

# Antitrust Remedies in the 21st Century: Too Many Actions? Too Much—or Still Too Little— Recovery?

Chair's Showcase Program, ABA Section of Antitrust Law 50th Annual Spring Meeting, April 25, 2002

## MODERATOR

### **Roxane C. Busey**

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## PANELISTS

### **Michael L. Denger**

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### **Harry First**

*Professor, New York University School of Law*

### **Robert Pitofsky**

*Professor, Georgetown University Law Center*

### **Hon. Susan Illston**

*U.S. District Judge, Northern District of California*

### **Hon. Lewis A. Kaplan**

*U.S. District Judge, Southern District of New York*

**Editor's Note:** *At the ABA Section of Antitrust Law's 50th Annual Spring Meeting, on April 25, 2002, Section Chair Roxane Busey moderated a panel discussion of antitrust remedies in the 21st century. The panelists—representing a wide array of views on the topic—considered whether the current structure of antitrust remedies strikes the right balance and achieves the goals of deterring antitrust violations, punishing wrongful conduct, and compensating injured parties. The panel participants were: Michael L. Denger, a partner at Gibson, Dunn & Crutcher; Harry First, professor at New York University School of Law and former Chief of the Antitrust Bureau of the N.Y. State Attorney General's Office; Robert Pitofsky, professor at Georgetown University Law Center, Of Counsel to Arnold & Porter, and immediate past Chairman of the Federal Trade Commission; The Honorable Susan Illston, a district court judge in the Northern District of California; and The Honorable Lewis A. Kaplan, a district court judge in the Southern District of New York.*

*After brief introductory remarks, the panelists participated in a lively give-and-take led by Chair Roxane Busey. We've highlighted here some excerpts from the speakers' prepared comments as background for the edited Question and Answer portion of the program, which is published in full below. With marquee-name cases—such as Vitamins, Mylan, and Microsoft—as their text, the exchange among panelists proved to be both interesting and enlightening.*

### Introductory Comments of Roxane Busey (excerpts)

Everyone knows that an antitrust violation may expose a company and its officers to legal actions in multiple fora, with various types of relief, and that this system did not come about as a result of any grand scheme. Instead, it was just a series of events, for better or worse, that gave us the current enforcement system and the remedies—federal civil and criminal enforcement actions, state enforcement actions, private treble-damage actions, indirect-purchaser suits, opt-out litigation—resulting in treble damages, corporate fines, individual fines, prison sentences, restitution, and disgorgement. As a result of all of these possible remedies, it is no surprise that we have seen duplicative recovery and multiple suits being brought in several cases. I would like to focus your attention on three cases.

The first, of course, is the *Vitamins* case,<sup>1</sup> where we saw criminal fines exceeding \$900 million. State *parens patriae* actions also were brought and settled for \$335 million. Federal private actions were settled for \$224 million, but there were 224 opt-out cases as a result of individual plaintiff decisions. In addition, the European Commission added 855.22 million Euros to the liability, and the Canadian authorities imposed a fine of 93 million Canadian dollars.

*Mylan*<sup>2</sup> is a case that also illustrates the potential for duplicative recovery. The FTC and thirty-two states settled this case for \$100 million, but there is still pending a direct-purchaser class action suit. Third-party payers settled for \$35 million.

We all know about the *Microsoft* case,<sup>3</sup> in which the Department of Justice and twenty states and the District of Columbia sought to break up Microsoft. There is a proposed settlement with the Department of Justice and nine states, but nine other states and the District of Columbia continue to seek additional remedies, and that litigation is currently pending before the court. At one time there were sixty federal cases and over one hundred state indirect-purchaser cases filed against Microsoft. There is also a European Commission investigation pending.

There is a piling-on effect of these remedies. Given the goals of remedies, which are related to compliance, deterrence, punishment, and compensation, I think there is a question whether this is the best system that we could have, or could we do better. Some possible modifications are: (1) federal preemption; (2) the repeal of *Illinois Brick*<sup>4</sup> to permit federal indirect-purchaser suits; (3) state *parens patriae* actions for indirect purchasers; (4) consolidation of civil and criminal suits in federal court before one judge; and (5) extending diversity and removal to consolidate civil suits in federal court while preserving a role for state courts to certify the class and apportion damages.

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<sup>1</sup> *In re Vitamins Antitrust Litig.*, 2001-1 Trade Cas. (CCH) ¶ 72,862 (D.D.C. Mar. 31, 2000), *aff'd*, 215 F.3d 26 (D.C. Cir. 2000).

<sup>2</sup> *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C.), *reconsideration in part*, 99 F. Supp. 2d 1 (D.D.C. 1999).

<sup>3</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); information relating to the current settlement proceedings is available at [http://www.usdoj.gov/atr/cases/ms\\_index.htm](http://www.usdoj.gov/atr/cases/ms_index.htm).

