UNITED STATES FEDERAL TRADE COMMISSION

and

UNITED STATES DEPARTMENT OF JUSTICE

SHERMAN ACT SECTION 2 JOINT HEARING
UNDERSTANDING SINGLE-FIRM BEHAVIOR:
CONDUCT AS RELATED TO COMPETITION

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Chairman
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and
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PANELISTS:

Susan Creighton
Jeff Eisenach
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Bob Pitofsky
Doug Melamed
Jim Rill
Charles F. (Rick) Rule
Greg Sidak

C O N T E N T S

P R O C E E D I N G S

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CHAIRMAN MAJORAS: Good morning, everyone.

Welcome to this final wrap-up panel of the hearings that we, the FTC, together with the DOJ Antitrust Division have been holding over the course of almost the past year.

I'm delighted to be here today to moderate this final session with my very good friend and colleague, Tom Barnett, Assistant Attorney General for the Antitrust Division.

So I thank you all for being here. I also thank our panelists for taking the time away to be with us this morning.

Before I get started, I should ask all of you just as a courtesy that if you have anything on that rings or otherwise makes noise, if you could turn off at least that part of it. We would appreciate it.

We ask that you not make comments, at least not above your breath, during the session or yell out questions from the audience, please.

I want to start this morning by thanking the staff from the FTC and from the Department of Justice Antitrust Division for their incredible work

over the course of the last year in putting together 27 Section 2 hearing sessions over the course of the year.

These things have gotten to the point where I think they go so well and so smoothly that you forget how much work is going on behind the scenes.

But I see Pat here and Bill Cohen and Gail. They can tell you all the work that has gone on behind the scenes. We are truly grateful for their contributions.

I also want to express my appreciation to the 130 panelists we have had over the course of these sessions. They have made an incredible contribution to these hearings.

I wanted to convene the hearings because it seemed to me that the debate over where we should be drawing the permissible lines for conduct by firms with market power needed something of a boost.

I was a little bit worried that it might be getting stuck. It seemed like we were drawing lines, to be sure, but we were drawing more like battle lines around certain tests or certain arguments.

And our hope was that through these hearings we could identify or highlight areas certainly of

broad consensus in enforcement against single-firm conduct and then also draw out the areas that require further rigorous analysis and guidance.

So starting with the opening session on June 20th, we have held hearings on a wide range of conduct, from predatory pricing to exclusive dealing to bundled and loyalty rebates and the whole spectrum, as well as sessions on monopoly power, remedies, market definition.

We also held a session on empirical research, during which we heard about the research that exists on Section 2 areas as well as areas where further research would be helpful.

We held a session on international perspectives, where we heard from a number of foreign competition agency officials as well as practitioners and academics in the field.

We held a session on business history in which we examined some of the more important monopolization cases of the past century.

We had a session on business strategy so we could learn more about what business schools are teaching future business leaders and executives, what they are teaching them and how that could ultimately impact competition and conduct.

I had hoped, as you all know, from the very beginning that we could get a fair amount of input from the business community so we could actually really think about certain types of conduct, why folks are engaged in it.

And I was pleased that we were able to hold two out of town hearings this time, get outside the Beltway. We held a hearing in Berkeley, California and Chicago, Illinois, which I was very pleased about.

Through all this, we have endeavored to select panelists that could provide a wide diversity for us of viewpoints on these important topics.

So here we are. We are at the last roundtable discussion. We held another almost last roundtable discussion last week. So here we are today.

We will ask our panelists to comment on a wide range of issues.

We will not have speaker presentations today. We will get directly into questions from our panelists, which we thought would be a richer forum to take advantage of the great wisdom and experience of this distinguished panel.

With that, I will tell you -- I think you

probably know who they are, but I'm going to tell you.

I will start with four of the panelists who I will introduce. Tom will introduce the others.

I will introduce all the former FTC folks, and Tom will introduce the former DOJ folks plus one.

I was thinking what we might do is have them duke it out. Maybe we can solve all the problems. We have a new form of clearance agreement of some sort.

So to my far right is Susan Creighton. Susan is a partner at the Wilson Sonsini firm after having served here as the director of the FTC's Bureau of Competition, and it has been my great pleasure to work with Susan.

Susan is quite well known in this area of Section 2 law and in particular of late in the area of cheap exclusion.

So we will look forward to her comments today.

Jeff Eisenach is the chairman of Criterion Economics and adjunct professor at the George Mason School of Law.

He has served in senior policy positions at

the FTC and also at the Office of Management and Budget. He was a cofounder of the Progress and Freedom Foundation. And he is also someone willing to play golf with me.

Tim Muris -- I can't introduce Doug because he used to be at DOJ. Sorry, Doug. So did I.

Tim Muris will be here. We knew that he would have to be a little bit late today. I will go ahead and introduce him anyway.

He is a George Mason University Foundation professor of law, of counsel at O'Melveny & Myers and a co-chair of that firm's antitrust practice.

He also, of course, served as chairman of the FTC until 2004. And in his previous life in the '80s was director both of the Bureau of Competition and the Bureau of Consumer Protection.

Tim will be here later this morning.

Finally, to Tom's left we have Bob Pitofsky, the Joseph and Madeline Sheehy professor in antitrust and trade regulation law at Georgetown University Law Center, where he formerly served as dean.

He is also counsel at Arnold & Porter and formerly chairman of the FTC, prior to Tim Muris, of course.

We have a lot for which we are grateful to Bob, but one I think is that Bob really reinvigorated this concept of hearings at the FTC during his tenure.

That, of course, is the tremendous legacy that brings us here today. So thank you.

Now I would like to turn it over to Tom Barnett.

MR. BARNETT: Thank you, Debbie.

I also would like to underscore my thanks to the staff, who have worked very hard. And in some sense it seems like yesterday, it was almost a year ago when Debbie and I stood up, I think over in that corner of the room, along with a few other people and helped launch these hearings.

But to the staff I have a feeling that may seem like about 10 years ago, given the number of sessions and panelists and issues.

As we were working through the preparation for the hearing today, one of the things that really struck me is the range of issues and the depth of thought that has gone into preparing each and every one of these sessions.

I know it is a tremendous amount of time and effort. But I also agree with Debbie that this is

an extraordinarily important topic.

I have long viewed this, along with I think Judge Posner who said this as well, really to be the most challenging area of antitrust enforcement in many ways, because large dominant firms can impose very significant costs in terms of consumer welfare.

It is also the most difficult area in which to avoid making mistakes as a government enforcer, both in terms of condemning conduct that actually can be beneficial, and even if you find a problem, in crafting remedies that will fix the problem without doing more harm than good.

And while I do agree that there are many areas of consensus at least within the United States in this area -- and I think the hearings have done a good job of highlighting some of those things -- I also think there are some very important issues that remain open.

And I'm optimistic with the wide range of experience and talent that we have had, the benefit of economists, lawyers, business people, academics, and certainly with the degree of experience and wisdom we have at the panel here today, I expect we will have resolved all of this by 1:00 today.

With that, I do want to move toward the

discussion, which we have a lot to cover in a lot of very -- it seems like a long time, but I have a feeling it will go quickly.

So let me just move to the introductions.

I will start off with introducing Doug Melamed, who is a partner and co-chair of WilmerHale's -- do you say WilmerHale?

MR. MELAMED: I am supposed to.

MR. BARNETT: -- antitrust and competition department and former Deputy Assistant Attorney of the Department of Justice's Antitrust Division, where he had a little bit of experience in some Section 2 matters.

And then over to my left is Jim Rill, who I'm sure everyone knows, who is a partner at Howrey and the former Assistant Attorney General of the Antitrust Division.

To his left is Rick Rule, who is a partner at Cadwalader, Wickersham & Taft and also a former Assistant Attorney General at the Antitrust Division.

And down at the left is Greg Sidak, who is a visiting professor of law at Georgetown University Law Center and a founder of Criterion Economics.

He served as the deputy general counsel of

the FCC and senior counsel and economist to the Council of Economic Advisors over in the executive branch.

So welcome to everyone. And with that I say why don't we get to it.

In terms of format, Debbie and I thought we would basically play tag team in terms of who will lead off each topic, with the idea, however, that each of us will jump in as seems useful.

And we are going to start off with the first topic being general standards and issues.

I will ask the very first question in the broadest possible form, which is I would like to ask which one or two issues -- and I would ask no more than two to keep it short -- that you think are the biggest problems or concerns facing antitrust enforcement today in the area of Section 2 that we should try to address in the report that comes out of this.

To start off, why don't I ask Jim Rill to jump in.

MR. RILL: Thank you, Tom.

Let me say it is an extraordinary honor to be here on this panel of august personages and to be invited to participate.

I think one issue stands out in a claim being addressed in the report, and I emphasize report, not necessarily guidelines, but an analytical report -- hopefully with some sense of conclusion and advocacy -- and that is the area of bundled pricing and loyalty discounts.

The area has abounded in some confusion ever since the LePage's-3M decision. There are several court decisions on the way up that may add clarity or possibly further confusion to the issue.

But trying to provide advice in that particular area is daunting. I think that there are a number of solutions out there, or at least potential solutions out there as we get into more the merits of the discussion today.

But I think those particular areas are ones that really stand out above the others in looking for a detailed analysis and what I would propose to be a report, which I earnestly hope is forthcoming as a results of these hearings.

MR. BARNETT: Thank you.

Bob, would you like to give us your perspective?

MR. PITOFSKY: Thank you.

It is very similar to Jim.

We talked about whether we could reach consensus. I suspect the best chance we have of reaching consensus is on the issue of what is the most pressing set of issues facing antitrust, and I think it is defining exclusionary behavior under Section 2.

I think it is a set of issues that is most confusing, hard to predict, hard to counsel, hard for judges to deal with.

Some people will hold out for the Robinson Patman Act, but I don't quite think that is really the toughest set of questions.

And as we will discuss today, what sort of rule should we build on? Is it the balancing test that was unanimously adopted by the Court of Appeals in Microsoft and echoed I think in Aspen, or these unitary tests. We all know the balancing test has its flaws in terms of unpredictability and difficulty in implementing in the context of a legal proceeding.

But should we look for a unitary test, which people understandably and with my admiration have tried to come up with -- sacrifice of profits, driving out a less efficient competitor and so forth.

I will give away my bottom line right now. I think the unitary tests, much as I admire the creativity of them, don't work, do more harm than good. And therefore, I would stick with the balancing test.

But I think that's what a lot of our discussion this morning should be directed toward.

MR. BARNETT: Doug?

MR. MELAMED: I think the most important thing that can come out of these hearings would be an explicit clarification or articulation of the purpose of rules about exclusionary conduct.

I had occasion before coming today to look through some of the summaries of the hearings that you have held thus far. I haven't read all the testimony. But I did look at the summaries.

I had the impression that it was like an unbounded exercise for a public policy class at the Kennedy School.

There are all sorts of people with all sorts of views about how to address tying, exclusive dealing, predatory pricing, whatever the topic is, unstated often in the dialogue, and I think often explaining the disagreements among the parties, were differences in assumptions about the purpose of

antitrust.

Is it consumer welfare? Is it total welfare? Is it dynamic analysis? Is it static analysis? And so forth.

This problem doesn't arise in cases of collusion, because in these cases, I think both the normative and the analytical converge on the understanding that the issue is, does the arrangement increase or decrease the output of the parties to the agreement.

In exclusion cases, we are often dealing with a trade-off between the efficiency benefits to the defendant and the exclusionary impact on rivals. And I think we don't have a clear understanding of what the antitrust objective is dealing with that trade-off.

My own view is that none of the sort of economic factors mentioned above is a sufficient statement of the objectives. If you look at the cases, and I think the cases are wise in this regard, you see, of course, Trinko, saying that monopoly profits can be a good thing.

More important, I think, you see some of the earlier cases, Grinnell and ALCOA, cases that say in effect quite explicitly that, if a monopolist gains

his monopoly power by skill, foresight and industry, that's okay.

Those cases embrace a normative proposition that is very important to the fact that antitrust has been supported by the political system in this country for 120 years. That normative proposition is that if the conduct is permissible, in some sense defined without regard to its consequences, it's okay.

So what we have to do on the conduct element, exclusionary conduct, is to focus on the quality of the conduct defined without regard to its impact on consumer welfare or dynamic welfare or whatever.

It happens, I believe, that if you do that, you are adopting, at least if you do it the way I would do it, what works out to be a very good proxy in the real world, given the problems of administrability and so forth, for achieving the economic objectives.

In any event, I think you cannot focus just on the economic objectives. You have to identify clearly the normative objectives of exclusionary conduct law.

CHAIRMAN MAJORAS: Anybody want to take that

on in terms of whether that is enough, whether looking at the conduct of the defendant rather than the impact on consumers or competitors is adequate?

MR. PITOFSKY: I already said I'm uncomfortable with that. It puts the focus in the wrong place.

My concern is not the behavior of the monopolist, the defendant. I thought antitrust laws were designed to advance and I think the bottom line is, consumer welfare.

If you are looking for consumer welfare, I think it is relevant but not dispositive to know what the intent of the monopolist is and what the nature of its conduct is.

But I want to pick up that just because the monopolist behavior is efficient or involves a sacrifice of profit doesn't answer the question. I want to know how anticompetitive it is with respect to consumers.

I thought at least in this country consumer welfare and not total welfare -- maybe you can challenge it in academia, but as far as the courts are concerned -- consumer welfare is what it's about.

MR. MELAMED: Can I make a brief comment in

response to Bob, just a question?

Bob, if a firm builds a better mousetrap and as a result obtains enduring market power, and the effect of the enduring market power is overall to make consumers worse off than they would have been if they never built the mousetrap, do you condemn that conduct because --

MR. PITOFSKY: How do consumers come out worse off in the face of a better mousetrap?

MR. MELAMED: My mousetrap is 5 percent better than the incumbents', I drive the incumbents all out of business; after they leave, I raise prices 5 percent. It is easy to think of hypotheticals where consumers are worse off.

MR. PITOFSKY: That's superior skill as far as I'm concerned and I don't have any problem with it. But it's not the typical case.

MR. BARNETT: I'm not sure we have so much disagreement.

Rick, you want to jump in?

MR. RULE: Sure. I am for once to the left of both Doug and Bob. And perhaps I wouldn't say it is one of the few times, because I actually agree with them a lot.

But I think I agree with Bob probably

wholeheartedly, I guess. I said this before.

I worry about the unitary approaches to single-firm conduct. I think it creates a lot of issues.

My own personal view is, as I said before, I don't think the world would be a terrible place without Section 2 of the Sherman Act, because I think most of the conduct that is worthy of condemnation can be attacked through various other legal means.

So to me, I would say the biggest issue is cabining Section 2 and focusing it.

The problem with the unitary standards is, I think, they presume a sort of capability of regulators and enforcers and courts to distinguish efficient from inefficient conduct that just doesn't exist.

I think that I have always been very impressed by some of the writings of Judge Easterbrook and particularly the limits of antitrust.

And the fact is, if you look, I think, historically at tests that put a burden on a defendant to justify its conduct as efficient, inevitably the courts find it very difficult to

agree or to see an efficiency.

So I think the focus really ought to be on whether or not there is exclusion, foreclosure, or whatever you want to say of competition.

I don't think that is a sufficient condition to condemn something, but I think it is necessary.

It may be that the foreclosure, or the exclusion is due to the fact that there is a better, more desirable mousetrap, and that is an efficiency defense, and I think there ought to be allowed an efficiency defense.

But I think that an absolutely necessary condition is market power on the part of the individual and exclusion of competition.

The last point that I would make that I think is often left unsaid in these sorts of discussions but I think is very important, when you are talking about going after unilateral conduct and you don't have an agreement, you don't have all the issues that I think, quite rightly, warrant antitrust enforcement when you are talking about an agreement. When you are talking about going after unilateral conduct, you are essentially talking about the government regulating behavior of individuals, maybe companies. But it is unilateral

action.

And there, I think, we as a society, given the way we are organized, should be very concerned not only about the adverse economic effects, the false positives, but also about the impact on liberty, on creativity, and on all of the benefits, not only to the economy, but also to our political life that individual freedom and liberty bring.

