A GENERAL PRACTITIONER'S INTRODUCTION TO ANTITRUST LAW AND PRACTICE

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Antitrust practice is considered by many general practitioners to be arcane, complex and mysterious. It is a jargon-ridden world, with rapid developments expanding an evermore complex vocabulary to describe new business practices brought within the ebb and flow of antitrust litigation. Most general practitioners are far too busy with the daily volume of business to expend effort on the rigorous and time-consuming task of self-education in the field or of keeping abreast of the latest developments. Consequently, many lawyers have little knowledge of antitrust law and a great reluctance to become involved.

The legal profession, clients seeking effective counsel and society at large no longer can afford the absence of widespread knowledge of fundamental antitrust concepts. While the jargon of the trade and high costs of entry may continue to limit specialization in the field to a relative few, most practitioners should be able to master a working knowledge of the concepts involved, at least to the point of recognizing the existence of antitrust issues and the need for employing expert assistance. Too often a failure to counsel clients of the antitrust risks of a particular course of conduct has generated exposure to a government complaint or treble damages and the massive expense of antitrust litigation. By the same token, a failure to recognize the antitrust implications of a client's injury or potential injury by the conduct of others or the structure of a particular industry can result in a missed opportunity to protect the ongoing interests of a client or to remedy past harms.

Society has a broad and growing interest in a widespread familiarity and working ability with antitrust concepts among the general lawyer population. The modern multinational super-corporation has become a social, political and economic phenomenon of immense power: unchecked discretionary power beyond the control of the state which created it,[1] the shareholders who theoretically own it,[2] and the federal government which supposedly controls it.[3] There is mounting evidence that the unchecked discretionary power now held by a few hundred large corporations has serious social, political and economic ramifications, not the least of which is

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[1] *See generally* R. NADER & M. GREEN, CORPORATE POWER IN AMERICA (1973); Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969).

[2] *See generally* Chayes, *The Modern Corporation and the Rule of Law*, in THE CORPORATION IN MODERN SOCIETY 25 (E. Mason ed. 1960).

[3] *See generally* R. BARBER, THE AMERICAN CORPORATION: ITS POWER, ITS MONEY, ITS POLITICS (1970); A. BERLE, POWER (1970); A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (rev. ed. 1968); J. COHEN & M. MINTZ, AMERICA, INC. (1971).

the responsibility for a substantial contribution to accelerating world-wide inflation.[4]

A major challenge facing the legal process will be the development of institutional devices, within the traditions of our constitutional system and in a manner consistent with the economic premises of our system, necessary to control the social, political and economic power that has accumulated in large modern corporations.

Uncontrolled inflation is a symptom of the absence of economic checks upon the massive economic discretion lodged in a few hands. The failure of monetary and fiscal controls to contain that inflation is a clear signal that the assumption of a competitive marketplace allocating resources and setting prices in response to government monetary and fiscal policies is no longer true. Unfortunately, the desperate use of wage and price controls to control inflation is an indication of a willingness to shift from a theory of free competition to state control in the organization of our economic affairs.

The choice is fast becoming one of competition or control:[5] competition by a multitude of independent decision makers free to enter or leave markets and subject to the discipline of consumers choosing goods and services on the basis of price, service and efficiencies; or control by corporate or government bureaucrats of what will be sold, at what price, upon what terms and utilizing which resources. The risks of controls, corporate or governmental, are not only the economic risks of inefficiency, high prices and shortages. They also include social and political risks to individual freedom of choice, opportunity and discretion. In this regard, recent antitrust litigation has become one of the major tools for fashioning institutional controls against the abuse of private economic power. In effect, recent antitrust litigation has been fashioning an economic bill of rights to secure economic equality of opportunity and to provide due process guarantees against the power of a corporate state. For example, as a result of judicial encouragement, there has been a dramatic increase in the use of private treble damage litigation over the past few decades[6] to control an ever-expanding category of abuse of economic power. Cases have included litigation to assure gas producers equality of access to a monopolistic pipeline,[7] and restraints upon the arbitrary use of administrative processes to bar new entry into a regulated industry.[8] Other cases[9] and new legislation[10] have sought to assure economic due process in vertical market relationships by curbing

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[4] *Hearings on Controls or Competition, Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972) (*see* statements of Dr. Willard Mueller at 11; Dr. Murray L. Weidenbaum at 85; Dr. Allan Meltzer at 88; Dr. Charles Schultze at 91). *See also* papers by W. Mueller, J. Weston & S. Lustgarten in Industrial Concentration: The Economic Issues (Mimeo, Columbia Law School Conference, Airlie House, Airlie, Va., Mar. 1 & 2, 1974).

[5] *See* authorities cited note 4 *supra*.

[6] *See* Note, *Nolo Pleas in Antitrust Cases*, 79 HARV. L. REV. 1475, 1478–79 (1966).

[7] Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

[8] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[9] *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968); Silver v. New York Stock Exch., 373 U.S. 341 (1963); Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598 (1972), *cert. denied*, 415 U.S. 920 (1974).

[10] *See, e.g.*, Auto Dealers Day in Court Act, 15 U.S.C. §§ 1221–25 (1970); Fair Marketing of Petroleum Products Act, S. 1694, 93d Cong., 2d Sess. (1974) (passed the Senate, 120 CONG. REC. 14,425 [daily ed. Aug. 7, 1974]).

arbitrary power to terminate those market relationships or to utilize unequal bargaining strength on one side of the relationship to coerce and intimidate the other. Consequently, there is a societal interest in broadening the awareness of antitrust concepts among lawyers so that the choice between competition or control, or the on-going mix of competition and regulation, will be a rational one made with the maximum protection of the economic and political goals of our society.

