempt state law?

PROF. LANDE: Could you still bring direct

purchaser suits under your hypothetical?

COMMISSIONER SHENEFIELD: In federal court.

PROF. LANDE: So it could be either – both?

COMMISSIONER SHENEFIELD: Both in federal court.

MR. BOIES: And you would not be overruling *Hanover Shoe*?

COMMISSIONER SHENEFIELD: I get to ask the questions.

[Laughter.]

MR. BOIES: I understand that. I'm just trying to – the answer's –

COMMISSIONER SHENEFIELD: Yes.

MR. BOIES: Okay.

COMMISSIONER SHENEFIELD: Any thoughts?

MR. BOIES: That's an interesting question, one I hadn't thought about, but I assume that – let me take that back. If you take the Supreme Court's theory when it approved the *Illinois Brick* repealers, that theory was that it was appropriate for the states to enhance the remedies. I think that what you'd have to conclude in order to preempt is that there was a significant danger of some of the problems that have been talked about – over-deterrence, unfairness, windfalls, and the like – if the states did provide enhanced remedies. I take it, what you're saying is, suppose the states said, instead of having treble damages, you can have four times damages under our –

COMMISSIONER SHENEFIELD: No, I'm just saying, would you, in order to make the adjustment effective, have to abolish the possibility of indirect purchaser suits in state courts?

MR. BOIES: I don't think you have to abolish it. You might want to make the policy judgment that you've provided as much remedy as was appropriate from an economic policy standpoint. But I don't think you've have to.

COMMISSIONER SHENEFIELD: Okay. Any other thoughts on that?

PROF. LANDE: If the right existed on the federal level, I wouldn't see why you'd need to keep it on the state level, assuming it was effective and you could certify classes and so on and so on. But, otherwise, there would be duplication.

COMMISSIONER SHENEFIELD: David Boies suggested at the outset that he might be willing to consider abolition of treble damages in follow-on class action suits. And, Mr. Susman, you seem to be willing to countenance that possibility as well.

Mr. Lipsky is uneasy about it, but might consider it in light of the fact that it may not be necessary to incentivize plaintiffs to bring suits. And I take it that you, Mr. Lande, would not like that idea.

Mr. Cavanagh, do you have a view on that?

PROF. CAVANAGH: From a deterrence perspective, I

think it's probably not the right thing to do. I would leave it alone; I would not detreble.

COMMISSIONER SHENEFIELD: Okay.

MR. LIPSKY: I'm ready, Commissioner.

COMMISSIONER SHENEFIELD: Your moment.

MR. LIPSKY: The court is going through the history in talking about *Mass. Board* and *Cal. Dental* and talking about restraints that are deemed inherently suspect and requiring the defendant to come forward with a legally cognizable and plausible competitive justification for the restraint. So that would be the definition of the line between *per se* and rule of reason or between horizontal restraints that were subject to immediate condemnation – condemnation without further analysis. That's where I would confine the trebling to, and anything outside that category in the horizontal restraints area I would detreble.

You know, having looked at it –

COMMISSIONER SHENEFIELD: But you're not requiring pre-notification; you wouldn't really want to hamstring American business to the extent that joint ventures had to be pre-notified to the Antitrust Division.

MR. LIPSKY: I think the kind of just soft touch, literal – the literal, you know, transmission of the information to an antitrust enforcement agency is probably not too high a price to pay to get rid of what I think is a significant deterrent effect to creative joint conduct. As I

mentioned, I wouldn't give it quite as rough a ride as David Boies wants to. But I don't think that disclosure would be too high a price to pay, particularly given the relationship, which is a logical and intuitively appealing relationship, even though I think the empirical evidence for it might be a little bit shakier between this notion of likelihood of detection versus a multiplier for damages.

COMMISSIONER SHENEFIELD: Okay. That's very helpful. Thank you very much.

Madam Chairman, over to you.

CHAIRPERSON GARZA: Okay. Commissioner Litvack?

COMMISSIONER LITVACK: Thank you. Let me say at the outset that my strong inclination coming in hasn't changed. It is not to detreble and not to do any of the things we've talked about. But I am, just curiosity-wise, troubled by something, which is the following: David Boies makes the comment in his written statement, and a couple of you have sort of echoed it, which is – and I'm quoting from him now – that "anticompetitive behavior remains persistent and recidivism prevalent. We have seen anticompetitive conduct flourish in recent years."

Now, that's in the face of treble damages, in the face of increased penalties, in the face of increased jail time. It sort of leads one to the question – or at least leads me to wonder out loud, as I am right now – maybe all this is doing no good, so if it's doing no good, why are you

bothering with trebling? Undo it. Or the flip side, which is Steve Susman's approach, you've got the right idea; you're just not going far enough. Make it six times, 20 times – we'll get those guys sooner or later; there's got to be a number.

And so if that's – and I'm being a little facetious, but I'm being largely serious – aren't we being told by these facts that this conduct is continuing and, to use your word, David, "flourishing," that we're doing is not working or not working well? And if that's the case, then maybe you do have to review it. Maybe detrebling isn't the answer. Or maybe it is because it's not doing any good. But isn't there a problem here that maintaining *the status quo* doesn't necessarily address?

MR. BOIES: First, I don't think it's not working. I think it may not be working enough. In other words, it's not that treble damages does not have an effect. I believe it does have an effect. But it clearly does not have enough of an effect to deter this conduct.

Now, whether or not four times damages or five times damages or six times damages would have greater deterrence – obviously it would have some greater deterrence – but whether it would have enough greater deterrence to justify it is something that I simply don't have a view on.

COMMISSIONER LITVACK: How would you feel about just leaving it up to the judges, just saying multiple

damages are to be determined by the court?

MR. BOIES: I think it would be a mistake if you took that below treble damages. I think changing the mandatory treble damages remedy introduces an element of uncertainty that would be undesirable. Whether or not you would want to give the court enhancement is something I've not thought about. In general, I think my view on that would be similar to my view about detrebling. I don't think an adequate case has been made for change.

COMMISSIONER LITVACK: Mr. Susman?

MR. SUSMAN: In the first place, don't leave it up to the court, to a jury. Okay? I don't have much problem with that.

COMMISSIONER LITVACK: My reference to the court was not inadvertent.

[Laughter.]

MR. SUSMAN: You want to get it out of the hands of jurors. I mean, that's what the defense lawyers want to do. And I say, you know, the uncertainty of having a jury maybe award four or five times actual damages might be a sufficient disincentive for companies to violate the antitrust laws. But I do think - the problem, the reason we see a lot of unlawful corporate conduct in all areas, and the reason is that everyone talks about the fact that business - defendants have an advantage in the system today. It's a real advantage. How many antitrust verdicts have been returned in

the last year or two years for a plaintiff after trial? How many have been sustained on appeal? You could count them on one hand across the country. And people know about that, and the pendulum has gone so far in the direction of protecting business, why push it a little further?

COMMISSIONER LITVACK: How about my question to the others. Would you favor an enhancement to the treble damages, just on the theory that treble damages isn't providing, as Mr. Boies put it, enough of an incentive? It's providing some incentive, but perhaps not enough?

Mr. Lande, Professor Lande?

PROF. LANDE: I guess my basic answer to your question is, maybe everything that I've been saying is right.

[Laughter.]

PROF. LANDE: In other words, maybe treble damages really are –

COMMISSIONER LITVACK: How's that for a shock?

PROF. LANDE: Let me give you the following scenario, which I am going to assert is not atypical of what actually goes on. You have a settlement with direct purchasers for nominal single damages. Then you have a settlement maybe in some 20 or 30 states with indirect purchasers for maybe a third of single damages. Now, that's nominal single damages. Then you have a criminal fine, which starts from the presumption of a 10 percent overcharge, which is really about one-half or one-third of what the cartels

actually overcharged. So even the criminal penalties today are far less than single damages. So today you have one, plus a third, plus less than one. You have what we think are treble damages. Oh, but then there's that darn discounted present value and allocative inefficiency and umbrella effect.

So, in other words, even for cartels, maybe all we really have today is single damages that have got to be raised.

COMMISSIONER LITVACK: Would you enhance it?

PROF. LANDE: Absolutely.

COMMISSIONER LITVACK: You would enhance it.

Mr. Lipsky?

MR. LIPSKY: I would not –

COMMISSIONER LITVACK: I don't mean to skip Professor Cavanagh, but –

MR. LIPSKY: I wouldn't exclude –

COMMISSIONER LITVACK: – since you think we ought to do away with all this.

MR. LIPSKY: I wouldn't exclude this possibility because of this problem that you started with, you know, the continuing conduct despite these huge penalties. But I really think somebody needs to kind of get inside the head of the violator and tell us why is this happening. If you apply any form of rationality to it, it seems either people really believe that they're going to get away with it – that's

possible, and that, we can address – but it might be something that would be harder to address or that would require a different remedy.

COMMISSIONER LITVACK: I have to interrupt to say that Commissioner Warden had whispered the same thing to me a moment ago, saying, why do people do this? as though I were an expert on why people do it. But suffice it to say, there's a lot of human behavior we can't explain, so I don't know that we're ever going to explain why except, as one of my former partners once told me, the Ten Commandments have been around a long time, and people are still violating them.

Thank you.

CHAIRPERSON GARZA: Commissioner Jacobson?

COMMISSIONER JACOBSON: I have a question for Professor Ned Cavanagh. Let me preface it by saying that even though the courts, by and large, deny this, there is undoubtedly a different standard in antitrust cases in a number of respects. There is a tougher summary judgment rule for plaintiffs. There's much tougher judgment notwithstanding the verdict, from a plaintiff's perspective, much tougher Rule 12 standards for plaintiffs. There is a very rigorous set of standards in antitrust injury doctrine that in the Sixth Circuit probably means that no plaintiff should be allowed to sue at all.

The question is the one that our advisor, Bill Kovacic, has, and to me it is the one troubling question

about treble damages, which is, do we have these sort of out-of-sorts doctrines in antitrust, these pro-defendant doctrines, as a reaction to treble damages? And if so, should we do something about it?

PROF. CAVANAGH: That may very well be. I'm not so sure that it's so much treble damages; it's just what it costs to prosecute an antitrust case, discovery. You know, look at a federal judge who gets an antitrust case dumped on him or her. You're in for a long haul. Your docket is now going to be loaded down with one case. There's going to be constant bickering among the clients. It's expensive; it's time-consuming. And you look at a case, and you have a gut reaction. This isn't a good case, so I'll throw it out because you didn't allege relevant market in the complaint.

Rule Eight doesn't require you to allege relevant market, but yet, read some decisions: We threw this out because you didn't allege antitrust injury. You don't have to allege antitrust injury; you have to prove antitrust injury.

But because judges make this sort of cost/benefit analysis at the outset that this is a loser, it's very easy to toss it on a motion to dismiss or on summary judgment. Summary judgment is a little different because you can get more in, but I'm very troubled by motions to dismiss.

COMMISSIONER JACOBSON: You don't think it's related to the trebling?

PROF. CAVANAGH: I don't think it's necessarily related to trebling. I think it's more related to the fact that these cases are complex and very, very expensive and lengthy and just, you know –

COMMISSIONER JACOBSON: Okay. Mr. Lipsky, I'm not going to let you off without a question about your joint venture analysis. Does your analysis apply to collateral restraints of a joint venture? Because it's rare, it seems to me, that there's injury to a private plaintiff from the formation of a joint venture. And if we were to apply the doctrine that you're discussing to collateral restraints of the joint venture, where would we draw the line?

MR. LIPSKY: I suppose you could imagine a joint venture containing a collateral restraint that was so completely unrelated to the efficiency-enhancing aspect that you could say, we're going to cut that off and treat it as a *per se* violation independently. But since I think the principal rationale for the multiplicity of damages in the area of cartel conduct, which is the one area where we continue to agree that this is reprehensible conduct, that if it is in fact occurring, can't be over-deterred – it's the relationship between disclosure and the rationale for that remedy in the cartel area that I think justifies bringing the entire joint venture in general within the detrebling rule.

Could I also pitch in on the question that you asked Ned?

COMMISSIONER JACOBSON: You can, but you have to answer the next question first.

MR. LIPSKY: All right.

COMMISSIONER JACOBSON: Which is, I have read Judge Ginsburg's decision, a rather good one, in the *Three Tenors* case, but I honestly don't see where you're coming from. Would any damages caused by that particular conspiracy be trebled or not? Onto which side of the line does it fall? And if I'm confused about that, is this the sort of line drawing that we should be doing?

MR. LIPSKY: It's not the easiest line to draw, but I think those would be treble damages, as I understand it.

COMMISSIONER JACOBSON: All right.

MR. LIPSKY: No cognizable justification, and that's the end of it.

COMMISSIONER JACOBSON: Why don't you go ahead and answer the –

MR. LIPSKY: I was just going to say that I really think that the – there's been quite a bit written about this question of – you know, *Equilibrating Tendencies* I think was the title of the Stephen Calkins article, but I really think that if you watch the long sweep of antitrust doctrine, the major change that has taken place is that a lot of different types of conduct that were not well understood, that were regarded as in some sense pernicious and in ways that were not defined through rigorous, empirically based,

microeconomic analysis, you know – there was a reason for perhaps overreacting, because they were misunderstood. But the evolution has been, we now understand them, and we don't think that there's a need to deter or that there's a need to scare a businessman that if he establishes exclusive territories, he might be subjected to treble damages class action and all these horrible remedies. A lot of these practices, in fact, the majority of them, are now as a matter of consensus regarded as procompetitive or anticompetitive, depending on some rather subtle distinctions. But there is concern about a chilling effect, and it is possible to over-deter these forms of conduct, and that is the main reason for the shift. The ideas that produced that consensus shift came from, you know, some superb quality of thought that was applied to these problems, beginning with George Stigler and Milton Friedman and Aaron Director, and it sort of spread outward because these ideas are persuasive. I think they would have taken hold regardless of what the remedial structure of antitrust had been.

COMMISSIONER JACOBSON: Isn't it a fair conclusion though, that the cumulative effect of these doctrines, particularly in an area where there's not a lot of government enforcement, is going to be no enforcement if you eliminate trebling and attorneys' fees?

MR. LIPSKY: It's going to be probably very little except in the case where you have, you know, a very strong or

very clear case, which, incidentally, I think is probably not a terrible problem with regard to the more or less conventional vertical restraints, as we understand them. But you may notice that in my testimony, I have deliberately shied away from the area of monopolization precisely for the reason that it is possible to imagine monopolization offenses that are not cartel offenses, that are not joint ventures, that are not even strictly vertical. But assume that an aggressive, an ambitious businessperson in control of a firm that did have monopoly power would be inclined to go right up to the line that his lawyer told him he could go up to, I can still imagine cases of exclusionary conduct where you might be sorry that you didn't have trebling available.

PROF. LANDE: May I add a response to your question, please?

COMMISSIONER JACOBSON: Of course.

PROF. LANDE: Thank you. You're saying, does the fact that we have treble damages, this horrible remedy, shift – help shape substantive law? And I think it might –

COMMISSIONER JACOBSON: No, I am not saying that. I am saying others have said that. That's the one argument that makes me think about this issue.

PROF. LANDE: Yes, and Professor Calkins wrote an article on the subject.

However, if you go back to my first myth, that we really don't have treble damages, that is, the law is being

shaped based on a myth. Judges are saying, oh, my God, there are treble damages, there are maybe even sixfold damages; I'll have to slant everything in favor of defendant.

If we could help publicize that treble damages are really single damages, then maybe judges wouldn't shift the law in this undesirable direction.

COMMISSIONER JACOBSON: Thank you.

CHAIRPERSON GARZA: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: Thank you. I want to talk a little bit about the issue of deterrence, which is obviously, maybe from an institutional perspective, the most important aspect of the remedies debate. And I assume we would all agree that you really can't focus on deterrence without taking into account the criminal penalties, especially the jail time that would be imposed on corporate executives and wrongdoers in the event that they entered into a cartel agreement.

My first question, Professor Lande, is, are you aware of any rigorous analytical analysis of how the deterrent effect of that criminal – the possibility of criminal sanctions, specifically jail time, weighs on corporate decision-making in the area of cartel misconduct?