CHAIRMAN MAJORAS: Susan, you were going to make a comment before Rick.

MS. CREIGHTON: That's all right. I can encompass it in my remarks, which was I have sort of a 1 and 2A and B. Hopefully that is not breaking the rules.

So the first point and I think actually maybe directly in contrast to Doug, the first thing I would love to see come out of the report is an affirmation that the principle that I think underlies the rule of reason both for Section 1 and Section 2, which is consumer welfare as sort of the touchstone for our analysis, should be really the governing principle in terms of what we adopt for specific rules for conduct under Section 2.

I think, like Bob, I'm not saying we can come up with a single unifying test that would cover

all that type of conduct. But I believe that we should be assessing the particular tests that we adopt with respect to particular conduct in terms of whether or not it does maximize consumer welfare and is consistent with the rule of reason.

So I would use something like the Microsoft test as sort of our default unless and until we can conclude with respect to particular types of behavior that there is another type of test that we have in predatory pricing that more specifically advances the balance of maximizing consumer welfare for that particular type of conduct.

The second thing that I would like to see come out of the report, and this may be a little bit outside the direct question of the adoption of substantive rules under Section 2, is I think that there are two powerful ways in which our analysis of Section 2 substantive standards gets distorted by things that don't directly relate to the merits of Section 2 liability, which is, first, the prospect of treble damages in private litigation, and the second is the question of the scope of privileges and immunities.

I think just as in our analysis of patent reform, I think many people in the antitrust

community thought it is important not to remedy problems with the patent system by adjusting antitrust.

In the same way, I think it would be important to try not to distort our analysis of substantive antitrust analysis because of the fear of treble damage liability, and if there is a perspective that that is influencing or has a powerful negative effect in terms of how Section 2 is being applied, that the agencies I would encourage to address that head on as something that Congress needs to address.

And in the same way, on sort of the opposite side, I think that the ever-expanding scope of privileges and immunities, the ability of people to protect conduct that otherwise would be subject to Section 2 is probably the single biggest deterrent to the ability of the agencies effectively to enforce against anticompetitive conduct.

That also would be an issue for the agencies to identify for Congress and for the courts.

MR. BARNETT: Not hearing a lot of support for a single unified test.

If I can turn to a slightly more specific question, I guess, which is do you think that there

should be particular safe harbors, maybe conduct specific or conduct-specific safe harbors under Section 2, and if so, what are a couple of the areas you would focus on?

I don't know if -- Greg or Jeff, you haven't jumped in yet. If you want to tackle that one initially.

MR. EISENACH: Let may say two things.

First of all, in my view, we have missed the biggest issue in the room, and it is not in the room, it is a couple thousand miles away across the Atlantic and across the Pacific.

I agree with Jim, the LePage's decision was -- what does Obi-Wan Kenobi say -- a powerful disturbance in the force, and we all felt that something bad had happened.

But that was a perturbance in a vastly more settled pond than what we see going on around the world.

I think reading the Article 82 Green paper is in many ways an exercise in cognitive dissonance for American antitrust professionals.

I guess if I were to suggest a number one priority, both from a substantive perspective and from the procedural perspective of venue shopping

and so forth, one of them has got to be trying to continue the process of achieving convergence in the major antitrust venues around the world. The EU is not alone.

So I didn't want to let that go.

The second thing is that it seems to me that the dichotomy between safe harbors and presumptions on the one hand and a complete consumer welfare approach on the other hand is a false one, and I think it is captured in Doug's comment.

The question that Doug leaves me with is what is the underlying analytical basis of the rules that we do adopt? If it is not a consumer welfare standard, then I don't know what it is.

I think our current safe harbors are quite unsophisticated ones in many cases. I find it inexplicable that 40 years after we began departing from the structure conduct performance paradigm, we are back at a point where the share of the number one firm is somehow the proposed safe harbor in the first step of a market power test.

I don't know what 75 percent or 50 percent or 40 percent means out of context. And surely we can state the safe harbors in more sophisticated ways.

But it does not seem to me that there is any necessary conflict between a safe harbor test or a series of safe harbors or presumptions on one hand and a consumer welfare analysis on the other hand.

Had Microsoft had some legitimate business purposes for some of the conduct for which it was found liable in the Court of Appeals ruling, it might not have been found liable.

That's a good example, I think, of a presumption for a safe harbor which very much is within the context of the whole rule of reason analysis.

CHAIRMAN MAJORAS: Can I just follow-up on that for a second?

I would like to see what others think about that.

When we look at what the Court of Appeals did in Microsoft and we talk about it as a balancing test, I have always looked at it as a weighted balancing test.

I think we are right about this. If you read, as the Court of Appeals went through every allegation of conduct, any time Microsoft put up any plausible business justification for it, that ruled the day and that was the end of it.

It was just, I think when Microsoft said "no, actually we didn't do those things," that then the court said "oh, yes, you did, and because you said you didn't, you didn't put forth a justification, therefore you lose on that one."

It seemed to me the balancing test was pretty weighted.

What do people think about that? Does that make you feel better or worse about if the so-called balancing test ended up sort of dominating in this area going forward?

I know Doug is dying to weigh in.

MR. MELAMED: I think you are completely right that the Microsoft Court never in fact balanced.

In the two instances I believe it found that there was a legitimate justification, and that was the end of the analysis. Microsoft won.

In other instances, either because Microsoft didn't advance a justification or the court rejected it on the facts, Microsoft lost.

Let me comment on this idea of balancing rule of reason in Section 2. It is a meaningless concept. It is at best a throwback to the Chicago Board of Trade case.

In collusion cases, we know that rule of reason means, did the agreement increase or decrease the outcome of the parties to the agreement.

There is no metric, no meaning to rule of reason, where you have both benefits and harms and you are trying to balance them or, in Hovenkamp's terms, assess proportionality.

As to safe harbors, I agree with Rick. There ought to be a safe harbor where the conduct did not exclude rivals or create or maintain monopoly power.

And on the other extreme, I think that cheap exclusion and other forms of naked exclusion, in which there is no efficiency you can condemn the conduct if it excludes rivals and injures competition, without more.

But to talk about rule of reason or balancing as a solution to the problem where you have both benefit and harm it seems to me is nonsense. And I don't think any court does it.

My experience is that courts find either a justification, in which case defendant wins, or no justification, in which case plaintiff wins.

It seems to me talking about rule of reason is an empty vessel that leads courts to do what the

LePage's court did, which is to say "I don't know how to balance this, I don't know what to do with this" and then come up with some crummy law because it finds no guidance in the prior cases.

MR. PITOFSKY: The balancing test is the baseline of all of antitrust.

The rule of reason compares procompetitive justifications, anticompetitive effects.

Is there another way to get there without examining the anticompetitive effects? That is true of exclusive dealing, true of tying, true of virtually everything regulated by antitrust, joint ventures.

Merger is really a rule of reason analysis. Why do you single out Section 2 of the Sherman Act as an area where balancing is nonsense?

MR. MELAMED: Because I think of it as collusion versus exclusion, not Section 1 versus Section 2.

If you and I agree to a joint venture, we can ask a simple question. Do the efficiencies trump the market power? That is, does our output go up or down?

If you exclude me from the market because you have a more efficient exclusive dealing

agreement that enhances your ability to distribute your product, you have the efficiency gains to you and the exclusion to me and the consequences for my customers.

I don't know of an algorithm that makes any sense for weighing those two against each other.

MR. BARNETT: Rick.

MR. RULE: The only point I would make is that, in this case, you are both right, I would say.

Bob's observation is sort of fundamentally true about antitrust. Inherently in antitrust, you are trying to balance harms to consumer welfare against gains to consumer welfare.

I think Doug is right in the sense that it becomes infinitely more difficult to make that operational in a Section 2 context for a variety of reasons.

So I agree with Doug that there is a need in light of that to look for, if you will, operational rules that incorporate that sort of insight of balancing, but it is done in a way that courts can actually manage.

You could argue that maybe they didn't do such a great job in the Microsoft case. My perspective is a little different than Debbie's, for

perhaps obvious reasons.

I think a lot of the company's justifications were given the back of the hand, frankly.

But I do believe that -- and I think this is pretty consistent in Section 2 -- there is this tendency, although it is a very difficult hurdle for defendants to get over, but if defendants can show that their conduct has a legitimate justification for it, it typically is a good defense to a Section 2 claim, regardless of its impact.

I think that is probably an appropriate way to approach it. Maybe Doug agrees with that.

The concern I have always had with a lot of these tests is that at the end of the day, you have to conclude that the conduct actually does exclude somebody.

One of the reasons that you look at the number one firm's market power, I would say, is a legal reason. Section 2 talks about monopolization, for better or worse.

That concept, other than a firm's market power and its position relative to its competitors, is meaningless. You have to give some meaning to the law. That is what the law is.

That's the single basis for attacking unilateral behavior.

MR. PITOFSKY: The sentence was there are a number of reasons why the rule of reason works in many areas of antitrust but not Section 2.

I would be curious as to what those other reasons are.

MR. RULE: If I said that, I'm not sure -- I think the concept of reasonableness is the appropriate way to approach it.

The question of what the rule looks like in Section 2 is more difficult.

One, it is more difficult because, unlike Section 1 where you have an obvious target which is an agreement that is in some way explicit between two parties and you can look at it, in Section 2, the conduct is not that explicit. It tends to be implicit. It is something a company has done unilaterally.

It is also very difficult to extricate it from all the other competitive conduct that a company engages in and evaluate it that way.

You have the fact that intent evidence, in my opinion, is completely worthless in this area, because you can't distinguish intent evidence that

shows a desire to be vigorously procompetitive or vigorously anticompetitive.

You also have the fact that -- and this was really Doug's point, which was perhaps his principal point -- unlike Section 1, where you can look and say, "okay, gee, we have an agreement and what does it do to market power, does it create it, is it an exercise of market power?"

In Section 2, it is always indirect. First off, we don't condemn a company unilaterally from exercising market power.

One of the things that's interesting about Trinko is the point the court makes that, rather than condemning a monopolist for charging monopoly price, we actually want him to do that because that's his reward if he has gotten it through luck, skill or foresight in doing it.

So instead, in a monopolization case, what you are looking at is some sort of indirect impact because there is an adverse effect on a competitor, which you then have to translate into some impact on consumer welfare.

Then you have to compare it with the procompetitive benefits. That's very difficult. That goes sort of to Doug's point.

There is no algorithm for making that comparison that I'm aware of from economists.

Instead, you have to try to develop rules, whether they are safe harbors, whether they are sort of general market power screens or something, because I think saying that you are going to directly measure and balance the procompetitive and anticompetitive effects is probably fooling yourself and the courts because it is not really possible.

Instead, you have to come up with rules that are directed to trying to make that balance but probably in some kind of gross fashion.

CHAIRMAN MAJORAS: I have a question about the safe harbor concept.

Before I do, Greg, you have been so patient down there. Is there anything you want to add on any of these topics?

MR. SIDAK: I was going to go off in a completely different direction.

Okay. I think that one of the big questions that Section 2 poses is whether the jurisprudence in this area is robust with respect to alternative objective functions of the firm, alternative revenue models, alternative production technologies.

By that, I mean suppose you change the

assumption that a firm is a profit maximizer. Does our existing jurisprudence on predatory pricing, for example, give us much guidance?

It is not such a hypothetical question. For example, the U.S. Postal Service is now subject to antitrust -- it has had its antitrust immunity lifted with respect to products that are not within the statutory monopoly.

The last time I checked, the U.S. Postal Service was not a profit maximizer.

With respect to revenue models, implicit in a lot of the discussion we have had so far is that we are talking about product markets that are pretty easy to get our arms around, relatively mature products.

What if we are talking about some of the kinds of products and services that are at the intersection of the Internet, telecommunications, financial services and the like, where you have multisited markets, you have multiproduct firms.

We can all agree that consumer welfare is what we are trying to maximize. But which consumers?

A given business practice may result in some service being given away for free to one set of

consumers. And that clearly benefits them. But is there an adverse effect on some other set of consumers?

So I think the consumer welfare objective is just the beginning of the analysis.

When we are looking at some of these more complex markets with multiple sides or firms that are multiproduct firms, in which they may be subsidizing a particular product in order to stimulate the network effects and then with respect to the production technology point, I think that antitrust jurisprudence, compared to the traditional law and economics of sector-specific regulation is not very agile with respect to multiproduct firms.

I think this is one place where the Europeans actually have shown some greater skill than American courts.

In a case like the Deutsche predatory pricing case in the EC, where they explicitly recognized the multiproduct nature of the firm and had to calibrate the predatory pricing rule to reflect the fact that there were multiple products involved.

So they used Jerry Fowell-Haber's combinatorial cost test to try to establish what the

appropriate price floor was for the particular service in question that was allegedly being priced below its cost.

So I think that the robustness of Section 2 jurisprudence across these different economic dimensions is an important issue.

The other really big thing -- and I will stop here -- is remedies and evaluation of the efficacy of enforcement and of particular remedies.

We don't have much of a tradition. I'm not sure we have much of a tool kit for knowing whether we are systematically improving or reducing consumer welfare over the long haul.

Much of the discussion about whether one kind of rule is better than a different kind of rule is really a question of are we minimizing the sum of type 1 and type 2 errors under one approach rather than another.

I don't know how we can possibly answer that question unless we have some sort of time series to look at.

Lawyers, that's not their stock in trade to do that sort of thing. It is a very difficult task to undertake.

CHAIRMAN MAJORAS: I agree with you on

remedies. I'm looking forward to discussing that further with you.

I know Jim Rill was going to make a comment.

MR. RILL: I would just as soon follow-up if you are going to start on safe harbors. If you want to lead that off.

CHAIRMAN MAJORAS: Yes, I will. What is interesting is, Jeff, I understand your point about, for heaven's sakes, when you talk about safe harbors, aren't you really talking about a market share of safe harbor, and then aren't we going backward, not forward, in terms of structural analysis.

I heard what Doug said in agreeing with Rick on what the safe harbor ought to be. That requires some real analysis to get there.

A safe harbor not based on structural presumptions might help you if you are actually in court because it gives you a better chance of winning.

How does that help lawyers who are counseling their clients and trying to keep them out of there initially?

What kind of a safe harbor can we have that is truly meaningful and keeps people out of the

legal system from the very beginning?

MR. EISENACH: Just very briefly. There are others wiser than me on this.

First, I'm not opposed in any way to a 75 percent safe harbor or a 70 percent safe harbor. It is better than a 50 percent safe harbor.

My point really went to the notion that surely we can do better than share of the top firm as a metric. That surely can't be the best we can do.

But the second point would be that, again, I think that the metrics can become more robust and more sophisticated without becoming less useful.

Also, do we have it upside down when we look at market shares first and entry second? I think we do.

CHAIRMAN MAJORAS: Interesting. Jim?

MR. RILL: I think history has embedded us with the notion of at least a market share test for a safe harbor, at least as a starting point, only as a starting point.

The International Competition Network recently surveyed, as part of its single firm conduct working group, the question of whether or not -- first of all, I think something like 70

percent agreed that consumer welfare of the 35 nations that responded to the questionnaire, that consumer welfare was the appropriate underlying fundamental principle of monopolization Section 2, Article 82 and related enforcement technology techniques. But very little probing beyond that as to what consumer welfare meant.

I think I have to say that Bob is a little bit simplistic on this notion, and I think there is a lot more latitude, but that is another issue.

I think that is a starting point. Again, any number, about 70, 80, 90 percent of respondents to the questionnaire would use a safe harbor threshold of some level of market share, market power, if you will.

Now, some of those safe harbors are rather low. I think Japan is around 10 percent, which doesn't give me a lot of comfort. 70 percent sounds reasonable to me, maybe a little higher.

But I think we can get beyond that. I think there is enough -- a lawyer quite clearly can demonstrate, an economist can demonstrate that there is a rich body of law in the United States stemming from the law of predatory pricing which can bring into the notion of consumer welfare certain

operational tests, if you will, that can be safe harbors applicable not only in the predatory pricing area but with some further depth analysis into areas that go beyond single firm predatory pricing, in fact, in all pricing areas, bundled pricing, loyalty discounts and maybe developing into the areas of coercive tying, one wants to think about not contractual tie but price-related tie.