The Goals of Antitrust Policy

The practitioner who is not immersed in antitrust litigation and practice usually does not recognize the antitrust implications of a stated set of facts. This is not unusual since sophisticated recognition of the legal implications of a set of facts is dependent upon a basic grasp of the field of law involved. Although the practice of law principally involves analytical skills, where an ability to analyze the facts in light of legal principles in a disciplined and logical manner is fundamental and an encyclopedic knowledge of legal rubrics is secondary, it also requires a basic knowledge of relevant legal concepts to begin the process of analysis.

How does one develop sufficient expertise to at least recognize the existence of potential antitrust problems lurking within the vicinity of a stated set of facts? It is essential to have a firm grasp of the basic goals of antitrust policy in order to be able to visualize potential antitrust rights or liabilities within a given set of facts. Consequently, a somewhat mechanical enumeration of antitrust goals for the sake of clarity is a useful beginning. From the legislative history of our major antitrust laws [11] and the judicial gloss which has been added over several decades, antitrust policy may be said to have the following major goals:

1. The maintenance and preservation of the neutral mechanism of competition as the rule of trade, in the belief that:

   > [U]nrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.[12]

2. The promotion of economic efficiency through the stimulus of competitive rivalry.[13]

3. The prevention of private systems of government which impinge upon competition, resource allocation and the economic, political and social freedoms of competitors and consumers.[14]

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[11] W. Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act (1965); H. Thorelli, The Federal Antitrust Policy: Origination of an American Tradition (1955) (an excellent study); A. Walker, History of the Sherman Law (1910). *See also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911); United States v. Addyston Pipe & Steel Co., 85 F.271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

[12] Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) United States v. Socony-Vacuum Oil Co., 310 U.S. 150 n.59 (1940).

[13] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[14] Associated Press v. United States, 326 U.S. 1 (1945); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 242 (1899).

4. The prevention of restraints upon the alienation of tangible property and other commercial values.[15]

5. The preservation of economic and political independence in the decision-making processes of commercial and other relationships.[16]

Many economists and some lawyers believe that the sole goal of antitrust policy should be the promotion of economic efficiency. However, the legislative history of the major antitrust laws and the judicial interpretations of those laws have stressed the political and social goals of antitrust policy in addition to the goal of economic efficiency.[17] Consequently, a responsible attorney in advising a client or preparing a lawsuit should never assume that the sole goal of antitrust policy is the promotion of economic efficiency. Thus, for example, if a client is about to engage in activity which impinges upon the neutral mechanism of competition for setting prices or allocating resources, or which creates a private governmental mechanism for setting prices or allocating resources, or which impinges upon independence in reaching economic decisions, an antitrust violation may be lurking in the vicinity, even though the practice may be economically efficient.

Where does the practitioner go from here? Ultimately, of course, he must resort to the antitrust statutes, the cases and the legal literature commenting upon developments in the field. Before entering this maze, however, it is best to obtain a broad perspective of the area involved so that subsequent effort will be efficient. To assist the attorney when he goes to the books, I have prepared an annotated antitrust bibliography, set out as an appendix to this article, designed to provide references wherein one may obtain an overview of antitrust concepts as well as detailed analysis of particular doctrines. But before one becomes enmeshed in the particularities found in treatises on the subject, an overview of the statutes is necessary.

Statutory Provisions

It is impossible in a single article to enumerate the kinds of fact situations which may give rise to an antitrust violation. They are as numerous as the events in human experience that give rise to tort claims. However, the panorama of antitrust legislation, when viewed against the backdrop of the basic goals of antitrust policy, may provide some idea of the incredible variety of possible violations that may occur in the day-to-day operation of any form of economic activity. Because the focus of an antitrust lawsuit changes in accord with the statutory basis of the suit, one must have some familiarity with the complex and wide-ranging legislation on the books to appreciate the potential of modern antitrust law.

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[15] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[16] Silver v. New York Stock Exch., 373 U.S. 341 (1963); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); American Medical Ass'n v. United States, 317 U.S. 519 (1943); Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc. 302 F. Supp. 459 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

[17] *See* Association for Antitrust Studies, *Statement of Organization and Purposes*, 2 Antitrust L. & Econ. Rev., Winter, 1968–69, at 77; *Report of the White House Task Force on Antitrust Policy*, 2 Antitrust L. & Econ. Rev., Winter, 1968–69, at 11, 53 (separate statement of Robert H. Bork).

The basic antitrust laws are as set forth below.

A. The Sherman Act,[18] which prohibits:

1. Contracts in unreasonable restraint of trade;[19]
2. Combinations in unreasonable restraint of trade;[20]
3. Conspiracies in unreasonable restraint of trade;[21]
4. Monopolization of any part of trade or commerce;[22]
5. Conspiracies to monopolize any part of trade or commerce;[23] and
6. Attempts to monopolize any part of trade or commerce.[24]

B. The Clayton Act,[25] which prohibits:

1. The lease, sale or contract of sale of goods, wares, merchandise, machinery, supplies or other goods or commodities (whether patented or not) on the condition, agreement or understanding that the lessee or purchaser shall not use or deal in the goods, wares, merchandise, machinery, supplies or commodities of a competitor or competitor of the lessee or seller;[26]
2. Stock or asset acquisitions which may substantially lessen competition or tend to create a monopoly in any line of commerce;[27] and
3. Certain types of interlocking directorates.[28]

C. The Robinson-Patman Amendments to Section 2 of the Clayton Act,[29] which prohibit:

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[18] Sherman Act, ch. 647, 26 Stat. 209 (1890), *as amended* 15 U.S.C. §§ 1–7 (1970).

[19] *See generally* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARV. L. REV. 655 (1962).

[20] *See generally* Note, *Combinations in Restraint of Trade: A New Approach to Section 1 of the Sherman Act,* 1966 UTAH L. REV. 75.

[21] *See generally* United States v. General Motors Corp., 384 U.S. 127 (1966); Turner, *supra* note 19.

