UNITED STATES FEDERAL TRADE COMMISSION

and

UNITED STATES DEPARTMENT OF JUSTICE

SHERMAN ACT SECTION 2 JOINT HEARING

UNDERSTANDING SINGLE-FIRM BEHAVIOR

SECTION 2 POLICY ISSUES

TUESDAY, MAY 1, 2007

HELD AT:

UNITED STATES FEDERAL TRADE COMMISSION

CONFERENCE CENTER

601 NEW JERSEY AVENUE, N.W.

WASHINGTON, D.C.

1:00 P.M. TO 5:00 P.M.

Reported and transcribed by:

Susanne Bergling, RMR-CLR

MODERATORS:

William Blumenthal
General Counsel
Federal Trade Commission
and
Dennis W. Carlton
Deputy Assistant Attorney General for Economic Analysis
Department of Justice

PANELISTS:

William J. Baer
Jonathan B. Baker
Stephen Calkins
Einer R. Elhauge
Jonathan M. Jacobson
William J. Kolasky
Thomas G. Krattenmaker
Janet L. McDavid
Robert D. Willig

C O N T E N T S

P R O C E E D I N G S

- - - - -

MR. BLUMENTHAL: Well, good afternoon, everybody. I am Bill Blumenthal from the FTC staff, and I am one of the moderators for our program this afternoon.

This is the first of two sessions we are going to be conducting to wrap up the series of hearings that I think, as all of you know, DOJ and the FTC have been conducting jointly for the past year or so into issues posed by Section 2, and more generally, dominance and monopolization and single-firm conduct.

I had the honor to moderate the first of the hearings that we had. That was the kick-off on June 20th of 2006, where the speakers were FTC Chairman Debbie Majoras, AAG for Antitrust Tom Barnett, Dennis Carlton when he was still a professor in the private sector, and Herb Hovenkamp, and basically today and next week we are coming full circle.

Dennis, now in the Antitrust Division, will be joining us as co-moderator a little later this afternoon, and Tom and Debbie will be co-moderating the final, final hearing a week from today, Tuesday, May 8th, from 9:00 a.m. until 1:00 p.m., and at that point we will turn our attention to next steps.

I want to thank the FTC and DOJ staffs for organizing this session. Today's hearing is going to be different from the way we have done all of the hearings up until now in this series. All of the ones to date have been basically set presentations with a little bit of Q&A at the end, and instead, today's entire session is unscripted.

Dennis and I will be posing questions and asking the panel to respond and to discuss, and we are honored to have with us a truly all-star group. Both today and next week, we have truly all-star panels of practitioners, consultants, and academics who I think are basically of the caliber that we need to be able to handle the extemporaneous back and forth that we are going to have.

Let me introduce all of them. They will be brief inductions. More detailed bios are available in the bio packet, copies of which are on the table as you enter the Conference Center, and I think probably all of these folks are known to you, but I will just go down for the record. Starting.

With Bill Baer, down at the end, a partner at Arnold & Porter and former Director of the Bureau of Competition at the FTC. Jon Baker, Professor at American University and a former Director of the FTC's

Bureau of Economics. Steve Calkins, former General Counsel and a Professor at Wayne State. Einer Elhauge, who is a Professor at Harvard Law School, and I might add, I see the prop right there. Hold it up. The author, co-author, of the just released Foundation Press Case book, the first, I believe, to deal with the topic of multi-jurisdictional competition law.

John Jacobson, a partner at the Wilson Sonsini firm and a member of the Antitrust Modernization Commission. Shifting over to this side, Bill Kolasky, a partner at WilmerHale and a former Deputy AAG in the Antitrust Division. Tom Krattenmaker, Of Counsel of the Wilson Sonsini firm, more recently; before that, a front office advisor at the FTC, and before that, a Professor with an illustrious career in academia. Jan McDavid, partner at Hogan & Hartson, and Bobby Willig, Professor of Economics and Public Policy at Princeton and, years ago, one of the Deputy AAGs in the Antitrust Division front office.

DR. WILLIG: Not like decades. You didn't say that about anybody else.

MR. BLUMENTHAL: We were all young.

Okay, before we start, some housekeeping matters. Actually, I have to check my own. Cell phones, BlackBerries, other electronic devices, please

turn them into vibrate or manner mode. While we are on cell phones, Steve Calkins has asked me to let you know that if he has to step out to take a call, it was because it was unavoidable. One of his classes is having its final exam right now in Michigan -- well, it starts in 25 minutes -- but in Michigan, and he is standing by for the sorts of emergencies that sometimes come up.

MR. CALKINS: So, if my phone rings, that is bad news, and it means I blew it and need to grab a file and run away and answer a stupid question.

DR. WILLIG: It means we are all posed a new question; namely, the one on your exam.

MR. CALKINS: Right.

MR. BLUMENTHAL: Speaking of emergencies, second, in case the building alarms go off, stay calm, follow instructions -- we do this at every one of these -- and if you must leave the building, you are supposed to exit from the New Jersey Avenue exit by the guard's desk out here. Please follow the stream of FTC staffers who are leaving the building to a gathering point and await further instruction and stay calm.

Third, restrooms, outside the double doors, across the lobby, just follow the signs.

Finally, we ask that you not make comments or

ask questions during the session, but we are going to take a break around 2:45 or 3:00, and if people want to slip questions to the moderators, we will, if they are reasonable questions, find a way to work those in.

Okay, with that, we will start the round table discussion, and the first question to the panel -- we can do this in reverse alphabetical order, we are going to start with Bobby Willig down at that end and work around -- but I want to start with the broad picture question, and I will ask it three different ways, and take whichever variation you want to use.

What do you regard as the one or two issues that the agencies most urgently need to address in the Section 2 report, or if you prefer to think of it a slightly different way, what are the one or two things we ought to be trying to achieve in the report, or what do you regard as the one or two biggest problems in Section 2 doctrine as it stands today?

If you don't want to do one or two, if you want to do three or four, that is okay, but let's just work around the horn with Bobby Willig, you first.

DR. WILLIG: Well, thank you, thank you. You connect your commentary on my age to the difficulty of the question to be posed, somebody -- with the number of years behind me -- of course, you have been at the front

the whole time, so...

I have read through these 15 pages, the extant agenda as of at least yesterday, called "Questions for Hearing." There are many sections of these questions. The first section is called "General Standards." There follows many, many other sections about particular areas of conduct. Each of the sections, in essence, as I read them, poses the same question, and it is the fundamental question that makes these very exciting times for those who like to think about Section 2, competition, and firm conduct, and that is, what should our attitude be as an enforcement community, as a competition policy community? What should our overall philosophy be in considering the everyday legal and counseling issues that arise under Section 2?

Is there a philosophy that should come out of academia that should generate particular standards for various contexts and various practices? Should there be one philosophy that actually itself applies in every context and to every set of practices? Or is it really hopeless and all we can do is blunder along in each separate context and make use of whatever experience we have, which differs from context to context, and use the accumulation of case law and footnotes and various economic articles and give up for another decade or so

some sort of overall, coherent view of philosophy in forming standards, in forming particular lines of useful evidence?

This to me is the big question of the day. It is an exciting question. It is really at its peak in terms of the span of time that I have spent in this profession right now, and around this horseshoe, and once again a few days from now, are the leading mouths, if not the leading minds, of the community, and if not us, who, and if not now, then when?

What makes this worthwhile from my point of view is that, look, if we spend four hours and actually make some progress on it all -- and there is enough of a chance of that in my mind to have motivated the train trip -- it will be an even more exciting time as we can move forward from that kind of progress. So, I would hope that we can do that. I would hope we set ourselves to that task as a group. If we make any progress at all in that respect, I would hope that the organizers and the authors of the subsequent report highlight that and say it as clearly as possible -- within the bounds of politeness in any event -- because such a move by such a group will actually help enormously in terms of framing where we go in the journals and even where we go in case decision-making over the next decade.

That would be my thoughts.

MR. BLUMENTHAL: We will talk about general standards.

Jan, same question.

MS. McDAVID: Well, first of all, I want to applaud the agencies for doing this. These hearings and the AMC hearings and report have really provided a wonderful opportunity to consider the questions that have been vexing many of us in antitrust law for a very long time, and I think it has provided a terrific forum. The AMC report -- congratulations Jonathan and to the staff and to the other commissioners -- it is a wonderful piece of scholarship and provides a lot of useful guidance, and I hope this report will do the same.

I would make two relatively simple pleas. The first would be practical advice. On a day-to-day basis, the issues governing Section 2 are applied by businesspeople, inside counsel, and outside counsel in a counseling setting, applying these standards to real life business questions as they arrive without the benefit of Dr. Willig and his colleagues and --

DR. WILLIG: I am always ready to serve.

MS. McDAVID: -- I know, but it is rarely practical here -- trying to determine whether there is

or is not a price above average variable cost, or whatever measure of cost one might be thinking to apply. So, try to provide some practical guidance that can actually be used to provide horseback advice, which is what most of us do on a day-to-day basis. You can also do the deep thinking, but we need some guidance in that way.

I would eschew the request for the Holy Grail. The question as to whether there is a single standard that should be applicable to all conduct under Section 2 I think is probably an interesting intellectual exercise, but I would be very surprised if there is one. I do not think there is. Everything I have read recently leads me to think that it is very fact-specific, and that should not surprise us. Antitrust analysis is inherently very fact-specific and very dependent on the particular effects of the particular conduct at issue and the justifications for it, and so I would eschew the quest for the Holy Grail and a single standard.

MR. BLUMENTHAL: Tom Krattenmaker?

MR. KRATTENMAKER: Thanks, Bill.

I agree with Jan, I think the hearings and the AMC have been terrific contributions to antitrust jurisprudence, and everybody should be congratulated for

them. I have had the great good fortune in my life to spend a fair amount of time on the enforcement side and an even longer time on the academic side, and from the enforcement side, my recommendation to those of you writing the report, Bill, and your colleagues, is that you should follow the path of the article "Cheap Exclusion" in the 2005 Antitrust Law Journal, of which I am a very junior author. That article tries to explain, at least in terms of enforcement priorities, there is behavior out there that is relatively cheap to engage in and oftentimes, nevertheless, promises large and durable pockets of market power, and that is where enforcers ought to be looking, and I still believe that is the case.

From my academic studies of Section 2, the conclusion I draw or drew and still do is that when you have got a Section 2 case, you begin with remedies; you do not end with remedies. I think the landscape is littered with Section 2 cases, that when they were all over, there was a victory, but it was completely pyrrhic. Sort of the best metaphor I have is that we were given 15 pages of very, very good questions for this session, and the last page was about remedies. The next time you do this, make the first page about remedies. Before you start to talk about Alcoa, tell me

the remedy; before you start to talk about Aspen Ski, tell me the remedy; before you bring the Microsoft case, talk about what the remedy is. So, I would hope the report will focus on remedies a lot. That is substantively.

In terms of what I think the report might achieve -- and as Bill knows, I have also had the chance to be Mr. Inside on this, because I had something to do with setting up some of these hearings in a different life -- I would like to see the report call for contributions from outside what I call the fraternity. There are a whole bunch of people in here that belong to the antitrust fraternity. One of the things I learned is -- and maybe it is, again, because I had another life -- is that we actually do not know everything that is relevant to antitrust. I will give you two examples.

If you want to learn about immunities, you ought to go talk to somebody who does Constitutional law and public choice. You will be shocked if you think you know what Noerr Pennington is about if you go talk to somebody who only does First Amendment law. Find me a Noerr Pennington case that has the phrase "commercial speech doctrine" in it. Find me a Noerr case that says we are dealing here with a content-neutral statute that serves an important governmental interest and is

entirely unrelated to the suppression of free expression. These phrases are littered throughout First Amendment jurisprudence, and they have never been tied in, because somehow Noerr became captured by the antitrust people and not by the First Amendment people.

The second example, which I do not have as much familiarity with -- as you would probably guess, I used to be a First Amendment teacher -- is what about, as Jan referred to, people are confused to some extent. Section 2 law contains many vague admonitions and somewhat inconsistent admonitions. How does this affect business decision-making? I do not know the exact phrase, but there is something like behavioral psychologists, and they are out there in universities and they are in business schools, and you could ask people to come tell you about what difference it makes if you have trouble guessing exactly what the rule is.

I really do not know what the outcome is going to be, because it is not my field, but instead of having somebody in here all the time telling us, "Our clients cannot possibly live under that rule of law," or as I now tell people, "My clients cannot possibly live under this vague standard," we have got people out there who might actually be able to address those questions.

Finally, I hope that the first sentence of the

report will be, "The fundamental purpose of the antitrust enforcement program at the antitrust agencies is to prevent firms from acquiring and exercising market power to the detriment of consumers." If you write that as your first sentence -- it is the second sentence of the "Cheap Exclusion" article -- I think you will get everything else right. I think your first legal point should be as follows: "Predatory pricing is not the only paradigm."

Thank you.

MR. BLUMENTHAL: Bill Kolasky, what are the one or two or four things we ought to address?

MR. KOLASKY: First of all, I want to join Jan and Tom in complimenting the agencies in having these hearings. I think that it is very important and very useful, especially when the European Commission is going through a similar process on the other side of the Atlantic and has put out a very thoughtful discussion paper, which is I think both provocative and in some ways troubling, while still being reassuring in other ways.

I would say three things very quickly. First, I think it is very important that the report focus on what the analytical framework for applying Section 2 ought to be, and I prefer to think about it in terms of an

analytical framework rather than general standards. Because antitrust is highly fact-specific, I do not think you can have general standards. I think you need a sound analytical framework that you apply through our traditional common law means.

I actually think that has worked quite well in the Section 2 area but that we have in some ways lost sight of the analytical framework that Chief Justice White first conceived way back in Standard Oil and applied to Section 2 as well as to Section 1, and that is the rule of reason, and I think that that is the framework that we should go back to applying under Section 2.

Second, I think it is very important that we focus attention on what is happening on the other side of the Atlantic and that we continue to have a dialogue about how we should apply our antitrust and competition laws to unilateral conduct, and I think there are at least three areas that I would focus on there.

The first and most general is the extent to which antitrust authorities -- I hesitate to call them regulators -- should intervene in the operation of markets and substitute their judgment for the judgment of markets. When I say that the European Commission's discussion paper is troubling in some respects, it is

because, while the discussion is extremely sophisticated, it is very difficult to imagine how you would reach decisions, taking into account all of the factors that the discussion paper puts forward with respect to many types of unilateral conduct, and what that suggests, again, is, as with Section 1, we basically need a sound analytical framework and a set of presumptions that we then apply case by case.

Second, I think we need to pay close attention to the whole issue of compulsory access to intellectual property, because that is the area in which decision-making by one competition authority can have the greatest spillover effects on other economies.

Third, in that regard, I think we need to restore a greater role for the notion of international comity, the idea that one jurisdiction will defer to another jurisdiction which has more substantial and significant contacts with the conduct at issue.

Then third and finally, I think that it would be very useful, in whatever reports come out of this hearing, for the report to address particular types of unilateral conduct on which the law is now most confused, and the one that springs to mind immediately is the whole subject of bundled discounts.

I think it is a very difficult subject. It is

certainly not one on which I would pretend to have the answers, but I think the law, after LePage's, is extremely confused in that area, making it very difficult for us to counsel our clients.

MR. BLUMENTHAL: Jonathan?

MR. JACOBSON: Bill, thanks.

I agree largely with what all of the panelists have said so far, particularly Jan's comment on counseling and Bill's endorsement of it. I think counseling in the single-firm conduct area is extremely difficult. Clients want to obey the law. They want to be able to engage in activities that are not going to get them sued or investigated, and today, there are a couple of areas, in particular, where counseling is extremely difficult.

One of them certainly is bundling. I do think some clarity in bundling is desirable. I am fond of the AMC's proposed test for bundling, which I do not think is intended by anyone as sort of a final measure on it but is sort of an interim measure until something better comes along, and I am sure we will discuss that in more detail today.

The second area where counseling is extremely difficult is refusals to deal, and, in particular, how do you deal with a rival in the same market, the Aspen

context; how do you deal with a rival in an adjacent market, Otter Tail and numerous other cases, AT&T; what is the standard for refusals to deal with customers and suppliers that impact horizontal competition in the defendant's market? There is no accepted standard for these areas. The issue arises constantly, and businesses are in dire need of some guidance on how to conduct their affairs in these areas.

Then, just sort of going upwards to the larger issues, I do think it is critical that the report say something about the overall framework and the general standards, if any, for Section 2 jurisprudence. I think it is important that the agencies repudiate the no economic sense test as a general test applicable to all forms of conduct. I am sure we will talk about that later. No economic sense has its application in predatory pricing and in some refusals to deal, but it is not a general test, and I think a lot of time and attention is being spent on it when that time and attention would be better devoted to other areas.

If we can start with an overall framework, as Bill mentioned, with the rule of reason as articulated in 1911, I think that would be a good place to start.

MR. BLUMENTHAL: Einer?

DR. ELHAUGE: I think the number one issue

should be increasing clarity. I happened to last week be at a Federal Judicial Conference event, and four judges, when they were introduced to me and found out I was an antitrust professor, sua sponte, volunteered they had each had a recent antitrust case, and they had no idea what the antitrust law meant on their case. These were very smart people. They are doing the instructions. They do not even know what it means. So, it is not surprising that you have trouble counseling firms about what the antitrust law might mean.

I think in order to achieve greater clarity, we actually need some more analytical clarity in separating out three questions relevant to this single standard issue. One is, what should the ultimate metric of social desirability be? On that, I actually think we do need one single standard, because we need to know what we are trying to maximize.

The second question is, what set of rules and standards will, given the imprecision of rules and standards in application, best advance that ultimate metric of social desirability? And the two are not at all the same.

So, for example, for driving, I think the ultimate metric is, we want everybody to drive the socially optimal speed, taking into account the

advantages of speed and the safety risks. We do not say just maximize safety; otherwise, the speed limit would be zero, and our cars would stay in the garage all the time, right?

So, we have some policy speed limit, but having decided that the optimal rule -- that that is what we are trying to maximize, we do not make the law, oh, drive the speed that maximizes total driver welfare, because nobody would know what that meant on a case-by-case basis. Instead, we have rules, set particular speed limits for particular areas, so there is a set of rules, they are over and under-inclusive, but they are designed, given the imprecision of application, to best achieve overall results of optimality.

In some cases, we have a back-stop standard where if it is, in fact, icy -- you may or may not know this -- but you cannot drive the speed limit if it is very icy. Instead, there is a backup standard that says, you know, in bad conditions, then we fall back to a more general standard of driving safely.

So, I think for antitrust, I guess the analogy would be, we evolve that metric, and I would say consumer welfare, given our history, one might argue for total welfare.