<sup>4</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

## Highlights from the Panelists' Opening Remarks (excerpts)

### Michael L. Denger

- The overall multifaceted, uncoordinated federal and state criminal and civil system of remedies for cartels is in serious need of re-examination.
- The present system does not insure that injured customers and consumers are fairly compensated for injuries actually incurred, gives rise to windfalls and excessive legal costs, imposes unnecessary burdens on the parties and the judicial system, and is not an effective vehicle for preserving and promoting a competitive structure for the industries affected. In particular, the current approach of direct purchaser damage actions in federal court and indirect purchaser actions in state court is inefficient, gives rise to the potential for double recovery, and makes coordination wholly dependent on the voluntary efforts of the counsel and courts involved.<sup>5</sup>
- To better address the problem, a single federal court should be given exclusive jurisdiction over all criminal and civil proceedings relating to a cartel, including indirect purchaser actions for damages and proceedings for monetary relief by state attorneys general.<sup>6</sup>

### Harry First

- The current system, notwithstanding its unplanned and chaotic structure, works and has important strengths that help explain why antitrust enforcement in the United States is so robust. Having multiple enforcers allows enforcers to magnify the resources available for antitrust enforcement, work cooperatively, bring different perspectives, and do a better job jointly than an individual agency could do by itself.
- For deterrence, penalties need to be set high enough so that violators will not profit from their violation, and this includes some multiplication of the penalty to take account of the fact that not every violation is caught; and penalties should take account of the social cost of anticompetitive conduct.
- It is pretty well accepted that damages rarely exceed single damages, for a variety of reasons. And there is certainly the question of whether the now-incomplete indirect purchaser right is bringing compensation to all who are injured by antitrust violations.

### Robert Pitofsky

- Antitrust doctrine is in reasonably good shape but the enforcement mechanism, including remedies, is deficient.
- Some remedies are inadequate to deter and compensate the victims, and other antitrust remedies are excessive.
- Relatively short jail sentences and heavier fines are better for deterring antitrust violations.

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<sup>5</sup> For a more comprehensive review of the problem, see Michael Denger & D. Jarrett Arp, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, ANTITRUST, Summer 2001, at 41.

<sup>6</sup> A proposal along these lines, which would require legislation, was set forth in the *Report of the ABA Section of Antitrust Law Task Force on the Federal Antitrust Agencies—2001* at 21–24 (Jan. 2001), available at <http://www.abanet.org/antitrust/antitrustenforcement.pdf>, on which Mr. Denger served. See also Denger & Arp, *supra* note 5, at 45.

**Judge Susan Illston**

- When an individual defendant appears before me for sentencing for an antitrust violation, I put the individual at the end of the calendar so that he can hear the sentences of other criminal defendants and note the longer sentences for far less volumes of commerce.
- Changing the system, including repealing *Illinois Brick*, likely will have the unintended consequence of spawning substantial legislation and massive litigation as the new legislation is interpreted and applied. This is what happened in commercial litigation when the Private Securities Reform Act was passed to solve procedural problems in the securities field.
- It has been suggested that all antitrust cases should be assigned to one judge and that the criminal case should proceed first and stay the civil case pending the outcome of the criminal. In my experience, white-collar criminal cases that actually are litigated take a very, very long time. If you do hold the civil case until the end of the criminal case, your civil cases will be placed in a limbo that may or may not ever end. That may not be an appropriate solution to the problems that we face.

**Judge Lewis Kaplan:**

- Obviously, as a judge, my role here is certainly not to suggest an answer to the question, and I do not, and nobody should understand me as suggesting an answer to that. I guess my message is only that we have been built for over 200 years on a system of checks and balances. Some of this inefficiency really is the same sort of checks and balances that has served us well in other areas of our national life for a very long time. If we are to consider changing the structure of the system, we at least ought to recognize that we are talking about changing something very important, something that has to do with more than transaction costs.
- I cannot intelligently discuss the question of the severity of antitrust penalties without asking “compared to what?” It has been very much in my mind lately because I have sort of gained from anecdotal evidence the sense that the sentences that the Sentencing Guidelines require all of us to hand out for nonviolent crimes of the sort almost always committed by the least-educated, the poorest, the most-poorly-represented, the least-influential members of our society can be very severe, particularly in comparison to white-collar cases of all kinds and antitrust cases in particular. I had a case where a single mother with no prior criminal record was caught carrying less than half a gram of crack across the street for \$100 in order to get enough money to feed her family and she was facing 41 to 51 months in jail. The Guideline range for price fixing by a first offender involving commerce of less than \$1 million, on the other hand, tops out at 8 to 14 months, of which only 4 months actually have to be served in jail. I leave to you the question of whether that is a right balancing, but it is on my mind.
- The net of all of this is that to talk about criminal sentences for antitrust violations without talking about them in a very detailed and analytical way in comparison to the sentences for the whole range of things that people are punished for in the criminal justice system is tunnel vision of absolutely the worst kind. Our criminal sentences reflect a political sense of the community through a whole bunch of imperfect institutions that embody a judgment about what we ought to do, what is the humane thing to do, what sits right in our gut when we go to sleep at night. And we cannot forget in talking about antitrust sentences that those considerations are just as important in determining penalties for criminal violations of the antitrust laws as they are for drugs and assault and embezzlement and everything else.