[22] *See generally* United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Co., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954); C. KAYSIN & D. TURNER, ANTITRUST POLICY (1959); Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy* 19 STAN. L. REV. 285 (1967); Turner, *Antitrust Policy and the Cellophane Case,* 70 HARV. L. REV. 281 (1956).

[23] *See generally* United States v. Griffith, 334 U.S. 100 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); Turner, *supra* note 22.

[24] *See generally* Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964), *cert. denied,* 377 U.S. 993 (1964); Note, *Prosecutions for Attempts to Monopolize: The Relevance of the Relevant Market,* 42 N.Y.U.L. REV. 110 (1967); Note, *Attempt to Monopolize: The Offense Redefined,* 1969 UTAH L. REV. 704 [hereinafter cited as *Attempt to Monopolize*].

[25] Clayton Act, ch. 323, 38 Stat. 730 (1914), *as amended,* 15 U.S.C. §§ 12–27 (1964).

[26] *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); *See generally* Note, *Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives,* 18 STAN. L. REV. 457 (1966); Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949); International Business Machs. Corp. v. United States, 298 U.S. 131 (1936).

[27] *See generally* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS: CASES & COMMENTS 315–443 (1968); Symposium, *Antitrust Symposium,* 1969 UTAH L. REV. 617; The Department of Justice Merger Guidelines (May 30, 1968), 1 J. RPT. FOR ANTITRUST L. & ECON. 181 (1969).

[28] Jacobs, *Interlocks,* 29 ABA ANTITRUST L.J. 204 (1965).

[29] Robinson-Patman Act, ch. 323, 38 Stat. 730 (1914), *as amended,* 15 U.S.C. § 13 (1964). *See generally* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962, Supp. 1964).

1. Price discrimination where the effect of the discrimination may be to lessen substantially competition or tend to create a monopoly in any line of commerce; or injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with the customers of either of them;
2. Certain types of brokerage; and
3. Certain types of service discrimination.[30]

Antitrust lawyers sort out this maze of principal antitrust statutes by reviewing a series of questions which signal the applicability or unavailability of a particular statute:

1. What is the degree of an effect on commerce?

The Sherman Act reaches any conduct which "affects" commerce,[31] while the Clayton Act and the Robinson-Patman Act generally require a more direct involvement with interstate commerce by using the standard of "in commerce."[32] The absence of any involvement with interstate commerce, however, does not necessarily preclude antitrust analysis because most states have antitrust laws[33] which are generally applicable to the same range of economic activity.[34]

2. Is the activity or industry otherwise regulated by federal or state laws?

Express regulation through some other statutory scheme may preclude or delay antitrust regulation or may immunize certain activity altogether.[35] Reference should

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[30] *See generally* C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (2d ed. 1959); C. EDWARDS, THE PRICE DISCRIMINATION LAW: A REVIEW OF EXPERIENCE (1959); F. ROWE, *supra* note 29; Millstein, *Section 2(d) and (e) Robinson-Patman Act—Compulsory Universal Reciprocity?*, 37 ABA ANTITRUST L.J. 77 (1967).

[31] In United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949), the court said of the reach of the Sherman Act: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." For cases where the "squeeze" of alleged local anticompetitive conduct did not cause a "pinch" on interstate commerce see Hotel Phillips, Inc. v. Journeymen Barbers, Hairdressers, Cosmetologists and Proprietors' Int'l Union of America, 301 F.2d 443 (8th Cir. 1962); Page v. Work, 290 F.2d 323 (9th Cir. 1961). *See generally* Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282 (1965); Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236; Krotinger, *The "Essentially Local" Doctrine and Section 1 of the Sherman Act*, 15 CASE W. RES. L. REV. 66 (1963).

[32] *See generally* Eiger, *supra* note 31. The commerce requirement of the Robinson-Patman Act is even more restrictive because the party charged with unlawful discrimination must be engaged "in commerce," the discrimination must take place "in the course of such commerce" and at least one of the sales upon which the charge of discrimination is premised must be "in commerce." Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972).

[33] The state antitrust statutes are collected in 4 CCH TRADE REG. REP.

[34] *See generally* J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION (1964); Goldstein, *The Tariff Is the Mother of Trusts*, 39 TEXAS L. REV. 711 (1961); Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEXAS L. REV. 753 (1961); Stern, *A Proposed Uniform State Antitrust Law: Text and Commentary On a Draft Statute*, 39 TEXAS L. REV. 717 (1961); Symposium, *State Antitrust Laws*, 29 ABA ANTITRUST L.J. 255 (1965); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961).

[35] *See generally* C. FULDA, COMPETITION IN THE REGULATED INDUSTRIES (1961); REPORT OF THE ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 261–93 (1955); Hale & Hale, *Competition or Control 1: The Chaos in the Cases*, 106 U. PA. L. REV. 641 (1958); Schwartz, *Legal Restriction of Competition In The Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954).

be made to state and federal laws which have conferred limited or blanket antitrust immunity.[36]

3. Is the activity unilateral or the product of joint conduct?[37]

A necessary element of a Sherman Act Section 1 case is some joint action in the form of a "contract," "combination" or "conspiracy." These are terms of art in antitrust law and practice. Section 2 of the Sherman Act, with the exception of "combinations" to monopolize, does not require joint activity and, therefore, can be violated by unilateral conduct or industry structure. The Clayton Act and the Robinson-Patman Act do not generally make joint activity the focus of illegality as does Section 1 of the Sherman Act.

4. Is the injury the result of activity derived from an industry's structure or from a company's behavior?

Antitrust policy categorizes impingements upon the competitive model as occurring in one of two ways: categories of behavior restraining trade,[38] or industry structure in a particular market whereby structure alone has an adverse effect upon competition.[39] A joint agreement between two competitors to fix prices normally constitutes a behavioral violation whereas unilateral pricing or other decisions by a firm having substantially all the production in a given market may constitute a structural violation.