Second, we need to have a set of rules that are designed to maximize that. Having a test that was, oh, just act in whatever way maximizes consumer welfare, will lead to no guidance and lots of error, but we could have specific rules for particular suites of antitrust, that is, a rule for predatory pricing, another rule for loyalty discounts, another for bundled discounts, et cetera, et cetera, and then have a backup standard for when none of those rules apply.

My nominee is my own article, which is whether or not you are advancing monopoly efficiency or succeeding by depriving rivals of efficiency, and I share the skepticism about the profit sacrifice test. But anyway, I think we need to relegate it to separate out those three things, because they are analytically three very separate questions: Ultimate metric, rules that advance that metric generally, and backup standards.

The second thing I think you need to emphasize in any report you write is to make sure that whatever rules we pick are clearly founded in economics. I would describe sort of the broad history of antitrust was we used to have silly, liberal rules based on formalisms. Economics critiqued those successfully, but it has led to a lot of open-ended standards, and there is a risk,

unless we have pretty clear rules that are based in some serious economics, we will instead have silly formalisms of another kind, and I think there is a lot of sort of silly conservative rule formalisms also based on autonomy notions that have nothing to do with economics that are out there now. So, I think you can be rule-like, but be a functionalist and not be a formalist.

MR. BLUMENTHAL: Steve?

MR. CALKINS: My colleague Baker tells me that you emailed me this question this morning, but I was traveling and did not get it. Previously, I had received the 15 pages of detailed questions, and I do not read 15 pages of questions, so instead, I spent my time reading transcripts of these hearings, and it is really a treat. I mean, it is a genuine feast of people's views, and let me just toss out four things that caught my eye as I was reading the transcripts, and, frankly, I am hoping I can go find somebody who will commission me to write a little article with what you can learn from these, because it is really fascinating. It is a real treasure trove of materials. I have four things to mention.

First, Ron Stern, General Electric: counseling in the world of Section 2, is very, very easy. The U.S.

has a massive safe harbor. You do not need to think about antitrust so long as your market share is not over 50 percent, and maybe it has to be beyond that, and it is very easy for him to figure that out, and it is just not a problem counseling in the world of Section 2, contrast dramatically the very, very different standards in other parts of the world, where agencies care about firms that have market shares that are somewhere below 50 percent. That is where you have interesting, difficult counseling questions. In the U.S., things are very clear, very easy. There are big safe harbors. He would like to see more, but in general, we do not have a big problem in the vast majority of cases.

Second, this was a terrific collection of distinguished economists, and one theme sang loud and clear throughout their testimony, and that is that we do not know very much. Again and again and again, people would say: we do not know this, we do not know that; it could be this, it could be that; it could be this way, could be that way; maybe it is going to lessen competition, maybe it won't; we have a lot of uncertainty, we are just beginning to learn this kind of thing. Of course, the interesting question then is: okay, if that is true, what do you do?

Some would say what you do is you bring no

lawsuits because you do not know enough, and so when in doubt, do not sue; and others would say, what you do is you create a bunch of rules of per se lawfulness because that is a way of making sure that lawsuits do not get brought; whereas others say, golly, if you do not know things, maybe you should hesitate before trying to lock in per se rules one way or the other when you do not know what the right answer is, and maybe you should hesitate before trying to solidify things exactly where they are today when we have so much uncertainty.

Third, if I could get a penny for every time there was mention of the word "Microsoft" or "Dentsply" or "American Airlines" or "LePage's," I could retire right now. My children's college tuition would be taken care of. That is what comes through this. Every time you come to another commentator, he or she says, "Well, since LePage's, we have had 50 different articles exploring these issues;" or "since Microsoft, we have begun to learn about tying law and dominant firms using tying law" -- and so on and so forth.

The thing that comes out is you stop and you say, my golly, put aside whether those were meritorious cases or whether they should have been brought or who should have won. Think how impoverished our antitrust law and economic learning would be had they not been

brought! I mean, the positive externalities of one interesting, important monopoly case are really extraordinary, and I hope that one thing that comes through this report is to remind the Department of Justice that, you know, if once every administration or two you bring a monopoly case -- maybe it will be a good case, maybe it won't -- but at least it will stimulate all sorts of learning and scholarship, which may advance the dialogue.

The last point was the very interesting lesson that came out of the monopoly power hearing where you had a number of people saying, golly, it is really hard to think about monopoly power, because let's go back and go back to the Department of Justice Guidelines, and how were we able to think about power issues there? We were able to think about power issues because we knew what our goal was. Our goal was to prevent a certain kind of merger, and having figured out our goal, we could then use that goal to think about the test that we would use for deciding whether the merger would result in an excessive increase in power.

The problem with Section 2 law is that we do not have that nice, bright, widely-agreed-to goal that is motivating what enforcers are doing, and because we do not, it makes the measuring -- the determining -- of

monopoly power much, much more difficult. So, I guess I would go back to Tom and say we need, in part, to have some lessons here about what we are about. Just in closing on that one, it seems to me critical to remind people that monopoly enforcement is not just about preventing the attaining of monopoly power; it is also about preventing the wrongful maintaining of monopoly power, and that is a message that ought to come through the report loud and clear.

Thanks.

MR. BLUMENTHAL: All right.

DR. BAKER: Well, thank you.

Let me begin by echoing many of my colleagues before in commending the agencies and the AMC and others who are doing similar work for systematically thinking about antitrust among the competition community. This is a great way of developing a basis for enforcement programs, for influencing how the courts think about things, and for giving Steve a treasure trove of testimony to work through.

As to the report, I would recommend beginning by re-affirming that monopolization is a legitimate area of antitrust enforcement, that firms can harm competition through acts that permit them to achieve or maintain monopoly, and that exclusion can be as harmful as

collusion. I imagine the report would likely go on and launch into some cautions, the sorts of things that many people also talk about, difficulties that arise in telling apart harmful conduct from procompetitive conduct; concerns about the motives of rivals when they complain about exclusion, and those are all legitimate, but I would start with a big endorsement of Section 2 and its importance.

I would also recommend that the report question an argument I sometimes hear, that when you consider false acquittals and false convictions, that that thinking should somehow suggest putting a thumb on the scales when analyzing monopolization in favor of defendants. The range of tests that are proposed I think of as the "thumb on the scales" tests -- profit sacrifice, no economic sense, disproportionate impact, things like that -- I think should be questioned and that the report should instead endorse a reasonableness approach, which I have heard some of my colleagues endorse also earlier on in the panel, either in an unstructured way, but potentially in the structured kind of way with shifting presumptions in the way that the Microsoft decision of the D.C. Circuit analyzed monopolization. I thought that was a sensible approach and would be an appropriate standard for the Commission

and the Justice Department to endorse.

Now, that does not mean you should stop there. I certainly understand the importance of counseling and practical guidance, not just for firms who want to stay within the antitrust laws, but also for Einer's judges who need to understand how to apply them in court, and it would certainly be appropriate for the agencies to propose various kinds of guide posts for implementing the general reasonableness standard in the form of presumptions, for example, in specific types of cases to get some of the benefits of bright line standards, either in settings where there is a reason to think harm is likely, or harm is not likely, or maybe there is no basis for intervention because there is no practical remedy. Those would all be good reasons to generate guide posts.

We can go into the details of this later on as we get into cases, but I think that is the general framework that I would suggest approaching in the report.

MR. BAER: Thanks, Bill. It is great to be considered a leading mouth, Bobby, and I thank you for that.

One of the great benefits of going last, of course, is that most of the things that you might want

to observe have already been articulated well by others, and so I will try and be very brief.

I do think a report out of these hearings ought to indicate the agencies' belief in the value of Section 2 enforcement. A number of people have talked about that. I think there ought to be a priority given to articulating, as best we can -- and we cannot in all areas -- what the standards are that ought to be applied. I think we need to appreciate not only the point that Jan and others made that guidance to clients, for those of us who are in private practice, are important, but that guidance to enforcers and to judges and to private plaintiff lawyers is of great value, too.

One of the most extraordinary benefits, I think, of the Merger Guidelines was the fact that it created common terminology, common ground, for enforcers and private parties to engage in understanding the key issues that needed to be addressed, and I think to the extent we can or this report can articulate comparable Section 2 standards, there is tremendous value to that.

Specifically, I do think the confusion over bundled discounts is an area where the business community, the courts, are crying out for guidance, and having this report begin to advance that dialogue is important, but it has to be accompanied, I think, with a

commitment to intervene and articulate the standard in courts in the hopes of expediting a refinement of what the law is on bundled discounts.

Finally, I agree with Tom's point that thinking about remedy, not as the throw-away issue but as a front-end issue, do not go in without knowing this has a foreign policy implications, too, without knowing where it is you want to come out or where you think you realistically can come out is a key consideration in terms of Section 2 enforcement.

MR. BLUMENTHAL: Well, thank you all. That is a lot to start, and as a moderator, it is almost the question of where do we go next.

You know, there are a number of themes that come out of the nine sets of comments. Let me start with this one. A number of people have spoken about the importance of re-affirming Section 2 as a basis for enforcement. Does anyone want to take the opposite side of that and stand up for the proposition that we ought to be expressing caution about excessive enforcement in the area?

If the answer is no, if that is the sense of the panel -- Steve?

MR. CALKINS: Bill, it is hard to say file fewer cases than the Justice Department is filing, because I

do not think the current Justice Department has filed a single case under Section 2. It is hard to say you want to cut back on that.

MR. BLUMENTHAL: Although I will say, in fairness, that Dennis is not here yet, so we do not have the Justice representative up here to defend himself, and I do not carry around a list of Justice Section 2 cases the way I do with FTC Section 2.

MR. JACOBSON: That is because there are not any, and Dennis would say, "I just got there."

MR. CALKINS: I mean, the question here is -- private enforcement is what a lot of this is all about. I mean, even some of the people who say, "Let's be cautious, let's cut back, let's have bright rules or bright line rules about why defendants should win," will concede that, in the end, what they are talking about is private litigation. Indeed, I think it was Dan Crane in his session who specifically said that he would like to have a different rule for a government case than he would for a private case.

So, when you are talking about enforcement, nobody could suggest that the Justice Department should file fewer suits. If people think there is too much litigation going on, they usually have in mind private enforcement, and, of course, that is controlled by the

private litigants.

MS. McDAVID: I would like to echo at least the implicit point Steve has made that there is a role for government enforcement in Section 2. That is something I have believed for a very long time. Let's remember that private cases often involve rivals who have axes to grind and may be fighting their battles in multiple fora, whereas the Antitrust Division and the Commission speak for the United States, and they speak for the consumers of the United States. So they do not bring those biases, and presumably can bring the kind of objectivity as to whether an appropriate case should or should not be brought that may be lacking in the private context. So, I think there is an important role for public enforcement of Section 2, in addition to having public advocacy with respect to Section 2.

MR. JACOBSON: Bill, if I could just endorse what Steve and Jan and John, in particular, said earlier, that we would be hard-pressed to say that there should be less Section 2 enforcement than there is today, and I think if one goes back through history and looks at the conduct that has had long-term deleterious impacts on consumers, we will focus on single-firm conduct a good deal more than we will focus on collusion.

Cartels are short-lived, there is cheating, they have no redeeming value, but the raw amount of harm that they inflict on consumers is a good deal less than the durable monopolies. One example that I go back to, and there are many others, but if you look at the motion picture patents case, you are looking at largely single-firm conduct based on the tying of the motion picture projector patent that messed up the motion picture industry for almost a century. I mean, it is still messed up today as a result the cartelization that was formed as a result of the tying arrangements associated with the Edison patent, and there are numerous examples, maybe not as dramatic as that, but the harm inflicted on the economy by unlawful monopolization is very, very severe and much longer-lasting than cartels.

MR. BLUMENTHAL: We are going to come back to that, but, Tom, you had --

MR. KRATTENMAKER: Well, yes, I will just congratulate Steve for having signed onto the Baer-Krattenmaker Doctrine, and the same kind of thought, if you think about remedies, that might shape a case you would bring, and also, at least -- forgive me if it is heresy, but if you think about a case and you say here is a Section 2 case, what is the end result

going to be, somebody is going to pay treble damages to somebody else, and there is going to be no other change in the world, I have to wonder whether that is something that is a good use of social resources.

So, whether you have the basis in this record for that kind of thing, I just do not know, Bill, but I do think that -- I think we have all seen -- and I do not know how many times I have wanted to ask somebody, you are proposing this standard, are you proposing this standard for the definition of monopoly, of a legal monopoly, or are you proposing this standard for the definition of illegal monopoly in a treble damages private action case? It is remarkable how often the explicit or implicit answer is it is only the latter that I have in mind.

I do not know that it is the burden of these hearings, but I do not know that it is right that the law of monopolization ought to be driven by the rules of standing to bring private treble damage actions, and I am glad Steve put that -- let me say, that issue, I think, should be on the table. I won't say I am glad Steve put it on the table. Maybe he does not find it that way, so I will take responsibility for it.

DR. WILLIG: But to go back to your question, Mr. Chair, do we see too many or too few cases and what

are the dangers, how do they balance going forward, to me this comes back to the standards question, to the question of what are the standards that the enforcement decision has in our collective minds and stomachs about bringing public cases, and how do courts react, and what are the footnotes in the latest Supreme Court case? These are all extremely important, as we all know, for the flow of cases and for the flow of counseling instructions that shape business based on liabilities and expected trouble in litigation.

All of this, at the end of the day, really does stem in ways that we can all appreciate from what is the general view, if there is a consensus, of what are the right standards to guide business conduct in specific areas unilaterally. I would like to put in my voice, once again, to say everything everyone has said is great, but, at the end of the day, we have got to get our standards straight, understand what the philosophy is, where we are coming from, and then what are the horseback implications, Jan, but you have got to start from a framework that makes sense, and, yes, makes sense economically as well as legally.

DR. ELHAUGE: I was going to say, I agreed very much with the comments that Tom made, and I wanted to relate it to the issue of EC convergence, because often

we say the EC has broader standards, but since there is very little private litigation, and thus, less of an over-deterrence problem, because almost every case is brought by a disinterested regulator who, in theory, has no interest in bringing it if he thinks it is desirable conduct, it actually makes sense for the EC to have broader standard than the U.S. has for the same sort of statute that is also enforceable with private actions.

That same kind of logic may suggest that the standards that the Government applies to enforcement action should be broader than the standards we apply in private litigation. A little harder to do for the Department of Justice, because it is the same statute; a little easier to do with the FTC Act, as they could limit these broader rules of FTC Act Section 5, which is not enforceable by the private parties.

MR. BLUMENTHAL: Although I suppose one could ask whether the absence of private cases ought to go to broader standards or simply a more active set of enforcement activities by the Government. In other words, it may be that we have the same set of standards but not necessarily the same bundle of government activity.

DR. ELHAUGE: Right, but I think different standards are optimal, though. I do think, though, if,

for example, you have some remedy -- if at the end you decide there is no equitable remedy, you might decide the only thing we can do is deter this conduct with treble damages, and so the Government may say this is very important, we just do not have treble damages in our arsenal of remedies, and that is why we leave it to private litigation.

MR. BLUMENTHAL: Let's chase down that line for a second. Does anyone have any views on whether we ought to be looking at a different set of standards for government enforcement versus private damage cases?

MR. JACOBSON: Well, I will take the contrary position. I believe one of the most important reasons for private enforcement law is government inactivity, and I think it is essential -- and I have said this publicly very recently in connection with the AMC -- it is important to have a robust private enforcement mechanism to make up for periods, as we are living through today, of under-enforcement by the Federal Government.

Why is this not a problem in my judgment? It is because, at the end of the day, there is no remedy other than what the courts grant, and there is no self-enforcing private enforcement mechanism. You have to get a court, sometimes a jury, usually the district

judge as well, finding the facts, and you have to get it through a court of appeals, and if you get through those hurdles and to get some relief, the private firm is going to have to have a very meritorious case, and if the private firm has a meritorious case and has been found to have standing and antitrust injury under the case law that has developed, I do not see why the substantive standard should be different than when the Federal Government sues.

I do think Section 5 has a role to play in terms of experimentation by the FTC that is broader than Section 2, but fundamentally, I think private enforcement is a good thing, and we should not be embarrassed about it.

DR. BAKER: I have a comment on the number of cases, private and government. I did a little research this morning, but it was not, you know, what you would like to do in going through the dockets in all the courts and actually count cases, but in terms of -- it might be useful to lay this out a little bit.

The Government, since about 1977, has basically brought about one monopolization case a year, and during the past -- during the current administration, they have essentially been all at the FTC. The FTC is bringing cases at the rate that has been common for the

Government since then. In the sixties and early seventies, it was about three times a year.

Now, in private monopolization cases, what I learned was I went back and read -- looked at Steve Salop and Larry White's work on the Georgetown Treble Damages Study. They were looking at 1973 to 1983, and monopoly or monopolization was a primary allegation, they say, in only 3.7 percent of private antitrust complaints. That is what I found. It was a secondary allegation in another almost 9 percent, but a primary allegation in less than 4 percent of the cases.

Now, I also happened to notice that predatory pricing was a primary allegation in about 3 percent of the cases, and you did not have to bring a predatory pricing case as a monopolization case, but it is possible that most -- and I just do not know this -- that most of those cases were predatory pricing. This study was done before Matsushita and before Brooke Group, and so the predatory pricing cases have become much more difficult to bring.

In addition, the antitrust injury requirements operate particularly on monopolization cases in private litigation, because they are often brought by competitors who then have to prove their antitrust injury. So, my suspicion, based on this limited

analysis, is that there is not a plague of bad monopolization cases going on right now and that one could overstate the concern with what would happen if private litigation were somehow -- or what does happen in private litigation, and, therefore, overstate a need to have a different standard for private litigation than for the Government.

MR. CALKINS: Well, I have to object. Although I love doing research, and I love having other people do research even better than doing it myself, the problem with looking at the Georgetown study to figure out how many private monopoly cases exist is that you have to remember that back in '73 to '83, there was a viable Section 1 private jurisprudence, and if you were a private party, you could bring a Section 1 case involving something other than cartels and expect to win.

Gradually, over time, we have learned that under Section 1, the defendants always win -- that is an overstatement -- unless it is a cartel; just you rattle through it: you know, it is very, very hard to win an exclusive dealing case (Section 1), or a tying case (Section 1), or any kind of Section 1 case. And what has happened? The answer is that innovative private plaintiffs' lawyers are not stupid. They have learned

that if you want to survive summary judgment or a motion to dismiss, the thing to do is to not bring a case unless you either can allege some kind of thing that is like a cartel or something that you can say with a straight face is a Section 2 case.