PROF. LANDE: The only material that I'm aware of is old. It's by Professor Gallo and some colleagues of his who tried to quantify – he would say, let's assume a year in jail is worth $2 million. This was a long time ago. You'd

have to adjust that up to $5 or $10 million just for interest today. So there's old work on this subject that showed that, if you took the existing penalties, they'd have to be raised tenfold. But that research was done before the amnesty program; it's quite old. I've urge Professor Gallo to update it. I don't know if he ever will. I'm just not aware of anything else.

COMMISSIONER BURCHFIELD: But, of course, the significance of the jail time is for a decision-maker. That's him wearing the striped suit as opposed to his corporate treasury paying the fine.

PROF. LANDE: That's exactly right. Maybe Judge Ginsburg is still right. Remember Judge Ginsburg said the chance of getting caught is less than one in ten? Maybe Judge Ginsburg is still right and that's why they keep trying it, because maybe there is a less than one in ten chance that they'll get caught.

COMMISSIONER BURCHFIELD: Maybe over the course of time, with the amnesty program, we will see those numbers change, as well as perhaps to go back to Commissioner Warden's question, be able to ascertain the basis for that 10-percent figure.

Let me ask you some questions, Professor Lande, about your less-than-one-in-ten analysis. Talking about deterrence, the potential conspirator, the potential price fixer, for example, is looking at a cost/benefit analysis.

If we were to write a formula for it, if we put aside jail time, it would be how much I make versus the probability of me getting caught and brought to account, times the potential penalty.

PROF. LANDE: Right.

COMMISSIONER BURCHFIELD: An equation that has been reiterated a number of times in the materials that we've looked at. It seems to me that such factors as umbrella effect, which is, as I understand it, other sellers taking advantage of the raised price level, uncompensated plaintiffs' attorneys' fees, uncompensated value of plaintiffs' time spent pursuing the case, cost to the judicial system, and, to some degree, tax effects, really don't factor into that equation. Am I correct?

PROF. LANDE: I don't believe so, sir.

COMMISSIONER BURCHFIELD: How am I wrong?

PROF. LANDE: The standard optimal deterrence model in the area was first proposed by Professor William Landes from the University of Chicago. It was explained most succinctly by Professors Breit and Elzinga, and they showed that optimal deterrence should focus on net harm to others from the violation, not on the gain to yourself but on the net harm to others. And people like me, who – how shall I put it? – don't automatically embrace everything produced by the Chicago School, looked at the Landes-Elzinga analysis and couldn't find any fault with it. I think it's pretty widely

accepted. Maybe Professor Carlton can speak to this; I don't know. But Landes and Elzinga show pretty carefully that it should be net harm to others, not gross harm to others, but net harm to others. That's includes allocative inefficiency. That includes umbrella effects. That includes cost to the judicial system. And the reasoning – I could read you a quote from Breit and Elzinga that explains –

COMMISSIONER BURCHFIELD: We could accomplish the same thing, though, by increasing the multiple for the harm that I have directly – for the benefit that I have directly attained, right?

PROF. LANDE: In a rough way, sure.

Sure, that's right.

COMMISSIONER BURCHFIELD: The factors that you're talking about, such as umbrella effects, ultimate costs to the plaintiffs, and tax ramifications to plaintiffs – those are not things that someone looking at a potential price-fixing conspiracy would know about in advance, are they?

PROF. LANDE: No, that's right, but from an optimal deterrence point of view, I would get back to the Landes-Elzinga formulation. You focus on net harm to others.

One way of explaining it is, you want people to internalize their externalities, and the specific reason that this is appropriate in antitrust, I've got it in my article. It's not the most intuitive, but these are sharp cookies, and they got this one right.

COMMISSIONER BURCHFIELD: Okay. Thank you.

CHAIRPERSON GARZA: Commissioner Kempf?

COMMISSIONER KEMPF: Thank you. This is a very distinguished panel, for which I have the utmost regard. And while I don't have any questions on this particular subject matter because I think I am where Commissioner Litvack said he was; I wouldn't detreble, and I'm fairly comfortable in that. To start with, I would like to extend an invitation with respect to something else that we're looking at that bears on a question that I think all of you have addressed, which is antitrust exemptions and immunities.

To me, the answer to the question that many of you have been asked about and touched on of, why do people keep breaking the antitrust laws if there are all these deterrents? What's the explanatory variable? To me, it's that the American people don't think that fixing prices is wrong, and the reason they don't think fixing prices is wrong is that half of the people in America do it every day under government-sponsored exemptions and immunities. And we are considering everything from the most obscure thing, like the Webb-Pomerene Act, which means that maybe people in Bolivia will pay more for widgets than they should, to stuff that impacts people in America every day of the week, to hundreds of billions of dollars because of the Wagner Act and the Norris-LaGuardia Act, which say anybody who's a union worker can conspire to fix the prices of labor, and Capper-Volstead

and a bunch of laws that follow on it that says everybody who grows anything in America can fix the price of that.

So there's widespread, out-in-the-public price fixing that the American people, I would say, in the main don't view it like they view theft or murder, which they feel are wrong. Price fixing, they say, well, it's right or wrong depending upon whether you get the government to sanction it or not. And I've always advised clients: gee, it's okay to engage in price fixing; you just have to get the government to give it the green light. And what you need, to do that, is a lot of people to price fix on something that everybody buys. If you can do that, you can get away with it.

So I am wrestling with the thing that grows out of that; what do we do on immunities and exemptions things? Things like farmers price fixing and laborers price fixing are so well ingrained in the fabric of America that it's almost impossible to think that those price fixing things would ever be reversed or even thought about being reversed. And yet they sort of set the template for what people think about price fixing.

And then I look at that, and I say, let's go the other way. Maybe we need to take a look at the *per se* – relook at Footnote 59 of *Socony*, and say, you know, maybe everybody ought to get a chance to say, you know, ruinous competition, which is what every – it's articulated in different ways just because it's a trite phrase, maybe. But

that's what every argument boils down to, that our industry is special, or our situation is special; there would be ruinous competition if we didn't have an exemption from the antitrust laws. And maybe what we ought to say is, either we abolish all exemptions and immunity on the one hand, or we say, you know, maybe we ought to get rid of *per se*/rule of reason to give other people a chance to justify the price fixing charges they face.

Now, that is not today's agenda, but this is, as I say, a group for which I have the highest regard, and I would welcome any written submissions you may have, or if we have any time left at the end of today's discussion, any thoughts you may have on that long invitation I just extended. And with that, I'll pass.

CHAIRPERSON GARZA: Okay. Back to treble damages. I just had a few quick questions. A couple of you, I think Mr. Boies and Mr. Susman, have indicated in response to questions that you thought it might make sense to have some kind of detrebling or reduced multiplier for follow-on suits to criminal prosecutions. But you've also talked about the ecosystem, and so the one question I have is, if we did something like that, wouldn't it undermine the recent legislation that, as part of the leniency program, gave detrebling to the firm that came in first and disclosed information about the cartel activity to the government?

MR. BOIES: That's a very good point. I think that

there are a lot of implications that the Commission would have to consider before recommending detrebling in the particular class action area that I've talked about. I think that you want to preserve the incentives for the amnesty program. I think one of the things that we all believe is that the amnesty program is working and is working very well. And if you were to eliminate the tripling of damages in the class action context, you could very well affect those incentives.

MR. SUSMAN: I just want to clarify my position. I would consider detrebling in a follow-on class action, but not just a follow-on suit. There are individual companies that file price-fixing cases, which opt out of a class and want to proceed on their own. Those are very difficult cases, and I think you need treble damages there to give them the incentive to pursue those cases.

Class actions are basically – I don't view them so much as compensating anyone as much as deterring wrongdoing; I think it's mainly deterring wrongdoing, not compensating anyone. Those are lawyer cases. Lawyers dream them up and lawyers file them, and they deter – if you are going to have a class certified, there's a lot of deterrence there on a corporation that does wrong. But where a business actually has paid too much for its goods over the last four years, I think it should have the right to pursue an individual price-fixing case, even though it would be a follow-on case, and

recover treble damages.

So just to make my position clear on the record, my willingness to consider detrebling is only in the follow-on class action.

CHAIRPERSON GARZA: But then considering the leniency program aspects, would you still consider it? Or would you rather – would you trade that?

MR. SUSMAN: I'm not sure I understand –

CHAIRPERSON GARZA: My question is whether, if you extended the detrebling to everybody, including those who didn't take advantage of the leniency program, you would undermine the deterrent effects of the new legislation. I'm just asking you, would you consider the detrebling if the cost was the benefits of the new leniency legislation?

MR. SUSMAN: I think so. I think I would.

CHAIRPERSON GARZA: Okay. Now, Tad, I had a question for you. In your testimony, your prepared statement, rather, you say that the strongest case for detrebling exists with respect to horizontal joint ventures. Why is the case weaker for other rule-of-reason conduct, such as non-price vertical restraints or tying?

MR. LIPSKY: I think the lines have been drawn in those other substantive areas with such clarity that the case is not as strong. In other words, I wonder, when was the last time there was even a significant settlement in a case alleging a vertical non-price restraint? Maybe our expert,

more experienced litigators know.

The reason I am so concerned about the horizontal joint venture context is that that is still the context of conduct that is not regarded as reprehensible, that may be legal or illegal, depending on market structure, competitive effects, rationale, all the things that go into making the judgment about competitive effect, but where the horizontal joint venture still receives such a rough ride that the spirit of experimentation, the liberation from the deterrence mentality has not really occurred. But I think it has occurred for all the reasons that Steve cites in vertical restraints cases, to a large extent in licensing cases. And then my reservation, as I just mentioned in response to Mr. Jacobson, is that the monopolization area goes the other way. I think that if we abandon any ability to maintain the deterrent aspect, you would, at the extreme, see conduct, if there is a firm that has the power to engage in it, you might very well see conduct – look at the old Bell System cases. There are real Section 2 cases in American antitrust history. I really believe it. I believe the *Standard Oil* case was such a case for the reasons that Ben Klein and Elizabeth Granitz identified. Of course, that was a cartel case the way they framed it, but, nevertheless, I believe that there may be monopolization cases where you would be sorry if you didn't have trebling available.

CHAIRPERSON GARZA: Thank you.

Commissioner Delrahim?

COMMISSIONER DELRAHIM: Thanks, Chair.

Mr. Susman, let me just clarify: When you mentioned that you might be open to detrebling follow-on class actions, do you mean class actions that would follow on other private class action cases brought, or follow on to the government's cartel –

MR. SUSMAN: A government – you know, a government case.

COMMISSIONER DELRAHIM: Okay. And that's what – I didn't know if that was an area that we may not have been clear about, partly because I was kind of surprised to read in Mr. Boies's and your openings for exactly that reason. I think that part of the problem with the cartel cases – and we see more and more of them. Frankly, two years ago, when I went to the Justice Department, I was just shocked, especially at the level of recidivism that is, you know, company after company. And you say: what's wrong with these people? Don't they have antitrust counsel?

And I think because of the amnesty program and the legislation last year to detreble and provide greater incentives, I would be strongly opposed to any detrebling of the government follow-on cases because I think that's the best source of detection of these cartels, which is really a lot of the challenge, a lot of the difficulty, and the amnesty program has been a great source for that.

Having said that, one idea I wanted to explore was for detrebling private class actions. I think treble damages are an important motivation for cases the government doesn't bring. However, in other areas – for example, in pharmaceutical, Hatch-Waxman, areas – there are some additional incentives provided for the first mover to challenge a patent. You know, if you're a generic, you get a certain period of exclusivity. Would it make sense to provide for detrebling of follow-on – or provide for greater incentive, even, maybe greater than treble damages, for the very first private class action, but then provide for single damages for anybody who's followed on down the road? So, for a case that the government did not have an involvement with. Mr. Boies, Mr. Susman, and others, if you could comment on that?

MR. BOIES: One of the things that would do is, it would deter people from opting out of the class action because by staying in the class action they could get treble damages, but by opting out they could not. I think that would, in effect, tie individual companies or individuals to the result of that class action, which I don't think they ought to be tied to if they don't want to be. I believe class actions play an important role, but I think it's quite important that individuals and companies have a practical opportunity to opt out of that litigation and have their interests represented by a lawyer whom they've actually

chosen as opposed to just the class action lawyer who brought the case to start with.

So I think it would be difficult, to justify burdening, in effect, the opt-out decision by saying you can only get single damages if you opt-out.

Also, as a practical matter, even though there have been class actions brought, almost all of those are settled. And so the opt-outs still have the burden of actually establishing their case.

So I don't think that I would favor it in that situation, and with respect to follow-on class actions, those would be very rare. It would have to be almost an indirect purchaser state class action because any follow-on class actions in federal court are going to be multidistrict consolidated.

COMMISSIONER DELRAHIM: If there are any other comments on this – I assume Mr. Boies probably spoke for everybody on that.

The issue with the recidivists: should Congress change the law to create a greater multiplier for somebody who's come back to the well again, especially – I'm talking about the cartel cases, the *per se* – Justice Department – if you are a German pharmaceutical company that every other year seems to be going to the Justice Department – should you, the next year and the following year, get six-times, ten-times greater criminal penalties for that?

MR. BOIES: I think there's merit to that. We certainly have that in the criminal law generally, where, whether you call it the three strikes rule or whatever, the more times you get convicted, the heavier the penalties become. I think you have to balance that against some of the other considerations in terms of the impact of treble damages as to how high you go. But I think that, as a matter of principle, it would be desirable to have some enhanced deterrence for those individuals and companies that seem to be repeat violators of the American antitrust laws.

PROF. LANDE: I certainly agree with that. Now, the cartel penalties assume a 10-percent overcharge. That figure comes, again, from Judge Ginsburg. But that figure is probably too low. It's probably more like 20 or 30 percent, or even more. So maybe some of these companies have figured that out and figure, even if they get caught, it's like paying a parking ticket; do it again. Maybe the solution is to double or triple all the cartel penalties.

COMMISSIONER DELRAHIM: Mr. Cavanagh?

PROF. CAVANAGH: I think I would agree with adjusting the criminal penalties. I don't know that we would necessarily want to mess with the civil penalties. But certainly the criminal area, I think it would be appropriate to do that.

MR. LIPSKY: I generally agree, but, again, it would be so helpful if we understood the failure mode. You

know, how does this happen? If we could have some kind of glimpse at the answer to that question, it would help us design the remediation. But certainly in principle, we do this all the time, first offense, second, offense, third offense. Why not in antitrust?

COMMISSIONER DELRAHIM: Thank you, Madam Chair.

CHAIRPERSON GARZA: All right.

Commissioner Carlton?

COMMISSIONER CARLTON: I'm trying to reconcile sort of two observations that people seem to be making on the panel. One is that we have under-deterrence as evidenced by covert cartels that get discovered – and there have been several recently – and the other observation you've been making is that it's often very difficult for a plaintiff to win an antitrust case.

Now, what I really want to figure out is, if you have a rule, sort of one size fits all, which is what treble damages seems to be, doesn't an analysis of whether there's over-deterrence require you to answer why it is that plaintiffs are losing, if, in fact, they are, so often in the courts? In particular, to follow that up, let me ask Professor Cavanagh, because I think you made the statement that plaintiffs have a hard time winning; isn't that suggesting that maybe there's a class of antitrust defenses for which we should worry about over-deterrence and that maybe we should be distinguishing between the covert cartel

behavior and other types of behavior in figuring out damages?

PROF. CAVANAGH: There are a lot of balls in play here. Part of it is, we have substantive law, and then we have the process of trial where you get good trial lawyers and good economists who are very persuasive with juries, who take facts, who take the exact same record and sculpt it in very, very different ways. And that's why I think it's very difficult for plaintiffs to win cases, because I think that defendants typically have deeper pockets, and they have access to better quality lawyers and economists, and the results, I think, show that.

The other thing is, we have less of this, but, you know, in the 1960s, your garden-variety antitrust case was a dealer termination suit. We don't see a lot of those anymore because the law has changed, and those things are just bad money. They're no longer part of the system. And so those were cases where there's some success, and now just because we've gotten rid of those kinds of cases and now focus on the harder cases, that's why plaintiffs aren't winning so much.