I think a thought given to that kind of an operational safe harbor approach is not inconsistent either with the unilateral or unitary test.

It doesn't seem inconsistent with a consumer welfare analysis stemming from some of the literature, at least in the Trinko decision and more recently in the Weyerhaeuser decision, where the Supreme Court provided that kind of approach to a safe harbor from a legal operational basis and would provide significantly greater clarity to those of us who are trying to counsel companies and to enforcement agencies as they move to the next stage.

MR. BARNETT: I think Jim's comments actually began to quite conveniently and appropriately blend into our next topic, having to do with a definition of what is monopoly power and by your reference to defining that through market

shares.

Debbie, I think you are going to lead off on that.

CHAIRMAN MAJORAS: I will.

Doug, you have been dying to jump in on this issue. I think it relates. If you want to go first.

MR. MELAMED: I will be very brief.

Debbie, I was very glad that you asked the safe harbor question in terms of the impact on counseling rather than just the impact on litigators, because the impact of antitrust rules in litigation, it seems to me is much less important than the impact of those rules on the millions of decisions that businesses make every day that don't reach the courts, that is, on the guidance that antitrust law gives to the business community.

From my experience in counseling, market share-type screens are of limited value because market share depends on market definition, and it is a binary concept and we are often sitting there, saying well, gidgets might be in the market with widgets, but they might not be and who knows.

In my experience, much more useful to the client are guidelines and safe harbors that focus on

the nature of the defendant's conduct, things like is the price below your avoidable cost, does it make business sense, are you sacrificing a profit, whatever it may be.

Even rules of that type I think are bad rules are useful for counseling -- rules such as: Is the exclusive dealing contract for a duration of a year or less?

Those things that enable the defendant to look at his conduct are much more valuable as safe harbors than those that require him to analyze the market.

CHAIRMAN MAJORAS: Okay.

Susan, as we look at the concept of monopoly power and we typically begin the analysis with that in a Section 2 context as well as in a Section 1 context, I should say -- welcome, Tim.

MR. MURIS: Thanks.

CHAIRMAN MAJORAS: As we look at this, do you think it is useful for us to establish a sort of conclusive presumption on market share?

We have had a couple comments here that the market share screens are really not that useful and you have to do so much analysis anyway in order to define the market that it is not that useful.

You have certainly been on the enforcement side. What do you think about those kinds of safe harbors?

MS. CREIGHTON: I think both Professor Elhauge and also maybe Tom Krattenmaker and Professors Lande and Salgo have written a couple of articles talking about how market power -- not market power -- the percentage of the market that you control actually can be helpful as direct evidence regarding how profitable is it likely to be to you and both your incentives and your ability to enter into some kind of exclusionary conduct.

So it can be direct evidence and quite important in that way.

I do get concerned about using, at least in attempt cases, as a screen, because I think if you looked at Unocal or Rambus, for example, without getting into the -- sort of any standard-setting case, the person may have had no market share at all in whatever the relevant market was.

That does not necessarily dictate how likely -- what the market share would have been or their market power would have been if the exclusionary conduct was successful.

So I would be concerned about saying it is

always required as a preliminary step before you get to the question of -- one of the advantages that I think or one of the things that American law emphasizes which maybe the Europeans don't as much is I think for them, they really do focus on market share dominance, and then they have very strict definitions of if you are one of those folks, what can you do.

In the course of that, they really lose sight of the question of the causation and whether or not the conduct is conduct that we are concerned about in terms of increasing barriers to entry or otherwise increasing somebody's market power in a way we would be concerned about.

I would be concerned also about using a market power screen in the first instance to make sure we don't lose sight of that important additional causation requirement.

I think that could be a danger.

CHAIRMAN MAJORAS: On the question of durability, I know that in prior panels the panelists really agreed that we need to look at market power and whether it is both substantial and durable.

Susan, you certainly but I think everybody

today now does so much work in dynamic industries and technology industries in which even if you have market power, it might be quite fleeting. There may not be a durability.

Does that make it even less the case today, that we should be looking first at market share screens as a way to at least start to get into the analysis?

Bob?

MR. PITOFSKY: I think you put it just right toward the end of your remarks.

Marketshare is the ramp that leads you into the analysis. The problem is sometimes judges and lawyers think the ball game is over because of the way in which the market has been defined. We shouldn't do that.

When you get to the end of the analysis and you look at conduct and barriers and all that, you go back and see if your market share analysis is correct in light of all these factors.

Of course, substantiality and durability are critical. If you have market power, but it only survives for a year and then is displaced by some other product that is not really market power.

We know the barrier to entry is important.

This applies to high-tech. I have always been an admirer of Andrew Groves' book "Only the Paranoid Survive."

The whole idea of Learned Hand that market power is a narcotic and competition is a stimulant, you can't say that about these big high-tech companies. They are extremely aggressive in their innovation, and that's a factor that has to be taken into account.

But unless you start with market power, I don't know where else you start. It gets you going, because some things, some behavior engaged in by a company with 10 percent of the market is legal and is illegal if the firm has 90 percent of the market is illegal.

You have to address that question at an early point. I skipped over the safe harbor.

Let me just say that first of all, I'm not comfortable with safe harbors. I like rebuttable presumptions because there are too many quirky situations.

Somebody has 40 percent of the market but everybody else has one percent each. So I think that presumption of a safe harbor is rebuttable.

Secondly, the safe harbor is going to vary

according to the behavior you are dealing with. We have safe harbors for exclusive dealing.

We have safe harbors for tie-in sales in terms of the market power of the seller instituting that program, 30, 40, 50 percent and so forth.

When you get to lying to the Patent Office, I don't think there is a safe harbor. I don't think there should be a safe harbor.

So I think safe harbors, of course, are useful to people who are advising firms about what they can and cannot do, but they should vary according to the nature of the conduct.

MR. BARNETT: What if you lie to the Patent Office and get a patent that actually confers no market power, what do you mean there is no safe harbor? Have you violated Section 2 then?

MR. PITOFSKY: If you lie to the Patent Office? You are talking about Walker Process insisting on defining the relevant market in order to make out a violation for lying to the Patent Office?

MR. BARNETT: The statement was if you lie to the Patent Office, there should be no safe harbor.

I'm just wondering what that means in terms

of if you get a patent, I think most of us agree that doesn't necessarily give you market power if you end up with a patent which does not give you market power.

Have you violated Section 2 or not?

MR. PITOFSKY: Fair enough. My answer is there are no redeeming virtues to lying to the Patent Office, none whatsoever.

MR. BARNETT: I understand. But if I can perhaps -- I thought it was a yes or no question.

MR. PITOFSKY: Okay. Here's my answer to that.

CHAIRMAN MAJORAS: You are back in Congress.

MR. PITOFSKY: Horizontal price fixing may confer no market power. We declare it illegal.

I think lying to the Patent Office is the same thing.

MR. BARNETT: Fair enough.

CHAIRMAN MAJORAS: We have talked about -- Bob, you and some others have said if we don't start with market share, where do we start. We have started there for very long time.

But Jeff Eisenach said why don't we think about entry first. I think that's what you said, Jeff.

Anybody have any -- Greg?

MR. SIDAK: I haven't heard anybody utter the words price elasticity. That's what I care about. I don't care about market shares or entry.

If I can directly observe the price elasticity of demand, I can make an inference about whether it is profitable or not profitable to raise price.

Let me give you a hypothetical example. Suppose some high-tech industry, a firm has 40 percent of the market, casually defined.

It raises the price by 10 percent, and its competitors over the same period of time lose market share.

Would we infer that there is not a problem because the market share is only 40 percent and that is way below Judge Hand's ALCOA threshold or would we look at a price increase or loss of competitor market share and say that is a more direct set of facts that elucidates what the price elasticity of demand is?

CHAIRMAN MAJORAS: Rick Rule, could you counsel a client on that basis?

MR. RULE: On price elasticities?

CHAIRMAN MAJORAS: Not you personally. I

have no doubt you could.

MR. RULE: I have generally not had to do that, fortunately.

But there are always difficulties, and you have to exercise care when you are counseling a client. But frankly, I have always found the market share requirements of Section 2 to be helpful in terms of advising clients.

There are edge cases where it can be a little difficult, and you can tell the client, "gee, I know you don't think you have a monopoly and that you are in a very competitive world, but there are ways in which a court could find the opposite, so you have to exercise some care."

But for a lot of companies, given the nature of the industries they are in and what they are doing, it is pretty clear that they don't have market power, and you can worry about other parts of the antitrust laws.

I will say that it is probably more difficult as technology has moved along and as the economy has gotten somewhat more dynamic and complex, particularly for information industries. It becomes a little more difficult to use the market power and monopoly power market share screen that

traditionally we have used.

And I guess for that reason, when you are counseling clients, you kind of have to have in the back of your mind that there could be a way to define the market that would suggest they do have monopoly power.

So then you go directly to conduct. And in those industries, particularly, conduct safe harbors would probably be very helpful.

So to some extent, I think conduct safe harbors are appropriate there. I will also say, interestingly, in information industries, you rarely get that concerned, at least I do, about pricing issues. Because if you think about it, if they are information industries, generally marginal cost will be pretty low and you will recognize that predatory pricing issues are not that problematic.

Generally, I think market share screens have worked. They are more complex today, but they have some value in counsel.

MR. BARNETT: Related to that, if I could follow-up with Greg for a little bit, the economists generally tell me that if you think about perfect competition, the way you deal with that is you graph that and it would be a perfectly horizontal demand

curve, and if you have downward sloping demand curve, you have some degree of market power.

And if you measure that directly, it is probably true that the vast majority of firms in the United States have a somewhat downward-sloping demand curve.

Does that mean they all have market power and we should just move on from there? Or should we try to deal with that in some meaningful sense to help in part from a counseling perspective?

MR. SIDAK: Of course, they may have differentiated products that explain the downward slope of their firm demand curves.

The slope of the demand curve, of course, doesn't tell you whether the firm is earning monopoly rent or just quasi, a risk-adjusted return on investment in innovative activities, for example.

So I don't think that the downward-sloping demand curve itself is a cause for antitrust intervention.

In terms of the market share, market power filter that we have been discussing, I think it is possible to directly infer something about the price elasticity of demand for a firm even in the absence of market shares if you have certain evidence.

So in other words, I don't think you should necessarily back away and say, well, this is way below Judge Hand's threshold in ALCOA, there is no way this could be a monopoly problem. It might be a monopoly problem.

CHAIRMAN MAJORAS: Tim, you had a comment.

MR. MURIS: I thought Tom's point was quite perceptive. It is not just differentiated products.

If you walk on the Mall, any hot dog vendor who raises his price won't lose all his sales. That means the demand is a downward-sloping curve. The reason is transaction costs more than anything else; in a world of positive costs, just about everybody has a downward-sloping demand curve.

This fact has profound implications for antitrust economics. Ben Klein has written the best about this in his analysis of the Kodak case and other articles.

It means that it is difficult to have simple uses of Lerner indexes and downward sloping demand as measures of anything meaningful.

CHAIRMAN MAJORAS: Any comment? No?

MR. SIDAK: A common problem when you start looking at industries that are subject to some kind of public service regulation, of course, is that

they may be compelled to sell products at low prices or even below costs.

So the Lerner index actually has its causation reversed. They have a high market share because they are compelled to charge low margins or negative margin.

I agree with Tim that the Lerner index is uninformative and potentially misleading in situations where you have significant economies of scale.

MR. BARNETT: Jim, I will turn to you for our next topic to lead off, because that is bundled discounts. You have already revealed a particular interest in that area.

We recently had a report issued by the Antitrust Modernization Commission that addressed this topic and set forth a three-part test to determine whether or not there is a violation of Section 2 from bundled discounts.

Just briefly, the first prong is allocating all of the discounts to the competitive product -- sometimes referred to as the Ortho test -- second, whether or not the defendant -- whether it is below cost under that measure. Second, whether or not the defendant is likely to recoup those losses. And

thirdly, whether the bundled or rebate program has had or is likely to have an adverse effect on competition.

Aside from the fact that the third prong seems to sort of ask the ultimate question there, the question is is this appropriate standard, is it appropriate as a safe harbor but perhaps not the standard or is it just something we should be looking in a different direction?

MR. RULE: First of all, I think the AMC is looking at it only when it relates to conduct by someone who is judged to be a monopolist.

Moving on from that to the operational test, I have some difficulty with let's call it the Ortho or AMC allocation formula, both from an operational and from, I think, an analytical standpoint.

From an operational standpoint, the allocation itself of the totality of the discount across to the single let's call it target product creates something of a daunting task, and there is a margin or opportunity for error there that I think is quite substantial.

Secondly, from an analytical standpoint, I think maybe it is operational as well, it raises the problem of double counting or multiple penalties.

Just to take a hypothetical industry, if someone sues on Post-its, and someone else sues on sponges, and someone else sues on tape, and there are three cases going on at the same time, does one allocate the totality of the package discount to each of those products, and in what position does that put the defendant in?

However, I think I prefer that there is a solid operational test to safe harbor. The proposition that I think is embraced in Tim's statement to the AMC is that the allocation of total cost to total bundles would be a better way of looking at a test that might suggest illegality.

On the other hand, it is possible that the allocation test or the Ortho or AMC formula of allocation, would be appropriate as a safe harbor.

This is the position taken in the brief of several law professors recently filed in the Ninth Circuit in the Peace Health case, Professor Crane and others.

Recognizing that the difficulties that we have suggested with that test as a presumption of illegality, it might serve a purpose at least of a safe harbor if practicable.

So far as recoupment is concerned, I think

in a pricing case, recoupment should be an element of the offense and should be considered as part of the potential safe harbor.

MR. BARNETT: Bob?

MR. PITOFSKY: Let me second what Jim has just said and then let people take shots at it.

First of all, back to Doug's excellent point in opening this whole discussion.

What is this all about? What are we quarreling about here? It seems to me the point of bundled discounts is it gives consumers a break. We ought to not be too aggressive in deterring it.

We should not overdeter it, it, but be careful in this area. Second, it seems to me to be more sensible, as the Aveeda-Turner Treatise originally said about this question when it first came up, you want to allocate the discounts product by product rather than put all of the discounts to one product.

There is a serious danger that will drive the price of that product below whatever predatory pricing turns out to be.

So I share Jim's view. I think LePage's was wrong, and if the court gets to overturn it and come up with a more sensible rule, the better off we all

are.

MR. BARNETT: Tim?

MR. MURIS: Obviously, anything is better than 3M, than turning it over to the jury.

The AMC deserves credit for trying to devise a test. But there are serious theoretical, empirical, and practical problems.

As Dennis Carlton said in the AMC report, the bundled discounts can be used for procompetitive reasons. For example, price discrimination can be anticompetitive or procompetitive. It is difficult to separate pro from anti and we need to be careful for that reason.

The second theoretical problem is the premise of the AMC allocation is to protect "equally efficient competitors." The problem -- and there is a nice footnote in the government's LePage's brief about this -- is that someone who sells you one thing that you want can't be as efficient as someone who sells you two things that you want.

So the AMC's premise is a problem. Moreover, empirically we know almost nothing that tells us that there are anticompetitive problems from bundling. Vernon Smith and I have put together a paper that summarizes the work of his group, which

spent a lot of time using experimental economics to take the theories of anticompetitive bundling and show they actually hurt consumers.

Well, it was almost impossible to do. They did find some ambiguous cases. Yet, if you do anything to those ambiguous cases, bundling becomes efficient. Thus, if the monopolist lacks a 100 percent share, if there are any efficiencies, like transaction cost savings, and if you don't have very strange-looking demand curves, bundling becomes efficient. Obviously, experimental economics has its limits, but it is certainly superior to simple theoretical arguments.

There is also a tremendous practical problem. Greg has done a lot of useful work in valuing regulatory agencies, and there is some older and good literature about allocating joint and common costs. If you start trying to do this across the products in a bundle, it is completely arbitrary in terms of allocating these costs to some products and not to others.

