ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, July 28, 2005

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

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

PRESENT:

DEBORAH A. GARZA, Chairperson

JONATHAN R. YAROWSKY, Vice Chair

BOBBY R. BURCHFIELD, Commissioner

W. STEPHEN CANNON, Commissioner

DENNIS W. CARLTON, Commissioner

MAKAN DELRAHIM, Commissioner

JONATHAN M. JACOBSON, Commissioner

DONALD G. KEMPF, JR., Commissioner

SANFORD M. LITVACK, Commissioner

JOHN H. SHENEFIELD, Commissioner

DEBRA A. VALENTINE, Commissioner

JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director & General Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

ALAN J. MEESE, Senior Advisor

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

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Lloyd Constantine
Hon. Frank H. Easterbrook
Michael D. Hausfeld
Don T. Hibner, Jr.
Harry M. Reasoner

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

1 P R O C E E D I N G S

2 CHAIRPERSON GARZA: Let me welcome our
3 distinguished panelists on behalf of the Commission, and
4 thank you for being here today to participate in our hearing
5 on civil remedies issues. This panel in particular will be
6 addressing damages multiplier, attorneys' fees, and
7 prejudgment interest.

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

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

20 It's important to bear in mind that the fact that
21 the Commission has selected an issue for study does not mean
22 that we have already decided on a particular recommendation
23 or particular findings; we have not. Our deliberations will

1 be conducted in the open, just as our selection of issues
2 for study was made in the open, in public meetings following
3 these next several months of hearings and study.
4 Again, I would like to thank the panelists for
5 being a part of this process, and let me take just a minute
6 to explain the format that we will follow. First, we would
7 like to give each of our panelists an opportunity to
8 summarize his testimony or make his statement. We ask you
9 to try to keep your statements to about five minutes apiece
10 so as to maximize the time for discussion. For your
11 convenience, we have devices on the tables with a green, a
12 yellow, and a red light.
13 After each panelist has made his statement, there
14 will be questions from the Commissioners. In this case,
15 Commissioner Warden will initially lead the questioning for
16 the Commission. He will have about 20 minutes to do that.
17 Following that, each Commissioner will have about five
18 minutes to put forth any questions he or she may have. The
19 order, again, Commissioners, is on the sheet that should be
20 at your seat. Any Commissioner, of course, may choose to
21 pass on their questioning.
22 The hearing is being recorded. Transcripts will
23 be made available to the public. Hard copies of the witness

statements are available in the hallway outside the room as you came in.

PANEL I

So, with that, I would like to open the hearing, and Tad Lipsky, let me start with you, if you are ready, if you don't mind giving your--

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

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

First, in many respects, the easiest point to make, but the most important one, is that the Commission, like the rest of the antitrust community, is faced with this disturbing and very poorly understood fact that, even as the criminal antitrust remedies and fines have soared skyward,

1 cartel conduct continues at a regular pace. And although
2 the consequences are clear, the causes, I think, are
3 virtually unknown. We need to understand the behavioral
4 pathology that leaves people confronted with the tangible
5 risk of tremendous liability and actual incarceration to,
6 nevertheless, engage in this kind of behavior. And so that
7 is something of serious concern to anybody interested in
8 good antitrust enforcement in a competitive market economy.
9 And so my number one conclusion would be, let's not right
10 now--while we're in the state of uncertainty about this
11 behavioral relationship--let's not limit the remedies
12 applicable to cartel conduct until we have a better
13 understanding of why it is still occurring.
14 Second, every advocate in every case has a
15 strongest argument and a weakest argument. And among those
16 who advocate the *status quo* for treble damages, the weakest
17 argument is that automatic trebling and mandatory payment of
18 the winning plaintiff's attorneys' fees are appropriate
19 uniformly in all antitrust cases.
20 The reason that this is the weakest argument is
21 that conduct once considered reprehensible and damaging,
22 like horizontal mergers or supplier assignment of exclusive
23 distribution territories, is now recognized as ambiguous, in

1 effect, and the possibility of chilling desirable conduct is
2 something that needs to be taken into account in the
3 fashioning of substantive rules and procedures. It's the
4 lesson of *Brunswick* and *Associated General Contractors* and
5 *Sylvania* and *Broadcast Music* and *Matsushita* and *Brooke Group*
6 and all the other cases cited in the testimony, establishing
7 the modern trend of the Supreme Court antitrust doctrine
8 with regard to substance, procedure, and evidence--
9 everything except remedy, which by statute is mandatory
10 treble damages and fee shifting in favor of winning
11 plaintiffs.
12 I believe that the proof that this is the weakest
13 argument in the *status quo* position is that it actually
14 loses almost every time it's made. You had the Export
15 Trading Company Act. You had the NCRA, which became the
16 NCRPA. You had the Standards Development Organization
17 Advancement Act, and two other statutes that I think should
18 be referred to, although they are perhaps not strictly
19 related to detrebling, but they are very much in this
20 pattern, and that is the exemption that was recently enacted
21 for the Medical Resident Matching Program, which I believe
22 was an outgrowth of a treble damage suit, and the Need-Based
23 Educational Aid Act, which, as I understand it, basically

1 codifies the relief obtained in another famous joint venture
2 case, which has been referred to as the Ivies case or the
3 MIT case.
4 For those who support competition subject to a
5 coherent set of antitrust principles, it is always troubling
6 to see a narrow amendment succeeding because the existing
7 enforcement system will not provide the flexibility and
8 wisdom for which judicial application of the Sherman Act is
9 justly renowned. Narrow changes are sometimes essential or
10 plainly justified, my favorite example being the Soft Drink
11 Interbrand Competition Act. But it is almost always the case
12 that it would have been better if the adjustment had
13 occurred within the existing system of rules.
14 The Federal Trade Commission of that day had a
15 clear opportunity to conform its approach on soft drink
16 territories to the Supreme Court law, but it chose to do a
17 180°. Faced with similar treatment before the courts or the
18 enforcement agencies, those who believe their conduct is
19 competitively benign or otherwise justified go to Congress
20 and, rightly or wrongly, use the image of the turbocharged,
21 multifaceted remedies and procedures of antitrust to make a
22 case that their conduct should be let off the hook or at
23 least be subject to a different standard of remedy. This

1 can have a corrosive and unfortunate influence on the
2 Sherman Act.
3 The existence of the treble damages remedy for
4 conduct that is not reprehensible is often one of the main
5 drivers of this corrosive evolution, in my opinion.
6 Now, if I were called to defend the Alamo, to
7 defend the treble damages remedy in all cases, I would
8 certainly want to be doing it with these legal titans seated
9 on the right end of the podium here today. They are
10 definitely the Davy Crockett and Jim Bowie of the antitrust
11 bar. But I would still have a problem with the outcome even
12 if I believed in the cause--and I don't really believe in
13 the cause of mandatory trebling in every single case and in
14 all circumstances. The staunchest defenders of mandatory
15 trebling claim it doesn't do justice in each case, usually
16 because plaintiffs are undercompensated and defendants are
17 underdeterred. But in making the claim that in practice
18 there are enormous variations in the degree to which damage
19 awards suit the purposes of a particular case, they equally
20 suggest we should be considering changes that improve the
21 *status quo*.
22 It's a dialogue that reminds me very much of the
23 old joke about the three economists who go hunting in the

1 woods. They see an elk, and the first economist takes out
2 his shotgun: "Bam!", and he misses to the left. And the
3 second economist takes out his shotgun: "Bam!", misses to
4 the right. And the third economist jumps up with his hands
5 in the air and says, "We got him!"
6 We shouldn't be satisfied with antitrust remedies
7 that go wide of the mark in most cases and that seem
8 effective only if you look at an irrelevant average.
9 I can finish up very quickly just by saying that,
10 just since I submitted my testimony, there has been a very
11 favorable development in this joint venture area, this overt
12 horizontal conduct area, where I think the case for
13 detrebling is the strongest, and that is the D.C. Circuit's
14 ringing endorsement of the *Massachusetts Board of Optometry*
15 standard in their affirmance of the FTC's decision in the
16 *Three Tenors* decision. And I don't have time to go into it
17 now, obviously, but I think it's a very good evolution of
18 joint venture standards and could provide a very sound basis
19 for drawing a clear distinction between naked cartel
20 conduct, which is properly subject to trebling, and conduct
21 undertaken with plausible efficiency justification, and, you
22 know, detrebling in that area is the main thrust of my
23 testimony.

1 Thanks very much.

2 CHAIRPERSON GARZA: Thank you very much.

3 Professor Cavanagh?

4 MR. CAVANAGH: Thank you, Madam Chairman. I

5 appreciate the opportunity to be here at the invitation of

6 the Commission to share my views on the future of antitrust.

7 It's a little humbling for me to sit here and look at this

8 distinguished assemblage and see my 30 years in antitrust

9 flash before my face.

10 The antitrust laws are 115 years old. Congress

11 authorized the Department of Justice to enforce the

12 antitrust laws with the full panoply of remedies, including

13 criminal sanctions. But it also authorized a private right

14 of action to complement the Department of Justice

15 enforcement proceedings. That private action was unique

16 then and is largely unique now when you compare it to the

17 way the rest of the world works, particularly in antitrust.

18 The treble damages remedy is indeed a powerful

19 tool. Mandatory trebling, attorneys' fees for prevailing

20 parties, tremendous incentives to bring lawsuits, and

21 proponents of the current system would suggest that the

22 treble damages system has served us well. Opponents suggest

23 that it is unfair, that it is chilling, and that there are

1 potentially catastrophic effects on a company's bottom line.
2 And, of course, the Commission is going to have to take a
3 look to see whether or not we should be preserving the
4 treble damages remedy or do something else.
5 Now, given that the antitrust laws have been in
6 place for 115 years, it seems to me that they come before us
7 with a presumption of validity, and the burden for change is
8 on the opponents of the current system. And I don't believe
9 that the case for change has been made.
10 Now, at the outset, the antitrust debate can grow
11 complicated very, very quickly. We can start talking about
12 Type 1 error, optimal deterrence, and game theory, among
13 other things, that complicate the discussion. But I think
14 things are really very simple, and I think the enduring and
15 endearing virtue of the treble damages remedy is its
16 simplicity, especially in giving incentives to detect and
17 prosecute cases, to provide rough justice for calculating
18 damages caused by antitrust violations, to deter conduct, to
19 provide for disgorgement of ill-gotten gains, and to punish
20 violators.
21 Now, I don't think the case for changing things
22 has been made. Unfairness? To the extent we have strike
23 suits, we can deal with them through Rule 11 and other

1 sanctions procedures, insubstantial claims, summary
2 judgment, and motions to dismiss.
3 Now, over the last eight years--and I worked with
4 the Antitrust Section--one thing that I've done each year at
5 the ABA meeting is provide the year in antitrust through a
6 procedural lens. And what I do is look at all of the
7 antitrust cases for the previous year where there were
8 motions to dismiss and motions for summary judgment. And,
9 not surprisingly, those motions come up in virtually every
10 case, and they're frequently successful. Well, I'm not
11 particularly sympathetic to the notion that the cards are
12 stacked against defendants.
13 The second concern, the catastrophic impact on the
14 bottom line caused by trebling, I don't think is a problem
15 in antitrust, and let me draw a distinction. And there was
16 an article on the front page of the *New York Times* last week
17 about asbestos litigation. Over the last 30 years, the
18 *Times* reported that some 20 companies had gone out of
19 business in asbestos, and damages have been--or payments
20 have been made over $70 billion. And there's not even
21 trebling in tort litigation, although there may have been
22 punitive damages there.

1 But my point is that, if there's a problem with
2 antitrust damages, if there's a problem with antitrust, it's
3 not trebling. There might be something more generic in the
4 system, but I think the fact that we have greater problems
5 in terms of effect on bottom lines in the tort area, where
6 you don't even have trebling, suggests that it's not--the
7 treble damages remedy is really sort of a straw man.
8 Lastly, and as Tad has noted, Congress has acted
9 to mitigate any harshness with trebling on a case-by-case
10 basis with decisions in the joint venture area, standard
11 setting, amnesty, and, you know, the fact that local
12 governments are not subject to treble damages. In short, I
13 think what we have here over the last 115 years is an
14 antitrust ecosystem that's in delicate balance, and I urge
15 this Commission to preserve that delicate balance.
16 Thank you.
17 CHAIRPERSON GARZA: Thank you.
18 Professor Lande?
19 MR. LANDE: Thank you very much. My testimony
20 today is on the subject of myth. A myth is a tale that has
21 never been proven. It is instead just assumed to be true,
22 often by self-interested parties.

1 By analogy, unicorns, witches, or dragons might
2 well exist, but unless somebody produces one, this
3 Commission should characterize each as only a myth. This
4 Commission should not make public policy determinations on
5 their assumed truth. The principal myths of antitrust
6 damages are:
7 First, that antitrust violations give rise to
8 treble damages. This is a myth. Second, there is
9 duplication of antitrust damages because some defendants pay
10 sixfold or more damages. This is a myth.
11 Third, the size of damages caused by antitrust
12 violations is relatively modest, so payouts are out of
13 proportion to these damages. This causes overdeterrence.
14 And, finally, even though treble damages should be
15 awarded for hard-core violations, they should be lower for
16 other kinds of violations.
17 If I am correct that each of these is only a myth,
18 then they should not influence this Commission when it makes
19 its recommendations.
20 Myth number one: Antitrust violations give rise
21 to treble damages.
22 If you look at antitrust's so-called treble
23 damages remedy carefully, you will find that it is really

1 only approximately single damages. This is in part because
2 of a lack of prejudgment interest, which is virtually never
3 awarded in antitrust cases. Due to this factor alone, the
4 so-called treble damages are really only around double
5 damages.
6 Moreover, antitrust violations also give rise to
7 allocative inefficiency, which also is never awarded in
8 antitrust cases. Judge Easterbrook calculated that, on the
9 average, allocative inefficiency effects of market power are
10 probably almost half as large as the transfer effects. He
11 concluded that, due to the omission of this factor alone,
12 and I quote, "'Treble damages' are really double the
13 starting point of overcharge plus allocative loss."
14 Now, you probably see where I'm going. What would
15 happen if we were to make both of these three-down-to-two
16 adjustments at one time? What would happen to the so-called
17 treble damages multiplier? However, there are six more
18 adjustments that we should make, such as for umbrella
19 effects and statute of limitations. If you make all of
20 these adjustments together, you'll find that what we think
21 are "treble damages" are really only about single damages.
22 However, the damage multiplier really should be
23 greater than one, because not all antitrust violations are

1 detected and proven. If it's not greater than one, then
2 defendants would have an incentive to violate the antitrust
3 laws. For example, if we catch a third of all violations,
4 if we detect and prove a third of all violations, then
5 treble damages are appropriate. Yet damages today currently
6 are only single-fold.
7 The second myth has to do with duplication of
8 antitrust damages, because allegedly, some defendants
9 currently pay sixfold or even more damages. Some argue that
10 the combination of three-times damages to direct purchasers,
11 plus another three to indirect purchasers and so on, leads
12 to sixfold or even larger damages. However, this
13 duplication possibility is only theoretical. It has never
14 occurred even one time in the real world.
15 If you read the statements of witnesses before the
16 AMC carefully, as well as writings of critics who have
17 discoursed on this subject, they always say that duplication
18 could occur, but they never provide even one real-world
19 example where it has occurred. We have been living with
20 *Illinois Brick* for more than 25 years, and the defendant's
21 nightmare scenario has never happened even one time.
22 Respectfully, this Commission should not just take
23 the defendants' word for the duplication argument. This

1 Commission should demand evidence that neutral parties--
2 judges or juries--have concluded that defendants had to pay
3 sixfold damages.
4 Moreover, from a public policy perspective, anyone
5 wanting to change the existing system should have to present
6 more than just a single anecdote. They should have to
7 present a pattern of evidence. Yet, such a pattern has
8 never been shown. The duplication argument should be
9 ignored.
10 I see I'm getting low on time. I will have to ask
11 you to see the written version of my testimony for myths
12 three and four. Myth three is that the damages caused by
13 antitrust violations are relatively modest, and payouts are
14 out of proportion to them. However, if anything, the
15 opposite is true. A survey that my co-author, John Connor,
16 and I did, which we summarize in our written testimony,
17 shows that the damages from cartels are probably two or
18 three times as large as was conventionally believed. We
19 also show that the current level of cartel fines is
20 insufficient to stop most cartel violations. This might be
21 the answer to Tad Lipsky's question, "Why do people keep
22 fixing prices when it's illegal, they can go to jail, *et*
23 *cetera, et cetera*?" I think the reason is that penalties,

1 even though they've gotten much larger in recent years,
2 should still be doubled or tripled.
3 My written testimony will also discuss the fourth
4 myth, how, even though treble damages should be awarded for
5 hard-core violations, they allegedly should be lower for
6 other violations. I will have to refer you to my written
7 comments because I'm out of time.
8 In conclusion, the only changes that this
9 Commission should recommend is that prejudgment interest
10 should be awarded in antitrust cases and cartel penalties
11 should be significantly raised.
12 Thank you.
13 CHAIRPERSON GARZA: Thank you.
14 Mr. Susman?
15 MR. SUSMAN: I don't have a very heavy burden
16 today because I see it is going to be four and one-half out
17 of five in favor of keeping the law the way it is. In
18 nearly 40 years representing both plaintiffs and defendants
19 in antitrust litigation, I have only once recovered more
20 than actual damages for a plaintiff, and that was after the
21 case was affirmed on appeal by the Fifth Circuit. That was
22 the *Affiliated Capital* case. And I have never represented a
23 defendant who paid more than actual damages to settle an

1 antitrust claim. That's because, particularly for the last
2 20 years, there have been so many substantive legal
3 obstacles put in the way of the private plaintiff. Add to
4 that a business-friendly judiciary ever ready to grant
5 summary judgments or to reverse jury verdicts in antitrust
6 cases, and a pool of jurors whose hearts have been hardened
7 by tort reform, and no plaintiff's lawyer ever expects to
8 recover more than actual damages when deciding to file or
9 settle a private antitrust case.
10 When a number of us appeared on an ABA panel 20
11 years ago to address the subject of reassessing antitrust
12 remedies, no one could make much of a case even then for
13 eliminating mandatory treble damages. Today, that task
14 would even be harder given the demise of the *per se* rule,
15 the erection of standing and direct purchaser doctrines, the
16 adoption of *Matsushita* standards and the use of *Daubert*
17 filters on expert testimony.
18 The only effects that the theoretical availability
19 of treble damages has on antitrust enforcement today are to
20 give the plaintiff with a meritorious claim some ammunition
21 for achieving a settlement closer to his actual damages and
22 to give the antitrust corporate counselor some ammunition
23 for warning his client to avoid clearly illegal conduct.

1 If corporations know that all they have to do is
2 disgorge their unlawful gains if they get caught, they will
3 have little incentive to keep their executives away from the
4 line. Isn't the lesson from Enron and its progeny that we
5 need more rather than less deterrence of corporate executive
6 excesses and arrogance?
7 If mandatory treble damages were no longer
8 available in federal antitrust cases, plaintiff's lawyers
9 like me would file their antitrust cases in state courts
10 under state statutes that provide for enhancement or simply
11 as a tort seeking punitive damages. They would forum-shop
12 for friendly jurisdictions where *voir dire* is allowed to
13 weed out the tort reform-minded jurors and where verdicts
14 need not be unanimous.
15 In none of the testimony or submissions to this
16 Commission have I seen any reference to even a single case,
17 even a single anecdote or horror story, where a company was
18 coerced by the threat of treble damages to forego beneficial
19 conduct or to pay to settle a frivolous claim. A remedy
20 that has been part of our laws for over 100 years should not
21 be tinkered with in the absence of a lot of empirical
22 evidence that it's causing harm, and there is none here.
23 Thank you.

1 CHAIRPERSON GARZA: Thank you.

2 Mr. Boies?

3 MR. BOIES: Thank you very much. It's a pleasure

4 to be here.

5 I think one of the things that is remarkable is

6 that the panelists, who come from very different backgrounds

7 and very different experiences, all share two common views:

8 one is that the antitrust laws as a whole, including

9 mandatory treble damages, do not adequately deter illegal

10 antitrust conduct; and, second, that it would be premature,

11 based on the evidence available, to make any change in the

12 deterrence that exists under current law.

13 If you look at what has happened over 115 years, I

14 don't believe that you can find any significant instances--

15 and this, of course, is a point that other panelists have

16 already made--where there has been overdeterrence, where

17 there have been windfalls for plaintiffs, where desirable

18 economic conduct has been deterred. Whether you call those

19 myths or speculation, the fact of the matter is that there

20 simply isn't a basis for making a change in law based on

21 those kinds of considerations.

22 What we know, and we know as a fact, is that

23 damages in antitrust cases are rarely, if ever, of an amount

1 that exceeds single damages under the current system. What
2 we know as a fact is, if any attempt to change the treble
3 damages remedy were made, there are many other things that
4 would have to be changed at the same time. You would have
5 to have mandatory prejudgment interest. You would have to
6 extend the statute of limitations. You would have to change
7 the rules that have grown up that restrict damages. You
8 would have to allow damages that are now considered
9 speculative in order to fully compensate injured parties and
10 to deter the parties from violating the antitrust laws,
11 because if you know, as we all know, that some of the
12 damages that exist and flow from an antitrust violation, and
13 some of the benefits that flow from an antitrust violation
14 to the violator are speculative under current law, you've
15 got to find some way to compensate the victim and some way
16 to deter the violator, or you will simply have unfairness to
17 the victim and continued incentives at the corporate level
18 to violate the antitrust laws.
19 So there are many changes that would have to be
20 made to the antitrust laws if you were going to consider
21 changing mandatory treble damages, or else you're going to
22 throw the ecosystem of antitrust off in a significant way.
23 I think that the Commission would be much better off staying

1 with the system that has worked for 115 years. If it's not
2 broken, don't try to fix it. Antitrust law is not, in the
3 damages area, broken. What has happened over the last 20
4 years is the courts have addressed instances of perceived
5 unfairness, instances of perceived uncertainty, instances of
6 perceived deterrence of desirable economic activity by
7 changing the antitrust laws, by eliminating *per se*, by
8 providing safe harbors.
9 If you were to go back and attempt to change the
10 treble damages remedy, I think you would have to look at the
11 substantive law changes that have been made over the last 20
12 years that have made defendants' lives easier, made it
13 easier to defend antitrust cases. I think the trend of the
14 law has been exactly right, to try to make the substantive
15 law reflect economic reality, to make the substantive law
16 reflect what is desirable deterrence and what is undesirable
17 deterrence, not to change the remedy phase or the mandatory
18 treble damages. That aspect of the law is something that
19 has worked well, and I think you hear all of the panelists
20 essentially telling you that it does not result in
21 overdeterrence, and I don't think anybody can point to you
22 any significant examples where it has resulted in
23 overcompensation or central unfairness.

1 Thank you.

2 CHAIRPERSON GARZA: Thank you.

3 We'll begin the Commission's questioning with

4 Commissioner Warden.

5 MR. WARDEN: Thank you.

6 Mr. Boies, you seem to have recognized in your

7 written testimony that treble damages may not be needed as

8 an incentive in follow-on class actions. Are there other

9 categories of cases, such as cases brought by well-financed

10 competitors of the defendant, where that might be so as

11 well?

12 MR. BOIES: I think that if you are looking simply

13 at the question of whether a lawsuit will be brought, there

14 will be cases in which a well-financed competitor with a

15 very serious injury will probably bring that lawsuit,

16 whether or not there are treble damages. The problem is it

17 is very hard to construct a law that says we will have

18 mandatory treble damages only for companies that are not

19 well-financed and don't have a serious claim.

20 I think that the right way to approach it is to

21 look at what fair compensation is, even for the well-

22 financed company, and what deterrence is for the antitrust

23 violator. You want to provide adequate compensation even

1 for the well-financed company that may sue, and you want to
2 deter the defendant from violating the antitrust laws. And
3 I think you need treble damages to do both of those,
4 although I agree with you that there would be antitrust
5 cases filed by some parties, even in the absence of treble
6 damages.
7 MR. WARDEN: Sticking with these well-financed
8 competitor cases, given the huge cost of antitrust
9 litigation today, wouldn't it be fairer to award counsel
10 fees to the prevailing party, plaintiff or defendant, or to
11 neither prevailing party?
12 MR. BOIES: I think that the issue of the English
13 rule in terms of fee shifting is an important issue. I
14 think that it is something that is not peculiar to the
15 antitrust laws, and I think it would be undesirable to try
16 to change the antitrust laws in that area independent of
17 other kinds of litigation. The reason that you have fee
18 shifting in favor of a successful plaintiff is to encourage
19 the private attorneys general, to encourage people to bring
20 lawsuits, even where the total amount that may be recovered
21 may not be enormous, because the damage to society--there's
22 a societal interest in having antitrust enforcement.