COMMISSIONER CARLTON: Okay. Let me just follow up. People have stressed the covert cartel cases that get uncovered as evidence that we seem not to be deterring cartels that are able to overcharge by a lot for a while, or maybe a considerable time period. Doesn't that suggest, just the way all of you have talked about these cartels, doesn't that suggest a different damage approach is relevant in

dealing with them as distinct from other antitrust defenses, so a covert cartel, hard-core price fixing, you know, would have six-times damages, or some multiple? I'd be curious.

MR. BOIES: Remember, in the price-fixing case, under the federal antitrust laws, you get the amount of the overcharge. Now, that is not necessarily the amount of the damage to the direct purchaser, or maybe even the amount of total damages. And it may definitely not be the total amount of benefit to the price fixer. So there is a sense in which, in the cartel cases, the price-fixing cases, you do have a more simplified approach and one that may enhance the award of damages.

I do think that we all think that the hard-core price-fixing cartel behavior is more egregious than various other forms of behavior. The problem is, do you make it six times for cartels and three times for the other people? Do you make it four times and two times? I think the sense that you have from the panel is that we don't see – or I don't see, at least, an adequate foundation for saying we know how to change the system. The system is not working perfectly or we wouldn't have so many antitrust violations. But it is working substantially, and I think the difficulty is deciding how you would change it. It's not that in principle it doesn't make sense to have some distinction between different categories, but I think none of us are comfortable that there is an adequate database out there to tell us comfortably how

to make those changes.

PROF. LANDE: One distinction that we already make, of course, is if it's a criminal violation. Then you've got the criminal penalties. So maybe the way to really get at the hard core isn't to monkey with the treble damages but just to dramatically increase criminal penalties.

COMMISSIONER CARLTON: Thank you.

CHAIRPERSON GARZA: Commissioner Cannon?

COMMISSIONER CANNON: Thank you. Let me just continue in that theme, if I can, Professor, which is, I'm sitting here thinking that everyone, I believe, is in violent agreement that as much deterrence as possible is a good thing. So is there anybody on the panel who would think that increasing the criminal penalties would be bad? And if so, why? Mr. Lipsky, how about yourself?

MR. LIPSKY: We've just undergone a tremendous upward ratchet in the criminal penalty. I think there ought to be concern about the possibility that remedies become so severe that they lead to some dynamic that might lead to false positives so that somebody who really has not committed a violation is forced to settle or – I don't – you know, this was explored. You know, you have great experience with S. 995 back when you were in the –

COMMISSIONER CANNON: I can't believe you remember the number of that.

[Laughter.]

COMMISSIONER CANNON: And I knew you were going to bring it up.

MR. LIPSKY: I've still got the button in my top desk drawer.

COMMISSIONER CANNON: There were two buttons, actually.

MR. LIPSKY: I can't remember which side I was for. But, in any event, subject to that qualification, and subject to the notion that you might want to let this new, you know, more than trebling of the criminal penalties that just was enacted in S. 1086 last year, just let that work through the system for a little while. But, in principle, if that doesn't do the trick, we've just got to find something that will if it exists. I really agree with that.

COMMISSIONER CANNON: Professor Lande?

PROF. LANDE: Sure. One problem is, many of these cartels are international cartels, so even if you have a stiff penalty in the United States, they do business worldwide and pay very few damages worldwide. The U.S. penalty is something they're willing to pay so they can continue to charge, overcharge, the rest of the world.

When we did our study, we found that the average domestic cartel overcharged by 17 to 19 percent, but international cartels overcharged by 30 to 33 percent. So maybe we should consider higher penalties, especially for international cartels.

COMMISSIONER CANNON: Higher criminal penalties?

PROF. LANDE: Criminal penalties.

COMMISSIONER CANNON: Mr. Boies, what's your opinion on that?

MR. BOIES: I think I am where Mr. Lipsky was in the sense that I think it's important to let the current changes work their way through and see what effect they have. When you're dealing with hard-core price fixing, it's hard to think of over-deterrence. On the other hand, I do think there are cases even in the price-fixing context where it's not a question of a meeting in a back room where you've got written proof that somebody engaged in price fixing. You have a series of circumstantial evidence from which you may very well conclude there was price fixing, but that decision may be wrong. And I think you do have to be careful of having the penalties so heavy that a defendant cannot, as a practical matter, contest a good-faith defense even in a situation like price fixing.

COMMISSIONER CANNON: In a criminal case, of course, if you're trying to convict someone, you do have a different standard of proof. Mr. Susman, would that enter into the analysis at all or not?

MR. SUSMAN: I don't know. Price fixing is normally, I think, engaged in by lower-level corporate executives or middle management, not the people at the very top. There are exceptions, but it's usually the lower-level

people. And so, you know, how much – and I think they're going to engage in it no matter how much you threaten to throw – how long you threaten to throw them in jail. The pressures are immense; they're created by meeting their numbers. And so the real way to deal with the price fixing I think is to do something at the corporate level that puts real pressure on the higher-level corporate executives and the board of directors to engage in – to institute programs that keep the lower-level people from engaging in these kind of things. And sometimes it may be just not setting their budget – you know, their profit numbers so high. And how do you do that other than the threat of treble damages, enhanced damages? Because you can't put the corporation in jail. What is the maximum – I don't know what the maximum criminal penalty is for the corporation now, but it's a drop in the bucket compared to the gains to be made by price fixing.

So I think that a damage threat is the only thing that is going to cause this whole problem to go to the board of directors level.

COMMISSIONER CANNON: So you think that it's the damage threat versus enhanced – versus the idea of losing your personal liberty and going to jail that really is the greater deterrent?

MR. SUSMAN: Yes. It works at a different level. Obviously, it threatens people to put them in jail, but I think these people are going to do it – I mean, we had those

penalties; they can be put in jail; some of them are put in jail. They still do it, because they aren't too smart, because the pressures on them are too great. So I think the way to stop price fixing or to minimize it is to do something at the corporate level that causes the board and the CEO and the top officers to do something to rein in the people who work for them.

COMMISSIONER CANNON: Thank you.

CHAIRPERSON GARZA: One question. Andrew can gavel me, but I have one question, and this is consistent with Bob Lande's warning that we should myth-bust, but everybody has been talking about this assumption – or everybody's been saying that they feel that there has been an increase in antitrust criminal behavior in recent years notwithstanding a substantial increase in fines and focus on cartel enforcement through the leniency program, through increased international coordination and focus, *et cetera*. I would like – if we're going to do anything based on an assumption that we have this huge amount of undeterred antitrust crime, I was wondering what the data are, and are we confident that what's happening is that more companies are committing more antitrust crime, as opposed to that we've gotten better, for whatever reason, at detecting and punishing it, whether it's because of the efforts of the leniency program and the lag time kicking in, or maybe because, as Bob suggested, a lot of this cartel activity we're seeing is international and there's been the

focus in Europe and other places on cartel activities, you know, more recent than not?

Just so I'm clear, do we know that this is actually, the inexplicable lies and criminal activity, happening at the same time that penalties are harsher, as opposed to there being better detection and enforcement?

MR. BOIES: Distinguish between two things, I think. One is whether criminal activity is increasing or not. I don't think we really know the answer to that. But the second is whether there's a lot of it, and we do know the answer to that. What we know is that there's not adequate deterrence, because we know there's a lot of it out there.

Now, are we finding more of it now because of amnesty programs, or because of better detection? I don't think we know the answer to that. So I don't think – at least I couldn't confidently say that there's more of that activity than there used to be. What I think we can say is that there's a lot of that activity now.

CHAIRPERSON GARZA: Everybody, I take it, agrees that you don't need to see zero cartel activity to believe that there's reasonably optimal deterrence. So what is a lot? Do you have a sense of what the tripwire is?

MR. BOIES: I don't think I've got a single quantification, but if you look at just the cases that the Antitrust Division has done in the last few years; in fact, if you just look at them with respect to German and Japanese

chemical companies, what you see is a repeated number of those cases. And, of course, the price fixing is not just limited to those companies. So there's a great deal of it going on if you simply look at the fines that are being levied by the Antitrust Division.

MR. SUSMAN: One thing I would want to focus on, that I think you need to pay attention to, the Commission needs to pay attention to, are the monopolization cases, because while it's traditionally been said that monopolization cases are rule-of-reason cases, there are a couple things we do know. Every company knows when its market share gets into the red zone, above 65 percent. There's not much question about that, when they have a market share that makes them a potential monopolist. And I think they also know pretty easily when they engage in conduct where there are less restrictive alternatives to accomplishing some means. I think they know when that takes place.

And so I think, for policy reasons, you want them to avoid that kind of conduct. Then you have to do something like treble – pay attention to – that's where treble damages I think are necessary, to cause them to seriously consider other ways of accomplishing the same thing when their market share knowingly goes over the 65-percent level.

MR. LIPSKY: I need to respond to a couple of things there. It's not so clear that you want the spirit of

deterrence for a lot of things that large firms do, and I don't think it's as clear as Steve has described. You know, if the market is carbonated soft drinks, maybe your share is big. But if the market is all commercial beverages, it's not nearly as big. And just a tremendous amount of money and effort and econometrics happens to try to decide which is which.

And so it can be very difficult, and that's why I think the deterrent spirit in many respects should be removed from – even in a broad swath of the area of monopolization law. And Bill Baxter used to have this favorite image that, you know, he didn't want the parimutuel theory of competition. If what you want is a couple of horses racing very close to each other, then you're going to have to put lead weights in the saddlebags of the fast runners. But, on the other hand, if you've got a Secretariat, you want him to win by 20 lengths. That's competition on the merits. But there are areas where you do need caution in monopolization.

I just also wanted to mention that it is worth thinking through – and this goes back to a couple of the different questions. It is worth thinking through whether one of the failure modes that produces continuing cartel activity is the notion, you know, that the United States is so far – even with the improvements in cartel prosecution that have occurred in other jurisdictions – the EU has gotten much more serious; even in the Far East, the Koreans just had

a huge cartel fine that they imposed. Nevertheless, the United States has by far the most consistent and credible record of cartel enforcement. In a global economy, if it's possible that a cartel can pick up enough profit outside the United States to make even the horrendous penalties available within the United States justifiable, well, that's a failure mode that we can address. We can get other countries to be more aggressive about seeking evidence and using it or giving it to jurisdictions that will go forward aggressively. And that's sort of a rational explanation – if it were true, that would be a rational explanation we could cope with. But it's the kind of thing – I certainly don't know enough to say that that's the case or not, but it's something worth looking into.

CHAIRPERSON GARZA: I'm going to have to close it, but I want to thank again on behalf of the Commissioners, everyone who has appeared on the panel. Thank you for coming and testifying. Thank you for your very thoughtful comments.

[Recess.]

Panel II: Joint & Several Liability, Contribution, and Claim Reduction

MR. HEIMERT: We'll now begin today's third panel, on contribution, claim reduction, and joint and several liability.

CHAIRPERSON GARZA: First, let me welcome our distinguished panelists on behalf of the Commissioners, and

thank you for being here today to participate in this hearing.

The Commission, as you know, is in the process of gathering information on issues that it selected to study. These hearings are an integral part of that process. They enable the Commission to hear from a broad range of experts and to probe and understand the competing arguments, and because the hearings are open to the public, they inform the public as well.

The topics we have selected for study present complex and important issues upon which reasonable people may disagree and have disagreed and as to which there may be no easy answers. Your presence here today and your thoughtful writings make this clear.

It is important to bear in mind that the Commission having selected an issue for study, does not mean that the Commission has already decided on a particular recommendation or findings; we have not. Our deliberations will be conducted in the open, just as our selection of issues for study was made in the open, at public meetings following these next several months of hearings and study. Again, I thank the panelists for being a part of that process.

Some of you may have been sitting in the audience and have heard this, but let me very quickly go through the format that we will follow.

First, we would like to give each of our panelists

an opportunity to summarize his testimony or to make a statement. We ask you to try to keep those statements to about five minutes in length so as to maximize the time that we have for discussion with the Commissioners.

After each of the panelists has made his statement, there will be questions from the Commissioners. Commissioner Burchfield will lead the questions for the Commission. He will have about 20 minutes or so to do that. Then we will go and each of the other Commissioners will have an opportunity to ask questions for about five minutes apiece.

The hearing is being recorded.

Transcripts will be made available to the public. Hard copies of the witness statements are available outside.

With that, let me first ask Judge Easterbrook if he would like to begin with a statement.

JUDGE EASTERBROOK: Thank you very much. I suppose I should apologize for not having had a prepared statement, but every time a judge opens his mouth, there's some danger of saying something inappropriate. So I thought I would give you an article I wrote with Professor Landes and Judge Posner 25 years ago. That article concludes that joint and several liability should be left alone and no contribution regime should be established.

It's 25 years old, and perhaps it just shows that I'm incapable of learning. But I still think that it's correct.

The intuition about how joint and several liability without contribution works, laid out in that paper, is that as some defendants settle and have their payments but not their market shares carved out of any final award, the remaining defendants have a greater exposure per dollar of sales and have to pay more. That happens because the early settlements are compromises. Every settling defendant pays less than the exposure at trial, but the non-settling defendants stare the full exposure in the face.

Everybody knows that, of course, and that drives the competition to settle early. But not everybody can settle early or cheaply because plaintiffs, who also know this, demand more in settlement as the price of giving some defendants their freedom from the risk that comes from being last.

The upshot established formally in the article – I have not asked for a blackboard to put any of the equations up – is that total collections in antitrust suits increase and, thus, there's better deterrence, at the same time as settlements increase, and thus the total costs of litigation fall.

The fact that some early settlers pay less doesn't reduce deterrence. The critical question for cartel stability is whether at least one defendant expects to pay more than his anticipated share of the profits. A system in which some defendants get off for less means that other

defendants are obliged to pay more. That means that if damages are set correctly, at least one member of the cartel will find it a negative-value proposition and drop out, and at that point everything unravels.

The point that was being made in the article, and which I'm reiterating, is that the critical step is making sure that damages as a whole are set high enough so that the cartel is unprofitable for at least one member, and then it unravels.

Now, a lot of people call these effects unfair, but there isn't really any reallocation among potential defendants *ex ante*. There is, of course, a lottery. You can't be sure who will be settling early and who will be called on to pay, but we don't call a lottery unfair just because people lose. The question for fairness is whether there are equal opportunities *ex ante*, and here there are.

If one were worried about *ex post* fairness, how much are you willing to pay to achieve it? Claim reduction and contribution schemes don't work unless you can get good estimates of the defendants' market shares and other good estimators of their contribution to the cartel. That isn't cheap.

We shouldn't just look at this from the perspective of antitrust. There are a few legal systems that try to do that kind of thing. CERCLA is one of them. The environment cleanup scheme actually has a contribution rule built into

it, and I can tell you from having had too many of those cases pass through my court, it ain't pretty; it's expensive; it's highly imprecise. The contribution questions under CERCLA have become more expensive to litigate than the basic questions of liability.

If somebody says to me these days: there's a CERCLA case coming up, my immediate reaction will be, ah, yes, the defendants are fighting about their shares. Very few fight about the underlying liability. I see very little reason to move that into antitrust.

The Supreme Court, even though it has allowed contribution in admiralty cases, has been very loath to extend it elsewhere, and I think with good reason.

If there are bad antitrust rules that lead to bad suits and inappropriate liability, the right thing to do is make the substantive rules good rather than create cumbersome rules for reallocating liability on the back end. If the net effect of joint and several liability without contribution is excess damages, then adjust the multiplier.

I have written on this as well – it was actually referred to in the last panel – an article in the *Journal of Law and Economics* in 1985 about the detrebling problem. But you have spent a panel on that, so I'm not going to pursue it.

But that's my bottom line. There's very little that can be got out of trying to rearrange liability *ex post*.

You want to get the rules right for the right amount of liability *ex ante* and then stick with it.

CHAIRPERSON GARZA: Thank you.

Mr. Constantine?

MR. CONSTANTINE: Thank you. Before I start, I just want to say I'm really happy to be here today with a lot of friends and colleagues and mentors and clients and partners.

[Laughter.]

MR. CONSTANTINE: And because I hold all of you in such high esteem, I hope the one sentence that you read in my written testimony was the part where I said that I thought you were all open-minded people and that you would all evaluate all the evidence, and I truly believe that.