Finally, I do agree we need a safe harbor. The Brooke Group allocation, the more general allocation that Jim and Bob are discussing is the one that I would support.

CHAIRMAN MAJORAS: Doug?

MR. MELAMED: There is a lot of force to Tim's points.

I completely agree that economies of scope are relevant economies and should be taken into account in the efficiency analysis.

I think there is a lot of force to Tim's notion that maybe because we don't have a lot of confidence that, bundling is likely over a lot of cases to reduce consumer welfare, we should paint with a broad brush and apply the Brooke Group test to the package.

But, ultimately, I don't agree with Tim because, first of all, I think the premise which Tim didn't state but I think Bob did, that bundled discounting is like single-firm price cutting -- that it is a price reduction that has short-term benefits for the consumer -- is not necessarily correct. In order to say that, we need to know what the but-for pricing would have been. I think it may well be the case that, in the absence of bundling, the stand-alone prices would be lower than they would be with the bundled offering provided. So the discount might be mythic.

One can imagine situations in which one

would increase the price on the monopoly product and use the margins there to subsidize below-cost pricing on another product, and you can imagine some competitive harm from that.

So where I come out is to think that the AMC's three-part test -- ought to be a safe harbor, but it shouldn't be the end of the analysis.

I agree with Dennis Carlton. I think his articulation in the AMC Report is right. That's a safe harbor. But you also have to -- Dennis actually admitted this, although he is not a supporter of the no economic sense test, he admitted what he was articulating as his separate statement was that no economic sense test.

You ought to allow the defendant and the plaintiff to duke it out over whether the bundling made economic sense.

MR. PITOFSKY: Very briefly.

MR. BARNETT: Sure.

MR. PITOFSKY: I have never seen a bundling that you can have A, B, C separate price, if you take all three, I will give you 10 percent off. I have never seen a situation where that produces higher prices than bundling produces.

More important, the idea that we should

somehow examine bundling by taking into account the efficiency of the bundler and the efficiency of the company that doesn't have the bundled offering, just think about that from the point of view of counseling.

Just think about the businessman saying, "well, if I do this, will I be in trouble?"

"No, not if the other fellow is not equally efficient as you and therefore is driven out. On the other hand, if they are equally efficient and this puts them out of business, you are in a lot of trouble."

How does the businessman know what the level of efficiency is? Not only doesn't he know his own level of efficiency, but how is he possibly going to know the level of efficiency of the other guy?

I think -- I have been there. I tried to draft a subpoena to figure out whether the other company was equally efficient. It was a disaster. It wasted a lot of money and we never got anywhere.

MR. BARNETT: You are not going to get private counselor subpoena power, I assume.

CHAIRMAN MAJORAS: I think Jeff wanted --

MR. EISENACH: I want to speak up in defense of recoupment. And in the same spirit as earlier,

speak about the importance of entry.

All of these behaviors are designed to foreclose in the sense of capturing market share.

The question I think we want to look to is whether enforcement offers a way of going forward to police prices at or near the competitive level and police behavior at or near the competitive level. If recoupment isn't possible, then it seems unlikely to me that enforcement is improving consumer welfare.

MR. BARNETT: Can I ask, is there a difference -- and maybe this would go to Jim and Bob as much as anyone -- if the plaintiff comes in and alleges a bundled discount, you apply the standard that you were suggesting or the plaintiff comes in, same set of facts, and says this is an illegal tie-in.

Is it the same analysis? I assume we agree that at some level a pricing structure could be labeled a de facto tie-in and tying theoretically could apply.

Does it matter what label the plaintiff puts on it or is there some other way to distinguish between those two types of claims?

MR. RILL: I assume you are talking about

what would be a pricing tie rather than a clear contractual tie.

With respect to I think the unicorn of a pricing tie, I see no reason why there would be any different test as to what is the nature of the plaintiff's claim.

I know that Hovenkamp and others would suggest that tying analysis is the right analysis to apply to bundled pricing.

At the same time, at the end of the day, he comes out with a test that is very much like, depending on when and what you read in Hovenkamp, it is either Ortho or Brooke Group, depending on whether it is the book or the most recent article.

I think the analytical formula should be exactly the same. If it is time to apply tying rules to Section 2, I think that's a good move, too.

The tying should be analyzed under Section 2 rather than as a per se offense as the courts at least currently view it.

I see no reason why you would deviate from the kind of safe harbor approach in tying as you would in a claim that is a pure pricing claim.

MR. PITOFSKY: I must say that's a tough one. The treatise position, as I recall it, is if

everybody takes the discount offer, it's a tie.

That doesn't mean it is illegal. It should be treated as a tie.

If a relatively small number of people say "I don't want that deal, I will stick with buying separately," then you treat it generously. It is not a tie; it is bundling. And for all the reasons that we have already discussed here, it turns out the customer gets a bargain.

That is about as generous as I think we probably ought to go, although, as I say, I did contend once that as long as you can buy the products separately, if you can get them for less, I wouldn't be unhappy if that were per se legal.

MR. RULE: I think the question about tie-ins and comparing that to bundled discounts is a good one because it points out one of the flaws in the AMC rule and a lot of the rules, from my perspective.

I think it is true that the kind of three parts, at least the first part, ought to be viewed as a safe harbor. And if that condition exists, that you allocate all of the discount to the supposed competitive product and the price is still above some incremental cost, then it seems to me

that it ought to be in the safe harbor.

But ultimately the question of whether or not it is illegal ought to be related to the degree of exclusion or foreclosure that is created.

The problem in saying that that's not incorporated in the AMC test is who knows what the third step means. Maybe that's what they meant by the third step.

I think noting that a bundled discount could be viewed, under certain circumstances at least, as a price tie points out, or to some extent exclusionary conduct generally points out, the fact that all of the tests ought to be focused at the end of the day on the extent to which they exclude competition, not just competitors from the marketplace.

There ought to be some notion of that. For example, if relatively few consumers actually take the discount, then it is a little difficult to say that there is some sort of exclusionary impact. And that ought to be the end of the story, whether you view it as a tie or bundled discount or anything else.

One of the problems -- and this is one of the problems I had with the unitary rules, profit

sacrifice and that sort of thing -- is they don't focus on the degree of foreclosure or exclusion.

I think if you ignore that, you potentially end up challenging a lot of conduct that is not necessarily anticompetitive.

It is also the reason that I think the incorporation of the recoupment test, as a couple people have already said, in a number of different areas is at least a start in terms of focusing on exclusion, because the recoupment test sort of presumes that there is exclusion and that there cannot be reentry, and that's the way recoupment occurs.

So at least the recoupment test has that benefit. In my mind, at least, in predatory pricing, that has been the principal innovation that has made it less of a problem, because the cost tests were always very hard and difficult and time-consuming to litigate.

The recoupment test, which I think can dispose of a large fraction of predatory pricing cases and probably a lot of these other cases at the end of the day, indicates that there is really no harm to consumer welfare; there is no exclusion that you need to be concerned about.

MR. BARNETT: Tim?

MR. MURIS: Theoretically, tying is different. The problem is in what is mostly the vast wasteland of modern IO, of which I'm not a fan, obviously, tying can be a problem.

What we know about bundling is that it is efficient and the experimental evidence really supports what Bob is saying. If it is really a bundle, which means that it is not a tie, there are people buying the bundle products as separate products. The bundle thus is not a de facto tie.

It is hard for me to envision a case where we would attack bundle. Yet from what we know about the theoretical literature of tying and the lack of evidence there is slightly more support for worrying about tying.

There is a Sibley paper, which says that the problem with bundling is that it is a de facto tie.

Yet, the second version showed you need to have perfect competition to have a problem. Of course, we don't have perfect competition.

So, the de facto tie didn't prove to be a very strong reason to worry. We tried to test that in the experimental setting. Again, that proved something close to the empty set for anticompetitive

conduct.

MR. BARNETT: Doug?

MR. MELAMED: Two things. Rick repeatedly said we ought to have a rigorous requirement of harm to competition.

I assume we all agree with that. That's not the issue.

Certainly at least one person who has written in favor of a so-called unitary test -- I think two of us actually did -- tried to make it perfectly clear that of course you have to have proof that the conduct had an impact, injured competition, but then went on to say, let's talk about a second way a defendant could win the case even if the conduct excludes competition because a better mousetrap could do that. Let's focus on the conduct element.

I assume everybody agrees here we have to have a rigorous competitive effects test.

On the question of, is it tying or is it bundling and what is the difference, and listening to Tim talk, I can't help but ask why are we worrying about the kind of analogical issue of what category does the conduct fall into.

To do that, we have to define the conduct.

Then we have to put it into a category. Then think of the rule for that category. We wind up with a lot of formal distinctions and without overarching principles to give guidance to a court like the LePage's court when it has something that doesn't fall into a specific category.

Why don't we simply think of the facts of a case of bundling, for example, and ask, how do we think we ought to analyze it, without worrying about what is the better analogy -- predatory pricing or tying or exclusive dealing or whatever the next category of the day might be.

MR. BARNETT: If I can briefly follow-up though.

If we abandoned the unitary test and are going to apply different operational tests to different contexts, doesn't that necessarily create the need to decide which bucket you are in?

MR. MELAMED: I guess I would say we shouldn't have that need.

CHAIRMAN MAJORAS: Really?

MR. RULE: Let me make one point.

It is nice when folks say that exclusion ought to be an element. It wasn't really in the government's brief, as I read it, when they

articulated the unitary effect test.

It is simply some harm to a competitor, which is very different. That's what it said. There was no quantitative exclusion.

The only place I have ever seen it is in exclusive dealing cases. Even there, to some extent, the government backed off of that in some of the cases.

So you may be right and maybe that's a standard. But that is not generally how it has been articulated to the court.

If you look at what Judge Jackson said in the Microsoft case in the District Court, that is not how he viewed it.

The profit sacrifice test is generally viewed as being a problem and negating the need to actually look at whether there is a quantitative measure of exclusion of competition from the marketplace.

But if you are saying that, "no, in fact that is a precursor and this is another way and all the unitary test is designed to do is provide an additional safe harbor," I guess I don't dislike it as much as I thought I did.

But that's not the way I have ever seen it

articulated in any of the court's briefs and I thought in your articles as well as others, but I will have to go back and reread them.

CHAIRMAN MAJORAS: Anything else before we move on to loyalty discounts?

I will ask a bridge question, bundled discounts, bundled rebates and loyalty discounts. And that is we do hear a lot that this is an area within antitrust law in which everyone could use more guidance. I certainly understand that.

But I have a question that's related which is how big a problem is it that there isn't more guidance? In other words, how often is this coming up?

Obviously, you can't tell me in some measured sense. I'm just curious, as you are counseling clients, whether these are issues, these pricing and discounting issues are sort of burning on the agenda for clients on a pretty regular basis.

Doug?

MR. MELAMED: I think that, because there is less, there is probably more confusion or unease about the bundling law post LePage's, it is probably an area where the clients and their counselors feel a little less sure footed.

It is a problem. Is it crippling the American economy? No.

CHAIRMAN MAJORAS: I'm glad about that.

Jim?

MR. RILL: Look at some of the cases coming up and you will see it is a problem.

You have cases that are for some strange reason being focused in the Third Circuit on bundled prices and loyalty discounts.

You have a case coming up in the Ninth Circuit, Cascade, the Sixth Circuit, Wyatt, all of which are being argued. And in the Ninth Circuit District Court construction is literally lifted from LePage's that resulted in a plaintiff's verdict there.

Yes, it is an important problem.

Let me bridge, to use your term, to the global aspect of the problem, because I think we can't ignore and shouldn't ignore the uncertainty and prevalence of the uncertainty surrounding these kinds of practices overseas.

I think we are aware of circumstances in Europe and the Far East where the law is, if you will, less developed or developing, not developing in the way we would want to develop it.

I think to the extent that the views of the United States in these areas could be made known and enforcement agencies in these areas could be made known explicitly in an effort through international organizations to secure convergence, dealing with a problem that is not a theoretical or merely an academically interesting problem but one that has real meaning overseas to companies that operate in the global marketplace, which are increasing.

CHAIRMAN MAJORAS: A question related to one of Bob's points.

The difficulty is we can't know how much the uncertainty contributes to inhibiting procompetitive discounting of price cutting certainly.

It is interesting, and Susan will appreciate this. Tim Muris walked into the room and the temperature in my Commission room mysteriously went way down to below levels that I think are appropriate.

Susan.

MS. CREIGHTON: Representing a lot of high-tech clients --

MR. MURIS: I didn't do anything. But I'm warm.

MS. CREIGHTON: It is not the thermometer.

It is just your presence that causes that.

MR. MURIS: I'm not sure what to make of that.

MS. CREIGHTON: I can't actually speak to the counseling question you asked, Debbie, because I mostly have high-tech clients, and price bundling isn't a pressing issue so much for them.

But I wonder whether some of the problem in bundling isn't so much that this is a huge issue so much as just the LePage's decision was so bad.

I would note in the Peace Health case which is one of the ones in the Ninth Circuit, the jury actually found for the defendant in the tying claim, they found no competitive effect.

I would throw out the possibility that any reasonable standard amongst whether the AMC or the one that Tim has articulated might go a long way towards addressing the problem.

So it is not that you have to get it exactly right than it is the one we have right now is so wrong that it really generates problems that might otherwise be unmanageable.

CHAIRMAN MAJORAS: Thank you.

Let's move to loyalty discounts and talk about that a little bit. I have a couple of

questions that I want to throw out.

One is once again looking at what our standard ought to be as we look at this again. This is an area involving price cutting and discounting.

So if we are looking at -- when we look at predatory pricing, when we look at bundled discounts, as Bob Pitofsky points out, we have to be careful because discounting is most often pro-consumer.

The interesting thing for me when I look at loyalty discounts is to look first at exclusive dealing and the way we look at that. And we find so often that exclusive dealing is not in fact an anticompetitive problem.

And loyalty discounts I think, it seems in my mind, then move even closer on the scale toward the area in which we don't have a big problem with it, right, because in many ways, I would think, loyalty discounts are less exclusionary than exclusive dealing, it seems. Yet we do see complaints about loyalty discounts in markets. There is no question about it.

First, if you have any views on my general point, and then second, looking at what the test ought to be.

I know Professor Hovenkamp has said, as others have, you basically apply a Brooke Group type test to loyalty discounts.

What does the group think about what how we ought to be evaluating these situations?

Nobody interested in loyalty discounts.

MR. MELAMED: No. You were speaking. I was listening.

MR. PITOFSKY: I know little about this. Therefore, I will speak on it.

I think there is less of a problem with loyalty discounts then with exclusive dealing for two simple reasons. Almost all loyalty discounts I have ever seen are less than 100 percent. They are partial exclusive dealing contracts.

Secondly, if halfway through the year you decide it is not worth it, you just opt out of the program. Somebody else comes along and says now for an exclusive dealing contract, I will give you an even better deal, you say, okay, I lose out on my loyalty discount but take your deal.

I don't regard it as much of a clog on competition, and it is lowering price in the direction of the consumer.

CHAIRMAN MAJORAS: Not a big issue.

MR. RULE: Just out of the need to fill some dead air, I again think this is an area where, if you focus on what the exclusionary impact is, it will get rid of a lot of cases.

To the extent I have seen loyalty discounts, they tend to have the benefit and they tend to be used with certain distribution channels to incent them to do certain things. It can be a pretty effective tool, at least in theory.

The one place where the Department of Justice at least has conducted more than one investigation -- I'm sure they have done it in other places, but the one I'm aware of -- is with respect to travel agent commission overrides in the airline industry.

Every time they have looked at them, they have concluded they were not really a problem.

One of the reasons they weren't a problem is, first, they were designed to incent travel agents to sell a particular airline's tickets.

But, second, by and large, notwithstanding certain articles that have been written by certain people that travel agent commission overrides tended to reinforce hub dominance, the fact is that when you actually looked at the evidence, they weren't

effective in keeping discounters out who came in on a route-by-route basis and basically could get travel agents to sell their tickets on the individual routes as opposed to the network the incumbent carriers had.

Generally, I'm not aware of any good case that's ever been pointed to where a loyalty discount has really had an anticompetitive effect.