So, what might have been a Section 1 case back during the Georgetown study era might very well, today, be a Section 2 case. It might not. I am not saying there are lots of private Section 2 cases. I am just saying that you have to be careful before drawing a conclusion from how many there were to how many there are today.

DR. BAKER: Fair enough, but you still have to prove monopoly power under Section 2, which you do not have to prove in Section 1.

MR. CALKINS: Well, and on that one, I am going to flip back to your should we use Section 5 kind of thing and might ever there be an appropriate situation where the Federal Trade Commission maybe should prevail in a Section 5 case, whereas it might be hard for a private party to prevail in a private treble damages case. I cannot say that I am ready to sit down and write a different legal standard, right, but in most of these cases, it is really about a story. It is not usually a single act. It is usually a story of what the

defendant has done that has allegedly lessened competition.

As a practical matter, a whole lot of these cases are won by defendants getting summary judgment for failure to show sufficiently high market share. Might there sometime be a situation where, we might decide that the Government, in a Section 5 case, should be able to intervene and prevent some pernicious activity even if, you know, maybe there is more of a debate about market power or maybe the market share is only 60 percent and not the 70 percent maybe that circuits seems to require in a private case?

Well, I would certainly want at least to leave that question open and think about it -- not as a matter of a different standard, as such, but maybe as applied. There may well be a time when there is a role for Section 5 here.

DR. ELHAUGE: In my earlier comment, I was not trying to suggest that private litigation, we need to clamp down on it more now. Instead, I was making a quite different point, that current Section 2 law, it seems to me, is already constrained by the fear of over-deterrence because of private litigation, and if we decouple the standards, then the Government could be freer to choose broader standards, because it may be the

case that the open-ended contextual standard, when applied by a disinterested regulator, makes sense, but if I were working for the Department of Justice, I would hesitate to establish that as the law through a case when I know every private party will be able to operate under the same standard. If you decouple them, then you may find, instead, a different standard would instead make sense.

DR. WILLIG: Does this go back to the questions of remedies that some of the panelists have put in the forefront? When I saw the remedy page of the 15, I just scribbled notes that said it is the last page, it is a throw-away, because we all know -- but I really do not know, this is a question for the practitioners -- but I would suggest that we all know that the real force behind counseling and behind your clients paying attention to your counseling is not the fear of remedies imposed by the Government or even by a private court, but instead, the massive treble damages in all the follow-on cases. Isn't that the real force that leads up to deterrence if we had clear and sensible standards? And if that's right, maybe we can leave the remedies page at the back of the stack instead of at the front.

MR. BLUMENTHAL: Does anyone have any comments on that?

MR. JACOBSON: I think that is absolutely right.

DR. WILLIG: No further questions.

MR. BLUMENTHAL: I want to come back to the standards question in a minute, but first, let me do a little bit more just to make sure we are all grounded on the too much or too little dimension.

A couple of people have expressed the view that exclusion is as big a problem as collusion. Somebody said it is a bigger problem than collusion can be. I know of at least a few speeches from the enforcement agencies in this decade that express a contrary view. So, I thought I would just, again, go around the horn and get a sense as to do people share that sense, that exclusion -- you know, not in theory, but as an empirical matter, as a practical matter, in terms of effects on the economy -- is likely to be as big a problem as collusion?

MR. KOLASKY: I will take a first stab at that since I have been fairly quiet.

I actually think that collusion is still a more serious problem than exclusion, and if you look at the kinds of multi-national cartels that we have seen over the last 10 to 20 years, oh, you know, starting with vitamins and lysene and continuing through air cargo and some of the other cartels that we have seen recently, it

is very clear that we still have very large-scale cartel activity going on, which is taking huge amounts of money away from consumers.

The whole area of exclusion, as we are going to be talking about when we start talking about the analytical framework, it is much more difficult, I think, to determine whether a firm has acquired and maintained a "dominant market position" through greater efficiency and aggressive competition as opposed to through exclusion.

So, you know, I think naked cartel behavior still should be the number one enforcement priority of our agencies, but I do think that the agencies have been paying too little attention to Section 2 and looking for exclusion cases, and when they do conduct investigations or bring the complaints, not prosecuting them as quickly and efficiently as they need to.

You know, I think one of the things which distinguish the Microsoft era, if you will, is if you look back at the Section 2 cases that the Justice Department brought during the late 1990s, the Microsoft case, the American Airlines case, the Dentsply case, all of those cases were tried relatively quickly, and we ended up with court of appeals decisions in a matter of just a few years. I think it is very important in terms

of the development of the law that we prosecute monopolization cases vigorously, not just often.

MR. BAER: Just to follow on Bill's point, and I agree with it, I mean, I do not know whether cartel misconduct creates more consumer injury than Section 2 misconduct, but I do know that detecting cartel conduct and being confident that you are dealing with a real problem that is producing consumer injury is easier than where we are today with Section 2, with evolving standards, and more uncertainty, and more of a risk that you actually will be penalizing successful single-firm conduct. So, it is just a harder question for me to answer than it is with regard to cartel.

MR. BLUMENTHAL: Tom?

MR. KRATTENMAKER: Bill Kolasky is certainly right I am sure about the harm from collusion, and the international stuff is really quite powerful. I do not think your question can be answered, Bill, and the reason for it is there just are incommensurate things here. When you say "exclusion," you probably do not mean, for example, the massive amount of exclusion that takes place because of government-controlled spectrum in communications industries; you do not mean the massive amount of consumer harm that is inflicted by entry requirements in the various professions or simple jobs

like being a barber or a beautician. So, we do not have a way of measuring these kinds of -- that is why I suggested, you know, a focus on them, and if you know anything about remedies, if you think about immunities, then you are thinking about exclusion.

So, I mean, it is a fair question to ask, but I think the right answer is, gee, you really cannot measure those things, because we have a sense of what we mean by collusion that harms consumer welfare, so the definition of collusion is that kind of cooperative activity among competitors that does not have some consumer welfare justification, but when we say exclusion, different people hear different things.

MR. BLUMENTHAL: And you are right, for purposes of my question, I was excluding all sorts of anticompetitive effects --

MR. KRATTENMAKER: No pun intended, you were excluding all the other --

MR. BLUMENTHAL: -- including government exclusionary conduct, also government collusion type mandated --

MR. KRATTENMAKER: And I am not sure that it makes any sense to weigh those two things.

DR. BAKER: I just want to add to the uncertainty rather than subtract from it. I am

wondering whether if we were thinking about harms to innovation rather than harms to price, whether we wouldn't be more concerned about exclusion. I am not sure, but we might. We have this general view, I think, that it is unlikely that firms collude in research.

DR. ELHAUGE: I think it likely dependent on the industry. In some industries, like cement, it seems collusion is clearly a bigger problem. Other industries where patents allow initial grants of monopoly power, you know, medical devices, drugs, new technology, they are more likely to have monopolists, because they do not need to collude with anybody, so they are more likely to engage in exclusionary conduct, and, of course, the whole thing is endogenous.

If you responded to the present-day sentiments, we are not going to enforce unless there is exclusion, then that is what you will see a lot more of. So, I am not sure that this question really helps you to frame a report.

MR. JACOBSON: Let me just clarify what I was saying. I am not saying that exclusion by a substantial, durable, economic monopoly is more prevalent than cartels. I do not think anyone has an empirical basis to say yes or no to that. What I am saying is that a given economic monopoly that is durable

and long-lasting can inflict as much or greater harm than a cartel.

Now, I would say that vitamins and lysene were particularly extraordinary cases in the audacity of the conduct and the degree of consumer harm they inflicted. I would compare that -- and I think Bill Baer can vouch for this -- you know, we are being told that, you know, DRAM was a massive cartel. I can tell you that DRAM has generated a lot of fines, but to compare it against vitamins, would be demonstrating a gross ignorance of the facts.

DR. WILLIG: If we are talking about enforcement priorities rather than what would be a lovely academic study to somehow trace out consumer harm from various categories -- that has never really been done and I can see why -- but clearly it is enforcement priorities that are most important in terms of what we might say that would be of use at this point, and I totally agree with those of us who have said that very, very hard enforcement against collusion is certainly socially appropriate, not only because you catch some huge miscreants occasionally and create some of the morasses that may or may not be socially appropriate, as in semiconductors, but to lay out a clear competitive code of conduct for the entire economy, and the best way to

do that is to have the big clear cases and criminal penalties and huge fines that we teach in our classrooms and just infuse the business sector with an understanding of what that code of conduct is, is of primary importance here and abroad, to be sure.

If only we had such clarity of purpose and of discernment in the exclusion area. What I would say in this same tone is that where we do find instances of clear exclusion, where it really does matter -- and I believe there are such instances in many different industries, I cannot tell you the prevalence, but one sees instances recurrently -- that if we had the right standards and could promulgate them and teach them by bringing the right cases and making a big show of them, the economy would be in better shape as a result.

It is a secondary priority compared to the competitive code of conduct, anticollusion, but a very important one nevertheless, and it falls to us to say this today and to say what the standards ought to be behind such red letter cases.

MR. BLUMENTHAL: The last of the scoping questions that I have based on the introductory remarks, I think it was Steve Calkins who attributed to one of the in-house practitioners the observation that dealing with Section 2 in the United States is quite easy and

that there are enough safe harbors that it is not a real problem, and I certainly know of one former practitioner who practiced about 25 years before entering government service who used to say to his clients that when it comes to Section 2, that is a success problem. You really do not need to worry about it. It is kind of a lightning strike, and every so often, every so often, a bolt will come out of the blue, but generally, just go ahead with the single-firm conduct of the type that you want, and we will deal with it later.

Other than in the bundled discount area, which I think a few people have cited, does anyone have concerns about over-deterrence from ambiguity in current Section 2 standards?

MR. JACOBSON: I think some of the refusal to deal area, because it lacks clarity, does cause a number of businesses to stop engaging in conduct that would be procompetitive or beneficial. I think refusals to deal are not as acute a problem as bundling, because you have LePages out there, which just says there is no standard at all, but I do think additional clarity is highly desirable.

MR. CALKINS: Bill, even on bundling -- just to make the GE point again -- bundling law is completely clear, transparent, and the defendant always wins so

long as you do not have a market share that is not comfortably well above 50 percent. So even though it would be nice if there were more clarity, let's not exaggerate the extent of the problem. This is a nonissue for the vast majority of American firms.

DR. ELHAUGE: I agree with that, actually, because you do not have to be a monopolist to have a Clayton Act Section 3 case or a Sherman Act Section 1 case with an agreement to abide by the bundling condition, so I do not see why that --

MR. CALKINS: I review every case that is handed down, and plaintiffs win almost no Clayton Act Section 3 cases. You know, plaintiffs are not out there winning bundling cases without alleging Section 2. Heck, they are rarely winning bundling cases as it is, and the reason LePage's is such a big deal is because nobody had ever won a case before -- that is an exaggeration -- but --

MR. JACOBSON: Well, Steve, in fairness, there are a lot of differentiated products where you do not know where the market definition fight is going to come out, and you have to be concerned in terms of day-to-day counseling, and you have products like pharmaceuticals, each of which, arguably, has a monopoly in its product line, and you have to be concerned about counseling

those companies as well. So, I would not say it is a zero.

MR. CALKINS: I am not going to say it is a zero, and I will concede there is ambiguity there, and clarity would certainly be a good thing -- but I just do not want to exaggerate the extent of the problem.

MR. BLUMENTHAL: If it is okay with the group, let's turn to general standards.

MR. JACOBSON: Oh, no.

MR. BLUMENTHAL: Well, you know, I couldn't help but notice that three or maybe four of you unilaterally took a swipe at no economic sense and profit sacrifice, and I guess my question is whether anyone is going to stand up for the opposite side and say, yeah, those are appropriate tests, at least for some purposes.

Jan?

MS. McDAVID: Well, as someone who does not think there is a single standard, I do think profit is a sacrifice appropriate test, but I do not think it is THE appropriate test. Based on the briefing in the Trinko case and the Trinko decision. I think is it is sufficient but not necessary in some circumstances. There are a range of other tests that may be more appropriate depending on the particular type of conduct and effect involved. So, I think the profit sacrifice

test is a very useful paradigm, and it really is what we are talking about in predatory pricing, and now, it turns out, also in predatory purchasing, but it is not the only test.

MR. BLUMENTHAL: Well, I know others have things to say, but let me just sort of step back to the logically prior question of single standard versus multiple standards that might track to, say, type of conduct. Where are all of you on that?

Bill?

MR. JACOBSON: Can I give a first crack at that? I think Bill Kolasky in his opening remarks hit it right on the head. You need an overall concept of what it is that your objective is, and --

MR. BLUMENTHAL: Several people said that.

MR. JACOBSON: -- you know, whether it be consumer welfare or total welfare or a rule of reason context -- mine would be consumer welfare in the rule of reason context -- I think you need to have, at the very apex, an idea of what your goal is.

It is when you get past that to the next level of analysis, is there a test, where I think -- I think the consensus today is that there cannot be a single test for all aspects of conduct, because, for example, to take predatory pricing, we want to single out that

behavior as being particularly hard for plaintiffs to attack, because it is price competition by definition. If we want to single it out for special treatment, that very concept precludes applying the same standard to other aspects of conduct that are not so uniformly beneficial to consumers.

MR. BLUMENTHAL: Bill?

MR. KOLASKY: Just to follow up on that, the reason I think that the rule of reason framework that derives from Chief Justice White's opinion in Standard Oil is the right framework is that it allows you to undertake what Justice Souter called in California Dental an inquiry meet for the case, and the point is that what you ought to look at first is the alleged anticompetitive harm, the alleged exclusionary conduct, and how serious is the anticompetitive effect.

The more serious the anticompetitive effect, the more closely you want to scrutinize the justifications that are proffered by the defendant for that conduct. So, if you have something in which the exclusionary effect is, at worst, mild, you are going to then give a great deal of deference to the judgment of even a monopolist to undertake the particular conduct in question, and you are not going to look that closely at whether there might have been less restrictive ways to

accomplish the same legitimate objectives.

On the other hand, if the exclusionary effect is very severe and serious, then you are going to subject it to a much closer, much more detailed scrutiny, and I cannot remember which one of the panelists on the other side noted the importance of looking beyond antitrust, but I think that is a very important point. When I was preparing for the hearings here last summer, I was working with a summer associate from Harvard who had just taken Constitutional law, and she was reminding me that under both the First Amendment and equal protection balancing test, the degree of scrutiny depends on the nature of the restriction, and it struck me, well, that is exactly right. That is how it should be and how it is under Section 1 rule of reason analysis, and why shouldn't it be the same under Section 2?

The other point is, you know, I think one of the things that we have really learned over the last 20 years is the importance of looking at the purposes and effects of the conduct as opposed to simply trying to label it, and that is particularly important here, I think, because some of the conduct that you talk about in Section 2 cases -- bundling, tying, exclusive dealing -- can also be a violation of Section 1, and it is by no means clear to me why the standards applied and

the analytical framework applied to that conduct should be different under Section 2 than it is under Section 1.

Under Section 1, using our common law approach over the last 100 years, we have evolved a set of presumptions, a set of virtual safe harbors, so that now the case law on exclusive dealing under Section 1 is pretty clear that if the percent of the market that is foreclosed is less than 40 percent, it is very unlikely that the plaintiff is going to be able to prevail, and, you know, why should the standard be any different under Section 2?

MR. BLUMENTHAL: Bill, when you speak in favor of the Standard Oil rule of reason test --

MR. KOLASKY: Yes.

MR. BLUMENTHAL: -- are you distinguishing that from the D.C. Circuit Microsoft standard?

MR. KOLASKY: Only slightly. You know, I think the D.C. Circuit rule of reason standard that they set forth in Microsoft or the framework they set forth is exactly the right one. It is a little bit confusing, because they talk about a four-part test, and I tend to think of the rule of reason as basically being a three-part test. The plaintiff initially has the burden of showing anticompetitive effect. If they succeed at that, the burden shifts to the defendant to proffer some

justifications for it. If the defendant does so, then the plaintiff gets another shot to show that there were other less restrictive ways to achieve that. Then, at the end of the day, the Court may have to balance.

But, in fact, when you look at the decisions, the courts never reach that final balancing stage, because they obviate the need for that by adjusting the degree of scrutiny that they engage in with respect to steps two and three, depending on how strong a showing the plaintiff makes in step one, an inquiry meet for the case, and I think that is the sound analytical approach.

MR. BLUMENTHAL: Leaving aside the relationship between Section 1 and Section 2, which I think raises some other issues that we will get into if we have time, just focusing on the application of the rule of reason to Section 2, if I hear you right, it sounds as if your view would be that that ought to be used as an overarching standard, where the variations by type of conduct would come in the application of the rule of reason, but the standard itself is the same.

MR. KOLASKY: That is right, and, in fact, I think that is implicit in the standard that the courts have articulated under Section 2 where they talk about whether or not the conduct is "unnecessarily exclusionary." How do you determine whether it is

unnecessarily exclusionary without basically going through that three-part rule of reason analysis?

MR. BLUMENTHAL: What do the other panelists think of that?

MR. JACOBSON: Well, I have spoken before, but I am going to be brief on this. I do not mean to interrupt.

I have a couple of articles out there on exclusive dealing that state exactly what Bill said, so let me agree with that. I do view that, though, as a test rather than an overall standard. I view consumer welfare as the standard and then rule of reason as the presumptive way of getting there, with some special rules like predatory pricing that would be outside of this same framework, but fundamentally, I think that articulation that Bill gave is dead on for the vast majority of cases.

MR. BLUMENTHAL: Let me just ask this: If I hear you right, a rule of reason test, calling it a test, would be something that could be applied regardless of whether consumer welfare or total welfare or something else was the standard, just that the detail of the application might vary?

MR. JACOBSON: Correct.

MR. BLUMENTHAL: Okay. Does anybody disagree

with all of that?

DR. WILLIG: Well, I disagree with this articulation of the rule of reason as being antithetical to or even separate from the idea of the no economic sense test or the test for sacrifice, and let me say the obvious and get your reactions to it.

In the articulations of the no economic sense test or the sacrifice test, the first legs of the test are whether there is anticompetitive effect, and, of course, in the history of Section 2 jurisprudence -- I am no scholar of this -- but I am told that in the bad old days, folks were not really careful about actually seeing first whether there was an anticompetitive effect, and, indeed, making sure, before proceeding to the tougher part of the analytics, that, indeed, there is a causal relationship shown between the challenged conduct and the alleged anticompetitive effect.

So, I think it is appropriate to break down that first stage -- and maybe that is conventional, maybe it is not, from the case law, you will tell me -- to break it down into is there competition at stake here in a relevant market, and then second of all, is that possible harm to competition or the maintenance of the absence of competition, does it flow causally from the challenged conduct? If we can all agree on that, that

is actually progress, I think, but that is the way I understand it.