## Questions and Answers

**MS. BUSEY:** If we were to make changes in criminal sanctions, what would we change and how do we avoid having tunnel vision so that we have a good rationale for whatever changes we make?

**PROF. PITOFSKY:** I would add to what Judge Kaplan said about the disparity of the enforcement for comparable white-collar crimes. For example, where the victims are defrauded out of \$100 million to \$200 million, the United States Sentencing Guidelines are astonishingly different. For antitrust violations the average recommended prison time is ten or eleven months, but for securities fraud and other types of white-collar crime, the average is about fifteen years.

Yet, the people who wrote the Sentencing Guidelines knew what they were doing. They said that the theme of the Sentencing Guidelines for antitrust would be relatively short prison terms and very heavy personal and corporate fines. Accordingly, my emphasis has been on whether the fines are as heavy as they ought to be as a practical matter. I was very impressed by Mike Denger's explanation of how difficult it would be for the current fine standard—"twice the loss, twice the gain"—to be measured in litigation.

I do not think that the time in jail ought to be changed radically. We have gotten away from attitudes that account for the famous case in which someone was caught engaged in a price-fixing cartel, and the judge did not want to give him any time in jail; as a result, the judge sentenced the party, as an alternative sentence, to run a golf tournament for charity. Then, the next year, the price fixer came back to report on how his year had gone, and he did say, more or less the following: "Judge, that was such an uplifting experience, I wonder if you would sentence me to another year." That is an attitude that I think is corrosive.

Now, we have adopted a different approach. Mr. Taubman's sentencing, which apparently will require him to serve a year or less in prison, shows that we have gotten away from that approach. The participants in the Archer-Daniels-Midland price-fixing conspiracy, including the top executives in those corporations, are serving prison time. Now, whether they should be serving five and ten years rather than three is a separate issue, and, I do not think they should. I would rather put the emphasis on corporate fines that are sufficient to deter companies from knowingly engaging in these hard-core crimes, and discount that by the fact that we all know that many of these crimes are not detected.

**PROF. FIRST:** One interesting thing about sentencing is that this fits within another system, and that is the Sentencing Guidelines and what the Sentencing Commission does, which, of course, takes a broader cut than just antitrust. Also, then-Judge Breyer was originally heavily involved in crafting the Guidelines, so the Commission was not without antitrust insight.

I am agnostic on increasing the maximum penalty, in part because I think that judges are not going to impose it in the general range of cases. Judges have much more discretion to do what they want than it might appear from just looking at the Guidelines.

What I would prefer to see is a continuation of prosecuting corporations and individuals, not just corporations, and getting closer to the maximum sentencing level. It took a long time after the amendment to the Sherman Act in 1974 that made antitrust violations a felony with a potential three-year prison sentence, for courts to sentence antitrust defendants to prison terms anywhere near that maximum level. So I am not certain that increasing the maximum level is the right approach.

If there is an equity problem between antitrust and other crimes, there are two ways of dealing with the inequities: one is to raise the antitrust penalties; the other is to lower the penalties for other

crimes, such as the penalty for minor amounts of crack cocaine possession. I would prefer the latter. I think our prison sentences are probably too long generally in the United States. So the equity issue can go either way.

**MR. DENGER:** First of all, on the corporate fine issue, I think we have to place that in the context of the entire system of monetary penalties that a corporation is going to face, including federal direct-purchaser damages, indirect purchaser damages, and penalties paid to the state attorneys general, and assess the fine issue in that light.

As far as individuals are concerned, I think most antitrust violators probably violate the laws because they do not think they are going to get caught. I believe that serious consideration should be given, both for equity reasons and for antitrust policy reasons, to exploring whether more significant sentences are in order on an individual basis, both personal fines and jail terms. Notwithstanding the fair amount of literature written over the years to assess how much of a monetary penalty is needed to provide adequate deterrence, the fact is, very simply, that no one knows. So when we look at criminal penalties, I think we need to consider the system as a whole and, possibly, consider elevating the fines and jail terms for individuals.

**MS. BUSEY:** You have anticipated my question to the judges, which is: as a practical matter, to what extent do judges take into account civil damage awards when they award penalties? Do judges ask, "Is there civil litigation pending and have there been any settlements?" Is that even a consideration in terms of the award of sentence?

**JUDGE ILLSTON:** I can tell you that since I first began hearing these abbreviated plea bargains in the criminal cases, I always ask, "What about restitution?" The U.S. Attorneys' eyes would generally glaze over and they would say, "Well, we are not seeking restitution in this case, but there are civil class actions out there." Often, when grilled about the details of that, nobody really knew, so I am not sure how serious the lawyers were about that. But for those who are concerned about the piling on, there certainly was a sense from the U.S. Attorneys that they were happy to leave the damages issues to the civil side and deal only with the criminal penalties.