1 I think that if you were to look at the issue of
2 whether the prevailing plaintiff should get antitrust fees,
3 I think you would find that that rarely, if ever, results in
4 any of the disadvantages that the Commission is concerned
5 with. The issue of fees for plaintiffs, I think no one
6 could seriously argue results in overdeterrence, the
7 discouragement of desirable economic activity, windfalls for
8 plaintiffs, and the like. And that is a very small part of
9 what you're talking about, and since most antitrust cases
10 are settled, there's no fee award anyway.
11 MR. WARDEN: Do you recognize that competitor
12 cases may have the potential for having themselves an
13 anticompetitive effect by deterring the defendant from
14 aggressive competition and imposing expense?
15 MR. BOIES: Sure, I think that you can have
16 tactical lawsuits under the antitrust laws or under many
17 provisions. I think those are undesirable. I don't think
18 the treble damage remedy is an issue there because, by
19 definition, you're talking about something where the
20 plaintiff doesn't intend to recover damages. It's bringing
21 the lawsuit for tactical purposes. So I don't think
22 changing the treble damages remedy affects those lawsuits,

1 but I think that is a problem not only in the antitrust area
2 but more broadly.
3 MR. WARDEN: Thank you.
4 Mr. Susman, what is your reaction to Mr. Boies'
5 suggestion in his written testimony that detrebling might be
6 worth considering in these follow-on class actions?
7 MR. SUSMAN: Well, that might be worth
8 considering. I mean, I don't really--I haven't focused on
9 that, but certainly you are talking about large damages to
10 make it worthwhile for a class action to be filed in a price
11 fixing case, for example. So I think the main effect of
12 treble damages there is not so much giving an incentive to
13 the plaintiff as it is deterring the conduct in the first
14 place. That is, hard-core conduct that no one can argue
15 there's any danger of--I mean, there's no danger in
16 deterring that conduct. And so you say, well, isn't going
17 to jail enough of a danger for people who engage in it? And
18 probably, for the individuals it is, but the corporation--I
19 mean, you can't put a corporation in jail. The fines are
20 small given the gains to be gained.
21 It just seems to me that it is so helpful in
22 counseling corporate clients to have compliance programs
23 that eliminate any possibility of collusion or talking to

1 competitors. It's so helpful for a lawyer to be able to
2 tell them about treble damages and class actions. I mean,
3 those are just words that scare them--and, of course, going
4 to jail. But treble damages, I mean, it's a deterrent.
5 MR. WARDEN: In your testimony, and otherwise,
6 there has been a lot of suggestion that we need the award of
7 counsel fees and trebling as an incentive for private
8 attorneys general to file antitrust actions. Wouldn't the
9 award of counsel fees to a prevailing defendant in the cases
10 I was discussing with Mr. Boies brought by the well-financed
11 competitor create a desirable incentive against filing
12 unmeritorious cases for competitive advantage?
13 MR. SUSMAN: Well, of course, it would. But, you
14 know, no one is going to--I mean, I don't think any--if the
15 plaintiff had to pay the defendant's attorneys' fees--now,
16 what's unmeritorious? A motion to dismiss is granted? I
17 mean, you've got to define what an unmeritorious case is.
18 But if a plaintiff had to pay the defendant's attorneys'
19 fees, what plaintiff would file any kind of case? It would
20 be true of any kind of case. I don't think this is unique
21 to antitrust.
22 MR. WARDEN: Okay. Thank you.

1 Professor Lande, have you read Harry Reasoner's
2 written testimony?
3 MR. LANDE: No, sir, I have not.
4 MR. WARDEN: Among other things, it recognizes
5 that antitrust cases are often close calls on both the law
6 and the facts. Do you agree with that?
7 MR. LANDE: Absolutely.
8 MR. WARDEN: If that's so, doesn't that counsel
9 strongly against any kind of punitive sanction such as
10 treble damages in all but quite clear cases?
11 MR. LANDE: No, sir, I don't believe it does.
12 First of all, I think that damage in rule of reason cases
13 today are single; they're not treble. That was the first--
14 MR. WARDEN: Okay. Can we leave aside, for the
15 purpose of this conversation, your analysis about what
16 damages are and how they're never sixfold and so on?
17 MR. LANDE: Fine. I think--
18 MR. WARDEN: Some of your co-panelists, as well as
19 others, have recognized that treble damages are punitive in
20 nature. Can we assume that for the purpose of this?
21 MR. LANDE: Sure. I think another factor is that
22 society won't produce enough antitrust cases. It's
23 desirable to have a lot more antitrust than would be

1 produced merely by the action of plaintiffs, for a number of
2 reasons. The damages from antitrust violations--Mr. Boies
3 started to talk about this--are much greater than could ever
4 be recovered by any plaintiff. We already talked about the
5 allocative inefficiency effects of market power. I'm not
6 going to--
7 MR. WARDEN: I was asking you to assume that
8 treble damages are punitive.
9 MR. LANDE: Absolutely. I'm saying we need to
10 incentivize plaintiffs to bring these cases. We have to
11 give them something like treble damages for a lot of
12 reasons: because antitrust violations lower consumer
13 choice, because antitrust violations cause less innovation,
14 because antitrust violations are often remedied only by an
15 injunction that won't give the plaintiff any money at all.
16 The system will not produce enough antitrust cases
17 unless you--even in rule of reason, hard cases in which
18 reasonable people could disagree--unless we really
19 incentivize the plaintiff to bring these cases. That's why
20 you really do need treble damages even in the close-call
21 rule of reason cases. Even those cases are really tough to
22 prove. Judge Easterbrook says even in a notorious case,

1 there may be evidence that's just very hard to find. Single
2 damages just aren't going to be enough.
3 MR. WARDEN: Okay. So I take it you would not
4 subscribe to changing the law so as to require proof by
5 clear and convincing evidence before treble damages were
6 awarded?
7 MR. LANDE: No, sir, I would not agree that that
8 would be a desirable change.
9 MR. WARDEN: Have you looked at any of the
10 questions that the Commission is considering this afternoon
11 from the standpoint of a defendant who is sued and believes
12 that it has been wrongly accused? Have you taken that
13 perspective?
14 MR. LANDE: I have tried to, yes, sir.
15 MR. WARDEN: So you know that antitrust litigation
16 is quite expensive.
17 MR. LANDE: Yes, sir. I used to work for Jones
18 Day, a firm that does mostly defense work.
19 MR. WARDEN: And you accept Harry Reasoner's point
20 that wide-ranging conspiracies are easy to allege and
21 sometimes hard to get dismissed on motion?
22 MR. LANDE: I've never been personally involved
23 with one of those cases.

1 MR. WARDEN: You disagree with his testimony?
2 MR. LANDE: I have no knowledge on that point.
3 MR. WARDEN: Okay. Have you read the testimony of
4 Mr. Reasoner or anyone else with respect to the "whipsaw"
5 settlement tactics used in large conspiracy cases?
6 MR. LANDE: I have read that on occasion. I
7 haven't read Mr. Reasoner on the subject.
8 MR. WARDEN: Let me ask you this: Doesn't the
9 combination of liberal pleading rules, treble damages, joint
10 and several liability, lack of contribution or claim
11 reduction, and the uncertainty inherent in litigation, both
12 as to law and fact, confront some defendants with a Kafka-
13 esque nightmare?
14 MR. LANDE: I don't doubt you could find
15 individual cases of injustice. But, on the average, I think
16 there are not enough cases against hard-core collusion,
17 which is what you're mostly talking about, I assume.
18 MR. WARDEN: Well, if one were to accept that
19 cases can be close on both the law and the facts, and one
20 were to accept that the judicial process isn't perfect, as
21 we well know from the number of overturned death sentences,
22 for example, by reason of DNA evidence, and that there may
23 be two sides to every story, isn't it a fundamental value of

1 our legal system to avoid exercises of state power that are
2 draconian in relation to what a reasonable person may
3 perceive his own conduct to have been?
4 MR. LANDE: I don't think we're anywhere near the
5 draconian stage, with due respect, sir. I don't think we're
6 close to it. If a firm helped cause price fixing in an
7 industry that helped cause prices to go up throughout that
8 industry, that firm helped cause prices not only for its own
9 customers to increase but for other firms' customers to
10 increase, I see nothing wrong with making them liable for
11 all of the price increases in that industry.
12 MR. WARDEN: But you're assuming that the
13 determination of law and fact against the defendant in every
14 such instance is perfectly correct.
15 MR. LANDE: There will be mistakes on all sides.
16 I concede that, of course.
17 MR. WARDEN: You state in your written testimony
18 that detrebling for rule of reason cases would mean that the
19 number of uncontested rule of reason violations would be
20 likely to increase tremendously. Do you have any evidence
21 that the National Cooperative Research and Production Act of
22 1993 has led to a tremendous increase in uncontested rule of
23 reason violations?

1 MR. LANDE: I've never studied the effect of that
2 act. If this Commission wanted to commission a study of
3 that act, I think it would be a very worthy exercise. I
4 have not studied it myself.
5 MR. WARDEN: What is the basis for your suggestion
6 that only one-third or fewer of antitrust offenses are
7 detected or proven?
8 MR. LANDE: Well, first of all, I didn't say that.
9 I said let us assume that one-third are detected. The only
10 evidence I know on the subject is a testimony by then-head
11 of the Antitrust Division, Douglas Ginsburg, that, at most,
12 10 percent of all cartel cases were detected, when he said
13 that in 1986. I happen to have the highest regard for Judge
14 Ginsburg. I regard that as evidence, not proof, but at
15 least a piece of evidence. Now, that figure has surely
16 increased due to the amnesty program and other programs.
17 But I have seen no solid evidence on that figure.
18 MR. WARDEN: What was the foundation basis for
19 Judge Ginsburg's testimony when he said that? Do you know?
20 MR. LANDE: I've got it here if you want me to
21 read you--

1 MR. WARDEN: No, no. I'd just like to know what
2 evidence he had in mind when he made that conclusory
3 statement.
4 MR. LANDE: To be perfectly honest, I e-mailed him
5 on that subject about a year ago, and he said he couldn't
6 remember. It's almost-- [Laughter.]
7 MR. LANDE: It's more than 15 years--
8 MR. WARDEN: Fine. We'll proceed to another topic
9 then.
10 Professor Cavanagh, you suggest on page eight of
11 your written testimony that intent should not be a
12 prerequisite to trebling because intent is not an element of
13 horizontal price fixing. Do you know of any cases in which
14 a defendant stumbled unknowingly or unintentionally into a
15 price-fixing conspiracy?
16 MR. CAVANAGH: I don't.
17 MR. WARDEN: If trebling were committed to the
18 sound discretion of the court, which I think is your second-
19 best outcome, wouldn't intent and knowledge of illegality be
20 important factors in the courts exercising that discretion?
21 MR. CAVANAGH: I think so.

1 MR. WARDEN: Do you think it would make sense to
2 require proof by clear and convincing evidence before
3 awarding treble damages?
4 MR. CAVANAGH: No, I think part of the theme I'm
5 trying to develop here with the current system is its
6 simplicity. And if we start going into clear and convincing
7 evidence, we start making the process more complicated. We
8 change the standards that have been around for 115 years.
9 We're going to introduce some uncertainty in a case that is
10 going to have to percolate up through the system, what is
11 clear and convincing, and I just think that would be a
12 mistake.
13 MR. WARDEN: Are you aware that parties may expend
14 many millions of dollars in antitrust litigation, even in
15 cases that are thrown out on summary judgment?
16 MR. CAVANAGH: That's true.
17 MR. WARDEN: Does that fact bear at all on the
18 question of whether fees should be awarded to prevailing
19 defendants?
20 MR. CAVANAGH: I think the current one-way street
21 situation works well because it's just very, very difficult
22 for plaintiffs to win cases. And I'm looking at this now
23 from a 2005 perspective. The fact of the matter is that

1 since the late '70s, the substantive law has really gone in
2 favor of the defendants. And if we now make that switch,
3 we're throwing--we're going to throw the ecosystem out of
4 balance, and we're going to stack the deck in favor of
5 defendants.
6 MR. WARDEN: Presumably, the courts have
7 articulated rules of substantive law that they believe
8 correctly carry into effect the policy of the antitrust
9 laws, not rules of law that they think are "favorable to the
10 defendants."
11 MR. CAVANAGH: That's true. They're trying to do
12 the right thing. The fact of the matter is it's just hard
13 to win cases these days for plaintiffs, and if that's the
14 case, you're not going to have a whole lot of incentive to
15 bring a case if we have a loser pays situation.
16 MR. WARDEN: And you would apply that reasoning
17 even in the case of one huge corporation suing another?
18 MR. CAVANAGH: Yes.
19 MR. WARDEN: Doesn't the fact that the courts
20 have, in your words, in your writing, and again today,
21 narrowed the *per se* spectrum over time actually bear in
22 favor of awarding treble damage only when the challenged

1 conduct is *per se* unlawful? Because that's a much clearer
2 category than it used to be.
3 MR. CAVANAGH: Well, I'm not so sure how clear it
4 is. I mean, certainly we know price fixing among
5 competitors is *per se* unlawful, but is tying? Tying is
6 nominally *per se* unlawful. I think it's still a very, very
7 unsettled area.
8 MR. WARDEN: Thank you.
9 Mr. Lipsky, what evidence do you have to support
10 your suggestion that present law has deterred the formation
11 of procompetitive joint ventures?
12 MR. LIPSKY: This is a judgment based on personal
13 observation of and counseling of, in many situations, joint
14 ventures, and I think this is reflected in other testimony.
15 Although the music for joint ventures is very welcoming at
16 the enforcement agencies and, to an extent, in the courts,
17 joint ventures receive an extremely rough ride. They get
18 looked at very, very carefully. Just recently, a three-year
19 investigation, which did not result in complaint, came to a
20 conclusion. It was a Department of Justice investigation
21 into a very overt, publicly announced joint venture. It
22 went forward. There was nothing to hide. And that is one
23 element of, I think, an accumulated experience. If you read

1 business review letters granted by the Department of
2 Justice, my very first experience coming out of the position
3 of Deputy Assistant Attorney General was getting a favorable
4 business review letter for a trade association, the
5 president of whom died a couple of days before the end of
6 the six-month period that the Department of Justice had
7 taken to look at that joint venture. It is slow; it is
8 painful; and it deters experimentation in a lot of
9 procompetitive joint ventures in my judgment.
10 MR. WARDEN: So that our record is clear, what are
11 you including within the term "joint ventures"?
12 MR. LIPSKY: Well, it's an excellent question, and
13 I would say that--I would try to conform the definition to
14 the precise point where the courts are trying to focus in
15 distinguishing between cartel conduct, conduct deserving of
16 immediate condemnation without consideration of any further
17 competitive analysis or efficiency defense, versus the kind
18 of joint venture that at least has the kind of integrative
19 efficiency or potential efficiency justification that would
20 require examination of the efficiency defenses. And I
21 really commend to you--as I mentioned at the very end of my
22 oral testimony, because this decision was just Friday the
23 22nd, after I had submitted my written testimony--Judge

1 Ginsburg's decision in the *Three Tenors* case I think is
2 about as close as I have seen to any judicial decision that
3 defines that line. And that is the line that I would try to
4 choose.
5 MR. WARDEN: What I'm trying to find out is, what
6 do you call a joint venture? You're not just talking about
7 a plant that two people build.
8 MR. LIPSKY: I'm talking about any--well--
9 MR. WARDEN: You're talking about any overt
10 horizontal arrangement; is that correct?
11 MR. LIPSKY: But with the element of potential
12 efficiencies or productivity-enhancing integration.
13 MR. WARDEN: That's a good joint venture.
14 MR. LIPSKY: Absolutely.
15 MR. WARDEN: Okay. It would be a joint venture
16 even if it didn't have those qualities, wouldn't it?
17 MR. LIPSKY: That's right. But what justifies the
18 treatment under something other than an immediate *per se*
19 cartel rule is some element of efficiency, and that's the
20 difficult-to-define concept. *BMI ASCAP*, in which I think
21 Mr. Boies was the victorious lawyer, if I recall correctly,
22 waited--what was it?--about 20, 25 years to find

1 out that it was in the rule of reason category. We've
2 gotten a little better at defining that line, I hope.
3 MR. WARDEN: All right. One final question: Does
4 your overt/covert distinction apply to conduct other than
5 joint venture formation?
6 MR. LIPSKY: It was not intended to, for a variety
7 of reasons that I could go into if you wanted. I've
8 excluded those other areas, but it is primarily relevant to
9 this area of horizontal efficiency creating--
10 MR. WARDEN: You've excluded them for analytical
11 reasons.
12 MR. LIPSKY: That's correct.
13 MR. WARDEN: Not because you just didn't consider
14 them.
15 MR. LIPSKY: That's correct.
16 CHAIRPERSON GARZA: Thank you, Commissioner
17 Warden.
18 Commissioner Yarowsky?
19 VICE-CHAIR YAROWSKY: Thanks for being here. I
20 just wanted to note that we've now shifted over from the
21 lead questioner, who gets 20 minutes, to everyone else, who
22 gets five minutes.
23 CHAIRPERSON GARZA: Is that a complaint?

1 VICE-CHAIR YAROWSKY: No, not a complaint at all.
2 So what I'm going to do is probably set up two or three
3 questions, and then if any of you would like to jump in and
4 answer any of them, that would be great. Maybe that's the
5 best way to use the time.
6 The lovely, almost baroque semantics of antitrust
7 lead people to think this is a very exotic field, but I
8 really do agree with Tad Lipsky that this is really about
9 human behavior. That's really what antitrust is about. And
10 for that reason, I think the role of conventional wisdom is
11 very important, as it is in most human endeavors.
12 What I mean by that is that over 115 years a
13 certain system has been laid down and inculcated in many
14 different audiences, including the business audience, the
15 consumer audience. If one changes that conventional wisdom,
16 one--I am just asking--would that signal less vigilant
17 commitment to the antitrust laws? And maybe even more
18 significant--and I think Mr. Boies brought this up--would
19 that lead itself, just that change in remedial structure,
20 lead itself to substantive changes, kind of drive them,
21 first?
22 Second, drawing on a number of your different
23 statements, some of the proposals for change in this area--

1 and they're very creative and very important to consider--
2 seem to be going in the direction of transforming the
3 antitrust remedial system into the tort system. And they're
4 very different systems. Is that a good idea, meaning should
5 we be changing evidentiary burdens? I think Mr. Warden made
6 that point. He was asking. I mean, obviously, with
7 punitive damages, the highest evidentiary standard attains
8 for the most part in most states. Obviously, they're
9 looking at subjective states of mind, *mens rea*--not a lot of
10 that going on in antitrust--and long proceedings. So we have
11 involved proceedings at the damage phase in antitrust, but a
12 different kind of proceeding that goes on. Would it be
13 useful to see this kind of shift over?
14 Lastly, if there's any time, what about these
15 prenotification statutes that have started with the NCRA?
16 And this goes to the joint venture area primarily,
17 obviously. The NCRA was about R&D joint ventures. In '93,
18 there was an amendment to have production joint ventures.
19 They drew the line at marketing. They didn't want to have
20 joint venture protection for that, and then we just had the
21 standards development. Is that a possible model, that, in
22 certain areas, it might be useful to clarify this without
23 having major remedial change? Anyone?

1 MR. BOIES: As I previously said, I think if you
2 were to change the remedy phase, it would have other
3 effects, that you would have to make other changes. That
4 is, you couldn't just detreble without looking at some
5 remedial issues, like prejudgment interest, like the statue
6 of limitations, and expanding recoverability of damages that
7 in our view are speculative. But you'd also have to look at
8 the substantive law changes that make it difficult for
9 plaintiffs to recover, in part because if you change one
10 without looking at changing the other, you're going to
11 affect deterrence.
12 MR. SUSMAN: I very much agree with your comment.
13 I mean, I think changing the treble damages remedy is
14 definitely going to encourage lawlessness. I think that it
15 sends the wrong signal to business and businessmen at a time
16 when they need to be sent a different signal. And I just
17 think that we need to say these are important laws and there
18 are seriously consequences to your violating them;
19 therefore, you had better listen to your antitrust lawyers.
20 MR. LANDE: I agree with what both of them said,
21 and I'd like to add that antitrust is not torts. Torts are
22 usually private matters between two people. Antitrust
23 affects an entire market. It causes lots of damages, more

1 than just to a few individuals. We've already talked about
2 those. The economists call some of them externalities, harm
3 to choice, harm to innovation, all these other harms that
4 make antitrust close to unique.
5 VICE-CHAIR YAROWSKY: So your point is simply that
6 tort law, if it does involve people, personal injury or
7 things like that--
8 MR. LANDE: Right.
9 VICE-CHAIR YAROWSKY: That's why there is this
10 delving into subjective states of minds and things like
11 that, as opposed to antitrust, which is more external.
12 MR. LANDE: Right. Antitrust is usually concerned
13 with harm to a market. Otherwise, we don't usually get
14 involved.
15 MR. CAVANAGH: I just want to pick up on your
16 prenotification statutes as sort of a model. I agree that
17 trebling in every case can be harsh. There are some cases
18 where we probably shouldn't be trebling, close cases. The
19 problem with that is that it's just really hard, until
20 you've seen the evidence, to know whether or that's the
21 case. In terms of what we like with a rule, we like
22 clarity, simplicity, and predictability, and you lose all of

1 that when you start saying, well, only in clear cases,
2 because we don't know what that's going to be like.
3 With this piecemeal detrebling that we've seen,
4 you know, Congress is watching what is going on, and if
5 there is harshness, it's going to come to Congress'
6 attention, and Congress is going to act on it; and it has
7 shown that it's going to act on it.
8 You know, I'm not sure that I always agree with
9 what Congress does, and the political process may mean that
10 my choice doesn't get taken and somebody else's does. But I
11 think that's the best way to deal with that.
12 MR. LIPSKY: I think it is terribly corrosive to
13 approach this in a piecemeal way. I think that the NCRA and
14 the detrebling in return for disclosure would be
15 particularly appropriate in this horizontal joint venture
16 context that I've been addressing.
17 I also want to say that it doesn't bother me that
18 you have to, when you reform treble damages--or it's usually
19 advisable to--sort of reform a little suite of functions.
20 And that's been the pattern in the NCRA where--you know, in
21 the Export Trading Company Act, which you can argue with or
22 not. But the point is there you do have a change. Not only
23 do you have detrebling, but you also have a change in fee

1 shifting, and I believe you also have changes in the
2 prejudgment interest area.
3 Just one final comment quickly, if I may. I wanted
4 to respond to something David said about changes to the
5 speculative damages rule, because antitrust goes at least as
6 far as any other system of law that I'm aware of or at
7 least, you know, civil litigation in the U.S. And the rule
8 in antitrust law is that once you get through the gate of
9 proving a violation and proving that that violation was a
10 material cause of the plaintiff's injury, anything other
11 than speculation is acceptable. Basically, anything you can
12 give a reason for is an acceptable damage proof, anything
13 you can persuade the jury of.
14 I actually sat through the damages presentation in
15 *MCI v. AT&T*, which I think at the time was actually the
16 largest civil antitrust remedy in history, and, you know,
17 MCI had a piece of paper written when the company was a
18 fledgling saying, "Boy, if we could get into this market, we
19 could earn a couple of billion dollars." And that was
20 accepted as the damage proof in that trial. It was later
21 retried, but MCI got a very substantial award from that
22 case.

1 So I would have an issue with going beyond and
2 permitting damages that were merely speculative, because
3 we're just one notch short of that right now.
4 CHAIRPERSON GARZA: Thank you.
5 Commissioner Valentine?
6 MS. VALENTINE: Thank you. Good afternoon, and
7 obviously, thank you all very much for your testimony.
8 Since this is actually quite a love fest and I think we have
9 heard very clearly and strongly where the panel is coming
10 out, can we just try getting at it one other way? I want to
11 ask each of you if you had to pick one area where treble
12 damages might be adjusted to achieve better deterrence,
13 compensation, punishment--and we're going to just detreble
14 in one area--I'm going to give you four: no trebling in
15 class actions brought post-DOJ conviction or guilty plea in
16 a criminal case; no trebling for indirect purchasers where
17 direct purchasers have gotten damages with respect to the
18 same violations; no trebling for competitor suits; and no
19 trebling for joint ventures where the joint action is
20 transparent and open. And I want you to pick the one that
21 you think would do the least damage to the system and tell
22 me why. And if you're really gagging in going for one of
23 those, you can also add that there should be prejudgment

1 interest, and if so and so, or you can say judicial
2 discretion, at least one and one-half, per Judge
3 Easterbrook, or whatever. Or you can make up another one.
4 MR. SUSMAN: How about this one: punitive damages
5 awarded by a jury after a finding of liability, but no cap
6 at three times. Okay?
7 MS. VALENTINE: Okay.
8 MR. SUSMAN: I've get six if I can convince the
9 jury to give me six times, or five times, or something else.
10 I'm not sure I would accept that. I mean, I'm not sure that
11 that wouldn't have a pretty good deterrent effect also on
12 unlawful conduct, because during that punitive damages phase
13 I can talk about the defendant's wealth; I can talk about
14 the defendant's lack of a compliance program or the
15 hypocrisy involved in it. And so I'm not sure that--I mean,
16 why don't we leave it to the jury to decide?
17 So that would be my--I mean, if you're going to
18 get rid of mandatory trebling, then leave it to the jury and
19 let it be handled like punitive damages in a normal tort
20 case. But I guess if you had to pick one, I would pick the
21 indirect purchaser one.
22 MS. VALENTINE: Okay. Let's go with David Boies.