Then, the way I see the schematic, if the answers to those questions are there may very well be room for concern here, competition is at stake, and it does flow from the conduct, the next question is, well, what is this conduct? Is this conduct really part of competition that is happening in these circumstances to be knocking out valuable and scarce competitors? That is one way to ask the question, is it a reasonable practice or is there a social rationale for it?

Another way to ask the question is whether competitors would be doing this absent the impact on competition, knocking rivals out, and is there economic sense to it? These are all different ways to say, at the end of the day, whether there is something inherently efficient about the practice in its context.

MR. BLUMENTHAL: Okay, let me make sure I understand what I think you are saying, but I am not sure. I mean, you live in a world of topology and Zajac geometry and things like that where doughnuts can get reshaped into coffee cups and the like.

DR. WILLIG: Right. It beats stare decisis and Latin stuff.

MR. BLUMENTHAL: Perhaps.

Is the proposition that if you just run the right transformation program, the rule of reason and the no economic sense test map into one and the same thing?

DR. WILLIG: Well, I think that is something for us to explore. That is not a position that I come into today holding, but it is worth pushing it to see where it breaks down, if it does. So, after seeing that there is anticompetitive effect of the conduct, the next step, we all agree, is examining the conduct to see whether there is a rationale for it in some sense, and now, where do we depart? It is the weighing step, I would imagine.

MR. CALKINS: Well, everybody (I suspect) would agree that the no economic sense question is a really good question to ask. I frankly think that Greg Werden -- sitting right there -- and his co-authors have greatly enriched the dialogue. They have provided a lot of help to counselors, because you can turn to a businessperson and ask why he or she is doing this and, you know, you have a question to think about -- does this make economic sense apart from injuring competition -- and it is a wonderfully important question that very often will answer the question as to how concerned are we about what is going on here.

I think the question is, is it, as Jan says, the

only question? Is it THE question? Is it always going to be the question? I suspect that the reluctance you are hearing around this table is that people may be reluctant to sign onto it as THE question, as such, but I am guessing that many of us -- certainly I think it is an important, interesting question in many cases. I think, frankly, it helps -- if you want to buy into a Microsoft balancing or call it a pre-Microsoft balancing, in the process of that balancing or that staggered series of questions, you would often be thinking about the no economic sense question as part of the analysis.

DR. ELHAUGE: I actually strongly disagree with this claim. I think the no economic sense test makes no economic sense. It seems to me it comes in two flavors. One is wrong, the other flavor is conclusory and obfuscatory. The wrong one is the one that actually makes no value judgments about where the profits come from. It just asks, is it profitable to exclude your rivals, without asking whether it is anticompetitive exclusion or not.

The trouble with that is there is all kinds of desirable conduct that excludes rivals and requires short-term profit sacrifice, like innovating to create patents. There is also all kinds of anticompetitive

exclusions that require no profit sacrificing, like a lot of bundled pricing in the short run. So, that version doesn't work I think is the problem.

The other version used to save it is to say, well, we only need to ask the question of whether excluding the profits that were gained through anticompetitive exclusion, would it be profitable, but that presupposes we know whether the exclusion was anticompetitive or not, and if we knew that, we would know how to resolve the whole case. So, I think it ends up begging the normative question about how to judge the conduct and burying what looks like a mathematical question about profit, and thus, obscures the question we have to ask, which is, is this conduct that excludes rivals actually anticompetitive or not?

MR. KOLASKY: Two quick points: One, I agree that focusing on profit sacrifice and whether the conduct makes economic sense is one of the questions that we ought to ask. From the standpoint of the counselor, it is a very useful question to ask your clients.

The two things that concern me about that test as opposed to the type of structured rule of reason framework that, you know, several of us have outlined, is first, at least the articles I have read do not

explicitly acknowledge that the degree of scrutiny needs to depend on the nature of the alleged exclusionary conduct and how anticompetitive it is in the sense of how likely to harm consumer welfare.

The second problem I have is that it focuses, in my mind, too much attention on whether the conduct makes sense from the standpoint of the alleged monopolist as opposed to what is its effect on the consumer, does it make sense from the consumer's perspective?

If you look back at the Aspen Ski case, one of the key things that jumps out at you in that case is that, assuming the facts are as the Court recited them, the conduct that Aspen was engaging in was degrading the quality of its product, making it less attractive for consumers, and costing it consumer good will, clearly not something that you would engage in unless you had some very strong reason for doing so.

Now, the record, at least as I read it, is silent on whether or not there was a short-term profit gain from the standpoint of the Aspen Ski Co. from engaging in that conduct. The revenues they may have gained by having skiers ski their three mountains instead of Highlands may well have exceeded the revenues they lost because fewer skiers came to the Aspen area if they could only ski three mountains instead of four.

The record is silent on that, but I do not think that is the important question.

To me, the important question is, you know, was this a monopolist, assuming he was a monopolist, who was degrading the quality of its product, and was the effect of that to exclude its only rival? If those are the facts, then that is a pretty strong monopolization case.

MR. BLUMENTHAL: Tom, you are wearing that bright yellow "Cheap Exclusion" button. Where are you on this issue?

MR. KRATTENMAKER: Which issue?

MR. BLUMENTHAL: Whether there is an easy transformation between a rule of reason standard and the no economic sense standard. I mean, the reason I point to you in looking at "Cheap Exclusion" is it seems to me that that is the easiest candidate to disprove the symmetry.

MR. KRATTENMAKER: I think it depends on the level of generality with which you are speaking. I liked Einer's speed limit stuff. If you are speaking at a level of generality of could you map a profit sacrifice test onto a general welfare standard, yes, you could, but you shouldn't, and the reason you shouldn't I thought was well said by Einer.

If you are saying that we should have a kind of

a Microsoft approach, a general approach, a multipart test for all kinds of monopoly cases, could you just map profit sacrifice onto that? No, I do not think so, because I think that you can map that onto predatory pricing, but I do not think you can map it onto what we have called a couple of times in here naked exclusion, or the extreme Steve Salop and I once called something, stark naked exclusion.

For the reasons that Bill Kolasky expressed, I do not think that kind of behavior gets subjected to a profit sacrifice test. So, if I understood your question, Bill, no, I do not think it could be mapped.

MR. JACOBSON: Bill, could I raise just a couple more things?

MR. BLUMENTHAL: Please.

MR. JACOBSON: First, if the no economic sense or profit sacrifice test is being applied by Greg Werden, Bobby Willig, and Doug Melamed, I think we will get the right result that almost everyone here will agree on most of the time, but the problem is that it is a very, very difficult test to administer. Its proponents say that it is an easier test to administer than the rule of reason. I couldn't disagree more with that. I think it is extremely difficult, and depending on the type of conduct, it is unintelligible.

I go back to the example I used, which is exclusive dealing. Exclusive dealing, in the traditional case, you have an exclusive deal with a dealer to get dealer focus, to have the dealer focus on your products, to distribute them more effectively, and not to be distracted by distributing other products as well. Well, that is a procompetitive effect, but why is it procompetitive? It is procompetitive precisely because you were excluding others from access to that dealer.

So, the test in that, you know, very recurring context is circular, and you can only apply it accurately if you go to Bobby Willig, Greg Werden, or Doug Melamed and, you know, that is a scarce resource, even collectively.

DR. WILLIG: Well, since the scarce resource is represented here, Greg?

No, let's talk about exclusive dealing. Hypothetically, you have got a manufacturer. The manufacturer is big in its own space. It would love to have some dealers really focused on its product line. It is costly to it to expand the domain of the dealers who are exclusive, because to sign up a big store and say, just handle my line, you are going to have to give that dealer a really good deal; otherwise, the dealer is

going to say, no way, I want five different brands, that is what my customers like. It is costly to buy exclusives. It is good to have some, but from the point of view of your ordinary bottom line, it is costly to have too many. Now, where is that line? Business people worry about this all the time, as you know, and they reach their own judgments.

Now, if I were a manufacturer and I was trying to monopolize my product space and I had some shot at doing that, I would very gladly overspend on a raft of exclusives to tie up the market, foreclose my product rival from the distribution she needs to get adequate scale economies, and I could monopolize the world this way, but you know what, I would be sacrificing profit by the no economic sense test or the sacrifice test, because I would be overspending on these relationships for a purpose -- a profitable purpose, but an anticompetitively profitable purpose -- namely, knocking my rival out of the product market, so its brand goes away, and it cannot come back tomorrow and bother me anymore.

MR. JACOBSON: But why should liability turn on whether you did the math right? Why shouldn't liability turn on whether the effects of the exclusion are outweighed by the procompetitive aspects of the

exclusive dealing?

DR. WILLIG: Well, the first step is to notice that you are monopolizing, and in the hypothetical, you are, otherwise, it is not an issue, but the next step is, is there something good about this kind of set of relationships and does it have to go this far? Under your version of rule of reason, I do not know who is going to sit back and make that judgment, but under the no economic sense test, the benchmark is what would a competitor do if the life's blood of one's competing brand name were not at stake, what would be a sensible business decision about the extent of exclusivity to purchase from your dealer?

MR. JACOBSON: No, it depends on how you do the math, how you calculate the cost, what variable costs you include, what nonvariable costs you include, how you expense the expenditure in terms of exclusivity. It reduces to math something that is one step removed from the analysis of whether there is an impact on competition or not, and that is the problem with the test.

DR. WILLIG: Well, I think it would be very interesting to actually apply that same sort of recognition of the practical difficulties to the stomach test of what is too much in the way of purchased

exclusivity for the sake of consumers, to weigh it against the impact on the product market. How do you do that weighing?

MR. BLUMENTHAL: I think a related question to the group as a whole, try this proposition: No economic sense is more administerable than a rule of reason test. Agree or disagree?

MR. KRATTENMAKER: To what kind of case? Like an above cost price cut that drives out rivals who are not quite as efficient?

MS. McDAVID: Across the board?

MR. KRATTENMAKER: Or an exclusive dealing case or a false advertising case?

MR. BLUMENTHAL: I offer it as an across-the-board statement --

MR. KRATTENMAKER: Nobody agrees to that. Nobody would treat the no economic sense test as an across-the-board statement. If you destroy your rivals by false advertising in a market where you were going to be advertising anyway, because nobody can survive without advertising, you just decide to put it "not" in the ad, nobody can argue that there is a profit sacrifice involved in there in any way other than perhaps John Jacobson's point, as applied by sensible people. Willig, Werden, and Melamed, they will figure

it out.

MR. BLUMENTHAL: That may be a perfectly good argument for why it is the wrong test, but just in terms of administerability.

MR. KRATTENMAKER: I have never heard anybody argue that you should apply a profit sacrifice test in an above cost price point.

MR. KOLASKY: Two quick points: One is that nobody's arguing I think that you should take any of these tests, whether it is the no economic sense test or the rule of reason, and apply it in a vacuum. You start out with the fact that we do have a hundred years of case law from which you can derive certain presumptions and even rules in some cases, and so you start with that framework, and you are using this rule of reason framework to decide the cases that are not decided by that set of presumptions and rules that have evolved over a hundred years of jurisprudence.

Second, in terms of balancing, the way I always think of it, and one of the questions I put to my clients, is you are not balancing in a vacuum either or thinking about, you know, two pans and which one weighs more. The question you are asking is, what is the likely net effect on output and on consumer welfare? Is this conduct that, net-net, is likely to increase

output, increase competition and increase output, or is it conduct that is likely to raise prices and restrict output? That is how you balance.

MR. JACOBSON: Ditto.

DR. ELHAUGE: I agree as well. I think it is much less administerable. In fact, I think you have to do the rule of reason output in order to do the profit sacrifice test correctly, because you have to figure out first whether the conduct was anticompetitive in order to apply it. The other problem I guess is it makes the case about the virtue of the defendant rather than about the effects of their conduct in a certain way, and that, it seems to me, is to obscure the utility of rule of reason.

Maybe the only place where I would differ, it seems to me the rule of reason is a good way to start to develop more precise rules. Its utility, as you do it a lot of times, it is the backup standard, but hopefully it will lead to more and more clear rules as we apply it.

DR. WILLIG: Let's talk for a minute about the over/under cost pricing, because I think that is a good example, and the way I like to look at that example is to say that, yeah, if we had all the information in the world, the firm did and counsel did and the agency and

the court did, it might make sense to say that there is above-cost predation, that there are price cuts above cost that might really be aimed at just knocking off competitors, and when those competitors are knocked off, it is not good for the market, it is not good for consumers, and protecting that sort of pricing would not be useful.

But we all agree as a community that the kind of information necessary to make that call is so impossible to imagine happening, and asking our assistant to make those case decisions based on five years of Ph.D. analysis of elasticities on which nobody will agree even after five years, that in view of the importance of the right to drop prices and in view of the importance of not getting every pricing case tied up in court inconclusively for a decade, it makes a lot of sense to make a rule of thumb, as Areeda Turner suggested, and for that carry forward as the horseback rule of the day in the area of predatory pricing.

I think it is conceivable that we develop such rules of thumb in other areas of conduct as well, stemming from consumer welfare, understanding that competitive practices are generally good ones, which is the no economic sense/sacrifice test, but driving toward rough and ready understanding of what we are going to

allow and where concerns will be raised in an everyday practical context.

DR. BAKER: I want to say a couple things about this. If the profit sacrifice or no economic sense test differs from the reasonableness analysis, it is doing so in order, as I said before, to put a thumb on the scales in favor of defendants. Now, maybe there are some areas where you worry very particularly about chilling legitimate conduct, and predatory pricing may be one, and there may be others, but it certainly does not make any sense to do that across the board.

That is, in effect, what the profit sacrifice or no economic sense tests do if they matter, and if they do not matter, then we do not need them, and they also have the disadvantage that Einer emphasized, that you take your eye off the ball. You are not focusing anymore on the harm to competition. You are focusing on -- he had a very nice word -- the defendant's virtue. I like that.

In any case, in terms of your administrability point, even the price-cost test that we are so used to -- and it is hard to think what else we would do in the predatory pricing area -- has tremendous problems with administrability. I mean, if you are going to use some fact to create a presumption, which is, in effect,

what we are doing with a price below cost, you want it to be something that is easy to observe and something that is related to the harm, and, again, cannot be easily manipulated, and at least on the first two categories, cost is not a very good -- price-cost is not a very good measure.

I mean, it can often be impractical to observe costs, particularly for multi-product firms, or when the key decisions involve things like capacity addition or expansion or entry. You know, this was the problem -- rather than incremental production, which is the problem in American Airlines, and it is not at all clear that that below-cost pricing itself is a good signal of anything.

I mean, whenever you have a case with a price that is below whatever the measure of cost is that we permit the case to go forward, the defense is going to have a good story about why the conduct is efficient, and a lot of those stories might well be good. There are all sorts of reasons that prices could appear to be below cost, and that could be okay, but, you know -- I mean, it could be accounting problems in how you are recording the investments and R&D and advertising, making costs look -- or depreciation, making costs look high, and it could be that the actual prices -- the

price is low relative to whatever the measure is because the firms are making all sorts of investments in market share or to induce people to try the product, replacement sales, after-market sales, or, or create scale economies or learning. There are all sorts of good reasons that firms might price below costs, and it still could be okay.

But by the same token, it could be above costs and still -- and that does not necessarily mean procompetitive, and Bobby just gave an example, I guess, or at least alluded to the fact that there are examples in the economics literature, and on top of that, there is the difficulty in administering this price-cost test. You know, you are arguing about defendant's cost accounting, not about exclusion and harm to competition.

So, I mean, I am not sure we have any practical alternative but to use the price-cost test in these cases, but I am very troubled by it on administrability grounds, and the same problems of administrability that come up here are going to come up in any kind of analog that generalizes the idea of below cost pricing to a broader profit sacrifice or no economic sense test.

DR. WILLIG: How does rule of reason solve those problems?

MR. JACOBSON: Because it looks at the net

effect on price and output, which is what the answer should be and the question should be from the outset. That is how it solves those problems. It goes directly to the point that you really care about. Why would you take a circuitous shortcut that is so difficult to administer that you will trip up on the way to get there, rather than just asking the question you really care about? That is why.

MR. KOLASKY: And also, the rule of reason test allows you to take into account in doing your analysis and applying the test the administerability issues and the remedy issues. You know, if you look back at some of the early articles by Don Turner in the fifties and sixties about the rule of reason, that was part of what he argued needed to be part of the application of the rule of reason.

MR. BLUMENTHAL: Let me ask a couple of questions about the application of the rule of reason in this context, and, you know, I do not know that the answer would be materially different from the answers you would give me in a Section 1 context, so it may be that your answer is, well, it is all the same as we are used to, but let me at least try to focus it here.

The first proposition, I take it that the bottom line, we are trying to balance procompetitive effect

against anticompetitive effect of a particular product, okay?

MR. JACOBSON: In the sense that Bill was talking about.

MR. CALKINS: I do not think that is it.

MR. BLUMENTHAL: Okay.

MR. CALKINS: Indeed, you go back to Bill Kolasky -- he says you do not balance until you get to the last step, and you never get to the last step, and so it is not really a balancing, five of these and four of those; rather, it is simply a sequence of questions like, the Joel Klein step-wise approach to the rule of reason and all these other different things. But it is not really a story about two scales to balance.

MR. BLUMENTHAL: I will adopt that. Whether we deal with it as a series of screens and steps or whether ultimately we get to the balance or not, what I really wanted to tee up was the question, how does one deal with uncertainty in measuring the effect?

Bill, in describing the application of the test, spoke repeatedly about the likelihood, and recognizing there is some significant uncertainty in what those likelihoods are going to be, how do you factor that in? Let me just say, I am raising that to tee up what is really the ultimate question I wanted to raise, which is

whether the assessment of those likelihoods, the sort of discounts you would apply, how you would think about false positives and false negatives, should that vary by the type of conduct we are dealing with, or is that something that itself can be applied to the general standard? How should we think about that?

MR. KRATTENMAKER: I will start and say, if I heard you right -- and it would be my fault if I didn't -- you said how do we assess or measure the effect --

MR. BLUMENTHAL: How do we deal with the uncertainty?

MR. KRATTENMAKER: With the uncertainty, excuse me, not the effect, and this is not the whole answer, but I think part of it is.

Unlike Steve Calkins, I have never tried to read all the cases, but from the ones I have read, what I would like to suggest is that one of the ways you try to deal with some of the uncertainty -- it goes back to Einer's thing about the judges all said this stuff just does not mean anything to me, and I am sorry, I do not know what your reaction was, Einer, but mine was, it is really not all that unclear.