The other question I have, just as a policy question, is: why can't the fines be used in some way to complement the damages that go to the victims? That apparently is not the way it is done at this time, but it would seem to me that that would be a useful thing to think about.

**MS. BUSEY:** Judge Kaplan, you raised this equity issue most forcefully in terms of creating equitable prison sentences. You commented in terms of prison sentencing and discussed the inequities among sentences. Harry First has suggested reducing sentences for violations other than antitrust in order to establish equity. For commercial and economic offenses how do you envision adjusting the fine penalties in order to address the inequities?

**JUDGE KAPLAN:** On the issue of fines generally and their relative severity, I do not really have a horse in that race.

But to respond more directly to the question you asked of Judge Illston, certainly all of this came together in an interesting way in the *Auction House* cases.<sup>7</sup> In the criminal case, the government had a Type C plea that called for a fine of \$45 million, which required a modest downward depar-

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<sup>7</sup> *In re Auction Houses Antitrust Litig.*, 164 F. Supp. 2d 345 (S.D.N.Y. 2001) (settlement approval).

ture, and no restitution. There had not yet been a settlement on the civil side. I deferred a decision on whether to accept the plea in the criminal case and called for a lot more information on ability to pay and so forth. I ultimately did not decide to accept the plea until I decided to accept the settlement that then was struck in the civil cases.

Now, that all came about as a result of a complete fluke. That is to say, the criminal case against the corporation happened to come out of the assignment wheel with my name on it. It ordinarily would not have gone to me in our district, and certainly it might have been filed in another district. So this is a good example to support the argument for putting this all in front of one judge, at least the federal civil and criminal cases.

**MS. BUSEY:** I would like to know your rationale. Why was it important to have the additional ability-to-pay information? What were you going to do depending on what the settlement was? Why did it matter?

**JUDGE KAPLAN:** I certainly entertained the possibility before the settlement was reached, in the magnitude that it was, of rejecting the plea on the ground that it did not adequately deal with the issue of restitution.

**MS. BUSEY:** So in your view the restitution was of prime importance?

**JUDGE KAPLAN:** It was important.

**MS. BUSEY:** I would like to pick up on the notion of treble damages in class actions. Mike Denger said damages could be treble or quadruple. Harry First explained that treble damages were popular in 1914. In 2002, do we want treble damages and do we want them mandatory? What would that mean in terms of the change to the system?

**MR. DENGER:** I'm not exactly sure here. My problem is not with the class-action vehicle itself. My problem is when there are twenty-eight class actions, including indirect-purchaser class actions in twenty-seven different forums, and when the federal class action is settled, the settling party does not get any credit for the settlement payments, or, for that matter, a judgment against the others. That's the direct and indirect purchaser double payment problem.

I think class actions are an efficient vehicle, and the proposal that we had is sort of a semi-class action, in that we would put all of the claimants, direct purchasers, indirect purchasers, and state attorneys general in one forum. Liability would be determined, and then damages would be determined. There would be an allocation of those damages, be they double, treble, or quadruple among various claimants.

But I think we ought to try to pick a rational number in light of the entire system. When treble damages were established originally, we did not have fines based on 20 percent of the affected volume of commerce and we did not have both direct purchaser actions in federal court and indirect-purchaser actions in state court.

So whatever number we pick, I think we need to look at the system as a whole and try to make some sort of rational determination of whether or not that is the appropriate way to compensate victims and achieve an appropriate level of deterrence.

**PROF. FIRST:** I like treble damages. It's an appropriate number. We have deviated from it histori-

cally only in a few areas where we are concerned with over-deterrence, and we have done that very rarely. Before we move away from treble damages, I would want to see some indication that we picked the wrong multiplier and that what we are seeing is somehow excess compensation and over-deterrence. I just do not think we are there.

I think that there is much to be said for Mike Denger's suggestion to examine everything together. One of the things to be said is that if we look at everything together, we still do not have treble damages, even in a case like *Vitamins*. When the numbers are added up, even if we put in the criminal fines, the direct and indirect-purchaser settlements, and value the opt-outs at their original value, or a bit higher, we still do not have treble damages. So we are still not there. We may in that case be a little beyond single damages, but even then it is single damages with regard to commerce in the United States. It does not even take account of the profits earned abroad.

So if what we are thinking is, "Gee, we really ought to deter these cartels," I simply do not think the deterrence is at an adequate level yet. Until we see proof that we are there, I would leave the system in place and do what we are doing now, which is to get closer to what the current system always held out as promise but which we are only now starting to reach.

**PROF. PITOFSKY:** I would do two simple things. First, I would add interest from the time of the wrongdoing on the illegal gains accumulated by the wrongdoer. A project headed by Steve Salop and Larry White examined extensively law enforcement in the late 1970s and 1980s, and it revealed treble damages are really close to single damages, just a little more than single damages. But if we added interest from the beginning, it really would be treble damages.