1 MR. BOIES: If I had to pick one, I'd pick the
2 post-verdict, post-guilty plea class actions. I do think you
3 would have to make adjustments there for prejudgment
4 interest and the like and the other things I've mentioned.
5 But if we were going to pick one of those, I would pick that
6 one.
7 One that I--sort of the second one, depending on
8 how you defined it, would be joint ventures where
9 everything's transparent. I think it's important that
10 everything that affects the legality of it be transparent.
11 That is, you can't just have notification of what is being
12 done. You have to have notification of why it is being done
13 and what the effects are going to be. That is, you've got
14 to have notification of everything that makes it legal or
15 illegal if you're going to do that.
16 MS. VALENTINE: Bob?
17 MR. LANDE: If I absolutely had to pick one, I
18 guess it would be the joint venture one, for the reasons
19 that Tad talked about. I wouldn't do class action follow-
20 ups or indirect purchaser, because those usually involve
21 hard-core conduct, hard-core price fixing. I think in that
22 area we ought to be increasing damages, not decreasing.

1 In the joint venture area, while I don't agree
2 with Tad, there's certainly some merit to his argument. So
3 if I had to pick one, I would go with that one.
4 MR. CAVANAGH: I would pick indirect purchasers,
5 and the reason for that is this: My objection *to Illinois*
6 *Brick*--the reason I agree with the *Illinois Brick* decision
7 is due to what Justice White said there: the complexity, the
8 fact that you're transforming a courtroom into an Economics
9 101 classroom, and all of a sudden the testimony is a battle
10 of the economists.
11 What troubles me about indirect purchaser suits is
12 that there's probably some pass-on there, and there's
13 probably--the rule of *Illinois Brick* probably denies people
14 who have actually been hurt compensation. And I would just
15 like to be able to compensate them without incurring all of
16 the other problems that Justice White points to. And I
17 think if we--I think permitting actual damages might be a
18 reasonable compromise.
19 MR. LIPSKY: My testimony should make clear that I
20 would go for the joint venture situation. My issue with all
21 three of the other cases that you mentioned is that they are
22 potentially applicable in the cartel area. And I really
23 think that we need to understand better why these cartels

1 are continuing, and what the pathology of the behavior is,
2 before I would consider anything that might substantially
3 decrease the remedies in the cartel area. So joint
4 ventures, I wouldn't give them anywhere near as rough a ride
5 as it sounds like David would want in order to qualify. And
6 I think that the previous detrebling acts, particularly the
7 NCRA and the NCRPA, provide the model for that.
8 MS. VALENTINE: I might go with David's model, but
9 one quick question because my time's up. Do any of the other
10 panelists agree with Mr. Lande that one should, in fact,
11 have prejudgment interest in addition to treble damages?
12 [No response.]
13 MS. VALENTINE: Okay. Thank you.
14 CHAIRPERSON GARZA: Thank you.
15 Commissioner Shenefield?
16 MR. SHENEFIELD: Let me start with Mr. Lipsky. I
17 got through the first 13 pages of your statement. I was
18 fascinated, indeed riveted.
19 [Laughter.]
20 MR. SHENEFIELD: I got to the first sentence of
21 the 14th page, and it's all downhill from there. What is
22 the answer to the question?

1 MR. LIPSKY: Judge Ginsburg really has filled it
2 in for us.
3 MR. SHENEFIELD: Why don't you word it for us
4 today?
5 MR. LIPSKY: Well, here I brought--give me back my
6 copy of the--
7 [Laughter.]
8 MR. SHENEFIELD: Don't sing. Just word it.
9 MR. LIPSKY: Well, look--you know, John, one way
10 to do this, go on to one of the other panelists, and I'll
11 find the wording and raise my hand when I do.
12 MR. SHENEFIELD: Okay. Take your time. It's
13 important. For the rest of the panel, let's just assume
14 that the Commission is going to recommend rescission or
15 repeal of *Illinois Brick*. This is a little unfair because
16 this isn't on your list of things to think about, but you
17 all are as smart a group and as good a group to comment on
18 this as any I know. Do you think it would be necessary to
19 accompany that with a preemption of state law? Is there
20 anybody who has a view on that?
21 MR. BOIES: Did you say, "Assume that you're going
22 to recommend repeal of *Illinois Brick*?"
23 MR. SHENEFIELD: Well, reversal.

1 MR. BOIES: Reversal. So that under federal law
2 you would be able to bring indirect purchasers--
3 MR. SHENEFIELD: Correct.
4 MR. BOIES: And the question is, should--
5 MR. SHENEFIELD: Do you need to preempt state law?
6 MR. LANDE: Could you still bring direct purchaser
7 suits under your hypothetical?
8 MR. SHENEFIELD: In federal court.
9 MR. LANDE: So it could be either--both?
10 MR. SHENEFIELD: Both in federal court.
11 MR. BOIES: And you would not be overruling
12 *Hanover Shoe*?
13 MR. SHENEFIELD: I get to ask the questions.
14 [Laughter.]
15 MR. BOIES: I understand that. I'm just trying
16 to--the answer's--
17 MR. SHENEFIELD: Yes.
18 MR. BOIES: Okay.
19 MR. SHENEFIELD: Any thoughts?
20 MR. BOIES: That's an interesting question, one I
21 hadn't thought about, but I assume that--well, let me take
22 that back. If you take the Supreme Court's theory when it
23 approved the *Illinois Brick* repealers, that theory was that

1 it was appropriate for the states to enhance the remedies.
2 I think that what you'd have to conclude in order to preempt
3 is that there was a significant danger of some of the
4 problems that have been talked about--overdeterrence,
5 unfairness, windfalls, and the like--if the states did
6 provide enhanced remedies. I take it, what you're saying
7 is, suppose the states said, instead of having treble
8 damages, you can have four times damages under our--
9 MR. SHENEFIELD: No, I'm just saying, would you,
10 in order to make the adjustment effective, have to abolish
11 the possibility of indirect purchaser suits in state courts?
12 MR. BOIES: I don't think you have to abolish it.
13 You might want to make the policy judgment that you've
14 provided as much remedy as was appropriate from an economic
15 policy standpoint. But I don't think you've have to.
16 MR. SHENEFIELD: Okay. Any other thoughts on
17 that?
18 MR. LANDE: If the right existed on the federal
19 level, I wouldn't see why you'd need to keep it on the state
20 level, I mean, assuming it was effective and you could
21 certify classes and so on and so on. But, otherwise, there
22 would be duplication.

1 MR. SHENEFIELD: David Boies suggested at the
2 outset that he might be willing to consider abolition of
3 treble damages in follow-on class action suits. And, Mr.
4 Susman, you seem to be willing to countenance that
5 possibility as well.
6 Mr. Lipsky is uneasy about it, but might consider
7 it in light of the fact that it may not be necessary to
8 incentivize plaintiffs to bring suits. And I take it that
9 you, Mr. Lande, would not like that idea.
10 Mr. Cavanagh, do you have a view on that?
11 MR. CAVANAGH: From a deterrence perspective, I
12 think it's probably not the right thing to do. I would
13 leave it alone; I would not detreble.
14 MR. SHENEFIELD: Okay.
15 MR. LIPSKY: I'm ready, Commissioner.
16 MR. SHENEFIELD: Your moment.
17 MR. LIPSKY: This is the--the court is going
18 through the history in talking about *Mass. Board* and *Cal.*
19 *Dental* and talking about restraints that are deemed
20 inherently suspect and requiring the defendant to come
21 forward with a legally cognizable and plausible competitive
22 justification for the restraint. So that would be the
23 definition of the line between *per se* and rule of reason or

1 between horizontal restraints that were subject to immediate
2 condemnation--condemnation without further analysis. That's
3 where I would confine the trebling to, and anything outside
4 that category in the horizontal restraints area I would
5 detreble.
6 You know, having looked at it--
7 MR. SHENEFIELD: But you're not requiring
8 prenotification; you wouldn't really want to hamstring
9 American business to the extent that joint ventures had to
10 be prenotified to the Antitrust Division.
11 MR. LIPSKY: I think the kind of just soft touch,
12 literal--the literal, you know, transmission of the
13 information to an antitrust enforcement agency is probably
14 not too high a price to pay to get rid of what I think is a
15 significant deterrent effect to creative joint conduct. As
16 I mentioned, I wouldn't give it quite as rough a ride as
17 David Boies wants to. But I don't think that disclosure
18 would be too high a price to pay, particularly given the
19 relationship, which is a logical and intuitively appealing
20 relationship, even though I think the empirical evidence for
21 it might be a little bit shakier between this notion of
22 likelihood of detection versus a multiplier for damages.

1 MR. SHENEFIELD: Okay. That's very helpful.
2 Thank you very much.
3 Madam Chairman, over to you.
4 CHAIRPERSON GARZA: Okay. Commissioner Litvack?
5 MR. LITVACK: Thank you. Let me say at the outset
6 that my strong inclination coming in hasn't changed. It is
7 not to detreble and not to do any of the things we've talked
8 about. But I am, just curiosity-wise, troubled by
9 something, which is the following: David Boies makes the
10 comment in his written statement, and a couple of you have
11 sort of echoed it, which is--and I'm quoting from him now--
12 that "anti-competitive behavior remains persistent and
13 recidivism prevalent. We have seen anti-competitive conduct
14 flourish in recent years."
15 Now, that's in the face of treble damages, in the
16 face of increased penalties, in the face of increased jail
17 time. It sort of leads one to the question--or at least
18 leads me to wonder out loud, as I am right now--maybe all
19 this is doing no good, so if it's doing no good, why are you
20 bothering with trebling? Undo it. Or the flip side, which
21 is Steve Susman's approach, you've got the right idea;
22 you're just not going far enough. Make it six times, 20

1 times--we'll get those guys sooner or later; there's got to
2 be a number.
3 And so if that's--and I'm being a little
4 facetious, but I'm being largely serious--aren't we being
5 told by these facts that this conduct is continuing and, to
6 use your word, David, "flourishing", that we're doing is not
7 working or not working well? And if that's the case, then
8 maybe you do have to review it. Maybe detrebling isn't the
9 answer. Or maybe it is because it's not doing any good.
10 But isn't there a problem here that maintaining *the status*
11 *quo* doesn't necessarily address?
12 MR. BOIES: First, I don't think it's not working.
13 I think it may not be working enough. In other words, it's
14 not that treble damages does not have an effect. I believe
15 it does have an effect. But it clearly does not have enough
16 of an effect to deter this conduct.
17 Now, whether or not four times damages or five
18 times damages or six times damages would have greater
19 deterrence--I mean, obviously it would have some greater
20 deterrence--but whether it would have enough greater
21 deterrence to justify it is something that I simply don't
22 have a view on.

1 MR. LITVACK: How would you feel about just
2 leaving it up to the judges, just saying multiple damages
3 are to be determined by the court?
4 MR. BOIES: I think it would be a mistake if you
5 took that below treble damages. I think changing the
6 mandatory treble damages remedy introduces an element of
7 uncertainty that would be undesirable. Whether or not you
8 would want to give the court enhancement is something I've
9 not thought about. In general, I think my view on that
10 would be similar to my view about detrebling. I don't think
11 an adequate case has been made for change.
12 MR. LITVACK: Mr. Susman?
13 MR. SUSMAN: In the first place, don't leave it up
14 to the court, to a jury. Okay? I don't have much problem
15 with that.
16 MR. LITVACK: My reference to the court was not
17 inadvertent.
18 [Laughter.]
19 MR. SUSMAN: You want to get it out of the hands
20 of jurors. I mean, that's what the defense lawyers want to
21 do. And I say, you know, the uncertainty of having a jury
22 maybe award four or five times actual damages might be a
23 sufficient disincentive for companies to violate the

1 antitrust laws. But I do think--I mean, the problem, the
2 reason we see a lot of--we see a lot of unlawful corporate
3 conduct in all areas, and the reason is that everyone talks
4 about the fact that business--defendants have an advantage
5 in the system today. It's a real advantage. How many
6 antitrust verdicts have been returned in the last year or
7 two years for a plaintiff after trial? How many have been
8 sustained on appeal? I mean, you could count them on one
9 hand across the country. So, you know, and people know
10 about that, and it just--I mean, the pendulum has gone so
11 far in the direction of protecting business, why push it a
12 little further?
13 MR. LITVACK: How about my question to the others.
14 Would you favor an enhancement to the treble damages, just
15 on the theory that treble damages isn't providing, as Mr.
16 Boies put it, enough of an incentive? It's providing some
17 incentive, but perhaps not enough?
18 Mr. Lande, Professor Lande?
19 MR. LANDE: I guess my basic answer to your
20 question is, maybe everything that I've been saying is
21 right.
22 [Laughter.]

1 MR. LANDE: In other words, maybe treble damages
2 really are--
3 MR. LITVACK: How's that for a shock?
4 MR. LANDE: Let me give you the following
5 scenario, which I am going to assert is not atypical of what
6 actually goes on. You have a settlement with direct
7 purchasers for nominal single damages. Then you have a
8 settlement maybe in some 20 or 30 states with indirect
9 purchasers for maybe a third of single damages. Now, that's
10 nominal single damages. Then you have a criminal fine,
11 which starts from the presumption of a 10 percent
12 overcharge, which is really about one-half or one-third of
13 what the cartels actually overcharged. So even the criminal
14 penalties today are far less than single damages. So today
15 you have one, plus a third, plus less than one. You have
16 what we think are treble damages. Oh, but then there's that
17 darn discounted present value and allocative inefficiency
18 and umbrella effect.
19 So, in other words, even for cartels, maybe all we
20 really have today is single damages that have got to be
21 raised.
22 MR. LITVACK: Would you enhance it?
23 MR. LANDE: Absolutely.

1 MR. LITVACK: You would enhance it.
2 Mr. Lipsky?
3 MR. LIPSKY: I would not--
4 MR. LITVACK: I don't mean to skip Professor
5 Cavanagh, but--
6 MR. LIPSKY: I wouldn't exclude--
7 MR. LITVACK: --since you think we ought to do
8 away with all this.
9 MR. LIPSKY: I wouldn't exclude this possibility
10 because of this problem that you started with, you know, the
11 continuing conduct despite these huge penalties. But I
12 really think somebody needs to kind of get inside the head
13 of the violator and tell us why is this happening. I mean,
14 it's just if you apply any form of rationality to it, it
15 seems either people really believe that they're going to get
16 away with it--that's possible, and that we can address--but
17 it might be something that would be harder to address or
18 that would require a different remedy.
19 MR. LITVACK: I have to interrupt to say that
20 Commissioner Warden had whispered the same thing to me a
21 moment ago, saying, "'Why do people do this?' as though I
22 were an expert on why people do it." But suffice it to say,
23 there's a lot of human behavior we can't explain, so I don't

1 know that we're ever going to explain why except, as one of
2 my former partners once told me, the Ten Commandments have
3 been around a long time, and people are still violating
4 them.
5 Thank you.
6 CHAIRPERSON GARZA: Commissioner Jacobson?
7 MR. JACOBSON: I have a question for Professor Ned
8 Cavanagh. Let me preface it by saying that even though the
9 courts, by and large, deny this, there is undoubtedly a
10 different standard in antitrust cases in a number of
11 respects. There is a tougher summary judgment rule for
12 plaintiffs. There's much tougher judgment notwithstanding
13 the verdict, from a plaintiff's perspective, much tougher
14 Rule 12 standards for plaintiffs. There is a very rigorous
15 set of standards in antitrust injury doctrine that in the
16 Sixth Circuit probably means that no plaintiff should be
17 allowed to sue at all.
18 The question is the one that our advisor, Bill
19 Kovacic, has, and to me it is the one troubling question
20 about treble damages, which is, do we have these sort of
21 out-of-sorts doctrines in antitrust, these pro-defendant
22 doctrines, as a reaction to treble damages? And if so,
23 should we do something about it?

1 MR. CAVANAGH: That may very well be. I'm not so
2 sure that it's so much treble damages; it's just what it
3 costs to prosecute an antitrust case, discovery. You know,
4 look at a federal judge who gets an antitrust case dumped on
5 him or her. I mean, you're in for a long haul. Your docket
6 is now going to be loaded down with one case. There's going
7 to be constant bickering among the clients. It's expensive;
8 it's time-consuming. And you look at a case, and you have a
9 gut reaction. This isn't a good case, so I'll throw it out
10 because you didn't allege relevant market in the complaint.
11 Well, Rule Eight doesn't require you to allege
12 relevant market, but yet, read some decisions: "We threw
13 this out because you didn't allege antitrust injury." You
14 don't have to allege antitrust injury; you have to prove
15 antitrust injury.
16 But because judges make this sort of cost/benefit
17 analysis at the outset that this is a loser, it's very easy
18 to toss it on a motion to dismiss or on summary judgment.
19 Summary judgment is a little different because you can get
20 more in, but I'm very troubled by motions to dismiss.
21 MR. JACOBSON: You don't think it's related to the
22 trebling?

1 MR. CAVANAGH: I don't think it's necessarily
2 related to trebling. I think it's more related to the fact
3 that these cases are complex and very, very expensive and
4 lengthy and just, you know--
5 MR. JACOBSON: Okay. Mr. Lipsky, I'm not going to
6 let you off without a question about your joint venture
7 analysis. Does your analysis apply to collateral restraints
8 of a joint venture? Because it's rare, it seems to me, that
9 there's injury to a private plaintiff from the formation of
10 a joint venture. And if we were to apply the doctrine that
11 you're discussing to collateral restraints of the joint
12 venture, where would we draw the line?
13 MR. LIPSKY: Well, I suppose you could imagine a
14 joint venture containing a collateral restraint that was so
15 completely unrelated to the efficiency-enhancing aspect that
16 you could say, "We're going to cut that off and treat it as
17 a *per se* violation independently." But since I think the
18 principal rationale for the multiplicity of damages in the
19 area of cartel conduct, which is the one area where we
20 continue to agree that this is reprehensible conduct, that
21 if it is in fact occurring, can't be overdeterred--it's the
22 relationship between disclosure and the rationale for that
23 remedy in the cartel area that I think justifies bringing

1 the entire joint venture in general within the detrebling
2 rule.
3 Could I also pitch in on the question that you
4 asked Ned?
5 MR. JACOBSON: You can, but you have to answer the
6 next question first.
7 MR. LIPSKY: All right.
8 MR. JACOBSON: Which is, I have read Judge
9 Ginsburg's decision, a rather good one, in the *Three Tenors*
10 case, but I honestly don't see where you're coming from.
11 Would any damages caused by that particular conspiracy be
12 trebled or not? Onto which side of the line does it fall?
13 And if I'm confused about that, is this the sort of line
14 drawing that we should be doing?
15 MR. LIPSKY: Well, it's not the easiest line to
16 draw, but I think those would be treble damages, as I
17 understand it.
18 MR. JACOBSON: All right.
19 MR. LIPSKY: No cognizable justification, and
20 that's the end of it.
21 MR. JACOBSON: Why don't you go ahead and answer
22 the--

1 MR. LIPSKY: Well, I was just going to say that I
2 really think that the--there's been quite a bit written
3 about this question of--you know, *Equilibrating Tendencies* I
4 think was the title of the Stephen Calkins article, but I
5 really think that if you watch the long sweep of antitrust
6 doctrine, the major change that has taken place is that a
7 lot of different types of conduct that were not well
8 understood, that were regarded as in some sense pernicious
9 and in ways that were not defined through rigorous,
10 empirically based, microeconomic analysis, you know--there
11 was a reason for perhaps overreacting, because they were
12 misunderstood. But the evolution has been, we now
13 understand them, and we don't think that there's a need to
14 deter or that there's a need to scare a businessman that if
15 he establishes exclusive territories, he might be subjected
16 to treble damages class action and all these horrible
17 remedies. A lot of these practices, in fact, the majority
18 of them, are now as a matter of consensus regarded as
19 procompetitive or anticompetitive, depending on some rather
20 subtle distinctions. But there is concern about a chilling
21 effect, and it is possible to overdeter these forms of
22 conduct, and that is the main reason for the shift. The
23 ideas that produced that consensus shift came from, you

1 know, some superb quality of thought that was applied to
2 these problems, beginning with George Stigler and Milton
3 Friedman and Aaron Director, and it sort of spread outward
4 because these ideas are persuasive. I think they would have
5 taken hold regardless of what the remedial structure of
6 antitrust had been.
7 MR. JACOBSON: Isn't it a fair conclusion though,
8 that the cumulative effect of these doctrines, particularly
9 in an area where there's not a lot of government
10 enforcement, is going to be no enforcement if you eliminate
11 trebling and attorneys' fees?
12 MR. LIPSKY: Well, it's going to be probably very
13 little except in the case where you have, you know, a very
14 strong or very clear case, which, incidentally, I think is
15 probably not a terrible problem with regard to the more or
16 less conventional vertical restraints, as we understand
17 them. But you may notice that in my testimony, I have
18 deliberately shied away from the area of monopolization
19 precisely for the reason that it is possible to imagine
20 monopolization offenses that are not cartel offenses, that
21 are not joint ventures, that are not even strictly vertical.
22 But assume that an aggressive, an ambitious businessperson
23 in control of a firm that did have monopoly power would be

1 inclined to go right up to the line that his lawyer told him
2 he could go up to, I can still imagine cases of exclusionary
3 conduct where you might be sorry that you didn't have
4 trebling available.
5 MR. LANDE: May I add a response to your question,
6 please?
7 MR. JACOBSON: Of course.
8 MR. LANDE: Thank you. You're saying, does the
9 fact that we have treble damages, this horrible remedy,
10 shift--help shape substantive law? And I think it might--
11 MR. JACOBSON: No, I am not saying that. I am
12 saying others have said that. That's the one argument that
13 makes me think about this issue.
14 MR. LANDE: Yes, and Professor Calkins wrote an
15 article on the subject.
16 However, if you go back to my first myth, that we
17 really don't have treble damages, that is, the law is being
18 shaped based on a myth. Judges are saying, "Oh, my God,
19 there are treble damages, there are maybe even sixfold
20 damages; I'll have to slant everything in favor of
21 defendant."

1 If we could help publicize that treble damages are
2 really single damages, then maybe judges wouldn't shift the
3 law in this undesirable direction.
4 MR. JACOBSON: Thank you.
5 CHAIRPERSON GARZA: Commissioner Burchfield?
6 MR. BURCHFIELD: Thank you. I want to talk a
7 little bit about the issue of deterrence, which is
8 obviously, maybe from an institutional perspective, the most
9 important aspect of the remedies debate. And I assume we
10 would all agree that you really can't focus on deterrence
11 without taking into account the criminal penalties,
12 especially the jail time that would be imposed on corporate
13 executives and wrongdoers in the event that they entered
14 into a cartel agreement.
15 My first question, Professor Lande, is, are you
16 aware of any rigorous analytical analysis of how the
17 deterrent effect of that criminal--the possibility of
18 criminal sanctions, specifically jail time, weighs on
19 corporate decision-making in the area of cartel misconduct?
20 MR. LANDE: The only material that I'm aware of is
21 old. It's by Professor Gallo and some colleagues of his who
22 tried to quantify--he would say, "Let's assume a year in
23 jail is worth $2 million." This was a long time ago. You'd

1 have to adjust that up to $5 or $10 million just for
2 interest today. So there's old work on this subject that
3 showed that, if you took the existing penalties, they'd have
4 to be raised tenfold. But that research was done before the
5 amnesty program; it's quite old. I've urge Professor Gallo
6 to update it. I don't know if he ever will. I'm just not
7 aware of anything else.
8 MR. BURCHFIELD: But, of course, the significance
9 of the jail time is for a decision-maker. That's him
10 wearing the striped suit as opposed to his corporate
11 treasury paying the fine.
12 MR. LANDE: That's exactly right. Maybe Judge
13 Ginsburg is still right. Remember Judge Ginsburg said the
14 chance of getting caught is less than one in ten? Maybe
15 Judge Ginsburg is still right and that's why they keep
16 trying it, because maybe there is a less than one in ten
17 chance that they'll get caught.
18 MR. BURCHFIELD: Maybe over the course of time,
19 with the amnesty program, we will see those numbers change,
20 as well as perhaps to go back to Commissioner Warden's
21 question, be able to ascertain the basis for that 10-percent
22 figure.

1 Let me ask you some questions, Professor Lande,
2 about your "less than one in ten" analysis. Talking about
3 deterrence, the potential conspirator, the potential price
4 fixer, for example, is looking at a cost/benefit analysis.
5 If we were to write a formula for it, if we put aside jail
6 time, it would be how much I make versus the probability of
7 me getting caught and brought to account, times the
8 potential penalty.
9 MR. LANDE: Right.
10 MR. BURCHFIELD: An equation that has been
11 reiterated a number of times in the materials that we've
12 looked at. It seems to me that such factors as umbrella
13 effect, which is, as I understand it, other sellers taking
14 advantage of the raised price level, uncompensated
15 plaintiffs' attorneys' fees, uncompensated value of
16 plaintiffs' time spent pursuing the case, cost to the
17 judicial system, and, to some degree, tax effects, really
18 don't factor into that equation. Am I correct?
19 MR. LANDE: I don't believe so, sir.
20 MR. BURCHFIELD: How am I wrong?
21 MR. LANDE: The standard optimal deterrence model
22 in the area was first proposed by Professor William Landes
23 from the University of Chicago. It was explained most

1 succinctly by Professors Breit and Elzinga, and they showed
2 that optimal deterrence should focus on net harm to others
3 from the violation, not on the gain to yourself but on the
4 net harm to others. And people like me, who--how shall I
5 put it?--don't automatically embrace everything produced by
6 the Chicago School, looked at the Landes-Elzinga analysis
7 and couldn't find any fault with it. I think it's pretty
8 widely accepted. Maybe Professor Carlton can speak to this;
9 I don't know. But Landes and Elzinga show pretty carefully
10 that it should be net harm to others, not gross harm to
11 others, but net harm to others. That's includes allocative
12 inefficiency. That includes umbrella effects. That
13 includes cost to the judicial system. And the reasoning--I
14 could read you a quote from Breit and Elzinga that explains-
15 -
16 MR. BURCHFIELD: Well, we could accomplish
17 the same thing, though, by increasing the multiple for the
18 harm that I have directly--for the benefit that I have
19 directly attained, right?
20 MR. LANDE: In a rough way, sure.
21 Sure, that's right.
22 MR. BURCHFIELD: The factors that you're talking
23 about, such as umbrella effects, ultimate costs to the

1 plaintiffs, and tax ramifications to plaintiffs--those are
2 not things that someone looking at a potential price-fixing
3 conspiracy would know about in advance, are they?
4 MR. LANDE: No, that's right, but from an optimal
5 deterrence point of view, I would get back to the Landes-
6 Elzinga formulation. You focus on net harm to others.
7 One way of explaining it is, you want people to
8 internalize their externalities, and the specific reason
9 that this is appropriate in antitrust, I've got it in my
10 article. It's not the most intuitive, but these are sharp
11 cookies, and they got this one right.
12 MR. BURCHFIELD: Okay. Thank you.
13 CHAIRPERSON GARZA: Commissioner Kempf?
14 MR. KEMPF: Thank you. This is a very
15 distinguished panel, for which I have the utmost regard.
16 And while I don't have any questions on this particular
17 subject matter because I think I am where Commissioner
18 Litvack said he was; I wouldn't detreble, and I'm fairly
19 comfortable in that. To start with, I would like to extend
20 an invitation with respect to something else that we're
21 looking at that bears on a question that I think all of you
22 have addressed, which is antitrust exemptions and
23 immunities.