So, I think you deal in part with the uncertainty by defining carefully what it is that you

are worried about. It is things like defining what you mean by a market and defining what you mean by things like market power and deciding whether you mean transitory or durable market power. In other words, the first way you deal with uncertainty, I think, is to try to decide what is it you are trying to be certain about, and it has been my observation from looking at cases or proposed cases that people might talk about here at the Commission or in private practice, that oftentimes there has not been a careful assessment of what we are talking about.

It is one thing to say consumer welfare. It is another thing to take it to another level to say let's be careful what we mean by consumer welfare, what are the elements of diminution to consumer welfare, and what do you need to know about to measure that. So, that is a partial response to your question. I think you deal with some of the level of uncertainty, and I think it has a practical application, you know, also in the sense that you might not find so many kind of screwy appearing cases if people had focused on things like is there a market here? Is there a market on which somebody could exercise market power? Is there some chance that this firm gained or is acquiring or is maintaining market power as a result of this conduct?

Is that responsive to your question, in part? I will settle for in part.

MR. CALKINS: Bill, you are saying let's go talk about competitive effect and -- and I think that the true answer is that it is often very hard. You look at Dentsply, right? Dentsply had exclusive dealing arrangements, and then you sit around and you ask, competitive effect? You say, well, these other firms did not do very well; and the defendant says, sure, because they were incompetent; and it is a very difficult process.

It is not like -- there will be times when a firm with monopoly power sees a rival coming along the path, adopts some practice that is specifically designed to exclude, and you can see how that works out. You can conclude that the practice does not have any legitimate justification, and you can feel pretty comfortable. But there can be lots of times where competitive effect is --

MR. KRATTENMAKER: That case will never be reported in any reporter, because it will not get anywhere. No, it is just a matter of probabilities, I mean, with anything in life.

MR. CALKINS: This is not easy.

MR. KRATTENMAKER: We do not --

DR. ELHAUGE: I guess on your question on whether with some things we would be more worried about false positives than others, I think the answer is yes, and it is conduct that is unavoidable, particularly every firm has price, the price it buys things at, the price it sells things at, and decides who to sell it to. So, those seem the three activities that we most worry about over-deterrence, because we are concerned that we are going to make prices -- cause people to elevate prices to avoid antitrust liability or deal with everybody no matter how inefficient it is to do so.

Conduct that is more avoidable, we have somewhat less concern about that. So, you do not have to condition your price on excluding rivals. You do not have to have agreements for exclusive dealing or tying agreements. So, it seems to me that more the conduct is, in fact, conduct that every firm does not have to engage in, the less we have concern, we worry about the false positives.

MR. BAER: I would also say that, you know, if you look at the false positive/false negative continuum, we would all probably agree that, you know, you are willing to tolerate some false negatives on competitor collaboration, because it is more often likely to be problematic, on balance. Most people would probably,

you know, be more worried about over-deterrence on horizontal mergers, but you might be willing to tolerate coming a little bit on the over-deterring side of the line, and so then you get into the Section 2 area.

Well, I mean, one area where I would be less willing to tolerate a lot of false positives is areas where the net result of the conduct is that prices are a lot lower, and you would want to be very, very careful before you adopted a rule that would deter a whole lot of that conduct. You would want to be able, whether you were doing a rule of reason balancing test or what, to make sure you had a fairly confident sense that the net effect of allowing that conduct to continue would dramatically change the market and lock it up for the dominant firm for the foreseeable future.

So, you know, for one, at least I would probably be less willing to accept over-deterrence there, because I think consumers more likely than not are going to benefit from the conduct.

MR. JACOBSON: Let me add, though, I think the problem is larger in the eyes of the enforcement community than it is in the real world. Number one, in litigation, defendants usually get summary judgment even in rule of reason cases. Either the plaintiff has not defined the market properly or the competitive effects

that they prove impacted only themselves rather than the market as a whole. The myth that if you are in a rule of reason case, it almost always goes to the jury, is a myth. So, I think in a litigation context, it is overblown.

It is more of a problem in the counseling context, but even in the counseling context, my experience is if the question you pose to the businessperson is, do you think this is going to raise prices in the marketplace, the businesspeople get that and can at least as often as not guide their businesses accordingly, and even when that is not true, I think you go back to what Brandeis said in the hearings on the Clayton Act before he was on the Bench, which is that if you want me to tell you how close can I get to the line without tipping over it, no, I cannot do that, but if you want me to tell you what I can do that is safe, yes, that I can do, and I think that is the case here.

MR. KOLASKY: Well, to follow up on that, I love the reference back to Brandeis, because we all should remember that Brandeis was one of the most vocal critics of the Standard Oil decision, because he thought the rule of reason did not provide efficient counsel or guidance to business, and the result was, of course, he lobbied for the Clayton Act, and I am not sure that any

of us think the Clayton Act did a particularly better job than the rule of reason has, but the more serious point is that, following up on John's comments and Bill's, competitor collaborations are increasingly and extremely common in today's economy where companies are very often not pure rivals but are also suppliers to one another, and I, at least, find that I have many more counseling questions involving competitor collaborations than I do single-firm conduct, and, you know, we have confidence that the courts are going to be able to apply the rule of reason in competitive collaboration cases, notwithstanding the kind of uncertainty, Bill, that you have referred to, which is every bit as present there as it is in single-firm conduct cases.

So, you know, why do we think they will do any worse job resolving the uncertainty in Section 2 cases, where they have the guidance of the Supreme Court from Trinko, that they have to take account of the potential chilling effect of false positives, than they do in Section 1 cases?

MS. McDAVID: Well, and Jonathan's statement suggests that the false positive risk is somewhat more ephemeral than is widely bandied about.

MR. BLUMENTHAL: Is that a shared view?

DR. ELHAUGE: Is what a shared view?

MR. BLUMENTHAL: That false positive risk is more ephemeral than is commonly put forward.

MR. JACOBSON: Yes.

MR. KRATTENMAKER: Yes.

MR. BLUMENTHAL: It looks to me like the group is a little bit tuckered out, and we probably ought to do a recharge. Why don't we --

MR. KRATTENMAKER: Does that mean you didn't like the answer?

DR. BAKER: A new panel for the next session.

MR. BLUMENTHAL: I do see the relief pitcher has arrived back there. Why don't we break for 10 or 12 minutes and come on back, and we will pick up on monopoly power or something like that.

(A brief recess was taken.)

MR. BLUMENTHAL: If I could ask everybody to take their seats, we are going to resume, and let me turn the floor over to the emcee for the rest of the afternoon, Dennis Carlton.

MR. CARLTON: Okay, it is a pleasure to be here and to be the moderator for such a distinguished panel. I came in at the tail end of the last session where I heard Bill say that everyone was tired and you should take a break, and then he also told me that we, out of the 15 pages of questions, we have gotten through two

pages, so --

MS. McDAVID: I thought we were still on page 1.

MR. CARLTON: -- so, I will do my --

DR. BAKER: With occasional peeks at the very end.

MR. CARLTON: I will do my best, and to make sure we get everybody's views, if we could sort of try and maybe have two or three people talk about each topic for a few minutes so we can cover a lot of topics, but what I will do so that nobody feels they missed an opportunity to say something that they really want to say, at the very end, probably around 4:30, what I am going to do is try and wrap up, and what I am going to do is ask each one of you to pose the question you wish either Bill or I had asked you, and then you can answer it for a few minutes, just so we get your views on probably what you think is the most important issue in these hearings.

So, let me start off with a question -- and I apologize, I do not know if we have asked you one of these questions -- but it is this, it is the following: In Section 2 cases, we have treble damages. We know from the economic theory of damages that multiplication is appropriate when you have difficulty detecting. Is it people's views that we should change the multiple in

Section 2 cases, at least some Section 2 cases, and, in particular, if, for example, there is an overt act that everybody can see, is it people's views that we should have only single damages?

So, anyone want to pick up on that? Yes.

DR. ELHAUGE: I do not think so. I think you are right, detection is sort of the main thing, but there is also adjudication costs or likelihood of adjudication, but in addition, there is the fact that we have treble damages, not necessarily treble the entire consumer harm, so usually the overcharge is treble that the defendant pays, not all of -- you do not get a measure of the foregone sales, and that is a big part of the loss. Prejudgment interest usually is not available, and given how long these cases last, that is a big factor.

I think Easterbrook once did some study showing that when you took this into account, it went from at least from treble to double, and you might get down to single, too, if you also take into account the fact that if you raise market prices, you may raise them for other people. So, we think of it as treble damages and tend to ally quickly that that means treble of the total harm created, and that is not necessarily the case.

MR. CARLTON: But to a large degree, it would

suggest a different multiple between covert and overt; whether it is one to three is a different question.

DR. ELHAUGE: Yes, I think that is right, but I think it is not just detection. It is detection times the odds of actually successful -- successfully adjudicate -- in some cases it may be very obvious to see, but nobody would bother to bring a case against it, because it is too hard to get a class action, say, and nobody else has standing, simple cases like that.

MR. CARLTON: Anyone else? Bobby?

DR. WILLIG: Yeah, I think we began to speak earlier about another role for treble and multiplying other than the difficulties of detection, and that is deterrence, deterrence of the act which has been found to be bad for the economy, and in the Section 2 context, where remedies are sometimes very difficult to think of in advance, and even if we can think of them, very hard to hold the liable firm to after the fact. We have examples of that phenomena all the time.

Deterrence is a better remedy for the entire context, treble, as well as other institutions, like the private case follow-ons, for example, and the follow-ons to the follow-ons, help to deter, and if we have good standards -- and we seem to disagree about what they are -- but if we had good standards, that would be a

good thing, to deter those practices about which liability would be found.

MS. McDAVID: Well, and I think Einer's point about the absence of prejudgment interest is also well taken. These cases, after all, tend to be the Jarndyce v. Jarndyce of the antitrust world, and as a consequence, if you would apply interest for the duration of the harm to the point of final judgment, who knows how they would come out.

MR. KRATTENMAKER: I am having a little trouble following the conversation, because I am assuming we are starting from the baseline that in almost all other areas of the law, we do not have treble damages.

MR. CARLTON: Well --

MR. KRATTENMAKER: I am trying to figure out what made it special.

DR. ELHAUGE: Well, we have punitive damages for a lot of torts. We have treble damages for RICO violations. So, there is a lot of -- I mean, sometimes there is a conscious effort to bring down the punitive damages to some multiple, but that is a standard deterrence mode.

MR. KRATTENMAKER: Well, I mean, I just -- if we are talking about ordinary tort, contract, property, landlord-tenant law, whatever, we do not start from the

proposition that you owe three times damages. Dennis started by saying that the literature would teach that this is an unusual thing to do, that would generally be tied to the -- something about the facts of the case, not the kind of law involved.

MR. CARLTON: Yes. If you focus on deterrence -- no, you are absolutely right. If you focus on deterrence, you know, taking what Einer said on lost consumer surplus --

MR. KRATTENMAKER: Right, I think antitrust is important, but why is it more important to deter violations of the antitrust laws than of the securities laws or the labor laws or the National Security Act? I am not sure I know.

MR. JACOBSON: Well, let me, first of all, incorporate by reference the AMC report on this in my current statement and --

MS. McDAVID: All 400 pages?

MR. JACOBSON: Yes.

MR. CALKINS: Including Dennis' footnote dissent?

MR. JACOBSON: No. So, Dennis knows my views on this, and I will just be very brief, which is that the treble damages are there for the principal reason of inducing private enforcement of the antitrust laws.

That is, in part, a deterrence factor, but it is, in part, getting private individuals, given that the Government has limited resources and in recent years limited inkling to enforce Section 2, to undertake the enormous effort of putting together an antitrust case at great risk in a world where standing rules, very appropriately, are designed to tightly cabin the number of private litigants that can proceed, in which, you know, summary judgment, there is a different standard in antitrust, and, again, I think it is a good thing, but I think to compensate from that, to have the law enforced, you absolutely have to have private enforcement, and you do not have private enforcement of antitrust without treble damages.

MS. McDAVID: I think the European experience right now, with the study that they are doing on private enforcement, takes you to that question. Private enforcement is hypothetically available in Europe, but given the absence of a whole series of mechanisms, one of which is the absence of treble damages or some multiplier, means that there just is not any private enforcement.

MR. CARLTON: Yes, although what is interesting about most of the responses is they are talking about the cost of bringing an antitrust action and also

talking about the incentive to bring one, which I think is completely appropriate, but what has always struck me as a bit odd is that the literature, the economic literature, although those points are certainly recognized, it is the detection probability that is most often used to justify a multiple. These other things are understood, and it does not mean you cannot build a model that includes them, but it does suggest that unless -- the costs of bringing the lawsuit is the hurdle rather than the gain or the harm the action creates.

You would think that there should be different multiples depending upon the detection probability, and whether it is one, one and a half, two, or overt and a different multiple for covert, I do not know, but it did strike me -- and John made reference to the AMC hearings -- it did strike me as odd that I was so much in the minority that these multiples should depend on the type of act.

MR. CALKINS: Once you start fine tuning it, though, you have to reduce the multiple when it is following onto a successful government prosecution, and then you have to reduce it by perhaps a different amount if there is a report in the newspaper that there is a government investigation -- and, you know, could we

construct a world wherein you did it differently and you took into account various interests, and would we have a different set of legal rules? Yes. Would it be better in some ways? Perhaps. It ain't going to happen.

MR. CARLTON: Yeah, I think it may not happen. I think it overstates the case to state it should be so finely graded. I mean, two multiples is better than one, and I would be happy with two. I do not need an infinite number, but --

DR. ELHAUGE: I was going to say, I think there is a distinction between detection of the conduct and detection of whether it has anticompetitive effects, because there is some conduct that cartels, in many you have to detect whether it occurs, and this may create a detection problem, but for monopolist conduct, it is often overt in the sense you mean, but the fact that you know the conduct occurred does not mean you know whether it is anticompetitive, and you may not know until you incur all the costs of discovery and --

MR. CARLTON: Yes, that is actually a good point. Now, Bobby raised something about remedies, so I guess one question is, what are your views on whether the Government should bring a Section 2 case unless, in advance, it can figure out what the remedy is? Should the Government have the right to fine people, which I

think it does not in a Section 2 case, or should it say, "I cannot figure out a remedy, so let them keep doing it"?

DR. WILLIG: That makes it real cheap for the follow-on cases, and that provides the deterrent in the first place. Once the law is clear, the public case can accomplish that.

MR. CARLTON: Right. So, private remedies following on a government case finding liability -- in which there is liability found, even if the Government cannot articulate a remedy.

DR. WILLIG: And then creating a good precedent and a clear precedent for subsequent behavior.

DR. ELHAUGE: Plus the Government might possibly be able to get disgorgement of profits as an equitable measure.

MS. McDAVID: But I think that as a practical matter, the agencies do try to think through the question of remedy in terms of determining whether to exercise the prosecutorial discretion and invest resources in this particular case, because perhaps there are better places to spend it if they cannot accomplish anything at the other end. Teeing up a private lawsuit is probably not on the list of agency priorities.

MR. CALKINS: Just to be a little contrary, I

cannot picture a good government enforcer saying that I think this is illegal, and I cannot think of any good thing to do about it, but I am going to sue and just hope to win and have the judge say, "You win, thanks very much, go away." I would assume that at the end of the day, the Government is going to ask for some remedy, and I would think that as a matter of good government, the Government ought to think in advance about what that remedy is, and if you cannot look in the mirror and say that if you win, the world will be a better place because of something that is going to happen in this lawsuit -- well, then, you probably should not be bringing that lawsuit.

MR. CARLTON: I guess the hard question that you raise is, let's suppose in the context of an individual case, whatever remedy you can conceive of would not make things better but would actually make things worse. On the other hand, it would set a precedent for deterrence, which was what Bobby was talking about earlier. Then it seems to me a more difficult question, and I suspect most people would be unlikely to impose a remedy that makes things worse in a particular case would be my hunch.

MR. BAER: Although they might end up with a remedy that, you know, that that is an effort to do

something, and really, at the end of the game, from the point of the view of the agency enforcement's objective, is to establish the precedent. If you look at what the FTC has just concluded in its Rambus standard-setting case, you know, they went through an elaborate focus on whether the conduct at the end of the day constituted illegal conduct under Section 2 and concluded it did, wrote a very strong, forceful opinion, and then found itself tied in total knots about what to do with regard to remedy.

They ended up allowing a limited royalty to be collected, but only on sales that occur from the date of the entry of the order, and 90-95 percent of the products have already been sold. So, Rambus really, at the end of the day, has gotten a slap on the wrist. It is going to be allowed on future sales to collect a very small royalty, but it is going to be able to go to court and collect all the back royalties it claims it is owed, which is billions of dollars, and, you know, you could -- that, to me, was a mistake. Obviously I was involved in the case and have some strong views on it, but at the same time, you could make the argument, which is I think your point, Dennis, is at the end of the day, in terms of a standard of conduct that will cause people to behave perhaps better in the course of

standard-setting organizations, there is a marker laid down there which may have some general deterrence, although if, in fact, at the end of the day, you would be allowed to keep your overcharges, maybe you do not think twice about it.

MR. JACOBSON: Dennis, I think if the only remedy you can think of would harm consumers, then there is something wrong with the liability case. So, I think if you are facing that scenario, I think you need to take another look at the liability case and see whether there is really a case to be brought.

MR. CARLTON: Well, it is a little tricky between a monopolization case when a monopoly has not been established and a person is being snuffed out. If you could have stopped it earlier, it would have helped consumers, but now you cannot. They are guilty of monopolization. What are you going to do? I mean, that was what I had in mind.

The benefit, I think, you know, the Rambus case is a good example where you are hopefully setting precedent to prevent future harms from occurring or you forgo a remedy in a particular case.

MR. JACOBSON: It would depend what the conduct was in that case, but normally -- my firm represents Rambus, so I will not comment on Bill's point on that

case -- but normally you would think about, you know, royalties in cases of intellectual property-related violation. I thought the Judge Jackson remedy in Microsoft was a sound remedy. I think the main beneficiaries of that, candidly, would have been the shareholders of Microsoft. Obviously management thought differently, but I think it is an unusual Section 2 case that has a strong liability basis that yields no productive remedy.

MR. CARLTON: Let me turn to some specific topics, and one I wanted to turn to was exclusive dealing, and I want to use exclusive dealing to pose a question.

Under a rule of reason analysis, we often say we weigh the procompetitive effects against the anticompetitive effects and then come to a decision, and I am wondering if that is an accurate characterization of not what is said, but what is done, and whether a weighing of procompetitive benefits verse anticompetitive harm really ever gets done in these Section 2 cases or whether we do something a bit different, which is try and figure it out and then say there are no benefits, there are only costs, you cannot do it; or the reverse, there are only benefits, there are no costs, so you can do it.