Although this structural-behavior dichotomy is not always clear in practice, it can be a useful distinction for signaling which statutes will be involved, or for determining the relevance of particular evidence and the complexity of litigation. As a general rule, Section 1 of the Sherman Act and Section 3 of the Clayton Act are aimed at behavioral violations while the monopolization provisions of Section 2 of the Sherman Act and the merger provisions of Section 7 of the Clayton Act are aimed at structural violations. Attempts to monopolize, which are prohibited by Section 2 of the Sherman Act, partake of both structural and behavioral violations.[40] The Robinson-Patman Act limitations on price discrimination are consider-

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[36] Once it is discovered that there is a regulatory conflict or an exempting statute, this does not necessarily end antitrust analysis. It is often only the beginning of a highly complex and sophisticated analytical process which must be undertaken with extreme care.

[37] The unilateral-conspirational dichotomy is derived from the language of the statutes. In particular, § 1 of the Sherman Act only strikes down "contracts," "combinations" or "conspiracies" in restraint of trade. 15 U.S.C. § 1 (1970). Consequently, § 1 of the Sherman Act "brands as illegal the character of the restraint not the amount of commerce affected." Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940). *See generally* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 n.59 (1940); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARV. L. REV. 655 (1962).

[38] One textbook defines "behavior or conduct" to describe a firm's acts. P. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES, 132–33 (2d ed. 1974). Behavior does, of course, determine performance, but it will be useful to distinguish acts from the "economic" appraisal of the industry's success or failure.

[39] Areeda defines structure as follows: "Market structure concerns the breadth and character of the market, the number and size distribution of buyers and sellers, the capacity of firms to expand or enter, and other factors." P. AREEDA, *supra* note 38, at 133.

[40] *See* Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two,* 72 MICH. L. REV. 373 (1974); *Attempt to Monopolize, supra* note 24.

ed behavioral restraints upon vertical market power by some[41] and an attorney unemployment compensation scheme by others.[42]

5. Is the source of the activity "horizontal" or "vertical"?

Antitrust conceptualization of economic impact and legal doctrines depends heavily upon whether the behavioral or structural problem is to be viewed as a problem across the same functional level of a market, or whether the difficulty is between different functional levels of a market, or whether it is a combination of the two. If the focus of litigation is across a functional level, *i.e.,* between producers, or between wholesalers or between retailers, it is called horizontal. If the focus is upon different functional levels in a marketing system, *i.e.,* between manufacturing and wholesaling, or between wholesaling and retailing, the difficulty is characterized as vertical.[43]

6. What is the "purpose" or the "effect" of the challenged conduct vis-à-vis the stated goals of antitrust policy?[44]

The degree to which competition is restrained in purpose or effect goes a long way in determining whether particular business conduct may be labeled a "per se" violation or whether the conduct must be analyzed on a "rule of reason" basis by a weighing process of numerous factors.[45] The evolution of antitrust policy in the courts has seen the development of evidentiary presumptions of illegality called "per se" violations. These presumptions arise once conduct is identified as coming within a labeled category of behavior which the courts have identified as so destructive of the competitive model as to be unlawful in and of itself. In effect, in "per se" violation cases the courts have dispensed with the necessity of proving that such

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[41] *See generally* W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT (1963); FTC v. Morton Salt Co., 334 U.S. 37 (1948); Perkins v. Standard Oil Co. of Cal., 395 U.S. 642 (1969). *See also Hearings Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the House Select Comm. on Small Business,* 91st Cong., 1st & 2d Sess., vols. 1 & 2 (1969–70).

[42] Criticism of the Robinson-Patman Act is widespread, both because of its complexity and because of the pro-competitive effects of some kinds of price discrimination. *See generally* Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal,* 42 WASH. L. REV. 1 (1966); Rowe, *The Federal Trade Commission's Administration of the Anti-price Discrimination Law—A Paradox of Antitrust Policy,* 64 COLUM. L. REV. 415 (1964).

[43] The impact of horizontal agreements (agreements between competitors) is often obviously anticompetitive, while vertical market arrangements are not always so clearly anticompetitive. *Compare* Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951), *with* White Motor Co. v. United States, 372 U.S. 253 (1963), *and* Arnold, Schwinn & Co. v. United States, 388 U.S. 365 (1967). Sometimes it might also be difficult to categorize the conduct as horizontal or vertical. *See* United States v. Topco Associates, Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967).

[44] *Compare* Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), *with* United States v. Jerrold Electronic Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961). *Compare* Board of Trade v. United States, 246 U.S. 231 (1918), *with* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[45] The extent to which the conduct involved directly affects the goals of antitrust policy has a material impact on the use of per se rules. *See generally* Loevinger, *The Rule of Reason in Antitrust Law,* 50 VA. L. REV. 23 (1964); Report of Special Subcomm. of Sherman Act Comm., *The Per Se Rule,* 38 ABA ANTITRUST L.J. 731 (1969).

conduct does in fact restrain trade. Once the conduct is proved, it is presumptively an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[46]

The process of sorting out which statute and which section of a particular statute may be involved in a potential antitrust violation may not end with these general questions. These questions are, however, useful in normal fact situations to sort out the statutes, analyze burdens of proof, suggest defenses, determine the relevance of evidence and the necessity for a minimum or maximum degree of sophisticated economic analysis. In circumstances where the industry is regulated by state or federal law to some degree, where there is federal law immunizing some or all of the activity from antitrust analysis, or where there are factors nullifying federal jurisdiction, a bewildering array of other statutes may become involved in the legal analysis. Many of these special federal laws are collected in volume 4 of the *CCH Trade Regulation Reporter*,[47] and all of the state antitrust and many special state laws may be found in the same volume.[48] Even experienced antitrust practitioners occasionally overlook the existence of some special industry law, the availability of state antitrust claims, or the full analysis of particular regulatory scheme and its intricate relationship with antitrust policy. Thus, the second question in the list of general questions narrowing the analytical process is highly significant and should not be answered in a superficial manner.