So for that reason, I do think that it is probably not something worth spending a lot of time on. Probably, if you apply a Brooke Group test to it, it will dispose of virtually all of the cases anybody could bring.

MS. CREIGHTON: Maybe I could articulate a slightly dissenting view.

One of the things that strikes me about loyalty discounts, as compared to exclusive dealing, is they are not found in nature.

You find everybody who has exclusive dealing contracts, whether they have 1 percent market share or 50 percent market share. I think we only see loyalty discounts from firms which have substantial positions in the market.

I do think it is a question about whether or not in a particular case they can be used to keep

rivals from gaining effective scale.

So I think that would be the one context in which I would be interested in knowing more, is whether or not if there are markets in which achieving sufficient scale is critical and the purpose of the loyalty discount really is to foreclose that.

MR. MELAMED: I think both of Susan's comments are quite right.

But I also think that what Rick said a minute ago is also correct. And that is, if you look at competitive effects, you often can allay the concerns about loyalty discounts because the best theoretical arguments I have heard against loyalty discounts have to do with the steep kind of cliff discount at a particular output, where you are in effect paying a huge discount or sometimes even negative price for the marginal sale.

There are many instances in which, if you allocate the discount, as it were, to a handful of sales in order to make the discount look like it is below cost, you will be talking about a volume of sales too small to have an impact on competition.

And so, if you marry both Susan's concerns and Rick's focus on competitive effects, I think you

still find very few instances in which loyalty discounts are likely to be anticompetitive.

CHAIRMAN MAJORAS: Tim?

MR. MURIS: The point Susan makes about scale is the modern theory of negative exclusion. But, it has problems.

Michael Winston pioneered this theory. In this room on September 11, 2001, unfortunately, we had leading IO economists talking about the issue. Michael said, "it may have helped my reputation, but I don't have a clue if it has any empirical meaning."

If what Susan says is correct -- and I don't know that it is or is not -- unlike bundling and exclusive dealing which we find everywhere, loyalty discounts are somehow a practice that we only find with firms with very large market shares, and that would be a very interesting fact. I don't know if somebody has done a survey or has published something. But that would be a fact that would distinguish it from other practices.

I still agree with the sentiment that it is hard to think that this kind of pricing practice would be generally anticompetitive. But maybe it is different. I just don't know of that evidence.

CHAIRMAN MAJORAS: Okay. Why don't we take a 15-minute break at this point, and we will see you at roughly 11:15.

(Recess.)

CHAIRMAN MAJORAS: All right. We will get back to it, then.

I'm going to start the second half here talking a little bit about tying.

We have obviously done some of that naturally in our other discussion, which highlights the fact that it is not very easy to put these in distinct buckets as one might think.

Let me just start with a question. There was a lot of discussion on the panels about Jefferson Parish, about the per se rule or maybe you could say the so-called per se rule that the court in Jefferson Parish seems to be laying out there.

There was a lot of discussion in our panels about that and I think the belief of a lot of people that in fact they are not even sure that Jefferson Parish really did set out a real per se rule and if it did, that that rule has seen better days and that, in fact, we ought to get on with moving toward admitting that we are moving toward a rule of reason in the tying area.

Do folks agree with this? Is this almost without controversy anymore in the United States?

Jeff?

MR. EISENACH: Yes.

CHAIRMAN MAJORAS: That's what I thought. That's why I wanted to get it out of the way.

Anybody else?

MR. SIDAK: I agree. Uncontroversial.

CHAIRMAN MAJORAS: Anybody want to take a dissenting view on that?

All right. That's what I thought. We will move on.

I want to talk a little bit about something that I find to be more interesting and potentially very important not only in the United States in our dynamic economy today but certainly around the world, and that is tying obviously can be achieved through contract, which is how I think we most often think of it, but it can also be achieved technologically, which we think about more today because the Microsoft case brought it front and center to our attention. But in fact this has been going on forever.

Air conditioners, as I understand it -- though of course I can't remember this -- used to be

an add-on in your car. I was told this.

MR. MURIS: We all know you are a mere child.

CHAIRMAN MAJORAS: I wouldn't go that far. But as I was told, air conditioners used to be something you would put in under your dashboard. And eventually the air conditioner became actually part of the car that you buy today.

So you could call that, I suppose, a technological tie.

Should our standard for legality be different, whether we are talking about contractual tying or technological tying?

Greg?

MR. SIDAK: I argued since the early '80s that technological tying with respect to product innovations ought to be per se legal, that if you had to choose between per se illegality or per se legality, I think the error costs are such that you are better off not trying to chase this particular business conduct.

CHAIRMAN MAJORAS: Susan?

MS. CREIGHTON: I'm actually of mixed mind on this.

I strongly understand the need to have clear

rules, and I suppose if one -- I can see the strong argument for having a rule of per se legality.

I think the only question I have in my mind is if it were shown that the technological tie actually decreased performance of the product, would that cause me to have any different view would be the only reason to tie actually.

I don't know. Is this a version of no economic sense? If it actually hampered your ability to sell the product or its performance, would I still be of the same view? And I guess I would throw that out as a question.

I'm not sure how I would come out on it.

CHAIRMAN MAJORAS: Doug, do you have anything?

MR. MELAMED: I understand all the reasons why courts have to tread very carefully in the area of product design innovation. But if a tie or any innovative product design has a tie-out feature, then I don't think we should be talking about per se legality.

For example, let's imagine that Microsoft, instead of trying to do in Netscape the way the court found it did, had done it by designing a new operating system that included not only its own

bundler but incompatibility with Netscape, ostensibly because that was the best way to make Explorer work well with the operating system.

I don't think that kind of so-called innovation should be beyond the reach of the courts. A test something like Susan articulated would be the right test.

MR. SIDAK: Do you think that as a practical matter the outcomes will be much different under the two different rules?

MR. MELAMED: The problem is when we talk about practical matter, we are often asking ourselves whether can we think of any cases that would have been decided differently.

But if you ask a different question -- whether the business community might behave differently -- there is a real risk that a safe harbor for innovation, will induce some firms to manipulate their interfaces and their product designs to exclude nascent rivals.

I can't prove that, of course, because we are trying to prove a world which didn't have the deterrent attributes that the law has brought to the world we have experienced. But that would be my conjecture.

MS. CREIGHTON: My experience has been counseling on both sides of that question that that kind of arbitrary interface problem actually is rampant in high technology.

So I don't think it is actually a hypothetical question. While I'm very sympathetic to the policy concerns about anything less than per se legality, having something less than that could make quite a difference in high technology.

MR. RULE: I'm curious, as somebody who occasionally counsels on this issue, how you think that rule would work, Doug.

Because it is true that if you have to choose interfaces, sometimes you choose interfaces that, typically you will choose that, allow your products to work better and probably differ from some competitor's product and require the competitor to change its product in order to operate as well.

MR. MELAMED: Here's what I would do. I would not do balancing and not do a rule of reason analysis and all that stuff I criticized already this morning.

I would say the plaintiff whose product has been excluded by the new design of his dominant rival's product has the burden of proving that the

particular aspect or feature or component of the new product that excludes him didn't serve a legitimate purpose.

MR. RULE: The problem is that, for example, in choosing interfaces, from what I have seen, to some extent there is an element of arbitrariness or at least subjectivity on the part of the software designer.

They have to make choices. And they may make choices that can be viewed objectively by certain engineers -- and, again, the problem with asking an engineer a question is every engineer comes to a problem with his or her own bias. So it is a little hard to ask an engineer.

There is that element of arbitrariness and subjectivity. The difficulty is, when you go to a judge, convincing the judge, "well, we had to make a choice at the time, your Honor, this happened to be the sort of technology, the sort of approach that the software designer was used to and preferred, and that's why he or she did it.

"But can we say that in some absolute sense it was the absolute best, or that the company spent a lot of time trying to figure out among the different alternatives what was the best or whether

or not instead of coming up with a new version of the interface they ought to just accept either an open standard or some competitor's? No, we didn't do that because that's not the way software is typically designed."

MR. MELAMED: In the spirit of the competitor collaboration guidelines, the test is not whether it was the least restrictive alternative. It is sort of ex ante, that, look, it wouldn't be a terrible world, it seems to me, in which dominant firms designing products that exclude rivals have to ask the lawyer can I do this.

And the lawyer should say is there a good reason why you are doing it that way, and if there is a good reason, he says it is fine. And if there is not, then maybe you ought to do it a different way.

MR. RULE: What if the reason is I have come up with a new innovation that creates value that I would like to capture, and the problem is I want to make sure that I use proprietary interface so I can capture it, so other people can't basically capture it by creating some sort of either peripheral hardware or software that manages to free ride on the efforts that I had? Is there a problem with

that?

MR. MELAMED: Certainly appropriating the benefits of innovation, it is a legitimate reason. It depends on the facts.

CHAIRMAN MAJORAS: Let's talk about evidence in courts, because we have seen instances in which if jurisdictions show that they are quite open to antitrust claims based on technological issues, based on whether they provide a sufficient interface and so forth, not surprisingly, like bees to honey, the rent-seeking behavior, if you will, the, "well, I want my product to interface on this, this is what my product ought to be able to do with this product" can become quite rampant.

Getting down to what are the indicia in any objective sense that the policymakers can look to and ultimately the courts can look to who are not technology experts?

What are the factors we would look for if we were going to bring a claim of technological tying?

MR. MELAMED: I don't know how to answer that question other than to repeat what I just said.

MS. CREIGHTON: I guess I don't see the problem there as being a lot -- certainly from a counseling perspective, it is not a whole lot

trickier in my experience than merger counseling.

You say "so why do you guys want to merge?" If they have some plausible story that passes the straight-face test, then you are a lot more comfortable than one who says "the only reason I want to do it is because it excludes my rival."

MR. BARNETT: Can I follow up with Susan?

What I heard Doug saying, he is not going to balance, that in the spirit of the D.C. Circuit in the Microsoft case, if you have a good reason, it sounded like you were going to call that per se lawful without balancing the potential exclusionary effect of other products.

If I have that right, Susan, would you agree with that approach or take a different approach?

MS. CREIGHTON: I would agree with that. I actually think the court in Microsoft got it right in the second decision. If you have a plausible efficiency justification, then that would be the end of the inquiry.

MR. PITOFSKY: Can I ask a question? I'm with you up until that last point and with Doug, really.

Suppose the efficiency is tiny and the anticompetitive effect is substantial. Are you

still not going to balance?

As long as you can find an efficiency of some magnitude, that's the end of the case?

MS. CREIGHTON: This may actually be getting into a can of worms. Certainly in terms of understanding the efficiency justification, unlike Rick, I would want to know whether that is actually why the company did it, as opposed to a post hoc justification.

I think if we are talking this little tiny bit and great big anticompetitive effect, I bring a certain skepticism to whether or not the efficiency justification actually is something other than a sort of post hoc rationalization.

CHAIRMAN MAJORAS: You really get to part of the point I was hoping we would get to, which is -- let me present it as a hypothetical.

Suppose we do an investigation and we find all kinds of documents in which a company is saying "I want to do this because I don't want any of these other companies to be able to interface and I want to keep them out."

So you get all the sort of bad language, bad intent documents. But then in fact the innovation has proven to be pretty successful for consumers and

consumers like it and it has actually made things a better mousetrap.

What do you do with that?

You said good reason, bad reason. So they did it for a bad reason, but it turned out to be a pretty good product.

MR. MELAMED: I wouldn't focus at least materially what was in their mind, the subjective motive, subjective intent.

I think those documents Susan is talking about are very relevant because they can very likely illuminate the underlying economic factors.

I would rely on the underlying truth of the matter.

Let me add two things. In response to Bob, I actually wouldn't think that just finding something good to be said about the design is enough. In other words, I would ask whether it was really the essential way to design it.

Let me tell an anecdote about the Microsoft case. In the Microsoft case, we had on the documents that said Tidalwave and "we have to do something to stop Netscape." And then we had all the conduct.

I and others in the Division at the time

said here is all the useful stuff we get from all of our Chicago School defense brief writing over the years.

And we served interrogatories on Microsoft and said "why did you do it and where is the compensation that came from that cost?" And they didn't have any answers.

Maybe they could have made something up. I'm not sure that the facts play out in quite the stark way that your question suggests.

CHAIRMAN MAJORAS: Sure. That's the beauty of hypotheticals.

I was about to say I don't even have to turn around and I know who I'm going to next.

MR. RULE: Let me tell you the other side of that story, which is actually one of my favorite anecdotes too.

I won't necessarily disclose the context in which this came up, and it wasn't Doug asking. By the way, I should just say that I wasn't representing Microsoft at the time those interrogatories were served.

But one of the things -- and I think this goes to the question that Debbie posed about what's the evidence.

The problem is -- and I don't think Microsoft is that different from what I have seen in other high-tech companies, where you are talking about tens, scores, hundreds, thousands of software engineers developing pretty complex products --

It is not really the sort of orderly process that maybe a lot of us lawyers have in mind about how the process works. It tends to be a lot of people working in little collaborative groups over time writing code, then putting it in a tree, compiling it, testing it, going back and writing other things.

There is not necessarily a grand scheme every time something is done. So one of the difficulties is that it is very hard to sort of point to a company document that says "here is the strategy, here is why we adopted this, and here is why we didn't adopt that."

It is very difficult to think that you are going to find that, at least in a lot of the clients I have seen in the high-tech industry.

That brings me to the anecdote. And without disclosing the context, one of the things that somebody who I think is very sensible about antitrust issues, indeed, is generally associated

with the Chicago School, was very troubled by Microsoft's tendency to essentially expend large amounts of money to develop Web-browsing capability within its operating system without having done a cost-benefit analysis before it made those huge investments.

This person just could not understand why it was that Microsoft didn't have documents that laid out sort of, "gee, spending $100 million was worthwhile because we could generate this much in return."

The fact was -- I don't think Microsoft is that unusual in the real world today when you have a very dynamic economy.

What happened was that the company felt -- and the Tidalwave document was a good example -- that the way computing was moving, it was moving to the Internet, that that was going to be an extremely important function of an operating system, and if you were going to stay current, and if you were going to stay attractive to consumers, you basically had to have that functionality in your operating system.

So they didn't take the time to quantify what the costs and benefits were. They basically

said, "we just have to make sure we have that capability in our operating system."

I would argue that part of the problem with the like-profit sacrifice test is that the government, and to some extent the courts, took the fact that Microsoft didn't sit down and do a cost-benefit analysis as evidence that, "gee, the only reason they must have done this was basically to put Netscape out of the market."

I look at it -- and, again, it is just me -- but to me that evidence is equally consistent with the notion that it is a little hard in some economic settings to do a cost-benefit analysis.

It made sense to make those investments because the product had to have that functionality if it was going to be acceptable the way they saw the market moving.

And they basically said "we don't want to get out of the business, we want to stay in, so we will make the investments that are necessary to do it."

To me, that's evidence that that is an efficiency and a justification for the conduct. But the problem with I think some of the tests and the evidentiary rules is the plaintiffs and the court

could look at that same evidence and say, "no, no, that's evidence of profit sacrifice because they were willing to spend anything in order to get that functionality in order to beat Netscape."

MR. MURIS: If I could make a historical comment.

The context of this discussion about high-tech is so much better than the context 10 years ago, which focused on what the evidence showed to be a fallacious view of how network effects made high-tech industries different. Path dependency was said to lead to lock-in and inefficient industries.

The claim was based on a couple of examples that turned out to be fallacious, the Qwerty keyboard and on Beta/VHS.

The context today here is much more sympathetic to innovation and to high-tech. That is tremendous improvement in a decade.

MR. SIDAK: Can I say something about the counterfactual here?

We do have some experience with the issue of a large incumbent in a network industry degrading competitor access to the network. It is the telephone industry. It has been subject to heavy

regulation for at least a century.

The culture within an incumbent local exchange carrier bears no resemblance to the culture inside of Microsoft.

You would not go in to one of the former Bell companies to look for lots of R&D going on.

I think the process of subjecting that industry to the degree of regulatory scrutiny over all technical aspects of network interconnection invariably drains it of some of that mojo, if you will, that we hope to see in the computer industry and in other technologically dynamic industries.