MS. McDAVID: Well, we talked about it in terms of burden-shifting at the very beginning of the program, and in the sense of the Microsoft Court of Appeals opinion.

MR. KRATTENMAKER: No court has ever written an opinion saying, now that it is all over, we find that there are these harms and these efficiencies and we are now going to weigh them and we are going to choose between the two.

MR. CARLTON: Yes, that is my sense.

MR. KRATTENMAKER: Bill explained -- well, Bill can say it better than I can -- they changed the earlier step analysis to avoid that.

MR. KOLASKY: The point we were making earlier was that you have basically a step-wise analysis. I disagreed with the way that Joel Klein defined the steps, but the term is exactly right. The rule of reason involves a step-wise analysis where you first look at how serious are the anticompetitive harms, what are the procompetitive justifications, are they credible, and if they are, the plaintiff then has the burden of trying to show that the defendant could have achieved those same objectives in a less anticompetitive manner, but the real key is that the degree of scrutiny that you apply according to the strength of the showing,

so that you have what Justice Souter called an inquiry meet for the case. The stronger the showing of anticompetitive harm, the more closely you are going to scrutinize the procompetitive justifications that are offered.

MR. CARLTON: Yeah.

MR. KRATTENMAKER: And the more likely you are to have found some other way to have done it, find some less restrictive alternative, and that is why they avoid that ultimate fourth question or how they avoid it, overtly balancing.

MR. JACOBSON: Well, and just to close that off and to restate what Bill said earlier, the ultimate inquiry into net effect on competition, is the net effect of this practice going to increase or decrease output -- in particular, are prices, quality-adjusted, going to go up or not -- that that is where the balancing takes place in determining whether there is an output restriction or not. If there is no output restriction, there is no ephemeral balancing to be done.

MR. CALKINS: The problem I have with this is that it sounds nice, and I do not have any trouble with any of it, but I am not sure that is what really happens. I mean, take exclusive dealing, right? There are a whole series of cases where a judge says, ah-ha,

here is a contract -- it is a short-term contract -- it is less than a year, and, therefore, I conclude that it is procompetitive, and I am done.

One of the things that I like about the Dentsply case is that the Government won that case even though those contracts were terminable, as I recall, either on notice or in a short period of time, and the judge was able to say, no, harm can be lessened if reality is that those dealers are not about to give up dealing with Dentsply, and so even though it is terminable on short notice, an exclusive dealing clause can harm competition.

So, although we can sit here and talk about -- you know, it is nice, look at this and look at this -- the hard part often is not really that. It is how do you decide whether this particular arrangement is lessening competition or likely to lessen competition, and it becomes all too easy for people, I think, to go off the track one way or the other in trying to sort that out.

MR. KOLASKY: I guess the point is -- I mean, you are absolutely right, the Court did the right thing to look at whether the exclusives in that case had teeth -- sorry.

MR. CALKINS: The question was whether they were

"edentulous."

MR. KOLASKY: Yes. But the point is -- and actually, exclusive dealing is a perfect model for this, I think -- you know, the courts over the years have basically evolved a presumption, developed a presumption, that if you have short-term contracts that are terminable in less than a year, they are unlikely to have a durable anticompetitive effect.

On the other hand, it is a rebuttable presumption. It is not a conclusive presumption. So, the plaintiff has the opportunity, as the Justice Department did in Dentsply, of showing that, notwithstanding that the exclusives are nominally terminable, as a practical matter, the distributors have to carry Dentsply teeth or dentures, and, therefore, the exclusives have it.

MR. CARLTON: I wanted to follow up on the point about the length of the contract and the notion that the distributorship contracts are terminable at will. Courts have often placed a reliance on that when, what is interesting, is, if anything, the economics literature, especially the recent economics literature, has gone in a completely opposite direction, saying it is not a long-term tie-up of the dealerships that is the issue; it is the simultaneous incentives created by the

large market power that the incumbent has, and in light of that, those incentives make everybody want to deal with him. That is the exclusion.

I am wondering, from your comments, can we infer that the courts are relaxing their view about that presumption, that duration is key, or is that still going to remain?

MR. JACOBSON: Dennis, let me take a quick shot at that. The one-year presumption starts with the remedy in motion picture advertising back 50 years ago, over 50 years ago, and it is from that that courts later extrapolated a one-year presumption in these cases.

Now, what is important to recognize is that the law developed when exclusive dealing arrangements were subject to attack under much smaller market shares than you have today. So, when you are dealing with a firm with a 15 percent market share, then you are really going to want to insist much harder on longer term exclusives.

Now that the law has evolved to require much more significant market shares of the defendant and much more significant foreclosure in the real world, then the duration issue has less importance and less centrality than it used to have, and it has been informed, I believe, by the economic advances that focus more on the

incentives than, rather, on the specific terms of the contract.

DR. WILLIG: From the point of view of those incentives, the question is whether the economics that says the degree of scale economies is all important for judging the competitive consequences of the scope of the exclusivity, has that made its way into the courtroom yet?

MR. JACOBSON: Has it made its way into the courtroom? Yes. Has it made its way into Federal Supplement and F.3d?

MS. McDAVID: Or Antitrust Law Developments?

MR. JACOBSON: Well, it has made its way into Antitrust Law Developments, but no, the cases have not really caught up with it.

DR. ELHAUGE: On this point, I agree with you totally about the economic literature. It does not really suggest terminability should matter, because that was suggested, for some reason, the economic incentives to enter into these agreements are different from ones to not terminate, but I think I disagree that the law is clear. I mean, there are some lower court cases that have cited treatise to this effect, but, in fact, the Supreme Court authority is pretty clear.

There are a number of Supreme Court cases,

including the FTC Brown Shoe case, after motion pictures, that said, you know, it did not matter, and that case was voluntarily terminable at any time. The motion pictures case was actually just about the remedy -- clearly they took a remedy in that particular case. So, we kind of have an area where somehow everybody forgot about the old Supreme Court authority.

There is some recent appellate authority that just sort of lobbed onto this nice presumption, but this is one of those examples I think that I was talking about earlier of a silly formalism that is not really well based in economics, before you came here, that we need to avoid. Unless we can base it in some sound economic theory, it shouldn't be limiting the application of antitrust law.

MR. JACOBSON: Let me just add, though, that the silly court of appeals decisions start off with Dick Posner in Roland Machinery, for what it is worth.

MR. KOLASKY: I also want to come back to a theme that we started out talking about, and that is the importance of needing some presumptions, at least, so that we can counsel our clients and that companies have a better sense of how to shape their -- structure their conduct. So, the real question is, even if the economics literature has evolved this new way of

thinking about exclusive dealing arrangements that are terminable at will, are we sufficiently confident with that that we want to abandon what is a relatively administrable presumption, that in the real world has helped a great deal, I think, in helping clients figure out how to structure their exclusive dealing arrangements so that they are less obviously anticompetitive.

DR. ELHAUGE: I am just not sure they are less anticompetitive just because they are terminable. I think it is a misguided presumption. It may give defense false hope and lead them into liability that they could well be advised to avoid.

MS. McDAVID: Well, the temporal nature of an exclusive dealing arrangement is just part of the overall foreclosure analysis, and I think when the courts began to grapple with the temporality issue, it was part of the move away from Standard Stations, where we had this de minimus foreclosure being held unlawful, when, in fact, if they had focused on the fact that everyone was doing the same kind of practice, they might have gotten to illegality. But it really is about the extent of foreclosure, and duration is part of that.

MR. CARLTON: Yes, although it seems like there are really two separate forces going on. One is if I

have a long-term contract with all of the distributors and there is no entry, I am really the monopolist of distribution, and no one else can get in unless I charge them a monopoly price, and it is hard to keep them out. An alternative mechanism is simply there are economies of scale in distribution, and I do not have any long-term contracts, but I am the big guy on the block, and everybody has to use me, and I have a contractual term that forces people to choose between me and my rival, and they always choose me.

So, let me turn to a question about refusals to deal, and I am curious whether there is anyone on the panel who thinks that the Essential Facilities Doctrine should be a doctrine that ultimately the Supreme Court endorses, or should we just get rid of it? And I guess related to that is whether sort of the decision in Trinko, which I think pretty well establishes that rivals have no duty to deal with other rivals except in rare exceptions. Even there, I think the Court is wrong, but I am curious what other people think.

So, one, do people think the Essential Facilities Doctrine really should disappear forever from now, and two, whether they think that the Trinko standard is the right standard as I have interpreted it?

MR. JACOBSON: As you know, I have great

difficulties with the Trinko case, so let me start first. I think most would agree, and I certainly would agree, that the Essential Facilities Doctrine as an independent basis of liability does not belong. I do think in determining whether there has been an attempt to monopolize an adjacent market, that the inquiries that you make in an essential facilities analysis are relevant and appropriate, and one area where I think the law and the enforcement, particularly of late, has been lax is in cavalierly accepting the single monopoly profit assumption as dispositive in adjacent market cases.

Although it was correct to throw out the Berkey Photo Doctrine, that an attempt to gain a competitive advantage in a second market could be a basis for liability, I do think there is a problem, depending on the nature of the conduct, with using monopoly power in one market to monopolize a second market. The Essential Facilities Doctrine, one of the inquiries that it makes is one way of approaching that.

I do not think Trinko really articulates a standard. I do think that in the context of refusals to deal in the same market with a rival, the Aspen context, that there has to be, you know, a very, very, very narrow stroke, if any, of liability, but I think in the

adjacent market context, we are talking about a much different problem.

DR. ELHAUGE: To me I think the answer depends on what we think Trinko means, and other than it is at or near Aspen, maybe beyond or before, I am not even sure, I am not exactly sure. If we read it to mean that discrimination among outsiders on the basis of rivalry, that is, you sell to some outsiders voluntarily but not to rivals, if that is a necessary condition, then I agree with Trinko and think that the Essential Facilities Doctrine is mistaken because it does not incorporate that requirement.

But if you think that the key part is the other part of Trinko that emphasizes termination of rivals and that was emphasized in Aspen, that actually, it seems to me, is a misbegotten notion. It's like confusing tenure for law professors. It seems to me that essentiality is actually a better test than whether I once dealt with them and have now terminated them, because after all, in Aspen Ski, it was not essential -- the mountain still remained in the market. So, it is not clear to me why we wouldn't be asking if the Essential Facilities Doctrine is narrower than the Aspen doctrine.

MR. CARLTON: Do people regard the Essential Facilities Doctrine as an alternative to regulation and

that, therefore, it should be preserved, or do they think that that is a dangerous route to go down in which you have judges, in a sense, determining the terms on which one rival deals with another?

DR. WILLIG: I would agree with John that this is all properly viewed under a good analysis under Section 2, that the kinds of fact patterns that arise and the old standards of essential facilities are fact patterns that should be analyzed under appropriate use of essential facilities, and that might come out either way depending upon the fine-grain details of the case.

I think there are lots of conceivable instances where we do not want to see traditional public utility style regulation applied to a bottleneck, because it is not pervasive enough, it is not long-lived enough, but where nevertheless there may be antitrust issues, and so I am thoroughly agreeing with John, strange though it feels to agree with learned counsel.

MR. JACOBSON: I made economic sense for once.

DR. WILLIG: But do not sacrifice on my part.

DR. BAKER: I think I am more or less in the same place. It seems to me the question about you want to preserve any role for the Essential Facilities Doctrine has to do with whether -- a policy question about whether you want to use the antitrust laws in

certain kinds of natural monopoly settings rather than creating a commission, and there are pros and cons about that, and the modern trend is to not to do that, but, you could think about it.

I mean, I do not think I have anything to say other than spotting it as a policy question, although on the question of refusals to deal generally, it seems to me that with rivals, that Aspen is still the law, and that Trinko reaffirms it, maybe at the outer limits, but it is still the law, and if you have a termination of a rival and it harms competition, I think there was a pretextual justification in -- as was in Dentsply, too, for -- so, there was no good business justification for doing it. It is a perfectly legitimate basis for inferring harm to competition if a monopolist excludes a rival without a good justification.

MR. KOLASKY: I would just add, I think my view may be at the extreme end of this discussion, is after Trinko, the essential facilities RIP, rest in peace, and I do not think there really is anything left of the Essential Facilities Doctrine, and I hope that it will ultimately be interred, but I do think that the small window that the Supreme Court left open in Trinko for finding a refusal to deal with rivals to be a violation of Section 2 is an important one, and I think that the

key thing is the element that the Supreme Court mentioned there and that John alluded to, and that is the element of discrimination, that, you know, the refusal to sell to rivals on the same terms that you are selling to the public generally, and one of the reasons why that is so important is that that then gives you an administrable remedy.

The big concern I have with the Essential Facilities Doctrine or any kind of refusal to deal as a basis for a Section 2 violation is, you know, how does the court enforce the terms of access without becoming a regulator? And that is not a role I think we want the antitrust courts to play, but so long as you have the discrimination element present, as it was in Aspen, then a court could impose a compulsory duty to deal.

MS. McDAVID: Absent some preservation of some duty to deal, depending on the circumstances, then we are throwing ourselves into a regulatory regime and all the things that go with it, including capture. The preference for regulation was one of the things about the Trinko decision that puzzles me, frankly, given all we have learned about regulation and the fact that we all thought we were moving to a deregulated world in which markets worked.

MR. CARLTON: I guess the real question is, do

you think there could be a market solution when you have to have access when there is a claim that a rival has been deprived of it? And I take Bill's point to be sometimes that may be easy to do in some fact patterns, but there are clearly other fact patterns where I think that would be quite difficult, and I am worried about precisely the choice you described, which is having a judge, who may not have any expertise, trying to regulate an industry versus a regulatory authority, which also has its own costs.

MS. McDAVID: Perhaps it takes us back to the question of what is the appropriate remedy and whether, in a circumstance like that, a structural remedy avoids the need for getting into the question of the royalty.

DR. ELHAUGE: I think it also goes to the elements, because I think Bill is exactly right. If it is a discriminatory element, then you can foresee what the application is going to be, and I think it can be administered by randomly selected judges and juries.

The problem is if it is just a refusal outright, somebody has set the price who is supposed to have done that, and in constructing the refusal, charging too high a price, when does that really count as a refusal, and people have to be careful, what is a judge or jury going to say ten years later, they are not going to know what

to do, that is I think a powerful argument for limiting the Essential Facilities Doctrine, a nondiscriminatory one, the two cases of where there really is a regulator available to tell you prospectively what these actors are supposed to do.

DR. WILLIG: That is not the way I read that part of Trinko, Dennis. I am intrigued by your reading. I thought the court was stating that the regulation exists, the agency exists, the regulation explicitly covers the terms of such pricing, and the issue is whether to impose antitrust on that rather than to make it an initial choice between those two modes in regulating the market.

MR. CARLTON: Yes, I think that is exactly right. So, just to be clear, the question I was posing is, in an unregulated industry, if there is a challenge based on essential facilities, do we feel comfortable in having the judge issue a remedy in which he has to say what the transaction terms are? That makes me nervous, and that is why I do not like it as a method. I think the fact pattern that Bill talked about can get you around it sometimes, but in the large majority of cases, we might not see these outside offers.

MR. BAER: Even in the AT&T case, it was the best of worlds, it was the worst of worlds, right? The

divestiture, the clean remedy basically introduced a structural mode to things, but Judge Harold Green spent a hell of a lot of time regulating, and some would say maybe not doing the best job in the world of that. I mean, it was an impossible job, and once he got the structural part done, I mean, he really had no choice but to stick with it, and that was tough.

MR. KOLASKY: And what a great job the FCC did after they took over the job.

MR. BAER: Right, good point.

MR. CARLTON: Yeah, let's go to a different topic now on predatory bidding, and let's talk a little bit about the Weyerhaeuser case or at least how I read that, which I generally like what the Court said, but I was a little worried that in discussing predatory bidding or, in general, discussing monopsony, I get the feeling sometimes when I read decisions or even sometimes the legal literature or the economics literature, that there is a confusion between monopsony and monopoly, and there is a failure to recognize that you can monopsonize the input market but have no effect on output prices.

Now, if that were the case, does anyone have misgivings about any of the language in Weyerhaeuser, that someone could interpret what they are saying as,

well, there is an output effect, so, therefore, that is what I am basing my decision on? In other words, in the absence of an output effect, would you be happy with condemning monopsony is the question.

MR. JACOBSON: Well, output. As you and I have discussed, it is not monopsony unless you have an upward sloping supply curve, and the result of the exercise of monopsony power is to restrict the quantity that is purchased in the market. What Weyerhaeuser does not recognize, although I do not think he could write the opinion differently, is that the differences between monopsony and monopoly relate importantly to the incentives to engage in monopsonistic behavior, because a firm that has very little or no market power in the output market, as did Weyerhaeuser, is going to have mixed incentives when it comes to monopsonizing an input market, because the degree to which they restrict the quantity of logs purchased is correspondingly going to impair their ability to profit in the output market.

So, what Thomas' opinion misses -- and I think it is a very good opinion and this issue was not raised so it was unnecessary to decide it -- but I think later cases, to the extent there are any, are going to have to focus on whether this conduct, which may be ambiguous, is likely to harm consumers given that the incentives of

the monopsonist may be altered in a way that would not be true in a selling case.

DR. ELHAUGE: I actually think this is -- I thought the court did address this in footnote 2, that it was quite clear that they understood this was not a case likely to affect output. This was just likely to affect the upstream market, but I do not think that is a problem. That is, if there is a monopsony in some upstream local market, it is a lot like the Manfeld case, which also was buyer cartel with the same kind of upstream local market/downstream national market case.

The only effect on national output could be negative. It might have no effect or a negative effect by reducing output from that particular region with a subcompetitive price. So, there is no possible positive effect on consumer welfare that one might think should counterveil the negative effect on the upstream sellers of lumber or the rice growers in Manfeld.

So, it seems to me, you know, antitrust law, although consumer welfare trumps other interests, if consumer welfare is not, in fact, being enhanced by some conduct, but it is anticompetitive and it is harming somebody else, they have always recognized the ability to protect those other groups of producers.

MR. CARLTON: Do you think the recognition that

monopsony power is a problem by itself is actually an example that shows that it is not a consumer welfare standard that we really have in all cases and that --

DR. ELHAUGE: No, no, I think it --

MR. CARLTON: -- that it suggests that it could be properly viewed as a total welfare standard sometimes?

DR. ELHAUGE: No, I think they have always been clear that they are interested in harm to anybody. I think that it is just if there are benefits to consumers and harm to competitors, then it is about, you know, consumer welfare and not competitors, but, you know, not only Manfeld in this case, but boycotts with no particular -- just boycott one particular firm out of thousands, in Clorz, they have always been pretty clear, it seems to me, that if there is no actual benefit to consumer welfare, we are willing to use the antitrust laws to protect other people from anticompetitive harms.