I'm honored to provide testimony today. For the last 25 years, I have practiced, taught, lectured, and written about antitrust.

The issues addressed to this panel were the subject of several legislative proposals in the 1980s and, most prominently, in 1986. Back then, I testified frequently before the Senate and the House on these proposals.

The Reagan administration's 1986 proposals, styled the improvement and modernization acts, were designed to substantially eliminate federal antitrust law. They included *de facto* repeal of Section 7 of the Clayton Act, antitrust immunity for firms in industries harmed by foreign

competition, the substantial elimination of treble damages, and two proposals to eliminate joint and several liability, S. 1300 and S. 2162.

Malcolm Baldrige, the Reagan administration's Secretary of Commerce, called for repeal of Section 7 and observed that the antitrust laws had outlived their usefulness. One Reagan Antitrust Chief, Doug Ginsburg, drafted a bill that effectively would have repealed Section 7. Bill Baxter, the first Reagan antitrust chief, derisively predicted that, by 1996, the federal government would be substantially out of the business of enforcing antitrust law, having ceded that role back to the states.

The Reagan administration's legislative proposals had the backing of the Business Roundtable, whose Antitrust Committee was headed by Tom Leary, and the ABA Antitrust Law Section headed by Jim Halverson, who delivered the Section's support for these proposals in response to a personal request made by Attorney General Ed Meese. At some of those congressional hearings, I was the only government witness opposing these proposals. And when they were ultimately defeated, I and my colleagues and the states became the primary enforcers of the antitrust laws until the rule of law was restored in the Bush administration of the early 1990s.

I believe the motivation for establishing this Commission was not modernization but virtual destruction of the antitrust laws. The proposals being considered by the

Commission are, by and large, the same as those rejected two decades ago. I draw a clear distinction between the motivation for establishing the Commission and the motivation of the Commissioners themselves. I know you are distinguished professionals who will evaluate all the testimony and evidence.

Now, reasonable people differ on whether the antitrust laws help or hurt, but there is no doubt that if the 1986 package had been enacted, Bill Baxter's prophecy and goal of federal antitrust enforcement disappearing would have come to pass. I think there is little doubt today that if the same proposals, merely dusted off, were enacted now, they would reduce the scope and power of antitrust law even more radically because there are additional modernizations under consideration now, such as proposals to substantially preempt state antitrust enforcement.

With regard to joint and several liability, nothing useful has been contributed in the last 20 years to enlighten the debate. That's pretty much what Judge Easterbrook just said. My copanelist Don Hibner relies upon his testimony from the 1970s and 1980s. I rely upon mine from the same period. Judge Easterbrook gave us his 1980 article. Harry Reasoner finds that there's no empirical support for any change or positions pro or con and concludes, as we all apparently do, that nothing substantial has enlightened the debate since it raged 20 years ago.

For me, the issue was and is simple: joint and several liability without contribution or claim reduction is part, and is an important part of, the positive force of the antitrust laws. My belief in this regard has not changed. But the experience that informs that belief has broadened significantly.

In '86, I was just a state official who could only speculate about the deterrent effect of antitrust, but for the last 14 years, while engaged in private law practice, I have examined these issues first-hand. I have defended large firms in antitrust matters as frequently as I have been plaintiffs' counsel, and I have spent almost as much time counseling.

The antitrust laws – and this is something you should think about – the antitrust laws have very little *in terrorem* effect today, either individually or collectively. The businesses I counsel and defend are respectful and mindful of all the myriad antitrust sanctions from various jurisdictions, but I have yet to see any substantial business initiative die on the vine because of antitrust concerns, let alone the threat of joint and several liability for treble damages.

My observations from the plaintiff's side further inform my opinions on these issues. In case after case, litigation discovery from defendants reveals a keen awareness of potential antitrust exposure. However, it also shows very

little moderation of conduct in response to the potential exposure.

The quick settlement by the hypothetical innocent company under the threat of onerous antitrust penalties is unknown to me. The one time in a long career that I used joint and several liability was after a trial where we represented New York in a highway bid-rigging case. After securing a multimillion-dollar verdict from a federal jury against a bunch of bid-riggers, who paved roads on Long Island, the defendants appealed to the Second Circuit, and I focused my attention on the bid-rigger with the deepest pocket. I told their counsel that the cost of their appeal was this: drop your appeal, and you'll pay 50 percent of the treble damages for the entire nine-defendant conspiracy; but if you lose your appeal, your client will pay 80 percent. I also told them that the cost of a *cert.* petition was the final 20 percent.

I knew that collecting from the small bid-riggers would be difficult. After the appellants lost in the Second Circuit, I took the threatened 80 percent and got the rest from the other eight defendants.

That I had the power to do that was a good thing. The legendary Milton Gould of Shea Gould complained to me and also to the Attorney General, Bob Abrams, about how this was all so unfair to his client. Bob and I told him that we had both testified against the administration's antitrust remedy

bills and specifically against eliminating joint and several liability. We also told Gould that our experience with his client had reinforced our convictions about our testimony.

Then and now, and with the additional benefit of experience defending those charged with price-fixing, I believed and believe that the arguments against joint and several liability and for contribution and claim reduction amount to legislating a code of honor among thieves. I oppose doing that, and I oppose it based upon my significant, relevant experience. Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Hibner – I'm sorry. Mr. Hausfeld.

MR. HAUSFELD: I too would like to thank the Commissioners for inviting us to address the Commission this afternoon on a matter of most essential importance generally to the private civil enforcement of the antitrust laws. The same considerations that the Supreme Court focused on in *Illinois Brick* with respect to tracing damages or injury through chains of distribution I believe are relevant to a consideration of abdicating the rule against contribution.

Judge Easterbrook focused on environmental law. In environmental law, what the defendants seek to do is look to what is generally referred to as the toxic stew, created by their various dumpings so that you cannot extricate and isolate and identify what toxin was caused by—or can be traced back to which particular defendant, and what the mix

of the toxins was within each stew.

The same policy consideration that prompted *Illinois Brick* points to what practical evaluations can be made in a market analysis among cartel members to isolate and identify the impact of one member as opposed to another.

How does that get tried? As a practical matter, at the same time, the plaintiff's case goes on, when really, the issue of relative culpability among defendants has nothing to do with whether or not there was a cartel that socially impacted a class of victims.

What difference does it make to the remedial purpose of the antitrust laws that there is fairness among felons who commit violations of public policy? Is it a valid public consideration, to try to take into account a fair apportionment in whatever factors there are to re-create the market to determine which felon contributed which factor to the impact of a cartel?

So I would like to carry over those policy considerations into the abrogation of a contribution rule, and I believe that, for the same reasons that *Illinois Brick* was established, for the purpose of creating a bright line, the same reasons exist to create a bright line of culpability among tortfeasors.

I have a less harsh approach, possibly, with respect to modernization, but it does have a more global aspect.

Modernization is an interesting word, but what is it that we are seeking to modernize and by whose standard? Is it the U.S. standard?

Antitrust law or competition law is no longer the sole, exclusive province of U.S. civil or criminal enforcement. There are very active enforcers outside the United States. How are they approaching competition law? Are they seeking to modernize competition law the same way we're looking at modernizing competition law?

Recently, in England, there was a report – it's called the Ashurst Report – that was just done to advise the British judiciary, as well as the European Commission, as to what considerations might be taken into account in the judicial systems outside the United States to enhance private civil enforcement. And the very things that we're considering in our modernization of doing away with they're thinking of utilizing to impose.

Yes, there is contribution outside the United States in competition law, in theory. But there's been very little enforcement privately of competition law outside the United States. And Mario Monti, the former Commissioner at the European Commission, has advocated doing away with contribution, doing – imposing an *Illinois Brick* approach – establishing some ability to have bright lines so that you can get really effective civil enforcement, and the balance between incentive and disincentive.

The incentive is to try to end a cartel and or to make restitution. The disincentive is to make it economically unsustainable for the cartel to continue in the future. Thank you.

CHAIRPERSON GARZA: Thank you. Mr. Hibner?

MR. HIBNER: One thing I would like to say at the start is that it's a pleasure to be here, and I was here once before on a similar subject in 1979, with my good friend, Steve Cannon, and I just wonder what we've learned since 1979. Of course, we learned *about Texas Industries v. Radcliff*, which reshaped the debate that we're having, but certainly did not end the debate.

But I'd like to think back to what we're really doing here and that is to do the public a service and to see if we can make the administration of justice better, fairer, more predictable, and do a better job for U.S. consumers. You know, I think that we can be proud of the fact that we're going to produce as good a record as we can and move this matter forward. I'm also mindful of the fact that this was not the first such Commission that has been investigating ways to improve antitrust enforcement policy. And I remember, when I was a very young lawyer, I was given a copy of the 1955 Attorney General's Commission Report, read it, and I thought it was pretty good. And I read an article the other day, that was pointed out to me by Bert Foer and written by Tom Kauper, and Tom asked the question: "What

would the 1955 Commission members have thought about the development of antitrust law if they were here today?" And I think his conclusion – and one that I share – is that they'd be pretty darned pleased.

I think antitrust is in much better shape than it certainly was in 1962, when I started. And I think since 1977, with *Continental TV* and *Brunswick* and even *Illinois Brick*, we have come a long, long way, and I think that's a very good thing.

But we have to see if we can do a little better. Simply to have a bright line, I don't think tells us whether or not that is the right standard that we really need to have. You could say that would be the standard for the Spanish Inquisition. They had some very bright lines, and some very draconian measures, but it really wasn't through the level of deterrence or the appropriate deterrence that that regime could engender change. And I think the same is also true here, to some degree.

I'm also mindful of the fact that we have a heavy burden in asking Congress to take action with relation to any antitrust regime.

I remember when I was a young lawyer, and I was in Washington one time with my mentor, Gordon Hampton, and Marcus Hollabaugh. Marcus and Gordon were at that time on the Supplementary Sanctions Committee of the Antitrust Section. And they had studied supplementary antitrust

penalties, and they had a resolution from the Council to see if we could take remedial action and get some of those repealed. One was the Panama Canal Act of 1912. Another was the Alaska Coal Lands Act of 1908. And another was the Arkansas Pipeline Act of 1910.

So, we went to see Don Turner at Justice, and we asked him if he would be interested in seeing if we could remove the supplementary sanctions that had really never done any good for the country; they had never been invoked.

And he looked at us, and kind of laughed, and he said, "You expect me to go tell Senator Metzenbaum that I want repeal the antitrust laws? 'Get real.'"

So that is one of our problems. But we have to be mindful that it's a worthy endeavor to study these matters and to see what we can do that is meaningfully remedial. And with that in mind, I asked myself the question, as a boy from Boone, Iowa, who is deterring whom, and for what? And I really don't know after reading the literature, whether or not we're talking about decision-making at the top, the middle level, or whether we need draconian measures for the corporate enterprise or what, but I suggest that if you really want to get real about deterrence – and certainly we do, because unless we solve the deterrence question, we really don't seem to have anywhere else to go – we're going to have to find out what is working and what is not, and if it's not working, why it's not working.

And I suggest that, in my 40 years of practice or so, I have not met many people who have been deterred by joint and several liability, contribution, or whatever. They have been deterred more or less to the extent that they have symmetrical information flows – from jail time, losing their jobs, not getting promoted, not getting that bonus, but, as it was pointed out not too long ago, we are seeing a lot of violations by middle management, and not senior management, and I share this experience that the most dreaded person within any manufacturing company that distributes its products is your sales manager that calls on the trade.

That is the person who is hard to control, but I think that we really need to find out the answer as best we can as to who is being deterred, and from what are they being deterred?

And to give a positive direction, I offer for your consideration, or at least some way to study and to get in better touch with these issues, is to take a look at what Bill Baxter proposed back in 1982, in H.R. 5794.

Being a Stanford law graduate, I've known Bill – or knew him for a long time – and I sort of had a rule of thumb, and if I could follow along behind Bill Baxter and not stray too far from one side or the other, I'd probably stay out of most difficulty, and I commend his – I suggest to you, very thoughtful effort for your consideration in framing this debate. And, I thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Reasoner?

MR. REASONER: Thank you, and I very much appreciate the opportunity to be here. I do believe that there are instances where the application of unalloyed joint and several liability can create unfairness.

Let me say that I find that Judge Easterbrook's analysis to be extremely persuasive on the way it would work and the ultimate place that I would come out. But I think that my friend, Lloyd Constantine, gave you a very vivid example of the way joint and several liability can be used unfairly in an individual case to attempt to deprive someone of the right to appeal or to coerce them out of it.

To me, the critical question is, what could we do to change the antitrust laws in these areas without encountering a risk of lessening a deterrence? It is my belief that the governmental resources for prosecution of the antitrust laws are more severely limited today than they ever have been before with the enormous growth in the internationalization of our economy, so I think that the stimulation - or at least not creating barriers to legitimate private actions, ought to be a critical goal of this Commission.

I am concerned that any injection of issues of contribution and claims reduction would complicate the task - make the transactional cost of antitrust litigation higher

and inject further uncertainty into it. Judge Easterbrook gave you an excellent example in CERCLA. Another example, you can see how not being – not having the whipsaw effect, I think as you referred to it in the literature, of defendants having an incentive to settle rapidly, unless they were so confident of their purity in their case, in which case they should enter into a sharing agreement where they would avoid the risk of joint and several liability.

I think that it's instructive to look what has happened in the area of the Private Securities Litigation Reform Act, where they put into effect for non-intentional violations proportionate liability provisions, with the reduction being either of the greater of the proportionate responsibility of the settling defendant or the amount of the settlement.

My belief is that that has greatly slowed the settlement process in securities cases because plaintiffs are afraid to settle with smaller defendants, or defendants, fearing that disproportionate liability will be attributed to the defendants they've settled with, so that – their leverage against larger defendants might be reduced.

A vivid example of that occurred in the Enron litigation, where Arthur Andersen immediately agreed to – in the class action settlement – $750 million for relief. The plaintiff's class action attorneys turned it down for fear that they would encounter a situation where the financial

institutions, which were obviously the deep targets, would take the position that the responsibility was 99 percent, 95 percent – you pick a number – the responsibility of Arthur Andersen.

I don't think that that's healthy to inject those additional costs into antitrust litigation. I think undertaking a plaintiff's antitrust case is a formidable undertaking now. The litigation is growing more costly, with the cost of electronic discovery. There are delays in getting to trial in almost every federal court. And if you were to inject into it the complex issues of trying to decide proportionate responsibility, which Professor Bill Baxter used, I think that's an empty phrase. I don't know how long it would take the courts to give content to it, but it would simply be another risk, another uncertainty that you would be engaged in. If you had to try those issues as well as the issues of trying to impose liability, I think it would complicate a trial where it's already extremely difficult and complex to try.

I think that it would potentially raise a real barrier to entry. I would further add that I'm much influenced by the lack of empirical evidence of abuse. With today's far more orderly and transparent antitrust rules, unintentional violation is less likely now than it was 25 years ago. I suspect there is much less of a need for reform to prevent injustice. Thank you.

CHAIRPERSON GARZA: Thank you. Commissioner, Burchfield will lead the questioning.

COMMISSIONER BURCHFIELD: Thank you, Madam Chair. And I should begin by saying how happy I am personally that all of you would come and testify before us today. This is truly a remarkable panel, and you have all done considerable work in preparing to testify here today. And I appreciate it. I'm sure the rest of the Commissioners do as well. Let me begin with Mr. Reasoner. In your statement, Mr. Reasoner, you mentioned that we could benefit from watching PSLRA and other instances in which proportionate liability or contribution have been allowed. Obviously, since 1799, when the *Merryweather* case decided and first imposed joint and several liability, about 40 states, either legislatively or judicially, as I understand it, have abandoned joint and several liability, and some or all tort claims in the federal securities laws. It has been – the contribution has been allowed since 1933. And in a variety of other contexts it's allowed.

What are you looking to find from further study of these new laws?

MR. REASONER: I think one thing, you'll find— although, let me say – I can't find – I could not find a case where anybody had ever actually tried one of the things, and, you know, gone through the discovery and had actually gone to a trial and had an allocation of responsibility in this

fashion in the securities area so that you could have a template there.