MS. CREIGHTON: I guess I would have used the telephone industry actually, though, as a counterfactual for why not to have a per se rule.

That was, in fact, an industry where there was some technological innovation whose sole purpose was to foreclose competition. So I think --

MR. SIDAK: Of what sort? What technological innovation are you thinking of?

MS. CREIGHTON: I'm going to get the specific facts wrong. Maybe folks will remember the MCI case better than I do.

As I recall, AT&T innovated in a way that required you basically to have these huge boxes that

basically would slow down your ability to interconnect with the network. That was an important part of that case, as I recall.

MR. SIDAK: I recall the interconnection issues as being a little more pedestrian than inferior access to the network.

Why don't we go on.

MR. BARNETT: Sure.

Given the scarce resource of time, why don't we move on to our next topic, which has to do with refusals to deal with a rival.

I guess this has some connection to the telecommunications industry, at least, for those who have viewed it as having such an application.

During the various hearings, there have been a range of views presented. But one of the views suggested that a unilateral unconditional refusal to deal with a rival should not be viewed as an exclusionary act, indeed, should be deemed to be per se lawful under the antitrust laws.

Would anyone like to agree or disagree with that statement, that proposition?

MR. EISENACH: I will start, and I will tie it directly to the conversation we were just having.

If Gillette decides it doesn't want its

razor to be compatible with Bic, independent of technological tying, as it were, why can't it just say no, in the same way that Verizon can just say no?

I think the issue here goes very quickly to the question of the cost of the alternative, or the "catching the fire engine" problem.

Obviously, the European Union is dealing in a much different way with what do you do when you catch the Microsoft fire engine than the United States did. That was always the problem.

What do you do when you catch the technological tying fire engine, or what do you do when you catch Verizon?

What we have done with the telephone companies in the U.S. is impose a stultifying regulatory regime which very clearly, and I think unambiguously now in the economic literature has been shown to have, resulted in the kind of competition that Scalia talked about in Iowa utilities, which is competition not at the point where innovation occurs and not at the point where costs can be reduced. And at the same time it has dramatically reduced innovation and investment at the core of the network where real competition now

finally is developing in the U.S. about six or seven years after we began removing the worst of the regulatory regime.

I think the problem in both cases is that the remedy probably is worse than the disease.

If I own the only well, I guess I feel like you have to demonstrate to me that there is no other well possible before I start thinking that the benefits of regulating access to the well exceed the costs.

MR. BARNETT: Following up on that, the question is should it be per se lawful without regard to whether or not there is another well.

And I guess a related question is are you saying if we may compel some sort of dealing in unique circumstances, should we do it through antitrust laws or separately through regulation?

MR. EISENACH: I think the history of innovation has shown there is almost always another way, other than regulation, to skin that economic cat.

And the flip side is that when that isn't the case, the cure is often worse that the disease. Again, I think the Europeans' experience with Microsoft is as bad as our experience has been with

trying to regulate telephone companies.

The Europeans' experience with Microsoft shows that there is a worse way to do it, and they found it.

MR. BARNETT: Bob?

MR. PITOFSKY: This is going too genially here. I think I will stir things up.

Let me start by saying that mandated dealing by a single firm, even a monopolist, with applicants should be very rare. It just doesn't come up all that often. But I'm not comfortable with never.

I think, like the discussion of Section 2, I think a balancing test, of the kind put forward by the Supreme Court in Aspen, is the way to go.

There was nothing good about denying the four-mountain ticket in Aspen. And the evidence was that consumers preferred it. So it was a pro-consumer effect that was cut off for no good reason.

The problem is -- and I know if I don't say it right now, others will leap in -- what is the remedy? Can you get to a remedy that makes sense and doesn't use the same phrase I used earlier, do more harm than good?

And if that's the case, then we have no

right to impose on companies a remedy that we can't describe and we can't enforce and they can't abide by.

But I think the difficulties in getting to a remedy have been exaggerated.

Take Aspen. They were licensing other mountains in other parts of the west. Then all of a sudden, they go over to Aspen and they cut somebody off abruptly with no reason.

I don't think the remedy is very difficult. You take whatever the arrangement was in the other resort areas and apply it to Aspen.

There is a question if in the presence of a regulatory agency, is it easier to impose a remedy. And I remember Phil Aveeda making quite a point of the fact that Otter Tail was an extreme case, but the Federal Power Commission was available to handle the details of the remedy.

Third, what the Europeans do is send the parties into a room and say "negotiate, come up with something, and if you don't, we will have mandatory arbitration."

Imposing a remedy is very difficult. If it is impossible, then the government shouldn't be in it.

The point about -- I have a well, and before I think access should be mandated, I want to know that there is no other well there. Absolutely right. That's the point of "essential."

If it is not an essential facility, there is no reason for the government to intervene.

But if it is, then the question is can you have an essential facility doctrine, as I believe is the case in most countries developing antitrust law in the world, Europe, China and elsewhere, a narrow, narrow, narrow, remedy?

Are we disserving antitrust purposes? I don't think so. Certainly I think the lower courts -- I think MCI is the best case for setting up a whole series of conditions before you get access to an essential facility -- sensibly take the remedy question into account.

I do not think that unilateral refusal to deal is per se legal. Close to it, but not there.

CHAIRMAN MAJORAS: Of course, I would add that sometimes we do the negotiation thing in the U.S. too.

Judge Kollar-Kotelly forced Rick Rule and I into the same room for four straight weeks.

MR. RULE: It was very pleasurable.

CHAIRMAN MAJORAS: Yes, I enjoyed it as well, Rick.

We did come out with something. But I would say that as I look at the implementation of that, which we then stuck Tom with, has been difficult, requiring Microsoft to license server protocols that they had never done before. Whereas, in the Aspen case, yes, they had a history.

But where it had never been done before proved to be extremely challenging.

We haven't had the problems that the Europeans had.

MR. BARNETT: Fair enough.

Doug?

MR. MELAMED: A couple thoughts. Answering the liability question with the remedy question is a mistake.

We prohibit murder even though we can't resurrect the corpse. It may be the solution is not to have equitable remedies where we try to regulate the market but, rather, to have a deterrent in the form of exposure to treble damage fines.

I think we ought to separate the issues of if there is a disease versus is the cure going to be worse.

A couple thoughts on what the rule ought to be. Trinko, by the way, wasn't really about dealing. It was about divesting a very peculiar circumstance there.

As a practical matter, we don't need to make it a safe harbor or per se lawful because it will be a very rare case, as experience has shown.

He has to have a benchmark. If you don't go in and say you want it for nothing, you have to say he wouldn't sell it to me at price X. The terms are these.

It is going to be very hard for a plaintiff to win a case without a contemporary discriminating benchmark.

Having said that, we ought not to have a per se lawful rule because when an AT&T refuses to deal with a rival even though it deals with others interconnecting into the market or when an Aspen refuses to accept tickets sold at retail prices to a competitor, there ought to be some room to say now we know he has gone too far.

MR. RULE: Let me make two points. It seems to me that one of the reasons -- and I obviously will come to this -- why liability and remedy are, I think, kind of unacceptable is, if you can't think

of an equitable remedy, there may be reasons you don't want to impose it.

But if you can't think of an equitable remedy, which is to say a rule, it may suggest that there is some at least fussiness around what you are telling a defendant to do.

The problem with your analogy to murder is it is easy to enunciate the rule to society, "don't kill other people," and it may be that you can't resurrect the dead, but you can certainly impose punishments to deter future folks from engaging in that conduct. That is a very clear rule.

MR. MELAMED: I have a rule. It is don't refuse to deal when it wouldn't make sense.

MR. RULE: If you have a rule that says don't refuse to deal without the when, I could understand.

The problem is, it seems to me, once you acknowledge that you have the when, if you have the condition, and then if you add on to that what I think both you and Bob have said is that it is a very rare case that you would ever want to impose some liability for that, it seems to me there is a very strong argument for a rule of per se legality.

It is false, it seems to me, to say that,

"gee, you can only have a per se rule of legality when you know that in 100 percent of the circumstances the activity is not going to harm competition."

That's not the reason that you have a per se rule. Because, you can't even say that in 100 percent of the cases of price fixing that there is going to be harm to competition.

That's not the reason we have a per se rule. We have it because of error costs.

It seems to me that in the area of refusals to deal, particularly if you are talking about unconditional unilateral refusals to deal, the circumstances under which you would ever be concerned about it are so limited and so rare that that's precisely the kind of place you would want to have a rule of per se legality, if for no other reason than saving the courts and the enforcers resources that are otherwise expended investigating and potentially looking for the needle in the worldwide haystack.

MR. BARNETT: Tim?

MR. MURIS: I like the somewhat Delphic statement in your very good report that came out recently about how it has no meaningful role in

antitrust.

Let me also say a word about Aspen and ask Doug a question. What the Supreme Court did, given the posture of the case before it, made sense. But, the reality of the case is a business dispute about sharing the profits.

MR. MELAMED: It made no sense. I agree.

MR. MURIS: Suppose it came to the court that way. Is that a legitimate business reason?

Of course, it was a forced bargaining situation, and we know what often happens in forced bargaining situations. You know how they resolve the dispute? They merged.

Suppose that had been the context, that Aspen said, "These guys are being unreasonable, and we think we are not getting a big enough share of the profits?"

MR. MELAMED: I haven't actually thought through precisely how that would play out. The case was presented in a very odd way.

MR. MURIS: And there obviously wasn't a market.

MR. MELAMED: Fair enough. So it changes the effects.

MR. SIDAK: Could I add a point here about

price?

In sector-specific regulation, call it the access pricing problem. There is no problem with granting a competitor access to your facility if you can agree on prices, terms and conditions that are mutually acceptable.

The problem is the incumbent will always say you are not compensating for the opportunity cost of the asset.

So the access seeker then tries to invoke an antitrust remedy or a regulatory remedy or an arbitration remedy, in the hope of getting a price that's closer to the incremental cost.

Is that a problem? Well, it depends on your perspective.

If the network only exists because of a very large expenditure of sunk costs, there has to be some contribution to the recovery of those costs beyond the incremental cost of the use of the network.

That's what the whole decade of litigation over the Telecom Act in 1996 was all about. They get you into the question of regulating price, which is fundamentally not something that a court can do.

It is not even clear that constitutionally

they should be doing because the Supreme Court tells us that price regulation is a legislative function.

MR. MELAMED: What he is not entitled to is to refuse a price that is equitable for the purpose of gaining additional market power in some adjacent market.

I realize this is very difficult for a factfinder to prove in the absence of contemporaneous discrimination as a benchmark.

But what if we could stipulate that the defendant refused to deal on a price equal to his opportunity cost and did so as part of a longterm strategy to preserve or gain market power in an adjacent market?

MR. SIDAK: It is plausible. But basically then you are talking about a kind of predation strategy.

MR. MELAMED: Yes, one that made no economic sense but for the extra market power.

MR. EISENACH: This is one where type 1 and type 2 errors matter tremendously.

The reason you have per se rules is not because you are 100 percent sure but because the cost of error is so high.

You don't get a second well. That's the

cost. The cost of regulating the telephone sector in the U.S. was we didn't get a second network.

It is called cable and we now have the most competitive telecom sector in the world as a result of removing excessive regulation. And we are now getting wireless. But that is all because the lack of the regulatory remedy, taking away the regulatory route to a free ride on the incumbent's network.

The problem in all this is I don't know how you find the opportunity cost of digging the well. Maybe he kept records of how long he was there with the shovel.

But trying to find the opportunity cost of the telephone network is a problem.

MR. PITOFSKY: I have been waiting to ask this question for quite some time.

What is the empirical evidence, not the theory, empirical evidence, that a mandatory requirement that you deal or you disclose information to rivals is going to lead to a reduction in innovation or a reduction in people coming in and digging a second well?

MR. SIDAK: In England, the cable industry vigorously opposed greater unbundling obligations placed on British Telecom, precisely because it

destroyed their business model.

MR. PITOFSKY: What did they rely on?

MR. SIDAK: Their own wires.

MR. PITOFSKY: No. What empirical evidence did they rely on that this remedy would do harm because it would raise barriers to entry to new people who would come into the market?

MR. SIDAK: They were in the market at that point, and they were making decisions about investment over time, sequential sunk investment.

So it is not really -- in their case, it would not be a question of is there some third party who will enter but, rather, will I currently, a competitor of the incumbent firm, continue to invest in expanding my network or will I simply stop investing.

MR. PITOFSKY: I don't want to limit this to telecom. I guess I'm trying to make a very general point.

I am upset with the following process of thinking. This is a very, very difficult issue and the remedy is extremely difficult to work out and, therefore, let's call it per se legal. I don't think that's the way antitrust law should proceed.

MR. RULE: Bob, you have to add to that the

question of its frequency and the question of in the instances where folks have gone after it, whether you think there have been greater incidents of false positives versus false negatives and what the cost is of going after it.

I think the frequency is important. Whatever you want to say about the one well, there aren't very many one-well situations in the world.

MR. PITOFSKY: I agree with you. I'm with you.

I'm sorry. I should have elaborated on this point.

I think you have to talk, you have to look at free riders, false positives, false negatives. But I want to do it on the basis of empirical data and not on theoretical assumptions.

MS. CREIGHTON: I just wait to ask a question. I don't know this. I thought Bill Kolasky's comments, Doug's partner, were quite interesting at the hearing on refusals to deal.

He was articulating how he thought a sort of step-wise application of the Microsoft test would work quite well here.

But he observed I think that in the cases where there have been problems, either MCI, AT&T or

Otter Tail, it was part of an overall course of conduct, which I thought was an interesting observation. I would also note in both those cases there wasn't a regulatory overlay.

Again, I would just pose the question whether or not that combination of factors calls for sort of a potentially different inquiry, and then if we look overseas, whether they are likely to find that combination of factors more often than you would here in the United States and how the articulation of a rule of per se legality would maybe not be helpful in advancing the analytical debate worldwide about how those issues should be addressed.

MR. RULE: Can I make a comment on that?

I would take the opposite view. To the extent that the United States equivocates because of penumbras and says we don't think we can have a per se rule of legality, because there may be some incident where there is a problem. And the two that you mentioned and, frankly, the ones that sort of classically I have always thought about, I would argue frankly are as much a function of the regulatory regime that was in place, as opposed to anything that you would have seen in the absence of

the regulatory regime.

I think that is kind of Jeff's point.

I think I will grant you that if you take a position that unilateral unconditional refusals to deal are per se lawful, that will be a somewhat controversial position outside the United States.

But on the other hand, I would say that the United States would be in a better position to make certain arguments because I think there is a sound, logical, and I think also empirical basis for taking that position, and taking it and taking a stand on it, and arguing and explaining why that's a reasonable rule.

Once you start adding in the equivocation, we may all -- Bill Baxter used to have this saying, that if he got to make all the decisions, he would be fine with basically everything being potentially subject to antitrust regulation.

His concern was that he wasn't going to get to make all the decisions.

The same thing is true in the United States. In our hands, sort of an equivocal rule may be okay because we are smart enough, sophisticated enough to figure out how to work it.

I always worry if you have an equivocal rule

like that in the hands of others whose incentives may not be as pure, whose training and experience may not be as exemplar as our heads of agencies, that in effect they are going to abuse that equivocation in a way that's very harmful to the economy.

I think there is at least some argument that they have already done that.

MS. CREIGHTON: I guess I was responding to your point in rejoinder to Bob, which was the reason for saying never, not seldom, was because it is rare.

I'm just asking if then our articulation of why our answer is never and not seldom doesn't resonate with the experience of folks elsewhere, whether that is maybe not the strongest basis on which to articulate the rule.

MR. MELAMED: Let me say relating to that the question, of course, is not is it rare but would it be rare if we had the rule of per se legality?

MR. PITOFSKY: Would it be so rare if in fact it became per se legal?

MR. RULE: I think you can ask the question a little bit differently. Jeff's question to some extent is the reasonable one.

How many single wells are there, how many truly essential assets are there that can't be duplicated that we don't want to be implicated in some way? That's really the issue, I think.

I don't think that you can look at the economy and say there are a large number of incidents of those kinds of assets.