MR. CARLTON: Okay, all right.

DR. WILLIG: Are workers consumers?

MR. CARLTON: I do not think under the standard interpretation of people who want to use the consumer welfare standard. I think they view it as buyers, and, therefore, if you are on the demand curve, it counts, but if you are on the supply curve, it does not count.

DR. WILLIG: Even if you are a person?

MR. CARLTON: Even if you are a person, and even if buyers and sellers are not technically people but they are both firms owned by people, even the same people. So, it depends on whether you are up or down, I guess.

DR. WILLIG: That means you hang out with lawyers too much.

MR. CALKINS: Dennis, the debates on this -- you have been a part of the debates forever. I have never actually understood -- and a quick clarification: I missed the question because the phone rang, and it was not a problem with my exam. It was just my daughter wanting free advice.

MS. McDAVID: An antitrust problem?

MR. CALKINS: Ah, no.

MR. CARLTON: She is taking the final exam right now.

MR. CALKINS: I have never understood exactly why there is such a big problem here. Imagine a cartel that fixes the price that they are paying to suppliers. Assume that I have declared I care about consumers and only consumers -- I am not a total welfare person -- I would have thought that I could easily say that, of course, when I said that, I meant I care about the

people who are buying from a cartel, and if the cartel is fixing the prices that they are paying to suppliers, I just treat those folks as the equivalent of consumers for the purpose of discussion. Of course, I always meant to protect them equally. So, I do not have to change any adherence to a consumer welfare standard to accommodate a buyer cartel.

MR. CARLTON: But if you want to define the suppliers of the input as consumers, you are absolutely correct, but I think that that really proves the point, that the logical consistency is you really do need something like a total welfare standard; otherwise, you get -- you have to have either an exception or you have to explain it in some other way.

What I have always found peculiar about this, really two things: One, that the cost-benefit analysis in other parts of economics as it is applied, it is standard to use total surplus for evaluating the welfare of certain projects, but two, that despite that and despite my view, which is it should be total welfare and total surplus, which I do think is more in line with what the economics profession would say, if you go around the world, that is not the typical standard they have, with the exception of Canada and New Zealand, which do consider total welfare. Most of the world does

follow what we do.

MR. KOLASKY: I guess I have one -- like Steve, I have a question about this, because clearly this is a subject that is the topic of a lot of debate in connection with merger enforcement policy and how we should consider efficiencies, and there seem to be differences of view among jurisdictions, but if you look at our case law, of course, it is hard for me to think of any case in which a court has ever really focused on this distinction between consumer welfare and total welfare, and then the further question is, even if they did focus on it, in what areas would our Section 2 law, since that is what we are talking about, be any different, applying a total welfare standard rather than a consumer welfare standard?

MR. CALKINS: Let me give you one question -- and I do not know the answer to this, but I was thinking about it while I was reading all those transcripts. What if we have somebody that is a monopolist, and it is engaging in a -- it is clearly a monopolist, we all agree it is a monopolist, it has been a monopolist for a long term, and it is charging monopoly prices that are way above whatever one would say is a competitive price -- and is engaging in a practice that Bobby Willig has come in and testified under oath does no good for the

people buying its product at all, but increases its profits.

Could you imagine that you might ever say that, golly, if we were looking at a merger that was going to save the two firms lots of money, we would approve it just based upon that figure, that some of it would eventually end up in consumers' hands and we are not going to worry about it too much, so we will go with total welfare under our merger analysis, figuring that it will all shake out in the end -- but maybe we wouldn't be quite so eager in approving a monopoly situation where we really thought this was not doing consumers any good at all? And I was just wondering whether you might ever come up with more enthusiasm for total welfare in a merger context than you would in some monopoly context, and I do not know the answer. I was just wondering about it.

DR. ELHAUGE: First of all, I agree with your earlier comments, but then I disagreed with you twice before, that I think you can go with a total welfare of the victims to be consistent with your approach, that is, the upstream producers or the consumers, but not necessarily those who are doing the cartel or the anticompetitive conduct. Their welfare does not have to be included in the calculus.

There is a case, Superior Propane, in Canada, that did do the total welfare analysis and did find the efficiencies outweighed the anticompetitive effects on consumers. Now, they had to exclude all the non-Canadian consumers to do this, which actually makes an interesting question of political economy. There is a global market when you have got multiple jurisdictions.

One nice thing about a consumer welfare standard is that every jurisdiction, to an extent, in just imposing remedies has a sense to just protect its consumers and not overdo antitrust law or underdo antitrust law, but if you thought the right standard was total welfare, then a lot would turn on whether the producers are in your country and the consumers elsewhere. So, it might make it much harder to coordinate jurisdiction.

You could simply, in other words, rely on whoever the consuming nations in enforcing the antitrust law and figure that the producing agencies will just unreinforce it, but we do not have to worry about that because somebody else is protecting consumers.

MR. CARLTON: And also, when you take into account total welfare, you are correct that the countries that do try and look at foreign ownership, for

example, who owns stock in the company, and that can be quite complicated, as well as who is consuming it. What is interesting, what I have always found interesting, is that New Zealand is one of these countries that uses total surplus, and one of the justifications they give is that they rely on international trade, and, therefore, I am very concerned about having efficient firms, and, therefore, they want to give a lot of weight in having efficient firms who can engage in international trade, even if domestically prices might rise.

But the place -- I mean, I agree with Bill that there is not a big -- probably in most cases, there wouldn't be a huge bit of -- a huge difference whether you used total surplus or consumer surplus, that I think is right, but the one place where it does apply a lot or could has to do with fixed costs and R&D, and I think those may become more important in the future, and I think if you only are focusing on price effects to consumers in the short run, you tend to overestimate the importance of marginal cost savings relative to what I will call a fixed cost savings, but it is a recurring fixed cost savings that in the long run really is a variable cost.

DR. BAKER: There is another place which cuts

the other way, because we are talking about exclusion cases with monopolization. So suppose you had a practice that excluded rivals and the firm lowered its costs and maybe lowered its price a little bit? Consumers seem to benefit, but under a total welfare standard, you would have to take into account the lost profits to the rivals, the producer surplus to them, and you might end up deciding that the practice harms the competition under your total welfare standard.

So, just the way you want to ask the consumer welfare folks how they can get to objecting to monopsony, the question for the total welfare defender is how you cannot avoid attacking exclusion in that circumstance.

MS. McDAVID: Exclusion may also matter in the context of innovation. If someone refuses to deal in a way that precludes innovation, you may be able to reach that best with a total welfare standard.

DR. ELHAUGE: I would also think you could always convert a gain in total welfare to a gain in consumer welfare if you really had to, because if you had a big fixed cost savings, it is not clear why you do not just fund some consumer trust that pays consumers every time you sell or do something like that and make sure that the consumers benefit on balance.

MR. JACOBSON: There is no answer to this harm to competitors. Competitors are part of the total welfare analysis. So, you could have a practice that lowers prices to consumers, but if it hurts competitors more, it violates the total welfare standard, and that is just -- you know, no one believes that. So, you have to make ad hoc exceptions to the total welfare standard that you do not have to do under the consumer welfare standard, so people are really applying consumer welfare. They just do not want to admit it.

MR. CARLTON: That I don't think is true, because the examples John gave about sort of rivals and the harm to rivals, which depends on whether -- their efficiency relative to the incumbent firm, it really has to do with what is called in a cost-benefit analysis sort of second best analysis or what happens in other markets or what happens to output in which price does not equal marginal cost. As far as I know, no one has ever advocated that we should look in a -- you know, in doing cost-benefit analysis in antitrust at ancillary effects in unrelated -- in related markets. Let me give you an example.

If there were a merger of tennis racket producers, so the output of tennis rackets went down because they are going to raise price, that might have

an effect on the tennis ball market. As far as I know, no one on this panel would suggest that if we had a Section 2 case involving tennis rackets, we should also look at tennis balls and, you know, if there is less tennis balls sold, maybe people go to fewer health clubs to play tennis.

I mean, I think you have to -- even if your objective is to maximize total welfare, that the process by which you do it may well be you should ignore secondary market considerations. I think that is just a -- sort of a logical point about how you pursue the process of figuring out how to maximize total welfare, but I think -- I did want to say something about what I understood about -- isn't there more money basically because it is efficient? And in New Zealand, they actually have some -- there is no simple solution to this problem, but they actually have pursued ideas like maybe I should make a company a mutual and give consumers shares in the company, and they have tried to pursue some of these other remedies that in the United States we have not actually looked at.

MR. JACOBSON: But, Dennis, why is effect on competitors in the same market a second order effect? It does not seem to be.

MR. CARLTON: It is second order -- second order

is probably a poor choice of terms, actually first order. You have a first order effect any time an action in one market -- the output of one firm affects the output of other firms and the output of those other firms is not being sold at marginal cost. That happens all the time, and if you started taking account of it, my hunch is it would lead to a very unwieldy analysis.

MR. JACOBSON: Which is why you should use a consumer welfare standard.

MR. CARLTON: No, consumer welfare, you have the same effects on consumer welfare, the same -- the problem persists no matter what the standard is.

DR. WILLIG: There is another way to think about it. There are horrible examples that we economists cannot get around, for example, of markets full of differentiated products, they compete with each other, they are not priced to marginal cost because there are brand-specific fixed costs, and where the horrible fact is that there can be and generally often is excess entry in an open marketplace, where that last firm or the last three firms to want to go into the market, in fact, benefit the consumers of those products, they cover their costs, but they divert so much profitability from their rivals that the total social welfare impact is negative from open entry in such market.

It is not generally true in a branded market, but it is generally true in a Cournot market. There are firms with that effect, as economists know, and does that mean that we embrace entry barriers or we embrace predation as somehow bringing us a welfare superior answer? No, we do not, and as Greg is fond of saying, that is why in some sense we do not really adhere to a welfare standard, we adhere to a competition standard under the general belief, which is somewhat -- how should I put it -- religious for some of us or maybe a generalization that we think is far more true than not true, even though there are counter-examples, and that is really the standard that antitrust uses, is follow procompetitive enforcement decisions and case law standards, not social welfare or consumer welfare, except inasmuch as they usually go along with competition.

MR. CARLTON: Yes, let me just -- I would phrase that slightly differently, but the process of competition is the process we think ultimately, given our limited abilities to adjudicate matters, that will lead to highest total welfare.

DR. WILLIG: Right.

MR. CARLTON: I mean, that is my sense, and I actually think the lawyers figured that out before the

economists. They are much more concerned about process than -- economists sometimes were over -- in my view are over-confident they can get every case right, so they do not really -- these error costs are low, but once you realize --

DR. ELHAUGE: If you really believed that, you would be breaking up monopolies right and left because we would have more process of competition.

MR. CARLTON: Yes, absolutely. That is why if you go back to the fifties and you look at the literature, it would turn your hair less gray or more gray.

MR. KOLASKY: But also shifting to some of the transatlantic dialogue that we have had over the years, the danger in going down that road is you run into the argument that we used to hear over in Europe and now occasionally hear, how can you protect competition without protecting competitors? And I do not think we want to go there.

MR. CALKINS: One of the interesting debates that came up back in the hearings that I read was a disagreement about whether or not we should be sad that there has been a long-term durable monopoly -- with I think Professor Feldman saying that that is something we are sad about (not condemn it by itself, but we would be

sad about it) whereas I think it was David Evans, who came back and said, no, I have got no troubles with a long-term monopoly so long as it is an efficient monopolist. It was interesting simply to see a disagreement as to whether when we get up in the morning, we are unhappy or not with a long-term monopoly, which goes back to the welfare we are concerned about.

MR. CARLTON: Let me actually follow up a little bit on that in contrasting Europe to the United States on Section 2-like cases. I think it is fair to say they think we are not as aggressive as they are and that they have proper enforcement standards, although I think the differences are narrowing between us and them, but our enforcement of Section 2 or our willingness to enforce Section 2 depends upon sort of trading off an aggressive policy where we think we will be stopping -- where the benefits would be stopping competitive harms, but the costs are chilling competition, and let's suppose someone poses to you the question, what justifies or on what basis do you think the less aggressive policy of the United States is justified by the empirical evidence and what empirical evidence is there about basically type one and type two errors on Section 2 cases?

MR. KOLASKY: Let me take a first cut at this,

because I have been thinking about this a fair amount of late, and I have a new theory which I am going to throw out into the discussion, and that is a new way of looking at ours as more of a market-based approach, and that is one of the reasons why our courts, I think, are more liberal in terms of how they apply Section 2; that is, they are less likely to find conduct violates Section 2 because they are very concerned about the risks of false positives, and those false positives derive from our judicial system, our treble damages, class actions, one-way fee shifting, jury trials.

But I would suggest that what that means is that our antitrust laws may, in fact, be more self-enforcing in the sense that companies are more likely to want to not get too close to the line and risk being found guilty of violating our antitrust laws because of all of those consequences, whereas the European approach -- again, going back to its heritage -- is much more status. They are much more willing to have the administrative authorities decide whether conduct is or is not anticompetitive, and they do not want to have in their legal system all of these features that we have that causes ours to be more of a market-based system.

DR. ELHAUGE: So, two things: One, I am not sure about the premise that the EC is more aggressive.

On some things, it is a little bit more aggressive, but actually, when I was writing this book, I was surprised at how similar a lot of these things are. In some respects, they are actually less aggressive. They have more safe harbors, a smaller percentage of foreclosure. They do not have the attempted monopolization law. So, even though they are dominant-central with the monopoly power standards, on balance it is not clear that that is much more aggressive.

But the other thing I would add, which I said in the earlier panel, is because there is no private litigation, there is less concern about over-deterrence there, and it makes sense to actually have somewhat broader law in a lot of areas, because it is only really being enforced by disinterested government regulators, whereas here, if you are enforcing -- I think the current state of our law, in part, the fact is every judge writing a Section 2 opinion is thinking about the private treble damages litigant and not a world where everything is an agency enforcement.

MR. CALKINS: This is something that -- I mean, I have been writing about this forever, the equilibrating tendencies I call them -- and let me just put in a good word for the private enforcement system. The one great thing about the U.S. system for private

enforcement is that we have laws, and one cannot bring an action and establish some rule of law without knowing that a private party may then invoke this in front of a court and win some kind of a judgment.

A downside of a European model is that it -- or any regulatory model, and, indeed, part of the U.S. merger system now to some extent -- is that it opens up the regulators and the system to accusations that decisions are being made not based upon consumer welfare or total welfare, but rather, favoritism for the home team, and that is a very unhappy place for antitrust to find itself.

I think one of the great fears about the emerging economies and their use of antitrust is that maybe they will not really be using antitrust for anybody's welfare other than the welfare of the home team, and one of the reasons why it is good to have standards, principles, things to which people can point, is because it gives you some grounding and some comfort that decisions are being made on some basis other than favoritism, and that is really a terribly important value to try to achieve.

MR. CARLTON: There was something Bill said I wanted to follow up on. There is certainly a history of intervening in Europe and regulating, and one of the

things we know from our experience in the United States is that when regulators get involved, sometimes price discrimination becomes something they become quite concerned about, either they do not like it or they encourage it because of cross-subsidies, but one or the other sometimes, and in particular, in the United States, it is not an -- putting Robinson-Patman to one side, price discrimination by itself need not be an antitrust violation.

In Europe, there seems to me to be a much greater sensitivity towards price discrimination, and I think in certain aspects of transactions, they bar price discrimination, and I am wondering whether anyone has any thoughts on what would account for that.

MR. KOLASKY: Well, is not part of that the nature of Article 82, which is talking about abuse of dominance rather than monopolization, and so there still is a remnant that worries about exploitative abuses, not just exclusionary abuses, and, you know, I think the other thing which we have to be conscious of is that while all of us would like to forget that the Robinson-Patman Act exists -- and I certainly endorse the AMC's recommendation that it cease to exist -- the fact of the matter is that historically, there was a fair amount of enforcement under the Robinson-Patman Act

that has dropped off considerably in the last decade or so, but we have our own dirty laundry here.

DR. BAKER: Also, in Europe, they have had a long-standing concern right from the inception with price differences across nations -- across borders.

MS. McDAVID: Across borders.

DR. BAKER: -- across borders, and their whole effort has been to create a national market to get rid of those differences, and so those kind of price differences have always been --

MR. CARLTON: That is a legislative solution rather than a market solution that gets rid of artificial transaction costs. That is what is peculiar. In other words, in the United States, our view is, I think, that price discrimination should not be an antitrust violation. In Europe, I think there is much less of that view.

MR. JACOBSON: Well, because of the common market, the point that John is making, it is historical, it is engrained in the whole structure of the European Union. Here, I think it is very clear that price discrimination does not violate Section 2, and who is the last plaintiff that won a case under the Robinson-Patman Act? One has to have a better memory than me to remember who that was.

MR. CARLTON: Let me turn to one final topic before I turn it over to you guys to ask questions of yourselves. I wanted to talk about tying and bundling, and I will try and keep the time -- I will cut off the discussion, so everybody knows we have five to ten minutes.

One of the things I find interesting in discussions about bundling and tying is they are put in separate categories, especially in the legal literature. I think that is not really true in the economics literature, they are treated as a very similar phenomenon, and one of the questions I had was in the tests for bundling, one common test, sometimes called the Ortho test, the AMC outlines a test that is very similar, and it always follows, you look basically to see whether the product that is sold separately, suppose is product A, you look at its price, you look at the packaged price of A and B, and then you look at the incremental revenue you get from selling the package, and you compare it to the marginal cost of B, and if that is positive, that is sort of price above marginal cost. So, that is the analogy, and that is fine.

In the AMC report, there were two other components to the test, but I just want to stop on the first component, that first component, which seems to

have relatively widespread agreement. I think in the AMC, everybody voted for it, though I have a dissenting statement but an explanation of what more they should have voted for. There is this analogy to predation. I mean, that is clearly what price versus marginal cost is doing, yet in the economics literature, when you look at strategic behavior, although we understand predation, most of the stories in which you get an anticompetitive harm from tying or exclusive dealing or whatever it is has to do with scale economies, and that is a different theory than predation. Predation theory, we understand. Scale economies, we also understand.

I am just curious, do people have the view that the bundling theory, at least in the legal literature or the economics/legal literature, is really talking about what economists call mixed bundling, and it is really focusing only on the predation part of the story and it is missing the usual -- not usual, but the other parts of the story that we usually relate to tying? Is that --

DR. ELHAUGE: I think they are missing. I agree with you completely on what the economic literature shows, and I think there is a lot of tendency to get beguiled by the word "discounts." Actually, all we know is there is a price difference that is conditioned. We

do not know anything about any discount from any but-for price. The noncompliant price is higher than the compliant price, that is all. There is a difference. We could call it -- if we called it disloyalty penalties, we would have a very different flavor to this doctrine.