1 To me, the answer to the question that many of you
2 have been asked about and touched on of, "Gee, why do people
3 keep breaking the antitrust laws if there are all these
4 deterrents? You know, what's the explanatory variable?" To
5 me, it's that the American people don't think that fixing
6 prices is wrong, and the reason they don't think fixing
7 prices is wrong is that half of the people in America do it
8 every day under government-sponsored exemptions and
9 immunities. And we are considering everything from the most
10 obscure thing, like the Webb-Pomerene Act, which means that
11 maybe people in Bolivia will pay more for widgets than they
12 should, to stuff that impacts people in America every day of
13 the week, to hundreds of billions of dollars because of the
14 Wagner Act and the Norris-LaGuardia Act, which say anybody
15 who's a union worker can conspire to fix the prices of
16 labor, and Capper-Volstead and a bunch of laws that follow
17 on it that says everybody who grows anything in America can
18 fix the price of that.
19 So there's widespread, out-in-the-public price
20 fixing that the American people, I would say, in the main
21 don't view it like they view theft or murder, which they
22 feel are wrong. Price fixing, they say, "Well, it's right
23 or wrong depending upon whether you get the government to

1 sanction it or not." And I've always advised clients, "Gee,
2 it's okay to engage in price fixing; you just have to get
3 the government to give it the green light." And what you
4 need to do that is a lot of people to price fix on something
5 that everybody buys. If you can do that, you can get away
6 with it.
7 So I am wrestling with the thing that grows out of
8 that; what do we do on immunities and exemptions things?
9 Things like farmers price fixing and laborers price fixing
10 are so well ingrained in the fabric of America that it's
11 almost impossible to think that those price fixing things
12 would ever be reversed or even thought about being reversed.
13 And yet they sort of set the template for what people think
14 about price fixing.
15 And then I look at that, and I say, "Well, let's
16 go the other way." Maybe we need to take a look at *the per*
17 *se*--relook at Footnote 59 of *Socony*, and say, you know,
18 maybe everybody ought to get a chance to say, you know,
19 ruinous competition, which is what every--it's articulated
20 in different ways just because it's a trite phrase, maybe.
21 But that's what every argument boils down to, that our
22 industry is special, or our situation is special; there
23 would be ruinous competition if we didn't have an exemption

1 from the antitrust laws. And maybe what we ought to say is,
2 either we abolish all exemptions and immunity on the one
3 hand, or we say, you know, maybe we ought to get rid of *per*
4 *se/*rule of reason to give other people a chance to justify
5 the price fixing charges they face.
6 Now, that is not today's agenda, but this is, as I
7 say, a group for which I have the highest regard, and I
8 would welcome any written submissions you may have, or if we
9 have any time left at the end of today's discussion, any
10 thoughts you may have on that long invitation I just
11 extended. And with that, I'll pass.
12 CHAIRPERSON GARZA: Okay. Back to treble damages.
13 I just had a few quick questions. A couple of you, I think
14 Mr. Boies and Mr. Susman, have indicated in response to
15 questions that you thought it might make sense to have some
16 kind of detrebling or reduced multiplier for follow-on suits
17 to criminal prosecutions. But you've also talked about the
18 ecosystem, and so the one question I have is, if we did
19 something like that, wouldn't it undermine the recent
20 legislation that, as part of the leniency program, gave
21 detrebling to the firm that came in first and disclosed
22 information about the cartel activity to the government?

1 MR. BOIES: I think that's a very good point. I
2 think that there are a lot of implications that the
3 Commission would have to consider before recommending
4 detrebling in the particular class action area that I've
5 talked about. I think that you want to preserve the
6 incentives for the amnesty program. I think one of the
7 things that we all believe is that the amnesty program is
8 working and is working very well. And if you were to
9 eliminate the tripling of damages in the class action
10 context, you could very well affect those incentives.
11 MR. SUSMAN: I just want to clarify my position.
12 I would consider detrebling in a follow-on class action, but
13 not just a follow-on suit. I mean, they're individual
14 companies that file price-fixing cases, that opt out of a
15 class and want to proceed on their own. Those are very
16 difficult cases, and I think you need treble damages there
17 to give them the incentive to pursue those cases.
18 Class actions are basically--I don't view them so
19 much as compensating anyone as much as deterring wrongdoing;
20 I think it's mainly deterring wrongdoing, not compensating
21 anyone. I mean, those are lawyer cases. Lawyers dream them
22 up and lawyers file them, and they deter--well, I mean, if
23 you are going to have a class certified, there's a lot of

1 deterrence there on a corporation that does wrong. But
2 where a business actually has paid too much for its goods
3 over the last four years, I think it should have the right
4 to pursue an individual price-fixing case, even though it
5 would be a follow-on case, and recover treble damages.
6 So just to make my position clear on the record,
7 my willingness to consider detrebling is only in the follow-
8 on class action.
9 CHAIRPERSON GARZA: But then considering the
10 leniency program aspects, would you still consider it? Or
11 would you rather--would you trade that?
12 MR. SUSMAN: I'm not sure I understand--
13 CHAIRPERSON GARZA: My question is whether, if you
14 extended the detrebling to everybody, including those who
15 didn't take advantage of the leniency program, you would
16 undermine the deterrent effects of the new legislation. I'm
17 just asking you, would you consider the detrebling if the
18 cost was the benefits of the new leniency legislation?
19 MR. SUSMAN: I think so. I think I would.
20 CHAIRPERSON GARZA: Okay. Now, Tad, I had a
21 question for you. In your testimony, your prepared
22 statement, rather, you say that the strongest case for
23 detrebling exists with respect to horizontal joint ventures.

1 Why is the case weaker for other rule of reason conduct,
2 such as non-price vertical restraints or tying?
3 MR. LIPSKY: I think the lines have been drawn in
4 those other substantive areas with such clarity that the
5 case is not as strong. In other words, I wonder, when was
6 the last time there was even a significant settlement in a
7 case alleging a vertical non-price restraint? Maybe our
8 expert, more experienced litigators know.
9 The reason I am so concerned about the horizontal
10 joint venture context is that that is still the context of
11 conduct that is not regarded as reprehensible, that may be
12 legal or illegal, depending on market structure, competitive
13 effects, rationale, all the things that go into making the
14 judgment about competitive effect, but where the horizontal
15 joint venture still receives such a rough ride that the
16 spirit of experimentation, the liberation from the
17 deterrence mentality has not really occurred. But I think
18 it has occurred for all the reasons that Steve cites in
19 vertical restraints cases, to a large extent in licensing
20 cases. And then my reservation, as I just mentioned in
21 response to Mr. Jacobson, is that the monopolization area
22 goes the other way. I think that if we abandon any ability
23 to maintain the deterrent aspect, you would, at the extreme,

1 see conduct, if there is a firm that has the power to engage
2 in it, you might very well see conduct--look at the old Bell
3 System cases. There are real Section 2 cases in American
4 antitrust history. I really believe it. I believe the
5 *Standard Oil* case was such a case for the reasons that Ben
6 Klein and Elizabeth Granitz identified. Of course, that was
7 a cartel case the way they framed it, but, nevertheless, I
8 believe that there may be monopolization cases where you
9 would be sorry if you didn't have trebling available.
10 CHAIRPERSON GARZA: Thank you.
11 Commissioner Delrahim?
12 MR. DELRAHIM: Thanks, Chair.
13 Mr. Susman, let me just clarify: When you
14 mentioned that you might be open to detrebling follow-on
15 class actions, do you mean class actions that would follow
16 on other private class action cases brought, or follow on to
17 the government's cartel--
18 MR. SUSMAN: A government--you know, a government
19 case.
20 MR. DELRAHIM: Okay. And that's what--I didn't
21 know if that was an area that we may not have been clear
22 about, partly because I was kind of surprised to read in Mr.
23 Boies's and your openings for exactly that reason. I think

1 that part of the problem with the cartel cases--and we see
2 more and more of them. Frankly, two years ago, when I went
3 to the Justice Department, I was just shocked, especially at
4 the level of recidivism that is, you know, company after
5 company. And you say, "What's wrong with these people?
6 Don't they have antitrust counsel?"
7 And I think because of the amnesty program and the
8 legislation last year to detreble and provide greater
9 incentives, I would be strongly opposed to any detrebling of
10 the government follow-on cases because I think that's the
11 best source of detection of these cartels, which is really a
12 lot of the challenge, a lot of the difficulty, and the
13 amnesty program has been a great source for that.
14 Having said that, one idea I wanted to explore was
15 for detrebling private class actions. I think treble
16 damages are an important motivation for cases the government
17 doesn't bring. However, in other areas--for example, in
18 pharmaceutical, Hatch-Waxman, areas--there are some
19 additional incentives provided for the first mover to
20 challenge a patent. You know, if you're a generic, you get
21 a certain period of exclusivity. Would it make sense to
22 provide for detrebling of follow-on--or provide for greater
23 incentive, even, maybe greater than treble damages, for the

1 very first private class action, but then provide for single
2 damages for anybody who's followed on down the road? So,
3 for a case that the government did not have an involvement
4 with. Mr. Boies, Mr. Susman, and others, if you could
5 comment on that?
6 MR. BOIES: One of the things that would do is, it
7 would deter people from opting out of the class action
8 because by staying in the class action they could get treble
9 damages, but by opting out they could not. I think that
10 would, in effect, tie individual companies or individuals to
11 the result of that class action, which I don't think they
12 ought to be tied to if they don't want to be. I believe
13 class actions play an important role, but I think it's quite
14 important that individuals and companies have a practical
15 opportunity to opt out of that litigation and have their
16 interests represented by a lawyer whom they've actually
17 chosen as opposed to just the class action lawyer who
18 brought the case to start with.
19 So I think it would be difficult, to justify
20 burdening, in effect, the opt-out decision by saying you can
21 only get single damages if you opt out.
22 Also, as a practical matter, even though there
23 have been class actions brought, almost all of those are

1 settled. And so the opt-outs still have the burden of
2 actually establishing their case.
3 So I don't think that I would favor it in that
4 situation, and with respect to follow-on class actions,
5 those would be very rare. I mean, it would have to be
6 almost an indirect purchaser state class action because any
7 follow-on class actions in federal court are going to be
8 multidistrict consolidated.
9 MR. DELRAHIM: If there are any other comments on
10 this--I assume Mr. Boies probably spoke for everybody on
11 that.
12 The issue with the recidivists: should Congress
13 change the law to create a greater multiplier for somebody
14 who's come back to the well again, especially--I mean,
15 again, I'm talking about the cartel cases, the *per se*--
16 Justice Department--if you are, you know, let's say, a
17 German pharmaceutical company that every other year seems to
18 be going to the Justice Department--should you, the next
19 year and the following year, get six-times, ten-times
20 greater criminal penalties for that?
21 MR. BOIES: I think there's merit to that. We
22 certainly have that in the criminal law generally, where,
23 whether you call it the three strikes rule or whatever, the

1 more times you get convicted, the heavier the penalties
2 become. I think you have to balance that against some of
3 the other considerations in terms of the impact of treble
4 damages as to how high you go. But I think that, as a
5 matter of principle, it would be desirable to have some
6 enhanced deterrence for those individuals and companies that
7 seem to be repeat violators of the American antitrust laws.
8 MR. LANDE: I certainly agree with that. Now, the
9 cartel penalties assume a 10-percent overcharge. That
10 figure comes, again, from Judge Ginsburg. But that figure
11 is probably too low. It's probably more like 20 or 30
12 percent, or even more. So maybe some of these companies
13 have figured that out and figure, even if they get caught,
14 it's like paying a parking ticket; do it again. Maybe the
15 solution is to double or triple all the cartel penalties.
16 MR. DELRAHIM: Mr. Cavanagh?
17 MR. CAVANAGH: I think I would agree with
18 adjusting the criminal penalties. I don't know that we
19 would necessarily want to mess with the civil penalties.
20 But certainly the criminal area, I think it would be
21 appropriate to do that.
22 MR. LIPSKY: I generally agree, but, again, it
23 would be so helpful if we understood the failure mode. You

1 know, how does this happen? If we could have some kind of
2 glimpse at the answer to that question, it would help us
3 design the remediation. But certainly in principle, we do
4 this all the time, first offense, second, offense, third
5 offense. Why not in antitrust?
6 MR. DELRAHIM: Thank you, Madam Chair.
7 CHAIRPERSON GARZA: All right.
8 Commissioner Carlton?
9 MR. CARLTON: I'm trying to reconcile sort of two
10 observations that people seem to be making on the panel.
11 One is that we have underdeterrence as evidenced by covert
12 cartels that get discovered--and there have been several
13 recently--and the other observation you've been making is
14 that it's often very difficult for a plaintiff to win an
15 antitrust case.
16 Now, what I really want to figure out is, if you
17 have a rule, sort of one size fits all, which is what treble
18 damages seems to be, doesn't an analysis of whether there's
19 overdeterrence require you to answer why it is that
20 plaintiffs are losing, if, in fact, they are, so often in
21 the courts? In particular, to follow that up, let me ask
22 Professor Cavanagh, because I think you made the statement
23 that plaintiffs have a hard time winning; isn't that

1 suggesting that maybe there's a class of antitrust defenses
2 for which we should worry about overdeterrence and that
3 maybe we should be distinguishing between the covert cartel
4 behavior and other types of behavior in figuring out
5 damages?
6 MR. CAVANAGH: Well, there are a lot of balls in
7 play here. Part of it is, we have substantive law, and then
8 we have the process of trial where you get good trial
9 lawyers and good economists who are very persuasive with
10 juries, who take facts, who take the exact same record and
11 sculpt it in very, very different ways. And that's why I
12 think it's very difficult for plaintiffs to win cases,
13 because I think that defendants typically have deeper
14 pockets, and they have access to better quality lawyers and
15 economists, and the results, I think, show that.
16 The other thing is, we have less of this, but, you
17 know, in the 1960s, your garden-variety antitrust case was a
18 dealer termination suit. We don't see a lot of those
19 anymore because the law has changed, and those things are
20 just bad money. They're no longer part of the system. And
21 so those were cases where there's some success, and now just
22 because we've gotten rid of those kinds of cases and now

1 focus on the harder cases, that's why plaintiffs aren't
2 winning so much.
3 MR. CARLTON: Okay. Let me just follow up.
4 People have stressed the covert cartel cases that get
5 uncovered as evidence that we seem not to be deterring
6 cartels that are able to overcharge by a lot for a while, or
7 maybe a considerable time period. Doesn't that suggest,
8 just the way all of you have talked about these cartels,
9 doesn't that suggest a different damage approach is relevant
10 in dealing with them as distinct from other antitrust
11 defenses, so a covert cartel, hard-core price fixing, you
12 know, would have six-times damages, or some multiple? I'd
13 be curious.
14 MR. BOIES: Remember, in the price-fixing case,
15 under the federal antitrust laws, you get the amount of the
16 overcharge. Now, that is not necessarily the amount of the
17 damage to the direct purchaser, or maybe even the amount of
18 total damages. And it may definitely not be the total
19 amount of benefit to the price fixer. So there is a sense
20 in which, in the cartel cases, the price-fixing cases, you
21 do have a more simplified approach and one that may enhance
22 the award of damages.

1 I do think that we all think that the hard-core
2 price-fixing cartel behavior is more egregious than various
3 other forms of behavior. The problem is, do you make it six
4 times for cartels and three times for the other people? Do
5 you make it four times and two times? I think the sense
6 that you have from the panel is that we don't see--or I
7 don't see, at least, an adequate foundation for saying we
8 know how to change the system. The system is not working
9 perfectly or we wouldn't have so many antitrust violations.
10 But it is working substantially, and I think the difficulty
11 is deciding how you would change it. It's not that in
12 principle it doesn't make sense to have some distinction
13 between different categories, but I think none of us are
14 comfortable that there is an adequate database out there to
15 tell us comfortably how to make those changes.
16 MR. LANDE: One distinction that we already make,
17 of course, is if it's a criminal violation. Then you've got
18 the criminal penalties. So maybe the way to really get at
19 the hard core isn't to monkey with the treble damages but
20 just to dramatically increase criminal penalties.
21 MR. CARLTON: Thank you.
22 CHAIRPERSON GARZA: Commissioner Cannon?

1 MR. CANNON: Thank you. Let me just continue in
2 that theme, if I can, Professor, which is, I'm sitting here
3 thinking that everyone, I believe, is in violent agreement
4 that as much deterrence as possible is a good thing. So is
5 there anybody on the panel who would think that increasing
6 the criminal penalties would be bad? And if so, why? Mr.
7 Lipsky, how about yourself?
8 MR. LIPSKY: Well, we've just undergone a
9 tremendous upward ratchet in the criminal penalty. I think
10 there ought to be concern about the possibility that
11 remedies become so severe that they lead to some dynamic
12 that might lead to false positives so that somebody who
13 really has not committed a violation is forced to settle or-
14 -I don't--you know, this was explored. You know, you have
15 great experience with S. 995 back when you were in the--
16 MR. CANNON: I can't believe you remember the
17 number of that.
18 [Laughter.]
19 MR. CANNON: And I knew you were going to bring it
20 up.
21 MR. LIPSKY: I've still got the button in my top
22 desk drawer.
23 MR. CANNON: There were two buttons, actually.

1 MR. LIPSKY: I can't remember which side I was
2 for. But, in any event, subject to that qualification, and
3 subject to the notion that you might want to let this new,
4 you know, more than trebling of the criminal penalties that
5 just was enacted in S. 1086 last year, just let that work
6 through the system for a little while. But, in principle,
7 if that doesn't do the trick, we've just got to find
8 something that will if it exists. I really agree with that.
9 MR. CANNON: Professor Lande?
10 MR. LANDE: Sure. One problem is, many of these
11 cartels are international cartels, so even if you have a
12 stiff penalty in the United States, they do business
13 worldwide and pay very few damages worldwide. The U.S.
14 penalty is something they're willing to pay so they can
15 continue to charge, overcharge, the rest of the world.
16 When we did our study, we found that the average
17 domestic cartel overcharged by 17 to 19 percent, but
18 international cartels overcharged by 30 to 33 percent. So
19 maybe we should consider higher penalties, especially for
20 international cartels.
21 MR. CANNON: Higher criminal penalties?
22 MR. LANDE: Criminal penalties.

1 MR. CANNON: Mr. Boies, what's your opinion on
2 that?
3 MR. BOIES: I think I am where Mr. Lipsky was in
4 the sense that I think it's important to let the current
5 changes work their way through and see what effect they
6 have. When you're dealing with hard-core price fixing, it's
7 hard to think of overdeterrence. On the other hand, I do
8 think there are cases even in the price-fixing context where
9 it's not a question of a meeting in a back room where you've
10 got written proof that somebody engaged in price fixing.
11 You have a series of circumstantial evidence from which you
12 may very well conclude there was price fixing, but that
13 decision may be wrong. And I think you do have to be
14 careful of having the penalties so heavy that a defendant
15 cannot, as a practical matter, contest a good-faith defense
16 even in a situation like price fixing.
17 MR. CANNON: Well, in a criminal case, of course,
18 you know, if you're trying to convict someone, you do have a
19 different standard of proof. Mr. Susman, would that enter
20 into the analysis at all or not?
21 MR. SUSMAN: I don't know. I mean, in the price-
22 fixing area, price fixing is normally, I think, engaged in
23 by lower-level corporate executives or middle management,

1 not the people at the very top. I mean, there are
2 exceptions, but it's usually the lower-level people. And
3 so, you know, how much--and I think they're going to engage
4 in it no matter how much you threaten to throw--how long you
5 threaten to throw them in jail. The pressures are immense;
6 they're created by meeting their numbers. And so the real
7 way to deal with the price fixing I think is to do something
8 at the corporate level that puts real pressure on the
9 higher-level corporate executives and the board of directors
10 to engage in--to institute programs that keep the lower-
11 level people from engaging in these kind of things. And
12 sometimes it may be just not setting their budget--you know,
13 their profit numbers so high. And how do you do that other
14 than the threat of treble damages, enhanced damages? Because
15 you can't put the corporation in jail. What is the maximum--
16 I don't know what the maximum criminal penalty is for the
17 corporation now, but it's a drop in the bucket compared to
18 the gains to be made by price fixing.
19 So I think that a damage threat is the only thing
20 that is going to cause this whole problem to go to the board
21 of directors level.
22 MR. CANNON: So you think that it's the damage
23 threat versus enhanced--versus the idea of losing your

1 personal liberty and going to jail that really is the
2 greater deterrent?
3 MR. SUSMAN: Yes. It works at a different level.
4 I mean, obviously, it threatens people to put them in jail,
5 but I think these people are going to do it--I mean, we had
6 those penalties; they can be put in jail; some of them are
7 put in jail. They still do it, because they aren't too
8 smart, because the pressures on them are too great. So I
9 think the way to stop price fixing or to minimize it is to
10 do something at the corporate level that causes the board
11 and the CEO and the top officers to do something to rein in
12 the people who work for them.
13 MR. CANNON: Thank you.
14 CHAIRPERSON GARZA: One question. Andrew can
15 gavel me, but I have one question, and this is consistent
16 with Bob Lande's warning that we should myth-bust, but
17 everybody has been talking about this assumption--or
18 everybody's been saying that they feel that there has been
19 an increase in antitrust criminal behavior in recent years
20 notwithstanding a substantial increase in fines and focus on
21 cartel enforcement through the leniency program, through
22 increased international coordination and focus, *et cetera*.
23 I would like--if we're going to do anything based on an

1 assumption that we have this huge amount of undeterred
2 antitrust crime, I was wondering what the data are, and are
3 we confident that what's happening is that more companies
4 are committing more antitrust crime, as opposed to that
5 we've gotten better, for whatever reason, at detecting and
6 punishing it, whether it's because of the efforts of the
7 leniency program and the lag time kicking in, or maybe
8 because, as Bob suggested, a lot of this cartel activity
9 we're seeing is international and there's been the focus in
10 Europe and other places on cartel activities, you know, more
11 recent than not?
12 Just so I'm clear, do we know that this is
13 actually, the inexplicable lies and criminal activity,
14 happening at the same time that penalties are harsher, as
15 opposed to there being better detection and enforcement?
16 MR. BOIES: Distinguish between two things, I
17 think. One is whether criminal activity is increasing or
18 not. I don't think we really know the answer to that. But
19 the second is whether there's a lot of it, and we do know
20 the answer to that. What we know is that there's not
21 adequate deterrence, because we know there's a lot of it out
22 there.