If we did that, then I think we ought to consider doing away with mandatory treble damages. I have seen cases involving activity in which the issue of violation was border line. The company decided to engage in the activity, and the company landed in court. The trial did not work out well; the witnesses did not perform as hoped. The company lost the case, and the result was treble damages for a corporation that really was engaged in borderline activity.

So add the interest and take away the mandatory feature, and then leave the question of the severity of the violation and the issue of whether it should be single, double, or treble damages to the judge.

**JUDGE KAPLAN:** I think there is a lot to be said for differentiation in types of antitrust behavior. I would not take away mandatory treble damages in hard-core price fixing. But, surely, we have all been exposed to cases in which liability was a very, very close call, not because of evidentiary problems but because of a real issue about whether or not the conduct should have been viewed as unlawful. Mandatory treble damages are something that perhaps might be reexamined in those kinds of areas.

**JUDGE ILLSTON:** I was just going to say that because so few parties actually litigate these cases we are talking about a theoretical question and not really a day-to-day, bread-and-butter question.

**MS. BUSEY:** Let's talk about incentives. If you change the treble-damage action, you might have different incentives in terms of the class action suits that are brought. Do we want to discourage class actions? Will changing the multiplier from treble to single do that? Again, I think we need to consider the consequences. That would at least still enable everyone to have the rights they had. They are cut back a little, but they are still there. Any thoughts about that?

**JUDGE ILLSTON:** But the parties still do not try the cases.

**MS. BUSEY:** But maybe they would then. Maybe that would change the whole dynamics.

**MR. DENGER:** I just think, with joint and several liability and a lot of the other things that go into it, we are still going to have a relatively high percentage of cases that settle, particularly in the cartel area, as opposed to distribution cases and things of that nature.

But I do think Bob Pitofsky's thoughts about making treble damages in certain circumstances not mandatory and taking into account when the offense occurred and possible adjustments for time value of money are thoughts that are worth considering.

**PROF. FIRST:** I like the idea of considering the time value of money. I am concerned about moving away from mandatory trebling at least because of its impact on settlements. To the extent that it is uncertain whether damages will be treble, that will be taken account of. It will be another litigation uncertainty that will affect the level of settlement, and not necessarily in a correct way.

So if people settle on the notion that there might be treble damages, or there might be single damages, I think people will still settle, but of course they will not settle for a number that approaches treble damages. The numbers will go down. From an overall system point of view of deterrence and compensation, we have to think clearly about whether that is the right direction we want to go.

**MS. BUSEY:** What are your views on repealing *Illinois Brick*?

**MR. DENGER:** It is my opinion that *Illinois Brick* should be repealed.

**MS. BUSEY:** And what would be the consequences of that?

**MR. DENGER:** I would also probably preempt state indirect-purchaser cases. Otherwise, you would get the worst of both worlds, where you would have indirect-purchaser cases in federal and state court.

**MS. BUSEY:** Okay. Let's take the preemption and indirect purchaser questions together.

**PROF. FIRST:** First, of course, is the irony that interest in repealing *Illinois Brick* is directly related to the number of state indirect-purchaser statutes that are being enacted. The more the states enact these and the more cases we have, the more interest there will be in repealing *Illinois Brick*.

I think we are getting there, and I think it is a good idea. I would amend the Hart-Scott-Rodino state *parens patriae* provision to allow states to bring indirect-purchaser consumer cases—*parens* cases—in federal court, as I think Congress probably intended originally in 1976.

I would not preempt state law. We have not preempted it for direct purchasers. I do not see the reason to preempt it for indirect purchasers. I agree with Justice Brandeis on this—not that he spoke about preempting state antitrust laws, but, with regard to his famous statement that one of the happy incidents of the federal system is that the states can act as laboratories, experimental laboratories. I think we are seeing the benefit of it now because, thanks to the states, we are actually interested in changing the law and giving compensation to indirect purchasers.

**MS. BUSEY:** One consequence of this repeal or *Illinois Brick* preemption would be an increased

caseload for the federal judges. So I would be interested in your perspective on what that means and whether, in the theoretical as well as the practical sense, it is a good solution.

**JUDGE ILLSTON:** Well, you better fill our vacancies if you increase the number of federal cases.

**MS. BUSEY:** Let's assume we fill your vacancies.

**JUDGE ILLSTON:** Then I think there is an enormous logic to it if you did fill the vacancies. I think these cases are enormously well-suited to being handled by one court. The real inequity that Mike Denger has been talking about and the piling on that we hear about, is because there is not one place where 100 percent of the damages inflicted is determined and then divvied up and analyzed so that one person has an overview of all the consequences. I think that makes eminent good sense.

I express no view, however, with respect to the question of whether there should be preemption, therefore, taking from the states their opportunities—or the citizens of the states their opportunities—to litigate those issues in state court. But to the extent that, for example, *Illinois Brick* were repealed and we had indirect-purchaser actions available in federal court, then I do think that we would have a lot of mechanisms at our fingertips to improve the quality of the decision making on the civil side in the antitrust area.