I can say that there are a much larger number of cases where plaintiffs have argued that there are single wells when there really aren't. That's the danger.

MR. PITOFSKY: You can distinguish those cases on the record. You say that only one well can be built here. If it is obvious there can be two, you lose your case.

MR. RULE: But it is not costless to do that.

MR. PITOFSKY: Of course it is not. We can call everything per se legal and save a lot of costs.

MR. RULE: That's not the point. The point is that you could say that there is no such thing as per se illegality because there are times where you could prove that a price-fixing agreement doesn't harm competition.

We don't do that because we don't want to expend the resources to try to distinguish those situations.

I don't understand logically why the converse doesn't apply as well with respect to conduct that you expect to be so rare and the cost of finding those that are actually problematic are so high that under those circumstances you decide you have a rule of per se legality, recognizing that some harm may go unpunished.

MR. PITOFSKY: It won't be so rare when it becomes per se legal.

Let me ask you a question. It is exam time. I can't help it.

I gather that your approach would overrule Aspen, overrule Otter Tail. My question is would you also overrule Lorain Journal, which was a refusal to deal?

MR. RULE: I'll be honest. I'm not a big fan of Lorain Journal. I have said that on a number of occasions.

Part of the problem I have with it -- it is a different issue, to some extent. The problem I have always had with Lorain Journal is it doesn't look at the competitive impact that conduct had, in

my opinion. It is sort of the precursor of a lot of the unitary tests. I'm not a big fan of it.

MR. PITOFSKY: I am a great fan of Lorain Journal. It is the most extreme case I know of where there was no justification and there was a significant anticompetitive effect. This side of the scale had nothing on it.

MR. BARNETT: With that, I hope you won't take this as a refusal to deal with the issue further, but I will suggest that we move on to cheap exclusion.

CHAIRMAN MAJORAS: I will talk briefly about cheap exclusion. Then we have two more important topics to cover.

The Court of Appeals in Microsoft in 2001 in upholding Microsoft's liability did so in part on the basis of an act of deception that it found -- that the trial court found Microsoft engaged in.

The Commission in its Rambus case used similar conduct in finding Section 2 liability.

Is there anyone here who does not agree that misleading or deceptive conduct could be considered to be exclusionary conduct under Section 2?

And if it can be, how would others draw the line between situations that justify antitrust

involvement and situations where you might say, well, there is a contractual problem here or perhaps a tort problem, but we don't see an antitrust problem?

Doug, do you want to? Moving to another case.

MR. MELAMED: I think that conduct that is misleading or deceptive can be anticompetitive conduct.

Microsoft Conwood -- and logic make that clear. But it is not anticompetitive conduct because it is susceptible of being labeled misleading or deceptive.

Trinko made clear that conduct that is a breach of contract and indeed conduct that violates nonantitrust federal law, is not exclusionary or anticompetitive conduct for antitrust purposes.

It seems to me that the Court in Trinko was completely right in that. The issue is does it violate and run afoul of some proper antitrust standard. Yes, causation and all that have to be satisfied.

One more brief thing, cheap exclusion. Susan's paper I think on that is a wonderful, insightful contribution to our understanding of the

world. It is a very intelligent elaboration, it seems to me, of the Chicago School insight that predatory pricing is an unlikely strategy because it is so costly to the defendant.

It points enforcers and plaintiffs in the direction of conduct that is more likely to be mischievous.

I don't think it is a concept that helps us answer the question we have been talking about today because as I understand the paper, it identifies a category of conduct that one is cheaper and therefore we should suspect the defendants might want to engage in it. Two, it has no legitimate purpose.

I think that's a subset of naked exclusion and with the other elements, market power and all that proven, seems trivial to say that's an antitrust violation.

Labeling it deceptive doesn't really advance the question of whether it is anticompetitive. That depends on how it measures up against the preexisting antitrust test.

CHAIRMAN MAJORAS: Tim?

MR. MURIS: Viewed another way, and this is hardly a declaration against interest I'm making

here -- cheap exclusion is an extraordinarily useful way for the government to think about monopolization. In Susan's phrase it means fishing where the fish are.

If you look at the Bush administration's record on Section 2, I think it is spectacular. There are two settlements that are as important and as large as any in history in terms of their monetary relief to consumers, Unocal and BMS, where the FTC worked with the states. By focusing on fishing where the fish are, you are much more likely to produce benefits for consumers and thus have the record of the last several years.

So in that sense, which is different than the previous discussion, it is where the government ought to put its effort.

It is an extraordinarily important insight because the history of government in private and Section 2 enforcement has not been a happy history at all. It has been a history mostly of mistakes. The many studies that have looked at cases after the fact have shown that the famous cases, ALCOA, United Shoe, and on and on and on, with rare exceptions, were government mistakes.

CHAIRMAN MAJORAS: Jim?

MR. RILL: I think there is a risk here of taking an interesting and provocative and I think very logical notion of cheap exclusion and expanding that notion across a variety of practices that may or may not be exclusive at all.

It is one thing to suggest that hypothetically someone with an essential patent, truly essential patent, knowingly hides it under the table and manipulates the standard process deliberately to include that patent and then shows up once the standard is adopted and says a-ha, guess what I have, and I'm charging royalties of 50 percent of the sales price of the implemented article.

That doesn't exist. I'm not involved in Rambus. It doesn't exist very often in the real world, particularly when you are talking about innovative evolutions of highly technological products in a moving process.

What is the exclusionary act? Does it require that one engage in a continuing patent search to determine whether the standard evolving is something that relies on the patent? Or vice versa?

Does it require some kind of -- I think the issue is related to the remedy here.

What is the relationship of a remedy if one is forced then to somehow license the patent to those who want to exploit the standard? On what terms?

I think it is no answer to say that the notion of fair and reasonable terms suggests that there has to be some solution ahead of time.

I think that the danger of adopting an attractive notion such as cheap exclusion and expanding it across a variety of practices tends to produce possibly oversimplistic results that don't fit in the real world and create serious dangers of overenforcement and inefficiencies.

MR. SIDAK: I think the controversy looks a lot like the access pricing problem in network industries in the sense that the objective of the party that is seeking access to the patented technology is to try to get as low a royalty price that it has to pay as possible.

It is the same generic problem of whether the incumbent, the owner of the essential patent in this case, is going to recoup quasi rents or not or whether the quasi rents will be extracted by the access seeker.

I think it is very, very similar to that

problem.

CHAIRMAN MAJORAS: Even though it is in the standard-setting context and they can choose a different technology?

MR. SIDAK: I think it is a less sympathetic set of facts than the typical network interconnection problem.

It is, after all, a contractual relationship. These are repeat-play situations.

So there is learning by doing, so to speak, in terms of your negotiation with the community of companies that are involved in the innovation giving rise to this set of patents.

Also, I think one of the considerations that is not given enough weight here is due diligence on the part of the parties that find themselves later on in the position of wanting access to the patented technology that they think is being priced too high.

These are sophisticated companies. If they were to buy or sell a manufacturing facility, they would expect their lawyers to engage in due diligence for the transaction.

Why do we think there should be any lesser degree of due diligence on the part of parties participating in standard-setting organizations?

I think the whole characterization of these controversies is such that there is too little consideration given to the amount of precaution, the investment and precaution by other members of the standard-setting organization.

CHAIRMAN MAJORAS: I think that's a good point.

Of course, there are costs to each individual member going out and getting that information, and some of it may not even be available, which I gather is why standard-setting organizations sometimes put in place rules that say everybody tell us.

MR. SIDAK: If you are in a high technology industry investing in trying to resolve uncertainty and plumb the unknown, that's part of what you should be doing, just as what Rick was talking about when Microsoft can't put a price tag on what it is worth to try to be sure that they are around when competition shifts to the Internet.

MR. BARNETT: What is the cost, the downside, if you will, from a competition perspective of permitting a standard-setting organization to say rather than us being required to go dig out the weeds, we know you have the answer

and you tell us the answer?

Is there a downside from the competitive process?

MR. SIDAK: Well, the parties certainly can negotiate over what the degree of disclosure has to be.

It seems to me that if the burden is always then placed on some party to inform others, there is a kind of moral hazard problem in that the others don't invest enough in creating their own body of information with which to verify the technology or to explore other technologies that wouldn't put them in a bind later on.

It seems to me that it sounds good ex ante. But ex post, the problem is that somebody will always come back and say there was more that you could have done or disclosed.

It is sort of this problem am I my brother's keeper, how much do I have to tell other companies about what I'm thinking?

MR. RULE: I think this goes to the last part of Debbie's initial question, which is I don't know the facts.

So it may be that what Rambus did was particularly heinous and completely duplicitous or

not. I don't know. But I don't know that that answers the question as to whether or not it should be an antitrust offense.

For example, I could certainly imagine an organization that was trying to come up with a standard having all of its members post a bond or enter into some sort of contract that says that they have to make certain disclosures, and there are certain penalties if they don't.

To the extent they violate that contract, then there is a contractual remedy. I can also imagine, with respect to a lot of things that I think of when I hear cheap exclusion, that it is fraud or force.

Fraud or force is very bad. Generally it is hard to justify it. But there are also a myriad of statutes, tort law, and other things that address it.

It has never been clear to me why antitrust needs to come along and sort of compound that.

Maybe those other statutes that directly go to that sort of conduct, frankly, particularly since that sort of conduct is generally going to be bad regardless of the market power or potential market power of the person exercising it, it seems to me

that maybe leaving it to those other statutes is a better way to go than trying to import it into Section 2.

MR. EISENACH: Just to frame what you just said, it is the equivalent of burglary with and burglary without a gun or armed versus unarmed robbery.

What we are saying is, the act performed outside the context of an anticompetitive scheme gets a penalty. The act performed in the context of an anticompetitive scheme gets a triple penalty.

MS. CREIGHTON: I guess I would turn that around and say in criminal antitrust, I don't think we would say we will only apply the criminal antitrust statutes unless we first find that the conduct isn't reachable by mail and wire fraud.

I think it is a separate and independent question. I think whether it is a tort, not all torts are antitrust violations, and obviously most antitrust violations aren't torts.

But I don't think we would want to say because it is a tort that therefore something that otherwise would be an antitrust violation therefore on that ground alone should be immune.

MR. RULE: I think -- not disagreeing

necessarily with what you are saying, but I will say that I think the analogy to criminal law is wrong. Because the only reason -- I think there is a good basis for saying this --

The only reason that the conduct that is also challenged as wire fraud or mail fraud is challengeable is generally because the underlying conduct violates the antitrust laws for various reasons.

There are certain exceptions and certain times that you can challenge it as an attempted wire fraud, whereas, you couldn't challenge it under the antitrust laws.

It is because the underlying act itself would violate the antitrust law.

My only point is there are certain downsides to Section 2 enforcement, including whether the penalty -- I guess you could say that for a lot of cheap exclusion, because it has no socially redeeming value and we can always identify it perfectly, who cares what the penalties are.

But to the extent that's not the case, and to the extent there are other regimes that are intended to impose punishments and they are optimal, then adding antitrust on top of it, to me at least,

arguably creates suboptimal enforcement because you have too much enforcement.

MR. BARNETT: Okay. I want to move quickly to the international setting and make sure that we leave time for remedies as well, which I think a number of folks think is a very important topic.

On the international fronts, let me ask Bob -- I will start off with you, if that's okay -- whether there are particular areas that you are aware of where there is not currently convergence between the United States and other jurisdictions around the world in terms of unilateral conduct enforcement.

And a related question with respect to those, presumably we should be trying to move towards some convergence, would you rather see convergence for its sake or only if it goes in one direction, the right direction, if you follow?

MR. PITOFSKY: I can go on for a long time about where divergence is occurring.

I just finished teaching a seminar on comparative antitrust. I will just pick two.

Others will probably want to add different examples. Dominant firm behavior is diverging, not just between the United States and Europe but

between the United States and many other countries.

Second, I'm not sure there ever was convergence, but the United States' position that only economics matters and no other factors should be taken into account is practically unique in the world.

I'm not sure we are wrong about that. But I would simply point out that there are 104 countries, and 103 of them don't seem to be going along with that kind of approach.

Is convergence a good idea? Yes, I think it is. I think we are going to get more. We have had quite a bit already.

Just take EU and U.S. definition of relevant market, attention to distribution arrangements, oh, and worldwide, worldwide agreement that cartels do no good, and they ought to be challenged in the most vigorous, serious way.

So you do have convergence. I think convergence is a good idea. We ought to achieve more of it.

I hope I will have a chance to talk about comity later on.

CHAIRMAN MAJORAS: Jim?

MR. RILL: I think we should not be too

pessimistic and certainly not too humble about the opportunities for convergence and the role the U.S. should play.

There is an enormous track record with respect to merger enforcement and cartel enforcement.

And I think possibly we can see at least through the discussion draft some move on the part of the European Union, coming more under the discussion draft, towards looking at an effects-based analysis under Article 82.

I think the role of the United States is critically important in its maturity and development that it has contributed to antitrust.

I think sometimes we are criticized and more often we criticize ourselves for saying convergence means do it our way. That's not the case.

I think we do somehow, I think, get an attack made on our credibility by those who say you don't bring these kinds of cases, why should you tell us not to bring these kinds of cases.

I don't think we tell the story that I think Tim was talking about and Justice could say as well that we have brought the right kind of cases. Some might argue whether they are.

We have a story to tell here. There is an economic basis that needs to be explained and I think there is an opportunity for progress there.

Without prolonging it, there are organizations and institutions for that progress to be made through the ICN and OECD through the cooperation that has been developed. I think there is much to be done in the area, and it shouldn't be abandoned with respect to Section 2, Article 82 and whatever is going on in the Far East.

MR. BARNETT: Rick, anything?

MR. RULE: The only thing I would say is if given the choice between convergence and advocating what you believe is the right principle, I would frankly urge you always to adopt the second.

I think that ultimately convergence is important, and the fact that there is divergence in certain areas can be very costly and painful to some companies. And I think that in terms of cost, obviously convergence is a good thing.

The problem is if you compromise in terms of your position, and I think that even though obviously I have some disagreements with where U.S. positions have evolved, the fact is they are backed up by a lot of experience, and I think they are

pretty sophisticated.

By and large, they are the most defensible positions. I think it is a mistake if in the name of convergence you move away from the right principles.

If you advocate the principled position and explain why it is the principled position, even if people won't accept it today, they will accept it later. The one example I will give is cartel enforcement.

When I was in the Department of Justice, we were ordered by the President to shut down an investigation of airline price fixing over the Atlantic by the British government, which called us a banana republic for criminally enforcing antitrust laws.

Well, guess what --

MR. MURIS: Actually, I was there. He said they were acting like a banana republic.

MR. RULE: Yes. But they were calling us other names.

But what the United States did was stick to its guns, that cartel behavior is bad, severe penalties are appropriate to deter the conduct, and over the course of 25 years, it has actually brought

the rest of the world around.

It is important to maintain the principled position, and ultimately people will follow you.

MS. CREIGHTON: In that regard, I could be a one-trick pony here. We don't have to call it cheap exclusion. We could just call it naked exclusion.

If you think internationally there is some benefit to culling out, that the agency should focus on instances where they know there is competitive effects and there is no cognizable efficiency justification, that if they are going to have civil nonmerger investigations, that's where they should focus, just like we have told them in mergers, it's good to focus on horizontal mergers, not vertical mergers, it is good to focus on cartel behavior, because it has a much less kind of chilling effect.

And I think I probably disagree with Jim a little bit in that what Tim was saying was that if you view naked exclusion as Doug had defined it, as reducing the output of your rivals so that it crosses both Sections 1 and 2, virtually all of the FTC's real estate cases sort of going all the way back for the last six or seven years, except for Three Tenors, all of them have been instances where it was naked exclusion.

One can actually point to that record and say it is actually quite common, it typically involves manipulation of government or quasi-government services, Orange Book cases, for example.

That is really where they should be putting their resource dollars, as opposed to focusing on price bundling or refusals to deal with rivals.

MR. BARNETT: Doug?

MR. MELAMED: I agree with almost everything that Susan said. But I don't agree with the implicit characterization of Rambus as a case of naked exclusion. I guess that is for the courts to decide.