1 Now, are we finding more of it now because of
2 amnesty programs, or because of better detection? I don't
3 think we know the answer to that. So I don't think--at
4 least I couldn't confidently say that there's more of that
5 activity than there used to be. What I think we can say is
6 that there's a lot of that activity now.
7 CHAIRPERSON GARZA: Everybody, I take it, agrees
8 that you don't need to see zero cartel activity to believe
9 that there's reasonably optimal deterrence. So what is a
10 lot? Do you have a sense of what the tripwire is?
11 MR. BOIES: I don't think I've got a single
12 quantification, but if you look at just the cases that the
13 Antitrust Division has done in the last few years; in fact,
14 if you just look at them with respect to German and Japanese
15 chemical companies, what you see is a repeated number of
16 those cases. And, of course, the price fixing is not just
17 limited to those companies. So there's a great deal of it
18 going on if you simply look at the fines that are being
19 levied by the Antitrust Division.
20 MR. SUSMAN: One thing I would want to focus on,
21 that I think you need to pay attention to, the Commission
22 needs to pay attention to, are the monopolization cases,
23 because while it's traditionally been said that

1 monopolization cases are rule of reason cases, there are a
2 couple things we do know. Every company knows when its
3 market share gets into the red zone, above 65 percent.
4 There's not much question about that, when they have a
5 market share that makes them a potential monopolist. And I
6 think they also know pretty easily when they engage in
7 conduct where there are less restrictive alternatives to
8 accomplishing some means. I think they know when that takes
9 place.
10 And so I think, for policy reasons, you want them
11 to avoid that kind of conduct. Then you have to do
12 something like treble--pay attention to--that's where treble
13 damages I think are necessary, to cause them to seriously
14 consider other ways of accomplishing the same thing when
15 their market share knowingly goes over the 65-percent level.
16 MR. LIPSKY: Well, I need to respond to a couple
17 of things there. It's not so clear that you want the spirit
18 of deterrence for a lot of things that large firms do, and I
19 don't think it's as clear as Steve has described. You know,
20 if the market is carbonated soft drinks, maybe your share is
21 big. But if the market is all commercial beverages, it's
22 not nearly as big. And just a tremendous amount of money

1 and effort and econometrics happens to try to decide which
2 is which.
3 And so it can be very difficult, and that's why I
4 think the deterrent spirit in many respects should be
5 removed from--even in a broad swath of the area of
6 monopolization law. And Bill Baxter used to have this
7 favorite image that, you know, he didn't want the parimutuel
8 theory of competition. If what you want is a couple of
9 horses racing very close to each other, then you're going to
10 have to put lead weights in the saddlebags of the fast
11 runners. But, on the other hand, if you've got a
12 Secretariat, you want him to win by 20 lengths. That's
13 competition on the merits. But there are areas where you do
14 need caution in monopolization.
15 I just also wanted to mention that it is worth
16 thinking through--and this goes back to a couple of the
17 different questions. It is worth thinking through whether
18 one of the failure modes that produces continuing cartel
19 activity is the notion, you know, that the United States is
20 so far--even with the improvements in cartel prosecution
21 that have occurred in other jurisdictions--the EU has gotten
22 much more serious; even in the Far East, the Koreans just
23 had a huge cartel fine that they imposed. Nevertheless, the

1 United States has by far the most consistent and credible
2 record of cartel enforcement. In a global economy, if it's
3 possible that a cartel can pick up enough profit outside the
4 United States to make even the horrendous penalties
5 available within the United States justifiable, well, that's
6 a failure mode that we can address. We can get other
7 countries to be more aggressive about seeking evidence and
8 using it or giving it to jurisdictions that will go forward
9 aggressively. And that's sort of a rational explanation--if
10 it were true, that would be a rational explanation we could
11 cope with. But it's the kind of thing--I certainly don't
12 know enough to say that that's the case or not, but it's
13 something worth looking into.
14 CHAIRPERSON GARZA: I'm going to have to close it,
15 but I want to thank again on behalf of the Commissioners,
16 everyone who has appeared on the panel. Thank you for
17 coming and testifying. Thank you for your very thoughtful
18 comments.
19 [Recess.]
20 PANEL II
21 MR. HEIMERT: We'll now begin today's third panel,
22 on contribution, claim reduction, and joint and several
23 liability.

1 CHAIRPERSON GARZA: First, let me welcome our
2 distinguished panelists on behalf of the Commissioners, and
3 thank you for being here today to participate in this
4 hearing.
5 The Commission, as you know, is in the process of
6 gathering information on issues that it selected to study.
7 These hearings are an integral part of that process. They
8 enable the Commission to hear from a broad range of experts
9 and to probe and understand the competing arguments, and
10 because the hearings are open to the public, they inform the
11 public as well.
12 The topics we have selected for study present
13 complex and important issues upon which reasonable people
14 may disagree and have disagreed and as to which there may be
15 no easy answers. Your presence here today and your
16 thoughtful writings make this clear.
17 It is important to bear in mind that the
18 Commission having selected an issue for study, does not mean
19 that the Commission has already decided on a particular
20 recommendation or findings; we have not. Our deliberations
21 will be conducted in the open, just as our selection of
22 issues for study was made in the open, at public meetings
23 following these next several months of hearings and study.

1 Again, I thank the panelists for being a part of that
2 process.
3 Some of you may have been sitting in the audience
4 and have heard this, but let me very quickly go through the
5 format that we will follow.
6 First, we would like to give each of our panelists
7 an opportunity to summarize his testimony or to make a
8 statement. We ask you to try to keep those statements to
9 about five minutes in length so as to maximize the time that
10 we have for discussion with the Commissioners.
11 After each of the panelists has made his
12 statement, there will be questions from the Commissioners.
13 Commissioner Burchfield will lead the questions for the
14 Commission. He will have about 20 minutes or so to do that.
15 Then we will go and each of the other Commissioners will
16 have an opportunity to ask questions for about five minutes
17 apiece.
18 The hearing is being recorded.
19 Transcripts will be made available to the public.
20 Hard copies of the witness statements are available outside.
21 With that, let me first ask Judge Easterbrook if
22 he would like to begin with a statement.

1 JUDGE EASTERBROOK: Thank you very much. I suppose
2 I should apologize for not having had a prepared statement,
3 but every time a judge opens his mouth, there's some danger
4 of saying something inappropriate. So I thought I would
5 give you an article I wrote with Professor Landes and Judge
6 Posner 25 years ago. That article concludes that joint and
7 several liability should be left alone and no contribution
8 regime should be established.
9 It's 25 years old, and perhaps it just shows that
10 I'm incapable of learning. But I still think that it's
11 correct.
12 The intuition about how joint and several
13 liability without contribution works, laid out in that
14 paper, is that as some defendants settle and have their
15 payments but not their market shares carved out of any final
16 award, the remaining defendants have a greater exposure per
17 dollar of sales and have to pay more. That happens because
18 the early settlements are compromises. Every settling
19 defendant pays less than the exposure at trial, but the non-
20 settling defendants stare the full exposure in the face.
21 Everybody knows that, of course, and that
22 drives the competition to settle early. But not everybody
23 can settle early or cheaply because plaintiffs, who also

1 know this, demand more in settlement as the price of giving
2 some defendants their freedom from the risk that comes from
3 being last.
4 The upshot established formally in the article--I
5 have not asked for a blackboard to put any of the equations
6 up--is that total collections in antitrust suits increase
7 and, thus, there's better deterrence, at the same time as
8 settlements increase, and thus the total costs of litigation
9 fall.
10 The fact that some early settlers pay less doesn't
11 reduce deterrence. The critical question for cartel
12 stability is whether at least one defendant expects to pay
13 more than his anticipated share of the profits. A system in
14 which some defendants get off for less means that other
15 defendants are obliged to pay more. That means that if
16 damages are set correctly, at least one member of the cartel
17 will find it a negative-value proposition and drop out, and
18 at that point everything unravels.
19 The point that was being made in the article, and
20 which I'm reiterating, is that the critical step is making
21 sure that damages as a whole are set high enough so that the
22 cartel is unprofitable for at least one member, and then it
23 unravels.

1 Now, a lot of people call these effects unfair,
2 but there isn't really any reallocation among potential
3 defendants *ex ante*. There is, of course, a lottery. You
4 can't be sure who will be settling early and who will be
5 called on to pay, but we don't call a lottery unfair just
6 because people lose. The question for fairness is whether
7 there are equal opportunities *ex ante*, and here there are.
8 If one were worried about *ex post* fairness, how
9 much are you willing to pay to achieve it? Claim reduction
10 and contribution schemes don't work unless you can get good
11 estimates of the defendants' market shares and other good
12 estimators of their contribution to the cartel. That isn't
13 cheap.
14 We shouldn't just look at this from the
15 perspective of antitrust. There are a few legal systems
16 that try to do that kind of thing. CERCLA is one of them.
17 The environment clean-up scheme actually has a contribution
18 rule built into it, and I can tell you from having had too
19 many of those cases pass through my court, it ain't pretty;
20 it's expensive; it's highly imprecise. The contribution
21 questions under CERCLA have become more expensive to
22 litigate than the basic questions of liability.

1 If somebody says to me these days, "There's a
2 CERCLA case coming up," my immediate reaction will be, "Ah,
3 yes, the defendants are fighting about their shares." Very
4 little fight about the underlying liability. I see very
5 little reason to move that into antitrust.
6 The Supreme Court, even though it has allowed
7 contribution in admiralty cases, has been very loath to
8 extend it elsewhere, and I think with good reason.
9 If there are bad antitrust rules that lead to bad
10 suits and inappropriate liability, the right thing to do is
11 make the substantive rules good rather than create
12 cumbersome rules for reallocating liability on the back end.
13 If the net effect of joint and several liability without
14 contribution is excess damages, then adjust the multiplier.
15 I have written on this as well--it was actually
16 referred to in the last panel--an article in the *Journal of*
17 *Law and Economics* in 1985 about the detrebling problem. But
18 you have spent a panel on that, so I'm not going to pursue
19 it.
20 But that's my bottom line. There's very little
21 that can be got out of trying to rearrange liability *ex*
22 *post*. You want to get the rules right for the right amount
23 of liability *ex ante* and then stick with it.

1 CHAIRPERSON GARZA: Thank you.

2 Mr. Constantine?

3 MR. CONSTANTINE: Thank you. Before I start, I

4 just want to say I'm really happy to be here today with a

5 lot of friends and colleagues and mentors and clients and

6 partners.

7 [Laughter.]

8 MR. CONSTANTINE: And because I hold all of you in

9 such high esteem, I hope the one sentence that you read in

10 my written testimony was the part where I said that I

11 thought you were all open-minded people and that you would

12 all evaluate all the evidence, and I truly believe that.

13 I'm honored to provide testimony today. For the

14 last 25 years, I have practiced, taught, lectured, and

15 written about antitrust.

16 The issues addressed to this panel were the

17 subject of several legislative proposals in the 1980s and,

18 most prominently, in 1986. Back then, I testified

19 frequently before the Senate and the House on these

20 proposals.

21 The Reagan administration's 1986 proposals, styled

22 the improvement and modernization acts, were designed to

23 substantially eliminate federal antitrust law. They

1 included *de facto* repeal of Section 7 of the Clayton Act,
2 antitrust immunity for firms in industries harmed by foreign
3 competition, the substantial elimination of treble damages,
4 and two proposals to eliminate joint and several liability,
5 S. 1300 and S. 2162.
6 Malcolm Baldrige, the Reagan administration's
7 Secretary of Commerce, called for repeal of Section 7 and
8 observed that the antitrust laws had outlived their
9 usefulness. One Reagan Antitrust Chief, Doug Ginsburg,
10 drafted a bill that effectively would have repealed Section
11 7. Bill Baxter, the first Reagan antitrust chief, derisively
12 predicted that, by 1996, the federal government would be
13 substantially out of the business of enforcing antitrust
14 law, having ceded that role back to the states.
15 The Reagan administration's legislative proposals
16 had the backing of the Business Roundtable, whose Antitrust
17 Committee was headed by Tom Leary, and the ABA Antitrust Law
18 Section headed by Jim Halverson, who delivered the Section's
19 support for these proposals in response to a personal
20 request made by Attorney General Ed Meese. At some of those
21 congressional hearings, I was the only government witness
22 opposing these proposals. And when they were ultimately
23 defeated, I and my colleagues and the states became the

1 primary enforcers of the antitrust laws until the rule of
2 law was restored in the Bush administration of the early
3 1990s.
4 I believe the motivation for establishing this
5 Commission was not modernization but virtual destruction of
6 the antitrust laws. The proposals being considered by the
7 Commission are, by and large, the same as those rejected two
8 decades ago. I draw a clear distinction between the
9 motivation for establishing the Commission and the
10 motivation of the Commissioners themselves. I know you are
11 distinguished professionals who will evaluate all the
12 testimony and evidence.
13 Now, reasonable people differ on whether the
14 antitrust laws help or hurt, but there is no doubt that if
15 the 1986 package had been enacted, Bill Baxter's prophecy
16 and goal of federal antitrust enforcement disappearing would
17 have come to pass. I think there is little doubt today that
18 if the same proposals, merely dusted off, were enacted now,
19 they would reduce the scope and power of antitrust law even
20 more radically because there are additional modernizations
21 under consideration now, such as proposals to substantially
22 preempt state antitrust enforcement.

1 With regard to joint and several liability,
2 nothing useful has been contributed in the last 20 years to
3 enlighten the debate. That's pretty much what Judge
4 Easterbrook just said. My co-panelist Don Hibner relies
5 upon his testimony from the 1970s and 1980s. I rely upon
6 mine from the same period. Judge Easterbrook gave us his
7 1980 article. Harry Reasoner finds that there's no
8 empirical support for any change or positions pro or con and
9 concludes, as we all apparently do, that nothing substantial
10 has enlightened the debate since it raged 20 years ago.
11 For me, the issue was and is simple: joint and
12 several liability without contribution or claim reduction is
13 part, and is an important part of, the positive force of the
14 antitrust laws. My belief in this regard has not changed.
15 But the experience that informs that belief has broadened
16 significantly.
17 In '86, I was just a state official who could only
18 speculate about the deterrent effect of antitrust, but for
19 the last 14 years, while engaged in private law practice, I
20 have examined these issues first-hand. I have defended
21 large firms in antitrust matters as frequently as I have
22 been plaintiffs' counsel, and I have spent almost as much
23 time counseling.

1 The antitrust laws--and this is something you
2 should think about--the antitrust laws have very little *in*
3 *terrorem* effect today, either individually or collectively.
4 The businesses I counsel and defend are respectful and
5 mindful of all the myriad antitrust sanctions from various
6 jurisdictions, but I have yet to see any substantial
7 business initiative die on the vine because of antitrust
8 concerns, let alone the threat of joint and several
9 liability for treble damages.
10 My observations from the plaintiff's side further
11 inform my opinions on these issues. In case after case,
12 litigation discovery from defendants reveals a keen
13 awareness of potential antitrust exposure. However, it also
14 shows very little moderation of conduct in response to the
15 potential exposure.
16 The quick settlement by the hypothetical innocent
17 company under the threat of onerous antitrust penalties is
18 unknown to me. The one time in a long career that I used
19 joint and several liability was after a trial where we
20 represented New York in a highway bid-rigging case. After
21 securing a multimillion-dollar verdict from a federal jury
22 against a bunch of bid-riggers, who paved roads on Long
23 Island, the defendants appealed to the Second Circuit, and I

1 focused my attention on the bid-rigger with the deepest
2 pocket. I told their counsel that the cost of their appeal
3 was this: drop your appeal, and you'll pay 50 percent of
4 the treble damages for the entire nine-defendant conspiracy;
5 but if you lose your appeal, your client will pay 80
6 percent. I also told them that the cost of a *cert.* petition
7 was the final 20 percent.
8 I knew that collecting from the small bid-riggers
9 would be difficult. After the appellants lost in the Second
10 Circuit, I took the threatened 80 percent and got the rest
11 from the other eight defendants.
12 That I had the power to do that was a good thing.
13 The legendary Milton Gould of Shea Gould complained to me
14 and also to the Attorney General, Bob Abrams, about how this
15 was all so unfair to his client. Bob and I told him that we
16 had both testified against the administration's antitrust
17 remedy bills and specifically against eliminating joint and
18 several liability. We also told Gould that our experience
19 with his client had reinforced our convictions about our
20 testimony.
21 Then and now, and with the additional benefit of
22 experience defending those charged with price-fixing, I
23 believed and believe that the arguments against joint and

1 several liability and for contribution and claim reduction
2 amount to legislating a code of honor among thieves. I
3 oppose doing that, and I oppose it based upon my
4 significant, relevant experience. Thank you.
5 CHAIRMAN GARZA: Thank you.
6 Mr. Hibner--I'm sorry. Mr. Hausfeld.
7 MR. HAUSFELD: I too would like to thank the
8 Commissioners for inviting us to address the Commission this
9 afternoon on a matter of most essential importance generally
10 to the private civil enforcement of the antitrust laws.
11 The same considerations that the Supreme Court focused on in
12 *Illinois Brick* with respect to tracing damages or injury
13 through chains of distribution I believe are relevant to a
14 consideration of abdicating the rule against contribution.
15 Judge Easterbrook focused on environmental law.
16 In environmental law, what the defendants seek to do is look
17 to what is generally referred to as the toxic stew, created
18 by their various dumpings so that you cannot extricate and
19 isolate and identify what toxin was caused by—or can be
20 traced back to which particular defendant, and what the mix
21 of the toxins was within each stew.
22 The same policy consideration that prompted
23 *Illinois Brick* points to what practical evaluations can be

1 made in a market analysis among cartel members to isolate
2 and identify the impact of one member as opposed to another.
3 How does that get tried? As a practical matter,
4 at the same time, the plaintiff's case goes on, when really,
5 the issue of relative culpability among defendants has
6 nothing to do with whether or not there was a cartel that
7 socially impacted a class of victims.
8 What difference does it make to the remedial
9 purpose of the antitrust laws that there is fairness among
10 felons who commit violations of public policy? Is it a
11 valid public consideration, to try to take into account a
12 fair apportionment in whatever factors there are to re-
13 create the market to determine which felon contributed which
14 factor to the impact of a cartel?
15 So I would like to carry over those policy
16 considerations into the abrogation of a contribution rule,
17 and I believe that, for the same reasons that *Illinois Brick*
18 was established, for the purpose of creating a bright line,
19 the same reasons exist to create a bright line of
20 culpability among tortfeasors.
21 I have a less harsh approach, possibly, with
22 respect to modernization, but it does have a more global
23 aspect.

1 Modernization is an interesting word, but what is
2 it that we are seeking to modernize and by whose standard?
3 Is it the U.S. standard?
4 Antitrust law or competition law is no longer the
5 sole, exclusive province of U.S. civil or criminal
6 enforcement. There are very active enforcers outside the
7 United States. How are they approaching competition law?
8 Are they seeking to modernize competition law the same way
9 we're looking at modernizing competition law?
10 Recently, in England, there was a report--it's
11 called the Ashurst Report--that was just done to advise the
12 British judiciary, as well as the European Commission, as to
13 what considerations might be taken into account in the
14 judicial systems outside the United States to enhance
15 private civil enforcement. And the very things that we're
16 considering in our modernization of doing away with they're
17 thinking of utilizing to impose.
18 Yes, there is contribution outside the United
19 States in competition law, in theory. But there's been very
20 little enforcement privately of competition law outside the
21 United States. And Mario Monti, the former Commissioner at
22 the European Commission, has advocated doing away with
23 contribution, doing--imposing an *Illinois Brick* approach--

1 establishing some ability to have bright lines so that you
2 can get really effective civil enforcement, and the balance
3 between incentive and disincentive.
4 The incentive is to try to end a cartel and or to
5 make restitution. The disincentive is to make it
6 economically unsustainable for the cartel to continue in the
7 future. Thank you.
8 CHAIRMAN GARZA: Thank you. Mr. Hibner?
9 MR. HIBNER: One thing I would like to say at the
10 start is that it's a pleasure to be here, and I was here
11 once before on a similar subject in 1979, with my good
12 friend, Steve Cannon, and I just wonder what we've learned
13 since 1979. Of course, we learned *about Texas Industries v.*
14 *Radcliffe*, which reshaped the debate that we're having, but
15 certainly did not end the debate.
16 But I'd like to think back to what we're really
17 doing here and that is to do the public a service and to see
18 if we can make the administration of justice better, fairer,
19 more predictable, and do a better job for U.S. consumers.
20 You know, I think that we can be proud of the fact that
21 we're going to produce as good a record as we can and move
22 this matter forward. I'm also mindful of the fact that
23 this was not the first such Commission that has been

1 investigating ways to improve antitrust enforcement policy.
2 And I remember, when I was a very young lawyer, I was given
3 a copy of the 1955 Attorney General's Commission Report,
4 read it, and I thought it was pretty good. And I read an
5 article the other day, that was pointed out to me by Bert
6 Foer and written by Tom Kauper, and Tom asked the question:
7 "What would the 1955 Commission members have thought about
8 the development of antitrust law if they were here today?"
9 And I think his conclusion--and one that I share--is that
10 they'd be pretty darned pleased.
11 I think antitrust is in much better shape than it
12 certainly was in 1962, when I started. And I think since
13 1977, with *Continental TV* and *Brunswick* and even *Illinois*
14 *Brick*, we have come a long, long way, and I think that's a
15 very good thing.
16 But we have to see if we can do a little better.
17 Simply to have a bright line, I don't think tells us whether
18 or not that is the right standard that we really need to
19 have. You could say that would be the standard for the
20 Spanish Inquisition. They had some very bright lines, and
21 some very draconian measures, but it really wasn't through
22 the level of deterrence or the appropriate deterrence that

1 that regime could engender change. And I think the same is
2 also true here, to some degree.
3 I'm also mindful of the fact that we have a heavy
4 burden in asking Congress to take action with relation to
5 any antitrust regime.
6 I remember when I was a young lawyer, and I was in
7 Washington one time with my mentor, Gordon Hampton, and
8 Marcus Hollabaugh. Marcus and Gordon were at that time on
9 the Supplementary Sanctions Committee of the Antitrust
10 Section. And they had studied supplementary antitrust
11 penalties, and they had a resolution from the Council to see
12 if we could take remedial action and get some of those
13 repealed. One was the Panama Canal Act of 1912. Another
14 was the Alaska Coal Lands Act of 1908. And another was the
15 Arkansas Pipeline Act of 1910.
16 So, we went to see Don Turner at Justice, and we
17 asked him if he would be interested in seeing if we could
18 remove the supplementary sanctions that had really never
19 done any good for the country; they had never been invoked.
20 And he looked at us, and kind of laughed, and he
21 said, "You expect me to go tell Senator Metzenbaum that I
22 want repeal the antitrust laws? 'Get real.'"

1 So that is one of our problems. But we have to be
2 mindful that it's a worthy endeavor to study these matters
3 and to see what we can do that is meaningfully remedial.
4 And with that in mind, I asked myself the question, as a boy
5 from Boone, Iowa, who is deterring whom, and for what? And
6 I really don't know after reading the literature, whether or
7 not we're talking about decision-making at the top, the
8 middle level, or whether we need draconian measures for the
9 corporate enterprise or what, but I suggest that if you
10 really want to get real about deterrence--and certainly we
11 do, because unless we solve the deterrence question, we
12 really don't seem to have anywhere else to go--we're going
13 to have to find out what is working and what is not, and if
14 it's not working, why it's not working.
15 And I suggest that, in my 40 years of practice or
16 so, I have not met many people who have been deterred by
17 joint and several liability, contribution, or whatever.
18 They have been deterred more or less to the extent that they
19 have symmetrical information flows--from jail time, losing
20 their jobs, not getting promoted, not getting that bonus,
21 but, as it was pointed out not too long ago, we are seeing a
22 lot of violations by middle management, and not senior
23 management, and I share this experience that the most

1 dreaded person within any manufacturing company that
2 distributes its products is your sales manager that calls on
3 the trade.
4 That is the person who is hard to control, but I
5 think that we really need to find out the answer as best we
6 can as to who is being deterred, and from what are they
7 being deterred?
8 And to give a positive direction, I offer for your
9 consideration, or at least some way to study and to get in
10 better touch with these issues, is to take a look at what
11 Bill Baxter proposed back in 1982, in H.R. 5794.
12 Being a Stanford law graduate, I've known Bill--or
13 knew him for a long time--and I sort of had a rule of thumb,
14 and if I could follow along behind Bill Baxter and not stray
15 too far from one side or the other, I'd probably stay out of
16 most difficulty, and I commend his--I suggest to you, very
17 thoughtful effort for your consideration in framing this
18 debate. And, I thank you.
19 CHAIRMAN GARZA: Thank you.
20 Mr. Reasoner?
21 MR. REASONER: Thank you, and I very much
22 appreciate the opportunity to be here. I do believe that

1 there are instances where the application of unalloyed joint
2 and several liability can create unfairness.
3 Let me say that I find that Judge Easterbrook's
4 analysis to be extremely persuasive on the way it would work
5 and the ultimate place that I would come out. But I think
6 that my friend, Lloyd Constantine, gave you a very vivid
7 example of the way joint and several liability can be used
8 unfairly in an individual case to attempt to deprive someone
9 of the right to appeal or to coerce them out of it.
10 To me, the critical question is, what could we do
11 to change the antitrust laws in these areas without
12 encountering a risk of lessening a deterrence? It is my
13 belief that the governmental resources for prosecution of
14 the antitrust laws are more severely limited today than they
15 ever have been before with the enormous growth in the
16 internationalization of our economy, so I think that the
17 stimulation--or at least not creating barriers to legitimate
18 private actions, ought to be a critical goal of this
19 Commission.
20 I am concerned that any injection of issues of
21 contribution and claims reduction would complicate the task-
22 -make the transactional cost of antitrust litigation higher
23 and inject further uncertainty into it. Judge Easterbrook

1 gave you an excellent example in CERCLA. Another example,
2 you can see how not being--not having the whipsaw effect, I
3 think as you referred to it in the literature, of defendants
4 having an incentive to settle rapidly, unless they were so
5 confident of their purity in their case, in which case they
6 should enter into a sharing agreement where they would avoid
7 the risk of joint and several liability.
8 I think that it's instructive to look what has
9 happened in the area of the Private Securities Litigation
10 Reform Act, where they put into effect for non-intentional
11 violations proportionate liability provisions, with the
12 reduction being either of the greater of the proportionate
13 responsibility of the settling defendant or the amount of
14 the settlement.
15 My belief is that that has greatly slowed the
16 settlement process in securities cases because plaintiffs
17 are afraid to settle with smaller defendants, or defendants,
18 fearing that disproportionate liability will be attributed
19 to the defendants they've settled with, so that--their
20 leverage against larger defendants might be reduced.
21 A vivid example of that occurred in the Enron
22 litigation, where Arthur Andersen immediately agreed to--in
23 the class action settlement--$750 million for relief. The