**JUDGE KAPLAN:** I agree entirely with Judge Illston. I would leave to Congress and whoever else gets involved the question of whether to repeal *Illinois Brick*.

But certainly, it is my very strong view that, to whatever extent there is federal jurisdiction over any of this, it all ought to be before the same judge—civil, criminal; direct purchasers, indirect purchasers.

I think *Lexecon*<sup>8</sup> ought to be overruled legislatively. I think the multidistrict litigation judge ought to have it forever, or for such shorter period of time in which he or she is capable of resolving it. There is just no argument about that. I did recently get a multidistrict litigation case, which the lawyers happily told me I will have forever because it involves latent injury issues, and I am told I will spend the rest of my life with it. But it is not an antitrust case.

**MS. BUSEY:** But, Judge Kaplan, how does the judiciary feel about this? What if that actually happened and certain judges would get the antitrust cases?

**JUDGE KAPLAN:** My sense of the way this all works in the federal system is that the judges who receive long-term cases are going to be the judges that the Multidistrict Panel selects. My sense of the way that game is played is that nobody who does not want a multidistrict litigation case ever has one.

**PROF. PITOFSKY:** First, I was never in favor of the decision in *Illinois Brick* in the first place, and I am glad to hear that all these other people now think it was a wrong initiative. I think it should be repealed.

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<sup>8</sup> *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998).

Second, I do think that cases, to the extent feasible constitutionally and practically, which involve all these different sorts of remedies ought to be tried in one courthouse in front of one judge, if we can do it. That is a challenge.

Yet, if putting all of the cases in one courthouse requires preempting state enforcement, I have several reactions. First, I do not think preemption will happen because the current trend in Congress and the Supreme Court is to depend more on the states.

Second, in light of the periods in our history when, in my view, the only authority engaged in adequate antitrust enforcement were the states, I would not like to see the states precluded from the antitrust enforcer role. If states coordinated their role—and they certainly have made great strides in doing that—and then coordinated with federal and private enforcement as well, so that we do not get the chaos that Mike Denger fairly talks about, the result would be excellent, and it would be a challenging reformation of remedial enforcement law in the United States.

**MR. DENGER:** I think the state attorneys general can play a very important coordinating role in reaching settlements when we have, for example, indirect-purchaser actions pending in twenty or twenty-five states. I think that the mechanism the state attorneys general have in place, layered on top of private counsel, can be a useful approach to trying to reach a resolution of some of these cases on a global or national basis.

**MS. BUSEY:** But that is inconsistent with your proposal. So is this your second-best choice?

**MR. DENGER:** No. I was just saying that in the present system there are some things that occasionally make life easier.

**MS. BUSEY:** In light of *Mylan* and *Microsoft*, what has been the role of the states? Is this positive or negative?

**PROF. PITOFSKY:** With respect to *Mylan*, the judge played a very strong role, and so there really were not that many difficulties. But the notion of an enforcement system that, because of administrative difficulties, leaves the ill-gotten gains in the hands of the person who violates the antitrust laws is intolerable to me.

And I understand that there are great difficulties in handling restitution and disgorgement cases. I think disgorgement can be made to work, especially in a courtroom with a strong judge.

As to *Microsoft*, I do not want to discuss the merits of *Microsoft*, and I do not think any of us up here do. But I do want to say one thing: it seems to me that, given the unanimous opinion of the court of appeals and then the remedy that was negotiated, it is a fair question to put to a judge as to whether or not the remedy is adequate, given the opinion on a formal record.

Now, is judicial review of Department of Justice settlements inefficient? It is, and I am sure you could close that thing down by just saying, "Anything the Department of Justice decides is going to have to be the last word on this." I prefer the inefficiency, and I think the nine states that have not gone along with the settlement, whether it turns out in the end that they are right or wrong, have raised legitimate issues.

**PROF. FIRST:** One of the things that helps to make our networked system of antitrust work is that in the end we have a judicial system that gets to decide. So if there are different policies, in the end the courts are going to make the decisions.

This is true in *Microsoft*. If we are talking about having things in front of a single judge, *Microsoft* is a great example of this. There is some benefit to having these issues actually tested and subject to some degree of litigation, not just simply determined by what is going to happen under the Tunney Act. So we may think of it as inefficiencies or we may think of it as cost/benefit, in that there are benefits along with the costs.

In general, with regard to the states, I think the states deliver remedies. With regard to *Mylan*, I never looked at *Mylan* as just a Federal Trade Commission case. I am sure the FTC did not either. This was a case of coordinated effort. I think it is very important to see that, as a descriptive matter, as Mike Denger has pointed out, these various groups are cooperating to a large degree and this cooperation has tremendous benefits, including eventually getting money to injured consumers, as in *Mylan*.

Historically, this is nothing new. Remedies are what the states have really concentrated on in terms of their antitrust enforcement, and it has been a very important part of the antitrust system. Now we are seeing more zeroes attached to it with settlements like *Mylan* and *Vitamins*, and I think that is all to the good.