Recognizing Potential Antitrust Problems

Certain categories of business activity raise clear antitrust implications and should be generally recognized by any attorney, regardless of antitrust experience, as potential areas of exposure to antitrust liabilities. If a client is asked by a competitor,[49] buyer [50] or seller [51] to set prices for selling goods or services,[52] to refuse to deal

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[46] Even though a practice might be a per se violation, proving that the specific activity does in fact equate with the per se unlawful practice may require a substantial effort and litigation. For example, in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the government claimed that several practices of the major oil companies constituted horizontal price fixing, a per se violation of the Sherman Act. Proof that the challenged practices had the purpose or effect of fixing prices required a lengthy trial producing a massive record.

[47] *See generally* S. Oppenheim & G. Weston, Federal Antitrust Laws: Cases & Comments, 37–75 (3d ed. 1967); Jones, *Antitrust and Specific Economic Regulation: An Introduction to Comparative Analysis*, 19 ABA Antitrust L.J. 261 (1961).

[48] *See also* J. Flynn, Federalism and State Antitrust Regulation (1964); French, *The Minnesota Antitrust Law*, 50 Minn. L. Rev. 59 (1965); Granger, *A Glimpse at a Plaintiff's Remedies Under Kansas' Antitrust Laws*, 8 Washburn L. Rev. 1 (1968); Hanson, *Comparison of State and Federal Antitrust Laws in Selected Areas*, 29 ABA Antitrust L.J. 267 (1965); Howland, *Enforcement of State Antitrust Laws from the Viewpoint of the State Department of Justice*, 29 ABA Antitrust L.J. 258 (1965); Maroney, *Antitrust in "The Empire State": Regulation of Restrictive Business Practices in New York State*, 19 Syracuse L. Rev. 819 (1968); Note, *Antitrust and Unfair Trade Practice Regulation in Utah*, 8 Utah L. Rev. 339 (1964).

[49] Outright agreements by competitors to fix prices are seldom litigated since they are uniformly held unlawful. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). There may be exceptions due to peculiar characteristics of a particular business, Board of Trade v. United States, 246 U.S. 231 (1918), or because of unusual economic conditions, Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933). But once price fixing is shown—which may not be easy—United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), it is declared unlawful. It matters not whether the price fixed is a maximum or minimum

with a buyer [53] or seller,[54] to grant or receive exclusive territorial markets,[55] to purchase or sell products exclusively from one seller [56] or to one buyer,[57] or to buy or sell a product only when the seller or buyer agrees to buy or purchase some other product,[58] his attorney had better watch out! Likewise, if a client is injured by others doing these things, his attorney should start to keep track of the damages. In antitrust lore these actions are known as price fixing,[59] concerted refusals to deal,[60] market divisions,[61] exclusive dealing [62] and tie-ins.[63]

The legality or illegality of these practices depends upon a weighing of the facts developed by asking the above series of questions and evaluating the answers in light of the goals of antitrust policy. For example, horizontal price fixing is condemned, regardless of the amount of commerce involved or laudable motives, because it is a direct attack upon competition as the neutral mechanism for governing trade [64] and because it establishes a private pricing mechanism which eliminates the independence of decision makers and consumers in the marketplace.[65] The drastic infringement of horizontal price fixing upon antitrust goals is so great that it is considered "per se" unlawful.[66] Consequently, there need not be much evidence

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price or whether the price is "stabilized." United States v. Container Corp. of America, 393 U.S. 333 (1969); Albrecht v. Herald Co., 390 U.S. 145 (1968).

[59] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[61] Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[62] *See, e.g.*, United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950).

[53] Unilateral refusals to deal might be unlawful under § 1 of the Sherman Act if a "combination" can be found. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964); Note, *"Combinations" in Restraint of Trade: A New Approach to Section 1 of the Sherman Act,* 1966 UTAH L. REV. 75. A more rational approach to unilateral refusals to deal should be developed under § 2 of the Sherman Act and its ban upon "attempts to monopolize." *See Attempt to Monopolize, supra* note 24. Concerted refusals to deal with a buyer are per se unlawful. Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

[54] Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914).

[55] Burke v. Ford, 389 U.S. 320 (1967); United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

[56] Standard Oil Co. of Cal. v. United States, 337 U.S. 293 (1949).

[57] Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[58] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947); International Business Machs. Corp. v. United States, 298 U.S. 131 (1936).

[59] *See* cases cited notes 49–52 *supra.*

[60] *See* cases cited notes 53–54 *supra.*

[61] *See* cases cited note 55 *supra.*

[62] *See* cases cited notes 56–57 *supra.*

[63] *See* cases cited note 58 *supra.*

[64] *See* United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[65] *See* authorities cited note 64 *supra. See also* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[66] *See* Loevinger, *supra* note 45.

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[57] Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1969); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

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[63] *See* cases cited note 58 *supra.*

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[65] *See* authorities cited note 64 *supra. See also* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[66] *See* Loevinger, *supra* note 45.

demonstrating a conspiracy to fix prices nor is it necessary to prove that the price fixing "unreasonably restrains trade." Any concerted action by competitors tampering with competition as the mechanism for setting prices is usually sufficient evidence of an unlawful contract or conspiracy.[67] Once the conduct is labeled price fixing, it is presumed to unreasonably restrain trade.[68]

The same may be said for vertical price fixing, except here the conduct also imposes restraints upon alienation.[69] While vertical price fixing usually eliminates only intrabrand competition and is not as great an infringement of competition, it too is condemned without proof of the degree to which it unduly restrains trade.[70] Although there may be arguments that vertical price fixing promotes economic efficiency, the destructive effect of vertical price fixing upon the other goals of antitrust policy is so great that condemnation out of hand is warranted.