1 plaintiff's class action attorneys turned it down for fear
2 that they would encounter a situation where the financial
3 institutions, which were obviously the deep targets, would
4 take the position that the responsibility was 99 percent, 95
5 percent--you pick a number--the responsibility of Arthur
6 Andersen.
7 I don't think that that's healthy to inject those
8 additional costs into antitrust litigation. I think
9 undertaking a plaintiff's antitrust case is a formidable
10 undertaking now. The litigation is growing more costly,
11 with the cost of electronic discovery. There are delays in
12 getting to trial in almost every federal court. And if you
13 were to inject into it the complex issues of trying to
14 decide proportionate responsibility, which Professor Bill
15 Baxter used, I think that's an empty phrase. I don't know
16 how long it would take the courts to give content to it, but
17 it would simply be another risk, another uncertainty that
18 you would be engaged in. If you had to try those issues as
19 well as the issues of trying to impose liability, I think it
20 would complicate a trial where it's already extremely
21 difficult and complex to try.
22 I think that it would potentially raise a real
23 barrier to entry. I would further add that I'm much

1 influenced by the lack of empirical evidence of abuse. With
2 today's far more orderly and transparent antitrust rules,
3 unintentional violation is less likely now than it was 25
4 years ago. I suspect there is much less of a need for
5 reform to prevent injustice. Thank you.
6 CHAIRMAN GARZA: Thank you. Commissioner,
7 Burchfield will lead the questioning.
8 MR. BURCHFIELD: Thank you, Madam Chair. And I
9 should begin by saying how happy I am personally that all of
10 you would come and testify before us today. This is truly a
11 remarkable panel, and you have all done considerable work in
12 preparing to testify here today. And I appreciate it. I'm
13 sure the rest of the Commissioners do as well. Let me
14 begin with Mr. Reasoner. In your statement, Mr. Reasoner,
15 you mentioned that we could benefit from watching PSLRA and
16 other instances in which proportionate liability or
17 contribution have been allowed. Obviously, since 1799, when
18 the *Merryweather* case decided and first imposed joint and
19 several liability, about 40 states, either legislatively or
20 judicially, as I understand it, have abandoned joint and
21 several liability, and some or all tort claims in the
22 federal securities laws. It has been--the contribution has

1 been allowed since 1933. And in a variety of other contexts
2 it's allowed.
3 What are you looking to find from further study of
4 these new laws?
5 MR. REASONER: Well, I think one thing, you'll
6 find—although, let me say--I can't find--I could not find a
7 case where anybody had ever actually tried one of the
8 things, and, you know, gone through the discovery and had
9 actually gone to a trial and had an allocation of
10 responsibility in this fashion in the securities area so
11 that you could have a template there.
12 One thing I think--I believe is reasonably clear
13 is that it has slowed down settlements and protracted
14 litigation in the securities area. And, you know, that's
15 not a trivial cost, because normally, what plaintiffs would
16 do would be to settle with the lesser targets. I think
17 plaintiffs' lawyers are sophisticated. They settle with the
18 people they have the weakest evidence against, or they
19 settle with people who have relatively limited capability to
20 pay, and they get out of the ongoing costs of the
21 litigation. In the securities suits that go on now, there
22 are--my impression is, no settlements with the small players

1 until the big players settle so that you have a room full of
2 a hundred lawyers sitting through these depositions.
3 But further, I think, you know, sitting on the
4 other side, thinking about whether you're going to file one
5 of the suits, if, you know, it's going to be protracted, you
6 know the expense is going to be greater, you know there are
7 not going to be any settlements at the courthouse; it's
8 another risk factor and another burden.
9 My impression now is while the scope of antitrust
10 suits had been narrowed, you have to be pretty well financed
11 to be willing to file a plaintiff's antitrust suit now.
12 MR. BURCHFIELD: The same in the securities area I
13 think. The same in the securities area?
14 MR. REASONER: Yes, I would think that would be
15 so.
16 MR. BURCHFIELD: Judge Easterbrook, do you, from
17 your experience--and you've obviously mentioned CERCLA--from
18 your experience, have you seen instances of either
19 contribution or claim reduction issues litigated in some of
20 these other areas like state diversity tort suits, product
21 liability, for example, or federal securities laws?
22 JUDGE EASTERBROOK: Very few under the diversity
23 jurisdiction get to us with any contribution issues. I

1 don't know why not. I have not seen any under the
2 securities law. I've never understood why the Securities
3 Litigation Reform Act was thought to be interesting in that
4 respect. I'm interested in Mr. Reasoner's statement that it
5 has some effect, because the new contribution right was
6 designed for unintentional violations, and, of course, all
7 the private rights of action under the securities laws are
8 limited to intentional violations. So there was this
9 contribution right put in, which would be important I would
10 think in suits by the Securities and Exchange Commission or
11 perhaps suits under Section 11 of the Securities Act of '33,
12 and there's very little private litigation under that
13 provision. Now, I'm not sure why that would have much
14 effect. We see CERCLA cases in well, let's just say in
15 large numbers, and they all take a lot of time. The Supreme
16 Court has shown some restiveness in the *Keytronic* case a
17 couple of years back, and *Aviall Services* just last term
18 with those actions precisely because they been so time-
19 consuming and expensive. And they've really come to
20 dominate the liability actions.
21 The thing that has made CERCLA as expensive as it
22 is is that it's a real contribution system. And it seems to
23 me one wants to distinguish contribution systems from claim

1 reduction systems. A lot of people refer to claim reduction
2 as a form of contribution, but it isn't. What characterizes
3 contribution is a system in which people who have settled
4 out can, nonetheless, be called on to pay money to the non-
5 settlers or to pay money--who pay a larger proportion and
6 share later. What makes it extremely expensive is not only
7 that you can't buy peace, because you can never get out of
8 the claim from the non-settling defendant, but the fact that
9 since money is going to change hands between the defendants,
10 it's a great opportunity for rent seeking. You see an
11 opportunity to collect funds. You invest in attorneys' fees
12 at the margin, up to where the marginal dollar investment in
13 attorneys' fees raises your return from your settling
14 defendant. That's what makes contribution actions
15 particularly expensive under CERCLA.
16 JUDGE EASTERBROOK: Claim reduction systems, on
17 the other hand, have no rent seeking opportunities. There's
18 no pass over. The only expense in a claim reduction system,
19 if you adopt--if there is a system under which, for example,
20 the settling defendant's market share is taken out, if you
21 define--if you can define market share in a way that's quite
22 transparent so that everybody knows what market share means,
23 that can be done fairly mechanically, and there's no pass

1 over between the defendants so there's no opportunity for
2 rent-seeking behavior.
3 MR. BURCHFIELD: Could you reach the same result
4 by simply eliminating joint and several liability? In other
5 words, if each defendant is only initially liable for his
6 share of the blame--
7 JUDGE EASTERBROOK: Then I think you can't--well,
8 first, you still need clear and easily ascertainable rules
9 to determine percentage shares, and everybody has been very
10 reluctant to do that in cartel cases, because participation
11 of everybody is essential in the cartel; if the people jump
12 out, the cartel unravels.
13 But if you have a perfectly simple rule, then
14 breaking things up will, of course, reduce plaintiffs'
15 recoveries, will reduce net deterrence, because some of the
16 defendants will be unable to pay according to their shares.
17 They'll be insolvent, or there will be other reasons you
18 can't collect.
19 So net deterrence is bound to go down, but it
20 wouldn't be nearly as complicated or cumbersome as a genuine
21 contribution system would be. If there's some need to step
22 away from joint and several liability, it's gotta be some--
23 from the current system of joint and several liability. You

1 either strike the joint part or adopt a claim reduction
2 system. It's the contribution that really gets the worst
3 features going.
4 MR. BURCHFIELD: Okay. And in your view, you
5 could have contribution without claim reduction or claim
6 reduction without contribution?
7 JUDGE EASTERBROOK: Yes. Right. You can have
8 claim reduction without contribution. For what it's worth,
9 my understanding is that many states that started in a
10 contribution direction have moved to claim reduction
11 systems. That is, people who settle in good faith, as it's
12 usually said--you know, fighting about good faith is nasty,
13 but if you settle in good faith, you're never liable to your
14 co-defendants for contribution under most current state tort
15 systems, so that amounts to a claim reduction system.
16 Nobody really likes to emulate what we've got in
17 CERCLA.
18 MR. HIBNER: Just a comment, if I may. I believe
19 the Polinsky article, which is contemporaneous with Judge
20 Easterbrook's article, prefers a claim reduction system to a
21 contribution system and for many of the reasons stated.
22 MR. BURCHFIELD: I was going to ask you, Mr.
23 Hibner, in a contribution system and also in a claim

1 reduction system, if you can answer for both, what effect
2 would the adoption of those in the antitrust context have on
3 the amnesty program, which at least intends to limit
4 exposure of a cooperating defendant to that defendant's
5 single damages. Does that take away enough of the incentive
6 to cooperate that it would undermine our efforts to expose
7 cartel activity?
8 MR. HIBNER: Well, we're talking about a subset of
9 individuals or enterprises on a continuum, and there's going
10 to be a myriad number of different actors who are going to
11 respond differently. I would like to see the experience of
12 the amnesty program factored into future deliberations and
13 thought about as to how to make a given system better, and I
14 applaud that use of the resources in that way. I think that
15 it's not likely to do any harm, and it's likely to do a lot
16 of good. I certainly hope so. And, as Mr. Reasoner points
17 out, perhaps we'll learn some things.
18 But I do not know whether very many people are
19 meaningfully deterred by a non-contribution rule. And, as
20 Bill Baxter once responded, a system of some sort of
21 contribution, particularly where you have a price-fixing
22 cartel arrangement, if you can have an allocation system

1 that is better than a coin flip, then it's probably going to
2 be less arbitrary and should be considered.
3 MR. BURCHFIELD: Well, apparently the public
4 policy judgment has been made in some of these areas of law-
5 -CERCLA and securities law and tort law--that--where we
6 presumably want to deter securities law violations and so
7 forth the same way we want to deter antitrust violations.
8 The public policy judgment has been made that the deterrent
9 effect of having joint and several liability is not
10 sufficiently weighty to continue it there.
11 Is that judgment wrong in that context, or is it--
12 how do you view the public policy issue on a larger scale?
13 MR. HIBNER: The public policy issue to me is
14 that, unless a rule of non-contribution would greatly affect
15 risk aversion in some significant fashion, the experience
16 that we're going to gain through the securities law changes
17 is well worth taking a serious look at.
18 As a private antitrust lawyer of 43 years'
19 experience, I believe, from Boone, Iowa, I don't know a man-
20 -I'm thinking now of being out there with Diogenes with my
21 lantern looking for somebody who's meaningfully deterred
22 from violating the antitrust laws because of non-
23 contribution. And quite frankly, I've never met anybody

1 like that. I've met more people who have reasons why they
2 don't think they're culpable at all or have less culpability
3 than the person next door: "The devil made me do it."
4 MR. BURCHFIELD: Judge Easterbrook, do you see
5 what is happening in the antitrust area where joint and
6 several liability without contribution or claim reduction is
7 allowed whereas, in the securities law area, joint and
8 several liability is not the paradigm? Is one wrong and the
9 other right?
10 JUDGE EASTERBROOK: I'm a little puzzled by the
11 way you put it. I don't know any area of federal law, where
12 there are private remedies, that does not have joint and
13 several liability. Securities law certainly has joint and
14 several liability.
15 It also has, to a limited extent, a contribution
16 system on top of it, but it starts with joint and several
17 liability. Now, there may be some states where there is
18 several liability, but not joint, but the lack of joint and
19 several liability would be quite startling. It's not used
20 in any federal system that I know of.
21 MR. BURCHFIELD: Well, let me rephrase the
22 question then, if I may. Then, is it your view, that we are

1 not maximizing deterrence in these other areas that allow
2 contribution?
3 JUDGE EASTERBROOK: We are certainly not
4 maximizing deterrence under CERCLA, but for very complex
5 reasons. It has to do with the fact that there's also a
6 federal subsidy, substantial taxes. The way in which the
7 CERCLA system works--I always have to be careful talking
8 about these things, given my role--responsible people could
9 think that the CERCLA system could use a careful re-
10 examination. In securities law, for reasons I don't
11 understand--it may have to do what the difference between
12 liability for non-intentional acts, which is really not
13 there, and the standard liability based on fraud--has simply
14 not been a much-litigated question.
15 Never having made a study of that, I can't really
16 explain why; it's beyond the scope of my expertise.
17 MR. BURCHFIELD: Mr. Reasoner, do you have a view
18 on whether we are underdeterring and taking as the contrary
19 example securities law where contribution is allowed?
20 MR. REASONER: Well, you know, I would think that
21 you'd have to give a lot of thought as to how much an analog
22 a charge of conspiracy to violate securities law would be to
23 cartel behavior. I mean, in a normal securities law

1 violation, if you have an issuer and you have various people
2 involved to various degrees, I don't think it's a good
3 analog. It's much easier over time--I mean, a securities
4 law violation involving one company is apparently much
5 easier to detect, and, of course, we also have a history of
6 securities cases being brought and settled. Cartel
7 activities are far more difficult to detect. We now know of
8 major cartels that have been uncovered, particularly those
9 with international aspects, which had operated successfully
10 for many years--to go back a little in time, the uranium
11 cartel. The key evidence wasn't produced by a federal grand
12 jury, which was unsuccessful in obtaining it, but by the
13 Friends of the Earth, who broke into a cartel member's
14 offices and stole it in Australia.
15 So I think that you need to take a harder line on
16 deterrence in the antitrust area.
17 Clearly, we haven't reached a point where I think
18 you could point to, at least on things like cartel conduct,
19 where we've needed to be worried about overdeterrence. And
20 it seems to me the laws have evolved to the point where
21 there are fewer areas that we need to be worrying about
22 overdeterring possible procompetitive conduct. In the area
23 of monopolization, you could get into hard questions about

1 regulating monopolistic conduct, perhaps in vertical
2 exclusive dealing arrangements--you get into questions as to
3 whether you were interfering with procompetitive conduct.
4 But to me, the lesson to be learned from the
5 securities laws is, by allowing contribution and claims
6 reduction, they've slowed down the process, made it less of
7 a deterrent, and it's not something that we could afford to
8 inject into the antitrust area.
9 JUDGE EASTERBROOK: Could I supplement my answer?
10 What dominates the deterrence question is not contribution
11 or claim reduction or joint and several liability: it's
12 first the probability of detection, which is largely outside
13 anybody's control--at least anybody here, unless one of you
14 knows about a cartel. And the other is the damages
15 multiplier.
16 You want to make sure you get the damages
17 multiplier right. As some members of the last panel said,
18 it's very hard to know what that multiplier ought to be,
19 because we really don't know how many cartels evade
20 detection. If you knew how frequently they completely
21 evaded detection, you could figure out what the right
22 multiplier was.

1 What one can say about contribution and claim
2 reduction is that, at any given level damages multiplier, if
3 you put in a system of either contribution or claim
4 reduction, you would reduce deterrence by some amount,
5 because what joint and several liability without
6 contribution or claim reduction does is ratchet up the
7 damages a little. We don't know exactly how much, but it
8 ratchets up the damages some. So there's an interaction
9 effect with the damages multiplier.
10 The other thing one can say--and this is
11 completely independent of deterrence--is that a contribution
12 system, as CERCLA exemplifies, because of the rent seeking
13 opportunities of the pass over payments, is extremely
14 expensive to administer, and unless it's doing something for
15 you, which, as I said, in both my article and in my
16 statement, I don't think it's doing anything helpful for
17 you, you don't want to incur a pointless expense.
18 MR. BURCHFIELD: Thank you. I want to come to
19 this side of the table. Mr. Hausfeld, you said in your
20 statement that a defendant that knows that it will be
21 subject to a contribution action from a codefendant found
22 liable for the remaining damages of the conspiracy will be
23 much less likely to disclose information that will increase

1 this risk. Doesn't the antitrust leniency program address
2 that issue by incentivizing the first person in to come in
3 and disclose the existence of the cartel?
4 MR. HAUSFELD: There is an interesting play
5 between the new leniency act and just the general
6 competitiveness of settling when there is joint and several
7 liability. Under the new leniency act, the leniency
8 applicant is limited to exposure for single damages.
9 MR. BURCHFIELD: Correct.
10 MR. HAUSFELD: But the incentive there behind the
11 act is to have the leniency applicant disclose to the civil
12 plaintiffs everything about the conspiracy so that the civil
13 plaintiffs can then pursue the remaining defendants. Well,
14 what happens in a situation where there is another cartel
15 member, who says, "I don't want to sit back here and wait,
16 knowing that there's a leniency applicant already out
17 there," and comes in and settles with the civil plaintiffs
18 before the leniency applicant?
19 At that point, you've got a settlement. You've got
20 all the cooperation that you want, and so what benefit is
21 there to limiting the leniency applicant to single damages?
22 And it's interesting that under the leniency application
23 it's within the court's discretion to limit the damage to

1 single damages. So you do have an incentive already built
2 into the leniency incentive of having the first--leniency
3 applicant--come in early to make their disclosure early to
4 get the benefit of the limitation.
5 Likewise, you have an incentive to some of the
6 other cartel members to come in to try to resolve their
7 civil liability before they're held for the joint and
8 several liability.
9 In all of this, in terms of discussing the
10 fairness--what I call the fairness to the felon--nobody is
11 changing the aggregate damage. It's how you allocate that
12 aggregate damage among the cartel members. You're not
13 producing a greater result for the victims, so everyone
14 understands with joint and several liability what the
15 incentives are to get out as quickly as you can, and as
16 rationally as you can without being the last holdout.
17 MR. BURCHFIELD: One last question for Mr.
18 Constantine. You obviously have had a tremendous amount of
19 experience on both sides of the "v." advising business
20 clients, representing business clients as plaintiffs and
21 defendants, and it would seem to me that--and we heard this-
22 -and we heard people on the prior panel say--that the risk--
23 the great risk of price-fixing activity is by the lower-

1 level people in the company--the sales managers--not the
2 senior executives. And I would--it's been my experience,
3 perhaps yours as well, that those people are the ones who
4 are frankly least familiar with the arcane rules of joint
5 and several liability, and maybe even treble damages and
6 maybe even criminal--
7 MR. CONSTANTINE: Or all of the above.
8 MR. BURCHFIELD: On the other hand, the senior
9 executives, when they are considering doing something that
10 might be evaluated under the rule of reason, would almost
11 always seek sophisticated counsel on that, and, at that
12 juncture, be informed of joint and several liability, treble
13 damages, criminal penalties.
14 In light of that, do you think that joint and
15 several liability is really--if it is true, if the
16 hypothesis is true that the cartel activity, the price-
17 fixing activity, typically occurs lower in the organization,
18 is the joint and several liability more likely to deter rule
19 of reason conduct, or is it more likely to deter *per se*
20 conduct?
21 MR. CONSTANTINE: Wow. Let me try to approach
22 that. I think that joint and several liability--and I think
23 that it's of one piece with treble damages--I think that--

1 you know, it's a good thing that you're having these
2 hearings today to get at what I think is part of the overall
3 strength of the remedy that the antitrust laws provide.
4 I think that there is a significant deterrent
5 effect for all anticompetitive conduct that violates the
6 antitrust laws.
7 One of the things that I've been struck by in
8 listening to the previous panel and to this panel as well
9 is, there seems to be this sort of, not tacit, but active
10 agreement that, you know, there's this bad stuff, and this
11 price-fixing, some of this is hard-core criminal, felonious
12 conduct, and then there's all this other ambiguous conduct--
13 rule of reason conduct--which is supposed to be
14 competitively ambiguous, potentially procompetitive, and all
15 that.
16 I don't view the law that way at all. I take a
17 lesson from one of the former heads of the antitrust
18 division, Tom Kauper, who said if he thought the only job of
19 the antitrust division was to prosecute price fixers, he
20 would resign and close the office.
21 I think some of the most anticompetitive conduct--
22 the conduct that harms our economy the most, harms our
23 technology the most--is not necessarily conduct that is *per*

1 *se* unlawful or price-fixing conduct; I think it is conduct
2 that falls within Section 2 of the Sherman Act,
3 monopolization conduct. I think some of it--a lot of it--is
4 clearly conduct which is evaluated under the rule of reason,
5 and I think it is conduct that is engaged in with open eyes.
6 I think people at the highest levels of the business have
7 sought antitrust counsel. They know, and they've heard
8 about the possibilities, not of criminal prosecution, but of
9 treble damage actions, of private treble damage actions, and
10 they go and they engage in this conduct with their eyes
11 open, because they believe that their company will benefit
12 more from the potential upside than it will suffer from the
13 potential downside. And the reason they think that is that
14 it's just so difficult now to lose an antitrust case, to
15 lose a private antitrust case.
16 There are so many--the first panel focused on the
17 issue, you know, of deterrence, and why there isn't a
18 significant deterrent.
19 I don't think it's because of treble damages or
20 joint and several liability. It has to do with the myriad
21 obstacles to maintaining a successful antitrust case,
22 whether it be by government or private enforcers--standing
23 requirements, *Daubert* motions, various, you know, threshold

1 rules that just make it extraordinarily difficult to ever
2 get to the--to a trial of an antitrust matter. So I
3 disagree I think with the premise of your question,
4 Commissioner. I think that it's very important to have
5 joint and several liability and treble damages there for
6 conduct which is characterized as rule of reason conduct,
7 because I think that some of that conduct is potentially the
8 most injurious conduct. Without trying to get into the
9 facts of any particular case, I think about one of the
10 cases, which is one of the largest cases in antitrust
11 history--the recent *Microsoft* case.
12 That case came down to a essentially a tying
13 arrangement and some non-price, near exclusive distribution
14 arrangements for conduct, which everybody would agree is
15 subject to the rule of reason, and, certainly Judge Ginsburg
16 thought that the tying claim was subject to the rule of
17 reason, and certainly the non-price vertical restraints of
18 trade were subject to the rule of reason. But that was the
19 core conduct at issue.
20 Without getting into who was right and who was
21 wrong and what actually happened, if you take the--you know,
22 the government's position on that, the position of both the
23 U.S. government and the position of the state governments

1 that brought that case--they thought that that rule of
2 reason conduct was throttling competition in the most
3 important area of our economy, the most important part of
4 our commerce, the most important part of our future, and it
5 all came down to this rule of reason conduct.
6 So I think that, even more importantly, because
7 there aren't any criminal sanctions there, I think that the
8 rule of joint and several liability and treble damages is
9 necessary for that kind of conduct as well.
10 MR. BURCHFIELD: Thank you, Madam Chair.
11 MR. HIBNER: I would like to respond just very
12 briefly. If I change the words rule of reason to monopoly
13 price maintenance, I would suggest that that should make a
14 difference. And while there may not be very many really
15 good or strong monopoly cases, they do exist, and they
16 should be honored accordingly. And I think *Microsoft* is
17 certainly one of those cases.
18 We have some other exclusionary conduct cases that
19 we've seen in the last couple of years that are also I think
20 quite important, and they're getting a lot of press in the
21 business world. One is *3M*, and the other is the *Dentsply*. I
22 think they've learned a lot from those cases.

1 But in my experience, most business executives do
2 not believe that what they're doing is wrong, particularly
3 if they believe that all their competitors are doing it,
4 such as a MAP program or some form of resale price
5 maintenance, and, of course, the fact that, in a
6 concentrated industry, their competitors are doing it will
7 only make matters worse, such as we saw in the FTC consent
8 decrees in the *CD Video* cases. But, if attacked, I think
9 most business people believe that they've already lost.
10 It's not that they're going to win; they've lost their
11 executive time; they've lost their key to the restroom,
12 whatever. They're not happy campers about that.
13 CHAIRMAN GARZA: I want to make sure that our
14 Commissioners get a chance--will it be a short--
15 MR. HAUSFELD: A short one.
16 CHAIRMAN GARZA: Okay. MR. HAUSFELD: I just
17 don't believe that reality supports the view that most
18 business executives don't understand that, if they
19 participate in cartels, they are doing something wrong. You
20 take a look at the vitamins cartel, for example, where the
21 chief executives of the various divisions met in secret in
22 various locations throughout the world, deliberately kept
23 their minutes secret--or destroyed their minutes by design--

1 there is no rational explanation or justification for saying
2 that cartels, particularly those operating today at the
3 international or global level, do not involve the knowledge
4 of the senior people within the companies and their active
5 knowledge that what they're doing is in violation of laws,
6 not only in the United States, but elsewhere in the world as
7 well.
8 MR. BURCHFIELD: Thank you, Madam Chairman.
9 CHAIRMAN GARZA: Commissioner Jacobson?
10 MR. JACOBSON: Thank you. First of all, I'd like
11 to say, it's possible to support treble damages and a rule
12 of claim reduction, and I don't think the propositions are
13 inconsistent. Perhaps we can test that.
14 I do have an initial question or two for Judge
15 Easterbrook, and it goes back to your article.
16 You indicate that under the rule of no
17 contribution, defendants have an incentive to settle for an
18 aggregate amount greater than their expected damages from a
19 trial. And I gather that the math for that holds
20 irrespective of the multiplier, whether it's one or two or
21 10.
22 JUDGE EASTERBROOK: Yes.
23 MR. JACOBSON: Is that a good thing?