But I think it is also -- I mean, it is a predation thing, and I think it has the odd element as a result of focusing, again, more on the virtue of the -- before I talked earlier about not focusing on the virtue of the defendant but on the effects. Here they are focusing on the virtue of the rival, whether the rival is equally efficient, as if that is a good proxy for anticompetitive effects, whereas a less efficient rival may well restrain a monopolist to price below a monopoly price, and if you actually have this economy of scale denial, you are raising your costs, and this test has the odd feature of allowing you to bootstrap yourself into a defense. It assumes away the very anticompetitive effect of interest by assuming the rival is equally efficient when the whole point of the conduct may have been to make them less efficient.

MR. CARLTON: Anyone else?

DR. WILLIG: Yes, I agree with you, Dennis, that the literature, when it comes to foreclosure of various

kinds, including price predation, is really all about scale economies, either volumetrically at one point in time or scale economies or scope across time -- if we can't sell it today, we are not going to be around tomorrow -- which is what recoupment is all about, and the idea of the bundling, the Ortho test, with all of the complications that I understand the Commission has now come to grips with, which I hope is great, has to do with using this kind of bundling to close off parts of some element of the market to your rival.

What makes economic sense and what is consistent with the literature is that the purpose might be to limit the quantity that that rival can sell, thereby drive up the average cost curve, and make it less able to compete with the perpetrator in other parts of the market, a noncoincident market, another segment of consumers, another state, or later on in time. So, in that sense, under that theory, it is very related to predatory pricing and very appropriate to look at the incremental price against the incremental cost as the standard.

MR. KOLASKY: I guess what I would say on this -- and, again, I said at the outset, I do not pretend to be an expert on bundling -- but from the literature I have read, this seems to be an area in

which the literature itself is still, I think, quite confused, and the case law is very underdeveloped, and so I cannot think of another area that more cries out for an article in the nature of the Areeda Turner article on predatory pricing that lays out an administerable standard or poses an administerable standard, following which there can be several years of debate in the law review and economic literature, and then finally the courts will settle on something.

MR. CALKINS: But that is the problem for this project and this report. I mean, right now, with bundling, I think Einer is correct, in that people have basically looked at this and said, ah-ha, it results in a lower price, we like lower prices, and so let's analogize it to the predatory pricing standards with a twist, and then they say because bundling is very common and very good thing and so is allegedly predatory pricing -- and on you go.

Then you get nervous, because bundling is not as good as low pricing, because you can come up with ways that it can harm competition, and so you get a little bit nervous about whether or not you ought to adopt a standard that you know is under-inclusive, that we adopted deliberately because we wanted to protect something that is the ultimate value -- one of the

ultimate values -- low prices, and maybe these values are not quite so ultimate.

We are working our way through it, and the flourishing of literature in this area has been immensely helpful and immensely interesting, and the problem for you folks who have to deal with this is are you ready to say, ah-ha, we now are prepared to be the Areeda Turner and to declare a standard that exactly balances it and will enshrine the correct answer for all time -- or is this something whereby we need a little more work before we are ready to do that?

MR. CARLTON: Okay, why don't we start going around, and we will start with Bill. So, as I said at the outset of this panel, I think it would be useful if each one of you could, you know, pose a question that you think is the most important one that has not yet been posed or if you want to reiterate or elaborate on a point.

MR. BAER: Well, a question that comes to mind, having sat unusually quietly through a lot of this, is the extent to which the Section 2 behaviors we are talking about is the prevalence of those behaviors, and we haven't really talked about that. We have talked about, you know, bundled discounts, we just finished talking about that, and concerns with how you

appropriately analyze them, refusals to deal.

I mean, the extent to which, as a counselor, I deal with Section 2-type issues, I deal with them, but I deal with them less than collaborative issues and ones you run afoul of, and what I am trying to get a handle out of in this discussion is at the end of the day how important resolving a lot of these issues is in the scheme of things, and is Section 2 monopolistic, anticompetitive conduct a sufficiently small part about what we worry about in the economy that we shouldn't overdo our analysis and our attention to it?

I do not know the answer to that question based on -- I haven't read all the transcripts, although there have been summaries of all the prior hearings, and the discussion here today. So, that is the question I have.

DR. BAKER: I have a brief comment about a proposition that did not really come up today but could have, and that has to do with the question of whether the market will cure all these monopolization problems on its own. My comment has to do with thinking about some of the recent cases, the government cases, which I know a little better than the private cases. But it seems to me if you accept that -- if you accept the allegations that were made by the Government or the facts as found by the courts that the market power in

the cases that I am thinking of was all essentially durable and would not have eroded absent government action. I am thinking about UNOCAL and Rambus, where the allegations were deceit in the adoption of a standard that conferred market power a firm, and on Biovale and BristolMyers Squibb, the FTC cases where there was fraud on, again, obtaining regulatory protection against new competition, and then some of the government -- the Justice Department cases, Dentsply, at least we think we understand this naked exclusion equilibrium where it is durable absent government action, and Microsoft, the facts as found by the court, it seems to me that the market power in operating systems is not forever but durable in an important sense for antitrust law.

So, I think that the argument sometimes made that we can just sit back and ignore monopolization because market power disappears on its own is -- does not seem to be true in the cases where the enforcement is.

MR. CALKINS: I would ask: what else do you see in the hearings that you thought was interesting and has not been mentioned -- and I would rattle off five very quick things.

First, on Jon Baker's point, Mike Scherer

talking about the lasting harm done by U.S. Steel in sort of stultifying the steel industry for a long time -- the example of the long-term harm to come out. Beyond that, it was interesting that sometimes people in testifying forget that they are talking about monopoly cases, so that in terms of bundling, one of the witnesses was saying one of the great things about bundling is it could help to undo a situation of conscious perilism in an oligopoly. Well, that is not really relevant if we are suing a firm that is a monopoly -- if it has gotten an 80 percent share -- and so sometimes the people testifying forgot that they are talking about standards for judging a monopolist. I thought that was something that ought to be remembered.

There did not seem to be a lot of joinder and agreement on exactly what is a legitimate business justification. Some people say -- they seem to be thinking that any time a monopolist could say it is going to increase the monopolist's revenues, that is legitimate business justification, that is what they are supposed to do when they get up in the morning. The problem with that, of course, is that would justify bombing your rivals' plants, because that would improve your revenues, improve your profits and things -- and so I would suggest that the legitimate business

justification probably ought to be keyed to something that is going to be benefiting a consumer at some point in the future, and that is something that is a very important part of the case law and something that is very underdeveloped.

Third, Dan Rubinfeld had an interesting discussion talking about the applications barrier to entry in the Microsoft case, saying that when that case began, nobody talked about the applications barrier to entry, and they spent a whole lot of that case trying to persuade the judge that there was such a thing, and I am going to try to remember that every time that somebody says that a plaintiff should lose unless it can prove entry barriers, and I am going to try to remind myself that, golly, you know, maybe it is not so easy all the time to prove entry barriers. So, before I say a defendant should win summary judgment because the plaintiff has not proven entry barriers, I am going to try to remind myself that sometimes it is hard to think through entry -- and you know this very well -- but entry is very difficult, and so I think we ought to worry about entry more than we do.

And I guess last, in terms of candor, the observation that I liked best was the comment from the representative of the Chamber of Commerce who conceded,

without much cross examination, that, in truth, we do not really value or care about convergence. What we are interested in is convergence to standards that we like, and convergence is not really a value at all, and I think that the next time someone writes a paragraph about convergence, you should stop and think, do people really value convergence, or do they just want standards they do not like to be changed into standards they do like -- which goes back to Bobby's point, which is that this is all about trying to figure out good standards.

DR. ELHAUGE: So, the first question I would ask is, we have been talking a lot about the rule of reason, is there any role in Section 2 for an abbreviated rule of reason analysis in cases where the defendant cannot come forward with any plausible procompetitive justification? So, we tend to critique a lot the Europeans for their loyalty discount rule, for example, as a kind of per se rule, but actually, all these opinions are cases where they say the defendant failed to come forward with any procompetitive justification at all. So, you might think, just like we do it for Section 1, we would say, well, maybe there is something anticompetitive, I do not really know, and I have got nothing on the positive side of the ledger, so why don't I condemn those kind of cases?

But also, we might also have some -- this goes to the other question whether there is some meaningful review to be done at the motion to dismiss stage. So, now everything tends to be motion for summary judgment. We could apply this for the California Dental analysis where first the plaintiff has the burden of proving some plausible anticompetitive theory, then the defendant has the burden of proving some procompetitive theory, and those could be done at the motion of dismiss with regard to the facts, and then we wait for summary judgment.

The second question was to answer the question which was raised and we never got to, but is there any reason to be more worried about false positives than false negatives? And actually, I think in a global economy, there is, or global markets there is, for this reason: If you imagine every regulator in a global market is optimizing over-deterrence and under-deterrence, and sometimes they make mistakes, the problem is since the most aggressive regulator wins in the sense that they make the difference. Over-deterrence dominates more on global markets, because whenever -- if they each make the over -- if any one of them makes the over-deterrence error, then we would have over-deterrence, where it sort of takes both of them to make the under-deterrence error. So, that

may mean that in global markets there is some reason to think that the standards should be more tighter and more concerned about over-deterrence.

MR. JACOBSON: The question I would ask is what is with this AMC standard for bundling and why is there this Dennis Carlton footnote? So, I cannot answer the second, but I think I can answer the first.

Bundling has aspects of different types of behavior, but it is really its own category. It has aspects of predatory pricing because bundling, by definition, involves some price reduction. It is something that customers frequently seek out and expect. They say, if I am buying two for one, I need to pay less if I was buying one, and so it is a common form of discounting, so that you cannot rule out a predatory pricing issue.

It has aspects of tying because you are combining the sale of different products, and there is some compulsion from the bundle that induces the purchase of the second, more competitive product. It is different, though, than tying, because there is no coercion, as such, in a bundling case. It has aspects of exclusive dealing because, at least in the extreme, one effect of a bundled price arrangement is to induce exclusive or quasi-exclusive dealing by the customer.

So, it has aspects of all these behaviors.

It is also, when you think of the bundling, as such, as just a pricing decision, it is a type of conduct that may enhance competition but has few cost-saving efficiencies. There may be some transaction cost savings, there typically will be, and there may be in some cases some shipping cost savings, but you do not get the level of efficiencies that you would see in the typical exclusive dealing arrangements or in most tying arrangements. So, it is a practice that defies easy categorization.

Now, the default rule that, you know, I have gone on at length today in saying should apply in Section 2 cases is the structured rule of reason analysis that we have from the Microsoft case. The reason the AMC has a standard that has that as the third part, as the back-stop, but we have two safe harbors because bundling is so prevalent, because in most cases it is simply a price reduction, and because we do want to err at least a bit on the side of not discouraging procompetitive pricing behavior.

So, the first safe harbor is basically the Ortho test. It is the test that says if you take the total discount applied for the entire bundle and you subtract that from the revenues that you would normally sell for

the competitive product on a stand-alone basis, if that attributed price is above the incremental cost, we are basically thinking variable costs here, then that pricing practice cannot exclude -- not necessarily the plaintiff, but it cannot exclude a hypothetical equally efficient competitor, and so on that basis, we are going to say that that is a safe harbor. If the plaintiff cannot show that the pricing is below attributed price costs on that basis, that the defendant wins.

We have a second safe harbor that is not particularly safe that is a recoupment safe harbor. Now, one can do a recoupment safe harbor in a number of different ways. The AMC did it to determine whether the defendant is going to likely recover the "lost profits" from the calculation of below-cost pricing on the basis I described. Whether those profits are going to be recovered at all -- and, of course, in most bundling contexts, recoupment can be simultaneous, and it typically is, because the total bundled price typically exceeds the total bundled costs. So on that basis, if recoupment is simultaneous, the recoupment safe harbor does not apply. It is there, it is there largely I think because Commissioner Birchfield said, well, we need to have something that sounds like Brooke, so we wanted to have something with a price-cost test as well

as a recoupment element. So, it is there, but I wouldn't pay an awful lot of attention to it.

But then at the end, we have the basic test of the rule of reason. Is the net effect of this practice going to be to harm competition and to restrict output and raise prices to consumers? And it may not be the perfect test that endures as long as Areeda and Turner, I mean, that has been pretty impressive, you know, 32 years since 1975, but I think it is by far the best available today. Certainly none of the alternative tests that people have come up with come close to this one in terms of administerability, intelligibility, ability to counsel clients, and part of the good news is that just a few weeks ago, the 9th Circuit called for amicus briefs in a bundling case where the jury was instructed under LePages. The case is called Peace Health, and a number of amicus briefs were submitted, and Deborah Valentine and I submitted one articulating the AMC standard, so we will see what shakes out of that.

But one thing I hope in terms of the agencies is when that case reaches the petition for certiorari stage, which it will, that the agencies, you know, get a sufficient act together to file a brief with the Supreme Court articulating some standard, hopefully the AMC

standard, for both.

MR. CARLTON: Okay, thank you. If anyone wants to read my footnote, you are welcome to. I will just say one thing. I won't explain the footnote, because we do not have much time. When you teach bundling in economics, and if you look at the economics literature, it is called mixed bundling, because you are offering product A and product A and B together and then maybe product B, and the economics literature is pretty well developed, you know, many years ago, I think starting in the seventies, in which they describe mixed bundling as a way to price-discriminate. It had nothing to do with harming competition, bettering your ability to charge a high price because your competitor is harmed. Pure price discrimination.

Failure to appreciate that will mean that you will see people failing the Ortho test, the first prong that John described, even though they are doing nothing that harms competition. So, that was -- that is the short version, and you can read the long version in the report as to why I think there needs to be something more expansive.

In any case, Bill.

MR. KOLASKY: I will be very brief. I have a question to which I do not have an answer, and it is the

very important subject that we did not get a chance to discuss today, and that is monopoly power.

All of us know that market share is a relatively poor surrogate for market power, and all of us know that it is exceedingly difficult to define markets in monopoly cases. We have a very good test, the hypothetical monopolist test, to use in mergers, because there we have a base price, the pre-merger price, from which to work, and we do not have that in monopolization cases generally.

So, my question really is, especially in high-tech markets, markets characterized by intellectual property in which recurring innovation is important and, therefore, you have recurring fixed costs, so that it is inevitable that prices are going to have to be well above marginal cost, how are the courts to define substantial and durable market power sufficient to create a monopoly?

MR. KRATTENMAKER: I guess I want to say the first three questions I would have asked myself have already been asked, so I won't answer them, and I think we have done such a terrific job of posing a lot of good questions that there are not a lot left, so with that qualification, if I were to ask myself or if you were to ask me what has not been asked, I would say when you

look at the law of Section 2, what do you see that we haven't talked about?

I would say when I look at Section 2, I see it encrusted with a lot of barnacles, a whole bunch of immunities, areas to which Section 2 does not apply at all, for example, so-called petitioning the Government or so-called state action, a whole bunch of exemptions, a whole bunch of activity at the federal level where comparable monopoly is not only tolerated, but it is fostered, and so I would ask myself the question, if we are having a series of hearings or writing a report about Section 2, can we leave out what I might call the ghosts in the room or the barnacles on the back of Section 2 that protect and sometimes foster monopoly in ways that are entirely lawful under the parameters of the rest of the discussion we have had today?

MS. McDAVID: One issue we haven't talked about at all today, and I do not honestly know the answer to it either, is in a framework that applies the rule of reason to Section 2 cases, what is the role of what someone might loosely call intent or might be called contemporaneous business evidence of why a practice was engaged in. We all understand the risk that it can be misconstrued, and that is why we have tended to play it down. But we look at ex post justifications in figuring

out what the efficiencies are, shouldn't we also be informed to some extent about the prior explanations as to why the practice was being proposed, and is that an appropriate part of this analysis? Today, I think we exclude intent in the predatory pricing arena almost entirely, but I am not certain that is appropriate in all section 2 cases.

DR. WILLIG: Thank you. I would like to throw out two things, one very short, because we spent a lot of time on it already, and that is the idea of the test or is there an overarching philosophy. To bring it back to some comments we were sharing on consumer welfare, total welfare, or competitive process, I think competitive process is really what our ability to analyze is about, and I will just put out as a proposition that the no economic sense test, the sacrifice test, are about protecting conduct that is part of the competitive process. We can all go home and think about it.

On monopolization, market power, I would love it if the report would come out and say that this is no longer viewed as a paradox that in any way should slow down our ability to do Section 2 analysis. The Cellophane Fallacy was a fallacy, but it is not a paradox. We know the way out of that fallacy, and it is

real simple. It is just staying somewhat clear-headed about what is the issue, and just in case we do not all agree on it yet, I think we probably do, but let me do a two-minute version of it.

We have got a firm, the defendant, it has got some nice market position, it puts out a practice that is a killer practice. The practice takes out some competitors, and yeah, later on we will talk about whether it was a valid practice or not in some sense, but first let's talk about just the precondition. Is there a monopoly power issue?

I would like to emphasize the way to analyze that is to focus on the situation before the killer practice, we have got the victims of the practice, and we have got other possible sources of competition disciplining the defendant, and the issue that we can resolve using regular monopolist 5 percent test kinds of mind-sets is to ask before the killer practice went into effect, how important in the firmament of competitive forces were those who were the victims of the practice i.e., what is their share?

We can do that in the ordinary sort of measuring system. We can ask what was the share of the defendant in that market and what is the increment to its market power viewed through the regular lens, i.e., what was

the share of the competitors who were being slain? How many others are there who are also sources of competitive discipline? These are share-based kinds of questions. We can put entry into it. We can use uncommitted and committed -- actually, we can use the whole paraphernalia from the Guidelines, as long as we remember to do it pre-kill.

Now, maybe it is five years later and the kill is over, but mentally, we can go back to before the kill and still ask those questions, and there is a relevant market that's pertinent for this analysis. I would love it if the report would say, there is no more Cellophane paradox, there never really was, we just weren't being very clear-eyed about it.

MR. CARLTON: On that note, unless there are any questions from the audience, I would like to say two things. One, I have already mentioned a disclaimer, that my views, if I expressed any today, are mine alone, not those of the Department of Justice, and also, I want to thank this very splendid panel. It's rare to have such talent in one room, and I am grateful to all of you for taking the time to give us your views. Thank you very much.

(Applause.)

(Whereupon, at 4:57 p.m., the hearing was

concluded.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: P062106

CASE TITLE: SECTION 2 HEARING

DATE: MAY 1, 2007

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 5/3/2007

SUSANNE BERGLING, RMR-CLR

C E R T I F I C A T I O N O F P R O O F R E A D E R

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation and format.

DIANE QUADE