One thing I think – I believe is reasonably clear is that it has slowed down settlements and protracted litigation in the securities area. And, you know, that's not a trivial cost, because normally, what plaintiffs would do would be to settle with the lesser targets. I think plaintiffs' lawyers are sophisticated. They settle with the people they have the weakest evidence against, or they settle with people who have relatively limited capability to pay, and they get out of the ongoing costs of the litigation. In the securities suits that go on now, there are – my impression is, no settlements with the small players until the big players settle so that you have a room full of a hundred lawyers sitting through these depositions.

But further, I think, you know, sitting on the other side, thinking about whether you're going to file one of the suits, if, you know, it's going to be protracted, you know the expense is going to be greater, you know there are not going to be any settlements at the courthouse; it's another risk factor and another burden.

My impression now is while the scope of antitrust suits had been narrowed, you have to be pretty well financed to be willing to file a plaintiff's antitrust suit now.

COMMISSIONER BURCHFIELD: The same in the securities area I think. The same in the securities area?

MR. REASONER: Yes, I would think that would be so.

COMMISSIONER BURCHFIELD: Judge Easterbrook, do you, from your experience – and you've obviously mentioned CERCLA – from your experience, have you seen instances of either contribution or claim reduction issues litigated in some of these other areas like state diversity tort suits, product liability, for example, or federal securities laws?

JUDGE EASTERBROOK: Very few under the diversity jurisdiction get to us with any contribution issues. I don't know why not. I have not seen any under the securities law. I've never understood why the Securities Litigation Reform Act was thought to be interesting in that respect. I'm interested in Mr. Reasoner's statement that it has some effect, because the new contribution right was designed for unintentional violations, and, of course, all the private rights of action under the securities laws are limited to intentional violations. So there was this contribution right put in, which would be important I would think in suits by the Securities and Exchange Commission or perhaps suits under Section 11 of the Securities Act of '33, and there's very little private litigation under that provision. Now, I'm not sure why that would have much effect. We see CERCLA cases in well, let's just say in large numbers, and they all take a lot of time. The Supreme Court has shown some restiveness in the *Keytronic* case a couple of years back, and *Aviall Services* just last term with those actions precisely because

they been so time-consuming and expensive. And they've really come to dominate the liability actions.

The thing that has made CERCLA as expensive as it is is that it's a real contribution system. And it seems to me one wants to distinguish contribution systems from claim reduction systems. A lot of people refer to claim reduction as a form of contribution, but it isn't. What characterizes contribution is a system in which people who have settled out can, nonetheless, be called on to pay money to the non-settlers or to pay money – who pay a larger proportion and share later. What makes it extremely expensive is not only that you can't buy peace, because you can never get out of the claim from the non-settling defendant, but the fact that since money is going to change hands between the defendants, it's a great opportunity for rent seeking. You see an opportunity to collect funds. You invest in attorneys' fees at the margin, up to where the marginal dollar investment in attorneys' fees raises your return from your settling defendant. That's what makes contribution actions particularly expensive under CERCLA.

JUDGE EASTERBROOK: Claim reduction systems, on the other hand, have no rent seeking opportunities. There's no pass-over. The only expense in a claim reduction system, if you adopt – if there is a system under which, for example, the settling defendant's market share is taken out, if you define – if you can define market share in a way that's quite

transparent so that everybody knows what market share means, that can be done fairly mechanically, and there's no pass-over between the defendants so there's no opportunity for rent-seeking behavior.

COMMISSIONER BURCHFIELD: Could you reach the same result by simply eliminating joint and several liability? In other words, if each defendant is only initially liable for his share of the blame –

JUDGE EASTERBROOK: Then I think you can't – first, you still need clear and easily ascertainable rules to determine percentage shares, and everybody has been very reluctant to do that in cartel cases, because participation of everybody is essential in the cartel; if the people jump out, the cartel unravels.

But if you have a perfectly simple rule, then breaking things up will, of course, reduce plaintiffs' recoveries, will reduce net deterrence, because some of the defendants will be unable to pay according to their shares. They'll be insolvent, or there will be other reasons you can't collect.

So net deterrence is bound to go down, but it wouldn't be nearly as complicated or cumbersome as a genuine contribution system would be. If there's some need to step away from joint and several liability, it's gotta be some – from the current system of joint and several liability. You either strike the joint part or adopt a claim reduction

system. It's the contribution that really gets the worst features going.

COMMISSIONER BURCHFIELD: Okay. And in your view, you could have contribution without claim reduction or claim reduction without contribution?

JUDGE EASTERBROOK: Yes. Right. You can have claim reduction without contribution. For what it's worth, my understanding is that many states that started in a contribution direction have moved to claim reduction systems. That is, people who settle in good faith, as it's usually said – you know, fighting about good faith is nasty, but if you settle in good faith, you're never liable to your co-defendants for contribution under most current state tort systems, so that amounts to a claim reduction system.

Nobody really likes to emulate what we've got in CERCLA.

MR. HIBNER: Just a comment, if I may. I believe the Polinsky article, which is contemporaneous with Judge Easterbrook's article, prefers a claim reduction system to a contribution system and for many of the reasons stated.

COMMISSIONER BURCHFIELD: I was going to ask you, Mr. Hibner, in a contribution system and also in a claim reduction system, if you can answer for both, what effect would the adoption of those in the antitrust context have on the amnesty program, which at least intends to limit exposure of a cooperating defendant to that defendant's single

damages. Does that take away enough of the incentive to cooperate that it would undermine our efforts to expose cartel activity?

MR. HIBNER: We're talking about a subset of individuals or enterprises on a continuum, and there's going to be a myriad number of different actors who are going to respond differently. I would like to see the experience of the amnesty program factored into future deliberations and thought about as to how to make a given system better, and I applaud that use of the resources in that way. I think that it's not likely to do any harm, and it's likely to do a lot of good. I certainly hope so. And, as Mr. Reasoner points out, perhaps we'll learn some things.

But I do not know whether very many people are meaningfully deterred by a non-contribution rule. And, as Bill Baxter once responded, a system of some sort of contribution, particularly where you have a price-fixing cartel arrangement, if you can have an allocation system that is better than a coin flip, then it's probably going to be less arbitrary and should be considered.

COMMISSIONER BURCHFIELD: Apparently the public policy judgment has been made in some of these areas of law – CERCLA and securities law and tort law – that – where we presumably want to deter securities law violations and so forth the same way we want to deter antitrust violations. The public policy judgment has been made that the deterrent

effect of having joint and several liability is not sufficiently weighty to continue it there.

Is that judgment wrong in that context, or is it – how do you view the public policy issue on a larger scale?

MR. HIBNER: The public policy issue to me is that, unless a rule of non-contribution would greatly affect risk aversion in some significant fashion, the experience that we're going to gain through the securities law changes is well worth taking a serious look at.

As a private antitrust lawyer of 43 years' experience, I believe, from Boone, Iowa, I don't know a man – I'm thinking now of being out there with Diogenes with my lantern looking for somebody who's meaningfully deterred from violating the antitrust laws because of non-contribution. And quite frankly, I've never met anybody like that. I've met more people who have reasons why they don't think they're culpable at all or have less culpability than the person next door: "the devil made me do it."

COMMISSIONER BURCHFIELD: Judge Easterbrook, do you see what is happening in the antitrust area where joint and several liability without contribution or claim reduction is allowed whereas, in the securities law area, joint and several liability is not the paradigm? Is one wrong and the other right?

JUDGE EASTERBROOK: I'm a little puzzled by the way you put it. I don't know any area of federal law, where

there are private remedies, that does not have joint and several liability. Securities law certainly has joint and several liability.

It also has, to a limited extent, a contribution system on top of it, but it starts with joint and several liability. Now, there may be some states where there is several liability, but not joint, but the lack of joint and several liability would be quite startling. It's not used in any federal system that I know of.

COMMISSIONER BURCHFIELD: Let me rephrase the question then, if I may. Then, is it your view, that we are not maximizing deterrence in these other areas that allow contribution?

JUDGE EASTERBROOK: We are certainly not maximizing deterrence under CERCLA, but for very complex reasons. It has to do with the fact that there's also a federal subsidy, substantial taxes. The way in which the CERCLA system works – I always have to be careful talking about these things, given my role – responsible people could think that the CERCLA system could use a careful reexamination. In securities law, for reasons I don't understand – it may have to do what the difference between liability for non-intentional acts, which is really not there, and the standard liability based on fraud – has simply not been a much-litigated question.

Never having made a study of that, I can't really explain why; it's beyond the scope of my expertise.

COMMISSIONER BURCHFIELD: Mr. Reasoner, do you have a view on whether we are under-deterring and taking as the contrary example securities law where contribution is allowed?

MR. REASONER: I would think that you'd have to give a lot of thought as to how much an analog a charge of conspiracy to violate securities law would be to cartel behavior. In a normal securities law violation, if you have an issuer and you have various people involved to various degrees, I don't think it's a good analog. It's much easier over time – I mean, a securities law violation involving one company is apparently much easier to detect, and, of course, we also have a history of securities cases being brought and settled. Cartel activities are far more difficult to detect. We now know of major cartels that have been uncovered, particularly those with international aspects, which had operated successfully for many years – to go back a little in time, the uranium cartel. The key evidence wasn't produced by a federal grand jury, which was unsuccessful in obtaining it, but by the Friends of the Earth, who broke into a cartel member's offices and stole it in Australia.

So I think that you need to take a harder line on deterrence in the antitrust area.

Clearly, we haven't reached a point where I think you could point to, at least on things like cartel conduct, where we've needed to be worried about over-deterrence. And

it seems to me the laws have evolved to the point where there are fewer areas that we need to be worrying about over-deterring possible procompetitive conduct. In the area of monopolization, you could get into hard questions about regulating monopolistic conduct, perhaps in vertical exclusive dealing arrangements - you get into questions as to whether you were interfering with pro-competitive conduct.

But to me, the lesson to be learned from the securities laws is, by allowing contribution and claims reduction, they've slowed down the process, made it less of a deterrent, and it's not something that we could afford to inject into the antitrust area.

JUDGE EASTERBROOK: Could I supplement my answer? What dominates the deterrence question is not contribution or claim reduction or joint and several liability: it's first the probability of detection, which is largely outside anybody's control - at least anybody here, unless one of you knows about a cartel. And the other is the damages multiplier.

You want to make sure you get the damages multiplier right. As some members of the last panel said, it's very hard to know what that multiplier ought to be, because we really don't know how many cartels evade detection. If you knew how frequently they completely evaded detection, you could figure out what the right multiplier was.

What one can say about contribution and claim reduction is that, at any given level damages multiplier, if you put in a system of either contribution or claim reduction, you would reduce deterrence by some amount, because what joint and several liability without contribution or claim reduction does is ratchet up the damages a little. We don't know exactly how much, but it ratchets up the damages some. So there's an interaction effect with the damages multiplier.

The other thing one can say – and this is completely independent of deterrence – is that a contribution system, as CERCLA exemplifies, because of the rent seeking opportunities of the pass-over payments, is extremely expensive to administer, and unless it's doing something for you, which, as I said, in both my article and in my statement, I don't think it's doing anything helpful for you, you don't want to incur a pointless expense.

COMMISSIONER BURCHFIELD: Thank you. I want to come to this side of the table. Mr. Hausfeld, you said in your statement that a defendant that knows that it will be subject to a contribution action from a codefendant found liable for the remaining damages of the conspiracy will be much less likely to disclose information that will increase this risk. Doesn't the antitrust leniency program address that issue by incentivizing the first person in to come in and disclose the existence of the cartel?

MR. HAUSFELD: There is an interesting play between the new leniency act and just the general competitiveness of settling when there is joint and several liability. Under the new leniency act, the leniency applicant is limited to exposure for single damages.

COMMISSIONER BURCHFIELD: Correct.

MR. HAUSFELD: But the incentive there behind the act is to have the leniency applicant disclose to the civil plaintiffs everything about the conspiracy so that the civil plaintiffs can then pursue the remaining defendants. What happens in a situation where there is another cartel member, who says, "I don't want to sit back here and wait, knowing that there's a leniency applicant already out there," and comes in and settles with the civil plaintiffs before the leniency applicant?

At that point, you've got a settlement. You've got all the cooperation that you want, and so what benefit is there to limiting the leniency applicant to single damages? And it's interesting that under the leniency application it's within the court's discretion to limit the damage to single damages. So you do have an incentive already built into the leniency incentive of having the first - leniency applicant - come in early to make their disclosure early to get the benefit of the limitation.

Likewise, you have an incentive to some of the other cartel members to come in to try to resolve their civil

liability before they're held for the joint and several liability.

In all of this, in terms of discussing the fairness – what I call the fairness to the felon – nobody is changing the aggregate damage. It's how you allocate that aggregate damage among the cartel members. You're not producing a greater result for the victims, so everyone understands with joint and several liability what the incentives are to get out as quickly as you can, and as rationally as you can without being the last holdout.

COMMISSIONER BURCHFIELD: One last question for Mr. Constantine. You obviously have had a tremendous amount of experience on both sides of the "v." advising business clients, representing business clients as plaintiffs and defendants, and it would seem to me that – and we heard this – and we heard people on the prior panel say – that the risk – the great risk of price-fixing activity is by the lower-level people in the company – the sales managers – not the senior executives. And I would – it's been my experience, perhaps yours as well, that those people are the ones who are frankly least familiar with the arcane rules of joint and several liability, and maybe even treble damages and maybe even criminal –

MR. CONSTANTINE: Or all of the above.

COMMISSIONER BURCHFIELD: On the other hand, the senior executives, when they are considering doing something

that might be evaluated under the rule of reason, would almost always seek sophisticated counsel on that, and, at that juncture, be informed of joint and several liability, treble damages, criminal penalties.

In light of that, do you think that joint and several liability is really – if it is true, if the hypothesis is true that the cartel activity, the price-fixing activity, typically occurs lower in the organization, is the joint and several liability more likely to deter rule-of-reason conduct, or is it more likely to deter *per se* conduct?

MR. CONSTANTINE: Wow. Let me try to approach that. I think that joint and several liability – and I think that it's of one piece with treble damages – I think that – you know, it's a good thing that you're having these hearings today to get at what I think is part of the overall strength of the remedy that the antitrust laws provide.

I think that there is a significant deterrent effect for all anticompetitive conduct that violates the antitrust laws.

One of the things that I've been struck by in listening to the previous panel and to this panel as well is, there seems to be this sort of, not tacit, but active agreement that, you know, there's this bad stuff, and this price-fixing, some of this is hard-core criminal, felonious conduct, and then there's all this other ambiguous conduct – rule-of-reason conduct – which is supposed to be

competitively ambiguous, potentially procompetitive, and all that.

I don't view the law that way at all. I take a lesson from one of the former heads of the antitrust division, Tom Kauper, who said if he thought the only job of the antitrust division was to prosecute price fixers, he would resign and close the office.

I think some of the most anticompetitive conduct – the conduct that harms our economy the most, harms our technology the most – is not necessarily conduct that is *per se* unlawful or price-fixing conduct; I think it is conduct that falls within Section 2 of the Sherman Act, monopolization conduct. I think some of it – a lot of it – is clearly conduct which is evaluated under the rule of reason, and I think it is conduct that is engaged in with open eyes. I think people at the highest levels of the business have sought antitrust counsel. They know, and they've heard about the possibilities, not of criminal prosecution, but of treble damage actions, of private treble damage actions, and they go and they engage in this conduct with their eyes open, because they believe that their company will benefit more from the potential upside than it will suffer from the potential downside. And the reason they think that is that it's just so difficult now to lose an antitrust case, to lose a private antitrust case.

There are so many – the first panel focused on the

issue, you know, of deterrence, and why there isn't a significant deterrent.

I don't think it's because of treble damages or joint and several liability. It has to do with the myriad obstacles to maintaining a successful antitrust case, whether it be by government or private enforcers – standing requirements, *Daubert* motions, various, you know, threshold rules that just make it extraordinarily difficult to ever get to the – to a trial of an antitrust matter. So I disagree I think with the premise of your question, Commissioner. I think that it's very important to have joint and several liability and treble damages there for conduct which is characterized as rule-of-reason conduct, because I think that some of that conduct is potentially the most injurious conduct. Without trying to get into the facts of any particular case, I think about one of the cases, which is one of the largest cases in antitrust history – the recent *Microsoft* case.