**MR. DENGER:** There are a couple of things that we should keep in mind on *Mylan*. I am not so concerned about the particular case in *Mylan*. I think it was an egregious situation. But remember this: we now have a principle that all of the states, using the “little FTC Acts,” which are pretty broad based, potentially can seek restitution. And we also have a decision that suggests that the restitution remedy may not preclude damage remedies. Restitution is to disgorge the gain. Damages are for the loss to the victims. So while we may not have a problem in *Mylan* per se, the seeds of mischief are loose, and I think we all have to remember that.

As far as *Microsoft* is concerned, I am not going to talk about the case. But I think that since we have a national and an international scope for many, many industries, there are questions of whether or not and what role states should have in certain aspects of antitrust policy. I am not talking here about recovering damages for a state’s consumers and citizens, but in determining Section 2 policy, Section 7 policy, for global industries. I think we have to consider this.

I think if we examine a lot of state antitrust statutes, not only will we be thinking about the state attorneys general, but also the county prosecutors and a lot of others who have authority to bring actions under state antitrust laws. There is, in my view, a real issue—and I am not trying to resolve it—as to what role the states should have in certain areas of antitrust policy, particularly in national and international industries.

Finally, there are criminal penalties in a number of the states as well. So not only could the Antitrust Division of the Department of Justice indict, but there is also exposure under state laws. So I say let’s have a coordinated and efficient system. We need some checks and balances in case there are times when one part of the system is not enforcing the antitrust laws. But I think it is also a real mistake to have this uncoordinated patchwork of approaches to remedies without thinking it through as a whole.

**MS. BUSEY:** Judge Kaplan, I think you referred to a more centralized system. How do you reconcile that with our system of federalism? What would you propose realistically?

**JUDGE KAPLAN:** I was not proposing anything. I was saying that we ought to recognize that we must deal with this question. I would just put it this way: Winston Churchill was quoted as saying that democracy is the worst form of government known to man except for the alternatives. We have

the worst form of antitrust enforcement structure and remedies except for any alternative that anybody has ever yet come up with.

**MS. BUSEY:** Let's talk about some of the proposals that have been made. Mike Denger proposed putting everything in a federal court where there is a criminal proceeding.

**MR. DENGER:** I envision the various layered systems that we have today in cartel enforcement. I would not apply this proposal to things like vertical restraints cases and it certainly would not apply to a lot of other areas of state and federal enforcement activity.

But when we focus on all monetary penalties, including fines and damages, I think a single court is in the best position to determine how to compensate the victims, how to avoid windfalls, and what monetary level of fines and damages is appropriate for deterrence because that judge can see all of the parts of the system and how they fit together.

**MS. BUSEY:** It does not seem like a very realistic proposal. It seems very efficient but not very realistic. Am I wrong?

**MR. DENGER:** In terms of getting it through Congress?

**MS. BUSEY:** Yes.

**MR. DENGER:** I do not think that is probably in the cards unless there is a real concerted effort among a lot of people to try to get behind it. But, I think, if we care about antitrust policy, if we care about the purposes underlying antitrust enforcement, and if we want to have a more rational and efficient system instead of feeding all the lawyers, which our present system does pretty well, I think we ought to look at various alternatives. Maybe some are more realistic and can at least make steps in the right direction.

**MS. BUSEY:** Judge Kaplan, I think we are all interested to know what you would have said if you had more time in your opening remarks.

**JUDGE KAPLAN:** Well, I said most of it, but not all of it. Getting rid of the *Lexecon* decision to let the Multidistrict Panel or the transferee judges in a multidistrict litigation just keep all of these cases in one place is certainly on my list.

A second thing on my list is assigning closely related, overlapping civil and criminal cases to the same judge. There are just too many problems that arise that should be resolved in view of the entire case. For example, Judge Illston pointed out the problem of staying discovery or not staying discovery in a civil case where a grand jury or criminal prosecution is sitting or pending, and there are many other problems.

The other thing that is on my list—this is opening Pandora's box—is doing something about compensating the private bar in these class actions. The simple fact of the matter is that anybody who thinks that federal judges, or any other judges, are in a position to exercise any serious critical oversight about fee awards based on the typical lodestar approach is smoking a controlled substance. It is impossible. It is more complicated and more time-consuming than dealing with the case on the merits.

And furthermore, our law clerks would not know a legal fee from a Fed.2d. At least you can send

the clerks to do research on the law. They do not know what a lawyer ought to be charging to do something or whether you really need 279 depositions in a case. Something has to happen there.

**MS. BUSEY:** Can you comment on the auction system you used to select plaintiffs' lead counsel in the *Auction Houses* case<sup>9</sup> and whether you would say that is a good or a best practice for judges?