These are not necessarily easy cases, because it is often difficult to prove that the conduct fixes prices,[71] or that the fixed price is the result of duality.[72] But once duality in fixing prices is proved, it is assumed that the restraint upon competition is unreasonable. As the purpose or effect of business conduct less directly affects the basic goals of antitrust policy, the degree of proof necessary to establish that the conduct involved "unreasonably restrains trade or commerce," or is the product of duality, increases. In effect, there is a sliding evidentiary scale such that as the effect of the conduct less directly impinges upon the goals of antitrust policy, there is an increasing burden of proof that the conduct is conspiratorial or that the product and geographic markets are well defined and the impact of the conduct is an unreasonable restraint of trade. In other words, the litigation shifts from proof of a certain type of conduct to proof of the adverse effects or purpose of the conduct involved.[73] When this occurs, one is involved with a rule of reason case, where the legal rules are few; here the litigation can be long, expensive, and complicated; and juries are deciding the law as well as the facts.

In a rule of reason case, analysis will center upon a number of elusive factors: the characteristics of the particular industry involved, the power of the parties to the litigation, the motive and purpose underlying the challenged conduct, the effect of the conduct, a measurement of benefits and detriments in light of the central goals of antitrust policy and whether there are less restrictive alternative means for achieving the otherwise legitimate objectives sought by the practice. The appro-

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[67] United States v. Container Corp. of America, 393 U.S. 333 (1969).

[68] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[69] United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

[70] *See* authorities cited note 69 *supra.*

[71] *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[72] *See, e.g.,* United States v. Container Corp. of America, 393 U.S. 333 (1969); United States v. Parke, Davis & Co., 362 U.S. 29 (1960). The development of a broad definition of "combination," Albrecht v. Herald Co., 390 U.S. 145 (1968), should shift litigation from the irrelevant search for duality to the question of whether conduct infringes upon the goals of antitrust policy. *See* Note, *"Combinations" in Restraint of Trade: A New Approach to Section 1 of the Sherman Act,* 1966 UTAH L. REV. 75.

[73] *Compare* United States v. Sealy, Inc., 388 U.S. 350 (1967), *with* White Motor Co. v. United States, 372 U.S. 253 (1963).

priate mix of these factors varies from case to case as the courts seek to accommodate the demands of antitrust policy to the practical needs of a particular industry.[74] The intelligent and sophisticated analysis of a rule of reason case, however, depends upon a careful analysis of these factors and the skillful persuasion of the court as to the appropriate mix applicable in light of the practicalities of the industry and the central goals of antitrust laws.

Litigating an Antitrust Lawsuit

Many lawyers have difficulties with proving or disproving an antitrust case since they have a tendency to conceptualize the broad outlines of the case in terms of a traditional tort case—duty, breach and damage. In general, an antitrust case does not break down that way. If it is a Sherman Act Section 1 case, the essence of the violation is duality which unreasonably restrains competition and causes injury or damage to the plaintiff in his business or property. If it is a Sherman Act Section 2 monopolization case or a Clayton Act Section 7 case, the essence of the violation is structural and one must prove that the defendant's structure gives it power to set prices or exclude competitors in some relevant market or that a merger or acquisition may be to substantially lessen competition or create a monopoly in some relevant market. Analysis of violations based upon attempts to monopolize is unsettled, but the better thinking would treat them as behavioral violations which require proof of unilateral conduct to exclude competitors or fix prices without justification or excuse.[75] Present case law, with little guidance from the Supreme Court, emphasizes a structural approach to attempt cases by requiring (1) proof of a relevant geographic and product market dominated by a firm having a substantial share of the market, (2) evidence of a specific intent or predatory conduct to monopolize that market and (3) a dangerous probability of attaining a monopoly.[76] The law has remained similar to criminal law concepts of attempts ever since Justice Holmes' opinion in *Swift & Co. v. United States*.[77] The consequence of the confusion has been a series of cases pinpointing a gap in the Sherman Act's coverage of business practices impinging on the competitive model, because unilateral predatory conduct absent a dangerous probability of monopolizing a relevant market is not considered actionable.[78] In order to extend coverage to such cases the courts have greatly expanded the definitions of contract, combination and conspiracy—beyond their meaning elsewhere in the law and perhaps to a level of generality that

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[74] *See* Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933); Board of Trade v. United States, 246 U.S. 231 (1918); United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).

[75] *See Attempt to Monopolize, supra* note 24.

[76] For an exhaustive survey and critique of the cases on attempt to monopolize see Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich. L. Rev. 373 (1974).

[77] 196 U.S. 375 (1905).

[78] *See* Albrecht v. Herald Co., 390 U.S. 145 (1968); *Attempt to Monopolize, supra* note 24; Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965); United States v. Johns-Manville Corp., 231 F. Supp. 690 (E.D. Pa. 1964).

is meaningless—in order to restrain the more obvious abuses of unilateral market power.[79]

These kinds of cases point up the need to exercise great care in the drafting of an antitrust complaint or answer. Knowledge of subtle distinctions in substantive antitrust law as well as creative drafting are essential before discovery, litigation and jury instructions preclude claims that might have been available or defenses which may or may not be relevant. Consequently, drafting from forms or previous complaints in other cases is an extremely risky business absent a sophisticated understanding of antitrust theory, a fundamental working knowledge of the industry involved and an intimate familiarity with the facts of the case available in the pre-filing stage. There may be a temptation to draft a shotgun complaint or answer involving every conceivable theory available. The temptation should be resisted since a broad complaint, answer or counterclaim invites a war of attrition in the discovery process and a protracted trial, assuming that one's resources survive massive discovery.