1 JUDGE EASTERBROOK: If you think the current
2 multiplier is appropriate or too low—certainly. If you
3 think the current multiplier is too low, you think it's
4 unambiguously a good thing.
5 I'm inclined to think that it's a good thing
6 precisely because the same feature that raises the aggregate
7 amount paid by the defendants is what produces settlements
8 in antitrust cases; that is, the early settlements are
9 relatively cheap compared to the later ones. The reason
10 that the aggregate amount is going up is that the plaintiffs
11 are getting dollars with certainty from the early settlers,
12 and those certain dollars are being subtracted—right. If
13 you think the plaintiffs have brought a lawsuit that they
14 have a 50-percent chance of winning, the plaintiffs are
15 getting 100-percent dollars in the settlement rather than
16 50-percent dollars, while preserving the entire 50-percent
17 claim for the entire pot against whomever hasn't settled;
18 and that necessarily means the total stakes--the total
19 recoveries--exceed the net damages multiplied by 50 percent,
20 which would be the *ex ante* actuarial value of the suit.
21 So if you think the current damages multiplier is
22 too low, you're unambiguously in favor of that effect. If
23 you think that that effect is not a particularly large one--

1 it's proved very difficult to quantify. When Professor
2 Landes and Judge Posner and I thought about that article,
3 and it went through workshops at which it was presented to
4 people like Commissioner Carlton, we thought about ways of
5 testing this, trying to figure out how much. It's extremely
6 difficult, because you can't get your hands on the data.
7 Most people are unwilling to tell you the amount for which
8 they settled, and of course you can't run a natural
9 experiment. We don't have an alternative United States,
10 with a somewhat different contribution scheme, so it's very
11 difficult to get the data to analyze it.
12 But one thing that seems to be unambiguously true
13 is that the joint and several liability system with no
14 contribution is much cheaper to administer. The fact that
15 there is this worry about being the left-out party induces
16 people to settle early. It vastly reduces the cost of
17 allocation, compared with something like CERCLA, where we
18 see the alternative universe in operation, and there's a
19 whole lot more litigation about the contribution, as I've
20 said, then there is about the merits. And it's saving the
21 cost of litigation in a system that's already quite complex
22 in litigation, which seems to me quite beneficial.

1 MR. JACOBSON: Doesn't that mean we should certify
2 every class so that the defendants are pressured to settle
3 irrespective of the merit?
4 MR. HAUSFELD: Are we going to put that to a vote?
5 MR. HIBNER: But what's the difference in the
6 analysis?
7 JUDGE EASTERBROOK: I'm not sure what you mean,
8 however, by "certify every class".
9 MR. HIBNER: Well, I think--
10 JUDGE EASTERBROOK: Presuming you're going to do
11 this in a way that follows the rules.
12 MR. HIBNER: I think you just suggested the *Kline*
13 *v. Coldwell Banker* case in the Ninth Circuit, where the
14 court denied class certification because of the enormity of
15 the exposure to a large number of small real estate brokers
16 in L.A. County.
17 MR. JACOBSON: No, I'm trying to make the point
18 that the fact that a case is forced into a settlement mode
19 doesn't necessarily have to be a good thing--that there are
20 good settlements and bad settlements. And if defendants are
21 settling for an expected value greater than the expected
22 liability, I think that should raise a question.

1 JUDGE EASTERBROOK: The defendants will settle for
2 the aggregate of their expected liability, as multiplied
3 through this process, plus the cost of litigation. And
4 that's the effective settlement range.
5 If you do something that greatly increases the
6 costs of litigation--actually, you're increasing the
7 effective settlement range, but on the other hand, the
8 plaintiffs will get less of it, because they'll have to pay
9 more to their own lawyers for having engaged in the
10 additional litigation.
11 MR. JACOBSON: Well, let me just follow up
12 quickly. We permit claim reduction today, provided that the
13 defendants agree in a sharing agreement. Is anyone here
14 proposing that we outlaw sharing agreements? Just yes or
15 no.
16 MR. HAUSFELD: No.
17 MR. JACOBSON: Given that the best-organized
18 cartel and the defendants who are most friendly can reach
19 agreement on a sharing agreement, why are we denying the
20 benefits of claim reduction and the associated fairness to
21 those who are more competitive with each other and who
22 cannot reach such an agreement? Judge, I'm picking on you
23 again.

1 JUDGE EASTERBROOK: Well, first, I don't think
2 reshuffling the deck chairs after there's been a calamity is
3 an example of fairness. It's an *ex post* view on the world,
4 and as my article and my brief statement today said, you
5 want to take an *ex ante* view in thinking about expected
6 liabilities, and if you look at the world *ex post*,
7 everything is unfair, and it becomes not a useful way of
8 talking about it. Some defendants get caught, and others
9 don't. Isn't that unfair? Shouldn't we do something about
10 that? So that seems to me unhelpful.
11 The one thing I can say about sharing
12 arrangements--and it's the same thing I said about claim
13 reduction--is that it can be done in a way that's relatively
14 cheap compared to contribution. Anything is relatively
15 cheap compared to contribution, because contribution creates
16 rent-seeking alternatives.
17 And if there is anybody here who is a little
18 suspicious of sharing agreements, it's probably me, not so
19 much because of the way it resolves the litigation, but on
20 Adam Smith-ian grounds, which is that every time you get all
21 the players in an industry in the same room, talking about
22 what they're going to do jointly for their mutual benefit,
23 I'm thinking cartel again. Maybe you should have the

1 sharing agreement negotiations recorded and sent straight to
2 Assistant Attorney General Baxter, as he once suggested the
3 head of American Airlines do.
4 MR. JACOBSON: Just--my time has long expired--
5 just one last follow-up. Are you saying you would support
6 claim reduction or oppose it less vehemently?
7 JUDGE EASTERBROOK: As I've said, the multiplier
8 effect of pure joint and several liability interacts with
9 the damages multiplier. If you look at the article I wrote,
10 under the caption, Detrebling Antitrust Damages, you'll see
11 that I think that treble damages may be too high for
12 competitor suits, and, in those circumstances, it seems to
13 me the effect of claim reduction in avoiding the multiplier
14 would be desirable. But for many cartel cases, where my
15 suspicion is that they evade detection more often than one
16 time in two, anything that would reduce the damages would be
17 highly undesirable. It's very difficult to answer in a
18 categorical way.
19 You'll notice that at the end of the article, the
20 three authors try to weasel out on much the same grounds.
21 MR. JACOBSON: Thank you very much.
22 CHAIRMAN GARZA: Commissioner Litvak.

1 MR. LITVAK: Thank you. I really had two comments
2 I wanted to make and then one question. I approach this--I
3 probably have the distinction of having practiced law longer
4 than anybody else in this room. As a practical matter, I
5 don't see this as a deterrence issue, because I agree with
6 Don Hibner. In some 46 years of practice, including being
7 in-house counsel, I never heard anyone say to me, "Let's
8 see, what would the contribution be--and are we going to
9 have joint and several liability here?" It just doesn't
10 work that way. This isn't a deterrence issue in my mind.
11 And the quantum of damages, the trebling, and the
12 criminal fines--they are deterrence issues; this is not, in
13 my judgment.
14 Secondly, I want to respond to something that
15 Lloyd Constantine said. As a practical matter, if you're
16 not talking about cartel activity, and you are talking about
17 executives sitting down to make a judgment about business
18 conduct, in the main, certainly in every situation that I've
19 seen, no one sits and says, "Let me quantify exactly what
20 the treble damages would be and how much money I am going to
21 make." In that context, what they are doing, like it or
22 not, if they're relying on counsel, who typically will say
23 to them, "Look, I don't know." But I think--and with a

1 shrug of the shoulders--that we should be okay here or we
2 shouldn't be okay here, whatever the case may be, and then a
3 business decision is made. It really is a very different
4 kind of approach.
5 And that leads me to my question. You actually
6 touched upon it because Commissioner Jacobson touched upon
7 it, and Judge Easterbrook did. I don't view sharing
8 agreements as a question of fairness, and I don't view it as
9 a question of cartelization because, as a practical matter,
10 sharing agreements are done after the fact, as you said.
11 They're done between and among the lawyers, and I know the
12 businessmen aren't sitting down in a room doing this
13 typically, at least not within my experience, anyway. These
14 are the lawyers who are doing this.
15 If that's so--and again, with in my experience, if
16 so--I hate to put it this way, what's the big deal? If the
17 defendants--why is contribution a big issue? If the
18 defendants can work out a sharing agreement, all the more
19 power to them. Let them do it. If they can't do it, that's
20 their problem. They face the consequences of the law. Why
21 isn't that right, Mr. Reasoner?
22 MR. REASONER: Well, I think you could make a
23 powerful argument in that regard.

1 MR. LITVAK: I hope I just did.

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

7 MR. LITVAK: And I guess I'm going further in
8 saying--and maybe I'll address this to Judge Easterbrook--
9 why doesn't that, almost in an Adam Smith way, take care of
10 itself? If either defendants or the companies, through
11 their counsel, want to enter into an agreement to share, why
12 doesn't that deal with it?

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

1 MR. LITVAK: Yeah. I must tell you, I think the
2 strongest argument against contributions--and one you made—
3 that, as a litigation matter, the cost, the time, and the
4 burden of trying to sort that out, if the defendants haven't
5 agreed amongst themselves, is just something our society
6 ought not to bear. I have no further questions.
7 CHAIRMAN GARZA: Commissioner Shenefield.
8 MR. SHENEFIELD: Because I find this topic not
9 terribly interesting, may I just move slightly away from it,
10 Madam Chairman?
11 CHAIRMAN GARZA: Be my guest. And may I ask--
12 MR. SHENEFIELD: It's relevant, but not quite on
13 point.
14 JUDGE EASTERBROOK: You want to talk about
15 targets—
16 CHAIRMAN GARZA: Can I just ask you how many years
17 you've been practicing.
18 MR. SHENEFIELD: I have no idea.
19 CHAIRMAN GARZA: I just wanted to see if Sandy was
20 right or wrong. Go ahead.
21 JUDGE EASTERBROOK: I think he's right,
22 unfortunately.

1 MR. SHENEFIELD: I think he's correct. Yeah. Let
2 me ask the panel members whether they think that a rule that
3 would eliminate treble damages and follow-on class action
4 cases would present a better or worse situation than where
5 we are now. Mr. Reasoner?
6 MR. REASONER: I really don't see any argument for
7 that. I mean, you could argue about how class action
8 jurisprudence could be improved or not, but I think follow-
9 on class actions--I don't see the argument for eliminating
10 treble damages. In theory, if single damages were perfectly
11 measured, you would remove the cartel profits and break
12 even. And so I think any treble damages serve a deterrent
13 effect.
14 MR. SHENEFIELD: Judge Easterbrook? JUDGE
15 EASTERBROOK: Yeah, me, too. I think you need treble
16 damages for deterrent effect, but you have to understand I
17 have a conflicted position. Before I was appointed to the
18 bench, I was the Lee and Brena Freeman Professor of Law at
19 the University of Chicago, and but for follow-on class
20 actions, Lee Freeman would not have raised the funds to
21 endow that chair.
22 MR. SHENEFIELD: We understand.
23 Mr. Hibner?

1 MR. HIBNER: I would be of the mind that treble
2 damages and follow on class actions are probably as good as
3 the treble damage remedy itself. I think it's our
4 experience that a great deal is generally learned through
5 the class action process, that they did not, in fact, learn
6 from the government, and that law enforcement has probably
7 benefited accordingly.
8 MR. SHENEFIELD: I think I know what the next two
9 answers will be, but why don't we go through it anyway.
10 Mr. Hausfeld?
11 MR. HAUSFELD: There's no relationship between the
12 fact that there's a follow-on and treble damages--the
13 ability of the private civil plaintiff to recover that
14 amount of damage. So you want the deterrent effect. The
15 fact that it's a follow-on makes no difference.
16 MR. SHENEFIELD: Okay.
17 Mr. Constantine?
18 MR. CONSTANTINE: I'd leave it the way it is, but
19 I'd just observe that I was just involved in a case where
20 both the district court and the Second Circuit observed
21 that, unlike the traditional case, the government had
22 piggybacked on a case that we had won, which was a private
23 class action, and all that. And I would also be against

1 precluding the government from piggybacking on private
2 litigation.
3 MR. SHENEFIELD: Okay. Let me ask the same kind
4 of a question with respect to a rule that would confine
5 treble damages only to hard-core violations--forget what
6 they all are or how we have defined them at this point.
7 Would anybody on the panel favor that?
8 MR. CONSTANTINE: Yeah. And I--can I jump in on
9 that? Because that was the point I was trying to make, and
10 I think Sandy sort of, you know, turned it around or
11 misconstrued what I was saying. Maybe I misconstrued what
12 you were saying, Sandy. What I was trying to say is that I
13 think that some of the most potentially and actually
14 damaging conduct is conduct that is now considered under the
15 rule of reason--it's not considered to be hard-core.
16 MR. SHENEFIELD: So you wouldn't favor it.
17 Mr. Hausfeld? I got--I think we got the point.
18 Mr. Hausfeld?
19 MR. HAUSFELD: No, I wouldn't favor it.
20 MR. SHENEFIELD: Mr. Hibner?
21 MR. HIBNER: I might look with favor on exploring
22 that in a non-price vertical restraint case, where the

1 degree of foreclosability is below the *Jefferson Parish*
2 benchmark.
3 MR. SHENEFIELD: Judge Easterbrook?
4 MR. HIBNER: I think those cases are likely to be
5 dismissed anyway, but I do think they do clog the system,
6 not certainly as much as they used to, when we had the *Ace*
7 *Beer* sort of cases. But, still, these are not very worthy
8 candidates, and if I could de-incentivize their being
9 brought, particularly if we use appropriate screens, then I
10 probably would look with favor on that.
11 MR. SHENEFIELD: Judge Easterbrook?
12 JUDGE EASTERBROOK: I can't give you a clear
13 answer to that.
14 MR. HIBNER: I would cite Judge Easterbrook's
15 *Texas Law Review* article for the use of screens in those
16 cases.
17 JUDGE EASTERBROOK: The first annual Susman,
18 Godfrey, and McGowan Lecture, I will have you know--I think
19 Steve Susman has read it ever since. The best understanding
20 of how to set the multiplier is, I think, the one spelled
21 out in Professor Landes' article, *Optimal Antitrust*
22 *Sanctions*. It's based on Gary Becker's model. You want to
23 figure out the harm these people inflict on the rest of us,

1 and divide that by the probability of successful
2 apprehension and prosecution.
3 For hard-core violations--that is, concealed
4 cartels--these people are going out of their way to prevent
5 anybody from learning, so there has to be a substantial
6 multiplier. Treble damages are, in my view, probably the
7 lowest sustainable multiplier for concealable violations.
8 Many of the things you are referring to as not hard-core are
9 open and above board. What Microsoft was doing with
10 Internet Explorer, to take an example, since that litigation
11 is now over, everybody in the world knew. There was no
12 concealability. One had to figure out whether it was
13 lawful, but there was no concealment problem.
14 So I would distinguish not between *per se*
15 violations and non-*per se* violations, but between
16 concealable violations and non-concealable violations. Most
17 likely, the optimal multiplier should be maintained at three
18 or go up for concealable violations, and, if it should move
19 in any direction, it should go down for non-concealable
20 violations.
21 MR. HAUSFELD: With respect to that, Commissioner,
22 non-concealable violations are not confined to hard-core
23 cases.

1 MR. SHENEFIELD: Okay.

2 Mr. Reasoner?

3 MR. REASONER: You know, I think the devil would

4 be in the details in defining that. The concealable or non-

5 concealable line doesn't appeal to me as readily utilizable.

6 Microsoft did a lot of stuff they didn't talk about. But I-

7 -it's appealing that you're being too punitive with some

8 kind of conduct that people might in good faith have done,

9 but it was later found to violate the antitrust laws. But

10 I'm very troubled by how you would define it.

11 MR. SHENEFIELD: Okay. One final question and all

12 you need to do is raise your hand. So you can do it

13 simultaneously to save time. What about a rule that said

14 treble damages would remain as it is today except in cases

15 involving joint ventures with plausible, cognizable

16 efficiencies involved; anybody in favor of that?

17 JUDGE EASTERBROOK: Except as a--you know, as a

18 special case of the fact that most joint ventures are

19 perfectly observable. That is, they're not concealable.

20 But the things that make them antitrust problems may be

21 concealable; that is, there may be a productive integration,

22 coupled with some hidden stuff--and if it's the hidden stuff

23 that's involved, you certainly don't want to reduce damages.

1 MR. SHENEFIELD: Okay.

2 Thank you, Madam Chairman.

3 CHAIRMAN GARZA: Commissioner Valentine?

4 MS. VALENTINE: I am struggling here. I want us

5 to try to imagine a regime in which we do have joint and

6 several liability. We are not going to allow--force

7 plaintiffs to make up for any gaps in the system; that is,

8 if a defendant is unable to pay, that's going to fall on the

9 defendants. We're not going to worry about affecting the

10 leniency or amnesty system because the first-in guy to rat

11 on the cartel will have no contribution against him; he

12 won't have to pay anything at the end of the day to his

13 codefendants.

14 And I'm trying to think of some rule on

15 contribution that would either not allow for contribution

16 from defendants that do settle or would put some limits on

17 claim reduction, and I would like each of the panelists to

18 tell me how that would affect incentives of large players to

19 settle, small players to settle, and the incentives of

20 plaintiffs to settle.

21 MR. CONSTANTINE: I guess the question that I have

22 is--coming back to what Commissioner Litvak said--why is the

23 concern of imposing a rule of law or a principle of law to

1 measure allocation of wrong among defendants, in these
2 cases, in particular?
3 MS. VALENTINE: I'm not saying--I'm just asking an
4 incentive question as to how this would play out. I'm not
5 saying it's a good rule, or it's a bad rule. I'm not saying
6 that I necessarily believe in it or not. But I want to try
7 to imagine a system in which possibly defendants…But I don't
8 want this contribution system to affect the ability to
9 settle, because here is where I think Judge Easterbrook is
10 most correct in terms of the costs incurred by any
11 conceivable contribution system.
12 So I'm trying to imagine a claim reduction or a
13 contribution regime that would not unduly affect the ability
14 to settle, but I'm trying to see how it would play out among
15 settlement incentives by small players, large players, and
16 plaintiffs, and would it alter the way we typically think of
17 plaintiffs seeking out the various people with whom they
18 settle?
19 MR. CONSTANTINE: It would have to occur at some
20 remote point in time, you know, after the regular, so-called
21 regular, proceedings were over so that it would not affect
22 the incentives of the plaintiffs, *et cetera*. In other

1 words, it would be a private matter among the defendants
2 after.
3 MS. VALENTINE: Yeah. Okay.
4 MR. CONSTANTINE: And how that would happen and
5 whether that would be in a separate tribunal, you know, I
6 leave it to the imaginations of the Commission.
7 MR. HIBNER: I think what Bill Baxter had in mind
8 with his bill was that it would be in the same proceeding,
9 but after the trial was concluded, and it would be the court
10 sitting in equity, and not a jury trial. And if it could be
11 allocated on some basis, that's fine; but if it couldn't be,
12 then it probably would be *per capita*. But I think he also
13 envisioned that most of these situations, where we have the
14 use of judicial time, would be price fixing, hard-core cases
15 where the allocation formula would be readily apparent.
16 MS. VALENTINE: Judge Easterbrook?
17 JUDGE EASTERBROOK: I can't imagine any
18 contribution system in private litigation that wouldn't
19 clobber incentives to settle. There is one feature of
20 CERCLA we haven't talked about yet, which is, your
21 settlement is approved by an official government settlement
22 approver--there's debate about who that is--there are both
23 state and federal officials who fight to do this--but if

1 your settlement has the right blessing of some person who
2 comes up and does this, then you're not liable for
3 contribution later.
4 But if you don't have--even then CERCLA has had
5 enormous amounts of litigation. But the thing people are
6 trying to get with settlement is a cap on their liability at
7 some level, and stop paying their attorneys to buy peace.
8 And if you have a contribution system later, they can't do
9 either one of those things, and so why would they bother to
10 settle?
11 MS. VALENTINE: But that's why I'm either
12 limiting--
13 JUDGE EASTERBROOK: Right. The claim reduction
14 system, of course, does not have that problem. The
15 defendants would be as eager to settle as before, if not
16 more so, but from the plaintiffs' perspective, well, I think
17 the word "reduction" in claim reduction is an accurate one;
18 that is, if you settle with A, you are agreeing to reduce
19 your claim against B later on. And so plaintiffs are less
20 willing to settle in a claim reduction system, although I
21 don't think the effect is as bad as in a contribution
22 system.

1 I don't know of any system in which both
2 plaintiffs and defendants would be as willing to settle as
3 they are under the current joint and several liability rule.
4 It's something that makes one more willing to settle; it
5 makes the other less willing.
6 MR. HAUSFELD: You almost paralyze the first
7 settlement.
8 MS. VALENTINE: That's what I'm trying to--
9 MR. REASONER: Yes. I would agree with Judge
10 Easterbrook that claim reduction is far preferable. The
11 difficulty with claim reduction is that, as a plaintiff, you
12 have sufficient knowledge to reasonably evaluate how much
13 you're reducing your total remaining claim. And that's
14 difficult to do early on, and then in some types of
15 antitrust litigation--I would suggest, at this point, if
16 we're talking about a cartel, where it could be effectively
17 argued that any one of the defendants was equally
18 responsible and essential, *et cetera*, I don't know what a
19 jury would do with trying to pick who's primarily
20 responsible, you know; and getting into litigating, both
21 sides having to persuade the jury that there's a conspiracy
22 and that X is not there was--didn't have much to do with it

1 would be a heavy burden, assuming anybody ever actually
2 tried a case.
3 MS. VALENTINE: OK. Thank you. The costs are
4 crazy.
5 CHAIRMAN GARZA: Commissioner Warden:
6 MR. WARDEN: Thank you. First, I'd like to say
7 that I think in a claim reduction system involving any kind
8 of horizontal conspiracy, sales should be prescribed--sales
9 of the relevant product--or market share--as the basis for a
10 claim reduction myself.
11 MR. REASONER: I think that's a good surrogate,
12 but what about bid-rigging?
13 MR. WARDEN: Well, I know; I noticed that in your
14 written testimony. Please, can you explain why it doesn't
15 work in bid-rigging?
16 MR. REASONER: Well, because one guy gets the
17 contract.
18 MR. WARDEN: Yeah. What happens to all the other
19 people? They get other contracts normally.
20 MR. REASONER: Well, perhaps. But then you're
21 getting into a little more complicated trade off.
22 MR. WARDEN: I think you can still look at the
23 amount of commerce done in the affected product.

1 MR. HIBNER: We have to define an accounting
2 period. Then you can decide who's specifically doing what.
3 MR. WARDEN: Sure.
4 MR. CONSTANTINE: Can I respond to--Commissioner.
5 Commissioner, can I respond.
6 MR. WARDEN: No, I want to go on to something
7 else, please.
8 MR. CONSTANTINE: Well, you've made an
9 observation. I'd like to respond to it. Why you think it
10 should be--
11 MR. WARDEN: Well, when I've used up my time, then
12 maybe the Chairman will give you the time to respond to it,
13 because I want to go on to the discussion that has been
14 conducted in terms of felons and cartels and so on and so
15 forth as if that were all we're dealing with.
16 And I find it amazing that no one on either of
17 these panels, with the possible exception of Mr. Hibner and
18 Harry, have put themselves in the position of the defendant
19 who is accused of being a participant in a horizontal
20 conspiracy that he doesn't think he ever had a damn thing to
21 do with, but it gets past summary judgment, and there are 25
22 of these people, and the plaintiffs are picking them off one
23 by one on settlement; and this fellow is sitting there

1 saying I cannot try my case because I'm liable, jointly and
2 severally, with no claim reduction, no anything for all of
3 the alleged damages of this industry if I lose.
4 And you, my counsel, have told me that I have a
5 good case. You don't even think the case makes any sense as
6 a matter of law. But I can't roll those dice. Now, I've
7 seen this. Have you guys not seen this?
8 MR. CONSTANTINE: I have not seen this,
9 Commissioner.
10 MR. HAUSFELD: I've seen the opposite.
11 MR. HIBNER: I have been to the mountain,
12 Commissioner.
13 MR. WARDEN: Okay. I find it amazing that people
14 who have practiced that long and on both sides of the fence
15 haven't ever seen that. Harry has seen it, I'm sure.
16 MR. REASONER: Well, no, I think there's no
17 question that Commissioner Warden's scenario occurred in the
18 antitrust era, when, as Justice Stewart remarked, "The
19 government always wins," *et cetera*. Today if your client
20 was in this position, you would have a real shot at summary
21 judgment. Otherwise, you'd need claim reduction to go to
22 trial.