That case came down to a essentially a tying arrangement and some non-price, near exclusive distribution arrangements for conduct, which everybody would agree is subject to the rule of reason, and, certainly Judge Ginsburg thought that the tying claim was subject to the rule of reason, and certainly the non-price vertical restraints of trade were subject to the rule of reason. But that was the core conduct at issue.

Without getting into who was right and who was wrong and what actually happened, if you take the – you know, the government's position on that, the position of both the U.S. government and the position of the state governments that brought that case – they thought that that rule-of-reason conduct was throttling competition in the most important area of our economy, the most important part of our commerce, the most important part of our future, and it all came down to this rule-of-reason conduct.

So I think that, even more importantly, because there aren't any criminal sanctions there, I think that the rule of joint and several liability and treble damages is necessary for that kind of conduct as well.

COMMISSIONER BURCHFIELD: Thank you, Madam Chair.

MR. HIBNER: I would like to respond just very briefly. If I change the words "rule of reason" to "monopoly-price maintenance," I would suggest that that should make a difference. And while there may not be very many really good or strong monopoly cases, they do exist, and they should be honored accordingly. And I think *Microsoft* is certainly one of those cases.

We have some other exclusionary conduct cases that we've seen in the last couple of years that are also I think quite important, and they're getting a lot of press in the business world. One is *3M*, and the other is the *Dentsply*. I think they've learned a lot from those cases.

But in my experience, most business executives do not believe that what they're doing is wrong, particularly if they believe that all their competitors are doing it, such as a MAP program or some form of resale price maintenance, and, of course, the fact that, in a concentrated industry, their competitors are doing it will only make matters worse, such as we saw in the FTC consent decrees in the *CD Video* cases. But, if attacked, I think most business people believe that they've already lost. It's not that they're going to win; they've lost their executive time; they've lost their key to the restroom, whatever. They're not happy campers about that.

CHAIRPERSON GARZA: I want to make sure that our Commissioners get a chance – will it be a short –

MR. HAUSFELD: A short one.

CHAIRPERSON GARZA: Okay.

MR. HAUSFELD: I just don't believe that reality supports the view that most business executives don't understand that, if they participate in cartels, they are doing something wrong. You take a look at the vitamins cartel, for example, where the chief executives of the various divisions met in secret in various locations throughout the world, deliberately kept their minutes secret – or destroyed their minutes by design – there is no rational explanation or justification for saying that cartels, particularly those operating today at the international or

global level, do not involve the knowledge of the senior people within the companies and their active knowledge that what they're doing is in violation of laws, not only in the United States, but elsewhere in the world as well.

COMMISSIONER BURCHFIELD: Thank you, Madam Chairman.

CHAIRPERSON GARZA: Commissioner Jacobson?

COMMISSIONER JACOBSON: Thank you. First of all, I'd like to say, it's possible to support treble damages and a rule of claim reduction, and I don't think the propositions are inconsistent. Perhaps we can test that.

I do have an initial question or two for Judge Easterbrook, and it goes back to your article.

You indicate that under the rule of no contribution, defendants have an incentive to settle for an aggregate amount greater than their expected damages from a trial. And I gather that the math for that holds irrespective of the multiplier, whether it's one or two or 10.

JUDGE EASTERBROOK: Yes.

COMMISSIONER JACOBSON: Is that a good thing?

JUDGE EASTERBROOK: If you think the current multiplier is appropriate or too low—certainly. If you think the current multiplier is too low, you think it's unambiguously a good thing.

I'm inclined to think that it's a good thing

precisely because the same feature that raises the aggregate amount paid by the defendants is what produces settlements in antitrust cases; that is, the early settlements are relatively cheap compared to the later ones. The reason that the aggregate amount is going up is that the plaintiffs are getting dollars with certainty from the early settlers, and those certain dollars are being subtracted—right. If you think the plaintiffs have brought a lawsuit that they have a 50-percent chance of winning, the plaintiffs are getting 100-percent dollars in the settlement rather than 50-percent dollars, while preserving the entire 50-percent claim for the entire pot against whomever hasn't settled; and that necessarily means the total stakes – the total recoveries – exceed the net damages multiplied by 50 percent, which would be the *ex ante* actuarial value of the suit.

So if you think the current damages multiplier is too low, you're unambiguously in favor of that effect. If you think that that effect is not a particularly large one – it's proved very difficult to quantify. When Professor Landes and Judge Posner and I thought about that article, and it went through workshops at which it was presented to people like Commissioner Carlton, we thought about ways of testing this, trying to figure out how much. It's extremely difficult, because you can't get your hands on the data. Most people are unwilling to tell you the amount for which they settled, and of course you can't run a natural

experiment. We don't have an alternative United States, with a somewhat different contribution scheme, so it's very difficult to get the data to analyze it.

But one thing that seems to be unambiguously true is that the joint and several liability system with no contribution is much cheaper to administer. The fact that there is this worry about being the left-out party induces people to settle early. It vastly reduces the cost of allocation, compared with something like CERCLA, where we see the alternative universe in operation, and there's a whole lot more litigation about the contribution, as I've said, then there is about the merits. And it's saving the cost of litigation in a system that's already quite complex in litigation, which seems to me quite beneficial.

COMMISSIONER JACOBSON: Doesn't that mean we should certify every class so that the defendants are pressured to settle irrespective of the merit?

MR. HAUSFELD: Are we going to put that to a vote?

MR. HIBNER: But what's the difference in the analysis?

JUDGE EASTERBROOK: I'm not sure what you mean, however, by "certify every class."

MR. HIBNER: Well, I think –

JUDGE EASTERBROOK: Presuming you're going to do this in a way that follows the rules.

MR. HIBNER: I think you just suggested the *Kline*

v. Coldwell Banker case in the Ninth Circuit, where the court denied class certification because of the enormity of the exposure to a large number of small real estate brokers in L.A. County.

COMMISSIONER JACOBSON: No, I'm trying to make the point that the fact that a case is forced into a settlement mode doesn't necessarily have to be a good thing – that there are good settlements and bad settlements. And if defendants are settling for an expected value greater than the expected liability, I think that should raise a question.

JUDGE EASTERBROOK: The defendants will settle for the aggregate of their expected liability, as multiplied through this process, plus the cost of litigation. And that's the effective settlement range.

If you do something that greatly increases the costs of litigation – actually, you're increasing the effective settlement range, but on the other hand, the plaintiffs will get less of it, because they'll have to pay more to their own lawyers for having engaged in the additional litigation.

COMMISSIONER JACOBSON: Let me just follow up quickly. We permit claim reduction today, provided that the defendants agree in a sharing agreement. Is anyone here proposing that we outlaw sharing agreements? Just yes or no.

MR. HAUSFELD: No.

COMMISSIONER JACOBSON: Given that the best-

organized cartel and the defendants who are most friendly can reach agreement on a sharing agreement, why are we denying the benefits of claim reduction and the associated fairness to those who are more competitive with each other and who cannot reach such an agreement? Judge, I'm picking on you again.

JUDGE EASTERBROOK: First, I don't think reshuffling the deck chairs after there's been a calamity is an example of fairness. It's an *ex post* view on the world, and as my article and my brief statement today said, you want to take an *ex ante* view in thinking about expected liabilities, and if you look at the world *ex post*, everything is unfair, and it becomes not a useful way of talking about it. Some defendants get caught, and others don't. Isn't that unfair? Shouldn't we do something about that? So that seems to me unhelpful.

The one thing I can say about sharing arrangements – and it's the same thing I said about claim reduction – is that it can be done in a way that's relatively cheap compared to contribution. Anything is relatively cheap compared to contribution, because contribution creates rent-seeking alternatives.

And if there is anybody here who is a little suspicious of sharing agreements, it's probably me, not so much because of the way it resolves the litigation, but on Adam Smith-ian grounds, which is that every time you get all

the players in an industry in the same room, talking about what they're going to do jointly for their mutual benefit, I'm thinking cartel again. Maybe you should have the sharing agreement negotiations recorded and sent straight to Assistant Attorney General Baxter, as he once suggested the head of American Airlines do.

COMMISSIONER JACOBSON: Just – my time has long expired – just one last follow-up. Are you saying you would support claim reduction or oppose it less vehemently?

JUDGE EASTERBROOK: As I've said, the multiplier effect of pure joint and several liability interacts with the damages multiplier. If you look at the article I wrote, under the caption, Detrebling Antitrust Damages, you'll see that I think that treble damages may be too high for competitor suits, and, in those circumstances, it seems to me the effect of claim reduction in avoiding the multiplier would be desirable. But for many cartel cases, where my suspicion is that they evade detection more often than one time in two, anything that would reduce the damages would be highly undesirable. It's very difficult to answer in a categorical way.

You'll notice that at the end of the article, the three authors try to weasel out on much the same grounds.

COMMISSIONER JACOBSON: Thank you very much.

CHAIRPERSON GARZA: Commissioner Litvack.

COMMISSIONER LITVACK: Thank you. I really had two

comments I wanted to make and then one question. I approach this – I probably have the distinction of having practiced law longer than anybody else in this room. As a practical matter, I don't see this as a deterrence issue, because I agree with Don Hibner. In some 46 years of practice, including being in-house counsel, I never heard anyone say to me, "Let's see, what would the contribution be – and are we going to have joint and several liability here?" It just doesn't work that way. This isn't a deterrence issue in my mind.

And the quantum of damages, the trebling, and the criminal fines – they are deterrence issues; this is not, in my judgment.

Secondly, I want to respond to something that Lloyd Constantine said. As a practical matter, if you're not talking about cartel activity, and you are talking about executives sitting down to make a judgment about business conduct, in the main, certainly in every situation that I've seen, no one sits and says, "Let me quantify exactly what the treble damages would be and how much money I am going to make." In that context, what they are doing, like it or not, if they're relying on counsel, who typically will say to them, "Look, I don't know." But I think – and with a shrug of the shoulders – that we should be okay here or we shouldn't be okay here, whatever the case may be, and then a business decision is made. It really is a very different

kind of approach.

And that leads me to my question. You actually touched upon it because Commissioner Jacobson touched upon it, and Judge Easterbrook did. I don't view sharing agreements as a question of fairness, and I don't view it as a question of cartelization because, as a practical matter, sharing agreements are done after the fact, as you said. They're done between and among the lawyers, and I know the businessmen aren't sitting down in a room doing this typically, at least not within my experience, anyway. These are the lawyers who are doing this.

If that's so – and again, with in my experience, if so – I hate to put it this way, what's the big deal? If the defendants – why is contribution a big issue? If the defendants can work out a sharing agreement, all the more power to them. Let them do it. If they can't do it, that's their problem. They face the consequences of the law. Why isn't that right, Mr. Reasoner?

MR. REASONER: I think you could make a powerful argument in that regard.

COMMISSIONER LITVACK: I hope I just did.

MR. REASONER: You know it takes very little for you to rephrase on the stand. No, I do think that there is a ready solution. If it's a case you really want to try and you can mitigate the risk of defense, you should enter into a sharing agreement.

COMMISSIONER LITVACK: And I guess I'm going further in saying – and maybe I'll address this to Judge Easterbrook – why doesn't that, almost in an Adam Smith way, take care of itself? If either defendants or the companies, through their counsel, want to enter into an agreement to share, why doesn't that deal with it?

JUDGE EASTERBROOK: The only reservation I had was the one I expressed. If you get the business principals together in the same room talking about it, I get worried that some new mischief may be afoot. But if it's done in a way that's off the court's books – it's not going to replicate the – I'm again trying to be delicate – the problems that had been experienced in administering a contribution system under CERCLA, if you can avoid that, then it's not much of a problem. It's not increasing the cost of antitrust litigation. It may be reducing the cost.

COMMISSIONER LITVACK: Yeah. I must tell you, I think the strongest argument against contributions – and one you made—that, as a litigation matter, the cost, the time, and the burden of trying to sort that out, if the defendants haven't agreed amongst themselves, is just something our society ought not to bear. I have no further questions.

CHAIRPERSON GARZA: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Because I find this topic not terribly interesting, may I just move slightly away from it, Madam Chairman?

CHAIRPERSON GARZA: Be my guest. And may I ask –

COMMISSIONER SHENEFIELD: It's relevant, but not quite on point.

JUDGE EASTERBROOK: You want to talk about targets—

CHAIRPERSON GARZA: Can I just ask you how many years you've been practicing?

COMMISSIONER SHENEFIELD: I have no idea.

CHAIRPERSON GARZA: I just wanted to see if Sandy was right or wrong. Go ahead.

JUDGE EASTERBROOK: I think he's right, unfortunately.

COMMISSIONER SHENEFIELD: I think he's correct. Yeah. Let me ask the panel members whether they think that a rule that would eliminate treble damages and follow-on class action cases would present a better or worse situation than where we are now. Mr. Reasoner?

MR. REASONER: I really don't see any argument for that. You could argue about how class action jurisprudence could be improved or not, but I think follow-on class actions – I don't see the argument for eliminating treble damages. In theory, if single damages were perfectly measured, you would remove the cartel profits and break even. And so I think any treble damages serve a deterrent effect.

COMMISSIONER SHENEFIELD: Judge Easterbrook?

JUDGE EASTERBROOK: Yeah, me, too. I think you need treble damages for deterrent effect, but you have to

understand I have a conflicted position. Before I was appointed to the bench, I was the Lee and Brena Freeman Professor of Law at the University of Chicago, and but for follow-on class actions, Lee Freeman would not have raised the funds to endow that chair.

COMMISSIONER SHENEFIELD: We understand.

Mr. Hibner?

MR. HIBNER: I would be of the mind that treble damages and follow on class actions are probably as good as the treble damage remedy itself. I think it's our experience that a great deal is generally learned through the class action process, that they did not, in fact, learn from the government, and that law enforcement has probably benefited accordingly.

COMMISSIONER SHENEFIELD: I think I know what the next two answers will be, but why don't we go through it anyway.

Mr. Hausfeld?

MR. HAUSFELD: There's no relationship between the fact that there's a follow-on and treble damages – the ability of the private civil plaintiff to recover that amount of damage. So you want the deterrent effect. The fact that it's a follow-on makes no difference.

COMMISSIONER SHENEFIELD: Okay.

Mr. Constantine?

MR. CONSTANTINE: I'd leave it the way it is, but

I'd just observe that I was just involved in a case where both the district court and the Second Circuit observed that, unlike the traditional case, the government had piggybacked on a case that we had won, which was a private class action, and all that. And I would also be against precluding the government from piggybacking on private litigation.

COMMISSIONER SHENEFIELD: Okay.

Let me ask the same kind of a question with respect to a rule that would confine treble damages only to hard-core violations – forget what they all are or how we have defined them at this point. Would anybody on the panel favor that?

MR. CONSTANTINE: Yeah. And I – can I jump in on that? Because that was the point I was trying to make, and I think Sandy sort of, you know, turned it around or misconstrued what I was saying. Maybe I misconstrued what you were saying, Sandy. What I was trying to say is that I think that some of the most potentially and actually damaging conduct is conduct that is now considered under the rule of reason – it's not considered to be hard-core.

COMMISSIONER SHENEFIELD: So you wouldn't favor it.

Mr. Hausfeld? I got – I think we got the point.

Mr. Hausfeld?

MR. HAUSFELD: No, I wouldn't favor it.

COMMISSIONER SHENEFIELD: Mr. Hibner?

MR. HIBNER: I might look with favor on exploring that in a non-price vertical restraint case, where the degree

of foreclosability is below the *Jefferson Parish* benchmark.

COMMISSIONER SHENEFIELD: Judge Easterbrook?

MR. HIBNER: I think those cases are likely to be dismissed anyway, but I do think they do clog the system, not certainly as much as they used to, when we had the *Ace Beer* sort of cases. But, still, these are not very worthy candidates, and if I could de-incentivize their being brought, particularly if we use appropriate screens, then I probably would look with favor on that.

COMMISSIONER SHENEFIELD: Judge Easterbrook?

JUDGE EASTERBROOK: I can't give you a clear answer to that.

MR. HIBNER: I would cite Judge Easterbrook's *Texas Law Review* article for the use of screens in those cases.