There are several overriding practical considerations that influence the filing of or defense of any treble damage suit.[80] A major concern to both plaintiffs and defendants is the cost of litigation. Any substantial antitrust litigation will likely involve a minimum of 500 to 1,000 hours of time, plus endless taxable costs for depositions, interrogatories, transcripts, and expert witness fees. The fact that successful treble damage claimants are awarded reasonable attorney's fees and taxable costs should not overshadow the fact that unsuccessful plaintiffs must bear their own costs and attorney's fees. Consequently, contingent fee contracts are a risky business in substantial antitrust litigation, because it is not difficult to exceed $100,000 in costs and attorneys fees in successfully litigating a treble damage claim. In the recent *TWA v. Hughes* litigation,[81] for example, where the plaintiff *TWA* obtained a 45 million dollar verdict trebled to a 135 million dollar judgment, the plaintiff's attorneys requested counsel fees of $10,500,000 and $2,230,602 for costs of suit. The court awarded 7.5 million in attorneys fees and allowed only taxable costs. All this went for naught, however, when the Supreme Court reversed the judgment and dismissed the claim on a technical jurisdictional ground, leaving the plaintiff and its counsel to bear the loss of costs and attorney fees.[82] While that case is somewhat unique, it should give one an idea of the expense and risk involved in undertaking major antitrust litigation.

The nature of the issues and the evidence which may be used by either side make possible a defendant's war of attrition in an effort to defeat a plaintiff's claim. Consequently, an imaginative defendant can easily escalate costs to the point of bank-

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[79] *See* United States v. Container Corp. of America, 393 U.S. 33 (1969); Albrecht v. Herald Co., 390 U.S. 145 (1968); Rahls, *Conspiracy and Antitrust Laws,* 44 ILL. L. REV. 743 (1950); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARV. L. REV. 655 (1962).

[80] For excellent symposia stressing the practical factors of treble damage litigation for plaintiffs and defendants see Symposium, *American Bar Association National Institute on Preparation and Trial of an Antitrust Treble Damage Suit,* 38 ABA ANTITRUST L.J. 1 (1968) and Symposium, *1973 National Institute on the Corporate Trust Busters,* 43 ABA ANTITRUST L.J. 6 (1973).

[81] 458 B.N.A. ANTITRUST & TRADE REG. REP. A–4 (April 21, 1970).

[82] Hughes Tool Co. v. TWA, Inc., 409 U.S. 363 (1973).

rupting the plaintiff's attorney as well as the plaintiff. Conversely, defendants may face a hard choice in deciding whether to fully litigate all the issues, since they may only be increasing the plaintiff's attorney's fee if the plaintiff prevails. Thus, an initial and difficult question facing any plaintiff's attorney and any defense attorney is a hard-headed financial assessment of the costs of the litigation and the amount of time counsel will spend on the case. Such an assessment should make an attorney hesitant to take the case on a contingent fee basis. Factors to consider, in addition to the type of case and the kind of evidence needed to prove the case, should include the possibilities of a class action and, most importantly, whether or not there has been prior government litigation against the defendant. The Clayton Act makes litigated judgments [83] and litigated convictions [84] prima facie evidence of a violation of the antitrust laws. Consequently, prior government litigation can make a plaintiff's case much easier. If the defendant pleaded nolo contendere in a prior government criminal case or entered a consent decree in a prior government civil case, the prima facie provision of the Clayton Act is not applicable. If, however, grand jury proceedings were held, it may be possible to get access to some of the grand jury proceedings [85] which may be of great value in proving a violation of the law. In view of the difficulty of proving a violation, some plaintiffs' lawyers only take treble damage claims where there has been a prior litigated judgment or conviction. By mitigating or eliminating the necessity to prove the antitrust violation, the issues—which may still be complicated and expensive to litigate—become: proving a connection between the violation and the plaintiff's claimed injury [86] and proving the amount of the injury. In any event, a substantial retainer should be the rule rather than the exception if you propose to fully and adequately represent your client in private treble damage litigation.

The antitrust litigator must have a full understanding of the business involved—from the jargon of the trade used by the lowest employee to the intricacies of the kind of financing utilized by the business. Otherwise he won't understand what he finds in discovery and he will not be able to make intelligent use of it during trial. Before extensive discovery is undertaken, an attorney should acquire a working knowledge of the business from his client, employees, trade journals, or any other sources he may have available.

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[83] *See generally* Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals,* 53 IOWA L. REV. 983 (1968); Shores, *Treble Damage Antitrust Suits: Admissibility of Prior Judgments Under Section 5 of the Clayton Act,* 54 IOWA L. REV. 434 (1968); Comment, *Consent Decrees and the Private Action: An Antitrust Dilemma,* 53 CALIF. L. REV. 627 (1965).

[84] *See generally* Seamans, Winson, & McCartney, *Use of Criminal Pleas in Aid to Private Antitrust Actions,* 10 ANTITRUST BULL. 795 (1965); Symposium, *Trial of an Antitrust Treble Damage Suit, Including Effect of Guilty Verdicts and Nolo Contendere Pleas, Development and Proof of Economic Issues, Handling Documentary Evidence, Causation and Damages,* 38 ABA ANTITRUST L.J. 48 (1968); Note, *Nolo Pleas in Antitrust Cases,* 79 HARV. L. REV. 1475 (1966); Note, *Closing an Antitrust Loophole: Collateral Effect for Nolo Pleas and Government Settlements,* 55 VA. L. REV. 1334 (1969).

[85] McSweeney, *Privileged Communications, Attorney's Work Product, Confidential Information and Availability of Governmental Investigative Files and Grand Jury Transcripts,* 38 ABA ANTITRUST L.J. 24 (1968).

[86] *See generally* Pollock, *The "Injury" and "Causation" Elements of a Treble Damage Antitrust Action,* 57 NW. U.L. REV. 691 (1963); Wright, *Legal Cause in Treble Damage Actions Under the Clayton Act,* 27 MD. L. REV. 275 (1967).