Maybe I'm transitioning to the next topic. I want to say the following. I think with time there will be some convergence. Europe doesn't have the treble damages exposure that affects the analysis of false positives and false negatives. I think there will be increasing convergence.

In a way more serious than the problem of different substantive rules in different jurisdictions is the problem of overlapping investigation of the same transaction by multiple jurisdictions.

It is a problem in the U.S. when the FCC, the states, and the federal antitrust agencies have investigated the same transaction. It is especially a problem internationally with multiple jurisdictions.

The problem is not just sort of that there is a search by the complainant for the lowest standard. That is true. It is also that there is a search by the complainant for multiple reviews.

Multiple reviews ensure that we are going to have a bias in the system in favor of false positives because the second review can cure a false negative but there is nothing that can cure a false positive.

So I think one thing the United States ought to do is to stand firm for the principle that multiple agencies should not be looking at the same transaction.

MR. MURIS: Let me make three points.

First, I agree with Susan about the empirical significance of cheap exclusion. There has been significant work regarding horizontal activity in this administration. For example, at the Justice Department, grand juries had fallen to a very low level by the end of the last decade. The

Justice Department has built that back up and done a very good job. The FTC obviously did a lot with regard to price fixing and other cases.

Second, in response to Bob's point about the United States being unique or close to unique among the developed economies, we are the only one with flexible labor and credit markets, and that is to our enormous benefit.

Finally, in response to Doug's point, with which I agree, there is a difference between mergers and dominance. Mergers are divisible in the sense that you can have multiple reviews and it is basically okay because you can sell off parts. But in the dominance area, the most aggressive remedy tends to dominate.

MR. MELAMED: I meant to say for the global market situation I agree.

CHAIRMAN MAJORAS: Maybe it is a good time to jump in and finish up with remedies.

MR. PITOFSKY: Can I say a word about that?

CHAIRMAN MAJORAS: Yes.

MR. PITOFSKY: I let it go because I wanted to hear what everyone had to say.

My view -- I hope it is not too pessimistic -- is that convergence is a long way

off. It seems to be going a little bit the wrong way right now. For example, the WTO has given up on its working group seeking a way to achieve convergence.

I commend the other groups that keep at it. And I would keep at it even despite my view that it is not in the cards for the foreseeable future.

But I think there is something that is in the cards, and that is comity.

And please don't take what I say as deference. I am utterly practical about this. We will never get deference; one country says to the other country "you do it and I will go along with everything you say."

What you can have is enhanced comity. This comes back to three or four countries examining the same behavior, and for the second, third and fourth country to say "look, we are going to wait and see, we respect the way you do things, and we are going to wait and see what you do, and if you do the right thing, we will just accept your remedy and we will go away."

Canada does it on a regular basis constantly.

And I think there are a lot of people around

who believe that it is a step in the right direction.

Also, enhanced comity would require that you do everything possible not to have inconsistent judgments, not to say to a company do A and then somebody else says not do A. There are a number of things that can be done here.

I regard traditional "comity" up until now as being not frivolous but a trivial matter. It could be changed. It could be changed by treaty. The United States and Europe would get together and offer a program of enhanced comity.

I think it would migrate elsewhere. While we are standing around waiting for convergence, I see that as something useful to do.

MR. BARNETT: A quick follow-up.

If you are going to have this respect, if you will, do you decide who goes first and who sits back and watches?

MR. PITOFSKY: Tough one.

In the international bankruptcy field, they have that problem. And the answer is that the country that has the most connections with the debtor institution takes the lead. The United States and other countries have committed to

deference; anything they say is okay with us.

Antitrust comity will be more complicated. But we can find a way to decide which country has the most connections with the transaction.

MR. RILL: The principles of traditional comity are spelled out in the US-EU cooperation agreement. Those are taken from a long history of the development of traditional comity.

Those elements can lead those who wish to adopt, if you will, a soft deference policy towards a solution as to which country might go first.

Whether they can be applied with any degree of comity remains to be seen. The principles are there.

CHAIRMAN MAJORAS: Okay. We should move on to remedy, which is an area that is extremely important.

I think Doug's point, the D.C. Circuit in Microsoft said yes, it may be hard six years later after the conduct to find the right remedy but you still need to bring the cases because that gives instruction for companies in the future and may have some deterrent value.

I agree with all that. But nonetheless, I think the remedy issue is one that has been at least

as vexing as even the liability issue in a number of cases for us.

A couple questions I will throw out and folks can jump in.

One thing that we looked at was that when we had our panels on remedy, they generally agreed one of the goals should be to restore competition in the market.

Is that realistic, particularly in so many markets we deal with today? They are hardly static. You can't pin them down in time.

Is that a realistic goal? If so, how should we look at doing it?

The other question I would throw out in the interest of time now is if in fact we find that it is very difficult to impose a remedy and, worse yet, imposing a remedy may do more harm than good to the market, then are we better off with doing nothing or, for example, what Doug suggested, maybe having civil penalties, maybe leaving it to treble damages, as opposed to intervening with some sort of conduct or structural remedy?

MR. SIDAK: I think that the damages approach has a lot to commend it.

If you think about a big case like the

Microsoft case, I think it is unfortunate at the very beginning of the case there wasn't a clear statement as to what the desired remedies were on the part of the federal government.

The divestiture remedy was something that was introduced publicly at least much later on.

The critical issue over which Microsoft and the government disagreed the most was what is the measure of harm to consumers, what is the consumer welfare loss from this.

Economists would try to answer that question by measuring damages. It seems to me answering the liability question and getting to an alternative kind of remedy collapses into a single exercise.

CHAIRMAN MAJORAS: You should know in the 30,000 or something comments we received on the settlement, there were a pretty good percentage of people saying you didn't do your job because you didn't get any civil penalties or damages against Microsoft.

Of course, we had no authority to do it. But the general public, when they were doing it without profanity, agreed with you.

MR. SIDAK: But there was a prayer for other injunctive relief as the court might grant.

I don't know if the court would take that and run with it and cook up some kind of disgorgement remedy perhaps. But I don't believe it was pursued by the Justice Department.

CHAIRMAN MAJORAS: Doug?

MR. MELAMED: I agree with your bottom line, Greg. But Microsoft illustrates the limits, not the case for money remedies.

The Microsoft case at its core was a case about an investment by Microsoft in raising entry barriers.

I don't know how you would prove who was damaged by it. There was a prediction that the market would behave less well in the future sufficient to justify the liability determination.

If you really thought that the penalty for that should be equal to the damages incurred by some definable body, I'm not sure there would be much of a penalty.

MR. SIDAK: That was the problem with the back-of-the-envelope calculations about what would be the profit-maximizing monopoly price for Windows and how does it compare to the price that was actually being charged.

To me, that's what was the stark question.

Well, if the price that's being charged is so much less than what the profit-maximizing price would be, what is the big problem here, why the big case?

MR. EISENACH: Rick may know the number. I don't off the top of my head.

I know Sun's damages were I think settled at $4 billion. I don't know what all the totals were.

The conduct coming out of that case did translate directly into civil damages on Microsoft. They paid billions of dollars.

MR. RULE: They settled with quite a few people.

MR. EISENACH: Netscape.

MR. RULE: Yes. They did pay. I'm not sure what the number is now, but it may be exceeding $10 billion. I don't know when you add it all up.

I guess the thing I would say is it is important for the government to think about the remedy before it brings the case. A lot of people said that.

It may not be fair to the government to say they hadn't given that a lot of thought. I don't know. I defer to Doug as to whether or not they had given it a lot of thought.

But it does seem to me that the government

ought to have in clear mind what the remedy would be, and if it can't visualize and articulate what that remedy would be, maybe it shouldn't bring the case.

Second point --

MR. SIDAK: Could you push that a little farther? What should a court do if the government doesn't articulate the remedy in its complaint?

MR. RULE: I think it is just the way the rules work. A court is not going to throw you out on that basis.

You could establish a rule that says that the remedy ought to be articulated. What a plaintiff and a court may say is we can't fully understand what the appropriate remedy will be until the factual record is built. So you would have some issues there.

I think the government doesn't have that problem, and they ought to think about their theory in that way.

The second point I would make is, in a way, Microsoft arguably was an easier case. It was an easier case on remedy. I think it ultimately worked out as a remedy because it was a maintenance case as opposed to a monopoly acquisition case.

And the core of that remedy was a set of rules that really can be viewed largely as prohibitions. And, frankly, as far as that part of the decree has gone, it has worked pretty darn well.

The issues have come up in the Microsoft decree really in two different parts, one that sort of gets into the way the product is designed. But that has generally been fairly manageable because of the way the government ultimately focused in on what the court found to be the problem.

The place where there was really the problem was the protocol licensing provisions.

I would argue the reason that that was a problem, without going into how it got there, because it really wasn't part of the government's case, and it sort of came in in the course of a negotiation, and it was probably a part of the remedy that was not very well thought out. It didn't really have a basis in the factual record.

It has proven as a result to be kind of a difficult one to implement. I think there is some question about how efficacious it was.

But I think the strength of that decree is that it enumerated certain practices that had to be proscribed, and it has done a very good job of that.

If you can have a decree like that in a Section 2 case, it works.

When you start getting into structural remedies, I can see one in a case where a monopoly is created through acquisition so that you have at least arguable natural demarcations where you could divide a company.

But otherwise, it is very hard to have a structural remedy. And in my view, that sort of goes back to what Greg is saying. In most Section 2 cases, I think the government ought to think about whether it can bring about an appropriate remedy. And where it can't, it ought to recognize there is a treble damage remedy available to the plaintiffs.

Plaintiffs in monopoly cases are not somehow fooled. They know where there is a violation. They can go into court. And there is an argument that that is an overdeterrent. But they are entitled to that.

The argument would be that it is a rare Section 2 case that the federal government ought to go after and by and large it ought to leave those cases to private plaintiffs.

MR. MURIS: The remedy issue I think raises the second major benefit of the cheap exclusion

approach.

The first is by fishing where the fish are, you are more likely to find problems. The second is the remedies are generally easy.

The remedy that Chairman Majoras proposed in the Unocal case wasn't hard at all. It saved an enormous amount of money for consumers and it involved gasoline, for which the Commission should get a lot more credit than it gets.

CHAIRMAN MAJORAS: We get none.

MR. MELAMED: The questions that we were given beforehand, the first question on remedies, asked what are the appropriate goals for a Section 2 remedy.

I think there are six of them. One is general deterrence. Two and three, compensate victims and disgorge profits from the wrongdoer. Four and five, end the wrongful conduct and prevent its recurrence. And the latter includes sometimes fencing in, going beyond the literal conduct. And six is restore competition in the injured market.

The first 4-1/2 of these, general deterrence, compensate victims, disgorge profits, end the wrongful conduct, prevent its recurrence, don't raise difficult remedy questions.

So what we are talking about here is the scope of fencing-in remedies, which can be problematic and restoring competition in the injured market.

It seems to me nutty to say in effect that the complaint should be dismissed if the plaintiff cannot at the outset of the case articulate a coherent remedy that falls into categories 5B and 6. There are too many other reasons to bring a case to be held up on account of an inability to satisfy sensible injunctive remedy.

Maybe the answer is many don't have remedies of those types.

Two more brief comments. On Microsoft, there were billions of dollars paid largely to existing rivals who claim to have been excluded historically by the antibarrier conduct.

That didn't capture the theory of the case, which was consumers and rivals that hadn't arrived on the scene and consumers that would be injured in the future. It is not a bad start.

On structural relief, the structural remedy in the Microsoft case, entering it without a hearing was one of the most breathtaking remedies, but conceptually it wasn't a bad idea.

If you assume, probably counterfactually, that the ops company and the aps company could have been divided like Siamese conjoined twins without killing one of them without a lot of cost, then this is a remedy perfectly consistent with the theory.

It preserves the market power of both companies and changes -- it is a vertical divestiture and changes the anticompetitive behavior.

Suppose Office and Windows had been two separate companies? How would we feel about a merger? Might we be very concerned about that?

I'm not saying it made sense in fact. I don't think you can say mechanically or formulaically structural remedies are appropriate when you have an illegal horizontal aggregation because they might make the most sense.

MR. BARNETT: You sort of blew by your first 4-1/2 goals. Can I probe a little bit on that?

Take your bundled discount, some of the pricing conduct we talked about before. That puts the court in a position of prohibiting the conduct which I thought was within your first 4-1/2, prohibiting conduct relating to pricing.

You view that as a simple, straightforward

proposition?

MR. MELAMED: I agree. There may be instances where it gets difficult. Predatory pricing --

MR. BARNETT: I didn't give you that example.

MR. MELAMED: I understand. What you are doing it seems to me is sneaking in the remedy question an uncertainty about the liability test.

Let's take predatory pricing. I don't think we would want to have a remedy that said, defendant, don't sell your widgets for less than $4. But we might say don't sell it for less than whatever we think the appropriate cost measure is and in effect incorporate into an injunction the substantive standard.

I think when it comes to a simple sin no more remedy, the difficulties in most cases are going to mirror difficulties in articulating the liability rule. They are not difficulties of remedy. They are not inherent in a remedial scheme.

CHAIRMAN MAJORAS: I was surprised to hear you say government should primarily stay out of Section 2 and leave it to the private lawyers, and maybe your view is that is typically business to

business cases.

I understand. But several of the panelists noted that it was the private treble damage actions that really had the impact in terms of chilling certain types of aggressive behavior and really not the government actions.

So someone suggested because it is tough to identify actionable Section 2 behavior, we should in fact take away the treble damage aspect. I know if you did that, I would also have a question, should you give the government civil penalty authority as opposed to a disgorgement situation in the equitable realm?

MR. RULE: I will say that my comments before were premised on the assumption that you guys can't do something about the treble damage remedy.

I think it would exist. The other qualification which should be implicit in what I said before but I want to make it clear, when I say it should be left to private suits, I mean for damages, not injunctive relief.

Because as you know, I think, in my view, to the extent that there are injunctive remedies available to a plaintiff, it probably should be limited to the federal government because there are

too many problems when you expand that.

But having said that, look, I think there are definite problems with the treble damage remedy.

Twenty years ago, what the Department of Justice suggested was limiting treble damages to suits by suppliers or purchasers, and suits by others who claimed to have been harmed because of lost profits or exclusion from the marketplace would be limited to their actual damages. The argument being that it is not like there is some question of detecting the illegal behavior because you know you are subject to it, so there is no particular reason to give anybody more than compensation for their injury.

For that reason, I still believe that probably single damages for competitors who are harmed by that conduct is probably sufficient.

But do I think that you guys can bring that about? Do I think Congress is prepared to bring that about? No.

I think in light of that, that's why I say since that is going to exist anyway, you may as well leave most of these cases to the private sector.

CHAIRMAN MAJORAS: Any other final comments? Any other final comments on anything?

We can do like the McLaughlin Group and go down the line.

MR. RULE: You have to give us a one to ten question.

MR. BARNETT: The benefits of the hungry stomach.

MR. EISENACH: I can't resist saying one thing about essential facilities and remedies.

The guy who dug the well -- or the guy in Steve Jobs case who created the iPod -- may be the ninth or 10th guy who tried to dig that well. The first nine didn't make it.

The probability of a regulatory agency appropriately compensating the 10th guy who finally made it to the bottom of the well and got water for the risk he took is so close to zero to me it just trumps the case.

MR. SIDAK: A free option problem.

CHAIRMAN MAJORAS: Any last words?

Thank you so much, panelists. This has really been tremendous.

We thank you for your participation and for taking four hours out of what I know are your busy schedules.

MR. BARNETT: I agree. I actually, given

the reputation of the members of this panel, had very high expectation. I'm gratified to say they were exceeded.

Thank you.

(Applause.)

CHAIRMAN MAJORAS: I should probably say this for Pat and Gail. This concludes our Section 2 hearings.

(Whereupon, the hearing was concluded.)

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: P062106

CASE TITLE: SECTION 2 HEARING

DATE: MAY 8, 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: 5/15/2007

BRENDA SMONSKEY

CERTIFICATION OF PROOFREADER

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

DIANE QUADE