JUDGE EASTERBROOK: The first annual Susman, Godfrey, and McGowan Lecture, I will have you know – I think Steve Susman has read it ever since. The best understanding of how to set the multiplier is, I think, the one spelled out in Professor Landes' article, *Optimal Antitrust Sanctions*. It's based on Gary Becker's model. You want to figure out the harm these people inflict on the rest of us, and divide that by the probability of successful apprehension and prosecution.

For hard-core violations – that is, concealed cartels – these people are going out of their way to prevent anybody from learning, so there has to be a substantial

multiplier. Treble damages are, in my view, probably the lowest sustainable multiplier for concealable violations. Many of the things you are referring to as not hard-core are open and above board. What Microsoft was doing with Internet Explorer, to take an example, since that litigation is now over, everybody in the world knew. There was no concealability. One had to figure out whether it was lawful, but there was no concealment problem.

So I would distinguish not between *per se* violations and non-*per se* violations, but between concealable violations and non-concealable violations. Most likely, the optimal multiplier should be maintained at three or go up for concealable violations, and, if it should move in any direction, it should go down for non-concealable violations.

MR. HAUSFELD: With respect to that, Commissioner, non-concealable violations are not confined to hard-core cases.

COMMISSIONER SHENEFIELD: Okay.

Mr. Reasoner?

MR. REASONER: You know, I think the devil would be in the details in defining that. The concealable or non-concealable line doesn't appeal to me as readily utilizable. Microsoft did a lot of stuff they didn't talk about. But I – it's appealing that you're being too punitive with some kind of conduct that people might in good faith have done, but it was later found to violate the antitrust laws. But I'm very

troubled by how you would define it.

COMMISSIONER SHENEFIELD: Okay. One final question and all you need to do is raise your hand. So you can do it simultaneously to save time. What about a rule that said treble damages would remain as it is today except in cases involving joint ventures with plausible, cognizable efficiencies involved; anybody in favor of that?

JUDGE EASTERBROOK: Except as a – you know, as a special case of the fact that most joint ventures are perfectly observable. That is, they're not concealable. But the things that make them antitrust problems may be concealable; that is, there may be a productive integration, coupled with some hidden stuff – and if it's the hidden stuff that's involved, you certainly don't want to reduce damages.

COMMISSIONER SHENEFIELD: Okay.

Thank you, Madam Chairman.

CHAIRPERSON GARZA: Commissioner Valentine?

COMMISSIONER VALENTINE: I am struggling here. I want us to try to imagine a regime in which we do have joint and several liability. We are not going to allow – force plaintiffs to make up for any gaps in the system; that is, if a defendant is unable to pay, that's going to fall on the defendants. We're not going to worry about affecting the leniency or amnesty system because the first-in guy to rat on the cartel will have no contribution against him; he won't have to pay anything at the end of the day to his

codefendants.

And I'm trying to think of some rule on contribution that would either not allow for contribution from defendants that do settle or would put some limits on claim reduction, and I would like each of the panelists to tell me how that would affect incentives of large players to settle, small players to settle, and the incentives of plaintiffs to settle.

MR. CONSTANTINE: I guess the question that I have is – coming back to what Commissioner Litvack said – why is the concern of imposing a rule of law or a principle of law to measure allocation of wrong among defendants, in these cases, in particular?

COMMISSIONER VALENTINE: I'm not saying – I'm just asking an incentive question as to how this would play out. I'm not saying it's a good rule, or it's a bad rule. I'm not saying that I necessarily believe in it or not. But I want to try to imagine a system in which possibly defendants…But I don't want this contribution system to affect the ability to settle, because here is where I think Judge Easterbrook is most correct in terms of the costs incurred by any conceivable contribution system.

So I'm trying to imagine a claim reduction or a contribution regime that would not unduly affect the ability to settle, but I'm trying to see how it would play out among settlement incentives by small players, large players, and

plaintiffs, and would it alter the way we typically think of plaintiffs seeking out the various people with whom they settle?

MR. CONSTANTINE: It would have to occur at some remote point in time, you know, after the regular, so-called regular, proceedings were over so that it would not affect the incentives of the plaintiffs, *et cetera*. In other words, it would be a private matter among the defendants after.

COMMISSIONER VALENTINE: Yeah. Okay.

MR. CONSTANTINE: And how that would happen and whether that would be in a separate tribunal, you know, I leave it to the imaginations of the Commission.

MR. HIBNER: I think what Bill Baxter had in mind with his bill was that it would be in the same proceeding, but after the trial was concluded, and it would be the court sitting in equity, and not a jury trial. And if it could be allocated on some basis, that's fine; but if it couldn't be, then it probably would be *per capita*. But I think he also envisioned that most of these situations, where we have the use of judicial time, would be price fixing, hard-core cases where the allocation formula would be readily apparent.

COMMISSIONER VALENTINE: Judge Easterbrook?

JUDGE EASTERBROOK: I can't imagine any contribution system in private litigation that wouldn't clobber incentives to settle. There is one feature of CERCLA we haven't talked about yet, which is, your settlement is

approved by an official government settlement approver – there's debate about who that is – there are both state and federal officials who fight to do this – but if your settlement has the right blessing of some person who comes up and does this, then you're not liable for contribution later.

But if you don't have – even then CERCLA has had enormous amounts of litigation. But the thing people are trying to get with settlement is a cap on their liability at some level, and stop paying their attorneys to buy peace. And if you have a contribution system later, they can't do either one of those things, and so why would they bother to settle?

COMMISSIONER VALENTINE: But that's why I'm either limiting –

JUDGE EASTERBROOK: Right. The claim reduction system, of course, does not have that problem. The defendants would be as eager to settle as before, if not more so, but from the plaintiffs' perspective, I think the word "reduction" in claim reduction is an accurate one; that is, if you settle with A, you are agreeing to reduce your claim against B later on. And so plaintiffs are less willing to settle in a claim reduction system, although I don't think the effect is as bad as in a contribution system.

I don't know of any system in which both plaintiffs and defendants would be as willing to settle as they are under the current joint and several liability rule. It's

something that makes one more willing to settle; it makes the other less willing.

MR. HAUSFELD: You almost paralyze the first settlement.

COMMISSIONER VALENTINE: That's what I'm trying to –

MR. REASONER: Yes. I would agree with Judge Easterbrook that claim reduction is far preferable. The difficulty with claim reduction is that, as a plaintiff, you have sufficient knowledge to reasonably evaluate how much you're reducing your total remaining claim. And that's difficult to do early on, and then in some types of antitrust litigation – I would suggest, at this point, if we're talking about a cartel, where it could be effectively argued that any one of the defendants was equally responsible and essential, *et cetera*, I don't know what a jury would do with trying to pick who's primarily responsible, you know; and getting into litigating, both sides having to persuade the jury that there's a conspiracy and that X is not there was – didn't have much to do with it would be a heavy burden, assuming anybody ever actually tried a case.

COMMISSIONER VALENTINE: OK. Thank you. The costs are crazy.

CHAIRPERSON GARZA: Commissioner Warden:

COMMISSIONER WARDEN: Thank you. First, I'd like to say that I think in a claim reduction system involving any

kind of horizontal conspiracy, sales should be prescribed – sales of the relevant product – or market share – as the basis for a claim reduction myself.

MR. REASONER: I think that's a good surrogate, but what about bid rigging?

COMMISSIONER WARDEN: I know; I noticed that in your written testimony. Please, can you explain why it doesn't work in bid rigging?

MR. REASONER: Well, because one guy gets the contract.

COMMISSIONER WARDEN: Yeah. What happens to all the other people? They get other contracts normally.

MR. REASONER: Perhaps. But then you're getting into a little more complicated trade off.

COMMISSIONER WARDEN: I think you can still look at the amount of commerce done in the affected product.

MR. HIBNER: We have to define an accounting period. Then you can decide who's specifically doing what.

COMMISSIONER WARDEN: Sure.

MR. CONSTANTINE: Can I respond to – Commissioner. Commissioner, can I respond.

COMMISSIONER WARDEN: No, I want to go on to something else, please.

MR. CONSTANTINE: You've made an observation. I'd like to respond to it. Why you think it should be –

COMMISSIONER WARDEN: When I've used up my time,

then maybe the Chairman will give you the time to respond to it, because I want to go on to the discussion that has been conducted in terms of felons and cartels and so on and so forth as if that were all we're dealing with.

And I find it amazing that no one on either of these panels, with the possible exception of Mr. Hibner and Harry, have put themselves in the position of the defendant who is accused of being a participant in a horizontal conspiracy that he doesn't think he ever had a damn thing to do with, but it gets past summary judgment, and there are 25 of these people, and the plaintiffs are picking them off one by one on settlement; and this fellow is sitting there saying I cannot try my case because I'm liable, jointly and severally, with no claim reduction, no anything for all of the alleged damages of this industry if I lose.

And you, my counsel, have told me that I have a good case. You don't even think the case makes any sense as a matter of law. But I can't roll those dice. Now, I've seen this. Have you guys not seen this?

MR. CONSTANTINE: I have not seen this, Commissioner.

MR. HAUSFELD: I've seen the opposite.

MR. HIBNER: I have been to the mountain, Commissioner.

COMMISSIONER WARDEN: Okay. I find it amazing that people who have practiced that long and on both sides of the

fence haven't ever seen that. Harry has seen it, I'm sure.

MR. REASONER: Well, no, I think there's no question that Commissioner Warden's scenario occurred in the antitrust era, when, as Justice Stewart remarked, "The government always wins," *et cetera*. Today if your client was in this position, you would have a real shot at summary judgment. Otherwise, you'd need claim reduction to go to trial.

COMMISSIONER WARDEN: I do want to make one other observation, and then Mr. Constantine is welcome to say whatever he wants on my nickel, and that observation is that, contrary to a vow I made, which was that I wouldn't stress the *Microsoft* case at any of these hearings, in view of what's been said here today, I want to suggest that before anyone again opines that anything that happened in that case had a demonstrable effect on the price of operating systems should go back and read the opinion of the court of appeals and its standard of causation again. I think David Boies, were he still here, would join me in saying that.

MR. CONSTANTINE: Okay. But let me respond on your nickel, Commissioner, but not to that last point, which I could also respond to. You've made the observation that if a system is going to be enacted, it should be based on sales. Let me just pick a famous case that we all know about, which was the *American Airlines/Braniff* attempt-to-monopolize case, where one CEO calls up another CEO, and says, "Hey, Howard,

let's fix prices." Bob Crandall calls Howard Putnam, and he says, "Let's fix prices." Now, one question we answered is, they knew about the antitrust laws, because Howard said, "Oh, Bob, we can't do that." And we know that Bob knew about the antitrust laws, because Bob was involved in a lot of antitrust cases over the course of his career, so we certainly know that he had gotten a lot of good counseling from some Texas firm. And so we know that both knew about the antitrust laws. And Howard Putnam said, "No, we can't do that, because it's illegal," and then Bob said, "We can do anything we please." And then Howard turned the tape over to Bill Baxter, and the rest is history.

Now, I would say that sales in that particular case wouldn't be – you know, if you are going to enact this system of honor among thieves, which is what I consider it to be, you certainly wouldn't want to, you know, if Howard had said yes, you wouldn't want to do that based upon sales. You would want to do it based upon some level of culpability, which I think – the relative culpability there – you might be able to determine.

So I think that just using sales, if you were to go down that route, would be the wrong way of doing it. Having said that, you would have to bring in so many factors that I think Judge Easterbrook would agree that it would be just an additional nightmare for whoever the trial was on, whether it be trial, fact, or law, and to try to figure out all of those

factors. But it certainly would not be any single factor.

COMMISSIONER WARDEN: I must beg to disagree. I think sales would be just fine then, and you can use all the culpability for the criminal punishment that you're going to impose for this open – it's concealed from the public – but otherwise totally naked crime. I will adopt your felony language there.

MR. HAUSFELD: But what happens when you have a market or a territorial allocation, and the agreement is, I won't make sales in your territory or in your market, so you can't, then, reduce my market share or sales to determine culpability because there were none?

COMMISSIONER WARDEN: Presumably, that party, who agreed not to go into your territory, got you to agree not to go into his territory in return, and you put it all together. I don't think these are problems.

MR. HAUSFELD: What happens if that territory is not in the United States? Suppose you agree not to sell outside the United States, and they agree not to sell inside the United States, then –

COMMISSIONER WARDEN: Well, I think the guy –

MR. HAUSFELD: It's not as simple –

COMMISSIONER WARDEN: I think the guy who sold in United States can pay everything in that case. Thank you.

COMMISSIONER JACOBSON: Just one quick observation that there were no damages in the Crandall Braniff case –

MR. CONSTANTINE: That's why it was an attempt to monopolize.

MR. HIBNER: Yeah. It was an injunctive relief case, and Mr. Crandall was enjoined from playing golf with Mr. Putnam for a third of the year – represented by an eminent law firm, with its main office in Los Angeles, but not my own.

CHAIRPERSON GARZA: Commissioner Yarowsky.

VICE CHAIR YAROWSKY: I find so far that there's kind of a remarkable unanimity about the general subject that we were talking about on this panel, joint and several, so I kind of want to stand back and rise up a little bit and ask you a larger question.

Pretend you're a structural engineer. Okay? And were standing back looking at the antitrust laws – look at it historically, and look at it substantively – and what you might see is that there's kind of an interrelated set of remedies and procedures that have been there for some time – long time. I mean, there have been some tweaks. Really where the dynamic side of the antitrust laws seem to come in is in the substantive area, OK? Substantive law changes. Immunities and exemptions. We talked about that. They come in and out. They mainly come in.

But the remedies and procedures have stayed relatively – you know, were done historically at a certain time, and have gone forward in time. From our standpoint –

because this is what I want to hear about – our exercise that we are doing here – should we really – do you view these as an interrelated set of procedures, so that when we talk about these analytically one by one, and we have to do that, because we have to have separate panels – we can just talk about everything – that's a matter of convenience. But should we really – should we look at another system of substantive law and procedures, and isolate one little aspect, and then try to import it into the antitrust laws and see if that would make it – our laws work better?

MR. CONSTANTINE: Jon, I think what you have to do is to start to try to answer the question, which was raised with the first panel, which is, how come, given the fact that we have treble damages and joint and several liability and vastly increased criminal sanctions and a proliferation of antitrust actions in other jurisdictions – in Europe, in Asia, in the states, *et cetera* – how come there's so much conduct, an increasing amount of conduct, that is violating the law? That's the question that the Commission should focus upon.

And I think the answer to that question, or a beginning to approach to answer that question has very little to do with the subject of either of these panels. It has to do with having gone – with the pendulum having swung too far from an era in which antitrust was not properly informed by economics and market reality, and the government always won

reflexively to an equally absurd *status quo*, which obtains in the United States now, which is that meritorious cases brought by the government – I mean, merger cases brought by the government – and private cases brought by private parties have little or no chance of making it all the way to success and suppressing anticompetitive conduct. I'm not speaking from sour grapes. Both in public practice and in private practice, we've been quite successful in those cases, but we represent a rank minority.

I was guided by Steve Susman, who was on the first panel, who addressed a group of state attorneys general in 1986, and that was where he drew the line of demarcation, and he said to us, quite succinctly, "I'm out of this business, unless somebody comes to me now with a hard-core *per se* case. All we do is give them respectful audience. We validate their parking ticket, and we move on to something else." And things have gotten significantly worse in the 19 years since then. I'd be very pleased to, you know, go beyond the written testimony that I've provided on this issue, where there really isn't much disagreement, to what the real issues all are, and I'd be pleased to do that if somebody is interested in reading it.

JUDGE EASTERBROOK: I agree with the proposition that one can't think in isolation about joint and several liability. I've tried to emphasize how it's linked to the multiplier, and both of these issues are linked to who owns

the enforcement rights. That's the *Illinois Brick* question. The proposals to spread the enforcement rights around effectively reduce the gains of anyone for their enforcement rights, because they've been diluted, and one would think that that would have an effect on enforcement. These things all have to be considered together, and I at least do not share the view that there is an increase in monopolistic or cartel behavior in the economy. I know of no evidence for that proposition. When I look around, I see large chunks of the economy that used to be noncompetitive, usually at the government's behest, have become competitive since the rise of deregulation in the Carter Administration. The airline market is competitive, and it used not to be. The telecommunications market is competitive when it didn't even use to exist, because the government propped up Ma Bell. The withdrawal of government regulation, has led, so far as I can see, to a great outburst of competition to everybody's benefit. I know of no contrary evidence. There are always problems and crooks, but one wouldn't say that the existence of bank robbery shows that our system of detecting and prosecuting robberies is ineffective. It shows that the optimal level of crime is never zero, because you don't want to devote all of society's resources to suppressing it. But I don't know of any reason to think that the amount of antitrust crime is going up.