**JUDGE KAPLAN:** I would say it was the best practice for that case. It was a unique case. Liability was a slam-dunk from the day the first class action was filed. The sequence of events was that *The New York Times* broke the story that Christie's had joined the amnesty program, and so one knew from the moment the story broke that there was going to be an indictment and there were going to be big settlements. That was surely one thing that favored the auction selection process.

A second thing that favored the process was the fact that figuring out damages in that case, although I do not mean to suggest that it was a trivial exercise, was absolutely nothing like many, many other cartel cases. The industry was, for all practical purposes, a duopoly. One company was public. The two companies basically had one line of business each. If you got the 10-K and spent forty-five minutes with a calculator, you had a pretty good order of magnitude as to what the exposure was.

And then, of course, I had half the class-action lawyers in America in that courtroom, all thirsting after this case because of the huge exposure and the clear liability. So I knew that if I auctioned the counsel selection, I would have an efficient auction market, as indeed I did. I got something like twenty qualified bids. So it was absolutely the perfect case for it.

Finally, I practiced in this area. I have been a member of this Section for about thirty years. There were very few lawyers in that courtroom whom I had not been for and against at various times in my career. So I felt that I did not have to make decisions about quality of representation purely on the basis of firm résumés from people I had never heard of.

You cannot make rules for selecting lead counsel on the basis of serendipitous events like that. But I think that was an advantage. So it clearly worked.

I would not even begin to suggest that an auction for lead counsel is an answer for every case. In fact, in the opinion I wrote, I acknowledged the fact, particularly under the bidding structure I used, that, in theory, there was a massive risk in that case, and the risk was that somebody was going to bid a number at which they would get no fee and then get surprised in the course of the litigation and find out there was no way they could recover the number and, therefore, that they were working for free. What would have happened then? I decided to take that risk because I had some confidence in the lawyers, in their assessment of the case, and in my own assessment of the case.

But, you know, there are risks in everything, and one of the things we get paid for is making judgments. That was a judgment. It happened to work in this case. It is not a prescription for everything else. I was motivated to try it because I just could not imagine dealing with the fee applications down the road. I was just horrified at that thought, and there was a better alternative in this instance.

**MS. BUSEY:** Did you pick the low-cost bidder?

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<sup>9</sup> *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000) (auction process).

**JUDGE KAPLAN:** Yes. There were two identical bids, and I picked one of them.

**MS. BUSEY:** And you judged quality on the basis of your dealing with these people in the past? How did you ensure quality?

**JUDGE KAPLAN:** Look, this was not a hard call. You know that David Boies was the guy who won. I just did not find it a close call.

**MS. BUSEY:** Finally, in closing, I will ask each of the panelists, first, whether they think that, given all the practical problems that we would have if we were to move forward on changing remedies in any way, should we as a Section consider this further and, if so, what should we focus on? Where should we spend our time? Do we do it across the board and air everything? Do we focus on certain aspects?

**PROF. PITOFSKY:** There is not likely to be a bandwagon effort to change remedies in this country in a radical way. But that does not mean that the effort should not be undertaken. I think it should.

I do not see incremental approaches (you nip here and you paste there). It seems to me that what you want to do is have a comprehensive review that takes deterrence and compensation into account. That could mean changing many things—some easing of the law with respect to some defendants, some making it a bit tougher.

I do think it is time to start. I have no particular place in which I would start but would rather have hearings that encompass the kind of discussion that was held here, either before the regulatory agencies like the Federal Trade Commission or in Congress.

**PROF. FIRST:** I agree. I think this is an important area, and I think it needs to be looked at on a system-wide basis, inevitably looking at individual things like indirect-purchaser legislation and other issues. But this is a very complex system that we have and I think we have to understand how it is operating as we are tinkering with it, because tinkering may produce unintended consequences if we do not think about the broader system.

**MR. DENGER:** I guess I am on record, as part of the Section Task Force on the Federal Antitrust Agencies, as saying that we should have an examination of our remedy system. I would encourage Section efforts to get participation by both federal antitrust enforcement agencies, by the state attorneys general, and by all parts of the bar.

I would start in the areas where the greatest number of sectors or components of our system are involved, and I think that would be cartel enforcement and potentially the restitution area—the monetary areas as opposed to the structural areas.

**JUDGE ILLSTON:** I would focus on efforts to make sure that there is one federal forum for all federal claims. So, without suggesting what those federal claims wind up being, I do think that a first step that could be accomplished is to encourage those changes that would be required in order to ensure that all federal claims be brought in one federal forum so that one overview of all the federal issues involved could be applied by one judge.

**JUDGE KAPLAN:** I agree generally with Bob Pitofsky and I agree very strongly with Judge Illston. I would reiterate only what I said before. I think it is critically important to the correct and appropri-

ate treatment of the subject, as well as to the credibility of this organization, that this be viewed in its broader context, as part, for example, of the criminal justice system as a whole, not simply as special pleading on behalf of the kinds of clients that probably 70 percent of the members of the Antitrust Section typically represent. I do not know what the numbers really are, but that is just a ballpark idea. It has to be a dispassionate, intellectually honest enterprise. ●