In most antitrust cases many of the issues may be decided on the basis of documents. A good attorney should learn how his client keeps documents and how his opponent keeps documents. Most businesses keep too many documents and a thorough examination of a client's files, assuming the client is conscientious, should provide the attorney with a good profile on the types of documents he may expect to find in his opponent's files. It is rare, but not unheard of, to find copies of documents stamped "burn after reading." It is far more common, however, to find endless reams of statistics, pricing information, and correspondence that must be constructed into a logical and understandable whole so the attorney can plan his case. One good document, fully understood and properly used, is of great value in antitrust litigation. One can usually get documents which describe just about all phases of the opponent's business and the major problem is sifting the relevant from the irrelevant and putting the mass into an intelligible and manageable form for trial. Consequently, it is absolutely essential to establish a uniform and consistent indexing system for documents involved in antitrust litigation.

Interrogatories and depositions can be especially useful to discover what documents an opponent may have in his possession. In particular, interrogatories can be used to make the other side do one's work in researching their files to answer what documents may be available to construct your financial information. Interrogatories and depositions are exceptionally helpful in assisting in the impeachment of witnesses because antitrust litigation often produces head-on collisions in interpreting past events, motive and purpose. Destruction of an opposing witness's credibility can be a most important factor in proving or disproving motive and purpose. In summary, the topic of discovery in antitrust litigation is vast and complicated.[87]

Trial lawyers are always interested in proof of damages. In the antitrust field this topic is a field of expertise in and of itself. In general, a plaintiff first must prove that an antitrust violation caused him injury in his business or property and then prove the amount of injury that resulted. Very often the plaintiff finds that he must prove a negative: what would have happened to his business if the illegal activity had not taken place? Moreover, a plaintiff must show a direct injury to his business or property "by reason of" a violation of the antitrust laws.[88] This is a vague standing to sue standard of the *Palsgraff* variety, designed to place some limit upon the scope of treble damage liability.[89]

Once a plaintiff has proven (1) an antitrust violation, (2) a connection between the violation and injury to his business or property and (3) that he was in the

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[87] *See generally* Kohn, *Evaluation of an Antitrust Claim, Prospective Cost of Litigation, Standing to Sue and Preparation of Suit,* 38 ABA ANTITRUST L.J. 7 (1968); McSweeney, *supra* note 85; Report of the Judicial Conference of the United States on Procedure in Anti-trust and Other Protracted Cases, 13 F.R.D. 62 (1951); Symposium, *Economics in Antitrust Policy and Practice,* 20 ABA ANTITRUST L.J. 10 (1962); Symposium, *Proof and Disproof of Damages in Private Antitrust Litigation,* 36 ABA ANTITRUST L.J. 149 (1967); Symposium, Developments in Multiple Treble Damage Act Litigation, 1966 Antitrust Law Symp. 1.

[88] Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine,* 32 ABA ANTITRUST L.J. 5 (1966).

[89] *See, e.g.,* Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952); Antitrust Developments 1955–68, ABA Supp. to the Att'y Gen. 1955 Nat'l Comm. to Study the Antitrust Laws 279–84 (1968).

"target area of the violation," [90] he must provide some rational method to measure damages. At one time, the requirement of certainty in proof of damages and proof of a connection between the violation and the damage were major stumbling blocks for treble damage litigants.[91] Due to the nature of an antitrust violation, the proof of most injuries is an attempt to measure what "would have been," but for the antitrust violation. In general, four types of damages have been recognized by the courts: (1) lost profits; (2) the amount of increased cost or the amount of an artificial price increase; (3) loss of good will or a capital loss; and (4) out-of-pocket expenses. Various methods have been developed for measuring such damages and they should be carefully studied well in advance of discovery and trial.[92]

A final factor in this survey is the assessment of attorney's fees. A successful treble damage claimant is entitled to recover reasonable attorney's fees and costs, both of which are assessed in the discretion of the court.[93] In dollar amount, some of the attorney's fees awarded have been extraordinary. In one case, the attorney's fee arrangment was fixed pursuant to a contingent fee arrangement and resulted in a 25% contingent fee on a 25 million dollar class action settlement in a price fixing case.[94] Needless to say, such fees are few and far between—and some are exorbitant under the facts of the case involved. Most courts assess an attorney's fee on the amount of time involved, the complexity of the issues, the length of trial, the prevailing rates in the area, and the responsibility and effort involved. Consequently, the antitrust litigator must keep detailed time records because he will be called upon to prove the reasonableness of the fee claimed. In antitrust litigation, the financial rewards can be great, but it is well to remember that the financial losses can be just as great.

Conclusion

The art of legal research and writing is knowing when to stop and having the emotional ability to do so, despite fears of leaving a stone unturned or a phrase better said. Furthermore, surveying a field as vast as antitrust treble damage litigation in a single article can be misleading. The legal issues and the practical problems of antitrust litigation are sophisticated and complex. For the lawyer who is dedicated to the exciting life of trial practice, however, antitrust litigation can be rewarding and challenging. The theory is profound; the stakes are high; the challenges are great. But of even more importance is the great need for talented trial lawyers to enter the field. The goals of antitrust policy are too important to allow them to be sacrificed by default.

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[90] Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

[91] *See* Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931).

[92] Comment, *Monetary Recovery Under Federal Statutes,* 45 Texas L. Rev. 856–80 (1967). These comments are an excellent survey of damage problems under antitrust law, labor law, Fair Labor Standards Act, copyright law, trademark law, patent law, federal transportation statutes, and federal civil rights legislation. *See also* E. Timberlake, Federal Treble Damage Antitrust Actions (1965); Alioto, *Proving Damages in an Antitrust Case,* 44 L.A.B. Bull. 485 (1969); Symposium, *Proof and Disproof of Damages in Private Litigation,* 36 ABA Antitrust L.J. 149 (1967).

[93] *See generally* Note, *The Nature of "A Reasonable Attorney's Fee" in Private Antitrust Litigation,* 1966 Wash. U.L.Q. 102.

[94] Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 1969 Trade Cas., ¶ 72,892 (E.D. Pa. 1969).

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* Prices are "suggested" publisher's prices as November, 1974.

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