MR. HIBNER: I would concur with that, and I'd like

to remind myself that many years ago there was a very famous plaintiff's lawyer from Los Angeles who said, "We don't need another law professor in the antitrust division; We need a cop." And I think he was dead wrong. We've done very well with the law professors. And I think the law is a lot better today. It's certainly in much better shape than it was when I signed on. And I think we all can applaud the direction of substantive law in general.

MR. CONSTANTINE: Let me comment on what Judge Easterbrook said. I agree that there are significant sectors of our economy which have been unfettered from regulation, and that's great. But that doesn't answer the question about whether there is anticompetitive conduct being engaged in. And if you just looked – and I realize that the concentration level is not the be all and an end to all – it's just the beginning of the analysis.

But if you look at the level of concentration in numerous industries in the United States, and you took a snapshot of the HHIs now and what the HHIs would have been, let's say in the '50s, '60s, and '70s, if there had been an HHI conceived of, you would see, at the time when they were considering Phil Hart's de-concentration formula, that the level of concentration in many, many key industries is much, much higher. And in counseling those private clients, Commissioner Burchfield, the question that I get asked often is, "Why can't we do a four-to-three merger? Why can't we do

a three-to-two merger? Why can't we do a two-to-one merger?" And I've been on both sides of that.

A couple of years ago, I was involved in one side of a merger of the only two DBS operators in the United States, Echostar and Direct TV, and the betting money at the beginning of that was that it was just going to go sail right through the Antitrust Division, the FCC, with its competition hat on, and the state AGs offices.

MR. REASONER: Can I respond to your question?

CHAIRPERSON GARZA: But can I – you gave me an opportunity, and I hate to be rude, but I've got a couple of other Commissioners that we need to get to, and given that people have flights out and whatnot, I really have to move it along. And so can I defer now to Commissioner Cannon?

COMMISSIONER CANNON: Thank you. Mr. Constantine –

CHAIRPERSON GARZA: Do we want to allow this?

COMMISSIONER CANNON: Is it my time?

CHAIRPERSON GARZA: Go ahead. But, Lloyd, keep it short.

COMMISSIONER CANNON: Yes, ma'am. I really have to congratulate you for effectively dashing speculation that you and I collaborated on your testimony. We have been arguing about all these things for about 20 years, but, you know, it's good to see that you have mellowed over the years on these views.

I do remember in the '80s when we used to argue

about this, and unless I am misremembering what happened then, I was thinking in the – certainly in the Baxter Antitrust Division at least – what we all are referring to as hard-core price fixing cases were really at an all-time high, and a fair amount, a good bit, larger than in the Carter Administration. I think that's right.

MR. CONSTANTINE: That is correct. And that was part of Bill's observation, which is that that really should be the be all and the end all of antitrust. You didn't need an Antitrust Division with the economic analysis group to do those cases.

Those cases, and he said this, could be very easily turned over to the people in the states or to the U.S. Attorneys offices under referral, and you just didn't need the Antitrust Division to do that. And in the article, which I cited in my testimony, Bill predicted that, by nine years ago, that's exactly what would have happened in the United States; the antitrust menu would have been reduced pretty much to those price-fixing cases, and that would have become the responsibility of the U.S. Attorneys' offices and the state AGs and maybe the district attorneys who have antitrust jurisdiction in some of the states.

COMMISSIONER CANNON: Judge Easterbrook, I'm kind of curious in listening to all of this. In all of your experience, have you seen an antitrust case that it ever occurred to you that perhaps this was a case where a

contribution and/or a claim reduction would be appropriate or, in fact, would actually be easy to administer?

JUDGE EASTERBROOK: Never.

COMMISSIONER CANNON: Thank you. Just checking. And if I could ask you one other question, to revert back to the prior panel a little while ago, and we only get you once or twice hopefully – I mean I hope we get you more, but we only have you at least today.

In terms of your thoughts about the appropriate multiplier for damages, do you have a thought on that, or what would you say about Susman's idea that you would not have an automatic trebling, but then you would have – give the question to a jury to determine?

JUDGE EASTERBROOK: I think having this very difficult economic issue decided by 12 high school dropouts is not a good idea. There are large advantages to having this done mechanically; three may be wrong. Five may be wrong. Two may be wrong. But at least one understands it. It is predictable. One can settle against that background. Predictability is highly desirable. We want to live in a world characterized by a rule of law, even if we aren't confident that that law is correct, rather than a world characterized by the whim of judges or jurors. So I am strongly opposed to anything that turns rules of law into the rule of whim.

COMMISSIONER CANNON: Mr. Reasoner, would you have

any additional thoughts on this?

MR. REASONER: No. I don't know that call it whim, but I –

COMMISSIONER CANNON: I know that it's not good to disagree with the judge ever, but I –

MR. REASONER: I think the variability you get with either judges or juries in assessing punitive damages on some undefined formula would not be desirable.

MR. CONSTANTINE: I'd like to take a shot at that, Steve.

COMMISSIONER CANNON: Oh, I knew you would.

MR. CONSTANTINE: I would.

COMMISSIONER CANNON: Go right ahead.

MR. CONSTANTINE: You know, up until that last comment by Judge Easterbrook, I guess my overall feeling was that it's very hard to open your mouth after someone as brilliant as Judge Easterbrook speaks, and plus he has the voice to go with it, but I really disagree with the comment about the 12 or six high school dropouts.

I, in my experience, on all sides of this, trust both the wisdom and the integrity of a jury they are properly instructed by a judge. And, all things being equal, I would trust them more than virtually any judge, including Judge Easterbrook.

CHAIRPERSON GARZA: Okay. Commissioner Carlton.

COMMISSIONER CARLTON: I have one question for the

panelists who support the no-contribution rule, and it's this: the benefit of the no-contribution rule, which Judge Easterbrook, Judge Posner, and Professor Landes show in their article, is that it induces settlement, and I think Judge Easterbrook described that as a competition to settle.

And if that's one of its advantages, I guess I have one question that I'll direct to Judge Easterbrook, and then I'd be interested in other people's reactions on the panel, and that is this: if you altered the incentives by allowing private contracting amongst the parties, that could undo some of the incentive to settle, and it also could delay the time to settlement; and, therefore, it would seem to me you'd want to oppose it. Do you have a view on timing? And I take it you would oppose private contracting.

JUDGE EASTERBROOK: No, actually I was asked that question by Commissioner Litvack, and didn't raise my hand when I was given that opportunity, although I said I was worried about cartelization if the principals are involved.

The common law rule is one that has allowed private contracting. You and I, from the home of Ronald Coase, should be particularly distressed about any prohibition of private contracting, if we can't be sure that there are uncompensated third-party effects. It seems to me that many of the costs of these private agreements are borne by the participants in these agreements. So I lack a basis of being confident that there are uncompensated third party effects

and generally favor, as long as the negotiation costs are low, allowing private contracts. We can't get to zero. That's the Coase theorem. But if they're low, and these are reasonable –

COMMISSIONER CARLTON: Even if the consequence allowing those private contracts would diminish what you show in the article, namely, the likelihood that the settlement – that the settlement will exceed damages.

JUDGE EASTERBROOK: Yes. It will reduce this ratcheting effect. That's clear. But it will also save some of the cost of administration, and I'm – I don't think one can be confident that there's a net loss.

In any event, I'm unwilling to be maneuvered into a position of opposing private contracts, because there's no telling what, you know, what pixies will pick on me for the rest of my life if I'm ever quoted as saying that.

COMMISSIONER CARLTON: I take it everyone else is in agreement with that position? You would not outlaw it?

MR. HAUSFELD: Taking a practical view, Commissioner, what will happen when you have an attempt at a private agreement in a joint presentation by multiple defendants at a single time? And then it becomes up to the plaintiffs to determine whether or not the aggregate amount is acceptable. If it's not, or if it is, it makes no difference how that is allocated among the settling defendants. If it's not, then the settling defendants have

to face the reality of whether or not they break their agreement and then try to settle independently or gain – increase the settlement offer or bring more defendants in.

MR. HIBNER: I would also say that whether a settlement is early or late, it's not a linear path, and there's a right or an optimal time for most settlements in these cases, and the sharing agreement negotiations will help them find its right level.

MR. REASONER: No, I agree with your observation, Commissioner, that it does, I think, protract the time to settlement because you've eliminated the competition.

I think my judgment would be it also probably lowers the aggregate settlement amount that the defendants will have to pay since they will not be competing with each other. It's my experience – I mean – very few plaintiffs' lawyers really want to try a case. And if defendants are not divided, and they really are going to have to face a trial where the defendants are not fighting with each other, and not trying to blame each other, it's a different fish.

I think that, if there are more variables, then all of the damages are artificially calculated. We don't know what the real damages were. We don't know what the odds are on any given – and if the defendants are unified, I think it optimizes their chances. It's very difficult for defendants to unify.

JUDGE EASTERBROOK: Precisely. That's one of the

reasons why I'm diffident. There's nothing about the legality of settlement agreements that prevents the plaintiffs from going and making, to one potential defendant, a better offer and causing the agreement to unravel. The competition still goes on. The defendants will agree to do this only as long as it's in the benefit of all of them.

MR. REASONER: No, but if it's a –

JUDGE EASTERBROOK: And the offers the plaintiff is making are affecting whether it's in the benefit or not. I think actually your prepared testimony says that; doesn't it? It's very hard for these things –

MR. REASONER: Oh, no. Well, no, they are – but if they're properly negotiated a defendant who breaks the agreement doesn't have a free pass.

JUDGE EASTERBROOK: Right. He may not opt into the agreement to start with.

MR. REASONER: Right. Yes, I agree. You know if you really want to defend a case, you ought to enter into it.

CHAIRPERSON GARZA: Commissioner Kempf.

COMMISSIONER KEMPF: Three quick comments and a little historical context.

Mr. Constantine, you refer to a GSA report you asked us to take a look at. Can you send that to the Commission staff so they can circulate it so that we can read it?

MR. CONSTANTINE: I was informed by one of the

Commissioners, helpfully, that what I was referring to, in fact, was an analysis done by the GAO, which resulted in a report by the House Judiciary Committee, and I will forward that to the Commission.

COMMISSIONER KEMPF: Okay. Good.

MR. CONSTANTINE: Thank you.

COMMISSIONER KEMPF: On the sharing agreements, my experience is they're extremely hard, especially when you get more defendants to enter, and there is a brief that a group of plaintiffs' lawyers have written a couple of times that I don't think has ever been ruled on. It does suggest that they are improper for two reasons. One, Judge Easterbrook, referred to it, that it's itself a conspiracy; and two, even if it isn't, it should be void as against public policy.

And I don't think it's ever been ruled on in the context of a really good brief, so I think that's an open issue.

Mr. Hibner, I was looking at your testimony that you attached from 1979, and you at that time said you'd only been practicing antitrust law for 16 years, not 40. So you could be very brief. The prior day, Commissioner Shenefield and I testified at the same hearings. We had been practicing law for only 14 years, having been law school classmates, and we were neither so modest, nor very brief. But I think that that experience grew out of a – for me anyway, and for many of those involved – grew out of a very prominent case that I

assume Judge Easterbrook focused on also, since I know that Hammond Chaffetz was one of those who read your piece before publication, and that was MDL 310, the *Corrugated Container* cases.

JUDGE EASTERBROOK: I was actually a consultant with Kirkland & Ellis in that case. Yes, I'm aware of it.

COMMISSIONER KEMPF: And the reason I raise that one in particular it's something that Mr. Hausfeld mentioned, and it says why should we care about fairness among felons. And in that case, which was settled for over $300 million, which would be, you know, $3 billion or more today, there was a trial. And those who went to trial, including multiple defendants, were found not to be felons. In the – there was some split in the treble damages cases, and Commissioner Litvack represented Container Corporation is my recollection, and they went to trial and were found not to be civilly liable.

A couple of other defendants went to trial – or actually Mead did – and were found liable. But there was a decided number of cases that went to a verdict and the majority of them were found to not be felons, nor were they found to be civilly liable. So the issue arose not in the context of, "What do we care about fairness among felons?" but what do we care about is fairness among alleged felons who may turn out not to be felons at all, and in that case –

MR. HIBNER: Or even those who were not indicted in

those cases.

COMMISSIONER KEMPF: Yes.

MR. HIBNER: And there were a lot of those.

COMMISSIONER KEMPF: Yeah. And the way it came about – the solution that we testified, at least three of us in the room back in 1979, was not contribution; it was claim reduction only. It was a bill, an amendment, advanced by Senator Bayh of Indiana –

MR. HIBNER: S.390, as I recall.

COMMISSIONER KEMPF: And –

MR. HIBNER: S.395?

COMMISSIONER KEMPF: Boy, your memory is better than mine. In any event, it had to do with the cases, the *Corrugated* case was a perfect example of them, where there were lots of defendants. They all had low shares. It was a product that had very thin margins, and a large volume of sales so that the potential exposure was astronomical, and even if you were shown not to be a felon and some of your colleagues had been acquitted, it was the quintessential bet-the-company case. And that led to a desire, and it was – you could not have negotiated a sharing agreement, and it was the stampede, which Judge Easterbrook describes, to be settlers. I was in that stampede, representing three of the defendants.

But that led to the petitioning of what became the Bayh proposal, not for contribution, but for claim reduction. And the other thing that triggered that was the *Radcliff*

case, which had said, hey, we aren't going to decide this. This is – may be right or wrong, but it's for Congress, not for us. And what had happened is the *Corrugated* – it's the old saying, bad cases make bad law. In the *Corrugated* cases we had filed for claim reduction and knew it had to be resolved by the Supreme Court. It got to the Fifth Circuit. I was one of those who argued it in the Fifth Circuit, and then we went to the Supreme Court, and what happened was, while we were in the Supreme Court, which became very intrigued with the case, they needed to settle.

JUDGE EASTERBROOK: *Cert.* granted.

COMMISSIONER KEMPF: *Cert.* granted.

JUDGE EASTERBROOK: And then –

COMMISSIONER KEMPF: *Cert.* granted and then Mead settled. And when they pulled the plug on it, a case from – I remember Monroe Freedman from Louisiana argued it. The *Radcliff* case came up. It raised the same issue, and it was a – the *Corrugated* case was a very compelling facts, so was the *Radcliff* case, but they were compelling in the opposite direction. I remember going down to the argument, and I worked with him ahead of time, and afterwards, he said, "How do you think it's going to go?" I said, "It's unanimous against you." This was in the hallway right outside the Court afterwards. But in my own mind, I draw this sharp distinction between the administrative nightmare that comes about with contribution, and I don't see the same nightmare

affiliated with claim reduction. I'd ask, in particular you, Judge Easterbrook, to comment on that.

JUDGE EASTERBROOK: Yeah. As I've said, it seems to me the nightmare lies in the contribution. The claim reduction could be administered more cheaply, how cheaply depends on whether one can find a very satisfactory and easily administered ground. If, for example, Commissioner Warden's proposal for doing it by sales were adopted, that could be done fairly cheaply. If you've got a cartel case where the claim is, for example, that defendant A did not build a plant, that the cartel reduced its output by curtailing their capacity, which has been the nature of the claim in many a cartel case, mainly to make it stable, then allocating by sales is much harder. Now, of course, you could do it as a completely arbitrary way just to get it done. But it can become hard. But I think that since there are no pass-over payments, and there is no rent seeking, it's got to be much easier to administer than any contribution system.

CHAIRPERSON GARZA: Gentlemen, thank you very much, our panelists for participating and for your thoughtful testimony and your statements. Mr. Constantine, if you'd like to send us anything else for our consideration, please, as with everyone, feel free to do so.

[Whereupon, at 5:05 p.m., the hearing was adjourned.] - - -