1 MR. WARDEN: I do want to make one other
2 observation, and then Mr. Constantine is welcome to say
3 whatever he wants on my nickel, and that observation is
4 that, contrary to a vow I made, which was that I wouldn't
5 stress the *Microsoft* case at any of these hearings, in view
6 of what's been said here today, I want to suggest that
7 before anyone again opines that anything that happened in
8 that case had a demonstrable effect on the price of
9 operating systems should go back and read the opinion of the
10 Court of Appeals and its standard of causation again. I
11 think David Boies, were he still here, would join me in
12 saying that.
13 MR. CONSTANTINE: Okay. But let me respond on
14 your nickel, Commissioner, but not to that last point, which
15 I could also respond to. You've made the observation that
16 if a system is going to be enacted, it should be based on
17 sales. Let me just pick a famous case that we all know
18 about, which was the *American Airlines/Braniff* attempt-to-
19 monopolize case, where one CEO calls up another CEO, and
20 says, "Hey, Howard, let's fix prices." Bob Crandall calls
21 Howard Putnam, and he says, "Let's fix prices." Now, one
22 question we answered is, they knew about the antitrust laws,
23 because Howard said, "Oh, Bob, we can't do that." And we

1 know that Bob knew about the antitrust laws, because Bob was
2 involved in a lot of antitrust cases over the course of his
3 career, so we certainly know that he had gotten a lot of
4 good counseling from some Texas firm. And so we know that
5 both knew about the antitrust laws. And Howard Putnam said,
6 "No, we can't do that, because it's illegal," and then Bob
7 said, "We can do anything we please." And then Howard
8 turned the tape over to Bill Baxter, and the rest is
9 history.
10 Now, I would say that sales in that particular
11 case wouldn't be--you know, if you are going to enact this
12 system of honor among thieves, which is what I consider it
13 to be, you certainly wouldn't want to, you know, if Howard
14 had said yes, you wouldn't want to do that based upon sales.
15 You would want to do it based upon some level of
16 culpability, which I think--the relative culpability there--
17 you might be able to determine.
18 So I think that just using sales, if you were to
19 go down that route, would be the wrong way of doing it.
20 Having said that, you would have to bring in so many factors
21 that I think Judge Easterbrook would agree that it would be
22 just an additional nightmare for whoever the trial was on,
23 whether it be trial, fact, or law, and to try to figure out

1 all of those factors. But it certainly would not be any
2 single factor.
3 MR. WARDEN: I must beg to disagree. I think
4 sales would be just fine then, and you can use all the
5 culpability for the criminal punishment that you're going to
6 impose for this open--it's concealed from the public--but
7 otherwise totally naked crime. I will adopt your felony
8 language there.
9 MR. HAUSFELD: But what happens when you have a
10 market or a territorial allocation, and the agreement is, I
11 won't make sales in your territory or in your market, so you
12 can't, then, reduce my market share or sales to determine
13 culpability because there were none?
14 MR. WARDEN: Presumably, that party, who agreed
15 not to go into your territory, got you to agree not to go
16 into his territory in return, and you put it all together.
17 I don't think these are problems.
18 MR. HAUSFELD: What happens if that territory is
19 not in the United States? Suppose you agree not to sell
20 outside the United States, and they agree not to sell inside
21 the United States, then--
22 MR. WARDEN: Well, I think the guy--
23 MR. HAUSFELD: It's not as simple--

1 MR. WARDEN: Well, I think the guy who sold in
2 United States can pay everything in that case. Thank you.
3 MR. JACOBSON: Just one quick observation that
4 there were no damages in the Crandall Braniff case--
5 MR. CONSTANTINE: That's why it was an attempt to
6 monopolize.
7 MR. HIBNER: Yeah. It was an injunctive relief
8 case, and Mr. Crandall was enjoined from playing golf with
9 Mr. Putnam for a third of the year--represented by an
10 eminent law firm, with its main office in Los Angeles, but
11 not my own.
12 CHAIRMAN GARZA: Commissioner Yarowsky.
13 VICE-CHAIR YAROWSKY: I find so far that there's
14 kind of a remarkable unanimity about the general subject
15 that we were talking about on this panel, joint and several,
16 so I kind of want to stand back and rise up a little bit and
17 ask you a larger question.
18 Pretend you're a structural engineer. Okay? And
19 were standing back looking at the antitrust laws--look at it
20 historically, and look at it substantively--and what you
21 might see is that there's kind of an interrelated set of
22 remedies and procedures that have been there for some time--
23 long time. I mean, there have been some tweaks. Really

1 where the dynamic side of the antitrust laws seem to come in
2 is in the substantive area, OK? Substantive law changes.
3 Immunities and exemptions. We talked about that. They come
4 in and out. They mainly come in.
5 But the remedies and procedures have stayed
6 relatively--you know, were done historically at a certain
7 time, and have gone forward in time. From our standpoint--
8 because this is what I want to hear about--our exercise that
9 we are doing here--should we really--do you view these as an
10 interrelated set of procedures, so that when we talk about
11 these analytically one by one, and we have to do that,
12 because we have to have separate panels--we can just talk
13 about everything--that's a matter of convenience. But
14 should we really--should we look at another system of
15 substantive law and procedures, and isolate one little
16 aspect, and then try to import it into the antitrust laws
17 and see if that would make it--our laws work better?
18 MR. CONSTANTINE: Jon, I think what you have to do
19 is to start to try to answer the question, which was raised
20 with the first panel, which is, how come, given the fact
21 that we have treble damages and joint and several liability
22 and vastly increased criminal sanctions and a proliferation
23 of antitrust actions in other jurisdictions--in Europe, in

1 Asia, in the states, *et cetera*--how come there's so much
2 conduct, an increasing amount of conduct, that is violating
3 the law? That's the question that the Commission should
4 focus upon.
5 And I think the answer to that question, or a
6 beginning to approach to answer that question has very
7 little to do with the subject of either of these panels. It
8 has to do with having gone--with the pendulum having swung
9 too far from an era in which antitrust was not properly
10 informed by economics and market reality, and the government
11 always won reflexively to an equally absurd *status quo*,
12 which obtains in the United States now, which is that
13 meritorious cases brought by the government--I mean, merger
14 cases brought by the government--and private cases brought
15 by private parties have little or no chance of making it all
16 the way to success and suppressing anticompetitive conduct.
17 I'm not speaking from sour grapes. Both in public practice
18 and in private practice, we've been quite successful in
19 those cases, but we represent a rank minority.
20 I was guided by Steve Susman, who was on the first
21 panel, who addressed a group of state attorneys general in
22 1986, and that was where he drew the line of demarcation,
23 and he said to us, quite succinctly, "I'm out of this

1 business, unless somebody comes to me now with a hard-core
2 *per se* case. All we do is give them respectful audience. We
3 validate their parking ticket, and we move on to something
4 else." And things have gotten significantly worse in the 19
5 years since then. I'd be very pleased to, you know, go
6 beyond the written testimony that I've provided on this
7 issue, where there really isn't much disagreement, to what
8 the real issues all are, and I'd be pleased to do that if
9 somebody is interested in reading it.
10 JUDGE EASTERBROOK: I agree with the proposition
11 that one can't think in isolation about joint and several
12 liability. I've tried to emphasize how it's linked to the
13 multiplier, and both of these issues are linked to who owns
14 the enforcement rights. That's the *Illinois Brick* question.
15 The proposals to spread the enforcement rights around
16 effectively reduce the gains of anyone for their enforcement
17 rights, because they've been diluted, and one would think
18 that that would have an effect on enforcement. These things
19 all have to be considered together, and I at least do not
20 share the view that there is an increase in monopolistic or
21 cartel behavior in the economy. I know of no evidence for
22 that proposition. When I look around, I see large chunks
23 of the economy that used to being noncompetitive, usually at

1 the government's behest, have become competitive since the
2 rise of deregulation in the Carter Administration. The
3 airline market is competitive, and it used not to be. The
4 telecommunications market is competitive when it didn't even
5 use to exist, because the government propped up Ma Bell. I
6 mean, the withdrawal of government regulation, has led, so
7 far as I can see, to a great outburst of competition to
8 everybody's benefit. I know of no contrary evidence. There
9 are always problems and crooks, but one wouldn't say that
10 the existence of bank robbery shows that our system of
11 detecting and prosecuting robberies is ineffective. It
12 shows that the optimal level of crime is never zero, because
13 you don't want to devote all of society's resources to
14 suppressing it. But I don't know of any reason to think
15 that the amount of antitrust crime is going up.
16 MR. HIBNER: I would concur with that, and I'd
17 like to remind myself that many years ago there was a very
18 famous plaintiff's lawyer from Los Angeles who said, "We
19 don't need another law professor in the antitrust division;
20 We need a cop." And I think he was dead wrong. We've done
21 very well with the law professors. And I think the law is a
22 lot better today. It's certainly in much better shape than

1 it was when I signed on. And I think we all can applaud the
2 direction of substantive law in general.
3 MR. CONSTANTINE: Let me comment on what Judge
4 Easterbrook said. I mean, I agree that there are--you know,
5 significant sectors of our economy which have been
6 unfettered from regulation, and that's great. But that
7 doesn't answer the question about whether there is
8 anticompetitive conduct being engaged in. And if you just
9 looked--and I realize that the concentration level is not
10 the be all and an end to all--it's just the beginning of the
11 analysis.
12 But if you look at the level of concentration in
13 numerous industries in the United States, and you took a
14 snapshot of the HHIs now and what the HHIs would have been,
15 let's say in the '50s, '60s, and '70s, if there had been an
16 HHI conceived of, you would see, at the time when they were
17 considering Phil Hart's deconcentration formula, that the
18 level of concentration in many, many key industries is much,
19 much higher. And in counseling those private clients,
20 Commissioner Burchfield, the question that I get asked often
21 is, "Why can't we do a four-to-three merger? Why can't we
22 do a three-to-two merger? Why can't we do a two-to-one
23 merger?" And I've been on both sides of that.

1 A couple of years ago, I was involved in one side
2 of a merger of the only two DBS operators in the United
3 States, Echostar and Direct TV, and the betting money at the
4 beginning of that was that it was just going to go sail
5 right through the Antitrust Division, the FCC, with its
6 competition hat on, and the state AGs offices.
7 MR. REASONER: Can I respond to your question?
8 CHAIRMAN GARZA: But can I--you gave me an
9 opportunity, and I hate to be rude, but I've got a couple of
10 other Commissioners that we need to get to, and given that
11 people have flights out and what-not, I really have to move
12 it along. And so can I defer now to Commissioner Cannon?
13 MR. CANNON: Thank you. Mr. Constantine--
14 CHAIRMAN GARZA: Do we want to allow this?
15 MR. CANNON: Is it my time? CHAIRMAN GARZA: Go
16 ahead. But, Lloyd, keep it short.
17 MR. CANNON: Yes, ma'am. I really have to
18 congratulate you for effectively dashing speculation that
19 you and I collaborated on your testimony. We have been
20 arguing about all these things for about 20 years, but, you
21 know, it's good to see that you have mellowed over the years
22 on these views.

1 I do remember in the '80s when we used to argue
2 about this, and unless I am misremembering what happened
3 then, I was thinking in the--certainly in the Baxter
4 Antitrust Division at least--what we all are referring to as
5 hard-core price fixing cases were really at an all-time
6 high, and a fair amount, a good bit, larger than in the
7 Carter Administration. I think that's right.
8 MR. CONSTANTINE: That is correct. And that was
9 part of Bill's observation, which is that that really should
10 be the be all and the end all of antitrust. You didn't need
11 an Antitrust Division with the economic analysis group to do
12 those cases.
13 Those cases, and he said this, could be very
14 easily turned over to the people in the states or to the
15 U.S. Attorneys offices under referral, and you just didn't
16 need the Antitrust Division to do that. And in the article,
17 which I cited in my testimony, Bill predicted that, by nine
18 years ago, that's exactly what would have happened in the
19 United States; the antitrust menu would have been reduced
20 pretty much to those price-fixing cases, and that would have
21 become the responsibility of the U.S. Attorneys' offices and
22 the state AGs and maybe the district attorneys who have
23 antitrust jurisdiction in some of the states.

1 MR. CANNON: Judge Easterbrook, I'm kind of
2 curious in listening to all of this. In all of your
3 experience, have you seen an antitrust case that it ever
4 occurred to you that perhaps this was a case where a
5 contribution and/or a claim reduction would be appropriate
6 or, in fact, would actually be easy to administer?
7 JUDGE EASTERBROOK: Never.
8 MR. CANNON: Thank you. Just checking. And if I
9 could ask you one other question, to revert back to the
10 prior panel a little while ago, and we only get you once or
11 twice hopefully--I mean I hope we get you more, but we only
12 have you at least today.
13 In terms of your thoughts about the appropriate
14 multiplier for damages, do you have a thought on that, or
15 what would you say about Susman's idea that you would not
16 have an automatic trebling, but then you would have--give
17 the question to a jury to determine?
18 JUDGE EASTERBROOK: I think having this very
19 difficult economic issue decided by 12 high school dropouts
20 is not a good idea. There are large advantages to having
21 this done mechanically; three may be wrong. Five may be
22 wrong. Two may be wrong. But at least one understands it.
23 It is predictable. One can settle against that background.

1 Predictability is highly desirable. We want to live in a
2 world characterized by a rule of law, even if we aren't
3 confident that that law is correct, rather than a world
4 characterized by the whim of judges or jurors. So I am
5 strongly opposed to anything that turns rules of law into
6 the rule of whim.
7 MR. CANNON: Mr. Reasoner, would you have any
8 additional thoughts on this?
9 MR. REASONER: No. I don't know that call it
10 whim, but I--
11 MR. CANNON: I mean, I know that it's not good to
12 disagree with the judge ever, but I--
13 MR. REASONER: I think the variability you get
14 with either judges or juries in assessing punitive damages
15 on some undefined formula would not be desirable.
16 MR. CONSTANTINE: I'd like to take a shot at that,
17 Steve.
18 MR. CANNON: Oh, I knew you would.
19 MR. CONSTANTINE: I would.
20 MR. CANNON: Go right ahead.
21 MR. CONSTANTINE: You know, up until that last
22 comment by Judge Easterbrook, I guess my overall feeling was
23 that it's very hard to open your mouth after someone as

1 brilliant as Judge Easterbrook speaks, and plus he has the
2 voice to go with it, but I really disagree with the comment
3 about the 12 or six high school dropouts.
4 I, in my experience, on all sides of this, trust
5 both the wisdom and the integrity of a jury they are
6 properly instructed by a judge. And, all things being
7 equal, I would trust them more than virtually any judge,
8 including Judge Easterbrook.
9 CHAIRMAN GARZA: Okay. Commissioner Carlton.
10 MR. CARLTON: I have one question for the
11 panelists who support the no contribution rule, and it's
12 this: the benefit of the no contribution rule, which Judge
13 Easterbrook, Judge Posner, and Professor Landes show in
14 their article, is that it induces settlement, and I think
15 Judge Easterbrook described that as a competition to settle.
16 And if that's one of its advantages, I guess I
17 have one question that I'll direct to Judge Easterbrook, and
18 then I'd be interested in other people's reactions on the
19 panel, and that is this: if you altered the incentives by
20 allowing private contracting amongst the parties, that could
21 undo some of the incentive to settle, and it also could
22 delay the time to settlement; and, therefore, it would seem

1 to me you'd want to oppose it. Do you have a view on
2 timing? And I take it you would oppose private contracting.
3 JUDGE EASTERBROOK: No, actually I was asked that
4 question by Commissioner Litvak, and didn't raise my hand
5 when I was given that opportunity, although I said I was
6 worried about cartelization if the principals are involved.
7 The common law rule is one that has allowed
8 private contracting. You and I, from the home of Ronald
9 Coase, should be particularly distressed about any
10 prohibition of private contracting, if we can't be sure that
11 there are uncompensated third-party effects. It seems to me
12 that many of the costs of these private agreements are borne
13 by the participants in these agreements. So I lack a basis
14 of being confident that there are uncompensated third party
15 effects and generally favor, as long as the negotiation
16 costs are low, allowing private contracts. We can't get to
17 zero. That's the Coase theorem. But if they're low, and
18 these are reasonable--
19 MR. CARLTON: Even if the consequence allowing
20 those private contracts would diminish what you show in the
21 article, namely, the likelihood that the settlement--that
22 the settlement will exceed damages.

1 JUDGE EASTERBROOK: Yes. It will reduce this
2 ratcheting effect. That's clear. But it will also save
3 some of the cost of administration, and I'm--I don't think
4 one can be confident that there's a net loss.
5 In any event, I'm unwilling to be maneuvered into
6 a position of opposing private contracts, because there's no
7 telling what, you know, what pixies will pick on me for the
8 rest of my life if I'm ever quoted as saying that.
9 MR. CARLTON: I take it everyone else is in
10 agreement with that position? You would not outlaw it?
11 MR. HAUSFELD: Taking a practical view,
12 Commissioner, what will happen when you have an attempt at a
13 private agreement in a joint presentation by multiple
14 defendants at a single time? And then it becomes up to the
15 plaintiffs to determine whether or not the aggregate amount
16 is acceptable. If it's not, or if it is, it makes no
17 difference how that is allocated among the settling
18 defendants. If it's not, then the settling defendants have
19 to face the reality of whether or not they break their
20 agreement and then try to settle independently or gain--
21 increase the settlement offer or bring more defendants in.
22 MR. HIBNER: I would also say that whether a
23 settlement is early or late, it's not a linear path, and

1 there's a right or an optimal time for most settlements in
2 these cases, and the sharing agreement negotiations will
3 help them find its right level.
4 MR. REASONER: No, I agree with your observation,
5 Commissioner, that it does, I think, protract the time to
6 settlement because you've eliminated the competition.
7 I think my judgment would be it also probably
8 lowers the aggregate settlement amount that the defendants
9 will have to pay since they will not be competing with each
10 other. These things are difficult to--it's my experience--I
11 mean, you know, very few plaintiffs' lawyers really want to
12 try a case. And if defendants are not divided, and they
13 really are going to have to face a trial where the
14 defendants are not fighting with each other, and not trying
15 to blame each other, it's a different fish.
16 I think that, if there are more variables, then
17 all of the damages are artificially calculated. We don't
18 know what the real damages were. We don't know what the
19 odds are on any given--and if the defendants are unified, I
20 think it optimizes their chances. It's very difficult for
21 defendants to unify.
22 JUDGE EASTERBROOK: Precisely. That's one of the
23 reasons why I'm diffident. There's nothing about the

1 legality of settlement agreements that prevents the
2 plaintiffs from going and making, to one potential
3 defendant, a better offer and causing the agreement to
4 unravel. The competition still goes on. The defendants
5 will agree to do this only as long as it's in the benefit of
6 all of them.
7 MR. REASONER: No, but if it's a--
8 JUDGE EASTERBROOK: And the offers the plaintiff
9 is making are affecting whether it's in the benefit or not.
10 I think actually your prepared testimony says that; doesn't
11 it? It's very hard for these things--
12 MR. REASONER: Oh, no. Well, no, they are--well,
13 but if they're properly negotiated a defendant who breaks
14 the agreement doesn't have a free pass.
15 JUDGE EASTERBROOK: Right. He may not opt into
16 the agreement to start with.
17 MR. REASONER: Right. Yes, I agree. You know if
18 you really want to defend a case, you ought to enter into
19 it.
20 CHAIRMAN GARZA: Commissioner Kempf.
21 MR. KEMPF: Three quick comments and a little
22 historical context.

1 Mr. Constantine, you refer to a GSA report you
2 asked us to take a look at. Can you send that to the
3 Commission staff so they can circulate it so that we can
4 read it?
5 MR. CONSTANTINE: I was informed by one of the
6 Commissioners, helpfully, that what I was referring to, in
7 fact, was an analysis done by the GAO, which resulted in a
8 report by the House Judiciary Committee, and I will forward
9 that to the Commission.
10 MR. KEMPF: Okay. Good.
11 MR. CONSTANTINE: Thank you.
12 MR. KEMPF: On the sharing agreements, my
13 experience is they're extremely hard, especially when you
14 get more defendants to enter, and there is a brief that a
15 group of plaintiffs' lawyers have written a couple of times
16 that I don't think has ever been ruled on. It does suggest
17 that they are improper for two reasons. One, Judge
18 Easterbrook, referred to it, that it's itself a conspiracy;
19 and two, even if it isn't, it should be void as against
20 public policy.
21 And I don't think it's ever been ruled on in the
22 context of a really good brief, so I think that's an open
23 issue.

1 Mr. Hibner, I was looking at your testimony that
2 you attached from 1979, and you at that time said you'd only
3 been practicing antitrust law for 16 years, not 40. So you
4 could be very brief. The prior day, Commissioner Shenefield
5 and I testified at the same hearings. We had been
6 practicing law for only 14 years, having been law school
7 classmates, and we were neither so modest, nor very brief.
8 But I think that that experience grew out of a--for me
9 anyway, and for many of those involved--grew out of a very
10 prominent case that I assume Judge Easterbrook focused on
11 also, since I know that Hammond Chaffetz was one of those
12 who read your piece before publication, and that was MDL
13 310, the *Corrugated Container* cases.
14 JUDGE EASTERBROOK: I was actually a consultant
15 with Kirkland & Ellis in that case. Yes, I'm aware of it.
16 MR. KEMPF: And the reason I raise that one in
17 particular it's something that Mr. Hausfeld mentioned, and
18 it says why should we care about fairness among felons. And
19 in that case, which was settled for over $300 million, which
20 would be, you know, $3 billion or more today, there was a
21 trial. And those who went to trial, including multiple
22 defendants, were found not to be felons. In the--there was
23 some split in the treble damages cases, and Commissioner

1 Litvak represented Container Corporation is my recollection,
2 and they went to trial and were found not to be civilly
3 liable.
4 A couple of other defendants went to trial--or
5 actually Mead did--and were found liable. But there was a
6 decided number of cases that went to a verdict and the
7 majority of them were found to not be felons, nor were they
8 found to be civilly liable. So the issue arose not in the
9 context of, "What do we care about fairness among felons?"
10 but what do we care about is fairness among alleged felons
11 who may turn out not to be felons at all, and in that case--
12 MR. HIBNER: Or even those who were not indicted
13 in those cases.
14 MR. KEMPF: Yes.
15 MR. HIBNER: And there were a lot of those.
16 MR. KEMPF: Yeah. And the way it came about--the
17 solution that we testified, at least three of us in the room
18 back in 1979, was not contribution; it was claim reduction
19 only. It was a bill, an amendment, advanced by Senator Bayh
20 of Indiana--
21 MR. HIBNER: S.390, as I recall.
22 MR. KEMPF: And--
23 MR. HIBNER: S.395?

1 MR. KEMPF: Boy, your memory is better than mine.
2 In any event, it had to do with the cases, the *Corrugated*
3 case was a perfect example of them, where there were lots of
4 defendants. They all had low shares. It was a product that
5 had very thin margins, and a large volume of sales so that
6 the potential exposure was astronomical, and even if you
7 were shown not to be a felon and some of your colleagues had
8 been acquitted, it was the quintessential bet-the-company
9 case. And that led to a desire, and it was--you could not
10 have negotiated a sharing agreement, and it was the
11 stampede, which Judge Easterbrook describes, to be settlers.
12 I was in that stampede, representing three of the
13 defendants.
14 But that led to the petitioning of what became the
15 Bayh proposal, not for contribution, but for claim
16 reduction. And the other thing that triggered that was the
17 *Radcliffe* case, which had said, hey, we aren't going to
18 decide this. This is--may be right or wrong, but it's for
19 Congress, not for us. And what had happened is the
20 *Corrugated*--it's the old saying, bad cases make bad law. In
21 the *Corrugated* cases we had filed for claim reduction and
22 knew it had to be resolved by the Supreme Court. It got to
23 the Fifth Circuit. I was one of those who argued it in the

1 Fifth Circuit, and then we went to the Supreme Court, and
2 what happened was, while we were in the Supreme Court, which
3 became very intrigued with the case, they needed to settle.
4 JUDGE EASTERBROOK: *Cert.* granted.
5 MR. KEMPF: *Cert.* granted.
6 JUDGE EASTERBROOK: And then--
7 MR. KEMPF: *Cert.* granted and then Mead settled.
8 And when they pulled the plug on it, a case from--I remember
9 Monroe Freedman from Louisiana argued it. The *Radcliffe*
10 case came up. It raised the same issue, and it was a--the
11 *Corrugated* case was a very compelling facts, so was the
12 *Radcliffe* case, but they were compelling in the opposite
13 direction. I remember going down to the argument, and I
14 worked with him ahead of time, and afterwards, he said, "How
15 do you think it's going to go?" I said, "It's unanimous
16 against you." This was in the hallway right outside the
17 Court afterwards. But in my own mind, I draw this sharp
18 distinction between the administrative nightmare that comes
19 about with contribution, and I don't see the same nightmare
20 affiliated with claim reduction. I'd ask, in particular
21 you, Judge Easterbrook, to comment on that.
22 JUDGE EASTERBROOK: Yeah. Well, as I've said, it
23 seems to me the nightmare lies in the contribution. The

1 claim reduction could be administered more cheaply, how
2 cheaply depends on whether one can find a very satisfactory
3 and easily administered ground. If, for example,
4 Commissioner Warden's proposal for doing it by sales were
5 adopted, that could be done fairly cheaply. If you've got a
6 cartel case where the claim is, for example, that defendant
7 A did not build a plant, that the cartel reduced its output
8 by curtailing their capacity, which has been the nature of
9 the claim in many a cartel case, mainly to make it stable,
10 then allocating by sales is much harder. Now, of course,
11 you could do it as a completely arbitrary way just to get it
12 done. But it can become hard. But I think that since there
13 are no pass over payments, and there is no rent seeking,
14 it's got to be much easier to administer than any
15 contribution system.
16 CHAIRMAN GARZA: Gentlemen, thank you very much,
17 our panelists for participating and for your thoughtful
18 testimony and your statements. Mr. Constantine, if you'd
19 like to send us anything else for our consideration, please,
20 as with everyone, feel free to do so.
21 [Whereupon, at 5:05 p.m., the hearing was
22 adjourned.] - - -